File Number: 40498

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

BETWEEN:

DANIEL HODGSON

APPELLANT
(Respondent)

and

HIS MAJESTY THE KING

RESPONDENT
(Appellant)

and

ATTORNEY GENERAL OF ONTARIO
CRIMINAL TRIALS LAWYERS' ASSOCIATION

INTERVENERS

FACTUM OF THE RESPONDENT,
HIS MAJESTY THE KING

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

Overview

1. The appellant was asked to help remove Bradley Winsor from a house party. In the process, the appellant wrapped his arm around Bradley's neck in a chokehold causing his death. At trial, the appellant claimed he was acting in self-defence. He was found not guilty of second-degree murder because the trial judge found that the appellant did not intend to kill or harm Mr. Winsor and that his death was an unlikely consequence of the chokehold. The appellant was also found not guilty of the lesser-included offence of manslaughter because the Crown had failed to disprove self-defence.

2. The Nunavut Court of Appeal overturned the acquittals because the trial judge had committed legal errors in her analysis of both *mens rea* and self-defence. The trial judge did not consider the inherent dangerousness of choking Mr. Winsor in her assessment of the appellant's intent for murder. On the issue of self-defence, the trial judge assessed the reasonableness of the appellant's response from a purely subjective perspective whereas it required an objective analysis. The Court of Appeal correctly identified legal errors in the trial judge's reasoning and its decision to overturn the verdicts should not be disturbed.

Facts

3. The appellant was charged with second-degree murder and elected to be tried by a judge alone. He testified at trial. He believed that Mr. Winsor was about to strike a guest, so he put his hands on Mr. Winsor's shoulders from behind and tried to pull him backwards. Mr. Winsor then elbowed him in the head. He put Mr. Winsor in a chokehold with his right arm, both men struggled and fell to the ground. When the appellant released his hold, Mr. Winsor had stopped breathing.

4. No one knows how long the chokehold lasted, but all witnesses agreed that it was "over quite quickly."[1] Nevertheless, all the witnesses repeatedly screamed at the appellant to stop and to let go of Mr. Winsor, in vain.[2] Mr. Burke, a friend of Mr. Winsor, thought the chokehold was just a regular calm down move until he noticed Mr. Winsor changing colour and started screaming at

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[1] Reasons for Judgement, Nunavut Court of Justice, at para 79 [AR, Part I.2, p 22].
[2] Reasons for Judgement, Nunavut Court of Justice, at para 78 [AR, Part I.2, p 22].

the appellant to stop. When he realized his shouts to "stop" were not acted upon, Mr. Burke pulled the men, now on the ground, apart.[3] When the appellant finally let go, Mr. Winsor had stopped breathing. He never regained consciousness and died moments later.[4]

5. The appellant explained that the chokehold was to "restrain [Mr. Winsor] and try and throw him to the ground," and that he maintained the chokehold until Mr. Winsor "stopped struggling" because he was afraid of Mr. Winsor. The appellant had seen law enforcement use chokeholds to induce unconsciousness on video. He also saw that chokehold technique used effectively when he was a bouncer and had used it himself in 2016 on a person who went unconscious for 30 seconds. The appellant could not say for sure whether he knew that chokeholds were dangerous, but he acknowledged seeing news stories of people dying at the hands of police as a result of being placed in chokeholds.[5]

6. Crown and defence each called a medical expert witness to testify to the cause of death. One performed the autopsy and the other reviewed his findings. They both identified compression of the neck as the cause of Mr. Winsor's death and agreed that the application of a significant amount of pressure fractured Bradley Winsor's hyoid bone, bruised the interior muscles in his neck and caused an internal hemorrhage.[6] Both experts also agreed that a chokehold is, by nature, an inherently dangerous act capable of causing grievous bodily harm, quickly leading to unconsciousness and death.[7]

