NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Levy*, 2016 NSCA 45

Date: 20160601
Docket: CAC 439723
Registry: Halifax

Between:

Terry Roy Levy

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Beveridge, Scanlan, Van den Eynden, JJ.A.
Appeal Heard:	March 29, 2016, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Beveridge, J.A.; Scanlan, and Van den Eynden, JJ.A. concurring
Counsel:	Roger Burrill, for the appellant Mark Scott, Q.C., for the respondent

Reasons for judgment:

INTRODUCTION

[1] On July 8, 2014, three shotgun blasts broke the peace and tranquility of island life on Little Tancook. The appellant had shot his daughter's common-law partner.

[2] The evidence was clear, the first shot was fatal. The appellant waited for police to arrive. He gave a lengthy recorded statement to the police explaining the events and why he had fired the gun. The next day he did a videotaped re-enactment.

[3] With one exception, everything the appellant told the police was confirmed or supported by other evidence. Nonetheless, at his trial for first degree murder, the jury convicted the appellant of second degree murder.

[4] The appellant complains that the trial judge, the Honourable Justice Gerald R.P. Moir, misdirected the jury on the intent required for murder and the instructions confused the jury about the appropriate sequence of their deliberations. In addition, the Court invited submissions from the parties about the instructions to the jury on self-defence, and whether the trial judge adequately related the evidence to the issues the jury had to resolve.

[5] For the following reasons, I would quash the conviction and order a new trial on the charge of second degree murder.

THE FACTUAL MATRIX

Background

[6] In the summer of 2014, the appellant, Terry Roy Levy, was sixty years old. He lived with his mother, Doris Levy, on Little Tancook Island. Doris was ninety years old and confined to a wheelchair. The household was rounded out by sixteen year old Jordan, the appellant's grandson.

[7] Nicole Levy is the appellant's daughter, and mother to Jordan. She was in a common-law relationship with Terry Green, the deceased, for approximately 14 years. Mr. Green did not like the appellant. The evidence was uncontradicted that somewhere between 12 and 14 years prior to July 2014 he beat up the appellant,

causing both eyes to be swollen closed, broken ribs and a "beat-up face". A second historical incident a few years prior to 2014 was less dramatic, but also involved the deceased manhandling the appellant. For these reasons, Mr. Green was never present at family dinners with the appellant and Mrs. Doris Levy.

[8] It was obvious that Nicole had little or no respect for her father, the appellant. She grew up on Little Tancook, living with Mrs. Doris Levy, the only mother she had ever known. Nicole ran a contracting business. Terry Green was her employee. She made a point of keeping Terry and the appellant apart. She acknowledged that Terry was the physical aggressor, but the appellant "had a lot to say".

[9] Nicole secured a contract to re-roof, re-side, and replace windows on a summer home on Little Tancook Island for July 2014. The crew consisted of herself, Terry Green, and two workers. On the first days of the job, Jordan did cleanup on the work site. He did not go to work on July 8. That started a chain reaction of the following events.

July 8, 2014

[10] It appears that Nicole Levy and Terry Green expected Jordan to come to work. Jordan did not feel like working with Terry that day. He described Terry Green as not a pleasant person to work for—he was aggressive when he got mad, and he could "turn just like that".

[11] Close to 8:00 a.m., Terry Green learned that Jordan was not coming to work. He set off at a fast pace to the Levy household, "pissed off" at the appellant for Jordan's planned no-show at work. Mr. Green entered the Levy house without knocking and confronted Jordan in the room where he slept. Evidence differed as to whether Jordan was up yet. But there was no dispute that Terry then angrily confronted the appellant in the kitchen, yelling at him that he was a "lazy cocksucker".

[12] The appellant's only response was "what is your problem". The deceased then grabbed the appellant by the throat and shoved him up against the wall. Decorations from the wall and kitchen table hit the floor. The incident caused the appellant to defecate. He fled to the bathroom. Terry pursued, yelling at the appellant to come out of the bathroom. He did not.

[13] Terry Green left with Jordan. Jordan described him as still mad. The appellant cleaned himself up. He left the house to go to the basement, where he retrieved his 12 gauge shotgun. He loaded it and started walking toward the house being renovated. After about 150 feet, he stopped. He returned to the house where he unloaded the shotgun and put the gun back in the basement.

[14] The appellant then walked to another house close by to water his grapevines. While there, he used his cellphone to call Nicole to try to find out why Terry had attacked him without provocation or explanation. Nicole answered her phone on speaker. Terry was close by. He joined the conversation.

[15] The evidence differed about what exactly was said. Nicole described the appellant as being very loud, demanding to know "what set that asshole off this morning"; that "he [Terry Green] came in and pushed and shoved me around". And, "If he wants to play that game I will end this once and for all." When Terry heard this, he said fine, he would be right back. Nicole testified that the appellant said "come on" and hung up.

[16] The appellant described it differently. He had called as he was completely in the dark about the events that morning. He had little recall of the specific words, but he got no explanation from Nicole. Terry took the phone, and he could get no answer from him, but he believed Terry was going to return to the Levy property. The appellant was adamant that he extended no invitation to settle things. He said the call was very short, when Terry came on the line. The appellant hung up. He believed Terry was on his way back.

[17] The appellant returned to the main Levy household where he retrieved his 12 gauge shotgun, reloaded it, and decided to walk the short distance to his brother's house, about 150 to 200 feet away. He sat on the steps with the gun beside him. He said he hoped Terry would not show up. But if he did, he was not going to take another beating.

[18] Terry Green showed up. He walked towards the appellant. At a distance of 15–20 feet away, Mr. Green was still advancing on him. With the gun at his hip, he shot, striking the deceased in the chest. The appellant described that with Mr. Green still coming forward, he quickly shot twice more, striking the back of the deceased's arm and his lower back. The chest shot was fatal, causing injuries that would lead to death within one to two minutes.

[19] The forensic pathologist testified that within minutes of receiving the chest wound the deceased would still have had the ability to move.

[20] An RCMP firearms expert testified about the shotgun and the approximate distances when the shots were fired. The closest range was the shot to the chest, at somewhere between 15 and 21 feet, to the back of the left arm and shoulder, 18 to 24 feet, and the shot to the lower back 24 to 30 feet.

[21] The appellant's version of events was captured in two recorded statements. The first one, later on the same day of the homicide. The second, in a recorded re-enactment performed by the appellant the next morning. The Crown tendered the recordings. As noted earlier, the Crown's evidence did not, with the one exception of the content of the telephone call (detailed above), contradict the appellant's version. The defence elected not to call evidence.

The Arguments to the Jury

[22] The Crown argued that the offence of murder was planned and deliberate. The appellant challenged the deceased to come back; he waited in a location where he would not be expected to be; he brought a gun, not for a discussion or fistfight, but to "finish this once and for all".

[23] The Crown argued that it had disproved provocation. Counsel went through the elements of provocation. Lastly, he addressed the defence of self-defence. The Crown acknowledged the prior assaults, and the deceased's unlawful assault on the appellant that morning.

[24] Reference was made to the three-part test for self-defence set out in s. 34 of the *Criminal Code*. Crown counsel argued that it had disproved that the appellant reasonably believed that Terry Green was using or threatening to use force against him; he did not shoot and kill Terry Green for the purpose of defending himself from the use or threat of force; and the shooting and killing of Terry Green was not reasonable in the circumstances. The Crown suggested that at no time would the appellant suffer anything more than a physical assault at the hands of the deceased. The appellant knew Terry Green was unarmed.

[25] The Crown argued that the appellant had simply ambushed Mr. Green. Crown counsel quoted Nicole's testimony: "He [the appellant] didn't fight. He used guns instead." I have some difficulty understanding how, in the context of this trial, this evidence was even admissible.

[26] The defence did not mention one word about provocation. The principal focus was self-defence as found in the statements of the appellant to the police. Those statements refuted first degree murder. In them, the appellant said his sole purpose of taking the gun out was, "Self-preservation more than anything else". When Terry Green approached him, he said it boiled down to: "I'd better shoot him now"; "It was him or me". He could not recall the exact words exchanged at the time of the encounter. He said his brain was "fried by the adrenaline".

[27] The defence emphasized the degree of fear instilled in the appellant by the completely unprovoked physical attack by Terry Green that morning; the prior assaults; the difference in size and capabilities; and the fact that the island is small, with no police presence.

[28] The appellant did not try to contact Mr. Green. Instead, he had called his daughter. It was the deceased that got himself involved in the call that ended with him returning to the Levy properties.

[29] With about six minutes to decide what to do, the appellant armed himself for protection. He did not hide. He was in plain view. When the gun was seen by Mr. Green, he did not desist, but continued toward him. The option chosen by the appellant to shoot was reasonable. Defence counsel forewarned the jury that the trial judge would explain in considerable detail the law of self-defence.

The Jury Charge

[30] The trial judge's charge to the jury was succinct. He provided what he referred to as a "bird's eye view" of the available verdicts, the elements of first and second degree murder and provocation. With respect to self-defence, he explained it was not a partial defence like provocation. If the Crown failed to prove beyond a reasonable doubt that the appellant was not acting in self-defence, they must acquit him. As there is much to the law of self-defence, he would come back to it later.

[31] After reviewing their role as jurors, the presumption of innocence, proof beyond a reasonable doubt, prior inconsistent statements, the statements of the appellant, and judicial notice, he turned to the substantive law.

