NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. MacLeod*, 2014 NSCA 63

Date: 20140613
Docket: CAC 410405
Registry: Halifax

Between:

Clarence Michael MacLeod

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Saunders, Beveridge and Farrar, JJ.A.
Appeal Heard:	February 4, 2014, in Halifax, Nova Scotia
Held:	Appeal allowed, conviction quashed and a new trial ordered per reasons for judgment of Beveridge, J.A.; Farrar J.A. concurring; Saunders, J.A. dissenting.
Counsel:	Roger A. Burrill, for the appellant Mark Scott, for the respondent

Reasons for judgment:

INTRODUCTION

[1] On October 17, 2009, two people were found in an apartment. One was the appellant—the other, his deceased girlfriend. The appellant had no explanation for her death.

[2] In his first statement to the police, the appellant said that he had left the apartment. When he returned a short while later, he found her dead. This turned out to be palpably false. His second statement to the police was to the effect he had gone to sleep on the couch, and on waking, found her dead on the floor nearby.

[3] Initially, the Chief Medical Examiner could not determine the cause of death. He suspected homicide. Eventually, he offered his opinion to the police—death by strangulation. The appellant was charged, and subsequently convicted of her murder. The trial judge sentenced the appellant to the statutorily mandated punishment of life imprisonment. Parole ineligibility was set at twelve years (2013 NSSC 137).

[4] The appellant appeals from conviction on the basis that the trial judge erred in two ways, either of which he says taints his conviction and mandates a new trial. First, the jury should have been charged that a verdict of manslaughter was available. At trial, defence counsel (not Mr. Burrill) urged the trial judge not to leave manslaughter, while the Crown argued just the opposite. Their respective positions are now reversed: the appellant argues the trial judge was required to put manslaughter to the jury as an available verdict; the Crown says the trial judge committed no error in declining to do so. The Crown adds that even if the omission of manslaughter could be said to be wrong in law, the conviction should nonetheless be upheld by application of the proviso in s. 686(1)(b)(iii) of the *Criminal Code*.

[5] Second, the appellant argues that declarations made by the deceased should not have been admitted, and even if properly heard by the jury, the trial judge did not give a proper limiting instruction on how the jury could use that evidence.

[6] I am convinced that the trial judge erred in law in failing to charge the jury on manslaughter. It is not appropriate to apply the proviso. I would quash the

conviction and order a new trial. I will set out a sufficient overview of the facts to understand the issues raised.

FACTS

[7] The appellant and the deceased, Roxanne Page, were involved in a relationship for approximately 18 months. There were break-ups and reconciliations. He was 54. She was 49. They had both been previously married and had children. He had two, she one, Lamar Glasgow.

[8] Ms. Page struggled with substance abuse, both drugs, such as crack cocaine, and alcohol. She had had some difficulties with the law. Her latest involved an incident in an apartment building in Spryfield in June 2009.

[9] At that time, she and the appellant were apparently living together. A dispute with a tenant in the building led to Ms. Page being arrested for assault with a weapon. She was remanded for a number of days. Release conditions required her to live, not just elsewhere, but with her surety, Shantia Simmonds, the mother of Ms. Page's granddaughters.

[10] Ms. Page lived with Ms. Simmonds from sometime in July 2009 to the end of September 2009. During this time, Ms. Page was apparently on good terms with the appellant. It was uncontradicted that Ms. Page and the appellant stayed together in a motel room for three or four weekends prior to her death.

[11] Ms. Page wanted to move out of Ms. Simmonds' apartment. Sometime in September 2009, she contacted Arnold Clarke, the superintendent of an apartment complex on Roleika Drive in Dartmouth. According to Mr. Clarke, the deceased explained that she needed an apartment because she was having problems with her boyfriend. She was successful in her application for an apartment, and moved into the building on Roleika Drive on the first of October 2009.

[12] Tragically, Ms. Page was found dead in her apartment by her son and a building employee, shortly after 11:00 a.m. on Saturday, October 17, 2009. There were no obvious signs of trauma. The appellant was seen standing over her body with a large butcher knife in his hand. When the employee directed him to drop the knife, he did not; he stabbed himself in the abdomen and fell back onto the couch.

[13] When the police arrived, he was flopped down on the couch with both of his hands on the knife that was protruding from his abdomen. The police told him he was under arrest, and to drop the knife. The appellant asked them to shoot him. Instead they used a Taser, then removed the knife from his torso.

[14] How the appellant came to be in the deceased's apartment, and what happened when he was there, is more than a little unclear. The appellant did not testify at trial. Therefore, the only direct evidence on these topics emanated from the two statements the appellant gave to the police. Both statements were introduced into evidence at trial.

[15] It is settled that where the Crown tenders evidence of what an accused said to others, a trier of fact can accept as true, some, all or none of the utterances, whether inculpatory or exculpatory (see: *R. v. Samuels* (2005), 198 O.A.C. 109, leave to appeal denied [2005] S.C.C.A. No. 313); *R. v. Yumnu*, 2010 ONCA 637 at paras. 322, 324). There were ample reasons that could cause a trier of fact to be hesitant in placing much reliance on what the appellant said had happened.

Statements by the Appellant

[16] The police wanted to interview the appellant. They visited him a few times in hospital, but his medical condition precluded a meaningful discussion.

[17] After discharge, the appellant called the police. He wanted to know what was happening in the investigation. Arrangements were made for investigators to visit him in his apartment later that day, October 27, 2009.

[18] This interview was audio-recorded. The appellant made a pre-trial motion to exclude the content of the interview. The motion was unsuccessful. No appeal is taken from that ruling.

[19] The police were candid with the appellant. They told him that he was a suspect in Ms. Page's death, but they did not really know what had caused her death. The appellant professed his innocence: he would never hurt her; he was not a murderer.

[20] In a general way, the appellant admitted that the deceased did not want him to know where she was living, but nonetheless said they were on friendly terms. He explained that she told him she did not want a relationship because she knew she would soon be going to jail.

[21] He described how Ms. Page showed up at his apartment on Thursday, October 15, 2009. They drank beer. She agreed to spend Friday night with him, again at a local hotel. A reservation was made. But then she invited him back to her apartment, on his promise that he would not arrive there without an invitation. He says he agreed. Liquor was bought.

[22] They took a cab to her apartment. They played Scrabble, but shortly after midnight the deceased wanted to consume crack cocaine. The appellant said that she left in pursuit of that drug, but returned without success. Calls were made by her, again in pursuit of crack.

[23] The appellant described in some detail how he had left, and ended up at a local pizza shop. It was closed. Buses were not running. He had no money for a cab. He said he then returned to the apartment, and was let into the building by a woman on her way out.

[24] The door to Ms. Page's apartment was not locked. When he entered, he found Ms. Page unconscious with blue lips. He tried to resuscitate her, but was unsuccessful. He described taking all of the deceased's medications. The next thing he said he remembered was waking up in the hospital. Later he expressed some memory of how hard it was to push the knife into his abdomen. He expressed his suspicion that the person the deceased had been fighting with in her previous apartment building had something to do with her death.

[25] The appellant had no real explanation as to what happened during the more than 24 hours between when he said he found her dead on his return to the apartment in the early morning hours of Friday, October 16, and when he was found in the living room with her body at around 11:00 a.m. on Saturday, October 17, 2009. He hypothesized that he must have blacked out from all of the medications he had taken.

[26] The police looked into the details of what the appellant had told them about going to the liquor store, the visits to motels, the reservation for Friday night and the cab ride to Ms. Page's apartment. Apparently, the police confirmed, or least had no evidence to contradict, what he had told them. But they soon learned that a significant part of what he had told them was not true.

[27] The appellant, in fact, never left the apartment. Footage from surveillance cameras confirmed that he and Ms. Page arrived at the time the appellant described, around 10:30 p.m. on Thursday night. However, it showed that he did

not leave the building until the paramedics took him out on a stretcher at 11:39 a.m. on Saturday.

[28] A second interview was in order. The police waited until April 22, 2010. They arrested the appellant with a plan to carry out an in-depth interrogation. They did so.

[29] The interview was again recorded, but this time at the police station with audio and video equipment. The appellant's description of the events from October 15 forward was essentially the same, but this time without any suggestion that he ever left the apartment. Instead, he said he fell asleep at one end of the couch in the early morning hours of October 16. Ms. Page was at the other end, wrapped in a blanket. When he woke up some hours later, he found her on the floor. He rolled her over onto her back. She had passed away. Despondent, he consumed her "meds" and another beer.

[30] When he came to, he heard someone saying "shoot him, or shoot him now". This is an apparent reference to the police having to shoot him with a Taser when he failed to comply with a direction by them to drop the knife.

[31] He was not asked, nor did he offer an explanation, about his earlier claim that he had left the apartment building, only to find Ms. Page dead on his return.

Evidence as to Cause of Death

[32] Two experts gave opinion evidence about the manner and cause of death: for the Crown, Dr. Matthew Bowes, Chief Medical Examiner for Nova Scotia; and for the appellant, Dr. Toby Rose, Deputy Chief Forensic Pathologist of the Ontario Forensic Pathology Service.

[33] Dr. Bowes is an anatomical pathologist. He was qualified to give opinion evidence about the cause of manner of death and the interpretation of injuries.

[34] Dr. Bowes prepared two documents: one was the Report of Medical Examiner; the other, the Report of Post Mortem Examination. Both were made exhibits. It was his opinion, set out in these exhibits, and explained to the jury in his testimony, that the manner of death was homicide, the cause of death, strangulation. Although it is customary to indicate whether the strangulation was manual or by ligature, Dr. Bowes acknowledged that the "anatomic data" did not permit an opinion on this issue.

[35] Dr. Bowes described what he observed at the scene on October 17, 2009. He found Ms. Page lying on her back. He saw petechial haemorrhages in her eyes, an abrasion on her left neck, and bruising of her right neck. There were no injuries to her hands. Dr. Bowes cautioned the police that he could only say that what he observed could be compatible with strangulation. A determination would have to wait until he did the autopsy.

[36] Dr. Bowes performed the autopsy on October 18, 2009. Even after that examination, he was cautious. He said he then believed the cause of death to be apparent strangulation; the manner of death required more work. Steps were taken to have microscopic slides done of the voice box. I will refer to these later.

[37] Officially, his office issued a preliminary determination the next day that referred to the manner of death as undetermined, the cause of death as "under investigation".

[38] At trial, Dr. Bowes described, in considerable detail, what he observed when he conducted the autopsy. He found a large number of petechial haemorrhages (petechiae) on the deceased's face and in her eyes. Dr. Bowes explained that these are very small haemorrhages of small blood vessels caused by changes in venous pressure in the head.

[39] Petechiae are not a homicidal injury by themselves. In fact, they can be caused by a variety of things, such as coughing or vigorous crying. Indeed, he volunteered in direct examination that the most natural common thing pathologists see to cause petechiae are people who have died of heart failure. However, petechiae also commonly occur in cases of strangulation.

[40] There were small abrasions on the nose of the deceased, the left cheek, and on the inside of her upper right lip. On the upper back of each arm were four round blue bruises, which he referred to as "fingerprint bruises" consistent with rough manual manipulation or a violent or vigorous grab. On the right neck, he observed a seven-by-seven centimeter area of small bruises, and a bruise to the right side of the tongue.

[41] On dissection, he found bruising to the strap (neck) muscles. Although there was nothing remarkable about the voice box (larynx), thyroid, or omohyoid muscles, he said he observed haemorrhaging of the intrinsic muscles of the larynx. But injuries more commonly seen in strangulation deaths, such as fracture of the

hyoid bone and of the brittle structures of the voice box, were absent. Even the microscopic slides of the voice box showed no evidence of any damage.

[42] Dr. Bowes confirmed the existence of what he called "critical coronary disease". He said he observed "worrying lesions", and pretty severe narrowing of the two coronary arteries (70 and 80% blockage). He allowed, in a different context, heart disease of the severity he saw would be an explanation for her death.

[43] Dr. Toby Rose is a forensic pathologist, certified as such in Canada and in the United States. As at the time of this trial, she had conducted more than 3,800 autopsies and testified as expert forensic pathologist approximately 180 times. She agreed the death of Roxanne Page was rightly considered to have been suspicious, but disagreed that she died as a result of being strangled.

[44] It was her opinion that the cause of death was atherosclerotic coronary artery disease—the critical stenosis (narrowing) of the two coronary artery branches could cause a sudden cardiac arrhythmia at any time. In her formal report, she wrote that the manner of death was undetermined. She explained:

> The cardiac arrhythmia could have been precipitated by stress brought on by a struggle with or by the behaviour of the man at the scene, or as a result of natural disease only.

[45] With respect to the recorded observations of Dr. Bowes of seeing bruising in the area of the right neck, it was her opinion that the discolouration was misinterpreted. It was not really bruising, but simply caused by post mortem lividity. She said this kind of phenomenon can also be seen in the internal structures of the neck, including the strap muscles.

[46] It was, of course, up to the jury to determine what weight to give to these conflicting opinions on the cause of death.

Utterances by the deceased

[47] The Crown sought to adduce statements made by the deceased to ten people. The bases for admission were that statements made by a deceased person that shows their state of mind are admissible as a recognized exception to the hearsay rule; or under the principled approach to admissibility of hearsay—that is, satisfaction of the twin requirements of necessity and reliability.

[48] After a five-day *voir dire*, the trial judge gave an oral decision. It appears to be unreported, but has a neutral citation (2012 NSSC 392). I do not need to refer in any real detail to his reasons.

[49] For now, it is sufficient to say that the judge concluded that the Crown could adduce statements made by the deceased to four witnesses: Arnold Clarke, the property manager; the deceased's son, Lamar Glasgow; Shantia Simmonds; and Dr. Umesh Jha. In the trial proper, the Crown only called the first three witnesses.

[50] I have already referred briefly to the evidence of Mr. Clarke. He testified about the urgency exhibited by the deceased in her efforts to get an apartment. He said that the deceased had explained that this was "because she was having problems with her boyfriend". It was open to the jury to conclude that her "boyfriend" was the appellant.

[51] The deceased lived with Shantia Simmonds. Ms. Simmonds was the mother of her grandchildren. She testified that, during the months prior to her death, the deceased spoke about her relationship with the appellant. She said that the deceased told her they argued often. They were not getting along, and the appellant would hit her on the arms and legs. In the *voir dire*, she said she saw no bruises.

[52] At trial, she testified as to having seen bruises on the thigh and lower calf of the deceased in mid-September 2009, after she had returned from one of her outings to a hotel with the appellant.

[53] Lamar Glasgow testified that the deceased looked after his children during the weekend of October 9, 2009. He told the jury that on October 11 the deceased informed him of two phone messages she had received. Both were from the appellant. He did not hear either message.

[54] The deceased told him the contents of the two messages. The first was a nice polite message, wondering what was going on—he had not heard from her. The second was of a completely different sort. She told Mr. Glasgow that the message was:

> …just him saying that, You remember what I did to you last time? And if I catch up with you, I'm going to fuck you up. And also that . . . that he was going to . . . that he was going to kill her.