7. The appellant was acquitted of both second-degree murder and the lesser-included offence of manslaughter.

8. The Court of Appeal overturned the trial judge's verdicts on both murder and manslaughter and ordered a new trial. With respect to the *mens rea* for murder, the Court of Appeal found that the trial judge failed to adequately address the inherent dangerousness of the chokehold and instead accepted that it was a regular calm down method. The judge also failed to assess the evidence of

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[3] Reasons for Judgement, Nunavut Court of Justice, at para 78 [AR, Part I.2, p 22].
[4] Reasons for Judgement, Nunavut Court of Justice, paras 80-81[AR, Part I.2, p 22].
[5] Reasons of the Court of Appeal, at para 3 [AR, Part I.3, p 32].
[6] Reasons for Judgement, Nunavut Court of Justice, at para 58 [AR, Part I.2, p 18].
[7] Trial Transcripts, April 23, 2021, Evidence of Dr. Milroy [AR, Part V.3, pp 203-204]; Trial Transcripts, April 27, 2021, Evidence of Dr. Chiasson [AR, Part V.6, pp 481, 492-493].

the appellant with respect to "what he believed or intended considering the dangerousness of squeezing Mr. Winsor's neck to the point of unconsciousness, or the possible recklessness of his actions." [8]

9. With respect to self-defence, the Court of Appeal relied on this Court's decision in *Khill,* 2022 SCC 37 that confirmed the modified objective standard created by s. 34 of the *Criminal Code*, and agreed with the Crown that the trial judge mistakenly took a solely subjective approach to assessing the appellant's response to the perceived threat posed by Mr. Winsor.[9]

PART II – POSITION ON THE QUESTIONS IN ISSUE

10. The appellant advances three grounds of appeal. The first two grounds relate to the second-degree murder charge and the third one to the lesser-included offence of manslaughter.

- Did the NUCA exceed its jurisdiction in concluding that the trial judge's failure to infer intent for murder was a reviewable legal error?

  No. The Court of Appeal intervened because they found that the trial judge erred in her inquiry into the *mens rea* for murder, and that her error had a material bearing on the verdict.

- Did the NUCA err in concluding that the trial judge was required to infer the intent for murder?

  No. The Court of Appeal did not find that the trial judge was required to infer intent for murder. The Court of Appeal found that the trial judge erred in law because (1) she failed to adequately address the "common sense inference" that Mr. Hodgson would have intended the predictable consequences of his actions in her *mens rea* analysis, and (2) she failed to consider the totality of the evidence when she mischaracterized the chokehold as a regular calm down move.

[8] Reasons of the Court of Appeal, at para 5 [AR, Part I.3, p 33].
[9] Reasons of the Court of Appeal, at paras 7-8 [AR, Part I.3, pp 33-34], citing *R v Khill*, 2021 SCC 37 at para 2.

- Did the NUCA err in concluding that the trial judge erroneously approached the issue of the reasonableness of the appellant's response under s. 34(1)(c) of the *Criminal Code* from a purely subjective perspective?

  No. The Court of Appeal did not err in concluding that the trial judge wrongly approached the issue of the reasonableness of the appellant's response under s. 34(2) of the *Code* from a purely subjective perspective. Contrary to what that section required, the trial judge did not examine what a reasonable person would have done in the same circumstances, but rather, what would have seemed reasonable to the appellant.

PART III – ARGUMENT

A. Appellate jurisdiction

11. Section 676(1)(a) of the *Criminal Code* limits the Crown's right to appeal from an acquittal to grounds that raise questions of law. The appellant concedes that the error identified by the Court of Appeal in the trial judge's analysis of self-defence (i.e., the application of a subjective standard to assess the objective reasonableness of the chokehold in response) constituted a reviewable error of law.[10] However, the appellant contends that in overturning the acquittal for murder, the Court of Appeal effectively allowed the Crown to appeal findings of fact, thereby exceeding its jurisdiction.

