Citation: R v Monro, 2025 MBCA 64
Date: 20250627
Docket: AR23-30-10028

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice David J. Kroft
Madam Justice Anne M. E. Turner

***B E T W E E N**:*

HIS MAJESTY THE KING	)	***A. L. Sansregret, K.C.*** *and* ***M. K. Davis*** *for the Appellant*
Respondent	)	
	)	***A. Y. Kotler*** *for the Respondent*
- and -	)	
JUSTIN PATRICK MONRO	)	*Appeal heard:* ***February 18, 2025***
(Accused) Appellant	)	
	)	*Judgment delivered:* ***June 27, 2025***

On appeal from *R v Monro*, 2023 MBKB 96 [*trial decision*]

CAMERON JA

[1] The accused appeals his conviction of second degree murder (see *Criminal Code*, RSC 1985, c C-46, s 229(a) [the *Code*]), after trial by a judge of the Court of King's Bench. He asserts that the trial judge erred in finding that he had the necessary intent to commit murder.

[2] The offence stemmed from an altercation between the accused and the deceased involving a two-by-four piece of lumber (the two-by-four). After considering the accused's explanation of the incident, along with all the other evidence, the trial judge held that there was no air of reality to the accused's

asserted defence of provocation. He rejected the accused's claim of self-defence finding that, while the accused initially acted in self-defence, his use of force was not reasonable in the circumstances. Finally, after considering the cumulative effect of all the relevant evidence, commonly referred to as the "rolled-up charge", he found that the accused acted with the requisite level of intent to commit murder.

[3] After considering the facts as found by the trial judge and his application of the law to them, I am not persuaded that the trial judge committed reviewable error. For the following reasons, I would dismiss the appeal.

Background

[4] The deceased was found by a passerby lying on the front boulevard of a residence in Winnipeg (the residence). The police were called, resulting in the deceased being taken to the hospital, where he was pronounced dead.

[5] The forensic pathologist and medical examiner who performed the autopsy on the deceased (the pathologist) testified that the deceased died of blunt force head injuries. She said that the deceased had thirteen lacerations on his head that had been caused by strikes from a blunt object. Two of the lacerations were to the back of the deceased's scalp and the remaining eleven were to his face. Parts of the deceased's skull were also fractured, leading to bleeding on both sides of his brain, most notably the left side, where he had suffered the most damage. One of the lacerations on the left side of his forehead was of such a depth that it exposed a fractured bone. She said that this latter injury could have caused significant incapacitation or perhaps unconsciousness.

[6] Notably, all the deceased's facial bones were fractured, resulting in his face being separated from his skull. The pathologist described the deceased's face as "sunken or misshapen" and "flattened."

[7] The pathologist testified that the injuries to the deceased's face could have been caused by an object such as a two-by-four piece of lumber. She said that in total there were at least seven blows to his face and to his head, but likely more than that.

[8] As earlier stated, the cause of death was blunt force head injuries. The pathologist was of the view that the deceased would have become incapacitated or unconscious after suffering the cumulative injuries. Nonetheless, she said that the deceased was still alive for an unknown period after suffering those injuries. She said he could have been in this state for a period lasting as little as several minutes, up to an hour, or even up to six hours before he died. She referred to this period as "the survival interval".

[9] In addition to the injuries to his head, the deceased had fractures to his elbows along with a laceration to his left elbow that went all the way to the bone. The pathologist said those injuries could have been caused by the deceased putting his arms up and being struck or if he fell on his elbows.

[10] Of some note, there was a 3.8-centimetre-deep, comma-shaped stab wound to the deceased's neck that the pathologist stated would have been caused by a cylindrical object such as a pen, pencil, screwdriver or a dagger with a rounded shape, as opposed to a flat knife. That injury did not contribute to the deceased's death.

[11] Toxicology reports indicated that there were low concentrations of fentanyl and pseudoephedrine (probably cold medicine) in the deceased's body. There were also methamphetamine and cocaine found in his blood. The pathologist stated that none of these substances contributed to the deceased's death.

[12] Regarding use of force required to cause the injuries suffered by the deceased, the pathologist stated that typically they "see these extensive head and facial injuries in cases where people are involved in high speed motor vehicle collisions or falls from a great height, so for example someone falls or jumps from a multistorey building."

[13] Surveillance footage from several sources showed the accused and his girlfriend walking away from the residence. One of the videos included footage that showed the accused walking up a nearby back lane with the two-by-four, which he placed behind a garbage can in a narrow space between a shed and a fence.

