NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Gregory***, 2013 NSCA 102

Date: 20130913
Docket: CAC 300542
Registry: Halifax

Between:

Jamie Gregory

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Beveridge and Farrar, JJ.A.
Appeal Heard:	April 4, 2013, in Halifax, Nova Scotia
Written Release	September 13, 2013
Held:	Appeal is dismissed, per reasons for judgment of Beveridge, J.A.; Fichaud and Farrar, JJ.A. concurring
Counsel:	Martin J. Siscoe, for the appellant James A. Gumpert, Q.C. and Lloyd B. Lombard, for the respondent

Reasons for judgment:

OVERVIEW

[1] An unusual trial has eventually led to this unusual appeal. The trial was unusual because it was, by and large, a trial by documents.

[2] The appellant was charged with the second degree murder of the bartender of the Legion located in Lawrencetown, Nova Scotia. The parties entered into an Agreed Statement of Facts pursuant to s. 655 of the *Criminal Code*. According to this document, the appellant's videotaped police statement, with accompanying transcript, would be admitted without a *voir dire*. A binder of witness statements was admitted for the truth of their contents, subject to any of the witnesses being called by either party for "clarification". The same applied to all of the Crown expert reports. There were nineteen other admissions. None are relevant to this appeal.

[3] The appellant elected trial by judge alone. The Honourable Justice Kevin Coady was the trial judge. He conducted the trial May 12-14, 2008. The sole defence argument advanced at trial was provocation.

[4] On July 31, 2008, in written reasons, Justice Coady convicted the appellant of second degree murder (2008 NSSC 239). Justice Coady later sentenced the appellant to life imprisonment without eligibility for parole for ten years.

[5] The appeal is unusual because the appellant now says the trial judge erred in law in failing to instruct himself on intoxication as a partial defence to the charge of murder – an issue not argued at trial.

[6] The appeal is also unusual due to the length of time since the trial proceedings were concluded. Mr. Gregory first appealed on August 27, 2008 on the sole ground that the trial judge erred in law in his application of the defence of provocation.

[7] The appeal was abandoned by the filing of a Notice of Abandonment on November 13, 2008. However, with the assistance of new counsel, the appeal proceedings were re-instated on March 4, 2010 by order withdrawing the Notice of Abandonment and the filing of a new Notice of Appeal. The new Notice of Appeal advanced the complaint about the potential defence of intoxication, and sought leave to appeal from sentence.

[8] Another change of counsel caused more delay. A further Notice of Abandonment deleted the application for leave to appeal against sentence. This leaves the sole issue: did the trial judge err in law in failing to address the issue of intoxication as a defence?

DID THE TRIAL JUDGE ERR IN LAW

[9] The appellant could not cite one case that said it was an error of law for a trial judge, in a judge alone trial, to consider a possible defence not raised by the accused. Instead, he argues by analogy. He says it is well recognized that a trial judge has an obligation to charge a *jury* on all available defences, whether raised or not; surely then, it must be applicable to a judge sitting alone.

[10] While I would not foreclose the possibility that a trial judge may have such an obligation where an accused is self-represented, that was hardly the case here. The appellant was represented at trial by Joel E. Pink Q.C., counsel of immense experience. The appellant expressly disavows any suggestion that Mr. Pink was incompetent or in any way derelict in his duty to his client by the failure to raise the issue of intoxiction.

[11] In any event, the appellant acknowledges that it could only be an error of law by the trial judge if there was an "air of reality" to the defence of intoxication. The parties agree that whether any particular defence has an air of reality is a pure question of law (see *R.v. Cinous*, 2002 SCC 29 ¶54-55; *R.v. Buzizi*, 2013 SCC 27 ¶15).

[12] After reviewing the complete record, the defence of intoxication had no air of reality. As a consequence, the trial judge in a judge alone trial, even if having a duty to consider all defences available to an accused, committed no error in law by not addressing the issue of intoxication. I will explain the basis for my view.

[13] To determine if the evidentiary record demonstrates an air of reality to the defence of intoxication, it is important to understand two concepts: what is the defence really about, and what is required to meet the air of reality requirement.