12. What constitutes an error of law allowing the Crown to appeal an acquittal was considered by this Court's in *R v J.M.H.,* 2011 SCC 45. The Court recognized four situations in which a judge's handling of evidence amounts to such error:

(1) Making a finding of fact for which there is no evidence;

(2) The legal effect of findings of fact or of undisputed facts;

(3) The assessment of the evidence based on a wrong legal principle;

(4) The failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence.[11]

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[10] Appellant's Factum, at p 18, footnote 29.
[11] *R v J.M.H.*, 2011 SCC 45 at paras 25-32.

13. Even in the face of a legal error, acquittals are not overturned lightly.[12] In order to set aside an acquittal, the appellate court must be convinced that the impugned error of law might reasonably be thought to have had a material bearing on the acquittal.[13] However, the Crown does not have to persuade the court that absent the error, the verdict would necessarily have been different. The Crown must only show that the verdict may well have been affected by the error of law.[14]

14. Recently, this Court explained that the second and third errors both address situations, "where the trial judge's application of the legal principles to the evidence demonstrates an erroneous understanding of the law, either because the trial judge finds all the facts necessary to meet the test but errs in law in its application or assesses the evidence in a way that otherwise indicates a misapprehension of the law."[15] Hence, in addition to the interpretation of a legal standard, its application to the facts of a case is a question of law.[16]

B. *Mens rea* for second-degree murder: the trial judge applied the wrong legal standard

15. The trial judge's *mens rea* analysis disclosed the second, third and fourth errors identified by this Court in *J.M.H*. The trial judge accepted that the appellant caused the death of Mr. Winsor, but had a reasonable doubt that he formed the required intent.[17] Although she correctly stated the required test for *mens rea* under s. 229 (a) (ii) of the *Criminal Code* in her reasons, the Court of Appeal properly found that the trial judge made two errors of law in its application to her findings of facts. First, the trial judge failed to address the common sense inference, which required her to examine all the evidence to determine whether the appellant had the ability to foresee that the chokehold was likely to cause death. Second, the trial judge ignored the expert evidence and the case law to find that the chokehold was a trite use of force which was unlikely to cause death. These interrelated errors had a material bearing on the acquittal.

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[12] *R v Cowan*, 2021 SCC 45 at para 46.
[13] *R v Graveline*, 2006 SCC 16 at para 14.
[14] *R v Cowan*, 2021 SCC 45 at para 46; see also *R v Morin*, [1988] 2 SCR 345 at 374.
[15] *R v Chung*, 2020 SCC 8 at para 11.
[16] *R v Shepherd*, 2009 SCC 35 at para 20.
[17] Reasons for Judgement, Nunavut Court of Justice, at paras 93-94 [AR, Part I.2, pp 24-25].

16. The appellant stood trial on a single count of second-degree murder pursuant to s. 229(a)(ii) of the *Criminal Code* which states:

229 Culpable homicide is murder

(a) where the person who causes the death of a human being

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not.

229 L'homicide coupable est un meurtre dans l'un ou l'autre des cas suivants :

a) la personne qui cause la mort d'un être humain :

(ii) ou bien a l'intention de lui causer des lésions corporelles qu'elle sait être de nature à causer sa mort, et qu'il lui est indifférent que la mort s'ensuive ou non;

17. The *mens rea* requirement incorporates three distinct elements: (1) a subjective intent to cause bodily harm, (2) a subjective knowledge of the likelihood to cause death and (3) recklessness as to the outcome. To secure a conviction, the Crown bears the burden of establishing all three elements beyond a reasonable doubt.

18. The criminal law accepts that "a person usually knows what the predictable consequences of his or her actions are, and means to bring them about."[18] Therefore, where the law requires proof of subjective intent, the Crown can rely on circumstantial evidence to ask the trier of fact to draw what is known as "the common sense inference" to establish the required *mens rea*.[19] As Cory J. explained in *Seymour*, "if a person acted to produce certain predictable consequences, it may be inferred that the person intended those consequences."