[55] Mr. Glasgow described how the deceased's demeanour made him think she was concerned. Personally, he did not take the threat seriously. In the course of explaining why he did not take the reported threat seriously, Mr. Glasgow referred to the failure of the deceased to follow his advice "the last time" to call the police.

[56] Mr. Glasgow testified that the previous occasion happened sometime in 2008, when he observed his mother with a black eye, an injury that she attributed to the appellant. His advice was to call the police. She did not.

[57] The only other evidence offered by Mr. Glasgow about statements made to him by his mother were general comments, the previous spring, that she did not want the appellant living with her. With this outline of the facts, I will set out my analysis.

ANALYSIS

Failure to charge on manslaughter

[58] This case engages the sometimes difficult question about the extent to which a judge should be swayed by the claimed ability of the defence to make what he or she believes to be sound tactical decisions to try to secure the most favourable verdict.

[59] Typically, the issue arises in circumstances where it appears that the defence goal to grasp the golden ring in a criminal trial—an outright acquittal—may be compromised by reference to alternative partial defences. It is hypothesized that the jury may be sceptical about the validity or credibility of a defence that advances alibi, but also suggests if that fails to raise a reasonable doubt, how about provocation or intoxication? Other examples abound.

[60] Not only will the defence not actively argue alternative scenarios, but may suggest to the trial judge that she not charge the jury on them. But when the jury does not return the sought-after verdict, an appeal is taken, arguing legal error by the trial judge in failing to charge the jury on all available defences. This is sometimes referred to as paddling in the opposite direction on appeal (see: *R. v. Chalmers*, 2009 ONCA 268, at para. 51).

[61] It is settled law that a trial judge is required to charge a jury on all defences for which there exists in the record sufficient evidence to cloak a defence with "an air of reality", and not to charge on any that do not meet that threshold. The

parameters of this gate have been measured, and re-measured many times. As observed by McLachlin C.J. and Bastarache J., in joint reasons for the majority, in *R. v. Cinous*, 2002 SCC 29:

> [48] This Court has considered the air of reality test on numerous occasions. The core elements of the test, as well as its nature and purpose, have by now been clearly and authoritatively set out. *See R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Park*, [1995] 2 S.C.R. 836; *R. v. Davis*, [1999] 3 S.C.R. 759. …

[62] Justices McLachlin and Bastarache saw no need to invent a different test, modify the current one, or to apply different tests to different cases (¶49). There are a variety of ways to phrase the test. Basically, a defence must be put to the jury if there exists direct or circumstantial evidence that a properly instructed jury, acting reasonably, could acquit. It is summed up in *Cinous* as follows:

> [86] The approach to be followed by a trial judge in ensuring that only defences arising on the facts are put to the jury is well established. The question is whether there is evidence upon which a properly instructed jury acting reasonably could acquit if it accepted it as true. We have seen that this question requires the trial judge to consider whether the inferences required to be established for the defence to succeed can reasonably be supported by the evidence. Where evidence does not permit a reasonable inference raising a reasonable doubt on the basis of the defence, the defence must be kept from the jury. This duty of the trial judge is at the very heart of the air of reality analysis.
>
> [87] The trial judge must review the evidence and determine whether, <u>if believed</u>, it could permit a properly instructed jury acting reasonably to acquit. It follows that the trial judge cannot consider issues of credibility. Further, the trial judge must not weigh evidence, make findings of fact, or draw determinate factual inferences.
>
> [Emphasis in original]

[63] The Supreme Court has repeated these governing principles in a host of cases, most recently in *R. v. Mayuran*, 2012 SCC 31, and the companion cases of *R. v. Cairney*, 2013 SCC 55 and *R. v. Pappas*, 2013 SCC 56. These cases considered whether the trial judges had erred in either not charging the jury on provocation, or in doing so, in the absence of an air of reality to such a defence. I will refer only to the reasons of the majority in *R. v. Pappas*.

[64] In that case, the trial judge had charged the jury on provocation. The jury acquitted the appellant of murder and convicted on the lesser offence of

manslaughter. McLachlin C.J.C., writing for the majority, summarized the sometimes delicate task facing trial judges:

> [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.
>
> …
>
> [25] Where the evidence instead requires the drawing of inferences in order to establish the elements of a defence, the trial judge may engage in a limited weighing to determine whether the elements of the defence can reasonably be inferred from the evidence. "The judge does not draw determinate factual inferences, but rather comes to a conclusion about the field of factual inferences that could reasonably be drawn from the evidence": *Cinous*, at para. 91. In conducting this limited weighing, the trial judge must examine the totality of the evidence: *Cinous*, at para. 53; *Park*, at para. 13, *per* L'Heureux-Dubé J.

[65] In the case at bar, there were no defences advanced by the appellant. Manslaughter is not a defence to the charge of murder; it is a building block upon which the Crown can then ask the jury to convict of second degree murder. This was not one of those relatively rare cases where, if the accused is found to have been a party to a homicide, there is no question that the homicide was not just culpable, but that injuries were such that the person responsible obviously meant to cause death.

[66] Charging a jury 'from the bottom up' (starting with the basic requirement of proof of an unlawful act causing death, i.e. manslaughter) is either recommended by, or is implicit in, the standard resources that are relied on by trial judges to properly charge juries (See: David Watt, *Watt's Manual of Criminal Jury Instructions* (Toronto: Carswell, 2005), at pp. 422-5; Canadian Judicial Council *Model Jury Instructions "Homicide"*, last revised – July 2012, p. 10; *CRIMJI: Canadian Criminal Jury Instructions*, 4th ed., Gerry A. Ferguson, Michael R. Dambrot & Elizabeth A. Bennett, ¶6.45). As observed by Watt J.A. in *R. v.*

Luciano, 2011 ONCA 89, a charge with such a structure is the prevailing practice (para. 91).

[67] In my opinion, this approach, absent special circumstances, is mandated by the provisions of the *Criminal Code*. The structure and content of the relevant sections are logical, and are, as legal constructs go, easily understood.

[68] Homicide is committed whenever a person causes the death of another human being. But homicide can be culpable or not culpable. If it is not culpable, there is no offence.

[69] If it is culpable homicide, it is murder, manslaughter or infanticide. This logical structure is found in s. 222 of the *Code*. The relevant parts of this section are:

> **222.** (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
>
> (2) Homicide is culpable or not culpable.
>
> (3) Homicide that is not culpable is not an offence.
>
> (4) Culpable homicide is murder or manslaughter or infanticide.
>
> (5) A person commits culpable homicide when he causes the death of a human being,
>
> (*a*) by means of an unlawful act;
>
> (*b*) by criminal negligence;
>
> (*c*) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or
>
> (*d*) by wilfully frightening that human being, in the case of a child or sick person.

[70] Culpable homicide is murder where the person who causes the death of the victim did so with one of two states of mind: either an intent to cause death, or to cause bodily harm that he knows is likely to cause death, and is reckless whether death follows. Section 229 provides:

> **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;

[71] Furthermore, s. 234 of the *Code* specifically directs that:

> **234.** Culpable homicide that is not murder or infanticide is manslaughter.

[72] Finally, s. 662(3) provides that manslaughter is an included offence in an indictment that charges murder.

[73] I have already referred to the positions advanced by the parties at trial: the defence wanted an all or nothing charge—the available verdicts limited to guilty as charged or not guilty; the Crown argued that manslaughter should be left with the jury. This was on the basis that even if death was not caused by strangulation, both pathologists acknowledged that a struggle could trigger a heart arrhythmia, causing death. The trial judge agreed. He said:

> THE COURT: As I see it, counsel, we are not in the position to know what findings of fact the jury will make, based on the evidence that they've heard. And I'm including the evidence of both Dr. Bowes and Dr. Rose. There is evidence of recent bruising. And given that evidence which comes from both experts, [the] jury may arrive at a conclusion that although there wasn't a strangulation, there was a physical assault and, as such, that assault contributed to the death. I will leave manslaughter to the jury as an included ... lesser included offence.

[74] Accordingly, both counsel in their jury addresses briefly referred to manslaughter scenarios. The defence urged that it was speculative to suggest an assault or scuffle occurred triggering a heart attack. The Crown seemed to agree, but suggested a struggle, which included an act of strangulation. She made the following submission to the jury:

> Now Dr. Rose's opinion that Roxanne Page died of cardiac arrhythmia which could have been brought on by a struggle with the accused that increased the heart rate... But we have no evidence of a struggle. But even if there was a struggle.... Dr. Bowes's opinion that she was strangled, that strangulation followed, came subsequent to a struggle where her heart rate was raised, …

[75] The defence immediately asked the trial judge to reconsider his ruling on manslaughter as an available verdict. Counsel referred to the decision of the Ontario Court of Appeal in *R. v. Wong*, (2006), 209 C.C.C. (3d) 520 for the proposition that the duty to instruct on included offences will depend on the evidence led, the issues raised, and the position of the parties. Given the Crown's

position, manslaughter should not be left. Over the Crown's objection, the trial judge agreed. He expressed his change of heart as follows:

> THE COURT: Oh, no, I realize that you wanted it, but I was basing my comments on what Crown would say their position was. And in the last, towards the end of your address, you indicated Dr. Rose's opinion regarding cardiac arrhythmia caused by a struggle. The Crown says no evidence of a struggle. No evidence of a struggle, that's the Crown's position. I'm not going to leave manslaughter with them.

[76] The trial judge then charged the jury. In discussing the offence of murder, he started on the correct approach of a "bottom up" instruction. He instructed them that:

> Our law states that a person commits homicide when, directly or indirectly, by any means, he causes the death of a human being. Homicide is culpable or not culpable. A homicide which is not culpable, that is to say, blameworthy, is not a criminal offence.

[77] The judge gave the jury an example of where there was no "blameworthiness" and hence, no offence. However, he then instructed the jury that a homicide which is culpable is murder. He said:

> On the other hand, a homicide which is culpable is murder. A person commits culpable homicide when he causes the death of a human being by means of an unlawful act.

[78] This is not correct. As detailed earlier, a homicide that is culpable is either murder, manslaughter or infanticide.

[79] The judge continued his instruction on the law, telling the jury that culpable homicide had three degrees of seriousness: first degree murder; second degree murder; and manslaughter. He said they were only dealing with second degree murder. Accordingly, there would be no instruction on the elements of first degree murder or manslaughter.

[80] The learned trial judge properly explained that in order to convict the appellant of murder, the jury had to be satisfied beyond a reasonable doubt the appellant caused the death of the deceased by means of an unlawful act; and that the appellant either meant to cause her death, or meant to cause her bodily harm that he knew was likely to cause death, and was reckless whether death ensued.

[81] The jury was told they had but two verdicts: guilty of second degree murder, as charged, or not guilty. I have already stated that the failure to leave manslaughter as an available verdict was, in my opinion, and with great respect for the very experienced trial judge, an error in law. There are two reasons for my view.

[82] The first is that there was sufficient evidence that would permit the jury to find that the appellant committed an unlawful act which triggered a fatal heart attack. The deceased had a number of abrasions on her nose, face, and bruises on the back of each arm, which Dr. Bowes said could be the result of a vigorous, violent grab. She also had a large bruise on her back.

[83] Dr. Rose's opinion was that the cause of death was not by strangulation—it was undetermined, but she thought the most likely explanation was a fatal heart attack. In cross-examination, the deceased's injuries (that were accepted by Dr. Rose as being present) were reviewed with her, and how they may relate to the likely cause of death. She testified:

> Q. You would. Okay. It sounds as though, from your review of the evidence that Roxanne Page was in a bit of a struggle.
>
> A. That's a very good ... that may be a very good explanation for what she has.
>
> Q. Okay. And I assume that you're saying that if she was involved in this struggle and as a result of that, with her heart disease, that struggle would have, I guess, sped up her heart disease and caused a heart failure? Is that how I understand it?
>
> A. Well, it would increase the load on her heart, so ask the heart to work harder, beat faster, increase the blood pressure to a point where it was no longer able to keep up and it could trigger a fatal arrhythmia.
>
> Q. Okay.
>
> A. So that's correct.
>
> Q. Okay. Now let's say, for example, that Roxanne Page was being strangled manually, and would that also increase her heart arrhythmia, as you say it?
>
> A. Her heart rate?
>
> Q. Her heart rate?
>
> A. I don't know what the physiological effects on the heart are during strangulation but it seems likely that the heart rate would go up.

[84] As noted earlier, the trial judge at the end of this evidence decided he would charge the jury on manslaughter. By necessary implication, he must have decided that there was an "air of reality" to such a verdict. The evidence did not change. The only thing that changed was that the Crown argued to the jury that there was no evidence of a struggle. The cross-examination of Dr. Rose provided ample evidentiary support to say otherwise.

[85] An assault is an unlawful act. The jury would also have to be instructed that they would need to be satisfied of the objective foreseeability of a risk of bodily harm from an unlawful act that is neither trivial nor transitory (*R. v. Creighton*, [1993] 3 S.C.R. 346).

[86] Of course, an act of strangulation can be an unlawful act that obviously creates a risk of bodily harm. The evidence before this jury was that an act of strangulation is not singular. There can be manual or ligature strangulation. In either case, death can be caused by asphyxiation or by compression of the blood supply to or from the brain. No definitive time frame was offered by the experts for an act of strangulation to be fatal.

[87] It was open to the jury to infer that the appellant strangled the deceased with the requisite intent for murder. It was also open to the jury to infer that the appellant strangled (compressed the neck of) the deceased without significant force, but it triggered a fatal heart arrhythmia. That inference would explain the absence of fractures to the hyoid bone and even microscopically to the larynx. It would also explain the complete absence of defensive wounds to the body and hands of the deceased normally found in cases of strangulation. The evidence of both pathologists was that the presence of extensive petechial haemorrhages would also be consistent with death by heart failure.

[88] There was considerable evidence of after the fact conduct by the appellant. This included evidence he: cleaned up the apartment; tried to kill himself by ingesting drugs and stabbing himself; told a deliberate lie to put himself out of the apartment during the timeframe of Ms. Page's death. All of this the judge told the jury they could use to infer the appellant's awareness of having "committed a blameworthy act". But the only blameworthy act they could convict him of was murder.

[89] Secondly, if the jury had a reasonable doubt about the presence of a murderous intent, whether the appellant engaged in an act of strangulation, or otherwise assaulted the deceased, they were faced with only one option: an outright

acquittal. They were therefore denied a true picture of the available options open to them. Indeed, they may have considered an outright acquittal not only quite unpalatable in the circumstances, but contrary to a considerable body of evidence suggesting that the appellant knew he had engaged in a blameworthy act—inferentially defined by the judge in this case to be murder.

[90] There is considerable authority for the proposition that ordinarily a jury must be instructed that if they have a reasonable doubt on the issue of intent to commit murder, they should return a verdict of manslaughter (see: *R. v. Wright*, [1979] 5 W.W.R. 481 (Alta. S.C.A.D.); *The Queen. v. Kuzmack*, [1955] S.C.R. 292; *R. v. Stowe*, [1979] 2 W.W.R. 90 (Sask. C.A.); [1978] S.J. No. 487).