The Defence of Intoxication

[14] Turning first to intoxication, "drunkenness" is not really a defence to a criminal act. It is a suggestion that, due to the consumption of alcohol, or other mind altering substances, the Crown cannot prove beyond a reasonable doubt the necessary *mens rea* to establish criminal liability. In the absence of such evidence,

the trier of fact is entitled to apply the common-sense inference that a sane and sober person intends the natural consequences of his or her actions.

[15] In terms of the offence of murder, consumption of intoxicants could be to such an extent that an accused did not have the capacity to form the intent to commit murder, or based on all of the evidence, might raise a reasonable doubt that the accused in fact intended to cause bodily harm with the foresight that the likely consequence was death.

[16] Authorities long debated the proper jury charge on voluntary consumption of intoxicants. Should it be restricted to the accused's capacity to form intent or on the ultimate issue: did the accused in fact form the necessary intent?

[17] The debate was somewhat resolved by the seminal decision of the Supreme Court of Canada in *R .v. Robinson*, [1996] 1 S.C.R. 683. Lamer C.J., for the majority, concluded that a charge that only focussed on capacity would violate the *Canadian Charter of Rights and Freedoms*. He wrote of how and when a jury should be instructed on intoxication:

> [48] How then should juries be instructed on the use they can make of evidence of intoxication? **I am of the view that before a trial judge is required by law to charge the jury on intoxication, he or she must be satisfied that the effect of the intoxication was such that its effect <u>might</u> have impaired the accused's foresight of consequences sufficiently to raise a reasonable doubt**. Once a judge is satisfied that this threshold is met, he or she must then make it clear to the jury that the issue before them is whether the Crown has satisfied them beyond a reasonable doubt that the accused had the requisite intent. In the case of murder the issue is whether the accused intended to kill or cause bodily harm with the foresight that the likely consequence was death.
>
> [emphasis added]

[18] However, Lamer C.J. was careful not to rule out that there may still be cases where it is appropriate to charge a jury about intoxication to the point of incapacity to form the intent to commit murder. He said this:

> [52] I should not want to be taken as suggesting that reference to "capacity" as part of a two-step procedure will never be appropriate in a charge to the jury. Indeed, in cases where the only question is whether the accused intended to kill the victim (s. 229(*a*)(i) of the *Code*), while the accused is entitled to rely on any evidence of intoxication to argue that he or she lacked the requisite intent and is entitled to receive such an instruction from the trial judge (assuming of course that there is an "air of reality" to the defence), it is my opinion that

> intoxication short of incapacity will in most cases rarely raise a reasonable doubt in the minds of jurors. For example, in a case where an accused points a shotgun within a few inches of someone's head and pulls the trigger, it is difficult to conceive of a successful intoxication defence unless the jury is satisfied that the accused was so drunk that he or she was not capable of forming an intent to kill. It is in these types of cases where it may be appropriate for trial judges to use a two-step *MacKinlay*-type charge. In addition, I suspect that most accused will want the trial judge to refer to capacity since his or her defence will likely be one of incapacity.

[19] A little more than ten years later, the Supreme Court in *R. v. Daley*, 2007 SCC 53 reviewed the role of voluntary intoxication as a defence. Bastarache J., writing for the majority, described the legally relevant degrees of intoxication: mild, advanced, and extreme intoxication, akin to automatism. The latter is extremely rare and by operation of s. 33.1 of the *Criminal Code* is limited to non-violent offences (*Daley*, ¶43). It is therefore of no relevance here, factually or legally.

[20] With respect to the first two degrees of intoxication, mild intoxication causing a relaxation of inhibitions is not legally relevant; advanced intoxication must be to the extent of an impairment of the accused's foresight of the consequences of his or her actions. In this regard, Bastarache J. accepted the legal principles earlier set out in *R. v. Robinson*. He wrote:

> [41] Our case law suggests there are three legally relevant degrees of intoxication. First, there is what we might call "mild" intoxication. This is where there is alcohol-induced relaxation of both inhibitions and socially acceptable behaviour. This has never been accepted as a factor or excuse in determining whether the accused possessed the requisite *mens rea*. See *Daviault*, at p. 99. Second, there is what we might call "advanced" intoxication. This occurs where there is intoxication to the point where the accused lacks specific intent, to the extent of an impairment of the accused's foresight of the consequences of his or her act sufficient to raise a reasonable doubt about the requisite *mens rea*. The Court in *Robinson* noted that this will most often be the degree of intoxication the jury will grapple with in murder trials: …

[21] Was there an evidential record such that there was an air of reality that the appellant was in a state of advanced intoxication such that there might be a reasonable doubt about the requisite *mens rea* for second degree murder? Before turning to this issue, it is useful to be clear about what is meant by "air of reality".

Air of Reality

[22] What is meant by "air of reality" is authoritatively answered by the seminal decision of the Supreme Court of Canada in *Cinous*. In joint reasons, delivered by McLachlin C.J. and Bastarache J., they emphasized that the question can only be determined by a consideration of the totality of the evidence, and by assuming that the evidence relied upon by the accused to be true. The evidence can come from the examination or cross-examination of the Crown or defence witnesses, or from any other source. The requirement to charge a jury is in no way linked to an assessment of the relative merits of the defence in issue. On these principles, they wrote:

> [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] 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] 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.**
>
> [emphasis added]

[23] Substituting Court of Appeal for trial judge, the question becomes whether we are of the view there was evidence that disclosed the appellant was in a state of advanced intoxication such that it was a real issue that he may not have meant to cause bodily harm to the deceased that he knew was likely to cause his death and was reckless whether death ensued.

The Evidential Record

[24] The appellant does not point to any evidence capable of permitting a trier of fact to reasonably conclude that at the time of the fatal attack, he was in such a state of advanced intoxication he might not have foreseen the death of the victim.

[25] Instead, the appellant points to one comment by the trial judge where he referred to the appellant's condition after the fatal attack. The trial judge in describing what the appellant did later that night, said:

> [67] Jamie Gregory inquired of Mr. Curtis and Mr. Veinot as to where he could get some "blow", referring to cocaine. These two gentlemen made two observations: one, his right hand was bloody and two, he was drunk. They described him as being "hammered". I find as a fact that when he arrived at the Capitol Lounge the second time he was highly intoxicated, but not to the point of incapacitation. I find that when he entered the lounge he had a "balled up shirt in his hand". I find that he went into the bathroom and disposed of the shirt in the garbage bin. I find that he stayed until closing time at 1:30am, December 23, 2006.

[26] Neither Mr. Curtis nor Mr. Veinot testified. Both gave written statements to the police on December 23, 2006. Mr. Veinot described the appellant's clothes and detailed conversations; the fact he had a freezer type glass that the appellant said contained rum, and his bloody shirt and hands. He said nothing about the appellant being drunk or hammered. He put the time at around 11:30 p.m.

[27] Mr. Curtis, in his statement, gave a similar description of their interaction with the appellant. He said the time was about 11:00 p.m. When asked "Anything else?, he responded "No sir. There was something strange about him. He was drunk or hammered". No further elaboration was sought or given.

[28] It is certainly not the function of the Court of Appeal to make new or different findings of fact. But is the factual finding by the trial judge, or the generic description in a statement by a witness that an accused was drunk some period of time after a homicide, sufficient to give an air of reality to the issue of did the accused have the capacity to foresee, or did in fact foresee the consequences of his actions when he earlier killed a man? In my opinion, in these circumstances, the answer is, no. I will elaborate.

[29] The homicide occurred around 10:20 p.m. on December 22, 2006. The appellant was arrested in the afternoon of December 23, 2006. In his police interview, he initially denied any involvement in the death of Peter Vanderpluijm, the bartender at the Lawrencetown Legion. The appellant's protestations of

innocence did not last. He confessed to killing the deceased. The reason? Because the bartender insisted on the appellant finishing up his VLT game so he could close up.

[30] The appellant was 28 years of age, 6'3" tall, and weighed 230 lbs. The deceased was a slight, older man, 59 years of age, and weighed but 110 lbs.

