NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. McNeil*, 2022 NSCA 55

Date: 20220817
Docket: CAC 508007
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Devonte Denzel McNeil

Respondent

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	June 9, 2022, in Halifax, Nova Scotia
Subject:	Criminal Law – Self-defense – Crown Appeal
Summary:	Mr. McNeil shot at Robert Chan shortly after leaving a Halifax nightclub when Mr. Chan pointed a handgun at him. He was charged with multiple offenses related to the possession and use of a handgun as well as four other offenses, including attempted murder. After trial in provincial court Mr. McNeil was convicted of the offenses related to the possession and use of the handgun but acquitted of the other offenses. The trial judge applied the self-defence provisions in s. 34 of the *Criminal Code* in his decision to acquit. The Crown appealed arguing the trial judge erred in finding an air of reality to self-defence and in relying on impermissible speculation in concluding Mr. McNeil's response to the threat posed by Mr. Chan was reasonable.
Issues:	Did the trial judge commit legal error in his application of the self-defence principles in s.34 of the *Criminal Code*?

Result: Appeal dismissed.

At the request of counsel, the trial judge agreed to hear argument about whether there was an air of reality to self-defence. He concluded there was and considered the defence in detail in his final decision. The Crown argued the initial air of reality decision was insufficient in addressing all required elements. However, the final decision did not contain the same deficiencies. The only criticism of that decision was that the judge engaged in speculation in finding all shots by Mr. McNeil were done for purposes of self-defence.

The purpose of the air of reality decision was to assist counsel and the judge in determining the issues to be argued. In a judge alone trial it was not required and any deficiencies were remedied by the judge's consideration of the required elements of self-defence in his final decision.

The series of shots spanned several seconds with a short pause before the final one. At the time of the last shot Mr. Chan was running between parked cars and away from Mr. McNeil. The judge concluded Mr. McNeil's defensive purpose did not change through the sequence of shots. He explained in detail his evidentiary findings and why self-defence was established. As the trier of fact, the assessment of the reasonableness of Mr. McNeil's response to the threat posed by Mr. Chan was for the trial judge to make.

The Crown did not demonstrate any error of law in the judge's self-defence analysis.

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. McNeil*, 2022 NSCA 55

Date: 20220817
Docket: CAC 508007
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Devonte Denzel McNeil

Respondent

Judges:	Wood, C.J.N.S.; Beveridge and Derrick, JJ.A.
Appeal Heard:	June 9, 2022, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Wood C.J.N.S.; Beveridge and Derrick JJ.A. concurring.
Counsel:	Timothy O'Leary, for the appellant Ian D. Hutchison, for the respondent

Reasons for judgment:

[1] The evening of August 8-9, 2019 was dark and rainy in Halifax. Shortly after midnight shots rang out on Dresden Row. Police were called and responded quickly. A police service dog followed a scent trail which led to Royal Artillery Park where a handgun was recovered.

[2] Devonte Denzel McNeil and another individual, Demarqus Beals, were arrested at Royal Artillery Park. A third person, Jayree Downey, was arrested the next day.

[3] Less than an hour after the shots were fired, Robert Chan arrived at the Emergency Department of the QEII Hospital in Halifax suffering from a non-life threatening gunshot wound. Mr. Chan did not cooperate with the police investigation into the circumstances leading to his injury.

[4] Messrs. McNeil, Beals and Downey were charged with various offences as a result of the events on Dresden Row in the early hours of August 9, 2019. For the purpose of this appeal, only those relating to Mr. McNeil are pertinent. He was charged with six offences jointly with Mr. Downey. These were under ss. 91(1), 95(1), 88(1), 90(1), 92(1) and 108(1)(b) of the *Criminal Code,* all in relation to the possession or use of a handgun. The four for which Mr. McNeil was the sole accused were:

- Attempted murder of Robert Chan contrary to s. 239 of the *Criminal Code*.

- Use of a prohibited weapon, i.e. a handgun, in a careless manner or without reasonable precaution for the safety of others contrary to s. 86(1) of the *Criminal Code*.

- Pointing a firearm, i.e. a handgun, at Robert Chan without lawful excuse contrary to s. 87(1) of the *Criminal Code*.

- Intentionally discharging a firearm while being reckless as to the life or safety of another person contrary to s. 244.2 of the *Criminal Code*.

[5] Following trial before Judge Gregory Lenehan of the Nova Scotia Provincial Court, Mr. McNeil was convicted of the six charges for which he was jointly charged with Mr. Downey and was sentenced to a custodial term of 37 months. Mr.

McNeil was acquitted of the other four charges because the trial judge found he was acting in self-defence.