[91] In *Stowe*, Culliton C.J.S., writing for the Court, described the settled nature of this proposition:

> **17 I think the law is well settled that a person on trial for murder has the right to have the issue of manslaughter left to the jury if the evidence is such that a verdict of manslaughter is open to the jury.**
>
> **18** In *Bullard v. R.*, [1957] A.C. 635, 42 Cr. App. R. 1, Lord Tucker, speaking for the Judicial Committee, said at p. 7:
>
> > 'Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.
> >
> > 'Their Lordships are accordingly of opinion that the verdict of guilty of murder cannot stand in this case."
>
> **19** Too, the issue of manslaughter must be left to the jury even if such a verdict appears to be improbable. This was made clear by Lord Tucker in *Bullard v. R.*, supra, when at p. 7 he said:
>
> > 'Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say it would have been impossible. As was said by Humphreys J. in *R. v. Roberts* (1942), 28 Cr. App. R. 102 at 110, [1942] 1 All E.R. 187: 'As for the question whether it was open to them on the facts, counsel for the prosecution has argued with good reason that no reasonable jury could come to such a conclusion. The court may be disposed to take much the same view, but it cannot delve into the minds of the jury and say what they would have done if the issue had been left open to them.'"

> **20** See also *R. v. Golder*; *R. v. Jones*; *R. v. Porritt*, [1960] 1 W.L.R. 1372, 45 Cr. App. R. 5, [1960] 3 All E.R. 457 (C.C.A.), and *R. v. Kwaku Mensah*, [1946] A.C. 83, [1946] 2 W.W.R. 455, 2 C.R. 113 (P.C.).
>
> **21** In my respectful view, the instructions to the jury that only one of two verdicts was open to them, either "guilty as charged" or "not guilty", were wrong. It was for the jury, giving due weight to the inferences which might properly be drawn, to decide whether the appellant had the necessary intent to make her guilty of murder. …
>
> [emphasis added]

See also: *R. v. Jackson*, [1993] 4 S.C.R. 573; *R. v. Coutts*, [2006] UKHL 39.

[92] With respect, I cannot agree with the Crown's submission that the judge committed no legal error by declining to leave manslaughter with the jury. The Crown also argues that even if there was an "air of reality" to a verdict of manslaughter, an appeal court should not second guess the sound tactical decisions of the defence at trial. Lastly, even if the failure amounts to legal error, the conviction should be upheld by application of the curative proviso found in s. 686(1)(b)(iii).

[93] There is an overlap in the concerns and principles that are engaged by an appellant who seeks to resile from a tactical decision made at trial and the proviso. I will address them together.

Tactical Decisions/Curative Proviso

[94] Just as a lawyer's ineffective assistance at trial cannot be swept aside under the rubric of it being a "tactical decision", when it was based on incompetence[1], a lawyer's position on the appropriate parameters of a jury charge, driven by tactical considerations, cannot change the law. Culpable homicide that is not murder is manslaughter. Here, the jury was told it was an acquittal.

[95] There are many cases where Crown and defence lawyers take positions at trial that turn out to be legally wrong. However, regardless of the positions taken, and arguments advanced to the jury, it is the function of the trial judge to instruct the jury on all relevant questions of law. This principle was recently reiterated by

[1] See: *R. v. Moore*, 2002 SKCA 30; *R. v. Gardiner*, 2010 NBCA 46 ; *R. v. Ross*, 2012 NSCA 56

the Supreme Court of Canada in *R. v. Picton*, 2010 SCC 32. Charron J., for the majority, wrote:

> [27] Regardless of counsel's joint position, the trial judge should not have agreed to include this instruction in the charge. Discussions between counsel and the trial judge about the content of the charge can provide invaluable assistance in crafting correct jury instructions and, as such, should be encouraged. However, it is the trial judge's role to instruct the jury on all relevant questions of law that arise on the evidence. In some cases, these instructions will not accord with the position advanced by counsel for the Crown or the defence.

[96] The Crown cites a number of cases from Ontario that discuss the requirement to put manslaughter as an available verdict, but only if there is an air of reality for it, and the tension created when the positions taken by counsel at trial, are eschewed on appeal. Most are referred to in *R. v. Chalmers, supra*. I will discuss that case, and refer to the authorities cited therein.

[97] In *Chalmers*, a death that had been considered an accident was re-examined. The appellant was interrogated. The appellant eventually confessed to having killed his wife, and carried out a re-enactment. He later recanted and disavowed the re-enactment. The jury found the appellant guilty of second degree murder. On appeal, he argued his statements to police should not have been admitted, and the trial judge erred in refusing to leave intent and a potential manslaughter verdict with the jury. The Court rejected his complaints.

[98] With respect to the issue of manslaughter, the appellant argued on appeal that there were references in his statements to the police that might suggest he did not have the requisite intent for murder. This had not been his position at trial, where he testified and disavowed his statement; the death of his wife was either an accident, or it was caused by someone else. He played no part in it.

[99] The defence approved of the jury instructions that there were only two verdicts available: guilty of murder or not guilty.

[100] Blair J.A., writing for the Court, referred to a number of authorities about the purported need to always charge on manslaughter:

> [51] Some older jurisprudence suggests that manslaughter, based on the Crown's failure to prove the requisite intent for murder beyond a reasonable doubt, must always be left to the jury in murder cases: see, for example, *R. v. Wright* (1979), 48 C.C.C. (2d) 334 (Alta. C.A.), at pp. 339-343, leave to appeal refused, 29 N.R. 623 n. Current authority confirms, however, that manslaughter

> should only be left as a possible verdict where that verdict has an "air of reality": *R. v. Aalders*, [1993] 2 S.C.R. 482, at p. 484. Where there is an "air of reality", it may be necessary to leave manslaughter to the jury as a possible verdict, even where the defence has objected to that possibility being put to the jury: see e.g. *R. v. Murray* (1995), 20 O.R. (3d) 156 (C.A.). At the same time, however, an accused has a constitutional right, albeit not an unlimited one, to control his or her own defence. This right has recently been re-affirmed by this Court - along with its corresponding consequence of not being able to paddle downstream on appeal when one has paddled vigorously upstream at trial - in *R. v. MacDonald* (2009), 92 O.R. (3d) 180 (C.A.).

[101] In *R. v. Aalders*, *supra*, the Supreme Court found no air of reality to a manslaughter verdict in light of all of the evidence, hence no error.

[102] In *R. v. Murray*, *supra*, the appellant, in pre-charge discussions, urged the trial judge not to charge the jury on intoxication. No direction was given, despite the existence of considerable evidence of the appellant having consumed alcohol. The jury convicted of murder. Osborne J.A. wrote for the Court. He referred to the issue of the effect of counsel's position. He cited the earlier case of *R. v. Lomage* (1991), 2 O.R. (3d) 621 (C.A.) where counsel's concession of admissibility of partially edited statements was excused as being a tactical decision. Krever J.A., in *Lomage* concurred, but added the following caution:

> I agree with Mr. Justice Finlayson's reasons for dismissing this appeal. . . . I do not want to be understood as having the view that in a criminal case, to say nothing of a first degree murder case, in which the liberty of the subject is at stake, the adversary system operates in its pure form. Just as the role of Crown counsel is not that of a pure adversary, so is the role of the judge modified. The judge in a criminal case assumes a greater responsibility to see that justice prevails than that in the pure adversary system controlled by the performance of the opposing parties. **Thus, for example, in a criminal case tried by a jury, the judge is obliged to instruct the jury with respect to defences that reasonably arise out of the evidence notwithstanding the defence advanced by counsel and, indeed, even over the objection of the counsel.** …
>
> [Emphasis added]

[103] Osborne J.A., in *Murray*, found that such an approach applied:

> [52] I think that the concerns expressed by Krever J.A. in Lomage have application here. As I have said, there was an evidentiary basis for charging the jury on intoxication. The appellant's ingestion of alcohol was relevant to the issue whether he formed the intent required for murder. Although I do not view intoxication as a "defence" it is, nonetheless, an aspect of the evidence which,

> along with other evidence going to the issue of intent, should have been left to the jury with the appropriate guidance as generally set out in *R. v. MacKinlay* (1986), 28 C.C.C. (3d) 306, 53 C.R. (3d) 105 (Ont. C.A.). In my opinion, the fact that the appellant's trial counsel took the position he did should be taken into account in assessing the gravity of the trial judge's failure to charge the jury on intoxication, but in these circumstances I do not think it should be viewed as being determinative: see *R. v. Chambers*, [1990] 2 S.C.R. 1293, 59 C.C.C. (3d) 321.

[104] A new trial was ordered.

[105] In *R. v. MacDonald*, 2008 ONCA 572, the appellant admitted that he had caused the death of the victim. He testified to an assault that included choking the deceased. When he relaxed his grip, the victim was dead. Throughout the trial, defence counsel insisted that the only issue was whether it was murder or manslaughter. Counsel conceded to the jury that the appellant had committed manslaughter. Accordingly, the trial judge instructed the jury that there were only two verdicts, guilty of second degree murder or guilty of manslaughter.

[106] On appeal, different counsel argued that the result of the trial judge's direction deprived the appellant of a verdict by the jury, contrary to the law set out by the Supreme Court of Canada in *R. v. Krieger* (2006), 213 C.C.C. (3d) 303. Doherty J.A., writing for the Court, distinguished *Krieger* on the basis that in that case there were no admissions that justified directing the jury that they must convict. In *MacDonald*, there were. He reasoned:

> [30] I do not think that *Krieger* holds that an accused can admit culpability with respect to part of the indictment or an essential element of the offence only by a guilty plea. The reference (para. 27, *supra*) in the passage from *Krieger* to a "guilty plea" is made in the context of a case in which the trial judge instructed the jury to return a guilty verdict on the full charge on which the accused had elected trial by jury. It is difficult to think of an admission other than a guilty plea that would justify an instruction to the jury to convict on the full charge.
>
> [31] The situation is quite different where an accused proposes to admit liability for an included offence or to concede an essential element of the offence. In those circumstances, a guilty plea may not be possible - much less provide the only means by which an accused could make an effective admission. In *R. v. Gunning* (2005), 196 C.C.C. (3d) 123 (SCC), a case in which all of the judges who sat on *Krieger* sat, the unanimous court, through Charron J., at para. 30, stated:
>
> > It is important to note that the "air of reality" test has no application in respect of the question of whether the Crown has proved beyond a reasonable doubt each essential element of the offence. By his

> plea of not guilty, the accused in effect advances the "defence" that the Crown has not met its burden in respect of one or more of the necessary ingredients of the offence. In every trial where there is no plea of guilty or an admission by the accused as to one or more of the essential elements of the offence, the question of whether the Crown has met its burden is necessarily at play and must be put to the jury for its determination. …
>
> [Emphasis added.]

> [32] *Gunning* contemplates admissions to one or more of the essential elements of an offence. In some circumstances, those admissions will eliminate the possibility of an acquittal and the jury must be so instructed. *Gunning* does not require that the admissions take any special form or be of any specific kind. Given their importance, these admissions must be express and unequivocal. Trial judges faced with such admissions must ensure that the admissions are what they appear to be and that they accurately reflect the defence position. If the trial judge is satisfied that the admissions are made, then the trial judge must give effect to those admissions even if it means removing certain verdicts from the jury's consideration.

[107] No error was found on the basis that the appellant had a constitutional right to control his own defence, which included admitting his liability for manslaughter. There was, therefore, no denial of his claimed right to a verdict by a jury on that issue.

[108] Returning to *Chalmers*, Blair J.A. found that the issue of manslaughter, if it had an air of reality, in the context of the evidence as a whole, was marginal at best (¶64-66). The defence conceded the issue of intent before the jury in light of the five skull fractures from blows administered by a long pipe-like instrument. The police found such an object close to where the appellant showed them he had thrown it. Even if there was a sufficient air of reality to require manslaughter to be put to the jury, there was no substantial wrong or miscarriage of justice in the circumstances. Hence, the proviso applied (¶64).

[109] The case at bar is markedly different. Here, the availability of a manslaughter verdict was not marginal at all. It was the opinion of Dr. Bowes that an act of strangulation, in these circumstances, plainly an unlawful act, caused the death of the victim. There was also evidence from which the jury could infer a physical struggle, amounting to an unlawful act, quite apart from an act of strangulation.

[110] Both pathologists agreed that the stress of either of these scenarios could trigger a fatal heart arrhythmia. Whatever the limits may be of an accused's claim

to a constitutional right to make tactical decisions or otherwise control his own defence, it does not extend to changing the law set out in the *Criminal Code*. Culpable homicide that is not murder is either manslaughter or infanticide. In these circumstances, the jury should have been instructed accordingly.

[111] Nonetheless, the Crown argues that even if the failure to leave manslaughter was an error of law, the proviso should be applied. As I understand it, there are three bases for its position. The first is that the tactical decision at trial was a reasonable one, made by experienced counsel, and should not be reversed on appeal. The Crown urges that in these circumstances an appellate court should, in effect, erect a higher threshold than merely requiring a verdict of manslaughter to have an "air of reality". If the evidence does not pass over the higher bar, the proviso should be applied.

[112] Second, the trial judge erred in law in his instructions to the benefit of the appellant, and this can be taken into account as to the appropriate remedy (see *R. v. Finck*, 2008 NSCA 42 at para. 25).

[113] Third, it is open to this Court to reason back from the jury's verdict of guilty of murder to conclude that the failure to leave manslaughter could not have affected the outcome, hence the error was harmless.

[114] I will deal with each of these in turn.

[115] On the first basis, that of the tactics at trial, essentially, the Crown suggests two things: even if there was an air of reality to a verdict of manslaughter, thus requiring it to be left with the jury, the tactical decision by the defence at trial was sound and the verdict should, as a consequence, be upheld via the proviso; second, and it is related to the first, the 'defence' of manslaughter was in conflict with his main defence and hence no reversible error occurred by failing to charge the jury on it.

[116] With respect, I am unable to agree. There is no jurisprudential foundation to erect a higher threshold dependant on an appellate court's view of the soundness of a tactical trial decision. Even if there was, manslaughter was plainly a viable option. I have already dealt with the contention that there was no "air of reality" to a verdict of manslaughter. To recap—assuming for the sake of argument that there needs to be an "air of reality" with respect to the existence of an essential element of an offence (here an unlawful act causing death), in my opinion there was—both on the basis of an unlawful act apart from an act of strangulation, and from that act.

[117] I do not find the authorities cited by the Crown persuasive on the claimed discretion of a trial judge to not charge on defences or other issues thought to be in conflict with the main defence.

[118] *R. v. Le*, 2009 MBCA 35 is a decision about bail pending appeal. The defence at trial was alibi. The applicant was initially content with no charge on self-defence or provocation. Before the charge, that position changed. In any event, the Crown argued that there was no air of reality to either defence. The trial judge did not charge on self-defence or provocation.

[119] In the course of assessing the strength of the appeal, Freeman J.A., referred to the Supreme Court of Canada's decision in *Wu v. The King*, [1934] S.C.R. 609, for the proposition that the alternative defence of self-defence was not available where the defence of alibi negated the possibility of self-defence.

[120] In its factum, the Crown also cites *Wu* for the proposition that defences should not be left with the jury when the main defence effectively negates them. Some of the comments in *Wu* that could be interpreted as supportive of such a proposition have since been clarified by the Supreme Court of Canada in *R. v. Gauthier*, 2013 SCC 32.

