NOVA SCOTIA COURT OF APPEAL

Citation: ***R. v. Tower***, 2008 NSCA 3

Date: 20080117
Docket: CAC 280533
Registry: Halifax

Between:

Trevor John Tower

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Bateman, Cromwell and Saunders, JJ.A.
Appeal Heard:	December 12, 2007, in Halifax, Nova Scotia
Held:	Appeal against conviction dismissed; leave to appeal sentence granted but the appeal is dismissed per reasons for judgment of Cromwell, J.A.; Bateman and Saunders, JJ.A. concurring.
Counsel:	Joel Pink, Q.C., for the appellant Mark Scott, for the respondent

Reasons for judgment:

I. INTRODUCTION:

[1] This conviction and sentence appeal raises issues relating to intervening cause, jury instructions about self-defence and the sentencing principles for manslaughter.

[2] The appellant and a friend left a party to confront an intoxicated neighbour outside who they thought was making a nuisance of himself. In the altercation that followed, the appellant took a set of long-handled pruning shears and, with a baseball-style swing, hit the neighbour across the back. This fractured two of his ribs and ruptured his spleen. Refusing all offers of medical assistance, he died in police custody two days later. At his manslaughter trial before Wright, J. and a jury, the appellant argued that he had acted in self-defence and that it was not the injuries he had inflicted but the deceased's failure to get medical treatment and the police failure to follow their policies respecting medical assistance for injured prisoners which had been the causes of death. He was convicted and sentenced to five years imprisonment.

[3] On his conviction appeal, the appellant says that the judge wrongly excluded evidence supporting his defence of intervening cause and misdirected the jury concerning self-defence. On his sentence appeal, the appellant contends that the judge attached undue weight to denunciation and deterrence and gave insufficient weight to the appellant's prospects for rehabilitation.

[4] I would dismiss the appeal. In my opinion, the judge did not err in excluding the evidence he did; he correctly ruled that the alleged failure to follow police policy was not capable in this case of being an intervening cause. As to self-defence, the judge's instructions, assessed as they must be as a whole and in light of the trial evidence, were correct. With respect to the sentence, the judge correctly decided that this senseless killing called for a strong response to denounce gratuitous violence and to deter the appellant and others tempted to follow his example.

II. THE CONVICTION APPEAL:

A. First Issue: Intervening Cause:

[5] At trial, the defence contended that the appellant should be acquitted of manslaughter because two causes of death intervened after the blows he struck: first, the deceased's failure to get medical attention and second, the failure by police to follow their operational policies about medical care for injured prisoners. The judge did not allow the defence to pursue this second alleged intervening cause. He refused to permit the defence to put in evidence the Halifax Regional Police Service Standard Operating Policies and Procedure Manual or to pursue this line of questioning in cross-examination. The appellant says the judge was wrong to exclude evidence about this second alleged intervening cause.

[6] This is a question of law reviewed on appeal for correctness.

[7] I would reject this ground of appeal. Even if the police failed to follow their policy, the judge was correct to rule that this could not, in law, have been an intervening cause of the deceased's death in this case. To explain my conclusion, I will first briefly summarize the relevant evidence at trial, then turn to the pertinent legal principles and why I think the judge correctly applied them in this case.

1. Brief outline of the evidence:

(a.) The deceased's refusal of treatment:

[8] There was conflicting evidence on many points. I will provide a brief overview here and deal with the evidence more specifically in connection with my analysis of the issues. I have drawn heavily on the judge's summary of the facts in his sentencing reasons.

[9] On the evening of November17, 2004, the appellant was attending a party in the apartment of one of his friends. Mr. Grismajer, the deceased, lived in a neighbouring apartment with two roommates. He appeared outside intoxicated and agitated, yelling and ranting. The appellant and his friend, Scott Ross, went outside to confront him about his behaviour.

[10] The witnesses at trial had differing versions of how the ensuing altercation unfolded. There was evidence that the appellant and Mr. Ross repeatedly said to Mr. Grismajer that they did not want crackheads, meaning cocaine users, in the neighbourhood. Mr. Grismajer may have thrown an empty liquor bottle in the direction of the appellant, narrowly missing him, although there was conflicting evidence on that point. There was also evidence that Mr. Grismajer picked up something like a pole or stick and advanced toward the appellant and his friend.