[14] The deceased's blood was found on the two-by-four and on the accused's clothing. The forensic officer who took photographs of the accused testified that he had no defensive wounds. Save for a bite mark on his shoulder, which he said was caused by his girlfriend, he had "almost imperceptible" cuts on the tops of his hands and "very minor" scrapes on his shins.

[15] The accused provided a statement to the police wherein he admitted to having an altercation with the deceased (the police statement). However, he claimed that he acted in self-defence. Briefly, he stated that the deceased was high when he started an altercation with the accused. The accused said

the deceased was angry at him for allowing another person to come in and smash things in the residence. The accused said that the deceased was attacking him verbally, physically and emotionally and that he swung a two-by-four at the accused but that he was able to get it away from him. The accused then admitted that he hit the deceased with the two-by-four. He said that he was in control of himself during the incident and that he defended himself.

[16] The accused's girlfriend resided at the residence at the time. The accused said that she was in a different room when the incident occurred. He did not believe she saw his interaction with the deceased outside, although she might have looked out of the window of the residence and seen what happened.

The Decision of the Trial Judge

[17] At the trial, the accused relied on the police statement to support his assertion that he was acting in self-defence. He presented two alternative arguments. First, that he was provoked within the meaning of section 232 of the *Code*. Second, that consideration of the cumulative effect of all the relevant circumstances raised a reasonable doubt as to whether he had the required requisite level of intent for murder.

[18] The trial judge found that the police statement made it clear that the accused did not lose self-control or act "on the sudden" before he had time for his passion to cool (*trial decision* at para 64). The trial judge said that he considered both the circumstantial and direct evidence in reaching his conclusion that there was no air of reality to the defence of provocation.

[19] Regarding self-defence, the trial judge found that after disarming the deceased, the accused was justified in initially applying force to him. However, the trial judge found that the extent of the force used was unreasonable. Crucial to his finding was that his consideration of all the evidence led him to conclude that, while the accused may have initially hit the deceased inside of the residence, "[t]here was a clear opportunity to disengage from the altercation when . . . [the deceased] ran out of the front door" (*ibid* at para 86). Instead, he found that the accused continued to beat the deceased after he left the residence. Relying on the testimony of the pathologist, he found that the deceased would have been immobile and unconscious after the final blow and could not have left the residence, gone through the front yard and gone thirteen feet further from the residence to the boulevard where his body was found if he had suffered all of the blows in the residence.

[20] Regarding intent, the trial judge stated that after considering all of the relevant evidence relating to intent as directed in *R v Khill*, 2021 SCC 37 [*Khill* SCC], he was satisfied that the accused had the requisite intent for murder.

[21] Prior to concluding his reasons, the trial judge stated that he considered the *W(D)* analysis as modified in the context of self-defence (see *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC) [*W(D)*]). After considering all the evidence, he found that the police statement did not raise a reasonable doubt as to the accused's guilt.

[22] Finally, the trial judge addressed the *Villaroman* issue that had been raised (see *R v Villaroman*, 2016 SCC 33 [*Villaroman*]). He noted that all his conclusions were based on direct evidence, except for "perhaps" his finding

that it was "the last blows [that] were struck that rendered [the deceased] unconscious and incapable of movement" (*trial decision* at para 109). He found that if *Villaroman* applied, the only reasonable conclusion based on the pathologist's evidence in combination with the admission of the accused that he struck the deceased a few times before the deceased ran out of the residence and the totality of the other evidence was that the accused had the requisite mental intent. He said (*ibid* at para 111):

> This applies to my finding that the accused admittedly not only struck [the deceased] "a few times" with the two-by-four inside the residence, but that he continued to strike [the deceased] with that two-by-four after he followed [the deceased] out of the residence after [the deceased] fled the residence, striking him with that two-by-four until he was unconscious and unable to move, dying in the location where [the witness] found him.

Grounds of Appeal

[23] The accused argues that the trial judge erred in each of his findings that a) there was no air of reality to the defence of provocation, b) the accused's use of force was not reasonable and therefore the defence of self-defence did not apply, and c) the accused had the requisite intent for murder. In addition, he argues that the trial judge erred in his application of the principles of *W(D)* and *Villaroman* in reaching his conclusion that the accused was guilty. I will examine this latter argument when discussing the grounds of appeal to which they relate.