[121] In *Gauthier*, the appellant was convicted of murder. The trial judge refused to charge the jury on the defence of abandonment. The Quebec Court of Appeal held there was no obligation to charge on abandonment as such a defence was incompatible with the defence's principal theory (¶20). On further appeal, the Supreme Court split in the result, but unanimously rejected the proposition that incompatible defences need not be put to the jury even if there is an air of reality to them.

[122] Wagner J., for the majority, clearly rejected the *obiter* comment in *Wu* about there being an exception to the legal requirement to charge on all matters having an air of reality. He wrote:

> [30] With respect, *Wu* does not stand for the proposition that a judge does not have a duty to put to the jury an alternative defence that is theoretically incompatible with the defence's principal theory. Rather, it reaffirms the cardinal rule that the trial judge need not - indeed must not - put to the jury a defence in respect of which there is no evidence in the record that would be sufficient, if it existed and if it were believed to be true, for a jury acting reasonably to accept the defence.
>
> …

> [31] The passage from *Wu* quoted in the Court of Appeal's reasons, at para. 71, in support of the proposition that the trial judge is not required to put to the jury an alternative defence that is incompatible with the primary defence is merely an *obiter dictum* that could be a source of confusion and should not be relied on. An accused might, for example, raise an alibi defence and testify that he or she was not in the city where the crime was committed at the relevant time, whereas certain Crown witnesses say that the accused was at the scene of the crime but was highly intoxicated. Even though the defences of alibi and of self-induced intoxication are incompatible in theory, the trial judge should, in my view, put both of them to the jury if they both meet the air of reality test.
>
> …
>
> [34] In conclusion, there is no cardinal rule against putting to a jury an alternative defence that is at first glance incompatible with the primary defence. The issue is not whether such a defence is compatible or incompatible with the primary defence, but whether it meets the air of reality test. In any case, the trial judge must determine whether the alternative defence has a sufficient factual foundation, that is, whether a properly instructed jury acting reasonably could accept the defence if it believed the evidence to be true.

[123] In the case at bar, while it may have been perfectly understandable why the defence did not suggest to the jury that they should consider an alternative verdict of manslaughter, that did not make such an option incompatible with the primary defence theory that the victim died from a heart attack. At worst, it would have left open the door for the jury to convict of manslaughter, a result they may have feared the jury might reach as a compromise verdict.

[124] With respect to the second basis for the Crown's plea for the proviso, it argues that the jury charge did not refer to some of what the Crown says is the more damning aspects of the evidence, nor to motive. No objection was taken by the Crown at trial with respect to any aspect of the trial judge's charge to the jury (other than the omission to charge on manslaughter). I find no merit in this argument.

[125] As to the request to find no substantial wrong or miscarriage of justice on the basis of reasoning back from the jury verdict, the Crown properly concedes that its submission is contrary to the Supreme Court of Canada decision in *R. v. Haughton*, [1994], 3 S.C.R. 516. It says this case is but a one paragraph decision saying that the Court cannot generally rely on a jury verdict for the more serious offence where conviction on an included offence was not left with the jury; the concern being that the conviction may have been a reaction against an unpalatable acquittal.

[126] However, the Crown urges us to find that the "tide may be changing". It cites *R. v. Sarrazin*, 2011 SCC 54, saying that the majority there had "summarily rejected" an inability to work back on the basis of *Haughton*.

[127] With respect, I am unable to agree. In fact, the principles reviewed in *Sarrazin*, and the authorities reviewed therein, point to the opposite conclusion: the proviso should not be applied. Before discussing *Sarrazin*, it is appropriate to first examine one of the authorities mentioned in the history of that case, and by the dissent, *R. v. Coutts*, [2006] UKHL 39.

[128] The facts and the issues in *Coutts* are remarkably similar to this case. There was an allegation of murder by strangulation. Both counsel for the Crown and defence viewed the case as either murder or an accident in the course of a consensual sexual encounter.

[129] The appellant had a fetish. There was considerable evidence that he had tied ligatures around the necks of at least two previous partners in the course of consensual sex. When asked by them to stop the use of the ligature, he always did. On the occasion with the victim, the appellant claimed that they had consensual "asphyxia sex". At one point he closed his eyes. He said he did not know that she had died.

[130] However, after her death, he stored the body at various locations. Almost a month later, he took the body to an isolated area where he set fire to it. When the body was found, it was still burning with the ligature still in place. When interviewed by the police he "prevaricated", which he later sought to justify.

[131] At the end of the case, the trial judge raised with counsel the possibility of manslaughter. The Crown acknowledged an alternative verdict of manslaughter would be arguable, but nonetheless said that if it had failed to prove deliberate killing, the defendant should be acquitted.

[132] Defence counsel said he was not asking for manslaughter to be left with the jury, but had not taken instructions. He then did. Although not communicated to the trial judge, there was no dispute: the appellant, on being advised of the potential for a sentence as long as 15 years for manslaughter, agreed that manslaughter not be put to the jury. The jury convicted. On appeal, the appellant claimed legal error in not leaving to the jury the alternative of manslaughter. He asked for a new trial.

[133] The English Court of Appeal dismissed his appeal. The House of Lords reversed. The Court emphatically confirmed that the trial judge had a clear duty to leave manslaughter to the jury, even if it had not been advanced, or even expressly disavowed (¶14). The rationale for such a duty was explained by Lord Bingham of Cornhill:

> 12. In any criminal prosecution for a serious offence there is an important public interest in the outcome (*R v Fairbanks* [1986] 1 WLR 1202, 1206). The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge (*Von Starck v The Queen* [2000] 1 WLR 1270, 1275; *Hunter and Moodie v The Queen* [2003] UKPC 69, para 27).

[134] Lord Rodger of Earlsferry, in a concurring judgment, despite the troubling inconsistency in the attitude of the appellant at trial and on appeal, agreed that the non-direction caused the verdict to be unsafe. He articulated the important principles at play in properly charging a jury:

> 82. Directing the jury on the way that the law applies to any reasonable view of the facts disclosed by the evidence ensures that they have a proper understanding of the way that the law is intended to work, depending on the view of the facts which they take. Therefore, by omitting to mention manslaughter in a case where it could apply on a reasonable view of the facts, the judge will misrepresent the position by making the law seem more rigid and less nuanced than it actually is. While, for tactical reasons, it may suit counsel on either or both sides to represent the law in this way, as offering a stark alternative between murder and acquittal, with nothing in between, in fact the law provides for an intermediate position. The jury are entitled to be told of that intermediate position, whenever it might come into play on a reasonable view of the evidence. The intermediate position may not be to the liking of either the prosecution or the

> defence, but the jury are still entitled to be told of it, so that they may reach their conclusions "in light of a complete understanding of the law applicable to them." Where the duty of the judge is to give a direction on the alternative verdict, counsel have to adjust their speeches to the jury to take account of that prospective direction.
>
> 83. As Lord Clyde points out, this approach secures that the overall interests of justice are served in the resolution of the matter committed to the jury. If the jury are not aware that the law provides for conviction of manslaughter on the view of the evidence which they form, there is a risk that they may go wrong in either of two ways. On the one hand, the jury may convince themselves that, despite what the judge has told them, a conviction of murder must be open even in circumstances where it is not actually the lawful verdict because the crime of manslaughter comes into play; on the other hand, they may conclude that the defendant is entitled to be acquitted completely, say, on the ground of accident, in circumstances where the law actually requires that he should be convicted of manslaughter. The first eventuality harms the defendant, the second harms the wider public interest. But both are unacceptable. And our system guards against them by requiring the judge to explain the law of manslaughter to the jury so that they are aware of it in any appropriate case. Omitting the direction removes the safeguard.

[135] The Law Lords were unanimous in affirming longstanding English authority, as well as accepting Australian, and Canadian authorities to the same effect, that it is inappropriate to reason back from the verdict on the more serious offence of murder to excuse an omission to charge on manslaughter (*Gilbert v. The Queen* (2000), 201 CLR 414 (High Ct.); *R. v. Jackson*, [1993] 4 S.C.R. 573).

[136] The significance in this case of the omission to charge on manslaughter can be easily demonstrated by considering the other side of the coin: what if the jury had found the appellant not guilty?

[137] An acquittal could be the result if either the jury having had a reasonable doubt that the appellant had committed an unlawful act that caused the death of Ms. Page; or that he had committed an unlawful act causing her death, but they had a reasonable doubt as to the existence of a murderous intent required by s. 229 of the *Criminal Code*.

[138] In the former case, an acquittal would be just and appropriate. In the latter, a man would go free, despite his patent culpability for the serious offence of manslaughter.

[139] Our legal system places great emphasis on the availability of being judged by a jury of our peers. Our belief in the justness of results reached by the collective wisdom of juries must be anchored in the firm foundation of knowing that they have been properly instructed in the legal principles that guide their deliberations, including the choices properly open to them.

[140] For the reasons earlier set out, manslaughter was a verdict that was plainly open for this jury to consider. They were told it was not. While there may be cases where the failure to charge on manslaughter does not amount to a reversible error, this is not one of them. I see no basis not to apply the long line of authorities that the failure to leave manslaughter as an available verdict is a reversible error of law.

[141] Has the tide swung, as argued by the Crown, by what was said by the Supreme Court of Canada in *R. v. Sarrazin*? In my view, it has not.

[142] In *Sarrazin*, the respondents were convicted of murder. There was evidence that they were parties to a shooting of a member of a rival gang. Medical intervention saved the victim's life. The victim was discharged from hospital, but died shortly afterwards due to a blood clot. The expert evidence was that the blood clot was probably related to the injuries sustained in the shooting. However, consumption of cocaine can cause a higher propensity for blood to clot. Blood tests revealed that the victim had consumed cocaine within 30 to 45 minutes of death. The Crown pathologist could not rule out that cocaine consumption caused the clot to form.

[143] The defence argued at trial for an acquittal on the basis that the Crown had failed to establish their involvement in the shooting. They also argued that if the jury found they did participate in the shooting, their unlawful act did not cause death. They asked for a direction that even if the jury found they had intended to kill the victim, they could acquit of murder but convict on the included offence of attempted murder. The trial judge declined.

[144] The Ontario Court of Appeal unanimously concluded that it was an error in law to not charge the jury on attempted murder, but split on the issue of remedy. The majority (Doherty and Epstein JJ.A.) agreed the proviso could not be relied upon to uphold the conviction. Moldaver J.A., as he then was, dissented on the basis that in the circumstances the error was harmless, and the proviso applied. He also urged that the legal test for invocation of the proviso be relaxed.

[145] In the Supreme Court, Binnie J. wrote for a plurality of six to dismiss the appeal. He declined to endorse a "watered down" burden on the Crown with respect to the applicability of the proviso to uphold a verdict in the face of legal error (¶27).

[146] With respect to the particular issue of whether the proviso can be applied where the legal error is a failure to instruct on the availability of a verdict on a lesser and included offence, the majority confirmed the proviso will generally not be available. Justice Binnie wrote as follows:

> [30] Moldaver J.A. was of the view that a new trial was unnecessary, but he nevertheless acknowledged that "[t]he governing principle is that the curative proviso will generally not be available in cases where an included offence (or in this case, a lesser offence) is not left with the jury and the jury convicts of a more serious offence" (para. 137 (emphasis added)). In his view, however, the decision in *R. v. Haughton*, [1994] 3 S.C.R. 516, where the issue was the subjective foresight of the victim's death, allows an appellate court in some circumstances to apply the curative proviso on the basis of factual findings implicit in a murder conviction where the jury is instructed on an included offence but the instruction is tainted by legal error.
>
> [31] Whether or not implicit findings of fact can be relied on for this purpose in such a case will depend on the circumstances, as Moldaver J.A. acknowledges (para. 165). It may be possible in the case of some errors of law to "trace their effect on the verdict and ensure that they made no difference" (*Khan*, at para. 30), but I do not believe it can be done in this case. The errors referred to by the Court in Khan referred to cases where the "triviality of the error itself or the lack of prejudice caused by a more serious error of law" attracted the application of the curative proviso (*ibid.*). **A failure to instruct on a viable alternative verdict falls into neither category. I agree with Doherty J.A. that "[f]ailure to afford a jury an opportunity to consider returning a verdict on an included offence, where that verdict is reasonably available, will in most circumstances constitute reversible error"** (para. 87). …
>
> [Emphasis added]

[147] I acknowledge that the dissent (Cromwell, Deschamps and Rothstein JJ.), penned by Justice Cromwell, expressed concern about following the authorities from the highest courts of Australia and the United Kingdom, at least where the issue before the jury did *not* involve manslaughter as opposed to murder. He put it this way:

> [50] I acknowledge that there is authority from the highest courts of Australia and the United Kingdom to the effect that failure to instruct on manslaughter will

> almost always be fatal to a conviction for murder, even when the instructions on the offence of murder were impeccable: see e.g. *Gilbert v. The Queen*, [2000] HCA 15, 201 C.L.R. 414; *Bullard v. The Queen*, [1957] A.C. 635 (P.C.); *R. v. Coutts*, [2006] UKHL 39, [2006] 4 All E.R. 353. This Court has on at least one occasion referred with approval to this approach: *Jackson*, at p. 593. However, my respectful view is that the reasoning underlying this approach is inconsistent and faulty and should not be followed, especially when the issue before the jury does not involve the difficult distinction between the mental states for murder and manslaughter.
>
> See also para. 57.

[148] The appellant, through trial counsel, put all his money on an outright acquittal. Having gambled and lost, it is disturbing to now have the appellant, with different counsel, ask for a new trial based on an error of law that he previously advocated was not an error at all.

[149] The position of counsel at trial is a relevant factor in assessing the seriousness of a putative error in a jury charge. But it is by no means determinative (*R. v. Jacquard*, [1997] 1 S.C.R. 314 ¶37-38). As was recently re-affirmed in *R. v. Picton*, it is the trial judge's responsibility to instruct the jury on all relevant questions of law that arise on the evidence. That responsibility is not diminished because of the positions advanced by the Crown or defence. Neither can it change the significance of the failure to charge on an included offence where there is an "air of reality" to a verdict for that offence.

[150] If legal error is found, the conviction can only be upheld if the Crown satisfies us that the proviso should be applied.

[151] The latest, and perhaps the most succinct, statement of the principles that determine the application of the proviso can be found in the majority judgment of Moldaver J. in *R. v. Sekhon*, 2014 SCC 15:

> [53] As this Court has repeatedly asserted, the curative proviso can only be applied where there is no "reasonable possibility that the verdict would have been different had the error . . . not been made" (*R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617, aff'd in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 28). Flowing from this principle, this Court affirmed in *Khan* that there are two situations where the use of s. 686(1)(*b*)(iii) is appropriate: 1) where the error is harmless or trivial; or 2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict (paras. 29-31).

[152] The burden is on the Crown to satisfy us that either one of these prerequisites exist. The Crown does not suggest that the evidence is such that a trier of fact would inevitably convict. It is not.

