File No. 40498

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF NUNAVUT)

B E T W E E N:

DANIEL HODGSON

APPELLANT

-and-

HIS MAJESTY THE KING

RESPONDENT

APPELLANT'S FACTUM
DANIEL HODGSON
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. OVERVIEW

1. On the evening of May 18, 2017, the Appellant and the deceased, Mr. Winsor, were at a house party in Iqaluit. Throughout the evening, Mr. Winsor consumed both alcohol and cocaine. In the early morning hours, a dispute broke out when the hosts and occupants asked Mr. Winsor to leave. Mr. Winsor refused to do so and became physically and verbally aggressive, engaging in a physical altercation with one of the occupants. The Appellant, who was asleep at the time in one of the bedrooms, was asked to help the others deal with Mr. Winsor. Although Mr. Winsor weighed 304 pounds (at least 100 pounds more than the Appellant), the Appellant came to the aid of the occupants when he saw Mr. Winsor make a fist. At first, the Appellant attempted to pull Mr. Winsor away by grabbing his shoulders from behind. Hampered by a pre-existing injury, the Appellant's efforts were not successful. Mr. Winsor then assaulted the Appellant elbowing him in the head. Fearing that the violence would escalate as against himself and the others, the Appellant grabbed Mr. Winsor around the neck in a head lock. Mr. Winsor reacted by attempting to use his weight to throw the Appellant off. The two men fell to the ground. In the process of the scuffle, the Appellant compressed Mr. Winsor's neck cutting off oxygen. Although the compression was brief and the entire incident happened quickly, Mr. Winsor passed out. Attempts were made to resuscitate him at the scene. Tragically, he died.

2. The Appellant was tried on a single charge of second-degree murder before a justice of the Nunavut court sitting without a jury. The Appellant testified at his trial and explained his actions and the reason he used force in the way he did. The trial judge had a reasonable doubt as to whether the Appellant had the requisite intent for murder. The court, however, accepted that the Appellant's actions were objectively dangerous and that he ought to have foreseen the possibility

of serious bodily harm or death arising from his actions such that he could be guilty of manslaughter. Ultimately, however, the trial judge concluded that the Crown had not proven beyond a reasonable doubt that the Appellant did not act in lawful self-defence in responding to Mr. Winsor's threat in the way that he did.

3. The Crown appealed the acquittal to the Nunavut Court of Appeal. On October 21, 2022, that Court unanimously allowed the Crown appeal and ordered a new trial on the charge of second-degree murder. The appellate Court concluded that the trial judge's failure to infer the requisite intent for murder from the Appellant's use of a chokehold to subdue Mr. Winsor was an error. The appellate Court also concluded that the trial judge erred in assessing the reasonableness of the Appellant's response to the threat posed by Mr. Winsor from a "purely subjective" perspective when undertaking the self-defence analysis. The Appellant applied for leave to appeal the Court of Appeal's decision to this Court to correct a miscarriage of justice. Leave was granted on May 4, 2023.

4. The Appellant makes three arguments on appeal:

1. The trial judge's assessment of whether the Appellant had the requisite intent for murder was not a reviewable question of law alone;

2. In any event, the Court below erred in concluding that the trial judge was required to infer the intent for murder from the act of a headlock, which improperly imported an objective element into the assessment of *mens rea* for murder; and

3. The trial judge did not approach the issue of the reasonableness of the Appellant's response to the threat posed by Mr. Winsor from a purely subjective perspective and the trial judge's analysis of self-defence was not tainted by any legal error.

B. FACTS

(1) A night of drinking and socializing

5. On the evening of May 18, 2017, the Appellant and Ms. Mantra Ford-Perkins were at Nova (a restaurant/bar) celebrating a friend's birthday. During the evening, Ms. Crystal Mullin, her sister (Samantha Mullin) and a long-time friend (Margaret Sikkinerk) showed up around 10:00 p.m. The Mullin sisters and Ms. Sikkinerk had earlier spent the evening at Crystal's apartment drinking wine and having dinner. Ultimately, the Appellant and Ms. Ford-Perkins ended up socializing with them at Nova together with other friends and acquaintances. When Nova closed at 11:30 p.m., the group traveled to another location (Storehouse) to continue drinking. Storehouse closed at 12:30. Crystal invited the Appellant and Ms. Ford-Perkins to return to her apartment with her sister and Ms. Sikkinerk to continue drinking. The Appellant drove to Crystal's apartment.[1]

6. Shawn Burke and his friend, Bradley Winsor (the victim), had also been out drinking the evening of May 18, 2017, into the early morning hours of May 19, 2017. Mr. Burke recalled that when the bar scene was closing, he contacted his friend – Crystal Mullin – by text. He remembered Ms. Mullin inviting the two to her home where some friends had gathered to drink. Mr. Winsor was the one who drove Mr. Burke's truck to the house party.[2]

7. Ultimately, the Mullin sisters, Ms. Sikkinerk, Ms. Ford-Perkins, the Appellant, Mr. Burke and the victim were all in Crystal's apartment socializing and drinking. As the trial judge noted

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[1] AR, Part V.2, Trial Transcript dated April 21, 2021, Evidence of Crystal Mullin, pp. 93-100.