Did the Trial Judge Err in Concluding There Was No Air of Reality to the Defence of Provocation?

The Defence of Provocation

[24] Provocation is a partial defence to murder. Pursuant to section 232(1) of the *Code*, conduct that would otherwise amount to murder may be reduced to manslaughter where the person committed the act "in the heat of passion caused by sudden provocation."

[25] As agreed by counsel, the trial judge did not err in citing *R v Barrett*, 2022 ONCA 355 at para 57 [*Barrett*], as a concise summary of the conditions required to meet the test for provocation. It states (*ibid*):

> There are four prerequisites to provocation: (i) a wrongful act or insult; (ii) the wrongful act or insult must be sufficient to deprive an ordinary person of the power of self-control; (iii) the accused must have acted in response to the wrongful act or insult that was sufficient to deprive an ordinary person of self-control; and (iv) the accused must have acted "on the sudden", before there was time for the accused's passion to cool. The first two elements are objective and the latter two are subjective: s. 232 of the *Criminal Code,* R.S.C. 1985, C-46 and *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at paras. 25 and 36.

[26] An air of reality must be found on each of the above elements before the defence can be considered by the trier of fact (see *Barrett* at para 61).

[27] The air of reality test "is whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true" (*R v Cinous*, 2002 SCC 29 at para 65).

[28] While the accused's testimony is an important consideration in assessing the viability of the defence of provocation, it is not determinative as to whether the subjective element of the defence has been satisfied. Rather, the trial judge (or jury) is required to consider whether there was any other evidence capable of supporting an inference of sudden rage or loss of control, even where the accused denies being in such a state at the time of the offence (see *R v Angelis*, 2013 ONCA 70 at para 33 [*Angelis*]).

[29] In *R v Mustard (G)*, 2016 MBCA 40 [*Mustard*], Mainella JA explained that the air of reality test involves an examination of the entire record. The judge must assume the version of events most favourable to an accused to be true (see *ibid* at para 20).

[30] The judge cannot assess the quality, credibility or reliability of the evidence or substantively weigh its value, make findings of fact or draw determinative inferences (see *ibid* at para 21).

[31] While there is no ability to weigh direct evidence, the judge may engage in a "limited weighing" of circumstantial evidence in determining whether there is an air of reality (*ibid* at para 22).

Positions of the Parties

[32] The accused argues that while the trial judge correctly cited the test for provocation, he failed to apply the air of reality test to it. He submits that the trial judge did not consider all the evidence, nor did he engage in a limited weighing of the circumstantial evidence when he focussed his assessment on the police statement. He asserts that the trial judge failed to assume the version of the evidence most favourable to the accused to be true.

[33] The Crown emphasizes that the defence of provocation requires a dramatic loss of self-control such that the "wrongful act or insult" must be "so objectively enraging that it drives the accused into a fury that he or she cannot control, resulting in a 'sudden' murder committed before his or her 'passions' can cool."

[34] The Crown argues that the accused emphasized that he was in control "both 'verbally and mentally'" of himself at the time of the incident to support his assertion of self-defence. It further disputes the accused's argument that an inference of provocation should be drawn on the basis that such an inference is not capable of displacing the direct evidence to the contrary found in the police statement in this regard.

[35] On the other hand, the Crown agrees that the trial judge's statement that he *believed* the accused's evidence that he did not lose self-control was contrary to the principle that judges should not assess credibility or make factual findings in the determination of the air of reality test. However, it argues that the totality of the trial judge's reasons demonstrates that he considered all the evidence, both circumstantial and direct, in reaching his conclusion.

[36] Finally, the Crown argues that even if the trial judge did err in this regard, it would not have affected the verdict and therefore the curative proviso found at section 686(1)(b)(iii) of the *Code* should be applied (the curative proviso).

Discussion

[37] The decision of a trial judge as to whether there is an air of reality

to a defence of provocation constitutes a question of law reviewable on the standard of correctness (see *R v Pan*, 2025 SCC 12 at para 35 [*Pan*]).

[38] As stated by the majority in *Pan*, a central feature of the air of reality test is that the trial judge is not permitted to make findings of fact (see para 39). The same applies to findings of credibility (see *Mustard* at para 21).

[39] In this case, the trial judge stated: "I believe the evidence of the accused that he did not lose self-control and that when considering the evidence, circumstantial and direct, as a whole, there is no basis to consider and *accept* the defence of provocation" (*trial decision* at para 65) [emphasis added].