[153] For the reasons set out above, I am not satisfied that the error is harmless or trivial. In other words, I am not satisfied that there is no reasonable possibility the verdict would have been different had the error not been made. I would therefore order a new trial.

Utterances by the deceased

[154] In light of my conclusion on the first ground of appeal, I decline to deal with the issue of the admissibility of evidence said to be hearsay. It is unnecessary to do so. Further, the admissibility of evidence is driven by a variety of factors, including: context; the purpose for which the evidence is being offered; an assessment of necessity and reliability; and a balancing of probative value versus prejudicial effect. These are matters best left to the trial judge to determine at the re-trial.

[155] I would allow the appeal, quash the conviction and order a new trial.

Beveridge, J.A.

Concurred in:

Farrar, J.A.

Dissenting Reasons for judgment: (Saunders, J.A.)

[156] I have had the privilege of reading the comprehensive reasons prepared by my colleague, Justice Beveridge. With great respect to him and to those who hold a contrary view, I see no error on the part of the trial judge, in the circumstances of this case, in refusing to instruct the jury on manslaughter. Accordingly, there is no need to invoke the curative *proviso* contained in s. 686(1)(b)(iii) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.

[157] Besides our disagreement as to whether the evidence supports a charge on manslaughter, I say the outcome in this case also turns on the answer to a question that is still unsettled in the law and looms large in how criminal jury trials actually play out in courtrooms across the country every day. I would frame the question this way:

> To what extent are defence counsel's express wishes and the strategies adopted at trial, to be considered when deciding to charge a jury on a defence or lesser alternative verdict, particularly where such an "alternative" would be completely inconsistent and incompatible with the position taken by the accused in answer to the charge?

[158] I respectfully disagree with my colleague's conclusion that the trial judge was obliged as a matter of law to instruct the jury on manslaughter. I say that on this record the judge was not required to put such an alternative verdict to this jury where the "omission" occurred at the direct request of counsel and where the evidence did not establish an air of reality to support such a manslaughter "defence" which was completely incompatible with the only position ever asserted by the defence at trial. My position is this:

- There was no evidential foundation lending an air of reality to a "lesser offence verdict" based on unlawful act manslaughter, and so the judge made no mistake in refusing to charge on it;

- Even if there had been an air of reality to support such a verdict, the judge would still be bound to consider defence counsel's entreaties/strategies and whether the "lesser offence verdict" option would have been incompatible with the only defence advanced, before deciding whether to charge.

[159] It is obvious, but bears repeating, that the determination of whether an air of reality exists to require a defence (or lesser, included offence and alternative

verdict) being put to a jury in any given case, depends upon the evidence presented in that particular case.

[160] For the reasons that follow I am not persuaded there was any evidentiary basis here which would lend an air of reality to a theory of death due to unlawful act manslaughter. I agree with the strong and persistent submissions by the appellant's trial counsel that manslaughter was not available on these facts. I say that Justice Cacchione was right to refuse to instruct this jury on manslaughter.

[161] One is struck by the irony that on appeal to this Court the parties have adopted the exact *opposite* positions they maintained at trial. At trial the defence implored the judge not to charge the jury on manslaughter on the basis that there was no air of reality to sustain it. Now, on appeal, different counsel for Mr. MacLeod says that the trial judge was wrong, and should in fact have charged the jury on manslaughter and that this "error" entitles him to a new trial. Conversely, the Crown at trial urged the judge to include manslaughter in his charge. On appeal the Crown now says the judge was right to have refused the Crown's request and that because there is no merit to the appeal we should dismiss it.

[162] The appellant received a jury instruction exactly as he had requested. I am unimpressed by his "about-face" in this Court where he complains that the judge and (by implication so too) his trial counsel erred, such that he is now entitled to a new trial because he does not like the result in the first one.

[163] For the reasons that follow I would dismiss the appeal.

[164] Before addressing the law and its application to the particular circumstances of this case, I will begin with a summary of the evidence as it relates to the appellant's account of Ms. Page's demise and then turn to a consideration of the strategies adopted by his lawyer in defending him.

The Appellant's Evidence

[165] The appellant did not testify. His version of events consisted of two lengthy interviews with the police which were then presented to the jury in the form of audio/video tapes, edited by agreement of counsel after the trial judge ruled them admissible. To put the evidence in context one needs to understand when the victim was last seen alive and how her body was found.

[166] Lamar Glasgow testified for the Crown. He is the son of Ms. Page. He testified that the last time he spoke with his mother was sometime during the afternoon of Thursday, October 15, 2009, when she asked him to pick up a few things at the store. Mr. Glasgow said he tried to reach his mother again around midnight on Thursday and again on Friday by telephone but that each time he called her number, no one answered. He said when he drove by her apartment at 50 Roleika Drive in the early morning hours on Friday he noticed that her apartment light was on. Concerned that he had not been able to reach his mother, he drove over to her apartment on Saturday. He knocked on her door but there was no answer. He called using his cell phone and could hear her phone ring from inside the apartment but no one answered the door or the phone. Mr. Glasgow sought the assistance of the building superintendent. Both knocked on the door without getting any response. The superintendent opened the door. The sum of their evidence is that they observed Ms. Page's body lying on the floor in the corner of the living room with a blanket over her, and the appellant seated on the sofa pulling a knife out of his stomach. Mr. Glasgow and the building superintendent left the apartment hurriedly and called the police who had to taser Mr. MacLeod in order to disarm him. Paramedics provided emergency care at the scene and then Mr. MacLeod was rushed to the hospital to treat his wounds and the effects of his overdose. After Mr. MacLeod was released from hospital he was interviewed at his home by two of the lead police investigators.

[167] The audiotape of that interview, October 27, 2009, was marked Exhibit 23 and introduced in evidence. The tape was played for the jury and a typed transcript of the interview was provided to assist them in following along.

[168] The second interview was conducted at the police station on April 22, 1010, after Mr. MacLeod had been arrested for the murder of Ms. Page. The interview lasted some 14 hours. The audio/video tape of that interview was marked Exhibit 32 and introduced in evidence. The trial judge described Exhibit 32 as:

> ....a condensed version of a 14-hour-long interview of Mr. MacLeod by various police officers that took place on April 22nd, 2010.

[169] During the course of this difficult and challenging 19-day trial, Justice Cacchione gave many careful and comprehensive mid-trial instructions to the jury cautioning them on the proper, or improper use to be made of the evidence they had just heard, or were about to hear, in fulfilling their role and responsibilities as the triers of fact.

[170] In introducing the jury to Exhibits 23 and 32 Cacchione, J. gave them a thorough and proper instruction explaining to them that the transcript had only been given to them as an aid and was not evidence. It would not form part of their deliberations. They were reminded that in viewing this evidence they were only to have regard to the appellant's words and demeanour. The judge cautioned them that the questions, suggestions, accusations, innuendos or editorial comments of the police interrogator(s) could not be considered as evidence against the accused.

[171] To illustrate the trial judge's careful, cautionary instruction and add further context to the case, I repeat here what he said with respect to Exhibit 32:

> ...members of the jury, any statement made by an accused person to a person in authority has to be ruled upon by the Court to determine whether or not it is admissible.
>
> Exhibit 32 has been ruled upon by the Court. It is admissible and you will hear it. Exhibit 32, however, is a condensed version of a 14-hour-long interview of Mr. MacLeod by various police officers that took place on April the 22nd, 2010.
>
> Rather than have you sit through and watch all 14 hours, some of which is irrelevant to the issues that you have to determine, counsel have with my permission agreed to edit the interview.
>
> Those portions of the interview which have been deemed relevant to the issues that you will have to determine and relevant to the Crown or Defence positions have been included in this exhibit.
>
> Those portions which have been deemed irrelevant to the issues that you will have to decide have been omitted from the Exhibit 32 and omitted as well from the transcripts that you have before you.
>
> You should rest assured that all relevant information contained in that extended interview will be before you for your consideration. But you will not be troubled by information which is irrelevant to your fact-finding duties.
>
> I caution you again that the transcripts that you have are not evidence. The evidence is in the form of CD which I understand will be played through a computer. Because it has been edited, you will notice that Mr. Wright will at certain points pause.
>
> And I'm not sure to move forward or what he does, but the bottom line is what's relevant you will hear. What's not relevant, you won't be troubled with. And I gather that it will save us some six or seven hours. ...
>
> . . .
>
> The comments of Mr. MacLeod in that interview are evidence and you can consider those comments. The comments of the police officers with respect to, This is a murder, There was semen, et cetera, et cetera, any of the comments made

> by the police officers to Mr. MacLeod is not evidence. . . . It's part of the interview or interrogation, but it is not evidence and it is not for you to consider during your deliberations. . . . You base your decision on the evidence that's properly before you. You don't consider evidence that is improper or not before you. Even if it is before you but it is improper, you can't consider it. All right?
>
> So just to reiterate, officers' comments made to Mr. MacLeod as to what they have, what they know, whether this was a murder or not a murder, that's the issue that you will have to decide. All right? Those comments are not evidence. Mr. MacLeod's comments made during the interview are evidence and you will and have to consider those during your deliberations. ...

[172] In his first account to the police on October 27, 2009, the appellant told the officers that he was surprised to see Ms. Page show up at his door unannounced. He said they talked, had sex, and he went to a liquor store to buy beer and vodka. Later she invited him back to her place. They took a cab to her apartment. He said they got there around 10:30 p.m., had more alcohol to drink and started playing Scrabble. He said she started talking about crack and began to make some telephone calls, presumably to arrange a buy. The appellant said he wanted no part of that and so he decided to walk to a nearby pizza store to get something to eat. He told the police that when he got there he found that the store had closed. Realizing that it was too late to catch a bus home, he walked back to her apartment hoping that she might agree to let him spend the night. He said he didn't have enough money to get a cab home.

[173] Upon entering her apartment the appellant said he saw her lying on the floor in a corner beside the sofa. Her lips and skin were blue. He said he checked her vital signs and could not detect a heartbeat. He tried his best to resuscitate her. He remembered slapping her face to wake her up and shaking her saying "come on, wake up, wake up". He said he banged her on the chest two or three times and there was no response. He mimicked the only sound he heard which was "like air escaping from something".

[174] He told the police his "mind just fucking snapped" and that he told himself "if she's dead, I don't want to live". He said Ms. Page kept her medicines in the bathroom. He remembered swallowing "a handful of pills", "a shitload of medication". Then he stabbed himself repeatedly in the stomach with a kitchen knife. This, he said, would have happened on the Friday. His next recollection was awakening in hospital the next morning.

[175] When asked by the police what Ms. Page was like when he left her apartment to go get a pizza, he said she was fine and sitting on the edge of the chesterfield with the telephone in her hands. When he returned to her apartment, he tried to resuscitate her, but when he realized that his attempts at CPR had failed, he figured "if you're dead, I want to be dead too". He told the police "I'm not a murderer ... I would never hurt Roxanne".

[176] Later, during the course of their investigation, the police were able to discredit the appellant's story that he had left Ms. Page's apartment to go to Jessy's Place to buy a slice of pizza. The police had seized the videotapes from surveillance cameras which showed Ms. Page and Mr. MacLeod entering the building and never leaving. A canvas of the other residents in the building also established that neither person had exited nor had gone into another apartment.

[177] As noted earlier, Mr. MacLeod gave a second statement during a fourteen hour interview with the police on April 22, 2010. He arrived at the police station in handcuffs having been arrested for Roxanne Page's murder. During that long interview the appellant became aware of the fact that the police had caught him in a lie after viewing the video surveillance tapes seized at the scene. In his earlier account to the police, when he said he had gone to Jessy's Place to buy a pizza only to find that the store was closed, he said he had walked back to her apartment and was able to re-enter the building by sneaking in behind another couple as the main entrance door opened.

[178] When the officers interviewed the appellant on April 22, 2010, they confronted him with the surveillance tapes which clearly showed the appellant and Ms. Page walking into her apartment at 10:03 p.m. on Thursday night, and never leaving.

[179] During this second interview Mr. MacLeod admitted to the police that he had not left Ms. Page's apartment. He then proceeded to give a slightly different account of what had happened. This time he said he fell asleep on Ms. Page's chesterfield while watching television and that when he awakened two hours later he found her on the floor, in the corner, with no detectible heartbeat. Despite his best efforts at CPR he was not able to save her.

[180] The appellant denied murdering Ms. Page. He also rejected the police officer's suggestion that while he may not have planned her murder, and had no intention of killing her, he ended up causing her death when they argued over Ms.

Page's crack habit and the fact that she continued to "use" him by spending his money to fuel her addiction.

[181] The consistent thread running through both of the appellant's statements to the police was that Ms. Page was alive and well the last time he spoke with her; he was shocked to later discover her body on its side in a corner of the living room beside the chesterfield; he never laid a hand on her except during his attempts to save her life using CPR; and that when his efforts failed, he swallowed handfuls of her prescription medicine and then stabbed himself repeatedly in his stomach with a kitchen knife in a failed attempt to kill himself, figuring that if she were dead, life was not worth living without her.

[182] From this necessarily detailed review of the appellant's statements to the police, it is clear that there was absolutely nothing in the appellant's own account which would open the door to any suggestion that he and Ms. Page had struggled during an argument such that Mr. MacLeod had somehow caused Ms. Page's death while assaulting her, but that her death was unintentional.

[183] At his trial the appellant was represented by Mr. Kevin A. Burke, Q.C., a veteran criminal defence lawyer and one who has practised in this specialized field for more than forty years. Both Mr. Burke and Justice Cacchione would be recognized as senior jurists with a vast experience in the criminal law. I will turn now to a consideration of the obvious defence strategy adopted by Mr. Burke at trial as may be gleaned from his exchanges with Justice Cacchione; his questioning of Dr. Toby H. Rose, the only witness called by the defence; and his final summation to the jury.

The Defence Strategy

[184] Dr. Rose is a certified forensic pathologist with more than 30 years' experience in this specialized area of medicine. She teaches pathology at the University of Toronto, is a coroner for the Province of Ontario, and currently serves as Deputy Chief Forensic Pathologist at the Ontario Forensic Pathology Service in Toronto. She estimated that she had personally conducted 3,800 medical/legal autopsies. Her report was introduced as Exhibit 39.

[185] In both her report and her testimony Dr. Rose opined that the cause of Ms. Page's death was not strangulation but rather, chronic heart disease which Ms. Page had had for many years. In her opinion, the Crown's expert Dr. Bowes, had misinterpreted lividity with Tardieu spots seen on the right side of Ms. Page's neck

as being bruising and petechiae. Dr. Rose explained that petechiae are common non-specific autopsy findings and their presence in a setting of cardiac death is not unexpected. She disagreed with Dr. Bowes' opinion that Ms. Page's death was caused by strangulation and that the manner of death was homicide. To the contrary, Dr. Rose insisted that Ms. Page had not been strangled, nor beaten. She said Dr. Bowes' misinterpretation of the lividity accompanied by Tardieu spots had prompted Dr. Bowes to mistakenly conclude that Ms. Page's death was a homicide caused by strangulation. She said the manner of death was undetermined and that Ms. Page's cardiac arrest:

> ...could have been precipitated by stress brought on by a struggle with or by the behaviour of the man at the scene, or as a result of natural disease only.