[6] The Crown appeals Mr. McNeil's acquittal, alleging the trial judge erred in law in determining there was an air of reality to self-defence and, therefore, should not have considered the substantive merits of this defence in his final decision. The Crown also says the trial judge engaged in impermissible speculation to support his finding that Mr. McNeil's response to the threat posed by Mr. Chan was reasonable.

[7] Mr. McNeil says the trial judge's decision contains no legal error in relation to self-defence and the appellant's attempt to re-argue the trial judge's factual conclusions with respect to the reasonableness of Mr. McNeil's response is impermissible on a Crown appeal.

[8] For the reasons which follow, I am not persuaded by the appellant's arguments and would dismiss the appeal.

Scope of Crown Appeals

[9] The Crown's right to appeal an acquittal is limited to questions of law. This is more restrictive than the grounds which an individual may raise on an appeal from conviction. Beveridge, J.A. described the scope of a Crown appeal in *R. v. Al-Rawi*, 2018 NSCA 10, as follows:

> [15] This case raises the sometimes difficult question of what constitutes an error of law. It is a question of vital importance, as the Crown, unlike a person convicted of an indictable offence, is restricted to appeals that raise a question of law alone.
>
> [16] A person convicted can appeal on the basis of an error in law, miscarriage of justice, or that the verdict is unreasonable or not supported by the evidence (s. 686(1)). However, in the absence of legal error, the Crown cannot seek to overturn an unreasonable acquittal (see: *Sunbeam Corp. (Canada) Ltd. v. R.*, [1969] S.C.R. 221; *Lampard v. R.*, [1969] S.C.R. 373; *Schuldt v. The Queen*, [1985] 2 S.C.R. 592; *R. v. Morin*, [1992] 3 S.C.R. 286).
>
> [17] The answer is not always clear whether a trial judge erred in law alone, thereby permitting appellant intervention, or simply made a factual determination that a reasonable doubt existed, for which an appellate court, however much it may consider the determination to be unreasonable, cannot intervene (see: *R. v. J.M.H.*, 2011 SCC 45, at paras. 26-27). And where the evidence was circumstantial, a finding of reasonable doubt is not necessarily flawed even in the

> absence of supporting evidence suggestive of an alternative inference (see: *R. v. Villaroman*, 2016 SCC 33, at paras. 38-43).

[10] In some circumstances, the Crown's challenge to factual findings may demonstrate an error of law. In *R. v. Percy*, 2020 NSCA 11, the Court described when this might occur:

> [36] The Crown cannot succeed on appeal because it believes an acquittal is unreasonable or unsupported by the evidence. An unreasonable acquittal is a foreign concept to the law (*R. v. Biniaris*, 2000 SCC 15 at para. 33; *R. v. Al-Rawi*, 2018 NSCA 10 at paras. 16-17).
>
> [37] That does not mean that the Crown cannot successfully convince an appellate court that a trial judge's factual findings are an error of law alone. Cromwell J., in *R. v. J.M.H.*, 2011 SCC 45 explained that there are at least four recognized scenarios where an appeal court can overturn what appear to be factual determinations on Crown appeal where the trial judge: found facts in the absence of evidence; erred with respect to the legal effect of the facts; assessed evidence based on a wrong legal principle; or, failed to consider all of the relevant evidence. But he stressed that an acquittal based on a conclusion of reasonable doubt unsullied by material legal error is not amenable to appeal.

[11] I propose to start with a review of the process agreed to by counsel and the trial judge for post trial submissions. This includes the Crown request that the issue of the existence of an air of reality to self-defence be addressed prior to counsel's final submissions on the merits. Following that, I will review the trial judge's reasons and examine the Crown appeal arguments to assess whether they demonstrate an error of law on the part of the trial judge.

Post Trial Arguments and Decision

[12] After completion of the evidence, Crown counsel asked for an opportunity to make submissions on the issue of whether there was an air of reality with respect to self-defence. Counsel explained that a determination on this question would impact the scope of the issues to be addressed in closing submissions. The trial judge accepted the Crown's suggestion and agreed this would assist in identifying the issues for closing arguments.

[13] The question of whether a defence has an air of reality typically arises in jury trials. The purpose is to ensure that only defences which meet this threshold are included in the trial judge's instructions to the jury. The ultimate determination of whether the defence applies is left to the jury, as the trier of fact. The leading

case from the Supreme Court of Canada on air of reality, *R. v. Cinous*, 2002 SCC 29, describes it this way:

> 53 In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. See *Osolin*, *supra*; *Park*, *supra*. The evidential foundation can be indicated by evidence emanating from the examination in chief or cross-examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused. See *Osolin*, *supra*; *Park*, *supra*; *Davis*, *supra*.
>
> 54 The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. See *Finta*, *supra*; *R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330. The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. See *R. v. Bulmer*, 1987 CanLII 56 (SCC), [1987] 1 S.C.R. 782; *Park*, *supra*. Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.