[40] When the trial judge stated that he believed the statement that the accused had made in this regard, he made a finding of fact based on his assessment of the credibility of the police statement.

[41] Furthermore, in stating that there was no basis for him to accept the defence of provocation, the trial judge appears to have conflated whether there was an air of reality to the defence of provocation with whether he ultimately should accept the defence.

[42] In my view, the above determinations made in support of his conclusion that there was no air of reality to the defence of provocation constitute errors in law.

[43] However, that does not end the matter. Section 686(1)(b)(iii) of the *Code* provides that a verdict may be upheld "where the Crown can establish that no substantial wrong or miscarriage of justice flowed from the error" (*Pan*

at para 86). The curative proviso applies where the error is harmless, to the extent that it had no impact on the verdict or despite the error being serious enough to warrant a new trial, there is no miscarriage of justice. As summarized in *Pan*, "the question is whether there is no reasonable possibility that the verdict would have been different had the legal error not been committed" (at para 88).

[44] While a failure to put a defence to a jury will rarely lead to the application of this provision, in this case, we are dealing with a trial by judge alone where the trial judge performed the actual analysis required in considering the defence of provocation.

[45] Aside from believing the accused's statements regarding his level of control at the time of the incident, the trial judge considered all the evidence. He conceded that the police statement could be a basis to find that the actions of the deceased constituted a wrongful act. However, the trial judge concluded that the accused did not act "on the sudden" (*trial decision* at para 64). In reaching this conclusion, he placed significant weight on the only direct evidence regarding loss of control, which came from the accused, who stated that he was "totally being in control" and that he had been trying to calm the deceased down (*ibid* at para 63).

[46] This is not a case such as *Angelis*, where the Court held that, despite the appellant having testified that he was not angry when he killed his wife after she attacked him, other factors supporting the defence of provocation suggested otherwise, and the defence should have therefore been left to the jury.

[47] In *Angelis*, the Court referred to the Crown's position at the trial that the appellant intended to kill his wife because he was angry and ridiculed his claim that he was not. The Court noted that anger may "fuel sudden rage, a loss of control, inflamed passions, a killing in the heat of the moment before regaining control of oneself" (*ibid* at para 36), in which case the defence of provocation would have an air of reality.

[48] In this case, the Crown did not dispute the accused's claim that he was in control.

[49] The second factor in *Angelis* involved the consideration of other evidence that indicated the appellant lost control, including a) the testimony of a witness who had overheard the argument between the appellant and his wife the morning of the incident; b) the fact that the accused killed his wife in front of his two children whom he loved and cared for; c) the fact that the appellant and his wife continued to live together despite their acrimonious relationship and that, in this context, she had clawed his penis just prior to the altercation that led to the killing; d) the appellant's nature; and e) the suddenness of the attack and the brevity of the encounter (see para 41). While each case must be decided on its facts, those considerations do not apply in this case.

[50] To conclude, I am of the view that, in the present case, there is no reasonable possibility that the verdict would have been different had the legal error not been committed. The reasons of the trial judge clearly demonstrate that, even if he had considered provocation, he would have dismissed it. Thus, I would apply the curative proviso to this ground of appeal and dismiss it.

Did the Trial Judge Err in Finding That the Accused's Use of Force Was Not Reasonable Pursuant to Section 34(1)(c) of the *Code*?

Did the Trial Judge Err in His Application of the Principles of *W(D)* and *Villaroman* in Reaching His Conclusion That the Accused Was Guilty?

Self-Defence Provisions of the Code

[51] A review of the self-defence provisions of the *Code* provides context to the reasons of the trial judge and the arguments of the parties. Sections 34(1) and 34(2) of the *Code* state:

Defence of Person	**Défense de la personne**
Defence — use or threat of force **34(1)** A person is not guilty of an offence if	**Note marginale : Défense — emploi ou menace d'emploi de la force** **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.