[186] Dr. Rose said she based her opinion and conclusions upon her review of a variety of reports, toxicology results, police summaries as well as studying Dr. Bowes' autopsy notes, diagrams, and the photographs of the autopsy and the scene. Dr. Rose elaborated upon her opinion in answer to these questions put to her by Mr. Burke during direct examination:

> A. Yes. So my interpretation is that Ms. Page may indeed have some petechiae in her eyes and on her face, but that the majority of the purple red discolouration of her eyes, face, and neck is actually lividity, post-mortem change, with areas of Tardieu spot formation. The areas of hemorrhage seen in the deeper structures of the neck also represent hemorrhagic lividity. I didn't actually mention this, but lividity doesn't just occur on the skin. It occurs in the internal organs, as well. So, for example, the back side of ... the back wall of the heart can often look darker than the front wall of the heart because blood has pooled in the back wall of the heart, as well.
>
> There's no evidence of the types of injuries of the skin of the neck that are seen in manual strangulation. The injuries that I didn't see that I would look for are abrasions, scratches, fingernail marks. And I don't think that there's any bruises either. And there's certainly nothing that I would describe as a ligature mark.
>
> In Dr. Bowes' very detailed examination of the structure, the bone ... the hyoid bone and the larynx, the voice box, the neck organs, there is no [sic] incontrovertible. So there's no hard evidence of injuries to the internal neck structures such as injuries to the cartilages that make up the larynx or to the hyoid bone. There are no significant injuries to any other part of the body. So I don't think that she's been strangled and I also don't think she's been beaten. She's got a couple of minor injuries but there's no evidence that she's been beaten to death.
>
> ...

A. ...So I believe that Ms. Page died of atherosclerotic coronary artery disease. She had critical stenosis of two branches of her coronary arteries and these . . . this disease can cause people to die suddenly at any time.

Q. Now what . . . are you able to comment on the possible manner of death?

A. Yeah. So this is an interesting case because, of course, it came in as a suspicious death. So homicide was right there on the table as what ... something that could be arrived at as a manner of death. But to come up with a manner of death of homicide, you need to have a cause of death that includes something that someone else did to the person. And I don't think that there is any evidence that anybody did anything specifically to cause her to die.

Now somebody with a bad heart can just die in bed because they have a bad heart and that is obviously entirely natural. Stressful events can make it more likely that people with bad hearts will die. So those stresses could be physiological stresses; running a marathon, for example. Emotional stress in terms of having to live through Hurricane Sandy last week and the worry that you weren't going to be rescued, that would be stress. Being in a situation where you were being threatened or were even in a physical fight, a minor physical fight, could also lead to death from this type of heart disease.

And that's because in the . . . so Ms. Page had this heart disease for a long time. This didn't just happen at the time she died. It had been building up and she had probably been living with this critical stenosis of her coronary arteries for some time, which means that her heart was getting enough blood day to day. [sic]

Now for some reason, it might happen that while she was lying on the floor she didn't have enough blood, but it could also be that she was in a stressful situation and that's what caused the increased need for blood, because stressful situations make your heart beat faster. Your blood pressure goes up. There's lots of chemicals that are produced by your body that cause all these things to happen in your heart and that make it more likely that an abnormal rhythm will occur. So those are the possibilities.

And considering that, I was not able to determine a manner of death, because it could be natural or it could be an accident, or because of what was going on at the time she died. And so I felt that the manner of death was actually undetermined. ... (AB, 1654-1658)

[187] Later, in her direct examination Dr. Rose told the jury she did not think there were any findings that were indicative of strangulation. She concluded her testimony by saying "I don't believe there is any homicidal injury".

[188] Having undertaken a close review of the transcript I am satisfied that there was absolutely nothing in Mr. Burke's direct examination of Dr. Rose to suggest that the defence was putting forward a theory that Ms. Page's cardiac arrest had somehow been triggered by a struggle or physical altercation with Mr. MacLeod. I recognize that in her written report Dr. Rose opined that:

> The cardiac arrhythmia could have been precipitated by stress brought on by a struggle with or by the behaviour of the man at the scene, or as a result of natural disease only. (AB, vol iv Tab 33 p. 365)

However, that is not to suggest the defence ever asserted or relied upon a "theory" that there *had been* "a struggle". In fact, as I will point out, Mr. Burke always maintained precisely the opposite position by insisting that there was no factual basis to support the hypothesis that there had been any kind of physical altercation between Ms. Page and Mr. MacLeod. Dr. Rose's comment in her written opinion that I referred to above was merely her illustration of how stress *might* have precipitated Ms. Page's cardiac arrest - whether brought on by a physical struggle; or the behaviour of the other individual at the scene; or simply the natural result of Ms. Page suddenly succumbing to her chronic heart disease.

[189] Nothing arose during Dr. Rose's cross-examination by Crown counsel which caused her to qualify or modify her opinion. She repeated her firm conclusion that strangulation should definitely be ruled out as the cause and manner of death, insisting that Ms. Page died after succumbing to a heart attack.

[190] To summarize the defence position then, in her report and testimony Dr. Rose said that there was no evidence of manual strangulation on the skin of the neck of the victim such as abrasions, ligature marks, or fingernail scratches or indentations. Neither was there any evidence of injury to the bony structures within the neck. The scrapes and bruises she did have elsewhere on her body could have been the result of falling and striking objects at some earlier time in the past. They were "minor" and did not cause Dr. Rose to suspect that Ms. Page had been strangled. In her opinion the purple-red discoloration of the face, eyes and neck represented "lividity with areas of Tardieu spot formation (post mortem changes)" which had been misinterpreted by Dr. Bowes as being bruising and petechiae. Dr. Rose said "the presence of a few petechiae in the setting of sudden cardiac death is not unexpected". As for the bruises which Dr. Bowes observed and dissected from the back of Ms. Page's left and right upper arms, neither pathologist could say when or how those bruises arose. All they could say was that the bruises seemed

"recent" as opposed to "old" and that at best, recent meant within days of her death.

[191] In my view, this bare evidence, without more, was not enough to establish an evidential foundation to support a possible scenario that the appellant and Ms. Page had argued, that he had grabbed her by the arms, that a struggle had ensued, and that during the course of the altercation she suffered a heart attack and died. This is especially so in light of the fact that the police found no evidence of noise, loud voices, disturbance or disarray at the scene, and the appellant maintained throughout that he had never laid a hand on Ms. Page except to try to save her by attempting CPR.

[192] After Dr. Rose had concluded her testimony and the jury was excused, Cacchione, J. held a pre-charge meeting with counsel and repeated his earlier request that counsel offer their own comments as to what he proposed to include in his charge. We see this exchange with Mr. Wright (co-counsel with Ms. Byard for the Crown) and Mr. Burke for the defence:

> **THE COURT**: …And I also raise with you the question of leaving manslaughter to the jury. Could I have your views on the latter?
>
> **MR. WRIGHT**: My Lord, I'll speak to that issue. Thank you. I believe it should be left to the jury. I think you heard from the Defence evidence and expert. If the heart arrhythmia was caused as result of a struggle, then that may have been her death [sic]. So I think if the jury finds that there was a struggle and she had heart failure as a result of that struggle, then that would be, in Crown's respectful submission, enough grounds to put that issue of manslaughter to the jury.
>
> **THE COURT**: Mr. Burke?
>
> **MR. BURKE**: Well, I don't see a manslaughter issue being factually sufficient to be put to the jury. This is the evidence that Crown has referred to as basically a speculation. It's one of many possibilities that have been, I guess, asked in cross-examination, Is it possible this happened; Is it possible that happened? Well, the jury can't be instructed with respect to included offenses on speculative theories that either is put forward by the Crown or by the Defence. And that's all that is. The Crown's theory, as I understood throughout the trial, is basically that this is a strangulation case. Well, either she died from strangulation or she did not die from strangulation.
>
> Now if, indeed, the jury accepts that, then it's my respectful submission that the jury must be directed to come back with a verdict of not guilty. If, indeed, the jury accepts the evidence of Dr. Rose or considering all of the evidence, including Dr. Bowes and Dr. Rose, that the Crown has not made out its

> case beyond a reasonable doubt, then what theory then is being put to the jury that while she may not have been strangled, we accept what Dr. Rose has said, that she died from a heart attack and then get into the area of speculation as to what may have prompted that.
>
> Now it's clear from Dr. Rose's report that it could have been from natural causes. It could have been from anything. But there . . . as her report says, there's no incontrovertible evidence, no hard evidence to indicate any particular explanation for bruises on this particular woman. So I would take issue with the instruction of manslaughter, My Lord, because I don't think that the evidence supports it.
>
> **THE COURT**: As I see it, counsel, we are not in the position to know what findings of fact the jury will make, based on the evidence that they've heard. And I'm including the evidence of both Dr. Bowes and Dr. Rose. There is evidence of recent bruising. And given that evidence which comes from both experts, jury may arrive at a conclusion that although there wasn't a strangulation, there was a physical assault and, as such, that assault contributed to the death. I will leave manslaughter to the jury as an included . . . lesser included offence. (AB p. 1788-1790)

[193] From this, two things clearly emerge. First, we see that the Crown's initial position was that manslaughter ought to be left to the jury; whereas defence counsel insisted that it not be mentioned. Second, we see Justice Cacchione's initial impression that he *would* leave manslaughter to the jury as an included, lesser offence.

[194] It is obvious that as far as the defence strategy was concerned, this was to be an "all or nothing" defence. As Mr. Burke put it, "either she died from strangulation or she did not die from strangulation". If the jury were to conclude that she died from strangulation then the obvious and only verdict would have to be guilty as charged since, by all accounts, Mr. MacLeod was the only person in her apartment when she died and the apartment was locked from the inside. Conversely, if the jury were to conclude that she did not die by strangulation, or were left with a reasonable doubt about that, then the obvious and only verdict as far as the defence was concerned would be to "come back with a verdict of not guilty", exactly as Mr. Burke described.

[195] By the time Justice Cacchione came to charge the jury, it is evident that he had changed his mind about including manslaughter as a lesser, included offence. After hearing the closing arguments of counsel for the appellant and the Crown he had good reason for doing so.

[196] In his closing summation Mr. Burke stressed the uncertainty and difficulties experienced by Dr. Bowes in finally coming to a conclusion as to Ms. Page's cause of death. Mr. Burke reminded the jury that it was only upon receipt of Dr. Bowes' opinion that the police decided to charge Mr. MacLeod. In his summation Mr. Burke got right to the point:

> **MR. BURKE: ....**I'd like to begin by saying that this particular case is unusual and that the question squarely before you is whether a crime has been committed at all. What makes the case even more unique is that the Crown's case rests squarely, indeed, solely upon the opinion of one medical expert, Dr. Matthew Bowes. Without his opinion there would be no case and Mr. MacLeod would not be here.
>
> This is a criminal case. My client has been charged with murdering Roxanne Page. It is the Crown's contention that Mr. MacLeod strangled her. Why and how he is supposed to have done that is unclear to me, but the Crown will be explaining this to you after I am finished addressing you.

[197] Later in his summation Mr. Burke attacked the foundation of the Crown's strangulation theory. He pointed to the fact that the autopsy revealed no fractures of the hyoid bone or other boney structures of the neck which are common in cases of strangulation. As well, Dr. Bowes had testified that there were no defensive injuries present on the deceased. Mr. Burke continued:

> …this case rests almost entirely . . . upon the evidence of one witness, Dr. Matthew Bowes. . . .Without his subjective interpretation that the cause of death was strangulation, the police, by their own admission, would not have laid a charge. (p. 1823)

[198] Mr. Burke then hammered home the point that there was an absolute lack of any evidence to support the Crown's theory that Ms. Page and the appellant had fought and that during the physical altercation Mr. MacLeod had strangled her. Mr. Burke said this in his summation:

> Now how does all of this evidence add up to strangulation? How do you visualize . . . If, indeed, she was strangled, how did it take place? Now you will recall that there is no evidence that has been given, notwithstanding an extensive police investigation, that any noise had come from the apartment. There was no evidence from adjoining apartments, tenants from adjoining apartments that a struggle had taken place, shouting had taken place, any kind of a disturbance. Indeed, there had been no complaints made to the superintendent about that apartment. As well, when you go into the apartment - it has been described in

> evidence by police officers as being tidy and neat, no evidence of turmoil, no evidence of a commotion, a struggle.
>
> Now these are factors that possibly may have been considered by Dr. Bowes when he came to his conclusion that this was a case for strangulation. For example, you would go and say, well, there was no disturbance at the scene. Was there any complaint of a disturbance? Was there any talk of shouting or screaming that would lend credence to the theory that this lady was strangled? Nothing. ...

[199] Mr. Burke then concluded with his explanation as to what had occurred. He told the jury:

> So what happened? Well, Roxanne Page simply had a heart attack, either dropped on the floor or fell off the chesterfield and lay in a particular position. Mr. MacLeod discovered her, rolled her over, and then, on two occasions, tried to take his own life. There was nothing happening that night other than two people in an apartment trying to watch television or play a game of Scrabble. No evidence to suggest anything else.

[200] Having called evidence which then obliged him to address the jury first, Mr. Burke could not be sure what theory the Crown would be advancing when its turn came to address the jury. Accordingly, Mr. Burke was forced to hedge his bets and close his summation with this response to what he imagined the Crown might say:

> Now my final point has to do with the question of other offences, which will be covered by His Lordship. His Lordship will address you on the included offence of manslaughter. Now the law allows, depending on the circumstances, that if you find that a person is not guilty of murder, that you can consider, if the evidence allows you to, a case for manslaughter. Now I would urge you to try to picture, if you will, a scenario that would allow you to consider the offence of manslaughter. If the Crown is arguing that he strangled Ms. Page, well, that's murder. If you accept the defence theory that Ms. Page simply died as a result of a heart attack, then Mr. MacLeod must be acquitted. However, if any theory is presented to you by the Crown that, notwithstanding if they do not prove that Mr. MacLeod strangled Ms. Page, then possibly, by virtue of certain bruises, he may have got into a scuffle with her, may have assaulted her, but ask you to speculate that these bruises (a) were caused by Mr. MacLeod – there's no evidence of that, these bruises were inflicted the night of . . . on the 17th - no evidence of that, and that these bruises somehow contributed to the death of Roxanne Page.
>
> Now you've heard Dr. Rose state that these bruises may have been as a result of her falling on the floor, bumping into a door, all kinds of explanations. Or it may be that the Crown will offer the suggestion that maybe Mr. MacLeod

had held her and she had a heart attack while being held. All of which is, in my respectful view, speculative and nothing more.

This, ladies and gentlemen, is a clear case, a simple case - has there been a crime committed in these circumstances? Nothing more than that. And I would respectfully urge that you find Mr. MacLeod not guilty of this charge as a result. Thank you.

THE COURT: Ms. Byard?

MS. BYARD: Thank you.