19. Second-degree murder is no exception. The common sense inference is in fact an essential part of the legal test of the *mens rea* for murder. This Court explained in *Daley* that where an accused faces a charge of second-degree murder, the inquiry into subjective knowledge of the likelihood of death requires the trier of fact to determine whether the accused had the ability to foresee the consequences of their actions.[20] As a result, unless there is direct evidence or admission of an accused person's subjective knowledge of the likelihood of death, decision makers are always

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[18] *R v Zora*, 2020 SCC 14 at para 120; *R v Walle*, 2012 SCC 41 at paras 61-67; *R v Seymour*, [1996] 2 SCR 252 at paras 19 and 23.
[19] *R v Zora*, 2020 SCC 14 at para 120.
[20] *R v Daley*, 2007 SCC 53 at paras 51 and 53.

required to ask themselves if the common sense inference can be drawn from their findings of fact.[21] A failure by the trial judge to consider the common sense inference in light of the relevant evidence is a reversible error.[22]

20. The appellant argues that the Court of Appeal intervened because it disagreed with the trial judge's decision not to draw the common sense inference. He submits that the Court of Appeal effectively articulated a legal principle that, "when someone uses a chokehold they must have the necessary intent required for murder should the person die."[23] The Criminal Trial Lawyers' Association makes a similar argument, suggesting that the Court of Appeal's decision, "mandates that trial judges must find 'inherent dangerousness' in all acts of choking that cause unconsciousness when assessing the *mens rea* for murder."[24]

21. The Court of Appeal did not find that the law requires all trial judges to infer the *mens rea* for murder in all cases involving a chokehold. On the contrary, the Court specified that "it would be reasonable [though not required] to infer the accused knew that strangulation was likely to result in death."[25] The failure identified by the Court of Appeal was not a failure to reach a necessary conclusion but rather a failure to address in any way the proposition that, "a chokehold was an inherently dangerous act."[26] Similarly, the Court of Appeal did not find that the conclusion in *Lemmon* regarding the inherent dangerousness of a chokehold was mandatory in all cases but rather that the evidence "suggested as much in this case."[27]

22. It was thus the trial judge's failure to apply an essential part of the legal test for the *mens rea* of murder to her findings of fact that justified appellate intervention.[28]

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[21] *R v Seymour*, [1996] 2 SCR 252 at para 19.
[22] *R v Williams*, 2023 MBCA 11 at para 48, leave ref'd, 2023 CanLII 64849 (SCC).
[23] Appellant's Factum, Statement of Argument, at para 26.
[24] Motion for Leave to Intervene, para. 14.
[25] Reasons of the Court of Appeal, at para 6 [AR, Part I.3, p 33], citing *R v Cooper*, [1993] 1 SCR 146 at 159.
[26] Reasons of the Court of Appeal, at para 5 [AR, Part I.3, p 33].
[27] Reasons of the Court of Appeal, at para 6 [AR, Part I.3, p 33].
[28] Reasons of the Court of Appeal, at para 5 [AR, Part I.3, p 33].

23. In its closing submissions at trial, the Crown argued that the trial judge could rely on circumstantial evidence to infer the required intent for murder and pointed to:

- The medical evidence establishing the grievous and extensive nature of the injuries caused by the chokehold;[29]
- The unanimous expert evidence establishing that the appellant had to forcefully compress Mr. Winsor's neck to fracture his hyoid bone;[30]
- The undisputed expert evidence that choking can quickly lead to unconsciousness and death if the neck compression is maintained; and[31]
- The witnesses' evidence that the appellant ignored their repeated screams imploring him to let Mr. Winsor go.[32]

24. The Crown also referred to the appellant's evidence, in which he made several admissions that supported the inference that he was able to foresee the likelihood of death stemming from a chokehold:

- that choking Mr. Winsor was not instinctive - it was a choice;[33]
- that he intended to choke Mr. Winsor until he stopped struggling;[34]
- that he squeezed Mr. Winsor's neck with a "pretty strong force";[35]
- that he did not release or deepen the choke after Mr. Winsor collapsed to the ground;[36]
- that he released the choke only once Mr. Winsor stopped struggling;[37]