[11] According to the appellant's voluntary statement to the police, he then picked up a set of long-handled pruning shears consisting of two parallel aluminum bars, each about three feet long, coupled to a pair of shears. He stepped forward and forcefully struck Mr. Grismajer across the back with either one or two blows with the shears using a baseball style swing. There was also evidence that during the altercation, Scott Ross kicked the deceased twice in the front and/or punched him.

[12] Police and paramedics arrived. The deceased refused to allow the paramedics to do a preliminary physical check, denied he had any injuries except a bleeding lip and made it clear that he was not interested in an assessment or any EHS involvement of any kind. He refused to go to the hospital and returned to his apartment.

[13] The next day he was in pain. His roommates repeatedly tried to get him to go to the hospital. He refused. There was evidence he even had been driven to the hospital but refused to get out of the car.

[14] The next day, November 19, the deceased was involved in an altercation with his roommates. The evidence did not suggest that he received any further injuries during this second incident. The police were called and took the deceased into custody, noting that he was intoxicated and in pain.

[15] The trial judge in his charge to the jury summarized what the police did with respect to medical treatment for the deceased:

> Constable Bruce then asked him if he needed medical attention either by calling EHS right then and there, or by going to the hospital. Constable Bruce said that Grismajer did not respond to that request at all. In the result, Constable Bruce said, "Well, I'll take that as a No," being aware as he was from his conversation

> with Godin that Grismajer had refused medical treatment from EHS when the incident happened and had similarly refused such attempts by his roommates.
>
> [Mr.] Grismajer was then arrested for public intoxication and taken to the booking area at the police station. It was there that Constable Bruce first saw the bruising on Grismajer's back, but in his experience, it wasn't a fresh bruising. With the knowledge he had, Constable Bruce used his discretion which means he made a judgment call, not to call in EHS to the police station. Constable Bruce said that to him overall everything seemed normal and fine and he had in his mind given Grismajer every opportunity at the scene of the arrest to get medical assistance from EHS there or to be taken to the hospital.

[16] As noted, Mr. Grismajer died during the night while in custody.

(b.) The medical evidence about cause of death:

[17] The expert medical evidence at trial was that the deceased died as a result of bleeding caused by either one or two blows from the long-handled pruning shears.

[18] Dr. Shawwa opined that the cause of death was a rupture of the spleen due to a fracture of the ninth and tenth ribs from a blunt trauma to the left side of the body. The laceration to the spleen from the fractured ribs led to bleeding which was ultimately enough to rupture the capsule which is a thin membrane surrounding the entire spleen. The escape of such a large amount of blood resulted in there not being enough blood to sustain circulation in the body which led to heart failure and then death. He estimated the injury had occurred approximately two days before death.

[19] Dr. Jones' opinion was mostly to the same effect. She was of the view that the injury had been inflicted by an object with two parallel cylindrical bars or parts that were separated but came together at some point. She thought that two blows had been struck with this instrument. She found no signs of bruising on the deceased's front that would indicate that he had been kicked there.

[20] Both doctors agreed that a competent medical assessment would have revealed the spleen injury. Dr. Shawwa thought that if the deceased had received medical treatment without complications before the rupture of his spleen had occurred, the deceased would have survived the injury. Dr. Jones said that while

surgery would have increased his chances of survival, there were no guarantees given the possibility of other complications.

2. The contested evidence and the judge's ruling:

[21] Sergeant Donald Moser was the principal investigator in this matter. He was cross-examined by defence counsel about the Standard Operating Policies and Procedure Manual as it pertained to the handling of prisoners. In particular, defence counsel put to the witness s. 2.6(b).1(a) of the Policy. It provided that the "arresting transporting officer at the scene will immediately request the attendance of EHS personnel to give medical treatment to any prisoner who appears or is known to have been showing signs of injury, illness or unconsciousness."

[22] Crown counsel objected, in part on the basis that "... nothing the police did contributed to the cause of death..." Defence counsel responded that he wished to lead evidence of the text of the policy and argue to the jury that the police failure to adhere to it was an intervening cause that interrupted the chain of causation. Defence counsel also in effect asked the judge to rule on the larger question of whether he would leave to the jury the issue of whether the alleged failure of the police to follow the policy was an intervening cause.

[23] The judge ruled that defence counsel would not be permitted to cross-examine Crown witnesses about the alleged failure of the police to strictly comply with departmental policy on the care and handling of prisoners. He concluded that any failure by the police to adhere to this policy could not be an intervening cause of death:

> ... I do not anticipate ... that the defence of intervening cause could realistically extend to the failure of the police to strictly follow its policy for the care and handling of injured prisoners. There's no suggestion that there will be any evidence that the police prevented, refused or somehow hindered [the deceased] from getting timely medical treatment. (AB 98)

3. Legal principles:

[24] In my respectful view, the judge's ruling was correct.