[32] The trial judge started with an explanation of the four elements of first degree murder:

> So you must find Mr. Levy not guilty of first degree murder unless the Crown has proved beyond reasonable doubt that Mr. Levy is the person who committed the

> offence on the date and in the place pledged [*sic*] in the Indictment. The Crown has to prove four elements beyond reasonable doubt:
>
> (1) that Mr. Levy committed an unlawful act, namely, that he shot Mr. Green with a firearm;
>
> (2) that Mr. Levy's unlawful act caused Mr. Green's death;
>
> (3) that Mr. Levy had the intent required for murder; and
>
> (4) that the murder was both planned and deliberate.
>
> Unless you are satisfied beyond reasonable doubt that the Crown proved all four of these essential elements, you must find Mr. Levy not guilty of first degree murder. If you are satisfied beyond reasonable doubt on all four essential elements and you have no reasonable doubt on provocation or self-defence, you must find Mr. Levy guilty of first degree murder.

[33] The trial judge reviewed some of the evidence relevant to the issue of planning and deliberation. Then the trial judge spent a considerable amount of time dealing with the partial defence of provocation, which he instructed the jury would reduce murder to manslaughter if the Crown failed to disprove beyond a reasonable doubt at least one of the elements of provocation. These were explained in detail. He referred to some of the evidence relevant to those elements.

[34] The trial judge turned to the "full defence" of self-defence. He identified the three conditions that he said must be present:

> So we turn to the full defence of self-defence. Mr. Levy is not guilty of first degree murder, second degree murder, or manslaughter if all of the following three conditions are present:
>
> (1) Mr. Levy believed on reasonable grounds that force was about to be used against him. Mr. Levy believed on reasonable grounds that force was about to be used against him.
>
> (2) Mr. Levy committed the killing for the purpose of defending or protecting himself from the use of the threatened force. Mr. Levy committed the killing for the purpose of defending or protecting himself from the use of the threatened force.
>
> (3) Mr. Levy's act, that is to say, the killing, was reasonable in the circumstances.

[35] I will set out in more detail later what the trial judge said about these conditions, and the evidence he said related to them.

Post charge problems

[36] After the charge, the Crown and defence counsel made submissions. They agreed that the trial judge should have given the jury a "*W.D.* direction" in light of the appellant's police statements. The defence was also concerned that the jury may have been confused about how they should approach the factors listed in s. 34(2) of the *Criminal Code* in relation to deciding if the Crown had proven beyond a reasonable doubt that the actions of the appellant were not reasonable.

[37] The trial judge re-charged the jury about those issues. The jury started their deliberations shortly after 3:00 p.m. They were instructed by the trial judge at approximately 6:30 p.m. to stop when they delivered a note that they needed equipment to be able to watch the video exhibits. They would be at liberty to recommence the next day.

[38] When court reconvened, the trial judge commented to counsel that he had not instructed the jury as to the position of the parties. Apparently each had prepared and delivered to the judge a brief summary of their respective positions. Both counsel were content to let things stand.

[39] They discussed the advisability of providing to the jury a copy of the transcript of the video exhibits and a copy of the text of s. 34 of the *Criminal Code*. The trial judge declined. During their in-court discussion, the judge announced that he had received a question from the foreman: "The jury needs to have the qualifiers repeated that satisfy the conditions for first and second degree murder".

[40] Considerable discussion followed about the meaning of this question. The trial judge decided that he would repeat what he had said in his main charge about the elements of first and second degree murder. During the judge's review of the elements, the jury foreman pointed out their confusion:

> The third element, as I said, is that Mr. Levy had the intent required for murder. If you want me to tell you what the intent required for murder is again, just let the Foreman know and we'll do that. Or you may be able to tell me right now, Mr. Foreman.
>
> JURY FOREMAN: The third point is where we were ...
>
> THE COURT: Okay.
>
> JURY FOREMAN: ... we were confused.

> THE COURT: Okay. I'm going to give you the whole of my instructions on "intent." Did Mr. Levy have the intent required for murder? That's the third question you have to confront on these.
>
> To prove intent required for murder, the Crown must prove beyond reasonable doubt one of two things, either (1) Mr. Levy meant to cause Mr. Green's death, or (2) ... and this is more complicated, but this is all (2) that Mr. Levy meant to cause Mr. Green bodily harm that Mr. Levy knew was likely to cause death or was reckless whether death ensued or not.
>
> I'll repeat that. But, remember, the Crown only needs to prove one of these two kinds of murderous intent. So the second one is, again, that Mr. Levy meant to cause Mr. Green bodily harm that Mr. Levy knew was likely to cause death or was reckless, that is to say Mr. Green ... Mr. Levy was reckless whether death ensued or not.

[41] The jury resumed their deliberations at 9:46 a.m. At 2:00 p.m. the jury had a second question:

> Does the decision for either first or second-degree murder necessitate; firstly, ruling out manslaughter and self-defence?

[42] Discussion ensued. The judge decided to ask the jury to reformulate their question. At 2:30 p.m. the jury delivered a reworded question:

> What order of verdict elimination should we consider (a) first-degree murder, second-degree murder, manslaughter, not guilty (b) not guilty, manslaughter, second-degree murder, first-degree murder? Our questions come from an earlier comment by Judge Moir when he said our deliberations are subject to findings on manslaughter and self-defence.

[43] The trial judge tried to address the jury's concerns. Amongst other things, he said:

> On the various occasions when I said subject to what you decide about manslaughter or subject to what you decide about self-defence or subject to both, what I was saying is that you have to find this person guilty if you're satisfied beyond reasonable doubt on all of these elements, subject to what you would decide about self-defence. I wanted ... or provocation. I want ... I was trying to be as precise as possible in making it clear that you still have to acquit if you have a reasonable doubt about one of those two defences.
>
> …
>
> So all of those comments, all of those "subject to's" add a substantive reason to them, not ... they were not directions as to how you go about doing your deliberations. It's entirely up to the jury which thing you consider first and so on.

> So if you wanted to start by finding out whether all members of the jury are ... have a reasonable doubt on self-defence, you're perfectly entitled to do that.
>
> **But just remember that, logically, you have to be satisfied beyond reasonable doubt on murder, never mind which kind. You know what I'm talking about. Logically, then if you're satisfied beyond reasonable doubt on murder, you still have to ask whether you have a reasonable doubt about one of the conditions for manslaughter. And even if you have no reasonable doubt on manslaughter, you have to consider whether you have reasonable doubt about one of the elements for self-defence ... all of the elements for self-defence. Sorry.**
>
> I'm not sure that that fully answers your question, but I think at the heart of it is, What order of things do we do? And the answer to that is, It's entirely up to you, as long as you keep within the legal framework that I just described. All right?
>
> [Emphasis added]

[44] Discussion with counsel led to another direction:

> Please be seated. We just wanted to make one thing clear. If you choose to start with self-defence and you're coming to the conclusion that all jurors have a reasonable doubt about self-defence, then you don't need to consider the other things, because you would render a verdict of not guilty. I think that was probably clear enough from what I said, but we wanted to be perfectly clear. The main point in answer to your question is it's in your hands so long as you follow the laws. I've told you what the law was. Okay? Thanks very much.

[45] Less than an hour-and-a-half later, the jury returned with a verdict of guilty of second degree murder. They recommended the minimum period of parole ineligibility of ten years be imposed.

[46] With this background I return to the issues that need to be addressed.

ISSUES

1. Did the trial judge err in his charge to the jury on the intent for second degree murder?
2. Did the trial judge err by confusing the jury about the appropriate sequencing of their deliberations?
3. Did the trial judge adequately charge the jury on the defence of self-defence?
4. If the trial judge erred, should this Court nevertheless uphold the conviction?

The Instruction on intent

[47] The intent required to make a culpable homicide murder is defined in s. 229 of the *Criminal Code*:

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

[48] In answering the jury's question about the "qualifiers" for first and second degree murder, the jury said it was the issue of the intent required for murder that had them confused. No one suggests that it was the first part of the statutory definition (that the accused meant to cause death) that could realistically have been confusing.

[49] For ease of reference, I will repeat the trial judge's instruction to the jury on the intent required for murder:

> To prove intent required for murder, the Crown must prove beyond reasonable doubt one of two things, either (1) Mr. Levy meant to cause Mr. Green's death, or (2) ... and this is more complicated, but this is all (2) that Mr. Levy meant to cause Mr. Green bodily harm that Mr. Levy knew was likely to cause death or was reckless whether death ensued or not.
>
> I'll repeat that. But, remember, the Crown only needs to prove one of these two kinds of murderous intent. So the second one is, again, that **Mr. Levy meant to cause Mr. Green bodily harm that Mr. Levy knew was likely to cause death or was reckless, that is to say Mr. Green ... Mr. Levy was reckless whether death ensued or not.**
>
> [Emphasis added]

[50] The trial judge misdirected the jury. He directed them that, as a matter of law, murderous intent was established if they were satisfied that the appellant meant to cause bodily harm to Mr. Green that he knew was likely to cause death, OR was reckless whether death ensued. He should have told them that they had to be satisfied that the appellant meant to cause Mr. Green bodily harm that he knew was likely to cause death AND was reckless whether death ensued.

[51] The Crown concedes that the weight of appellate authority indicates the use of "or" rather than "and" constitutes legal error, but argues that this error was

harmless. In other words, the *proviso* found in s. 686(1)(b)(iii) should be invoked to dismiss the appeal despite the error.

[52] I am unable to accept this submission for two reasons. The first is that the jury were never properly instructed on the intent required for murder. They expressed their confusion on this issue and asked for clarification. They were again wrongly charged. The second reason is that the trial judge's charge with respect to the new self-defence provisions and the evidence that related to those provisions was, with respect, unsatisfactory.