[2] AR, Part V.1, Trial Transcript dated April 20, 2021, Evidence of Shawn Burke, pp. 38-40.

in her reasons for judgment, "because of the consumption of alcohol that night, it is impossible to know exactly what happened" leading up to the events resulting in the victim's death.[3]

8. By all reports Mr. Winsor got pretty drunk during the evening. Because of his increased level of intoxication as the night carried on, Mr. Burke repeatedly asked Mr. Winsor to give his keys back so that Mr. Winsor would not drive drunk. Mr. Winsor refused to do so and at one point became physical with Mr. Burke. Mr. Winsor had, in the past, also been known to consume cocaine although Mr. Burke had not witnessed him consume any that night. A subsequent analysis of his femoral blood showed that he had an alcohol concentration of 174 mg/100 ml of blood at the time of his death. There was also evidence that he had consumed cocaine within 12 hours of his death.

(2) Mr. Winsor "flipped" and became aggressive

9. Ms. Ford-Perkins testified that, during the course of the house party, Mr. Winsor's mood "flipped".[4] At the time, the Appellant, Samantha Mullin and Ms. Sikkinerk were in the spare bedroom. Mr. Winsor and Crystal Mullin had been intimate in the past. Mr. Winsor continued to bring up the past encounter which caused Crystal to become annoyed.[5] The victim nonetheless persisted. As Crystal was making her way to bed to get some sleep because she had to work the next day, the victim tried to go into her room pressing her to be physically intimate with him.[6] Ms.

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[3] Reasons for Judgment, AR, Part I.2, pp. 021, at para. 73.
[4] AR, Part V.2, Trial Transcript dated April 21, 2021, Evidence of Mantra Ford-Perkins, pp. 156-157.
[5] AR, Part V.2, Trial Transcript dated April 21, 2021, Evidence of Crystal Mullin, pp. 103-104.
[6] AR, Part V.2, Trial Transcript dated April 21, 2021, Evidence of Crystal Mullin, pp. 103-104.

Ford-Perkins witnessed Mr. Winsor become physically aggressive towards Crystal Mullin at this point.[7]

10. Mr. Burke was asking the victim to leave and demanded his keys back.[8] Ms. Ford-Perkins was sufficiently concerned about the victim's conduct that she went to the spare bedroom and requested that the Appellant assist them in dealing with the victim.[9]

(3) The physical altercation between the Appellant and Mr. Winsor

11. Not surprisingly, the various party goers gave differing accounts of what transpired during the physical altercation that ultimately resulted in the victim's death. The Appellant testified that he intervened when asked to do so by Ms. Ford-Perkins because the victim was being physically aggressive and refused to leave the residence. At the time, the Appellant had a significant shoulder injury that impacted his mobility. He weighed approximately 200 pounds. The Appellant testified about the physical altercation as follows:[10]

> Q. Okay. And then when you moved behind him, what did you -- what did you see, what happened?
>
> A. His hands were up in the air and his fists were clenched. He was about to swing at Mantra is what I saw. I grabbed him by the shoulders with my two hands and I tried to slow him backwards to the floor.
>
> Q. Okay. What happened when you did that?
>
> A. He elbowed me in the head.

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[7] AR, Part V.2, Trial Transcript dated April 21, 2021, Evidence of Mantra Ford-Perkins, p. 156.
[8] AR, Part V.1, Trial Transcript dated April 20, 2021, Evidence of Shawn Burke, pp. 52-54.
[9] AR, Part V.2, Trial Transcript dated April 21, 2021, Evidence of Mantra Ford-Perkins, pp. 156-157.
[10] AR, Part V.5, Trial Transcript dated April 27, 2021, Evidence of Daniel Hodgson, pp. 401-402.