[14] Unlike a jury trial, there is no requirement in a judge alone trial for a separate determination of whether an air of reality exists in relation to a potential defence. The parties may, as they did in this case, find it helpful for the trial judge to consider this issue because if there is no air of reality to a defence it reduces the issues to be addressed in closing arguments.

[15] Counsel made submissions on the air of reality on April 29, 2021. On May 5, 2021 the trial judge gave a brief decision by teleconference indicating he was satisfied an air of reality existed. He said it was open to defence counsel to argue that Mr. McNeil was acting in self-defence (or defence of others) during the events of August 9, 2019.

[16] On May 6, 2021 the trial judge sent a list of issues to counsel for them to address in their closing submissions including several relating to the elements of self-defence.

[17] Final submissions of counsel took place on June 3 and 4, 2021 and the trial judge gave an oral decision on June 25, 2021.

[18] The principles governing self-defence are found in s. 34 of the *Criminal Code* :

Defence — use or threat of force

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.

[19] The Crown’s case at trial was circumstantial and consisted of a large amount of surveillance video from various locations in the vicinity of Dresden Row and Spring Garden Road. There was witness testimony but none from anyone who saw a gun being fired. Mr. McNeil and Mr. Chan did not testify. Counsel and the judge reviewed the video evidence frame by frame in an effort to discern what Messrs. McNeil and Chan were doing in relation to each other and, in Mr. Chan’s case, whether he was holding a firearm.

[20] In his trial decision, Judge Lenehan approached the issue of self-defence by examining the behaviour of Mr. Chan and Mr. McNeil. He started by reviewing the evidence with respect to Mr. Chan in order to decide whether he presented a threat or perceived threat to Mr. McNeil or his associates.

[21] After reviewing the video evidence, the trial judge concluded that Mr. Chan left the Jamaican Vibes night club on Dresden Row at 12:10 a.m. and returned soon after, having changed into black clothing. The trial judge made the following findings concerning Mr. Chan and his activities outside the club:

> Mr. Chan returned outside the entrance to Jamaican Vibes within 12 minutes of leaving Jamaican Vibes wearing all black... all dark clothes. He was accompanied by the same light-skinned male who left Jamaican Vibes with him. That male had not changed clothes. Mr. Chan stood on the sidewalk across the street from Jamaica Vibes. He was turned for the most part toward Jamaica Vibes entrance. At 12:23 a.m., Mr. Allison pulled up in his vehicle. Mr. Chan opened the front passenger door and leaned in. Within seconds, he closed the door and returned to the sidewalk and appeared to be watching the entrance of Jamaica Vibes.
>
> Next in the sequence of events, about one minute later, an unidentified black male in a pink golf-style shirt exited Jamaica Vibes with Mr. McNeil and others and he crossed the street and approached Mr. Chan. In a few seconds, he returned to Jamaica Vibes and entered the club with Mr. McNeil and others. Afterward, Mr. Chan walked up the sidewalk a few paces to be more directly across from the

> Jamaica Vibes' entrance. His light-skinned associate hurried down Dresden Row and began to return; moments later, accompanied by Mr. Allison.
>
> Mr. Chan over the next minute or so walked back and forth a few paces several times , always maintaining sight on the entrance to Jamaica Vibes. At a little after 12:27 a.m. Mr. McNeil exited Jamaica Vibes and within two seconds, Mr. Chan raised his right arm with his elbow to his shoulder height and his forearm parallel to the ground. During the next five seconds, he walked along the sidewalk heading south along Dresden Row with his arm raised and entered the roadway.
>
> At 12:27:13 a.m., Mr. Chan was in the middle of the street. One second later, he began to run. He had an object in his right hand. It can be seen on the video just before he disappears from view behind a power pole. Mr. Chan ducked and ran down the west sidewalk of Dresden Row away from Jamaica Vibes toward Clyde Street. As he was running , he had a dark object in his right hand. I conclude that it was the same object he had in his hand just before he went out of view behind a power pole, the same hand that was raised and pointed in the direction of the entrance to Jamaica Vibes in the location where Mr. McNeil was when he left the club.
>
> The object, as recorded in colour video, viewed at realtime speed resembles a firearm with the slide open. That is the best evidence of what the object looked like. Four black and white pixelated photos tendered as exhibit number 33 were far from being the best evidence and were entirely unhelpful in the assessment of the evidence. I draw the logical inference that the object that was in the raised arm of Mr. Chan when it was pointed at the entrance to Jamaica Vibes, the place where Mr. McNeil was located ... that that object that Mr. Chan had when he was going around the corner on Clyde Street was in his hand when he raised his arm across the entrance from Jamaica Vibes towards Mr. McNeil.