[25] To be convicted of manslaughter, the accused's acts must have been a significant contributing cause of the deceased's death: **R. v Nette**, [2001] 3 S.C.R. 488. The accused's actions do not have to have been the sole cause of death; there may be other contributing causes. However, the law recognizes that other causes may intervene to "break the chain of causation" between the accused's acts and the death. This is the concept of an "intervening cause", that some new event or events result in the accused's actions not being a significant contributing cause of death: see, e.g., Kent Roach, **Criminal Law**, 3rd ed. (Toronto: Irwin Law, 2004), Chapter 2, section B(2)(d).

[26] The law of intervening cause is not highly developed in Canada. However, both the Supreme Court of Canada and this Court have said that the effect of the accused's acts must have subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event: **R. v. Hallett**, [1969] S.A.S.R. 141 (S.C. in banco); **R. v. Harbottle**, [1993] 3 S.C.R. 306 at 324; **R. v. Nette**, 2001 SCC 78, [2001] 3 S.C.R. 488 at para. 78; **R. v. Reid**, 2003 NSCA 104, [2003] N.S.J. No. 360 (Q.L.)(C.A.) at paras. 72-73.

[27] The question facing the judge was whether the alleged failure of the police to follow their policy could, in law, constitute an intervening cause which the jury should consider.

[28] In my view, the judge correctly answered this question in the negative. As the judge pointed out, it was not suggested that the police conduct prevented or hindered the deceased from getting medical attention or that the police had authority to force the deceased to accept it. Given the uncontradicted evidence of the deceased's repeated and consistent refusal of treatment, evidence upon which the defence relied, any failure of the police to follow their departmental protocol could not realistically be seen as an intervening cause.

[29] That, strictly speaking, is sufficient to deal with the appellant's submission on the appeal. I should, however, comment on one other matter in light of the way the appeal was argued.

[30] The judge, as noted, charged the jury that the deceased's failure to get medical treatment could be an intervening cause of death. On appeal, the appellant

says that, if these instructions were appropriate, it would have been equally appropriate for the judge also to have charged the jury that the alleged failure by the police to follow their policy could be an intervening cause. In short, the appellant's argument is premised on the correctness of the judge's decision to leave to the jury the deceased's failure to get treatment. The Crown does not accept that premise. While we do not have to finally decide this question here, I wish to be clear that nothing I have said should be taken as accepting this premise.

[31] The common law of causation in criminal law has generally held that failing to obtain medical treatment, or receiving inadequate treatment, could not break the chain of causation between an injury and death. The **Criminal Code** may well reinforce this view.

[32] In the mid-nineteenth century, an English jury was told that if an accused inflicted the wound that ultimately caused death, it did not matter that it led to the death of the deceased because he had not adopted the best mode of treatment: **R. v. Holland** (1841), 2 M. & Rob. 351; 174 E.R. 313 at 314. In a more recent English case, the stabbing victim's refusal on religious grounds of a blood transfusion which would have saved her life was found not to break the chain of causation: **R. v. Blaue**, [1975] 3 All E.R. 446 (C.A., Crim. Div.)

[33] To the same effect is the Canadian case of **R. v. Hall**, [2002] A.J. No. 5 (Q.L.)(C.A.). The victim was rendered unconscious by a vicious beating leaving him comatose and helpless. Eventually, a family and medical decision was made to discontinue life support. The judge's instruction to the jury that this did not constitute an intervening cause was upheld, the Court noting that "[t]he heavy preponderance of Canadian appellate authority" supported the view that in a case of that kind, there was no intervening act such that the actions of the accused could no longer be said to be substantially connected with the death of the deceased. More recently, in **R. v. M.N.**, [2004] Nu. J. No. 7 (Q.L.)(C.J.), the trial judge held, in the circumstances of that case, that the decision by the victim's family and care-givers not to pursue aggressive medical treatment was not an intervening cause: paras. 4 - 19.

[34] Relevant as well is s. 224 of the **Criminal Code** which provides:

> 224. Where a person, by an act or omission, does any thing that results in the death of a human being, he causes the death of that human being notwithstanding

> that death from that cause might have been prevented by resorting to proper means.