Q. Okay. Then what happened?

A. I put my arms around his neck.

Q. When you say you put your arms or arm?

A. Arm. I put him in an arm lock and tried to pull him backwards.

Q. Do you remember which arm you used?

A. My right arm.

12. The Appellant further explained that as he was trying to restrain the aggressor, he used an "arm lock" or "choke hold" as follows:[11]

Q. Have you ever heard that motion -- have you ever heard that action described in any way as some sort of a ...

A. Arm lock, choke hold.

Q. Okay. But you did that. How strong were you doing that?

A. Pretty strong.

Q. Okay. So when you put the arm lock on him, what happens next?

A. My feet came off the ground.

Q. Whose feet came off the ground?

A. My feet came off the ground.

Q. How long did that last?

A. I have no idea. Very fast.

Q. Okay. When you say you have no idea, are we talking --

A. Seconds.

Q. Okay. What happens when your feet come off the ground?

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[11] AR, Part V.5, Trial Transcript dated April 27, 2021, Evidence of Daniel Hodgson, pp. 403-404.

A. He tried to swing me off his back.

Q. And then what happens?

A. He threw me to the left, and I threw my weight to the right and we hit the ground. Or he threw me this way, I went that way. We hit the ground.

13. The trial judge made the following findings of fact regarding the altercation:[12]

> [74] Regarding the specific incident, I find that when Mr. Hodgson came out of the bedroom at the request of Ms. Ford-Perkins, she and Mr. Burke were confronting Mr. Winsor in the living room. Mr. Winsor had Mr. Burke's keys and was refusing to give them back, and the two men scuffled physically. Mr. Winsor pushed Mr. Burke into the wall that separates the living room and the dining room. [Although no one else testified to this, I accept Mr. Burke's evidence that this happened to him, because it would be most meaningful to him.] Mr. Burke thought Mr. Winsor might also have pushed Ms. Ford-Perkins when she tried to intervene.
>
> [75] Mr. Hodgson thought he saw Mr. Winsor make a fist and decided to intervene. Mr. Hodgson went behind Mr. Winsor, and first tried to pull him back by the shoulders, to get him to fall to the ground. This move was not successful, and in fact Mr. Hodgson said that Mr. Winsor reacted by elbowing him in the head. No other witness noticed any of
> this, but that is not surprising: it appears that only Mr. Burke and Ms. Ford-Perkins were present at that time, and it is reasonable that they were focused on their own actions.
>
> [76] I note that the injury to Mr. Hodgson's right, dominant hand reduced his ability to pull on Mr. Winsor's shoulders and it limited other actions he could take. After being elbowed, Mr. Hodgson put a choke hold on Mr. Winsor.
>
> [77] After Mr. Hodgson put the choke hold on him, Mr. Winsor used his weight to throw him to the left to try to get him off; Mr. Hodgson threw his own weight to the right and that combined motion caused the two men to fall to the floor. Again, no one else describes these movements, but it makes sense that Mr. Winsor would try to use his body weight to break Mr. Hodgson's hold. The result agrees with Mr. Burke's evidence that after the choke hold was applied, the two men fell to the ground "quite quickly."
>
> [78] By this time, Ms. Crystal Mullin, Ms. Sikkinerk and Ms. Samantha Mullin had come into the living room. These witnesses testified that the men were standing while they tried to pull Mr. Hodgson's arm away. Since I found that the men fell to the ground quite quickly, I do not believe this happened. I accept Mr. Burke's evidence that he pulled the men on the ground apart after noticing Mr. Winsor's

[12] Reasons for Judgment, AR, Part I.2, pp. 021-022, at paras. 74-81.

> face turn blue, and after realizing that his shout to "stop" was not acted upon. I accept that most or all the others were also shouting at Mr. Hodgson to stop.
>
> [79] All the witnesses agree that the whole choking incident was over quite quickly, and all were surprised that Mr. Winsor did not recover quickly. Mr. Burke thought it was "just regular calm down" action.
>
> [80] Ms. Sikkinerk started CPR, and Ms. Samantha Mullin called Emergency Services for an ambulance, although she thought everyone was overreacting. Mr. Burke took over CPR, and Ms. Sikkinerk called the ambulance again, and waited outside for it to arrive.
>
> [81] Mr. Winsor seemed to breathe a bit during CPR, and one witness thought he had said something after the choke was over, but other evidence indicates that he had likely passed by the time the ambulance arrived.

(4) The medical evidence about the cause of death

14. Two pathologists (Dr. Milroy and Dr. Chiasson) agreed that the victim died of a neck compression.[13] There was also associated injuries associated with the use of an arm lock. As Dr. Milroy explained, when the veins and arteries to the head are compressed or blocked, a victim will become unconscious quite quickly.[14] He also suggested that the victim's other health difficulties (enlarged heart, obesity, cocaine use) would have made it less likely for the victim to survive the neck hold.[15] Both Dr. Milory and Dr. Chiasson agreed that neck compression can lead to unconsciousness in as little as 10 seconds.[16] It is not uncommon for someone to be rendered unconscious by a neck hold but to survive without death or permanent injury.