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[29] Trial Transcripts, April 23, 2021, Evidence of Dr. Milroy [AR, Part V.3, pp 185-196].
[30] Trial Transcripts, April 23, 2021, Evidence of Dr. Milroy [AR, Part V.3, pp 216-217, 220-221]; Trial Transcripts, April 28, 2021, Evidence of Dr. Chiasson [AR, Part V.6, p 501].
[31] Trial Transcripts, April 23, 2021, Evidence of Dr. Milroy [AR, Part V.3, pp 203, 226-227]; Trial Transcripts, April 28, 2021, Evidence of Dr. Chiasson [AR, Part V.6, pp 492-494; 502-503].
[32] Trial Transcripts, April 20, 2021, Evidence of S. Burke [AR, Part V.1, pp 58, 66]; Trial Transcripts, April 21, 2021, Evidence of C. Mullins [AR, Part V.2, pp 109]; Trial Transcripts, April 21, 2021, Evidence of M. Ford-Perkins [AR, Part V.2, pp 159-162].
[33] Trial Transcripts, April 27, 2021, Evidence of D. Hodgson [AR, Part V.5, pp 459-460].
[34] Trial Transcripts, April 27, 2021, Evidence of D. Hodgson [AR, Part V.5, p 424].
[35] Trial Transcripts, April 27, 2021, Evidence of D. Hodgson [AR, Part V.5, p 403].
[36] Trial Transcripts, April 27, 2021, Evidence of D. Hodgson [AR, Part V.5, pp 404-405 and 451-452].
[37] Trial Transcripts, April 27, 2021, Evidence of D. Hodgson [AR, Part V.5, pp 406, 423-424].

- that he had choked someone to the point of unconsciousness just months before the incident;[38]
- that he had seen news reports of police interventions where people died as a result of a chokehold; and[39]
- that he did not think about the dangerousness of the chokehold when he used it on Mr. Winsor.[40]

25. Although the trial judge accepted all this evidence, she failed to address any of it in her conclusion on *mens rea* for murder. The Court of Appeal correctly found that the evidence accepted by the trial judge was in line with this Court's finding that "blocking someone's airway is always an act which is more than merely transient or trifling in nature."[41] As noted by the Alberta Court of Appeal, "[r]endering 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."[42]

26. The appellant argues that 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.[43] However, the trial judge's reasons are completely silent about such an inference. On the contrary, her reasons show that she clearly believed that a chokehold was not likely to cause death or that it was objectively dangerous. The trial judge rather found that Mr. Winsor's death was an unlikely consequence of the chokehold. Moreover, the trial judge failed to consider that choking someone forcefully to the point of unconsciousness amounted to the intentional infliction of bodily harm.[44]

27. The common sense inference was a live issue at trial and there was significant evidence relevant to its application. If the trial judge had turned her mind to the totality of the evidence, she might well have found that the appellant would have foreseen that choking Mr. Winsor forcefully

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[38] Trial Transcripts, April 27, 2021, Evidence of D. Hodgson [AR, Part V.5, pp 445-447].
[39] Trial Transcripts, April 27, 2021, Evidence of D. Hodgson [AR, Part V.5, pp 452, 461-462].
[40] Trial Transcripts, April 27, 2021, Evidence of D. Hodgson [AR, Part V.5, pp 462-463].
[41] Reasons of the Court of Appeal, at para 6 [AR, Part I.3, p 33], citing *R v Lemmon*, 2012 ABCA 103 at para 28, leave ref'd, [2011] 1 SCR viii and *R v Cooper*, [1993] 1 SCR 146 at 159.
[42] *R v Lemmon*, 2012 ABCA 103 at para 28, leave ref'd, [2011] 1 SCR viii.
[43] Appellant's Factum, at para 25.
[44] Reasons for Judgement, Nunavut Court of Justice, at para 88 [AR, Part I.2, p 24].

until he stopped struggling was likely to cause death.[45] The trial judge's failure to address this as part of the foreseeability prong of the *mens rea* analysis was an error of law[46].