[201] Defence counsel's address was immediately followed by the Crown attorney's closing arguments. Not surprisingly, Ms. Byard attacked the appellant's credibility by emphasizing the inconsistencies between his first statement to the police and his second. She then explored the nature of the relationship between the appellant and Ms. Page, its volatility, and suggested how the appellant likely had a motive to kill her because he was infuriated by her wanting to break off their relationship. Ms. Byard then concluded her summation by dismissing the defence theory that Ms. Page had died from natural causes after suddenly suffering a heart attack brought on by her severe coronary artery disease. Ms. Byard said this:

Now Dr. Rose's opinion that Roxanne Page died of cardiac arrhythmia which could have been brought on by a struggle with the accused that increased the heart rate . . . But we have no evidence of a struggle. But even if there was a struggle . . . Dr. Bowes's opinion that she was strangled, that strangulation followed, came subsequent to a struggle where her heart rate was raised, and I believe Dr. Bowes testified it would only take about six minutes - or it could have been less than that; again, your notes would reflect better than mine the time frame - of blood circulation being cut off to the brain.

Remember, we're dealing with a woman who had a 179 milligrams percent of alcohol in her blood, more than twice the legal limit to operate a motor vehicle. There was no evidence of defensive wounds on her hands. There was an abrasion on her face, which Dr. Bowes testified could be as a result of her trying to remove the hands of Mr. MacLeod or perhaps caused by Mr. MacLeod, himself, when he was strangling her.

But Mr. MacLeod's explanation for failing to seek assistance for Roxanne Page is not logical, has no ring of truth to it, and Dr. Bowes acknowledged, absent the homicidal injuries, he would have ruled this . . . he would not have ruled this a homicide. But he had to consider all of the circumstances, and, after doing so, it is only logical, ladies and gentlemen, that Roxanne Page was murdered by Clarence MacLeod by strangulation.

> We respectfully request you find him guilty as charged, give Roxanne Page some closure, her son some closure, and allow her to rest in peace and with some dignity.
>
> Thank you. (Underlining mine)

[202] From Ms. Byard's address to the jury it became clear that the Crown had conceded there was no evidence of a struggle, no evidence of defensive wounds on her hands, and that the only logical conclusion was that Ms. Page was murdered by the appellant when he strangled her.

[203] Just as soon as the jury was excused, Mr. Burke rose to his feet to provide Justice Cacchione with case authorities supporting the position he had consistently taken throughout the trial that, as a matter of law, the jury should not be directed to consider the lesser, included offence of manslaughter because there was no evidential foundation to support it. It lacked any air of reality. Then when the Crown attorney rose to reply we see this exchange:

> **MS. BYARD:** My Lord, last day, when this was raised, the Crown had indicated that we would want manslaughter put to the jury, so ...
>
> **THE COURT:** Oh, no, I realize that you wanted it, but I was basing my comments on what Crown would say their position was. And in the last, towards the end of your address, you indicated Dr. Rose's opinion regarding cardiac arrhythmia caused by a struggle. The Crown says no evidence of a struggle. No evidence of a struggle, that's the Crown's position. I'm not going to leave manslaughter with them.
>
> 15 minutes, counsel. Thank you.

[204] From this, Justice Cacchione's reasoning and the basis for his ruling are clear. In light of defence counsel's trial strategy that this was an "all or nothing" case; Mr. Burke's repeatedly imploring the judge that the jury not be charged on manslaughter because there was no factual foundation to support it; followed by the Crown's unmistakable concession that there was no evidence of a struggle and therefore nothing to support the suggestion that Ms. Page's cardiac arrest had occurred in that way; the trial judge determined that it was his duty not to leave manslaughter to the jury.

[205] With great respect I think he was right.

[206] I felt it necessary to provide such a detailed account of the appellant's evidence, as well as the persistent and carefully considered tactical position

adopted by his trial counsel, so that the judge's duty to correctly charge this jury on the law could be assessed in its proper context. I will turn to that now.

The Law

[207] Before any defence (or lesser included offence) can be put to a jury, the judge must first be satisfied that there is an air of reality to it. As Chief Justice McLachlin and Justice Bastarache said in their joint reasons in **R. v. Cinous**, 2002 SCC 29:

> **92** ... The question to be asked is whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true.

[208] It is settled law that a determination as to whether there is, or is not, an air of reality to a defence or alternative verdict is a question of law. Charging a jury on a defence (or lesser verdict) that lacks an air of reality is as much an error of law as keeping from a jury a defence (or lesser verdict) that has an air of reality. Whether it does or does not will always depend upon the presence or absence of an evidential foundation for the defence, as it appears in any particular case. For the purposes of this discussion I use the phrase "charging a jury on a defence" and "charging a jury on an alternative or lesser offence verdict" interchangeably because the test, at law, is the same. In **Cinous,** the Supreme Court addressed what it described as a controversy concerning the extent of a trial judge's discretion to keep from a jury defences that are "fanciful or far-fetched." McLachlin, C.J.C. and Bastarache, J. explained:

> **48** This Court has considered the air of reality test on numerous occasions. The core elements of the test, as well as its nature and purpose, have by now been clearly and authoritatively set out. See *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Park*, [1995] 2 S.C.R. 836; *R. v. Davis*, [1999] 3 S.C.R. 759. Nevertheless, a controversy has arisen in this case concerning the extent of a trial judge's discretion to keep from a jury defences that are fanciful or far-fetched. More narrowly, the contentious issue is the correct evidential standard to be applied in determining whether there is an air of reality to the defence of self-defence on the facts of this case.
>
> **49** In our view, the controversy can be resolved on the basis of existing authority, which we consider to be decisive. The correct approach to the air of reality test is well established. The test is whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit. See *Wu v. The King*, [1934] S.C.R. 609; *R. v. Squire*, [1977] 2 S.C.R. 13; *Pappajohn v. The*

Queen, [1980] 2 S.C.R. 120; *Osolin, supra*; *Park, supra*; *R. v. Finta*, [1994] 1 S.C.R. 701. This long-standing formulation of the threshold question for putting defences to the jury accords with the nature and purpose of the air of reality test. We consider that there is nothing to be gained by altering the current state of the law, in which a single clearly-stated test applies to all defences. See *Osolin, supra*; *Park, supra*; *Finta, supra*. There is no need to invent a new test, to modify the current test, or to apply different tests to different classes of cases.

(1) The Basic Features of the Air of Reality Test

50 The principle that a defence should be put to a jury if and only if there is an evidential foundation for it has long been recognized by the common law. This venerable rule reflects the practical concern that allowing a defence to go to the jury in the absence of an evidential foundation would invite verdicts not supported by the evidence, serving only to confuse the jury and get in the way of a fair trial and true verdict. Following *Pappajohn, supra*, the inquiry into whether there is an evidential foundation for a defence is referred to as the air of reality test. See *Park, supra*, at para. 11.

51 The basic requirement of an evidential foundation for defences gives rise to two well-established principles. First, a trial judge must put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused. Where there is an air of reality to a defence, it should go to the jury. Second, a trial judge has a positive duty to keep from the jury defences lacking an evidential foundation. A defence that lacks an air of reality should be kept from the jury. *Wu, supra*; *Squire, supra*; *Pappajohn, supra*; *Osolin, supra*; *Davis, supra*. This is so even when the defence lacking an air of reality represents the accused's only chance for an acquittal, as illustrated by *R. v. Latimer*, [2001] 1 S.C.R. 3, 2001 SCC 1.

52 It is trite law that the air of reality test imposes a burden on the accused that is merely evidential, rather than persuasive. Dickson C.J. drew attention to the distinction between these two types of burden in *R. v. Schwartz*, [1988] 2 S.C.R. 443, at p. 466:

> Judges and academics have used a variety of terms to try to capture the distinction between the two types of burdens. The burden of establishing a case has been referred to as the "major burden," the "primary burden," the "legal burden" and the "persuasive burden." The burden of putting an issue in play has been called the "minor burden," the "secondary burden," the "evidential burden," the "burden of going forward," and the "burden of adducing evidence." [Emphasis added.]

The air of reality test is concerned only with whether or not a putative defence should be "put in play", that is, submitted to the jury for consideration. This idea was crucial to the finding in *Osolin* that the air of reality test is consistent with the presumption of innocence guaranteed by s. 11(d) of the *Canadian Charter of Rights and Freedoms*.

> **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.
>
> **55** Whether or not there is an air of reality to a defence is a question of law, subject to appellate review. It is an error of law to put to the jury a defence lacking an air of reality, just as it is an error of law to keep from the jury a defence that has an air of reality. See *Osolin, supra*; *Park, supra*; *Davis, supra*. The statements that "there is an air of reality" to a defence and that a defence "lacks an air of reality" express a legal conclusion about the presence or absence of an evidential foundation for a defence. (Underlining mine)

[209] My highlighting the 12 or more references in these passages of the judgment which emphasize the requirement that there must be an "evidential foundation" before a defence is "put in play" for a jury's consideration, serves to underscore the trial judge's responsibility to make a threshold determination as to whether the evidence discloses a real issue to be decided by the jury. I say Cacchione, J. recognized his responsibilities and, based on his view of the evidence, suitably informed by the positions taken by counsel in their final addresses to the jury, he concluded – properly in my view – that there was no evidential foundation to support the lesser alternative verdict of manslaughter based on a theory that Ms. Page died after suffering a heart attack during a physical altercation with the appellant. As I view this record, the judge was correct in his conclusion that the facts did not provide an air of reality to a lesser verdict option based on unlawful act manslaughter, and so cannot be said to have erred by refusing to charge on it. But even if there had been an air of reality to such a charge, I say the judge would still be bound to consider defence counsel's repeated entreaties (that he not charge)

and whether such a lesser verdict option would have been completely incompatible and inconsistent with the only defence ever advanced, before deciding whether to charge the jury.

[210] Had there been an acknowledgement by Mr. MacLeod that he had struggled with Ms. Page and that during the course of their struggle the added stress might have caused her cardiac arrest but that he never intended to kill her, then the trial judge would, I agree, have been obliged to leave manslaughter to the jury. But, that is not what happened in this case.

[211] The law with respect to the application of the air of reality test was most recently addressed by the Supreme Court in **R. v. Gauthier**, 2013 SCC 32 and **R. v. Pappas**, 2013 SCC 56. **Pappas** was a case where the accused confessed to killing his victim but at trial relied upon his confession as evidence of provocation. He maintained that he had "snapped" and killed the victim following the implied threat to harm his mother. He argued that the defence of provocation applied to reduce the verdict from murder to manslaughter. The trial judge left the defence to the jury, but the jury rejected it. The accused appealed, arguing that the trial judge's instructions to the jury on provocation were flawed. The Alberta Court of Appeal held that the defence of provocation was properly left with the jury and that there were no errors in the judge's charge. On appeal to the Supreme Court of Canada, the appeal was dismissed. Writing for the majority, Chief Justice McLachlin held that there was no air of reality to the subjective element of the defence of provocation on the evidence, and that therefore the defence should not have been left to the jury. Accordingly, any errors in the trial judge's instructions to the jury were irrelevant, the appeal was dismissed, and the conviction for second degree murder was affirmed. In separate reasons concurring in the result Fish, J. said that the trial judge did not err in leaving provocation to the jury, but he would dismiss the appeal for the reasons given by the majority of the Court of Appeal.

[212] In her decision, McLachlin, C.J.C. described the difficult task facing trial judges in such circumstances:

> [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.
>
> [23] The ability of the trial judge to engage in "limited weighing" depends on the type of evidence on the record. "If there is direct evidence as to every element of the defence, whether or not it is adduced by the accused, the trial judge must put the defence to the jury": *Cinous*, at para. 88. The trial judge may not engage in any weighing of direct evidence, since this would require a consideration of the inherent reliability of the evidence.
>
> [24] "Direct evidence is evidence which, if believed, resolves a matter in issue": *Cinous*, at para. 88, citing D. Watt, *Watt's Manual of Criminal Evidence* (2001), at §8.0. However, "the mere assertion by the accused of the elements of a defence does not constitute direct evidence, and will not be sufficient to put the defence before a jury": *Cinous*, at para. 88. An air of reality "cannot spring from what amounts to little more than a bare, unsupported assertion by the accused", which is otherwise inconsistent with the totality of the accused's own evidence: *R. v. Park*, [1995] 2 S.C.R. 836, at para. 35, *per* L'Heureux-Dubé J. For example, in *R. v. Gauthier*, 2013 SCC 32, [2013] 2 S.C.R. 403, this Court, *per* Wagner J., suggested that a single statement made by an accused that is otherwise inconsistent with the accused's "principal narrative" is insufficient to give an air of reality to a defence: paras. 60-61.
>
> [25] Where the evidence instead requires the drawing of inferences in order to establish the elements of a defence, the trial judge may engage in a limited weighing to determine whether the elements of the defence can reasonably be inferred from the evidence. "The judge does not draw determinate factual inferences, but rather comes to a conclusion about the field of factual inferences that could reasonably be drawn from the evidence": *Cinous*, at para. 91. In conducting this limited weighing, the trial judge must examine the totality of the evidence: *Cinous*, at para. 53; *Park*, at para. 13, *per* L'Heureux-Dubé J.
>
> [26] As discussed in *Cairney*, in cases where there is a real doubt as to whether the air of reality test is met, the defence of provocation should be left to the jury. However, this principle does not exempt the trial judge from engaging in a limited weighing of the evidence, where appropriate. The fact remains that the trial judge exercises a gatekeeper role in keeping from the jury defences that have no evidential foundation. Defences supported only by bald assertions that cannot reasonably be borne out by the evidence, viewed in its totality, should be kept from the jury. (Underlining mine)

[213] **Gauthier** was a case where the appellant was charged with being a party, together with her spouse, to the murder of their three children. During her jury trial she claimed to be in a disassociative state such that she could not have formed

the specific intent to commit the murders. In the alternative, should her argument based on the absence of *mens rea* be rejected, she claimed to have abandoned the common purpose of killing the children and that she had clearly communicated her intention of abandonment to her spouse. The jury found her guilty of first degree murder. The Court of Appeal upheld the guilty verdict, finding that the trial judge had not erred in refusing to put the defence of abandonment to the jury, since it was incompatible with the defence's principal theory. In dismissing the appeal, Wagner, J. for the majority of the Supreme Court held that in the circumstances of that case it was wrong for the judge to have put the defence of abandonment to the jury. The defence of abandonment did not apply, not because it was "incompatible" with the primary defence but rather because the evidential record would not permit a jury to reasonably conclude that the appellant had abandoned their common unlawful purpose. In dissent, Fish, J. held that it was a question for the jury to determine whether the appellant's words and conduct were believable and sufficient to demonstrate timely and unequivocal abandonment. He would have ordered a new trial so that a jury would be able to judge the merits of her defence, however weak.

[214] I recognize that in **Gauthier**, Wagner, J. observed:

> [34] In conclusion, there is no cardinal rule against putting to a jury an alternative defence that is at first glance incompatible with the primary defence. The issue is not whether such a defence is compatible or incompatible with the primary defence, but whether it meets the air of reality test. In any case, the trial judge must determine whether the alternative defence has a sufficient factual foundation, that is, whether a properly instructed jury acting reasonably could accept the defence if it believed the evidence to be true.