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[13] AR, Part V.6, Trial Transcript dated April 28, 2021, Evidence of Dr. Chiasson, p. 512; AR, Part V.3, Trial Transcript dated April 23, 2021, Evidence of Dr. Milroy, p. 196.
[14] AR, Part V.3, Trial Transcript dated April 23, 2021, Evidence of Dr. Milroy, pp. 192-194.
[15] AR, Part V.3, Trial Transcript dated April 23, 2021, Evidence of Dr. Milroy, pp. 195-196, 201-202.
[16] AR, Part V.3, Trial Transcript dated April 23, 2021, Evidence of Dr. Milroy, pp. 194, 202, 204; AR, Part V.6, Trial Transcript dated April 28, 2023, Evidence of Dr. Chiasson, pp. 491-492.

PART II – STATEMENT OF ISSUES

ISSUE 1: Did the Nunavut Court of Appeal exceed its jurisdiction in concluding that the trial judge's failure to infer intent for murder was a reviewable legal error?

ISSUE 2: Did the Nunavut Court of Appeal err in concluding that the trial judge was required to infer the intent for murder?

ISSUE 3: Did the Nunavut Court of Appeal err in concluding that the trial judge erroneously approached the issue of the reasonableness of the Appellant's response under s.34(2)(c) of the *Criminal Code* from a purely subjective perspective?

PART III – STATEMENT OF ARGUMENT

ISSUE 1: Did the Nunavut Court of Appeal exceed its jurisdiction in concluding that the trial judge's failure to infer intent for murder was a reviewable legal error?

A. Provincial Appellate Court jurisdiction on an appeal from an acquittal

15. Section 676(1)(a) of the *Criminal Code of Canada* limits the appellate rights of the Attorney General:

Right of Attorney General to appeal **676 (1)** The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal **(a)** against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;	**Le procureur général peut interjeter appel** **676 (1)** Le procureur général ou un avocat ayant reçu de lui des instructions à cette fin peut introduire un recours devant la cour d'appel : **a)** contre un jugement ou verdict d'acquittement ou un verdict de non-responsabilité criminelle pour cause de troubles mentaux prononcé par un tribunal de première instance à l'égard de procédures sur acte d'accusation pour tout motif d'appel qui comporte une question de droit seulement;

Provincial appellate courts do not have jurisdiction to consider a Crown appeal against an acquittal that involves a question of fact or even a question of mixed fact and law. Where a Crown appeal does not involve a question of law alone, an appellate court will have exceeded its statutory jurisdiction if it allows the appeal on that basis.

16. "A question of law alone" is one that does not involve fact finding. An issue properly framed as a question of law requires the appellate court to examine whether the trial judge appropriately applied or interpreted the law. A determination that involves the weighing of evidence or assessing whether it meets the standard of proof is not a question of law alone. It is only where a trial judge's application of legal principles to the evidence demonstrates a flawed or wrong understanding of the law or a misapprehension of the evidence that an error can properly be characterized as a question of law alone.[17] "[N]o legal error arises from mere disagreements over factual inferences or the weight of evidence".[18]

17. This Court has described the definition of a question of law alone as a "vexed question". In *R. v. J.M.H.*, 2011 SCC 45, this Court noted that, in the context of alleged shortcomings in the trial judge's assessment of the evidence, the jurisprudence had recognized four non-exhaustive situations where a question of law alone may arise:[19]

1. A finding of fact where there is no evidence to support such a finding however, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purpose of this rule (*Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at p.604; *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, at para. 22; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 33);
2. Where the trial judge fails to give legal effect to findings of fact (*R. v. Morin*, [1992] 3 S.C.R. 286, at para. 16);
3. An assessment of evidence based on wrong legal principles (*R. v. B.G.*, [1990] 2 S.C.R. 57); and
4. A failure to consider the totality of the evidence (*R. v. Morin*, [1988] 2 S.C.R. 345).

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[17] *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R 405.
[18] *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 24.
[19] *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197.

B. The question of whether the Appellant had the requisite intent for murder was not a question of law alone

18. The Crown appeal of the Appellant's acquittal on second-degree murder was not based on any question of law. The Crown did not impugn the trial judge's articulation or understanding of the law of murder. The Crown argued instead that the trial judge should have come to a different conclusion about whether the Appellant knew that his actions would cause bodily harm that was likely to cause death and was reckless to that outcome. But a determination as to criminal intent or lack thereof is not a question of law alone. It is a quintessential factual conclusion based on an assessment of the evidence by the trier of fact. Unless the accused has verbally expressed what they intended, determining intent will necessarily be grounded in inferences from all the relevant circumstances and facts as determined by the trier of fact. In the drawing of inferences, a Court is making a factual finding. Even if an appellate court concludes that the trial judge unreasonably failed to infer a particular intent, that error is a factual error and not a legal one.[20] "In other words, even if the trial judge's inference was unreasonable, it would afford the Crown no right of appeal. There is, after all, no such thing as an 'unreasonable acquittal'".[21]