[53] The law is clear, where a jury asks for guidance about an area of the law that is troubling them, the trial judge is obliged to provide a timely, complete, careful and legally correct response (see: *R. v. Brydon*, [1995] 4 S.C.R. 253; *R. v. Almarales*, 2008 ONCA 692; *R. v. D.M.S.*, 2004 NSCA 65).

[54] However, an answer to a jury question that incorrectly describes the intent for murder in s. 229(a)(ii) is by no means automatically fatal (see *R. v. Moo*, 2009 ONCA 645; *R. v. Simon*, 2010 ONCA 754; *R. v. Rodgerson*, 2014 ONCA 366, aff'd 2015 SCC 38).

[55] The authorities recognize that the "recklessness" requirement set out in s. 229(a)(ii) may not, from a coolheaded logical analysis, add much, if anything, to the mental element necessary for murder. Cory J., in *R. v. Cooper*, [1993] 1 S.C.R. 146 referred to the recklessness requirement in s. 220(a)(ii) as almost an afterthought:

> [18] This section was considered in *R. v. Nygaard, supra*. On the issue of the requisite intent the Court was unanimous. At pages 1087-88, it was said:
>
> > The essential element is that of intending to cause bodily harm of such a grave and serious nature that the accused knew that it was likely to result in death of the victim. The aspect of recklessness is almost an afterthought ...
>
> [19] The aspect of recklessness can be considered an afterthought since to secure a conviction under this section it must be established that the accused had the intent to cause such grievous bodily harm that he knew it was likely to cause death. One who causes bodily harm that he knows is likely to cause death must, in those circumstances, have a deliberate disregard for the fatal consequences which are known to be likely to occur. That is to say he must, of necessity, be reckless whether death ensues or not.
>
> …

> [23] The intent that must be demonstrated in order to convict under s. 212(a)(ii) has two aspects. There must be (a) subjective intent to cause bodily harm; (b) subjective knowledge that the bodily harm is of such a nature that it is likely to result in death. It is only when those two elements of intent are established that a conviction can properly follow.

[56] The problem is that the jury was repeatedly told that they could convict the appellant of murder if they were satisfied that he had the intent to cause bodily harm that he knew was likely to cause death, or was reckless whether death ensued or not.

[57] As observed above, this is by no means the first time that a trial judge has misdescribed the intent required for murder found in s. 229(a)(ii). It is to those cases I now turn.

[58] In *R. v. Czibulka* (2004), 190 O.A.C. 1 a conviction for second degree murder was quashed due to the improper admission of hearsay. In addition, the appellant complained of the trial judge's instruction on the intent for murder. Rosenberg J.A., writing for the Court, observed that the trial judge several times correctly directed the jury according to the exact words of s. 229(a)(ii). In addition, he provided that definition in written instructions he gave to the jury. The trouble arose when he elaborated on what was meant by recklessness:

> So far as bodily harm and recklessness are concerned, if a person is aware that the conduct is likely to bring about *bodily harm* and persists in that conduct, heedless and uncaring of the risks involved, then he is reckless. That's what reckless means in s. 229.
>
> Another way to put the meaning of reckless as set out in that section of the *Criminal Code* is found in the attitude of that person. *If the person is aware that there's a danger their conduct could bring about death from bodily harm*, but the person carries on despite that risk that is the conduct of one who sees a risk and takes the chance. That intention is sufficient for murder. [Emphasis added.]

[59] During deliberations, the jury asked for clarification on intent and what constitutes recklessness. The trial judge repeated his earlier instructions. Justice Rosenberg found two errors:

> [65] In my view, the impugned instruction contains two errors. The first is the statement that if a person is aware that his conduct is likely to bring about "bodily harm", and persists in that conduct heedless and uncaring of the risk, then he is reckless. I assume this was a slip on the trial judge's part and he intended to say

> that if a person is aware that his conduct is likely to bring about "death" and persists in the conduct heedless and uncaring, then he is reckless. Unfortunately, this slip was repeated when the trial judge answered the jury's question.
>
> [66] The second error was in the trial judge's reference to a "danger" that the conduct could bring about death, in his attempt to define recklessness….

[60] Justice Rosenberg declined to answer if this error standing alone would have warranted a new trial.

[61] A similar error was found not to be fatal in *R. v. Latoski* (2005), 202 O.A.C. 102. There, the trial judge told the jury:

> Recklessness is the attitude and conduct of one who sees the risk and takes the chance. In other words, recklessness is found in the attitude of one who is aware that there is danger, that his conduct could bring about certain results, and persists despite the risk.
>
> para. [14]

[62] Looked at in isolation, the direction appeared to be wrong, but in the overall context of the entire jury charge on the *mens rea* for murder, the Ontario Court of Appeal found no error. Laskin J.A. explained:

> [16] Looked at in isolation, the trial judge's direction on recklessness appears to be wrong. In *R. v. Czibulka* (2004), 189 C.C.C. (3d) 199 at paras. 66-68 (Ont. C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 502, Rosenberg J.A. affirmed what the Supreme Court of Canada had said over a decade earlier in *R. v. Cooper*, [1993] 1 S.C.R. 146, 78 C.C.C. (3d) 289 at 295: "[I]t is not sufficient that the accused foresee simply a danger of death; the accused must foresee a likelihood of death flowing from the bodily harm that he is occasioning the victim."
>
> [17] **However, the trial judge's direction on recklessness has to be assessed in the context of his entire instructions on the *mens rea* for murder. As the Crown points out in her factum the trial judge correctly recited the *mens rea* for murder six times. Each time the trial judge told the jury that to convict on this second prong it must be satisfied beyond a reasonable doubt that the appellant intended to cause bodily harm he knew was likely to cause death and was reckless whether death ensued or not. His third and fourth recitals bracketed the impugned passage on recklessness….**
>
> [Emphasis added]

[63] Similarly, an incorrect description of the *mens rea* required by s. 229(a)(ii) is not fatal where the trial judge correctly charged the jury on numerous other occasions (*R. v. Moo, supra.*; *R. v. MacDonald*, 2008 ONCA 572).

[64] In our case, the trial judge did not give the jury a copy of s. 229(a), nor did he *ever* communicate to them a correct version of the intent the Crown was required to prove.

[65] In *R. v. Patterson* (2006), 207 O.A.C. 147 the trial judge excluded evidence of propensity by the deceased for violence. In relation to the requisite intent for murder, the main charge was correct. Eight hours into deliberations, the jury requested clarification on the state of mind required for murder. The parties agreed that the jury must be struggling with the concept of recklessness. The trial judge told the jury:

> Now as to the word reckless, that I didn't expand on but I will give you the meaning of that word now or express it in another way.
>
> In effect, it means that Patterson saw the risk that Gomes could die from the injury but went ahead anyway and took the chance. That is the meaning of the word reckless.
>
> para. [36]

[66] LaForme J.A., writing for the Court, concluded that despite the trial judge's reliance for his explanation on the suggested language in the Ontario Standard Jury Instructions, the re-charge was legally wrong. The Court declined to decide whether either one of the errors on their own would have required a new trial. Together, they precluded the application of the curative *proviso*. The Court ordered a new trial.

[67] The Crown relies heavily on *R. v. Van Every*, 2016 ONCA 87. A jury convicted Mr. Van Every of second degree murder. The trial judge had committed the exact same error. On several occasions he instructed the jury that they had to be satisfied that the accused intended to kill the deceased, or to cause him bodily harm that he knew was likely to cause death or was reckless whether the deceased would die.

[68] The Crown successfully argued that the error was insignificant, and the case against the appellant for second degree murder was overwhelming; the curative *proviso* applied. Justice van Rensburg wrote the unanimous reasons for judgment. He embarked on a detailed summary of the evidence since the outcome of the conviction appeal depended on determining the effect of the admitted legal error.

[69] The theory of the defence was that the main Crown witness, J.G., was in fact the shooter. The appellant was too intoxicated to have been the shooter. If he was,

he lacked the *mens rea* for first or second degree murder. The appellant did not testify.

[70] J.G. and the appellant were drug dealers. Their boss was the deceased. The appellant and J.G. were impatient to go to a crack house to sell drugs. The deceased ignored their requests to go to work. J.G. said the appellant asked for the handgun and loaded it. The appellant went upstairs and said something to the deceased. A gunshot was heard. J.G. went upstairs. The deceased was wounded. The appellant demanded the location of the money. He threatened to put another bullet into the deceased if he did not tell him. J.G. knew where the money was. They left with the money and the deceased's truck.

[71] The appellant and J.G. arrived in Montreal. Over the next number of days the appellant spent money from a large wad of bills on alcohol and drugs. J.G. and other witnesses recounted the appellant uttering various incriminating comments about the homicide. Among those comments were that he felt bad for what had happened, but "what was done was done"; the deceased had been disrespecting him, so he "blew him away", "I smoked his ass".

[72] Justice van Rensburg identified four reasons why he was of the view that there was no realistic possibility that the jury convicted the appellant on the basis of recklessness. They were:

(i) the trial judge spoke of two alternate intents, which would be inconsistent with the third possibility arising from recklessness. [para. 53];

(ii) no one noticed the error even though counsel had a copy of the draft charge. The lack of any objection which is a strong indicator that in the context of the real issues in the case, it was not material. [para. 54.];

(iii) the content of the closing arguments and balance of the instruction could not reasonably be seen to have put recklessness in play, particularly where the principal defence was that the appellant was not the shooter. Moreover, the death arose from a single gunshot from a short distance away. This mechanism of death removed any real scope for doubt regarding intent. [paras. 57-60];

(iv) the jury's recommendation on parole eligibility provided insight that the jury did not view the appellant's actions as mere recklessness.