But I do not read the Court's direction as an admonition that trial judges are to ignore the strategies and positions taken by the defence at trial, or turn a blind eye to whether charging a jury on an alternative defence (verdict) will be inconsistent or incompatible with the primary defence. I do not view the current state of the law to be as absolute or rigid as that. Rather, in my respectful opinion, the trial judge's duty to review the evidence to see whether the alternative defence has a proper factual foundation will necessarily be informed by a consideration of the strategic position adopted by defence counsel during the trial. In other words, while the trial judge is bound to consider the presence or absence of an evidential foundation supporting a defence before deciding whether to charge a jury on that defence, I say such an inquiry will, for all practical purposes, need to take into account the strategies employed by the defence in presenting their case. As I see it,

that inquiry still obliges the trial judge to ask whether the alternative defence would be inconsistent or incompatible with the primary defence such that charging the jury with regards to it would likely cause the jury confusion or effectively sabotage an accused's carefully conceived defence.

[215] Put another way I certainly accept that a judge's duty to follow the law in charging a jury is not dictated by counsel's view. I appreciate that counsel's approach to the evidence is not dispositive and in no way trumps or serves as a substitute for the trial judge's duty to assess the evidence and come to his or her own conclusion as to whether the air of reality test has been satisfied. I am simply saying that in conducting such an inquiry as to the evidential foundation for any defence and deciding whether the judge is bound to charge, or refuse to charge, then surely the judge, as part of that determination, is expected to consider the strategies adopted by the accused at trial and ask himself or herself whether charging a jury on an alternative defence which is completely inconsistent and incompatible with the accused's primary defence might sabotage the accused's right to shape his own defence by confusing the jury and getting in the way of a fair trial and true verdict.

[216] Justice Fish put it well when writing for the majority in **R. v. Graveline**, 2006 SCC 16 at ¶10-11:

> 10 In this light, the decision of defence counsel not to plead self-defence appears to us not only appropriate, but also strategically sound: first, because there is an inherent risk that advancing a weak defence will detract from a strong defence amply supported by the evidence; second, because the particular defences in issue here — automatism and self-defence — are, as the Crown suggested on the hearing of this appeal, incompatible in theory, though perhaps not always in practice. That is because self-defence implies deliberate conduct that is at odds with the fundamental premise of automatism, a state of dissociative, involuntary conduct.
>
> 11 The second aspect of this matter which makes it unusual is closely related to the first. Mindful of his duty to put before the jury any defence upon which the jury might reasonably find in favor of the accused, the trial judge felt bound to open even a weak defence that was conceptually incompatible with the position taken by defence counsel. In the result, putting self-defence to the jury for the benefit of the accused might well, instead, have impacted adversely on the manifestly stronger defence of automatism upon which the accused had chosen to rely.

[217] To like effect the observations of L'Heureux-Dubé, J. in **R. v. Park**, [1995] 2 S.C.R. 836 at ¶35 that an air of reality "cannot spring from what amounts to little more than a bare, unsupported assertion by the accused" which is otherwise inconsistent with the totality of the accused's own evidence, and the observations of Wagner, J. in **Gauthier**, **supra** at ¶60-61 that a single statement made by an accused that is otherwise inconsistent with the accused's principal narrative is insufficient to give an air of reality to a defence (both references cited with approval by the Court in **Pappas**, **supra**, at ¶24).

[218] Applying those principles to his case and, based on my assessment of the record, we see that not only was there a complete lack of an evidential foundation to support the theory that, despite his abject denials, Mr. MacLeod had been involved in a physical altercation with Ms. Page and that during their struggle she suffered a heart attack that killed her; were the defence to have asked the judge to charge the jury on a lesser verdict based on unlawful act manslaughter, it would have been completely "incompatible" with the only position ever advanced by Mr. MacLeod, which was that he had been a Good Samaritan all along and tried unsuccessfully to save Ms. Page's life by attempting CPR. I believe Justice Cacchione recognized that to charge this jury on manslaughter would, as Chief Justice McLachlin said in **Cinous**, have "invited a verdict not supported by the evidence" and "served only to confuse the jury and get in the way of a fair trial and true verdict."

[219] On this record I believe Cacchione, J. admirably fulfilled his "gatekeeper role in keeping from the jury defences that have no evidential foundation."

[220] There are sound policy reasons why appellate courts are deliberately chary when asked to intervene in cases where a trial judge's charge to the jury is later attacked for "deficiency" on appeal, notwithstanding the judge's careful efforts to respect the strategic choices and positions taken by the defence at trial. The Ontario Court of Appeal expressed it well in **R. v. Levert,** [1994] O.J. No. 2627 at ¶7:

> [7] While it is the duty of a trial judge to put to the jury every defence available to the accused, it is not the duty of a trial judge to override tactical decisions of counsel for the accused by putting forward defences which are inconsistent with, or which undermine, the defence which is raised: *R. v. Lomage* (1991), 2 O.R. (3d) 621 (C.A.), at pp. 629-630. It is not in the interests of justice that an accused be given a chance to rethink his defence, on appeal, where his first trial was fair and free of substantial wrong or miscarriage of justice: *Leary v. The*

> *Queen* (1977), 33 C.C.C. (2d) 473 (S.C.C.) at pp. 483-484. The omission by defence counsel to raise s. 25(4) as a defence at trial was not only a tactical decision on the part of defence counsel but, indeed, to put that defence would have been inconsistent with the defence put at trial and could have impaired it. This is quite different from the situation in *R. v. Murray* (Ont. C.A.) unreported, Sept. 23, 1994. The trial judge committed no error in not leaving the defence of justification under s. 25(4) to the jury.

[221] The rationale for such reluctance was also aptly described by the Alberta Court of Appeal in **R. v. Roberts**, 2004 ABCA 114, ¶37:

> **37** Appeal courts are loath to permit a convicted appellant to reverse on appeal his earlier deliberate trial tactical choices. That rule applies even to choices whether to leave a certain defence to the jury: *R. v. Leary* [1978] 1 S.C.R. 29. ...

[222] So too that Court's decision in **R. v. Miljevic**, 2010 ABCA 115, ¶12:

> **12** The valuable right of an accused to shape his own defence will ultimately become hollow if we tell trial judges to ignore the shape of that defence when charging the jury. On that right, see *Swain v. A.-G. Ont*. [1991] 1 S.C.R. 933, 125 N.R. 1 (paras. 33-36). That is doubly so because defence counsel will usually know important facts which the trial judge cannot know. And it could harm the defence to insist that one arguable defence be smothered by a second arguable defence incompatible with the first one: see *R. v. Squire* [1977] 2 S.C.R. 13, 19, 10 N.R. 25 (para. 13). If we remove any defence right to keep out of the jury charge any topic ostensibly permitting an acquittal or lesser conviction, the accused may in effect be forced to testify in a jury trial. That said, it is clear law that a trial judge must in his charge to the jury put to the jury any affirmative defence that fairly arises on the evidence. In other words, an affirmative defence that possesses an "air of reality". ...

[223] The same caution and restraint was expressed by the Ontario Court of Appeal in such cases as **R. v. Chalmers**, 2009 ONCA 268 and more recently **R. v. Luciano**, 2011 ONCA 89:

> **75** The obligation of a trial judge to instruct jurors about the availability of a verdict of an included offence is *not* absolute, rather is conditioned upon an air of reality in the evidence adduced at trial to permit a reasonable jury, properly instructed, to conclude that the essential elements of the included offence have been established: see, generally, *R. v. Cinous*, [2002] 2 S.C.R. 3, at paras. 50-55; *R. v. Chalmers* (2009), 243 C.C.C. (3d) 338 (Ont. C.A.), at para. 51; *R. v. Sarrazin* (2010), 259 C.C.C. (3d) 293 (Ont. C.A.), at para. 62; and *R. v. Aalders*, [1993] 2 S.C.R. 482.

> **76** Sometimes, like here, counsel may not want a particular included offence, or a defence, justification or excuse, which may lead to an intermediate verdict, left with the jury. The reasons vary, but are often laced with tactical and practical considerations. Incompatibility with a primary defence. Presumed risk of a "compromise" verdict. An unpalatable alternative in the circumstances disclosed by the evidence.
>
> **77** To determine whether failure to instruct on an included offence reflects error, appellate courts take into account the position of counsel at trial, especially defence counsel: *R. v. Murray* (1994), 20 O.R. (3d) 156 (C.A.), at p. 171. See also, *R. v. Squire*, [1977] 2 S.C.R. 13, at p. 19; *R. v. Chambers*, [1990] 2 S.C.R. 1293, at pp. 1319-320. After all, an accused has a constitutional right, not without limits, to control his or her own defence: *R. v. MacDonald* (2008), 236 C.C.C. (3d) 269 (Ont. C.A.), at paras. 35-36; Chalmers at para. 51. See also, *R. v. Lomage* (1991), 2 O.R. (3d) 621 (C.A.), at pp. 629-30; and *R. v. Levert* (1994), 76 O.A.C. 307 (C.A.), at para. 7. No different principle applies where the included offence at issue is second degree murder.

[224] To conclude, I agree with the position taken by the Crown in its factum on appeal that an air of reality for manslaughter in this case lacks the requisite evidential foundation because:

> (i) the bruises on Ms. Page's arms could only be described by the pathologists as "recent" with no further specificity on timing or factual matrix;
>
> (ii) the Appellant's statements to the police, while self-contradictory regarding his whereabouts at the time of Ms. Page's death, unequivocally denied that he ever hurt her or laid a hand on her on the night in question (apart from resuscitation efforts) or in the past;
>
> (iii) the April 22, 2010 statement from the accused specifically denied being intoxicated or provoked at the time Ms. Page died;
>
> (iv) the evidence from the police was that there was no sign of a disturbance at the scene;
>
> (v) there was no evidence that neighbours heard a dispute at Ms. Page's apartment.

[225] On this record, putting manslaughter to the jury in the face of the appellant's consistent and only position that he never hurt Ms. Page and had only touched her when attempting to save her life, would leave the jury with radically incompatible defences. I agree with the Crown's assertion that the jury would have been faced with the following chain of reasoning:

> (i) ignore the proven lie within the 27 October, 2009 statement;

(ii) ignore the 22 April, 2010 statement;

(iii) ignore the defence expert;

(iv) if the Appellant was responsible for the death, it was because of a struggle;

(v) if the death was not from a struggle, it was from strangulation without "intent" to murder.

[226] In this context, and in the face of the appellant's statements to the police, a sudden about-face switching of theories to present an alternative manslaughter defence could only have been seen as a desperate measure, such that the appellant's primary defence would likely be tarred with the same brush. The appellant's submission would have gone something like this:

> I never hurt Ms. Page. I never laid a hand on her except to try to save her life by applying CPR. I awakened to find her on the floor, in a corner of the living room. Her skin was blue. She did not respond. I could not detect any vital signs. I attempted CPR, to no avail. I figured if she was dead, there was no point in living. I tried to kill myself.
>
> If you don't believe me, let me try this. Maybe we did argue. Maybe we did struggle. Maybe I did grab her by the arms. You can accept that all of those things did happen. She must have had a heart attack when we were struggling. But I never meant to hurt her. I did not intend to kill her.

[227] Respectfully, were such a contradictory position put to the jury, it would have given rise to the same situation this Court addressed in **R. v. Assoun**, 2006 NSCA 47 where at ¶217 we observed:

> [217] Mr. Assoun's defence at the trial was a complete denial supported by an alibi. There was no hint by Mr. Murray while he represented the appellant that there might be a defence of intoxication or provocation and Mr. Assoun made no attempt to put any evidence before the court that could raise those issues. When asked by the trial judge to comment on her plan not to instruct on manslaughter, Mr. Assoun said "I won't even comment on that, I can't". It would have been absurd for the accused to say to the jury "I did not kill her, I was not there, but if you do not accept that, then I killed her when I was drunk and/or because she provoked me". Leaving inconsistent defences with a jury might tend to either confuse them or substantially weaken the first defence of alibi, which if it raised a reasonable doubt would lead to an acquittal, while either of the other defences if successful would lead to a conviction for manslaughter. However, despite that possibility, if there was any evidence supporting an intoxication or provocation defence to the murder charge, then manslaughter as an alternative verdict should have been left with the jury. (Emphasis added)

...

[223] Although there was a good deal of evidence relating to a tumultuous relationship between Mr. Assoun and Ms. Way, there was absolutely no evidence capable of lending any support to a valid defence that he acted in the heat of passion after being provoked by her at a time proximate to the murder.

[224] In our view the trial judge did not err by failing to instruct the jury on the alternative verdict of manslaughter because there was no air of reality to either the intoxication or the provocation defences.

Conclusion

[228] And so I end where I began, by repeating this question:

> To what extent are defence counsel's express wishes and the strategies adopted at trial, to be considered when deciding to charge a jury on a defence or lesser alternative verdict, particularly where such an "alternative" would be completely inconsistent and incompatible with the position taken by the accused in answer to the charge?

[229] If the answer is "none at all" then I will stand corrected. But I do not believe that to be the law. In my view, it is an important question that is yet to be resolved.

[230] I appreciate that when deciding whether to charge, or not, a trial judge will be bound to apply the air of reality test to the evidence. If the judge is correct in concluding that an air of reality does not arise from the evidence, then the judge must not charge the jury with respect to it. I say that in fulfilling a judge's responsibility as gatekeeper, even if an air of reality arises upon the evidence, the judge will still be obliged to consider defence counsel's stratagem and whether the lesser verdict option will be compatible with the principal (or only) defence advanced, before deciding whether to charge.

[231] A trial judge must come to his or her own decision as to whether or not an evidential foundation exists which would lend an air of reality to a defence or lesser verdict, thereby requiring its inclusion in the charge to the jury. That determination is not subrogated to counsel nor dictated by counsel's view. However, I cannot conceive that a trial judge would ever charge a jury without soliciting and carefully considering counsel's advice on its content. A judge's evaluation of the factual basis said to support (or negate) the air of reality will necessarily be informed by the position taken by counsel with respect to it. In my opinion, charging a jury – against defence counsel's express wishes – with respect

to a defence shown to be completely inconsistent and incompatible with the strategic position adopted by the defence at trial, seriously impacts upon an accused's fair trial interests and right to make full answer and defence.

[232] Respectfully, Cacchione, J. did not err in refusing to charge this jury on manslaughter based on his assessment of the evidence, suitably informed by the positions adopted by defence counsel and the Crown at trial. The judge was right to conclude that there was no evidential foundation to lend an air of reality to the possibility that Mr. MacLeod had assaulted Ms. Page and that during their struggle he had unintentionally caused her death, which would then have left an unlawful act manslaughter alternative verdict open to the jury. The absence of such an evidential foundation was consistently asserted by the defence, eventually conceded by the Crown, and ultimately confirmed by the trial judge.

[233] Accordingly I find no error in the judge's charge. There is no need to invoke the curative *proviso*.

[234] As the result of the majority view will be to grant the appellant a new trial I will not address in detail his second ground of appeal challenging the admissibility of evidence said to be hearsay, except to say that in my opinion the trial judge's treatment of the impugned evidence, his reasons for admitting it, and his instructions to the jury with respect to their proper consideration of it, do not reveal any serious error which would cause me to intervene.

[235] For all of these reasons I would dismiss the appeal.

Saunders, J.A.