[22] The trial judge’s decision then outlines the evidence and his findings with respect to the activities of Mr. McNeil:

> Now let me look at Mr. McNeil and his actions. Mr. McNeil was in and out of Jamaica Vibes numerous times during the evening of August 8th and the early minutes of August 9th. At 12:24 a.m. he came out of the club. Within that group that exited at the same time was the black male in the pink shirt who approached Mr. Chan. That male re-entered the club behind Mr. McNeil. Mr. McNeil then exited the club at 12:27:05 a.m. At 12:27:09, he was on the sidewalk near the club entrance. Within the next two seconds, he walked around the front of a silver SUV and began motioning with his left arm in the direction where Mr. Chan was moving. Mr. McNeil stepped into the roadway with his right hand in his pocket. At 12:27:15 a.m., Mr. McNeil began to discharge his firearm in the direction of Mr. Chan. Splashes could be seen on the video of Dresden Row. A bus patron was seen to flinch. The recording from Modo Yoga recorded the sounds of the gunfire. All but one round were shot off within a second. The final round was fired at

> 12:27:19 a.m. Mr. McNeil was backing up when the last shot was fired. This was the only piece of video that clearly caught Mr. McNeil in the act of shooting.
>
> One projectile struck Mr. Chan in the left buttock. A couple of other slugs were retrieved from vehicles parked along the street. At 12:27:20 a.m., Mr. McNeil turned and began to run from the scene. Ahead of him were Mr. Downey and Mr. Beals. Other persons around the entrance of Jamaica Vibes appear to have their attention drawn to the direction of Mr. Chan. Mr. Downey seemed to be looking that way. Unfortunately, the video recordings are unclear about what, if anything, Mr. Downey or anybody else did or did not do during the eight seconds between Mr. Chan raising his arm and Mr. McNeil opening fire.
>
> The shooting itself lasted five seconds. It was ten seconds from when Mr. McNeil left Jamaica Vibes until he fired the first shot. It took eight seconds for Mr. McNeil to begin shooting after Mr. Chan first raised his right arm in Mr. McNeil's direction.

[23] In his decision, the trial judge correctly identified the three elements required for self-defence:

- Mr. McNeil believed on reasonable grounds there was a threat of force by Mr. Chan against him or one of his associates (the objective element).
- Mr. McNeil fired the handgun for the purpose of defending or protecting himself or his associates from Mr. Chan's threat of force (the subjective element).
- Mr. McNeil's conduct in firing the handgun was reasonable in the circumstances.

[24] With respect to the objective element, the trial judge's analysis was:

> The video evidence as I have viewed it and have determined it to be depicts Mr. Chan raising his right arm within seconds of Mr. McNeil stepping outside of the club. That is a factual finding. The arm is pointed in the direction of Mr. McNeil. That is a factual finding. As Mr. Chan begins to run from the middle of the street, he has a dark object in the hand that was raised. That is a factual finding. Within seconds Mr. Chan had in that same hand an object that appeared to be consistent with it being a handgun, a pistol, with the slide open. That is a factual finding. That object was absolutely inconsistent with it being a collapsible baton and any suggestion it might have been was utterly unsupported by the video evidence. When the motor vehicle in which Mr. Chan was transported to hospital was searched, pursuant to a warrant, a bullet was recovered from it. That is a factual finding.

> I infer from all these circumstances and in the fluidity in the action from when Mr. Chan raised his arm until he ran around the corner onto Clyde Street that the dark object, appearing as a firearm in the hand of Mr. Chan as he approached Clyde Street, was in his right hand as he raised that hand and pointed it in the direction of Mr. McNeil.
>
> Mr. Chan has a record for violence. Police consider him to have a reputation for violence and firearms. Objectively, a reasonable person viewing the actions of Mr. Chan, a person who had been apparently keeping watch on the entrance to Jamaica Vibes for about five minutes when he raised his right hand and pointed a firearm or imitation firearm in the direction of Mr. McNeil and began to move into the street, could have perceived Mr. Chan posing as an imminent threat of force or harm toward Mr. McNeil or another person near Mr. McNeil.
>
> Mr. Chan was the aggressor in these circumstances. That is a factual finding inferred from the totality of the evidence. The video evidence as assessed by me depicts an apparent firearm or imitation of one in the hand of Mr. Chan and to have been in all probability, attempted to have been discharged in the direction of Mr. McNeil by Mr. Chan. I have inferred this from the video showing what appeared to be the slide open and from the testimony from Crown witnesses about what circumstances could cause a slide on a handgun to remain open. That testimony was that a firearm could have jammed when trying to fire, the wrong ammunition was attempted to be used, it was empty, or the holder of the firearm manually slid it open. I also note the presence of a bullet located in the vehicle used to transport Mr. Chan to hospital shortly after this incident. There was certainly an objective foundation for self-defence and the Crown has not proven beyond a reasonable doubt there was not.