Factors

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

(c) the person's role in the incident;

(d) whether any party to the incident used or threatened to use a weapon;

(e) the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(f.1) any history of interaction or

Facteurs

(2) Pour décider si la personne a agi de façon raisonnable dans les circonstances, le tribunal tient compte des faits pertinents dans la situation personnelle de la personne et celle des autres parties, de même que des faits pertinents de l'acte, ce qui comprend notamment les facteurs suivants :

a) la nature de la force ou de la menace;

b) la mesure dans laquelle l'emploi de la force était imminent et l'existence d'autres moyens pour parer à son emploi éventuel;

c) le rôle joué par la personne lors de l'incident;

d) la question de savoir si les parties en cause ont utilisé ou menacé d'utiliser une arme;

e) la taille, l'âge, le sexe et les capacités physiques des parties en cause;

f) la nature, la durée et l'historique des rapports entre les parties en cause, notamment tout emploi ou toute menace d'emploi de la

communication between the parties to the incident;	force avant l'incident, ainsi que la nature de cette force ou de cette menace;
(g) the nature and proportionality of the person's response to the use or threat of force; and	**f.1)** l'historique des interactions ou communications entre les parties en cause;
(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.	**g)** la nature et la proportionnalité de la réaction de la personne à l'emploi ou à la menace d'emploi de la force;
[emphasis added]	**h)** la question de savoir si la personne a agi en réaction à un emploi ou à une menace d'emploi de la force qu'elle savait légitime.
	[nous soulignons]

Findings of the Trial Judge

[52] The trial judge made several findings of fact based on the evidence, including portions of the police statement that he accepted, the lack of injuries suffered by the accused, the evidence located at the scene of the crime and the evidence of the pathologist. These findings include:

- there was no evidence the accused was intoxicated by drugs or alcohol and that, while he admitted being high earlier in the day, the accused told police he was not high at the time of the incident;

- the deceased "snapped" (*trial decision* at para 66) when he came to the residence, found his property destroyed and blamed the accused for not protecting it;

- the deceased began throwing things at the accused and attacked him verbally and physically;

- the police statement and the police examination of the accused confirmed that the deceased did not "get [the accused] very well" (*ibid* at para 68) when the deceased was using the two-by-four against the accused;

- the accused said in the police statement that he was "totally" (*ibid* at para 63) in control during the incident and he "just defended himself" (*ibid* at para 67) in response to the deceased's aggressive behaviour; and

- the accused took the two-by-four from the deceased and swung it at him a few times in the residence and the deceased then ran outside. The trial judge rejected the accused's assertion in the police statement that after the deceased ran outside, the accused left the residence with his girlfriend.

[53] Significantly, the trial judge found (*ibid* at para 86):

> There was a clear opportunity to disengage from the altercation when, by the accused's own admission, [the deceased] ran out of the front door. Instead, it is apparent from the forensic evidence that the accused continued to beat [the deceased] outside of the residence. Based on the forensic evidence as to the nature of the injuries and the cumulative effect of the blows struck by the accused with the two-by-four, [the deceased] would have been immobile and unconscious after the accused finished delivering the blows. He could not have run anywhere, much less out of the house to the front of the yard, through the front fence gate and then another 13 feet further.

[54] After considering the police statement, the trial judge indicated that he was satisfied that pursuant to sections 34(1)(a) and 34(1)(b) of the *Code*, the accused believed that force or threat of force was being used against him and that "at least initially some of the force used . . . [was] for the purpose of defending himself" (*trial decision* at para 71). However, after considering the factors in section 34(2), he did not accept that the force used was reasonable pursuant to section 34(1)(c).

[55] In reaching his conclusion, the trial judge considered the accused's argument regarding *Villaroman*. He concluded that guilt was the only reasonable conclusion available given his finding that the accused not only struck the deceased a few times in the residence but also continued to strike the deceased until he was unconscious outside of the residence.

Positions of the Parties

[56] The accused argues that having found that the first two inquiries in sections 34(1)(a) and 34(1)(b) had been met, the trial judge erred in his assessment of section 34(1)(c).

[57] The accused argued at the hearing of the matter that the trial judge erred in considering the lack of injuries to the accused because this was irrelevant. However, I am of the view that this position can be summarily dismissed as simply one of the contextual factors that the Court is entitled to consider.

[58] Of more significance, the accused submits that, contrary to *Villaroman*, the trial judge erred in relying on circumstantial evidence to draw inferences that were determinative of his finding regarding the reasonableness

of the accused's conduct. In this regard, he maintains the trial judge failed to consider alternative inferences to his finding that the accused continued to beat the deceased after he left the residence.

[59] In support of his position, the accused submits that the trial judge failed to consider certain aspects of the cross-examination of the pathologist, including discussion regarding:

- the non-fatal stab wound that the deceased suffered to his neck;
- the possibility that some of the injuries, such as the lacerations or tears in his forehead and scalp, could have been caused by falling onto the ground, a table or a metal door;
- the possibility that after suffering some of the injuries the deceased still could have been walking, talking and breathing; and
- the fact that none of the injuries suffered by the deceased had started to heal, indicating that while they could have been caused at different times, they were all caused within the preceding twenty-four hours.