C. Self-defence: the trial judge erred by applying a subjective standard

28. Self-defence operates to "shield otherwise criminal acts from punitive consequences."[47] Section 34 of the *Criminal Code* provides:

34(1) A person is not guilty of an offence if:	**34 (1)** N'est pas coupable d'une infraction la personne qui, à la fois :
(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;	**a)** croit, pour des motifs raisonnables, que la force est employée contre elle ou une autre personne ou qu'on menace de l'employer contre elle ou une autre personne;
(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and	**b)** commet l'acte constituant l'infraction dans le but de se défendre ou de se protéger — ou de défendre ou de protéger une autre personne — contre l'emploi ou la menace d'emploi de la force;
(c) the act committed is reasonable in the circumstances.	**c)** agit de façon raisonnable dans les circonstances.

29. Section 34(2) sets out a non-exhaustive list of factors to be considered in assessing whether the purported act of self-defence was "reasonable in the circumstances" for the purpose of s. 34(1)(c).

30. In *Khill*, this Court underlined the importance of the objective character of the analysis to be conducted under s. 34(1)(c).[48] However, in the present case, the trial judge conducted a purely subjective analysis. Her analysis should have focused on the reasonableness of the force the appellant actually applied to Mr. Winsor resulting in his death, purportedly in self-defence.

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[45] *R v Walle*, 2012 SCC 41 at para 46.
[46] *R v Williams*, 2023 MBCA 11 at paras 36, 38, 48, leave ref'd, 2023 CanLII 64849 (SCC).
[47] *R v Khill*, 2021 SCC 37 at para 53.
[48] *R v Khill*, 2021 SCC 37.

a) *The reasonableness inquiry is objective*

31. Section 34(1)(c) requires the trial judge to determine the reasonableness of the act committed by the accused person, from the perspective of a reasonable person placed in comparable circumstances. This modified objective standard serves to limit access to this defence to behaviours that are consistent with societal values and norms of conduct.[49]

32. To determine the objective reasonableness of an act, s. 34(2) provides a non-exhaustive list of factors to guide decision makers. Although the assessment is highly circumstantial and no single factor is necessarily determinative of the issue, judges must consider every relevant factor set out at s. 34(2), and be "mindful of the proper interpretation, meaning and scope of each factor."[50] Among those factors, s. 34(2)(g) requires the trial judge to assess, "the nature and proportionality of the person's response to the use or threat of force." Determining the nature of an act requires the trial judge to look at its basic or inherent characteristics. It demands trial judges identify and compare the reasonably foreseeable risks entailed by the force used by the accused person and those of the force used or threatened against them.[51]

33. While the trial judge did not have the benefit of this Court's reasons in *Khill*, the Court of Appeal highlighted that "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."[52] This modified objective inquiry is necessary to achieve the appropriate balance between the security of the person who acts and that of the person acted upon and to discourage, "hot-headedness and unnecessary resorts to violent self-help."[53] Although a person may well be acting in defence against a real or perceived threat, where their actions exceed this objective threshold, s. 34 will not shield their acts from criminal consequences.

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[49] *R v Khill*, 2021 SCC 37 at para 62.
[50] *R v Khill*, 2021 SCC 37 at paras 68 and 114.
[51] *R v Baxter* (1975), 27 CCC (2d) 96 (Ont CA) at p 113.
[52] Reasons of the Court of Appeal, at para 8 [AR, Part I.3, p 34].
[53] *R v Khill*, 2021 SCC 37 at para 62.

b) *The trial judge conducted a subjective inquiry*

34. The Court of Appeal correctly found that the trial judge mistakenly took a solely subjective approach to assessing the appellant's response to the perceived threat posed by Mr. Winsor.[54] This is a reference to the trial judge's analysis of s. 34(2)(g), which requires consideration of, "the nature and proportionality of the person's response to the use or threat of force."