[25] With respect to the subjective element, the trial judge said:

> Mr. McNeil was in possession of a loaded, concealed handgun when he left Jamaica Vibes at 12:27:05 a.m. August 9th, 2019. He did not have it in his hand. He did not exit the club and begin shooting. That is not what happened. To say it did is to say something contrary to the clear evidence to the contrary. Mr. McNeil responded to the actions of Mr. Chan. Mr. McNeil was out of the club for 10 seconds before he began to discharge his illegal weapon. In those 10 seconds, Mr. Chan presented as a threat to the life and safety of Mr. McNeil by pointing what appeared to be a firearm in the direction of Mr. McNeil. It is inferred from the circumstances that Mr. McNeil recognized the threat and reacted by pulling out of concealment his handgun and firing in the direction of Mr. Chan.
>
> It must be remembered that Mr. McNeil was not viewing Mr. Chan's actions from a video camera on the wall of a building from across the street several days, weeks, or months afterwards. Mr. McNeil was at street level. Mr. McNeil was much closer to Mr. Chan than what was depicted in the video. Mr. McNeil's view of Mr. Chan, the object in his hand, and the gestures made by him was undeniably clearer and more certain and more immediate than what can be determined from

> the video. This must be considered when inferring Mr. McNeil's state of mind. Mr. McNeil was not required to wait to be shot at first before he was entitled to protect himself or others. Once he perceived the immediate threat from Mr. Chan he was allowed to act for defensive purposes. Mr. Chan did not drop his weapon when Mr. McNeil began shooting. Mr. Chan maintained possession of that weapon. While he had that weapon in his hand, he still posed an immediate threat to Mr. McNeil and others. Mr. McNeil discharging several rounds within a second was consistent with him reacting to an imminent threat in an attempt to protect himself or others from Mr. Chan. That is a logical, rational inference available in the circumstances. As long as Mr. Chan was running and ducking, Mr. McNeil was protected. Arguably, if Mr. Chan stopped, his threat to Mr. McNeil and others would have remained or returned.
>
> Mr. McNeil discharging a final round as he backed away was consistent with him wanting to ensure Mr. Chan continued to flee and not stop, turn, and return fire. That is one logical, rational inference available. There was no evidence that Mr. McNeil ever attempted at any time to pursue Mr. Chan. Mr. McNeil either stood his ground or distanced himself from Mr. Chan. I am satisfied Mr. McNeil committed his act for the purpose of defending himself or protecting himself and others from the attempted assault with a weapon from Mr. Chan. I am satisfied the subjective mental element of self-defence has been established to the requisite standard.

[26] The trial judge decided Mr. McNeil's response to the threat posed by Mr. Chan was reasonable. He described his reasons for doing so this way:

> The Crown's case has not proven beyond a reasonable doubt that Mr. McNeil did not have such a subjective belief and reason for acting as he did. The question remaining to be answered is whether Mr. McNeil's actions were reasonable in all the circumstances. I am satisfied they were.
>
> Mr. Chan posed an immediate, significant risk to the life and safety of Mr. McNeil and others near him. The force Mr. Chan threatened was from what appeared to be a firearm. There was no evidence presented by the Crown to establish Mr. McNeil had done anything to initiate the confrontation. The two men appeared to be similar in size, shape, and capabilities. Any history between the two is unknown to the Court. There is no evidence on this factor.
>
> The force Mr. McNeil used in meeting the force threatened by Mr. Chan seemed to be similar in type and consequences. A handgun versus a handgun. That would appear reasonable. A person defending themself or another is not necessarily required to measure with a nicety the force used to repel or respond to the threatened force. When potentially lethal force is threatened, it is reasonable to use a similar force to respond, to defend against the imminent threat.
>
> As I have said before, there was an air of reality to self-defence pursuant to s. 34 of the **Code.** After weighing the evidence, I am satisfied in the circumstances there was a strong probability that Mr. McNeil acted by firing his illegal handgun

> for the purpose of protecting life, including his own, and to dissuade Mr. Chan from completing his threatened application of force and/or returning fire. Mr. McNeil's actions were reasonable in the circumstances. He was not required to retreat. He was not required to turn his back on a potential shooter and try to run for cover or try to return to the club. There was no evidence from the Crown that Mr. McNeil knew Mr. Chan posed a threat before Mr. McNeil left the club. There was, therefore, no reason why Mr. McNeil would have or could have chosen to remain inside Jamaica Vibes.