[35] The inflexible application of this approach has been criticized as leading to unduly harsh results, particularly in cases in which very minor, untreated injuries lead to death: see for example Don Stuart, **Canadian Criminal Law**, 5th ed. (Toronto: Thomson Carswell, 2007) at 155 - 157. However, this is not such a case. The injury which the jury concluded the appellant inflicted required major surgery with all its inherent risks. The medical evidence suggested that the victim's prognosis of survival following the required surgery depended on appropriate follow-up care which may have been inconsistent with his life-style. In short, if the jury was persuaded that the appellant's assault caused the rib fractures and the ruptured spleen, the victim, even with the appropriate care, received a very serious injury at the appellant's hands.

[36] I conclude that the judge did not err in law in excluding evidence about the police policy offered in evidence by the defence.

B. Second Issue: Instructions on Self-defence:

[37] The appellant contends that there was a critical omission in the judge's instructions to the jury on self-defence. Self-defence could only succeed in this case if the jury had a doubt about whether the deceased assaulted the appellant before the appellant struck him. There was no evidence that the deceased actually struck the appellant. It was important, therefore, for the jury to understand that the deceased could have assaulted the appellant by attempting or threatening to apply force to him. The appellant's position is that the judge failed to communicate this to the jury and, as a result, the defence of self-defence was not fairly put before them.

[38] This ground of appeal raises a legal question which is reviewed for correctness. One must examine the charge as a whole, in the context of the trial evidence and the respective theories of the Crown and defence, to determine the general sense that the words used must have conveyed, in all probability, to the mind of the jury: **Daley v. The Queen**, 2007 SCC 53 at paras. 30 - 31.

[39] In my view, the judge's directions, assessed in that way, were correct. He provided the jury with the proper legal definition of assault and made it clear to

them that the question was whether the deceased had been the aggressor in the confrontation. His instructions, read as a whole in light of the trial evidence and the respective theories of the Crown and defence, could not have misled the jury.

[40] To set out my reasons for this conclusion, I will review the evidence relevant to self-defence and the judge's charge and then explain why I think it was proper.

1. Summary of evidence relating to self-defence:

[41] On the issue of self-defence, the most important evidence from the defence perspective was in the accused's statement to the police, which the Crown put in evidence, and from the defence witness, Daniel St-Pierre.

[42] In brief, the evidence was that the deceased had thrown a bottle at the appellant and/or had advanced on him armed with a stick or a pole. The judge summarized this evidence in his charge to the jury as follows:

> ... Mr. Tower described how he was attending a party in an apartment in his former neighbourhood on Waverley Terrace when a guy named Pierre came in through the door saying that there was some guy messing with him out in the alley. He said that Scott Ross immediately got up and went outside with the accused right behind him.
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> They saw a man at the top of the stairs at the next apartment and asked him in colourful language, to spare you hearing it again, what his problem was. The accused said that the man, who we now know to be Grismajer, took off his jacket, came down the stairs, reached under the stairs, and grabbed a stick or a pole which he then approached them with. The accused made no reference to any bottle being thrown by anybody. The accused said he reacted because Grismajer picked up a weapon and that's when, in his words, "I grabbed what I grabbed." The accused said that he then went up behind Grismajer and hit him once in the back to disarm him. At first, he said it was a stick of some sort, perhaps a hollow broom stick, but later he was more forthcoming and said that it was a silver pair of metal snippers, that is with two poles and a snipper at the end.
>
> After that, after the hit on Mr. Grismajer, the accused said he saw Scott Ross twice kick Grismajer frontly, followed by a punch to the face which caused Grismajer to fall to the ground. The accused said that he then just dropped the object that he had and he and Ross went back inside. He said he figured it was dealt with and that buddy had learned his lesson not to cause trouble in the neighbourhood.

And now there is the description of the incident as related as the defence witness, Daniel St-Pierre. Mr. St-Pierre is an Ace Tow Truck driver, works out of the garage on Mitchell Street at the head of Waverley Terrace. He related how he only came forward as a witness after a chance meeting with the accused on a tow truck call about four weeks ago whereupon he told the accused what he'd seen and that he should have his lawyer be in touch.

Mr. St-Pierre's evidence was that on November 17th, he was on night shift, that he was parked in his truck by the gate facing Waverley Terrace, and that between 9:15 and 9:45 that evening, he heard a commotion. He heard people yelling comments like, "lowlife" and "bunch of crackheads." He looked up and he saw three people which he estimated to be 70 to 90 feet away. He recognized two out of the three of them. He recognized the accused and Grismajer as having been regulars around that neighbourhood. He said Grismajer was on his right facing the other two. St-Pierre said that right after the "crackheads" remark, Grismajer threw a bottle at the other two and that they ducked and the bottle broke.