19. The Court of Appeal concluded that the trial judge erred in the way she considered the question of the Appellant's intent both in respect of the manslaughter charge and in respect of murder. The Court below wrote:

> [5] While the Crown raised ***R v Lemmon***, 2012 ABCA 103, 524 AR 164 [***Lemmon***], and submitted that a chokehold was an inherently dangerous act, the trial judge did not address this issue in her reasons for acquittal, either in respect of the intent for murder or manslaughter, but, rather, appeared to accept that a chokehold was a "regular 'calm down' method" or a "known calm down move". While the respondent admitted he was trying to stop Mr Winsor from struggling, including possibly rendering him unconscious, the trial judge did not assess this

[20] *Lampard v. R.*, [1969] S.C.R. 373.
[21] *R. v. Yazelle*, 2012 SKCA 91, at paras. 11-12. See also *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 32.

> evidence with respect to what the respondent believed or intended considering the dangerousness of squeezing Mr Winsor's neck to the point of unconsciousness, or the possible recklessness of his actions. But for this error, the verdict on second degree murder may well have been different.
>
> [6] Blocking someone's airway is always an act which is more than merely transient or trifling in nature. Further as ***Lemmon*** provides at para 28: "Rendering a person unconscious, whether by choking, strangulation or suffocation, is an inherently dangerous act that is easily capable of causing death, or brain injury with devastating lifelong consequences... The difference in the outcome, between unconsciousness, brain damage and death, may be only a matter of a few additional seconds of pressure." The medical evidence and the expert testimony suggested as much in this case. As the Supreme Court of Canada provided in ***R v Cooper***, 1993 CanLII 147 (SCC), [1993] 1 SCR 146 at 159, 78 CCC (3d) 289: "Since breathing is essential to life, it would be reasonable to infer the accused knew that strangulation was likely to result in death" .[22]

20. The trial judge did not commit the errors attributed to her by the Court of Appeal. But even if she did, there was no legal error giving rise to a question of law alone. Whether a chokehold is "an inherently dangerous act" or not does not constitute a legal principle or rule that a trial judge is obligated to apply.

21. The trial judge did not fail to appreciate the objectively dangerous nature of a chokehold. It was conceded, and the trial judge found, that if the Crown had proved beyond a reasonable doubt that the Appellant was not acting in lawful self-defence, he would be guilty of manslaughter.[23] The trial judge's analysis of intent was, accordingly, focussed on whether the Crown had proven beyond a reasonable doubt that the Appellant had the subjective intention to either kill the victim

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[22] Reasons of the Nunavut Court of Appeal, AR, Part I.3, p. 033, at paras. 5-6.

[23] The trial judge expressly recognized that the Appellant would only be outright acquitted if the Crown had failed to prove beyond a reasonable doubt that he was not acting in self-defence pursuant to s.34 of the *Criminal Code* (See Reasons for Judgment, AR, Part I.2, pp. 025-026, at paras. 99-101).

or to cause him serious bodily harm that he knew was likely to cause death (i.e. the *mens rea* for murder):[24]

> [93] ***I find that it is proven beyond a reasonable doubt that Mr. Hodgson caused the death of Mr. Winsor by placing his arm around Mr. Winsor's neck in a choke hold***. It may be that another person (without cocaine and alcohol, and without an enlarged heart) would not have died from the choke hold applied, but Mr. Hodgson is responsible for that act, and it caused Mr. Winsor's death. However, the act of causing death is not all that is required to be guilty of a criminal offence; the Crown must also prove that there was guilty intent. For murder, the Crown must prove that Mr. Hodgson intended to kill or intended to cause bodily harm that he knew was likely to kill.
>
> [94] ***On all of the evidence I cannot find such intent***. This was a party that suddenly took an unpleasant turn. Mr. Hodgson was asked to intervene, and he did what he could to control Mr. Winsor. The choke hold lasted a fairly short period of time, and everyone was surprised that Mr. Winsor was not responsive after. Mr. Burke called the choke a "regular calm down," implying that he had seen that sort of choke hold before. Mr. Hodgson admitted that he had seen it used when he worked at a local bar and had performed it once before.
>
> [emphasis added.]

22. The trial judge concluded that she was not prepared, in the context of the facts as she found them, to infer that the Crown had proved the necessary intention to establish the murder charge. She relied upon the Appellant's evidence, and the other evidence she accepted, in coming to that conclusion. Although the Nunavut Court of Appeal obviously disagreed with the trial judge, that disagreement does not translate a factual finding into a legal issue. There was no misapprehension of the evidence by the trial judge. There was no failure to consider the relevant evidence. There was no failure to consider the applicable law or failure to apply it.