[27] The trial judge’s overall summary of why he concluded Mr. McNeil should be acquitted was as follows:

> And with regards to Count number 2, it seems to me that having found Mr. McNeil acted to protect himself and/or others from an assault with a firearm, those actions must be excused even if they created risk to the safety of other persons. I have determined on the evidence that his actions were reasonable in the circumstances. We cannot expect a person who has a handgun pointed at them to look around the immediate area and assess the risk of harm to others before the individual takes action to protect themselves. By that time, the person could be dead. From the time Mr. McNeil walked out of Jamaica Vibes until Mr. Chan began to act aggressively was only two seconds. There were another eight seconds when Mr. Chan possessed his weapon in his right hand while confronting Mr. McNeil before the accused discharged his firearm in response. The entire incident took 15 seconds. S. 34 defence must apply in these circumstances to Count number 2 and Mr. McNeil is found not guilty of that count.
>
> A similar application of s. 34 must be made to the allegation of pointing a firearm. The firearm pointed and discharged at Mr. Chan was in the course of defending himself from Mr. Chan's immediate and very real threat is a complete defence. On the charge Mr. McNeil is found not guilty of Count number 3. And I come to the same conclusion on Count number 4. Mr. McNeil discharged his firearm intentionally; that's a given. I have found that he did so for the purpose of protecting the life of himself and/or other persons. While there might have been some recklessness in his actions, I have found his actions were nonetheless reasonable in the circumstances. As frightening and appalling as it is to say, I am not certain Mr. McNeil had a practical, safe alternative. Mr. McNeil was facing south down Dresden Row. There were several parked vehicles. A block away were residential buildings. There were two persons other than Mr. Chan known to be in the area, Mr. Chan's associate and Mr. Allison. Behind and around Mr. McNeil and in the direction in which Mr. Chan was pointing his weapon were several other persons - Mr. Downey, Mr. Beals, Mr. Thomas, Mr. Bowdery, other Jamaica Vibes security staff, pedestrians walking by along Spring Garden Road, et cetera. There was, as well, vehicular traffic, Metro Transit buses, taxis, and private motor vehicles. Mr. Chan's potential carnage was objectively far greater than what Mr. McNeil posed. S. 34 in the circumstances must be a complete defence. Mr. McNeil is found not guilty of Count number 4.

[28] It is obvious from the trial judge's decision that he carefully reviewed the evidence and listened to the submissions of counsel. The decision explains his factual conclusions, why they were reached and how those facts constitute self-defence to the charges against Mr. McNeil.

[29] I will now consider whether the appellant has identified any error of law on the part of the trial judge.

Issues

[30] The Notice of Appeal sets out the following grounds of appeal:

> 1. That the learned trial judge erred in law by finding that there was an air of reality to self defence.
>
> 2. That the learned trial judge erred in law by using impermissible speculation in acquitting the respondent.
>
> 3. Such other grounds of appeal as may appear from the record under appeal.

[31] With respect to the first ground of appeal, the appellant focuses on whether the trial judge's preliminary decision on air of reality adequately considered the third element of self-defence, that the conduct be reasonable in the circumstances. In my view, this argument focuses on the wrong stage of the judge's decision making process. In his trial decision the judge considered the elements of self-defence in detail and explained why he found Mr. McNeil's conduct to be reasonable.

[32] This was a judge alone trial with no obligation on the trial judge to engage in an air of reality analysis separate from the final decision on the merits.

[33] In my view, whether the trial judge adequately explained why there was an air of reality should not distract from the proper focus of the appeal, which is whether he erred in law in concluding that self-defence arose on the facts as he found them. I would, therefore, reframe the first ground of appeal as follows:

> Did the trial judge err in law in his interpretation or application of the provisions of s. 34 of the *Criminal Code*?

Analysis

[34] As I have said, the trial judge’s air of reality conclusion should not be assessed independently of the trial decision. Collectively they represent the trial judge’s post trial analysis.

[35] The appellant says the trial judge did not adequately discuss the reasonableness of Mr. McNeil’s response in his air of reality decision. This argument is not made in relation to the trial decision, nor could it, since Judge Lenehan engaged in an extensive review of the evidence as it relates to this element of self-defence.