Mr. St-Pierre said that Grismajer then picked up a large stick from a pile of rubbish on the other side of the lane and charged the other two with the stick raised in the air or swung back over his head. He said he didn't know what the object was. It was perhaps three to four feet long, he said. He thought it might have been a two-handled large stick or baseball bat or perhaps a pole from a parking metre which were known to lie about in that neighbourhood. At any rate, he said that as Grismajer approached the other two with the raised object, that the accused then bent over and himself picked up an object and demonstrating with a crouched position as the witness did, he said that the accused hit Grismajer in the back on the left side with that object before Grismajer could strike him.

When asked to explain how that was possible, St-Pierre said, and again demonstrated for you in the courtroom, that as Grismajer swung the object he had in his hands back over his shoulder, his back turned automatically with that turn, and that is when he was hit. St-Pierre said that as soon as he was hit, Grismajer dropped the object he was carrying and that the third person, the guy he didn't know, then grabbed or jumped him, punched him twice and that Grismajer then fell to the ground. He said that Grismajer got up about a minute and a half later and went over to sit on the stairs. He said that the accused and the unknown person went back into the next apartment and that's when St-Pierre says he got out of there, before the arrival of the police and the ambulance.

[43] There was evidence from Mr. Godin and Mr. St-Pierre that the deceased picked up and threw a bottle at the appellant, but in his statement, the appellant said this did not occur.

[44] That, in summary, was the evidential foundation for the defence of self-defence. There was no evidence that the deceased had actually struck the appellant.

2. The judge's charge:

[45] The appellant's complaint is that the judge did not properly explain the first aspect of self-defence set out in s. 34(1) and (2), the requirement that the accused had been "unlawfully assaulted" by the deceased.

[46] The judge charged the jury on self-defence under both s. 34(1) and (2). These provisions apply where the accused has been "unlawfully assaulted." Those sections provide:

> 34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
>
> (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
>
> (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
>
> (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

(Emphasis added)

[47] An "unlawful assault" may be, but need not be, an actual blow. By virtue of s. 265(b), an assault occurs when one "... attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose..." . For ease of reference, here is the text of s. 265(1)(a) and (b):

> 265. (1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose;

(Emphasis added)

[48] In his charge, the judge dealt with the elements of self-defence as a series of questions. With respect to both s. 34(1) and (2), he asked first: "Was the accused unlawfully assaulted by [the deceased]?" In each case, his explanation of the question referred only to an assault as an application of force directly or indirectly.

[49] In relation to s. 34(1), the judge explained this question as follows:

> The first one once again is, Was the accused unlawfully assaulted by [the deceased]? Well, again I remind you, an unlawful assault as set out in Section 265 is the intentional application of force directly or indirectly by any means to the accused's body without the accused's consent. We're talking here about whether or not the accused was unlawfully assaulted by [the deceased]. Now I've already reviewed for you the different versions of the various witnesses as to how this incident unfolded. And ladies and gentlemen, it will be for you to decide as a fact who the aggressor was and whether or not the accused was first unlawfully assaulted by [the deceased]. If you are satisfied beyond a reasonable doubt that the accused was not unlawfully assaulted by [the deceased], then it follows that the accused was not acting in lawful self-defence on this basis and your consideration of this basis of self-defence would be at an end. That is, you wouldn't even have to go on to consider the remaining three questions.

[50] With respect to s. 34(2), the judge put the question and his explanation as follows:

> The first question, to repeat, Was the accused unlawfully assaulted by [the deceased]? Well, ladies and gentlemen, my instruction to you on this question is the very same as it was for the earlier basis of self-defence, except that here under 34(2), the defence may be available regardless of who the aggressor was. So if you're satisfied beyond a reasonable doubt that the accused was not unlawfully assaulted by [the deceased], then it would follow that the accused was not acting

> in lawful self-defence on this basis and your consideration of this basis of self-defence would be at an end right at this point.

[51] The defence objected to the charge and requested that the judge recall the jury to tell them that an unlawful assault for the purposes of the first question could also be an attempted or threatened application of force as provided for in s. 265(1)(b). The judge refused. The appellant now takes the same objection on appeal.

3. Analysis:

[52] The appellant's contention is, in effect, that the judge's charge would have led the jury to think that self-defence was not available unless the Crown failed to disprove that the deceased actually struck the appellant. Reviewing the charge as a whole and in the context of the evidence and the respective theories of the Crown and defence, the appellant's contention is not sustainable.