[31] When the appellant told the deceased to "fuck off, man" the deceased was said to have pushed the appellant off his stool. The appellant immediately thought "you son of a bitch" and punched the deceased, sending him some distance. The appellant then put his knee on the victim and started "driving him" in the head. When he stopped, he realized the victim was hurt badly; blood was coming out his mouth. To "help him out" he took a fire extinguisher and "bashed him over the head with it" three times. Although being pretty sure that the deceased was dead, he was still making "this gurgling type noise", so he put paper towel over his face and pinched his nose.

[32] Despite ready access to a phone, the appellant did not call for assistance when he realized what he had done. Instead, he staged a robbery. He wiped his prints off the fire extinguisher and washed his hands. He took the cash register off the counter and dropped it so it broke open. He stole money from it. He reasoned that a real robber would not just take money but liquor as well, so he stole two bottles and left.

[33] The appellant went to a friend's house. His friend was not home, but he left the bottles of liquor there. At that time, there were no caps on either bottle. Before leaving he had a tumbler of rum to drink. It was then he knocked on a door and encountered Messrs. Curtis and Veinot, and others.

[34] There is no need to detail the rest of the appellant's activities that night. Suffice it to say that it involved returning to the Capital Lounge where he disposed of some of his bloodied clothes, bought rounds of drinks, and partied till the wee hours.

[35] In terms of his state of intoxication at the time of the murder, the evidence was that he had consumed hard liquor, but was nowhere close to being in a state of advanced intoxication. The appellant himself did not suggest that his consumption of alcohol clouded his ability to foresee the consequences of what he had done to the deceased – only that drinking hard liquor made him aggressive in manner and action.

[36] The appellant gave incredible detail to the police about what he did, what he ate and what happened throughout the night. He told the police what he had to drink leading up to the homicide: three or four drinks of rum at home (during the day); a drink of rum at the Capital Lounge; four double rums at the Legion from early in the evening to approximately 10:20 p.m.

[37] Frank Longley was with the appellant throughout the evening at the Legion. Mr. Longley had no alcohol to drink. He noticed that the appellant drank four or five doubles, but had spilled one when the appellant knocked it from a stool. The appellant cleaned it up. He described the appellant as normal, not rowdy or aggressive; only that he became more talkative as the evening progressed. He observed no slurring, staggering or other indicia of impairment.

[38] The defence called evidence. The appellant's father testified about the appellant's upbringing and struggles with drugs, alcohol and aggression. The appellant was supposed to be taking medication, but had stopped on his own accord. He also gave an estimate as to how much alcohol the appellant had consumed earlier in the day of December 22, 2006.

[39] Dr. Stephen Hucker, forensic psychiatrist, carried out an extensive review of all the Crown evidence, the medical history of the appellant, his statement to the police, and conducted his own interview of the appellant. Prior to the fatal attack on the deceased, the appellant told Dr. Hucker that he was "feeling the booze", though was not drunk; "I could feel it…starting to get there….half in the bag."

[40] Finally, the defence called Dr. Peter Mullen, pharmacologist and toxicologist. He spoke about the anti-depressant the appellant was supposed to be taking, venlafaxine (Effexor), but was not (at least not as prescribed). The drug would tend to overcome depression and lessen aggressive impulses.

[41] Dr. Mullen was asked to provide expert opinion evidence on two issues: the blood alcohol level of the appellant at the approximate time of the homicide; and the potential interaction between venlafaxine and alcohol. On the former issue, Dr. Mullen in his formal report, entered as an exhibit, assumed the following alcohol consumption on December 22, 2006:

> On December 22, 2006, Mr. Gregory consumed four "double rums" with Coca Cola between approximately 11:20 a.m. and 2:00 p.m. At approximately 6:00 p.m., he went to the Capital Lounge & Grill in Middleton, NS, where he consumed approximately four ounces of rum with cola while playing pool until leaving at roughly 7:45 p.m. He then traveled to the Legion in Lawrencetown,

> N.S. where he consumed an additional five double rums with cola between approximately 8:00 and 10:20 p.m.