[36] The appellant’s only criticism of the self-defence analysis in the trial decision relates to whether Mr. McNeil’s motive changed over the short period of time during which the shots were fired, thereby transforming a reasonable response into an unreasonable one. The thrust of the appellant’s submission is found in the following passage from their factum:

> 80. The Trial Judge erred by using speculation to determine what inferences were available about the Respondent’s motives for why he continued firing shots at Robert Chan. In particular, the last shot the Respondent fired.
>
> 81. In *Khill*, the Supreme Court of Canada discussed the motive component of self-defence. It stated at para. 59:
>
>> “The second element of self-defence considers the accused's personal purpose in committing the act that constitutes the offence. Section 34(1)(b) requires that the act be undertaken by the accused to defend or protect themselves or others from the use or threat of force. This is a subjective inquiry which goes to the root of self-defence. If there is no defensive or protective purpose, the rationale for the defence disappears (see *Brunelle v. R.*, 2021 QCCA 783, at paras. 30-33; *R. v. Craig*, 2011 ONCA 142, 269 C.C.C. (3d) 61, at para. 35; *Paciocco* (2008), at p. 29). The motive provision thus ensures that the actions of the accused are not undertaken for the purpose of vigilantism, vengeance or some other personal motivation.”
>
> 82. However, the Supreme Court of Canada also made it clear that an accused person’s motive or purpose for acting may evolve as an incident progresses. [*Khill* at para. 61]
>
> 83. The Trial Judge was satisfied the Respondent had acted for the purpose of defending himself or others from an attempted assault with a weapon by Robert Chan. The Trial Judge stated, in part:
>
>> “…Once he perceived the immediate threat from Mr. Chan he was allowed to act for defensive purposes.

> Mr. Chan did not drop his weapon when Mr. McNeil began shooting. Mr. Chan maintained possession of that weapon. While he had that weapon in his hand, he still posed an immediate threat to Mr. McNeil and others. Mr. McNeil discharging several rounds within a second was consistent with him reacting to an imminent threat in an attempt to protect himself or others from Mr. Chan. That is a logical, rational inference available in the circumstances. As long as Mr. Chan was running and ducking, Mr. McNeil was protected. Arguably, if Mr. Chan stopped, his threat to Mr. McNeil and others would have remained or returned.
>
> Mr. McNeil discharging a final round as he backed away was consistent with him wanting to ensure Mr. Chan continued to flee and not stop, turn, and return fire. That is one logical rational inference available. …" [AB, Vol. I, Tab 8, p. 49-50]

84. In essence, the Trial Judge found it was a logical and rational inference that the Respondent continued to keep firing his handgun for protection. He found that it was a logical and rational inference because it was also possible for him to infer the Respondent's motive to keep firing was to ensure Mr. Chan kept running, did not stop, turn and return fire.

85. The Respondent's initial shots may have been fired for the purpose of self-defence. However, it was irrational and illogical to infer the Respondent's motive to keep firing could have been to ensure Mr. Chan would keep running, not stop, turn and return fire. That inference is incompatible with the evidence. It is speculative.

86. The Trial Judge misapprehended evidence in this case. He misapprehended the timing of when the shots were fired. This misapprehension appears to have contributed to the Trial Judge's speculation.

87. The Trial Judge determined the elapsed time of the shootings from different videos. In doing so, he was mistaken. The Trial Judge stated all but one round was shot off within a second. The shooting lasted five seconds. The final round was fired at 12:27:19 a.m. [AB, Vol. I, Tab 8, p. 40 and 41]

88. The audio of the fired shots is clearly captured on the video from Moda Yoga. Two shots are fired in the first second. Four more shots are fired by the four-second mark. There is a gap of approximately three seconds before the seventh and final shot is fired. A total time of approximately seven seconds elapsed between the first shot and the last shot fired by the Respondent. [AB, Vol. III, Tab 34, Exhibit 2 and Exhibit 13]

89. In this case, a few seconds does make a difference. A person can act in self-defence at one point in time, but not act in self-defence at another point in time. There were obvious differences between the circumstances when the Respondent began to fire his handgun and when he finished firing it in the direction of Robert Chan. [See *R. v. Twiss* 2002 YKCA 1 at para. 16; *R. v. Forcillo* 2018 ONCA 402 at para. 45]

90. Despite the Trial Judge's comments about the slide on Robert Chan's handgun being open, it is questionable whether Robert Chan attempted to fire at the Respondent. In any event, what is clear, is that Robert Chan did not fire a shot at the Respondent.

91. The video depicts Robert Chan running away from the Respondent while the Respondent fired shots at Mr. Chan.

92. Mr. Chan ran behind a pole and gained some cover from parked cars. At this point in time, there is a gap between the Respondent's sixth and seventh shot. Even with a gap in time, Mr. Chan does not turn or try to return fire. He continues to run away.