35. In considering the proportionality of the appellant's response to Mr. Winsor's actions, the trial judge reasoned as follows:

> […]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.[55]

36. As can be seen from the plain text of her reasons, the trial judge did not focus on what a reasonable person would have done in comparable circumstances. Rather, she seemed to have slipped into the mind of the accused as this Court warned against in *Khill*. The trial judge failed to conduct an objective assessment of the force applied by the appellant to the neck of Mr. Winsor in response to the perceived use or threat of force.

c) *The trial judge's error had a material bearing on the verdict*

37. Had the trial judge applied the correct legal test, she would have considered the threat that Mr. Winsor posed, as well as the objective reality of the force applied by the appellant in response.

38. Regarding Mr. Winsor's threat or use of force, the trial judge accepted the appellant's evidence that he intervened because he believed that Mr. Winsor had made a fist and intended to strike a guest.[56] When the appellant put his hands on Mr. Winsor's shoulders and pulled him backwards, he was elbowed in the head. With respect to the magnitude of the threat posed by Mr.

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[54] Reasons of the Court of Appeal, at para 8 [AR, Part I.3, p 34].
[55] Reasons for Judgement, Nunavut Court of Justice, at para 120 [AR, Part I.2, p 29].
[56] Reasons for Judgement, Nunavut Court of Justice, at paras 45, 75 [AR, Part I.2, pp 15, 21-22].

Winsor, the trial judge found that he was a "large man, who could likely harm someone if he chose to." However, she also found that "any threat from him was not likely a threat to someone's life."[57]

39. As against this perceived threat or use of force, the trial judge should have then considered the appellant's lethal response. Central to this analysis would be the medical evidence that was largely uncontested and provided objective indicia of the magnitude of force applied by the appellant to Mr. Winsor's neck – a force sufficient to cause internal and external bruising to the neck and fracture the hyoid bone.[58]

40. An objective analysis of the chokehold would also have noted that Mr. Hodgson continued with sufficient force to occlude the veins in Mr. Winsor's neck after the two fell to the ground and there was no further immediate threat from Mr. Winsor. The chokehold continued until Mr. Winsor stopped struggling because he had lost consciousness.

41. The force used in self-defence need not be "weighed to a nicety."[59] However, when that force consists of something as objectively dangerous as choking, heightened scrutiny is required. The trial judge did not subject the appellant's actions to such scrutiny. The trial judge's failure to assess the appellant's actions in considering what a reasonable person would have done in like circumstances had a material bearing on the verdict.

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[57] Reasons for Judgement, Nunavut Court of Justice, at para 114 [AR, Part I.2, p 28].
[58] Reasons for Judgement, Nunavut Court of Justice, at para 58 [AR, Part I.2, p 18].
[59] *R v Khill*, 2021 SCC 37 at para 32.

PART IV – COSTS

42. In accordance with the usual practice in criminal matters, no costs should be ordered.

PART V – NATURE OF ORDER SOUGHT

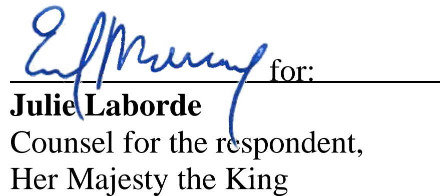
43. The appeal should be dismissed, without costs.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

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

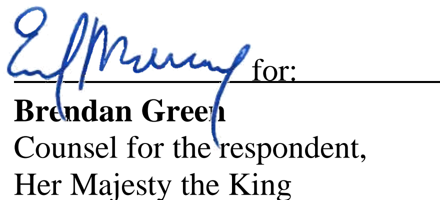
ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, in the Province of Ontario, this 5th day of September 2023.



for:

Julie Laborde
Counsel for the respondent,
Her Majesty the King



for:

Brendan Green
Counsel for the respondent,
Her Majesty the King

PART VII – TABLE OF AUTHORITIES

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