23. Whether the Appellant had the requisite intent to commit murder was not a question of law alone, and the Court below therefore lacked jurisdiction to allow the Crown's appeal on that basis.

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[24] Reasons for Judgment, AR, Part I.2, pp. 024-025, at paras. 93-94.

ISSUE 2: Did the Nunavut Court of Appeal err in concluding that the trial judge was required to infer the intent for murder?

24. Even if the trial judge's assessment of the issue of intent was a question of law alone, there was no reversible legal error. The primary facts found by the trial judge that informed her assessment on the issue of intent were as follows:[25]

- the victim was being physically aggressive towards the other occupants of the residence and had physically assaulted one of them (at para. 74);
- the victim may have also pushed another occupant when she tried to intervene (at para. 74);
- the Appellant reasonably believed he saw the victim make a fist and that's when he decided to intervene (at para. 75);
- the Appellant first tried to pull the victim back, but the victim then assaulted him by elbowing the Applicant in the head as confirmed by an injury he sustained (at para. 75);
- After being assaulted by the victim, the Appellant then restrained him using a choke hold. The victim resisted and they both fell to the floor as the victim used his extensive body weight to force them down (at paras. 76-77);
- Another occupant of the residence then pulled the parties apart because it appeared the victim was in distress (at para. 78); and
- Everything happened very quickly and, initially, during CPR attempts the victim appeared to be breathing on three different occasions (at paras. 80-81).

[25] Reasons for Judgment, AR, Part I.2, pp. 021-022, at paras. 74-78, 80-81.

From those facts, the trial judge concluded that she had a reasonable doubt on the issue of whether the Appellant intended to cause the victim serious bodily harm that he knew would likely result in his death. Contrary to the Court of Appeal's conclusion, there is no legal presumption that the use of a chokehold necessarily supports an inference of the intent for murder. Neither *R. v. Lemmon,* 2012 ABCA 103, nor *R. v. Cooper*, [1993] 1 S.C.R. 146, referred to by the appellate Court suggest otherwise.

25. *R. v. Lemmon,* 2012 ABCA 103 makes the commonsense observation that choking a person for the *purpose of rendering them unconscious* is an "inherently dangerous act." The case was provided to the trial judge during submissions and the Court, in any event, is presumed to know the law. The trial judge accepted that a reasonable person would foresee the risk of serious bodily harm or death arising from the use of a chokehold. That is why the Appellant would have been guilty of manslaughter if it was proven that he was not acting in self-defence.

26. *R. v. Cooper*, [1993] 1 S.C.R. 146 does not stand for the proposition that when someone uses a chokehold they *must* have the necessary intent required for murder should the person die. Even where someone purposefully strangles a victim (as Cooper did), this Court was clear to note that although it "would be reasonable to infer the accused knew that strangulation was likely to result in death" a trier of fact is "***not required to make such an inference***."[26] The trial judge's failure to infer intent could not amount to an error unless the law required her to draw that inference.

27. Turning a permissible inference into a presumptive one as the Court did below improperly injects an objective element into the assessment of *mens rea*. Elevating the inherent danger of

[26] *R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 159.

strangulation from a circumstantial piece of evidence into a necessary inference of foresight transforms the *mens rea* assessment into a reasonable person inquiry. The Court below implicitly reasoned that because "blocking someone's airway is always an act which is more than merely transient or trifling in nature", the trial judge was required to assess Appellant's intention against the fact that a person in the Appellant's position ought to have been aware of the danger. Although this appropriate in assessing the *mens rea* for manslaughter, this reasoning is inconsistent with this Court's declaration that murder constitutionally requires the Crown to prove subjective foresight of death.[27]

28. The trial judge had a reasonable doubt as to whether the Appellant subjectively appreciated that his conduct was likely to cause death. That doubt was grounded in the facts as found by the trial court. As the trial judge noted, to restrain the victim, the Appellant briefly held him in a chokehold until they both fell to the ground. The trial judge's language in the reasons for judgment make it clear that she accepted the Appellant's account that he was not trying to choke the victim out or strangle him or render him unconscious. The Appellant was simply trying to stop the victim from continuing to be physically aggressive and assaultive towards others. If the trial judge had concluded that there was a concerted and deliberate attempt to choke the victim (as in *Lemmon* where the accused choked the victim to unconsciousness for the purpose of subduing her and raping her or as in *Cooper* where the accused angered by the complainant grabbed her by the throat with both hands and shook her for up to 2 minutes until she died), that no doubt would have informed the trial judge's assessment of whether the requisite intent for murder had been established.