> Five jurors recommended 25 years; two, 20 years; three, 15-18; and two abstained. [para. 67]

[73] In addition, van Rensburg J. was of the view that the case against Van Every was overwhelming that he was the shooter and had the requisite intent for murder (para. 68).

[74] Some of the factors Justice van Rensburg found telling apply here. Others do not. Here, the jury unanimously recommended the minimum ten year parole ineligibility. There was no written charge provided to counsel; nonetheless, counsel did not notice the erroneous description of the required intent for murder.

[75] Furthermore, the principal defence here was self-defence based on the appellant's intended use of force to prevent the anticipated attack by the deceased, and that the force used was reasonable in the circumstances. Although the deceased died from a gunshot wound to the chest, the appellant fired from a distance of approximately 15–18 feet with a gun loaded with birdshot.

[76] If the jury rejected self-defence they still needed to be satisfied beyond a reasonable doubt that the appellant had the requisite intent as defined in the *Criminal Code*. That intent was never properly described.

[77] The burden is on the Crown to establish that either the error was harmless or trivial or that the evidence is so overwhelming that even if the error was not minor, a trier of fact would inevitably convict (see: *R. v. Arcangioli*, [1994] 1 S.C.R. 129 at para. 46; *R. v. Van*, 2009 SCC 22 at paras. 34-36; *R. v. Sekhon*, 2014 SCC 15). A decision on the *proviso* must be made in the context of the whole case. The Crown does not, as in *Van Every*, directly suggest that the case against the appellant is so strong that a trier of fact would inevitably convict.

[78] Standing alone, I would be tempted to apply the *proviso* on the basis that the error was harmless in the overall context of the case. But that is not the only error. There are others. The first is that of the confusion the jury apparently had with respect to the order of their deliberations. The second is in relation to the jury charge on the elements of self-defence – the lack of guidance to the jury about the issues they had to decide, the evidence that was relevant to their consideration of them and on the issue of intent.

Jury Confusion

[79] I have already quoted the jury request for help from the judge about the appropriate sequence they should follow. In hindsight, it is not difficult to trace the source of their confusion.

[80] The trial judge started with the elements for first degree murder. He instructed them that if they were satisfied beyond a reasonable doubt about those elements they must convict the appellant of first degree murder, subject to the defences of provocation and self-defence.

[81] Provocation is a partial defence to culpable homicide that would otherwise be murder. If there is an air of reality to the defence, the Crown is required to disprove one of the elements beyond a reasonable doubt. If it cannot, then the verdict is one of manslaughter.

[82] Provocation presumes that the accused intended to cause death or serious bodily harm that he knew was likely to cause death and was reckless whether death ensued—but the accused did so suddenly, in reaction to provocative conduct before there was time for his passion to cool. If the Crown establishes beyond a reasonable doubt that a murder is planned and deliberate, as those requirements have been defined in the authorities, it is difficult to see how the partial defence of provocation could play any realistic role as a defence. Of course, even if the statutory defence of provocation fails, provocative words or conduct would still be relevant for a jury to consider in determining whether they were satisfied beyond a reasonable doubt that the accused actually planned and deliberated the murder.

[83] Self-defence, on the other hand, is a complete defence. If there is an air of reality to the defence, the Crown is required to disprove at least one of the elements. If it does not, an accused may have caused death, but it was not by means of an unlawful act. He or she is not guilty of any offence. The verdict is one of not guilty. Unlike provocation, there may be some rare and exceptional situations where a homicide is planned and deliberate but excused by self-defence.

[84] There is no doubt that deference is owed to how a trial judge goes about equipping a jury to carry out their adjudicative duties (see *R. v. Almarales*, *supra*. at para. 98-101; *R. v. Huard*, 2013 ONCA 650; *R. v. Feng*, 2014 BCCA 71 at para. 56). Substance is more important than form.

[85] That said, the approach chosen by the trial judge was ripe to create confusion. And it did so. The general portions of the jury charge were admirably succinct and clear. The quicksand was created by instructing on first degree

murder, followed by a lengthy instruction on a defence that had no air of reality, provocation, and then tacking on self-defence at the end. I pause to observe that the record is silent as to why the jury was instructed on provocation, a defence that the appellant did not appear to rely upon.

[86] The clearest approach to a jury charge for murder is well-documented. Start with homicide, culpable homicide, then proceed to murder, and where applicable, first degree murder. At each step, relevant defences and the significant evidence are discussed (see for ex. *R. v. Almarales*, *supra*. at paras. 99-100; *R. v. MacLeod*, 2014 NSCA 63 at para. 66-67).

[87] There is no doubt that the jury was confused about how they should go about their adjudicative functions. Recall their query after the trial judge answered the initial question about the "qualifiers" for first and second degree murder. They asked:

> Does the decision for either first or second-degree murder necessitate; firstly, ruling out manslaughter and self-defence?

[88] The trial judge asked the jury to clarify their question. They did. They then asked:

> What order of verdict elimination should we consider (a) first-degree murder, second-degree murder, manslaughter, not guilty (b) not guilty, manslaughter, second-degree murder, first-degree murder? Our questions come from an earlier comment by Judge Moir when he said our deliberations are subject to findings on manslaughter and self-defence.

[89] They clearly wanted help about the proper sequencing of their adjudicative function. That did not happen. Instead, the trial judge told them:

> On the various occasions when I said subject to what you decide about manslaughter or subject to what you decide about self-defence or subject to both, what I was saying is that you have to find this person guilty if you're satisfied beyond reasonable doubt on all of these elements, **subject to what you would decide about self-defence. I wanted ... or provocation. I want** ... **I was trying to be as precise as possible in making it clear that you still have to acquit if you have a reasonable doubt about one of those two defences.**
>
> …
>
> So all of those comments, all of those "subject to's" add a substantive reason to them, not ... they were not directions as to how you go about doing your deliberations. It's entirely up to the jury which thing you consider first and so on.

> So if you wanted to start by finding out whether all members of the jury are ... have a reasonable doubt on self-defence, you're perfectly entitled to do that.
>
> **But just remember that, logically, you have to be satisfied beyond reasonable doubt on murder, never mind which kind. You know what I'm talking about. Logically, then if you're satisfied beyond reasonable doubt on murder, you still have to ask whether you have a reasonable doubt about one of the conditions for manslaughter. And even if you have no reasonable doubt on manslaughter, you have to consider whether you have reasonable doubt about one of the elements for self-defence ... all of the elements for self-defence**. Sorry.
>
> I'm not sure that that fully answers your question, but I think at the heart of it is, What order of things do we do? And the answer to that is, It's entirely up to you, as long as you keep within the legal framework that I just described. All right?
>
> [Emphasis added]

[90] With respect, this was anything but clear. The Crown acknowledges the lack of clarity and the struggle the jury had with how they were directed to consider the defences of provocation and self-defence. After discussion with counsel, the trial judge then added:

> Please be seated. We just wanted to make one thing clear. If you choose to start with self-defence and you're coming to the conclusion that all jurors have a reasonable doubt about self-defence, then you don't need to consider the other things, because you would render a verdict of not guilty. I think that was probably clear enough from what I said, but we wanted to be perfectly clear. The main point in answer to your question is it's in your hands so long as you follow the laws. I've told you what the law was. Okay? Thanks very much.

[91] No objection is taken with the wording of this last instruction. However, as I will discuss later, in the overall context of this trial, it was insufficient.

[92] I am not persuaded that the structure of the jury charge, while it created confusion, and was in some respects erroneous, standing alone, ascends to the level required to amount to legal error (*R. v. Hebert*, [1996] 2 S.C.R. 272).

The Duty to relate the evidence to the issues

[93] A trial judge's duty to review the evidence and relate it to the critical issues in the trial is not of recent origin, nor is there serious doubt about the content of the duty.

[94] The classic formulation of the duty is set out in *R. v. Azoulay*, [1952] 2 S.C.R. 495:

> …The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them. (*Spencer v. Alaska Parkers* [(1905) 35 Can. S.C.R. 362.]). As Kellock J.A. (as he then was) said in *Rex v. Stephen et al.* [[1944] O.R. 339 at 352.]: "It is not sufficient that the whole evidence be left to the jury in bulk for valuation." The pivotal questions upon which the defence stands must be clearly presented to the jury's mind. Of course, it is not necessary that the trial judge should review all the facts, and that his charge be a minute record of the evidence adduced…
>
> per Tashereau J. at p. 497-8

[95] Appellate courts have consistently insisted on fulfillment of this duty (see for example: *R. v. Daley*, 2007 SCC 53; *R. v. Minor*, 2013 ONCA 557; *R. v. Selbie*, 2002 ABCA 58; *R. v. P.J.B.*, 2012 ONCA 730).

[96] Bastarache J., giving the majority judgment in *R. v. Daley*, observed that the extent of the review of the evidence will depend on the circumstances of the case. He adopted as correct the description of the duty by Scott C.J.M. in *R. v. Jack* (1993), 88 Man. R. (2d) 93 (C.A.), at p. 102; aff'd [1994] 2 S.C.R. 310:

> [57] The extent to which the evidence must be reviewed "will depend on each particular case. The test is one of fairness. The accused is entitled to a fair trial and to make full answer and defence. So long as the evidence is put to the jury in a manner that will allow it to fully appreciate the issues and the defence presented, the charge will be adequate": see Granger, at p. 249. The duty of the trial judge was succinctly put by Scott C.J.M. in *R. v. Jack* (1993), 88 Man. R. (2d) 93 (C.A.), at p. 102; aff'd [1994] 2 S.C.R. 310: "the task of the trial judge is to explain the critical evidence and the law and relate them to the essential issues in plain, understandable language" (para. 39).