[42] The evidence at trial did not quite match the assumptions about consumption made by Dr. Mullen in his formal report. Instead, Dr. Mullen was asked by defence counsel to assume the appellant had consumed four double rums at the Legion. He testified that the appellant's blood alcohol concentration at 10:20 p.m. would be between 71 and 51 mg. per 100 ml. of blood. He said this would produce disinhibiting effects on behaviour.

[43] Even if the higher amount of alcohol was consumed, as set out in Dr. Mullen's formal report, his opinion was that, based on the appellant's age and size, his blood alcohol concentration would have been between 99 and 181 mg./100 ml. at 10:20 p.m. Dr. Mullen described the effects of even these higher concentrations as follows:

> Alcohol is a CNS depressant drug which blunts motor, sensory and cognitive functions. At concentrations in the 99-181 mg/100 ml range, **alcohol would be expected to reduce inhibitions, increase self-confidence and impair judgment** even in an experienced drinker in which tolerance has developed.
>
> [emphasis added]

[44] Reducing inhibitions, increasing self-confidence and impairing judgment are hallmarks of the classic mild intoxication described in *Daley* as having no legal relevance to determining if an accused had the necessary *mens rea* to establish criminal liability.

[45] Similarly, there was no evidence that the fact the appellant may have been taking, or recently ceased taking, venlafaxine had any bearing on the issue of his capacity to form, or if in fact he had, the necessary *mens rea* for the offence of murder. Dr. Mullen could only say:

> On the evening of December 22, 2006, Mr. Gregory may have been unknowingly experiencing venlafaxine discontinuation effects as a result of his episodic use of this medication. The consequent potential for increased impulsive aggression and hostility combined with the disinhibiting effect of alcohol could have contributed to his excessive and violent response to the provocative instance which led to Mr. Vanderpluijm's death.

[46] Despite the absence of any evidence that could possibly give intoxication an air of reality, the appellant argues it still should have been considered because the trial judge found as a fact that the first punch caused the death of Mr. Vanderpluijm. Although not expressly argued, it is implicit that the appellant says

the trial judge should or could have had a reasonable doubt about his intent to commit murder at the time of the first punch. In other words, there should be a conviction for manslaughter as there was no concurrence between the act that caused the victim's death and the intent necessary to make it murder.

[47] I am unable to agree. No one argued that the first punch caused the death of the deceased. There was no direct evidence that it did so. The Medical Examiner was Dr. Matthew Bowes. He conducted the autopsy. His Report said the cause of death was blunt head trauma. His Report of Post Mortem Examination did not say he found any tear of the carotid arteries. He did describe how he found a lot of skull bruising and a large comminuted depressed skull fracture of the left parietal bone. He testified this was a serious injury because the carotid arteries take a course through the temporal bone. If this bone is fractured, it can shear off this blood vessel, with consequent bleeding out the ear.

[48] He also testified that the depressed skull fracture was consistent with injuries from use of the fire extinguisher as the weapon. He added that a torn carotid artery was the best explanation for the large pool of blood by the head of the deceased.

[49] Dr. Robert MacAulay also testified. He is an expert in neuropathology. It was his opinion that the deceased died within three hours of the trauma. He added that with medical aid within five or ten minutes, the deceased could have survived. The cause of death was head impact causing mechanical brain injury. The mechanism of death was the destruction of various important tracts of his brain that were required for life.

[50] Dr. MacAulay gave a lesson in anatomy about the three carotid arteries. It is the internal carotid artery that actually supplies blood to the brain. He said he can know if it was torn as he can see it. He did not see any damage to the carotid artery. His evidence was: "So I can't say that it wasn't split, but I certainly didn't see any evidence that it was."

[51] The trial judge divided the deadly attack on Mr. Vanderpluijm into three assaults: the punch after the appellant was pushed off the chair; the series of punches when the deceased was on the floor; the third, the three blows to the head with the fire extinguisher (2008 NSSC 239 ¶76).

[52] The trial judge then announced:

> [78] I find as a fact that the cause of death was the rupture of the carotid artery and that the rupture was the result of the initial blow by Jamie Gregory. I will review the evidence that I relied on to come to this conclusion.