[53] I have already set out an overview of the evidence at trial. There was no evidence that the deceased actually struck the appellant. The judge's instructions and the submissions of both counsel on self-defence were premised on the issue being whether the deceased had thrown a bottle and/or advanced on the appellant with a weapon. The jury would not be quick to infer that all of the extensive discussion of self-defence in the judge's charge and the submissions of both counsel was irrelevant to the case. But that is what the jury would have to have concluded if the judge's instructions misled them as the appellant suggests.

[54] Defence counsel advised the jury that "... <u>one does not have to wait to be struck before he acts in self-defence</u>..." and further that " ... the prior acts of [the deceased] can only be used by you to conclude that on the night in question, <u>he, in fact, was the aggressor</u> person as claimed by Mr. Godin and Mr. Tower. As his [i.e, the deceased's] roommate, Doug Eldridge, stated, 'When he drinks, he is aggressive.'" (Emphasis added) Similarly, in the theory of the defence prepared by defence counsel and read by the judge to the jury during the charge, it was clear that the defence was premised on the deceased's having thrown a bottle at the appellant and proceeding towards him with an object in his hand: "Bernhard Grismajer threw a bottle at Mr. Tower and proceeded towards him with an object in his hand. Mr. Tower reacted by disarming Mr. Grismajer with one strike to the

back. Trevor Tower's act was in self-defence and he therefore cannot be held responsible in law for Mr. Grismajer's death."

[55] The Crown's submissions to the jury noted that "[i]f you're defending yourself, you're afraid that this guy is going or hit you or hurt you or kill you, then you have the right, even if you're the one that instigates it in the first place, the trouble, to defend yourself." (Emphasis added). The Crown theory, prepared by counsel and read by the judge, was based on evidence that the deceased had in fact not thrown a bottle or picked up an object to use as a weapon.

[56] If the appellant's contention were correct, the jury would have to have thought that the position of both counsel on self-defence was irrelevant to the case as both premised their positions on the absence of evidence that the deceased actually struck the appellant.

[57] The judge's review of the evidence focussed on the attempted and threatened assault by the deceased on the appellant. I have already set out the judge's review in this regard. In short, the context of the evidence, the theories of both counsel and the judge's review of the evidence made it clear that self-defence was premised on a threatened assault rather than on an actual blow.

[58] Returning to the judge's charge as a whole, there are a number of relevant passages. When the charge as a whole is read in light of the evidence and submissions of counsel, the jury could not have been misled.

[59] The judge provided the jury with copies of the relevant **Code** provisions set out on three pages. On the second of the three pages was included the text of s. 265(1)(a) and (b): Ex 16. The judge indicated that on the copies, the jury would see a series of three little dots indicating that he had omitted some provisions that do not apply in this case and might tend to confuse them. The full text of s. 265(1)(b) was included. The jury must have concluded that s. 265(1)(b), the definition of unlawful assault relied on by the appellant, was relevant to their deliberations.

[60] Immediately before the section of his charge dealing with self-defence, the judge explained the elements of the offence of assault with a weapon. He asked the jury to "put your hands on Exhibit 16 [i.e. the three pages of **Criminal Code**

provisions] which was handed out this morning" and which, as noted, included the text of s. 265(1)(a) and (b). He stated that "I am going to give you a specific instruction on self-defence but before doing so, I want to first instruct you on the essential elements of the offence of assault with a weapon...". He then referred the jury to the definition of assault and read out the text of both s. 265(1)(a) and (b). His reading of these provisions came one transcript page before the section of the judge's charge dealing with self-defence.

[61] The judge's introductory comments about self-defence made clear that self-defence was not limited to a scenario in which the deceased actually struck the appellant. The judge said, for example, that "... our law allows us to use force in defending ourselves from attack..." and that there had been evidence in the case that "... the accused may have acted in self-defence." He also said that there are limits on "... when and how much force may be used by a person who is attacked or believes he is going to be attacked." (Emphasis added) None of this suggested or was even consistent with the proposition that self-defence would be available only if the deceased actually hit the appellant.

[62] In his directions with respect to the question of whether the deceased had unlawfully assaulted the appellant, the judge referred to s. 265 of the **Code** which he had read, in its entirety, to the jury only moments before and a copy of which they had in front of them. He then put the issue in these words: "... it will be for you to decide as a fact who the aggressor was and whether or not the accused was first unlawfully assaulted by [the deceased]." (Emphasis added) The reference to aggressor could only have been understood as being linked to the defence evidence that the deceased had first thrown a bottle at and/or picked up a weapon and advanced on the appellant.