[97] The governing principles in assessing the adequacy of a jury charge are attractively summarized by Watt J.A. in *R. v. P.J.B.*, 2012 ONCA 730:

> [40] Basic principles inform our decision about the adequacy of the trial judge's instructions in this case.
>
> [41] Anyone charged with a criminal offence and tried by a jury is entitled to a properly, not perfectly, instructed jury: *R. v. Jacquard*, [1997] 1 S.C.R. No. 314, at para. 2.

> [42] As described by this court in *R. v. MacKinnon* (1999), 132 C.C.C. (3d) 545 (Ont. C.A.), at para. 27, a trial judge's final instructions must leave the jury with a clear understanding of:
>
> - the factual issues to be resolved;
> - the legal principles governing the factual issues and the evidence adduced at trial;
> - the positions of the parties; and
> - the evidence relevant to the positions of the parties on the issues.

[98] Despite the thoroughness of counsels' addresses, the trial judge still has an obligation to ensure the jury understands the significance of the evidence relevant to the issues:

> [47] The obligation to review the substantial parts of the evidence and to relate it to the issues raised by the parties is that of the trial judge, not counsel, whether prosecuting or defending. The closing addresses of counsel cannot relieve the trial judge of the obligation to ensure that the jury understands the significance of the evidence to the issues in the case, although the judge can consider the closing addresses of counsel in deciding how to discharge his or her obligations: *MacKinnon*, at para. 32; *Royz*, at para. 3; and *R. v. Garon*, 2009 ONCA 4, 240 C.C.C. (3d) 516, at para. 84.
>
> per Watt J.A. *R. v. P.J.B.*

[99] With these principles in mind, what were the issues the trial judge needed to instruct the jury on?

[100] There was never any doubt that it was the appellant who had caused Mr. Green's death. The real issue was whether the Crown had satisfied the jury beyond a reasonable doubt that any one of the elements of self-defence did not apply; if not, were they satisfied beyond a reasonable doubt that he had the requisite intent for murder. Then, if so, was the murder planned and deliberate?

Self-Defence

[101] After decades of lament by Courts and academics[1], Parliament set out to simplify the notoriously complex, and at times contradictory, provisions of the *Criminal Code* that defined the requirements for all forms of self-defence.

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[1] See for example: *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 16; Don Stuart, *Canadian Criminal Law: a treatise*, 2nd ed (Toronto: Carswell, 1987) p. 413; Morris Manning & Peter

[102] The new provisions were enacted in the *Citizen's Arrest and Self-defence Act*, S.C. 2012, c. 9. The statute came into force on March 11, 2013 (SI/2013-5, (2013) C Gaz II, 372).

[103] There have been many trial level and appellate decisions focussing on whether the new provisions govern if the incident happened before March 11, 2013, but the trial was subsequent to that date—in other words, are the new provisions retrospective or prospective?

[104] The issue of retrospectivity is not a live one in this case since the incident of July 8, 2014, obviously happened after the effective date of the new provisions. Nevertheless, there is some utility in referring to a few of these authorities, as they discuss the intent of Parliament and the import of at least some of the changes to the defence of self-defence.

[105] So far, appellate courts are unanimous. The new self-defence provisions have prospective application only, as they introduce at least some substantive change to the law (see: *R. v. Chubbs*, 2013 NLCA 60; *R. v. Evans*, 2015 BCCA 46; *R. v. Bengy*, 2015 ONCA 397; *R. v. Green*, 2015 QCCA 2109; *R. v. Power*, 2016 SKCA 29).

[106] *The Citizen's Arrest and Self-defence Act* repealed ss. 34 to 42. Sections 34 to 37 had dealt with acts that could be justified by self-defence or of a third party in a variety of circumstances. Different sections governed if the accused had not provoked the unlawful assault he was defending against. If death or grievous bodily harm was caused, the accused must have believed he was under reasonable apprehension of death, and the means he took were no more than necessary to preserve himself from death or serious bodily harm. Other sections dealt with situations where the accused was the initial aggressor or had provoked the assault.

[107] These sections were replaced with a new section 34. On its face, the defence is far simpler. One section applies to all forms of self-defence. If there is an air of reality to self-defence, no offence is committed unless the Crown disproves at least one of the following: 1) that the accused believed on reasonable grounds that force

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Sankoff, *Manning, Mewett & Sankoff on Criminal Law*, 4th ed (Markham: LexisNexis, 2009); Gerry Ferguson, "Self-Defence: Selecting the Applicable Provisions" (2000) 5 Can. Crim. L. Rev. 179; David M. Paciocco, "Applying the Law of Self-Defence" (2007) 12 Can. Crim. L. Rev. 25; Law Reform Commission of Canada, Working Paper 29, *Criminal Law - The General Part: Liability and Defences* (Ottawa: Minister of Supply and Services Canada, 1982) at 116.

or a threat of force was being used or made against them or another person; 2) the accused's acts were done for the purpose of defending or protecting themselves or another; 3) the act was reasonable in the circumstances. For the latter element, the trier of fact is directed to take into account the non-exclusive list of nine factors found in s. 34(2). The section reads as follows:

> 34. (1) A person is not guilty of an offence if
>
> (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
>
> (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
>
> (c) the act committed is reasonable in the circumstances.
>
> (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
>
> (a) the nature of the force or threat;
>
> (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
>
> (c) the person's role in the incident;
>
> (d) whether any party to the incident used or threatened to use a weapon;
>
> (e) the size, age, gender and physical capabilities of the parties to the incident;
>
> (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
>
> (f.1) any history of interaction or communication between the parties to the incident;
>
> (g) the nature and proportionality of the person's response to the use or threat of force; and
>
> (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.
>
> (3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

[108] There can be no doubt that Parliament intended to modernize the law of self-defence and provide a better framework for all concerned. As Frankel J.A. observed in *R. v. Evans*, while the law of self-defence is different from what it was prior to March 2013, it may well be that the application of either the old or the new provisions could result in the same verdict – but that will not always be the case (para. 30).

[109] At the time the new provisions came into force, the Department of Justice issued a "Technical Guide for Practioners" that sets out a helpful analysis of the overall purpose of the legislative initiative as well as a detailed comparison of the new sections with the old. The Guide has been referred to in numerous cases. In *R. v. Bengy*, Hourigan J.A., writing for the Court, paraphrased the Guide:

> [30] When the new provisions came into force, the Department of Justice released a "Technical Guide for Practitioners" commenting on the changes brought about by the amendments, which notes the following:
>
> - Parliament's primary intent was to simplify the legislative text that sets out the defences;
> - **The amendment is not meant to substantively alter the fundamental principles of self-defence**;
> - The provision converts rigid mandatory conditions of the former provisions into factors that remain relevant and may be considered on a case-by-case basis; and
> - To assist with the analysis of the reasonableness of actions taken in self-defence, the provision codifies relevant factors in a non-exhaustive list to guide judges and juries.
>
> [Emphasis added]

[110] Nonetheless, Hourigan J.A. concluded that the new provisions were not mere procedural changes to the law of self-defence, but substantive, and hence not retrospective. He summarized his analysis as follows:

> [46] The new unified three-element framework in the *Citizen's Arrest and Self-defence Act* may not have changed the scope of what is relevant to the defence. However, it changed the nature of what is relevant. Mandatory requirements were converted into discretionary factors (e.g. proportionality, provocation, the quantum of force used and the quantum of force apprehended). The substantive significance of this change manifests in the air of reality test during jury trials. The former threshold requirements that once governed whether the defence was left with the jury are now, instead, relevant considerations for the jury in determining the defence's ultimate success.

> [47] In some cases, the new self-defence provisions are more generous and in other cases they are more restrictive. The more generous elements of the new provisions include:
>
> - The conversion of mandatory prerequisites into discretionary considerations, which means more claims will be put before juries;
> - The allowance of defence of other persons not necessarily "under [the accused's] protection", as required under the former s. 37;
> - The elimination of a strict limitation on when fatal defensive force can be used, which previously required an apprehension of death or grievous bodily harm; and
> - The expansion of acts of self-defence from "use of force" to any "act" (e.g. stealing a car or breaking into a house).
>
> [48] There are also less generous elements of the new provisions. Most significantly, they require that certain "pro-conviction" factors be considered in every claim of self-defence, such as whether other means of response were available to the accused, the nature and proportionality of the accused's response, and the accused's role in the incident (i.e. provocation). Such considerations were not always relevant under the old regime. For instance, the former s. 34(2) had no proportionality requirement and arguably justified excessive force if the accused was under a reasonable apprehension of death. The former provisions also did not require consideration of alternative means of response, which made it possible for self-defence to be based on "stand your ground" righteousness.

[111] As would be expected, the new provisions have generated academic comment and analysis (see for example: Kent Roach, "A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions" (2012) 16 Can. Crim. L. Rev. 275; The Honourable Justice David M. Paciocco, "The New Defence against Force" (2014) 18 Can. Crim. L. Rev. 269; Steve Coughlan, Gerry Ferguson & Lee Seshagiri, *Annual Review of Criminal Law 2013* (Toronto: Thompson Reuters, 2014); Don Stuart, *Canadian Criminal Law: a treatise,* 7th ed (Toronto: Thompson Reuters, 2014) at 510-14).