[53] In his review of the evidence, the trial judge referred to Dr. Bowes as having identified two possible causes of death: one blunt head trauma; the second, the ruptured carotid artery. He said Dr. Bowes felt the ruptured carotid artery was the most likely cause because of the amount of blood on the floor which appeared to have exited through the victim's ear.

[54] With respect, Dr. Bowes did not identify two possible causes of death. He set out in his Reports, and in his testimony, that the cause of death was blunt head trauma. Before there was a mention of any potential role for a tear of a carotid artery, Dr. Bowes testified that the blunt injuries he observed, were grave, and irrespective of any evidence of an attempt at suffocating the deceased, death was probably inevitable.

[55] What Dr. Bowes added in his testimony was that a torn carotid artery was the best explanation for the amount of blood observed close to the head of the deceased – not that a ruptured carotid artery was the best explanation for the cause of death, let alone a single punch to the face as being the cause of a hypothetical torn carotid artery, an injury not observed by either pathologist during their respective post mortem examinations.

[56] But let us take the trial judge's finding as is – it was the first punch that tore the deceased's carotid artery, and that tear was the cause of death. In my opinion, it makes no difference. Obviously without such a finding provocation could hardly apply since by the appellant's own description, he either bashed the deceased in the head three times to "help him" or to stop the annoying gurgling noises – hardly acts committed on the sudden and before there was time for his passion to cool from an earlier provocative act or insult.

[57] The appellant admitted at trial that he caused the death of Peter Vanderpluijm, and that he either meant to cause his death or cause him bodily harm that he either knew was likely to cause his death or was reckless whether death ensued or not. The defence of provocation is defined in s. 232 of the *Criminal Code*. It is a partial defence that may reduce murder to manslaughter if certain requirements are met. As pointed out in *R. v. Tran*, 2010 SCC 58, the defence of provocation will only apply where the accused had the necessary intent for murder and acted upon his intent (¶10).

[58] As indicated earlier, the appellant never disputed that he had the necessary intent for murder. When dealing with the defence of provocation, the trial judge observed:

> [86] Voluntary manslaughter is mitigated murder. In such situations the accused kills in circumstances that amount to murder, but the presence of s. 232 reduces the crime to the less serious manslaughter. Voluntary manslaughter occurs in one instance only and that is where the killing is done under provocation. In other words, voluntary manslaughter is provoked murder. **In this case the crown and defence agree that the death was murder.** The defence argues that there is a reasonable doubt about provocation.
>
> [emphasis added]

[59] The appellant has not in any way disputed the accuracy of this observation by the trial judge. A review of the trial record fully supports the trial judge's view.

[60] I accept that to attach criminal liability there must be a concurrency of the wrongful act and the requisite *mens rea* (see *R. v. Williams*, 2003 SCC 41 ¶35). But it is not always necessary for the guilty act and the intent to be completely concurrent (see *R. v. Cooper*, [1993] 1 S.C.R. 146 ¶27).

[61] In *Cooper*, Cory J. adopted the approach of the Judicial Committee of the Privy Council in *Meli v. The Queen*, [1954] 1 W.L.R. 228 where the accused beat the deceased with the intent to kill him. The blows did not cause his death, but the accused, believing the victim to be dead, threw him over the cliff where he did eventually die of exposure. The Privy Council viewed the entire episode as one transaction, and that the conviction for murder was sound as at some point the accused had the requisite *mens rea*. (see also *R. v. Frizzell* (1993), 28 B.C.A.C. 122)

[62] To accept the appellant's implicit submission now would be to parse the fatal attack into distinct acts. The evidence makes it abundantly clear, it was but one transaction. By the appellant's own description, it was a powerful punch, followed by numerous more to a helpless man. At the end of those, he immediately took a fire extinguisher and bashed the deceased in the head three times. As noted by the trial judge, it may very well be that the blows with the fire extinguisher would have caused death in any event (¶83).

[63] The injuries found at autopsy were devastating. There could hardly be any doubt that at some point the appellant meant to cause Mr. Vanderpluijm's death or

meant to cause him bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not.

[64] Accordingly I would not give effect to any of the appellant's submissions and would dismiss the appeal.

Beveridge, J.A.

Concurred in:

Fichaud, J.A.

Farrar, J.A.