[63] In his "**W.D.**" instruction in relation to self-defence, the judge once again made it clear that it was not necessary that the deceased actually have struck the appellant. The judge said: "[i]f you believe the accused's evidence that he only meant to disarm [the deceased] who had grabbed a stick or pole in the confrontation and that he had no choice but to hit him with the shears in the manner that he did in self-defence ... then you must find Mr. Tower not guilty of any offence." (Emphasis added).

[64] When the charge is read as a whole, in the context of the trial evidence and of the theories of the defence and the Crown, the jury could not have been misled by the judge's failure to refer specifically to an unlawful assault as defined in s. 265(1)(b) in his discussion of the first question in the detailed directions on self-defence.

[65] I would find no error of law and dismiss this ground of appeal.

III. THE SENTENCE APPEAL:

A. Overview of the Appellant's Position, Standard of Review and the Judge's Reasons:

[66] The appellant submits that there are two main errors in the judge's reasons for sentence: he wrongly thought that the deceased's failure to get medical assistance was not a mitigating circumstance and he failed to give any or sufficient weight to the appellant's prospects for rehabilitation.

[67] The discretion of a sentencing judge should not be interfered with lightly. The appellant accepts that our role on a sentence appeal is to intervene only if there is an error in principle, a failure by the sentencing judge to consider a relevant factor or an overemphasis of the appropriate factors or if the sentence is demonstrably unfit in the sense that it is clearly excessive or inadequate: see, e.g. **R. v. M. (C.A.)**,[1996] 1 S.C.R. 500 at paras. 90 - 91.

[68] The judge imposed a sentence of 5 years imprisonment. He acknowledged that the range of sentences for manslaughter is very wide. He concluded that the appellant had not intended to place the deceased's life in jeopardy or to cause him bodily harm that he knew was likely to cause death. He noted that there was an element of chance in the resulting death. Taking these factors into account, he did not place the offence at the "near-murder" end of the spectrum of manslaughter offences. Rather, he found that this offence was roughly at the mid-point between "near murder " and "near accident".

[69] Relying on **R. v. Henry**, 2002 NSCA 33, 203 N.S.R. (2d) 40, the judge concluded that " ... a pivotal factor in the determination of a fit sentence for a manslaughter offence is an assessment of the moral blameworthiness of the

offender.". He found that the appellant had a considerable degree of moral blameworthiness. The appellant's actions, in the judge's view, showed "predatory callousness" by putting himself into a position of confrontation to "teach a lesson" to a smaller, intoxicated man.

[70] The judge rejected the appellant's contention that any provocation by the deceased should be considered as a mitigating factor or that the deceased's failure to seek medical attention reduced the level of the appellant's moral blameworthiness. The judge took into account the appellant's desire and improved prospects for rehabilitation and that he was badly needed at home to assist in caring for his disabled wife and infant child. He concluded, however, that these could not "trump" the need for a sentence of more than two years incarceration to denounce the appellant's unlawful conduct and to deter him and others from committing similar offences involving extreme violence.

B. Analysis:

1. The deceased's failure to get treatment:

[71] The appellant submits that the judge erred by refusing to accept as a mitigating circumstance the deceased's failure to get appropriate medical treatment for the injury which the appellant inflicted on him. Relying on statements in **Nette** at para. 49 and in **R. v. Thompson** (1988), 1 M.V.R. (2d) 322 (B.C.Co.Ct.), the appellant says that contributory negligence on the part of the victim may be considered as a mitigating circumstance and that the judge should have done so here.

[72] There is considerable controversy in the case-law about the propriety of taking the victim's contributory negligence into account as a mitigating circumstance: see, in addition to the authorities cited in the previous paragraph, Clayton C. Ruby, **Sentencing**, 6th ed. (Toronto: LexisNexis Butterworths, 2004) at para 5.278; **R. v. Dash** (1948), 91 C.C.C. 187 (N.S.S.C. *en banc*); **R. v. Duncan**, [1994] P.E.I.J. No. 24 (Q.L.)(S.C.A.D.); **R. v. McCarthy**, [1997] N.J. No. 262 (Q.L.)(N.L.S.C.A.D.). In my view, we need not resolve the controversy in this case.