[112] For the purposes of this appeal, it is not necessary to offer concrete conclusions on all of the subtleties of the new s. 34. The Crown agrees that the new provisions did not discard the many fundamental principles of the law of self-defence. Importantly, an accused need not wait until he or she is actually assaulted before acting, and an accused is not by law required to retreat before acting in self-defence. The imminence of the threat, the existence of alternative means to respond, and the actions taken by the accused are factors that belong in the things that a trier of fact is required to consider to determine if the act committed by the accused was reasonable in all of the circumstances; and an accused is not expected

to weigh with nicety the force used in response to the perceived use or threat of force.

[113] What then did the trial judge instruct the jury about self-defence, and what assistance did the trial judge provide relating the evidence to the issues the jury had to decide?

Relating the evidence to the issues

[114] As jury charges go, the one here was very brief. The trial judge started at 11:09 a.m. Court recessed for one-and-a-half hours for lunch at 12:32 p.m. The charge was complete at 2:24 p.m.

[115] In other words, the whole charge took about an hour-and-three-quarters to complete. Of that time, the charge on self-defence was a mere eight minutes. Brevity is, of course, not a hallmark of error. But, in this case, with all due respect to the trial judge, he did not fulfill his duty to review the critical evidence and explain how it was relevant to the issues that the jury had to decide.

[116] The trial judge forewarned the jury that although it is common for a judge to review some of the evidence and relate it to the various issues, he intended to try to keep his thoughts to himself. He said:

> A judge will often review some of the evidence with the jury and relate it to the various issues. As I said, you assess the evidence, not me. I can make mistakes, and it is your memory and understanding of the evidence that prevails.
>
> I understand that sometimes people are interested in knowing what the judge thinks about what the jury should do. Rest assured that, in many ways, a jury trial is an intense experience for a judge, as it is for jurors, but it's an opportunity for me not to have to make some decisions, and I generally try to keep my thoughts under control and, at least, to myself. So you shouldn't imply anything from what I say about what my views are. But the really important thing is it's not my view of the evidence that matters; it's your view of the evidence that matters.

[117] With respect to the elements of self-defence, there can be no fault with what the trial judge told the jury about the basic requirements for self-defence. It is apparent that the judge relied upon the Model Jury Instructions published by the Canadian Judicial Council for the structure and some of the language for his directions on self-defence. There is no need to quote the entirety of the language.

[118] The judge properly quoted the statutory language of s. 34 and the Model Jury Instructions that distill the s. 34 requirements into three questions. The questions he posed for the jury were:

> (1) Has the Crown proved beyond reasonable doubt that Mr. Levy did not believe on reasonable ground that force was about to be used against him?
>
> (2) Has the Crown proved beyond reasonable doubt that Mr. Levy did not commit the killing for the purpose of defending or protecting himself from the use of the threat of force?
>
> (3) Has the Crown proved beyond reasonable doubt that the killing was not reasonable in the circumstances.

[119] There is nothing objectionable about the phrasing of the first question. But the language of questions 2 and 3 that the act or conduct to be judged was "the killing" is not correct. It presumes that the appellant intentionally killed the deceased.

[120] The act was not the "killing"—that was the consequence of his act. The appellant's act was firing the shotgun in response to what he claimed was a reasonably perceived threat of force. The appellant shot at Mr. Green from a distance of approximately 15 feet, with the gun at his hip. He believed the first shot struck Mr. Green in the chest. The expert evidence and other circumstantial evidence supported that belief. As Mr. Green did not stop, he continued firing until the gun was empty.

[121] The appellant never said he intended to kill Mr. Green. He had the shotgun because he said he was not going to take another beating from Mr. Green. When Mr. Green continued toward him, even though the gun was in plain sight, he believed "it was him or me".

[122] That aside, the jury was not given any elaboration that what was essential was the appellant's subjective belief—even if he was mistaken in his belief—that he was facing a situation where a threat of force was being made against him. Of course, there must have been reasonable grounds for the appellant's belief.

[123] The trial judge's only reference to the evidence that was relevant to this first question was as follows:

> The evidence on that first subject includes the phone call with Nicole Levy's speaker phone and the conflicting account of Ms. Levy and Mr. Levy about what was said. However, under either account, Mr. Levy would know that Mr. Green

> was looking for him. At least, that's my assessment; it's up to you to decide, in the end. **The significance of that as reasonable grounds for the most extreme measures is something you will have to determine in light of the evidence we've already discussed, including**:
>
> (1) Evidence about the isolation and size of Little Tancook Island;
>
> (2) The history of conflicts between Mr. Levy and Mr. Green;
>
> (3) The relative age and size;
>
> (4) The altercation at the Levy home that morning;
>
> (5) Mr. Levy's statement that he believed it was "him or me";
>
> (6) That he was feeling fear as well as anger; and
>
> (7) That he expected serious violence from Mr. Green, to the extent that you accept any or all of his statements in those regards.
>
> [Emphasis added]

[124] With respect to the first requirement of self-defence set out in s. 34(1)(a) of the *Code*, the question of "reasonable grounds for the most extreme measures" is simply not relevant. The question of the reasonableness of the actions taken by an accused to defend himself or another person is to be considered under s. 34(1)(c) via the non-exhaustive factors set out in s. 34(2).

[125] The evidence about the isolation and size of Little Tancook Island was also irrelevant to the first question they needed to consider, as was the relative size and age of the antagonists.

[126] The telephone call between the appellant, his daughter and the deceased was certainly relevant. The trial judge was correct to suggest to the jury that under either account of the details of the call, the appellant would have known that Mr. Green was looking for him.

[127] The trial judge also correctly referred the jury to the history of conflicts between the appellant and Mr. Green; to what he called the "altercation" at the Levy home that morning; and lastly, to the appellant's expectation of serious violence.

[128] However, what is lacking in this generic recitation of topics is any reference to the actual evidence of the history of Mr. Green physically assaulting the appellant, or the considerable body of evidence that the appellant had been the victim of an unprovoked violent assault that very morning by Mr. Green, and how this related to the question of his subjective belief that as Mr. Green approached

him he was facing a threat of force and the evidence that could provide reasonable grounds for that belief.

[129] Lastly, on this first question, there was no reference to the fact that the threat of force does not have to be immediate. In other words, an accused such as the appellant did not have to wait to be actually assaulted before being entitled to act in self-defence (see: *R. v. Nelson* (1992), 71 C.C.C. (3d) 449 (Ont.C.A.); *R. v. Pétel*, [1994] 1 S.C.R. 3; *R. v. McConnell*, [1996] 1 S.C.R. 1075; *R. v. Young*, 2008 BCCA 393).

[130] The charge on the second question in terms of identifying the issues and relating the evidence to them is even briefer. It was as follows:

> The second question is has the Crown proved beyond reasonable doubt that Mr. Levy did not kill Mr. Green for the purpose of defending or protecting himself from the threat of force? This takes us to much of the evidence of what went on that day. On that subject, you have to consider the events of the whole day and decide what the sequence shows as to Mr. Levy's motives. You have to consider Mr. Levy's statements, already discussed, about his thoughts and emotions. You have to consider all of the evidence going to motive. Was the motive self-protection or was it something else? If it was something else, such as revenge, then the Crown has established the first, the second question and the defence of self-defence fails.

[131] While it would have been better for the trial judge to have avoided the use of the word "motive" as opposed to Parliament's choice of "purpose", it is not fatal. The more substantial flaw is the complete lack of reference to the evidence that could assist the jury in deciding whether the Crown had established beyond a reasonable doubt that the appellant did not shoot at Mr. Green to protect himself from the perceived threat of force.

[132] With respect to the issue of whether the act of the appellant was reasonable in the circumstances, the trial judge read to the jury the factors set out in s. 34(2). With respect to the evidence related to them, he told the jury he would keep it brief. The relevant extract from his charge is:

> The *Criminal Code* provides us with a series of factors that you are to consider, and I'll run through those with you. **If the Crown has proved beyond reasonable doubt that the killing was not reasonable in the circumstances, then the defence fails.** If, having got this far, you are, you have a reasonable doubt about whether the, about whether the killing was reasonable in the circumstances, then you have to find Mr. Levy not guilty of all charges.

…

I'll say a few words about the evidence related to each of those, but I will keep it brief. Each of these is a factor that you're to consider in light of the evidence as a whole. So, firstly, it's the nature of the threat of force against Mr. Levy. The evidence makes it clear that Mr. Green was not carrying a weapon, and it appears from the evidence, to me, at least, that the force that Mr. Levy was facing was an assault, as on previous occasions, perhaps more serious. So you'll have to assess the evidence to determine the nature of the threat of force that Mr. Levy was facing.

(2) The extent to which the use of force was imminent, whether there were other means available to respond to the potential use of force. The evidence is that Mr. Levy, I'm sorry, Mr. Green was expected at the Levy home imminently. Mr. Levy didn't have to be there; in fact, he wasn't there, but the evidence is also that we're dealing with a very small, one half mile by one mile island, and the evidence, it's for you to assess, but the evidence may show to you that there were limited alternatives available to Mr. Levy.

(3) Mr. Levy's role in the incident. Well, that's very clear.

(4) Whether any of the people involved used or threatened to use a weapon, and that, too, is clear. Only Mr. Levy did that.

The size, age, gender, and physical capabilities of those involved in the incident - we've discussed that at length previously in connection with other issues that you have to grapple with.

The nature, duration, and history of any relationship among the parties involved in the incident, including any prior use or threat of force and the nature of that force or threat - again, in connection with other issues that you have to grapple with we have discussed that evidence at some length.

Any history of interaction or communication among the people involved in the incident - that particularly refers to the communications that day, including the yelling and carrying on at the, at the Levy family residence.