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[27] *R. v. Martineau*, [1990] 2 S.C.R. 633.

29. The trial judge did not commit any error in refusing to accept the Crown argument that any chokehold in any circumstances necessitated a conclusion that the requisite intent for murder was established.

ISSUE 3: Did the Nunavut Court of Appeal err in concluding that the trial judge erroneously approached the issue of the reasonableness of the Appellant's response under s.34(2)(c) of the *Criminal Code* from a purely subjective perspective?

30. The appellate Court also concluded that the trial judge erred in the way she approached the issue of self-defence. The Court said as follows:

> [7] Three requirements must be met under s 34(1) of the *Criminal Code* for self-defence: (a) the accused must believe on reasonable grounds that force is being used or threatened against them or another person; (b) the accused's subjective purpose of the act must be to protect or defend themselves or others; and (c) the act committed must be reasonable in the circumstances. Section 34(2) sets out a non-exhaustive list of factors that shall be considered in determining whether an accused's act was reasonable in the circumstances. When considering the defence of self-defence in this matter, the trial judge did not assess the respondent's actions in considering what a reasonable person would have done in like circumstances. As the Supreme Court of Canada recently restated in ***R v Khill***, 2021 SCC 37 at para 2, 409 CCC (3d) 141 [***Khill***]:
>
> > The contours of our law of self-defence are tied to our notions of culpability, moral blameworthiness and acceptable human behaviour. To the extent self-defence morally justifies or excuses an accused's otherwise criminal conduct and renders it non-culpable, *it cannot rest exclusively on the accused's perception of the need to act*. Put another way, killing or injuring another cannot be lawful simply *because the accused believed it was necessary*. Self-defence demands a broader societal perspective. Consequently, one of the important conditions limiting the availability of self-defence is that the act committed must be reasonable in the circumstances. A fact finder is obliged to consider a wide range of factors to determine *what a reasonable person would have done in a comparable situation.* [Emphasis added]
>
> [8] While the trial judge did not have the benefit of ***Khill***, which was released after the trial decision in this matter, the reasonableness of an accused's response to a perceived threat has consistently been measured by considering what a reasonable person would have done in like circumstances; see for example, ***R v Rasberry***, 2017 ABCA 135 at para 12, 348 CCC (3d) 333. ***We agree with the Crown that the trial judge improperly took a solely subjective approach to assessing the respondent's***

> ***response to the perceived threat posed by Mr. Winsor.*** As stated in ***Khill*** at para 65: ". . . the trier of fact should not be invited to simply slip into the mind of the accused. The focus must remain on what a reasonable person would have done in comparable circumstances and not what a particular accused thought at the time."[28]
>
> [emphasis added.][29]

31. The reasons for judgment do not support the conclusion that the "trial judge improperly took a solely subjective approach to assessing whether" the Appellant's response to the perceived threat was unreasonable. It was never suggested to the trial judge by counsel that the issue of reasonableness in assessing self-defence should be assessed from a subjective perspective.[30] The trial judge never used language to suggest that she made such an obvious legal error. Indeed, the Court below did not point to a single passage in the trial judge's reasons that exhibited such an error. Its conclusion that the trial judge erred was nothing more than a summary conclusion, devoid

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[28] Reasons of the Nunavut Court of Appeal, AR, Part I.3, p. 033-034, at paras. 7-8.

[29] The Appellant accepts that, in theory, if the trial judge erred in the manner articulated by the Court of Appeal in the emphasized portion of the judgment, the error would be an error of law alone as the issue under s.34(2) is the objective reasonableness of the accused's conduct. However, the appellate Court's conclusion that the intention to murder necessarily follows from the use of a chokehold would have infected appellate review of the trial judge's self-defence analysis. As the Respondent noted in its response to the application for leave to appeal the "mischaracterization of the chokehold also tainted the judge's assessment of the defence of self-defence" and that the errors alleged by the Appellant are "mainly the same" related to the appellate court's criticism of the trial judge's purported "mischaracterization of the chokehold" which "led the trial judge to apply the wrong legal test for self-defence."

[30] In closing submissions, the Crown focused its submissions on whether there was an "air of reality" to self-defence noting that if there was an air of reality, then "his actions are not reasonable and they are excessive" because his "actions in choosing to choke are not reasonable as choking is an inherently dangerous act" (See AR, Part V, Volume 8 of Trial Transcript – April 30, 2021 (Closing Submissions), pp. 597-8).

of reasoning. Much like its approach to the issue of intent, the Court of Appeal characterized the trial judge's assessment of self-defence as a legal error in the absence of any error at all.