[73] The judge's focus was not so much on the tragic consequences of the appellant's acts, but on the nature of the acts that constituted the offence. This was by no means a trivial assault with consequences out of all proportion to the injury inflicted. The judge found that the appellant had used "an improvised weapon" - long-handled pruning shears with three-foot long parallel bars attached - with "great force," using a "baseball style swing," likely twice, after the deceased had turned away. The blow or blows fractured two of the deceased's ribs so that they lacerated the spleen. While proper medical attention likely would have saved the deceased's life, the judge made no error in concluding that the appellant's acts, in the context in which he committed them, gave him a considerable degree of moral blameworthiness.

[74] While the judge refused to take the deceased's failure to get medical treatment into account as such, the judge did take into account, as one of the factors which placed this offence at the mid-point between near accident and near murder, that there had been an "element of chance" in the deceased's death. Even assuming that contributory negligence on the part of the victim may in some circumstances be considered as a mitigating circumstance, the judge did not err in refusing to do so here given the nature of the appellant's acts and given that the judge factored this "chance element" in the deceased's death into his analysis of the appellant's blameworthiness.

[75] I find no reversible error in the judge's consideration of the effect on the sentence of the deceased's failure to obtain medical treatment.

2. The appellant's prospects for rehabilitation:

[76] The appellant submits that the judge failed to consider the principle of rehabilitation and relied solely on the principles of general and specific deterrence. I cannot accept this submission.

[77] In determining whether a period of imprisonment in excess of two years is called for, a judge should consider, to the extent necessary, the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2: **R. v. Proulx**, [2000] 1 S.C.R. 61 at para. 59. The judge in this case correctly instructed himself on the principles of sentencing, noting that one of the objectives is to assist in the rehabilitation of offenders. He acknowledged that he was obliged to take into

account, among other things, the personal characteristics of the offender. The judge referred to the appellant's desire and improved prospects for rehabilitation and to the fact that he was needed at home to care for his disabled wife and infant child. The judge referred in detail to the evidence by the appellant's wife at the sentencing hearing, to the sympathetic circumstances set out in the pre-sentence report and to the appellant's expression of remorse. The judge's reasons show that he considered all relevant matters, including the appellant's prospects for rehabilitation. However, as the Supreme Court of Canada recognized in **Proulx, supra**, incarceration may be required to meet the need for denunciation and deterrence: paras. 106 - 7. The judge decided that this was such a case. He did not err in doing so.

[78] "Denunciation," wrote Lamer, C.J.C. in **Proulx**, "is the communication of society's condemnation of the offender's conduct": at para. 102. It is a "... collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values ...": **M.(C.A.), supra** at para. 81. The appellant's conduct was a serious affront to the values of our society. He left a party to confront his victim, demonstrated what the judge termed "predatory callousness" in his assault on a smaller, intoxicated man as part of an excessive and unwarranted response to the situation. He inflicted life-threatening injuries with a weapon while the victim turned away. The victim's death was a direct result. The appellant's conduct combined vigilantism, bravado and brutality. It resulted in the most serious consequence possible, the loss of a human life. The judge did not err in concluding that this conduct must be clearly and forcefully denounced.

[79] The objective of a deterrent sentence is to make clear to the offender and others that serious consequences will follow the commission of crimes like that committed by the offender: see, e.g. **Ruby**, paras. 1.23, 1.24. The Court has recognized that deterrence is an important aspect of sentences for violent offences: see, e.g. **R. v. G.A.M.** (1996), 147 N.S.R. (2d) 343, [1996] N.S.J. 52 (Q.L.) (C.A.); **R. v. Henry** (2002), 203 N.S.R. (2d) 40, [2002] N.S.J. No. 113 (Q.L.) (C.A.). This offence not only involved a violent assault with a weapon, but one that resulted in the loss of the victim's life. The judge was right to characterize this as an offence of "extreme violence". A strong deterrent sentence was called for.

[80] The judge directed himself correctly with respect to the legal principles, took all relevant circumstances and factors into account and concluded that, for this

offence and this offender, denunciation and deterrence must be given priority. His sentence of a five year period of imprisonment gives effect to that conclusion.

[81] In my respectful view, the judge did not err in principle or impose a sentence that was manifestly unfit. While I would grant leave to appeal the sentence, I would dismiss the appeal.

IV. DISPOSITION:

[82] I would dismiss the conviction appeal and while I would grant leave to appeal the sentence, I would dismiss the appeal.

Cromwell, J.A.

Concurred in:

Bateman, J.A.
Saunders, J.A.