The nature and proportionality of Mr. Levy's response to the use or threat of force - the nature is that he used the shotgun. You have to consider in this connection again whether he had any alternatives, whether the threat was proportionate to the means he used to, to avoid it.

[Emphasis added]

[133] Again, the trial judge inappropriately referred to the act in question as being whether "the killing" was reasonable in the circumstances. As explained earlier, the act was not the "killing"—although a homicide was the consequence of his act. His act was firing the shotgun in response to what he claimed was a reasonably perceived threat of force. The question is whether that act was reasonable in all of the circumstances, not the consequences.

[134] There may be some scenarios where the distinction may not be significant. For example, if the evidence was clear that an accused used force intending to kill his actual or reasonably perceived assailant. That is not the scenario in this case.

[135] The trial judge made no reference to the degree of violence that the deceased had inflicted on the appellant in the past. Although dated, the previous historic acts were relevant to the subjective belief of the appellant, and to whether the act he committed that day was objectively reasonable. There was also no reference to the violent unprovoked attack that very morning and the expert evidence that supported the conclusion that he was so scared that morning that the appellant soiled himself. No mention was made of the continuing anger of Mr. Green as he returned to the worksite with Jordan or even why he would hold such anger against the appellant.

[136] As to Mr. Levy's role in the incident, "Well, that's very clear." That factor (s. 34(2)(c)) has to do with whether an accused had done anything to provoke the threat of force that triggered the claimed act of self-defence. Nicole Levy said he had challenged the deceased to return to finish things once and for all. The appellant denied any such challenge. In any event, he had done nothing to provoke the physical attack less than an hour before. No assistance was given to the jury about what this factor meant.

[137] The trial judge said: "the size, age, gender, and physical capabilities of those involved in the incident. We've discussed that at length previously in connection with other issues that you have to grapple with". With respect, there was no mention by the trial judge at all about the evidence on these factors in his charge.

[138] As to the nature, duration and history of the relationship between the parties involved in the incident, including any prior use or threat of force, the trial judge said: "Again, in connection with other issues that you have to grapple with we have discussed that evidence at some length". With respect, there was no discussion by the trial judge at all, let alone at some length.

[139] Essentially absent from the trial judge's charge, both in relation to the issue of establishing a murderous intent and to the defence of self-defence, are the statements of the appellant.

[140] The evidence of the appellant was contained in the recorded interview and re-enactment. They were lengthy. The appellant described in considerable detail

the events of July 8. The judge made scant reference to the appellant's statements. Earlier in his charge, he simply said this:

> Both the interview and the re-enactment are extensive. The incriminating things Mr. Levy said can be used as proof of an offence or an element of an offence against him; however, the things he said that are helpful to his position are also evidence. You have in the two statements extensive evidence from Mr. Levy relevant to the charge of murder, planning and deliberation, provocation, and self-defence. You must consider both that which is helpful to his position and that which is harmful to it.

[141] There was little, if any, elaboration as to what parts the jury could consider as incriminating and what parts were helpful to his defence. The only obvious thing that the appellant said that was incriminating was that he had shot the deceased. There was already ample circumstantial evidence that that was the case. In addition, he had told his mother he had done so. On the other hand, the statements of the appellant to the police contained much evidence helpful to his defence.

[142] The trial judge made but passing reference to some of those helpful statements. With respect to the evidence he identified as being relevant to the issue of intent, he said:

> So you have the circumstantial evidence of the weapon itself; you have evidence in the agreed statement and through Ms. Larder that there were three shots fired in rapid succession; there's the medical examiner's evidence about the wounds; and Mr. Levy's video statements.
>
> Your assessment of the videos, not mine, is what counts. **I do not recall and did not note a statement by Mr. Levy that he intended to kill Mr. Green.** As I recall, he told Sergeant Raaymakers that he waited for Mr. Green at Stirling Levy's, he hoped Mr. Green would stop, Mr. Green kept coming, Mr. Levy shot him in the chest. Mr. Green still kept coming, according to Mr. Levy. Mr. Levy shot him a second time and Mr. Green spun. Mr. Levy shot a third time, Mr. Green staggered and died. Mr. Levy's re-enactment and statements made there reiterated what he told Sergeant Raaymakers, as I assess what he, what I heard and saw on the, on the video recording.
>
> [Emphasis added]

[143] The key time frame for determining the issue of intent was when the appellant committed the act that caused Mr. Green's death. The Crown agrees that the first shot fired by the appellant was the one that caused death. The second shot caused superficial injuries to the back of the left arm. The third struck the lower

back over an area of 23 x 19 cm with numerous pellets entering the abdominal cavity, but did not appear to have played any causal role in the death of Mr. Green. That is not to say the events before the first shot and his subsequent shots were irrelevant to the jury's determination of intent.

[144] In the police interviews, the investigators went over and over with the appellant what he knew, what he was thinking, and the reasons for his actions. Initially, the police were of the view that the chest wound was the result of a very close range shot, inflicted after the deceased had already been wounded. The appellant vehemently denied such a scenario. The forensic evidence did not bear out the initial police theory.

[145] Amongst other things, the appellant told the police in his initial statement:

> Well what it boils down to was it was either him or me and he lost.
>
> …
>
> Put it this way. I was not taking another beating from Terry Green and it wouldn't of been the first one.
>
> …
>
> Well, if it hadn't gone down the way it was, it would have been him sitting in the chair here instead of me.
>
> …
>
> He's a sadistic bastard that liked beating people.
>
> …
>
> Basically, what it boiled down to was that I better shoot him now.
>
> …
>
> I don't know the exact words. Most of my brain is fried this morning. Well it's not morning anymore but everything's a blur.
>
> …
>
> Okay, um, I know this is gonna be hard Terry. Tell me what you were thinking when you pulled the trigger the first time?
>
> I wasn't.
>
> …
>
> At what point did you, did you make up your, well what point did you make up your mind that you were going to shoot Terry Green?
>
> Just before I squeezed the trigger.
>
> What were you thinking about that second?

I don't know what I could say I was thinking. Probably not thinking would be more accurate.

…

Oh yes, but as far as I'm concerned it was him or me.

…

…when [Terry Green] came down that road to see you, what do you think he thought he was coming for?

He was coming to beat the crap out of me. Plain and simple. That's the way I see it anyway.

…

Yup. What about the gun? Terry Green is not scared of guns?

Apparently not. He damn well knew it was there, he could see it.

…

You think this could have been avoided?

Oh yeah. I don't know how but it could have been avoided. Situations can always be avoided.

…

No. I didn't intend to hurt him but that ain't the way it worked out.

No, that's obviously not the way…

It went down a little different than original.

What were you hoping was gonna happen when he walked down the road?

Well I was hoping he would stay the hell at where he was.

[146] During the re-enactment the next day, there were numerous comments by the appellant that similarly bore on the issue of intent and the myriad elements of self-defence:

So what were you thinking then when ya, when ya hung up from that phone call. Terry just stay here with me for a second. So when you hung up from that phone call what were you thinking then?

There wasn't much for me to think.

What do you mean?

Well, I don't keep track of my thoughts.

So what were you feeling then?

Uneasy.

Why?

Ah, already had a couple of beatings from him. I wasn't taking anymore.

So then what were ya, what were your thoughts then about that?

Self preservation would be about it.

…

As far as I know, I hit him in the chest.

As far as you know, where abouts in the chest? Point on me.

That's a good question because I'm not a really sure whether it was right or left, should have been the middle but my aim ain't very good when I'm sitting there.

Okay, so when you got the gun (inaudible), so how would you have gotten the gun up. Did you bring it up to shoulder or did you shoot it from…

No I don't bother to put it up to my shoulder.

…

… Not on the phone call but the time you would of first seen him until you made your first shot. Did he say anything to you?

Yeah but I can't remember what it was he was saying. I got the general drift that I was in trouble.

…

…I told you last night the only, our only job is to determine the truth as to what happened.

The truth of the matter is it was him or me and it wasn't going to be me.

[147] I don't suggest that a trial judge need comb through lengthy police interviews of an accused and extract every statement relevant to the live issues. Here, none of these statements were pointed out to the jury as being relevant to the issue of the appellant's subjective belief that he needed to arm himself, use the gun to defend himself against the advancing Terry Green, and the circumstances that made that belief or his act reasonable. Nor was there any mention of this evidence on the issue of intent.

[148] It is common to give to the jury what is known as a rolled-up charge on intent. That is, even if the jury rejects the defences of self-defence, provocation, and intoxication, they may still have a reasonable doubt about the intent required for murder, and they must consider the evidence cumulatively on that issue (see: *R. v. Robinson*, [1996] 1 S.C.R. 683; *R. v. Flores*, 2011 ONCA 155 at paras. 73-75). I recognize that here there was no evidence of intoxication. But recall that the jury was confused about how to go about its adjudicative function.

[149] The trial judge's attempt to assist was confusing. An objection was voiced. The trial judge corrected his charge. For ease of reference, I repeat what he said, in its entirety:

> Please be seated. We just wanted to make one thing clear. If you choose to start with self-defence and you're coming to the conclusion that all jurors have a reasonable doubt about self-defence, then you don't need to consider the other things, because you would render a verdict of not guilty. I think that was probably clear enough from what I said, but we wanted to be perfectly clear. The main point in answer to your question is it's in your hands so long as you follow the laws. I've told you what the law was. Okay? Thanks very much.

[150] In supplementary submissions, counsel for the appellant agrees that this direction was technically correct, but argues it was flawed as it failed to emphasize what should happen if self-defence did not apply. He argues that the jury needed to be instructed that they must still assess, in light of all of the evidence, whether the Crown had proven beyond a reasonable doubt the requisite intent for murder. I agree.