32. At trial, the Crown argued that there was no air of reality to self-defence and, alternatively, that they had proven beyond a reasonable doubt that the Applicant did not act in self-defence. When considering the air of reality issue, the trial judge noted in reference to s.34(2) ("the reasonableness of the response") that if the Appellant's evidence were believed "there is some evidence to suggest that his actions ***were reasonable in the circumstances***: he was elbowed in the head when he tried to intervene, so the violence was increasing rather than decreasing."[31] When analyzing whether the Crown had disproved self-defence, the trial judge expressly articulated the right question – "Did the Crown prove beyond a reasonable doubt that the choke hold applied by Mr. Hodgson was not ***reasonable in the circumstances***?"[32] The trial judge then turned to the relevant factors under s.34(2) of the *Criminal Code* to assess the "reasonableness" of the Appellant's conduct noting that: [33]

> [120] The nature and proportionality of the person's response to the use or threat of force: It is well accepted that a person in a threatening situation is not required to carefully assess the threat and thoughtfully determine the appropriate response. This was a sudden, upsetting situation where a very heavy man had used violence and was ignoring requests to leave the party. Mr. Hodgson was brought into the situation at the request of Ms. Ford-Perkins, and he observed Mr. Winsor physically resisting attempts to get him to leave. Mr. Hodgson tried to pull Mr. Winsor away but was not able to and was himself hit in the process. With his injured right hand many forms of potential control were likely unavailable. A known "calm down" move that could be executed from behind would have seemed to be proportional in all of the circumstances.

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[31] Reasons for Judgment, AR, Part I.2, pp. 026, at para. 104.
[32] Reasons for Judgment, AR, Part I.2, pp. 028, at para. 112.
[33] Reasons for Judgment, AR, Part I.2, pp. 028-030, at paras. 112-123.

The trial judge ultimately concluded that:

> [122] In considering the factors above, ***it is my view that the Crown has not proven beyond a reasonable doubt that the choke hold was not reasonable in all of the circumstances***. Proportionality is the factor above that causes the most concern, but Dr. Chiasson's evidence raises the possibility that the choke hold was fatal only because of factors internal to Mr. Winsor that were obviously unknown to Mr. Hodgson. On this evidence, I have a doubt about whether a choke hold in this circumstance was disproportionate.
>
> [123] The Crown therefore has not proven beyond a reasonable doubt that Mr. Hodgson was not acting in defence of himself or others at the party

33. "This Court has frequently cautioned against appellate courts transforming their opposition to a trial judge's factual findings and inferences into attributed legal errors."[34] That is what the lower court did here. In effect, the appellate Court's finding of purported legal error amounts to this: "we believe using a modified-objective test that the Crown had disproved self-defence. Therefore, any conclusion to the contrary must be because the trial judge assessed self-defence *solely* from the subjective perspective of the accused." That reasoning fallacy fails to accord proper deference to the trier of fact or to respect the limited jurisdictional basis to review a Crown appeal against an acquittal.

34. The Appellant was acquitted after a full trial by a trial judge who issued thoughtful and considered reasons. There was no reviewable legal error tainting the verdict. While the death of the deceased is tragic, subjecting the Appellant to a second trial in these circumstances would be a miscarriage of justice. The Appellant's acquittal should be restored.

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[34] *R. v. Javanmardi*, 2019 SCC 54, [2019] 4 S.C.R. 3, at para. 42. See also *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 17.

PART IV – SUBMISSIONS REGARDING COSTS

35. The Appellant does not ask for costs and requests that no costs be awarded.

PART V – ORDER SOUGHT

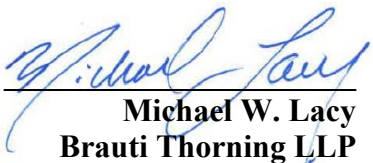
36. The Appellant requests that the appeal be allowed, the order of the Nunavut Court of Appeal be overturned, and that the Appellant's acquittal be restored.

37. In the alternative, the Appellant requests that the appeal be allowed and a new trial on the lesser included offence of manslaughter be substituted.[35]

PART VI – SUBMISSIONS ON CASE SENSITIVITY

38. There is no sealing or confidentiality order, publication ban, classification of information in this matter that is confidential under legislation or restriction on public access to information in this matter that could have an impact on this Court's reasons in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF JULY, 2023.



Michael W. Lacy
Brauti Thorning LLP
Counsel to the Appellant, Daniel Hodgson

[35] If the Court of Appeal was not in error in concluding that that the trial judge had applied a purely subjective approach to the question the reasonableness of the Appellant's actions when assessing self-defence, the appropriate remedy would have been to order a new trial for the lesser included offence of manslaughter not murder. Any purported error with respect to self-defence had no impact on the trial judge's finding that the Appellant lacked the requisite intent for murder.

PART VII – TABLE OF AUTHORITIES