93. As well, Mr. Chan is not moving slowly. He is running at what appears to be full speed. Mr. Chan runs between three-quarters to a full block away from the Respondent when the Respondent fires his final shot. Mr. Chan may also be wounded at this point in time. [AB, Vol. III, Tab 34, Exhibit #2]

94. In addition, the Respondent had brought a loaded handgun to Jamaican Vibes. It was a restricted firearm with the serial number sanded or ground off.

95. Restricted firearms are strictly regulated because they are easily concealable and generally do not serve a legitimate purpose. These guns are generally used to intimidate, wound, maim and kill. [*R. v. Nur* 2015 SCC 15 at para. 136]

96. Concealing a handgun and bringing it to Jamaican Vibes required foresight and planning by the Respondent. Having it loaded meant the Respondent was ready to use it for more than intimidation. [*R. v. Chin* 2009 ABCA 226 at para. 12]

97. The restricted firearm was semi-automatic. The Respondent had to pull the trigger to fire it. [AB, Vol. I, Tab 11, p. 176, line 18 to p. 178, line 2]

98. The Respondent was facing Robert Chan. He would have seen Mr. Chan running away from him. Yet, the Respondent continued to pull the trigger until he emptied the magazine in his handgun.

99. At the end of the day, Mr. Chan had not fired a shot. He was running away from the Respondent. In other words, he was retreating. This was especially clear when there was a gap in time between the Respondent's last two shots and Mr. Chan kept running instead of turning to return fire. However, the Respondent continued to pull the trigger and fired at Mr. Chan. Firing a handgun he had prepared for use.

100. The only rational inference to be drawn from the evidence is that the Respondent's motive to keep firing at Robert Chan, in particular the final shot, was to cause him harm or to gain vengeance.

[37] The inferences to be drawn from the evidence are the purview of the trial judge as the trier of fact. They are not reviewable on appeal unless they were made

in the absence of evidence or without regard to relevant evidence. In his decision, the trial judge discusses the evidence and explains why it led to the inferences he drew.

[38] The appellant argues the trial judge relied on speculation, rather than evidence, in inferring all of the shots were for defensive purposes. If he did, this would be an error of law. The judge found Mr. Chan was holding a gun as he darted between parked cars on the dark street while Mr. McNeil was shooting. He also found Mr. McNeil did not pursue Mr. Chan and was backing away as the last shot was fired. These facts are reasonably capable of supporting the inference drawn by the trial judge that Mr. McNeil's defensive intentions continued throughout.

[39] The appellant relies on the Ontario Court of Appeal decision in *R. v. Forcillo*, 2018 ONCA 402, as an example of circumstances where the availability of self-defence may change during a transaction involving a series of shots. Mr. Forcillo was a Toronto police officer who shot and killed Sammy Yatim while Mr. Yatim was on a Toronto street car holding a knife. He fired two volleys of shots separated by five seconds. At the time of the first shots, Mr. Yatim was standing with the knife in his hand and moving towards Mr. Forcillo. At the time of the second volley, Mr. Yatim was incapacitated and lying on the floor of the street car.

[40] The jury acquitted Mr. Forcillo of murder but convicted him of attempted murder in relation to the second volley. Mr. Forcillo argued on appeal that the verdicts were inconsistent and the acquittal based upon self-defence in relation to the first volley should have applied to the second as well. As explained by the Ontario Court of Appeal, the determination of whether the shots should be treated differently from a self-defence perspective is for the trier of fact to decide. In *Forcillo* that was the jury. The Court explained it this way:

> [46] The jury was entitled to reject the appellant's evidence that he thought Mr. Yatim was getting up when he fired six shots at Mr. Yatim from ten feet away. If the jury rejected that evidence and instead concluded that when the appellant opened fired, he saw Mr. Yatim lying on his back on the streetcar floor, just as the video surveillance showed, the jury would have little difficulty concluding that Mr. Yatim posed no imminent threat to the appellant and the appellant knew it. If the jury came to those factual conclusions, the appellant's justification defences could not succeed on count two.
>
> …
>
> [51] It was important that the jury understand the potential relationship between the circumstances surrounding the first volley and the justification

> defence as it related to the second volley. The jury could, however, make that connection and properly assess the evidence relating to the first volley without concerning itself as to whether the two volleys constituted one or two transactions.

[41] In this case, the trial judge's decision not to treat the final shot differently than those made seconds earlier is one that was available on the evidence. As the trier of fact, Judge Lenehan was entitled to make that determination. It did not amount to impermissible speculation nor otherwise reveal legal error.

Conclusion

[42] The appellant has not shown any error of law in the trial judge's decision. He considered the proper legal principles and applied them to the facts which he found. He did not make factual findings in the absence of evidence nor did he ignore relevant evidence. I would dismiss the appeal.

Wood C.J.N.S.

Concurred in:

Beveridge J.A.

Derrick J.A.