[151] With respect to any deficiencies of the charge on self-defence, the Crown argues they are irrelevant as there was no air of reality to self-defence. This was obviously not the view of counsel at trial, nor of the trial judge.

[152] Specifically, the Crown argues that the appellant had other means available to respond (s. 34(2)(b)) and the use of the shotgun was not a proportional response to the threat of force from the deceased (s. 34(2)(g)).

[153] I am unable to agree. Parliament did not give direction on the weight that should be attached to the nine factors listed in s. 34(2). Under the former s. 34(1) the accused was justified in using force if it was not intended to cause death or grievous bodily harm and was not "more force than necessary to enable him to defend himself". Likewise, s. 37 justified force if the accused used no more force than was necessary to prevent the assault or its repetition.

[154] And under the former s. 34(2), the accused who caused death or grievous bodily harm in repelling an assault must have believed, on reasonable grounds, that he could not otherwise preserve himself from death or grievous bodily harm.

[155] These statutory requirements for proportionality were muted somewhat by case law that interpreted these provisions to mean that an accused need not

measure with nicety the degree of force used to preserve himself from reasonably perceived death or grievous bodily harm[2]. Nor was there a strict requirement that an accused run away or otherwise retreat[3], particularly if the force he or she faced was on their own property (see: *R. v. Cain*, 2011 ONCA 298 at paras. 7-9; *R. v. Forde*, 2011 ONCA 592; *R. v. Docherty*, 2012 ONCA 784, leave to appeal denied, [2013] S.C.C.A. No. 18).

[156] There is no indication that Parliament intended to change the law in these respects. If anything, the converse. Imminence of the threatened force, its nature, other means to respond, and the nature and proportionality of the accused's response are now among the nine enumerated (non-exclusive) factors in s. 34(2) that the trier of fact must consider in determining if the Crown has proven beyond a reasonable doubt that the act committed by the accused was not reasonable in the circumstances.

[157] Here, the trial judge failed to explain to the jury the meaning of the enumerated factors and the evidence relevant to them.

[158] It is impossible to determine which of the s. 34 requirements that the jury determined had been disproved. The Crown need only disprove one to defeat the defence. With respect, the trial judge failed to fully explain the elements the jury had to consider and to properly relate the evidence to those elements, including the factors that bear on assessing whether the act of the appellant was reasonable in the circumstances.

[159] The failure to do so was non-direction amounting to misdirection, and hence an error in law. Should the curative *proviso* found in s. 686(1)(b)(iii) be applied?

The Proviso

[160] Persons accused of crimes have a right to have their trials conducted without legal error. The right is not absolute. An appeal court has the power, by virtue of s. 686(1)(b)(iii), to dismiss an appeal despite finding one or more errors in law if it concludes that no substantial wrong or miscarriage of justice occurred.

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[2] *R. v. Baxter* (1975), 27 C.C.C. (2d) 96; [1975] O.J. No. 1053; *R. v. Kong*, 2006 SCC 40, affirming the dissent of Wittman J.A., as he then was (2005 ABCA 255); *R. v. Lavalee*, [1990] 1 S.C.R. 852; *R. v. Kandola* (1993), 80 C.C.C. (3d) 481.

[3] Section 35 did make retreat a requirement if the accused had initially assaulted the victim.

[161] There are two situations where an appeal court can safely conclude there was no substantial wrong or miscarriage of justice—the error was minor, such that the court is satisfied it had no impact on the verdict, or even if the error was not minor, the case against the appellant was overwhelming. The burden is on the Crown to demonstrate either.

[162] The test is thoroughly described by LeBel J. in *R. v. Van*, 2009 SCC 22 as follows:

> [34] It is worthwhile taking one small step back for a moment to acknowledge that not every error in a criminal trial warrants appellate intervention. Under s. 686(1)(a) of the *Criminal Code*, an appeal against a conviction may be allowed only in the event of an error of law, an unreasonable verdict, or a miscarriage of justice. In this case, it is not disputed that the failure to give a limiting instruction is an error of law that falls within s. 686(1)(a)(ii) and that the appeal could therefore have been allowed. However, it still falls to this Court to determine whether the convictions can be upheld despite the existence of an error, with resort to s. 686(1)(b)(iii) of the *Code*. Under this provision, a conviction can be upheld providing that the error has not resulted in a substantial wrong or a miscarriage of justice. The Crown bears the burden of showing the appellate court that the provision is applicable, and satisfying the court that the conviction should stand notwithstanding the error. To do so, it must establish that the error of law falls into one of two categories. First, that it is an error so harmless or minor that it could not have had any impact on the verdict. In the second category are serious errors that would otherwise justify a new trial or an acquittal, but for the fact that the evidence against the accused was so overwhelming that any other verdict would have been impossible to obtain: *Khan*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239.

[163] Here, the Crown argues that any errors regarding the judge's instructions on self-defence are not material as the defence had no air of reality. With respect, as indicated earlier, I am unable to accept that there was no air of reality to the defence of self-defence.

[164] It is settled that to have a defence put to a jury there must be evidence on all of the essential elements of the defence. Recently McLachlin C.J. wrote of the correct approach:

> [22] The air of reality test requires courts to tread a fine line: it requires more than "some" or "any" evidence of the elements of a defence, yet it does not go so far as to allow a weighing of the substantive merits of a defence: *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162, at para. 21. A trial judge applying the air of reality test cannot consider issues of credibility and reliability, weigh evidence substantively, make findings of fact, or draw determinate factual inferences: *R. v.*

> *Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 87; *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702, at para. 12. However, where appropriate, the trial judge can engage in a "limited weighing" of the evidence, similar to that conducted by a preliminary inquiry judge when deciding whether to commit an accused to trial: see *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828, cited by McLachlin C.J. and Bastarache J. in *Cinous*, at para. 91.
>
> *R. v. Pappas*, 2013 SCC 56

[165] There are now three elements to the defence of self-defence: a subjective belief based on reasonable grounds that force or a threat of force against them or another person exists; the act committed by the accused is for the purpose of protecting or defending themselves or another against the use or threat of force; and the act committed is reasonable in the circumstances.

[166] The Crown argues that there was no air of reality to self-defence because it is impossible to say that there were *no* alternative courses of action open to the appellant at the time—hence the act could not be reasonable in the circumstances. It cites *R. v. Cinous*, 2002 SCC 29 in support.

[167] The situation facing the appellant on Little Tancook Island is a far cry from the scenario in *Cinous*. In that case, the accused decided he was facing a threat of death by one of his fellow cohorts. No actual threats were made. Nevertheless, after stopping at a gas station and purchasing windshield fluid, the accused saw his opportunity and shot the deceased in the back of the head. There was no issue that he intended to kill the deceased. But there was no evidence from which the jury could reasonably infer that the accused believed he had no alternatives. Errors in the jury charge on self-defence were immaterial since the defence should not have been left with the jury at all.

[168] Here, the evidence of the appellant was not that he armed himself to kill the deceased, but to protect himself from another assault. He acted when the deceased continued to approach him in what he believed to be a threatening manner despite the plain presence of the gun. There was ample evidence upon which a jury could decide that his act was objectively reasonable. They could decide it was not. It is a matter for the trier of fact.

[169] The existence of other alternatives and the nature and proportionality of the appellant's response are but two factors that inform the issue of the reasonableness of his act.

[170] I have not overlooked that trial counsel did not object to the charge on intent, self-defence or the failure of the trial judge to relate the evidence to these issues. Such a failure to object to a jury charge is not fatal to a well-founded complaint; it can be taken into account considering the adequacy of the overall instructions, as well as assessing the seriousness of the putative error (*R. v. Jacquard*, [1997] 1 S.C.R. 314 at paras. 37-38; *R. v. Daley*, 2007 SCC 53 at para. 58; *R. v. Jaw*, 2009 SCC 42 at para. 44).

[171] Nevertheless, in light of the cumulative errors, I am not satisfied that the Crown has met its burden, and I would decline to apply the *proviso*. Accordingly, I would allow the appeal and direct a new trial on the charge of second degree murder.

SUMMARY AND CONCLUSION

[172] An accused is entitled to a fair trial, untainted by serious legal error. Here, the trial judge misdirected the jury on the intent required to establish murder. He repeatedly told the jury that the intent for murder was established if the Crown proved that the appellant meant to cause death, or meant to cause bodily harm that he knew was likely to cause death, or was reckless whether death ensued. The jury voiced their confusion as to the intent required for murder. The misdirection was repeated. The law requires the Crown to prove beyond a reasonable doubt that an accused meant to cause bodily harm that he knew was likely to cause death and was reckless whether death ensued. This slip, standing alone, might nonetheless be saved by the curative *proviso*.

[173] But that was not the only legal error. The trial judge erred in his instructions on self-defence by: misdescribing the act in question as "the killing"; failing to fully explain the meaning of the elements of self-defence and relating the evidence to the issues that the jury had to decide; lastly, the trial judge also omitted to provide to the jury a "rolled-up charge" on the issue of intent. In light of the confusion expressed by the jury, both about the issue of intent and the sequencing of their deliberations, the failure amounts to legal error.

[174] Given the flexible direction mandated by the new self-defence provisions on whether an act of an accused was reasonable in all of the circumstances, there was evidence in the record upon which a reasonable jury, properly instructed, could acquit. There was, therefore, an air of reality to the defence. It is not an appropriate case to apply the curative *proviso*. I would allow the appeal and direct a new trial on the charge of second degree murder.

Beveridge, J.A.

Concurred in:

Scanlan, J.A.

Van den Eynden, J.A.