[60] The accused argues that the above supports a reasonable alternative inference that some of the injuries suffered by the deceased may have been inflicted prior to the altercation with the accused. He submits that it was a reasonable inference that the deceased stumbled out of the residence and, suffering from the cumulative effect of the injuries, fell on the boulevard, which caused the fatal injury. Thus, he argues that a proper application of

Villaroman leads to the conclusion that the inference of fact, which he submits was determinative of the accused's guilt, was not the only reasonable inference.

[61] Concurrently, the accused argues that the trial judge erred in his *W(D)* assessment of the police statement and that he was simply defending himself in his determination of reasonableness pursuant to section 34(1)(c).

[62] The Crown's main argument is that the accused's fundamental disagreement is with the trial judge's fact-finding. It submits that most of those findings relied on the direct evidence of the police statement, but that where it conflicted, the trial judge reconciled it with the evidence of other witnesses. The Crown submits that the totality of the evidence supported the trial judge's findings of fact, including the conclusion that the accused continued to beat the deceased with the two-by-four after the deceased had run outside.

[63] Thus, the Crown maintains that the crux of the accused's argument is not that the trial judge erred in his finding that the accused exceeded the use of reasonable force in defending himself based on the facts accepted by the trial judge, but that the facts the trial judge found to support his finding in that regard were speculative.

[64] Alternatively, the Crown argues that if this Court disagrees with its position that the accused is essentially disputing the findings of fact made by the trial judge, it must consider the applicable standard of review to a section 34(1)(c) analysis. The Crown submits that the Ontario Court of Appeal's decision in *R v Khill*, 2020 ONCA 151 [*Khill* ONCA], supports the proposition that the weighing and assessment of the factors in section 34(2) in

the determination of reasonableness pursuant to section 34(1)(c) is subject to review on the reasonableness standard that is applicable to review of verdicts (see para 63).

[65] Regardless, the Crown submits that whether the standard of review is correctness or reasonableness, the trial judge was entitled to conclude that, after disarming the deceased, the accused caused extensive injuries to the deceased that were obvious and exceeded those that were likely to cause death.

Discussion

[66] In the recent decision of *Khill* SCC, Martin J, writing for the majority of the Court, explained the reasonableness analysis pursuant to section 34(1)(c). She said (*ibid* at para 62):

> The final inquiry under s. 34(1)(c) examines the accused's response to the use or threat of force and requires that "the act committed [be] reasonable in the circumstances". The reasonableness inquiry under s. 34(1)(c) operates to ensure that the law of self-defence conforms to community norms of conduct. By grounding the law of self-defence in the conduct expected of a reasonable person in the circumstances, an appropriate balance is achieved between respecting the security of the person who acts and security of the person acted upon. The law of self-defence might otherwise "encourage hot-headedness and unnecessary resorts to violent self-help" (Roach, at pp. 277-78). That the moral character of self-defence is thus now inextricably linked to the reasonableness of the accused's act is especially important as certain conditions that were essential to self-defence under the old regime — such as the nature of the force or threat of force raising a reasonable apprehension of death or grievous bodily harm — have been turned into mere factors under s. 34(2).

[67] Determinations made in considering the factors listed in section 34(2) regarding findings of self-defence are highly fact-dependent.

[68] I am somewhat sympathetic to the Crown's argument that the findings made constitute findings of fact, subject to review on the standard of palpable and overriding error.

[69] Nonetheless, at its core, the argument advanced by the accused regarding the trial judge's finding that he did not use reasonable force in defending himself is based on his *Villaroman* argument that there were gaps in the direct evidence as to what occurred after the deceased left the residence and that the trial judge erred in his assessment of what happened during that time frame based on the circumstantial evidence.

[70] In *Villaroman*, Cromwell J, writing for the Supreme Court of Canada, clarified the way circumstantial evidence should be assessed in the consideration of reasonable doubt. He said (*ibid* at para 37):

> When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.
>
> [emphasis in original]

[71] It is without doubt that the trial judge's finding that the accused continued to beat the deceased after he had left the residence until he collapsed formed the basis for his finding that the force used was not reasonable and therefore self-defence did not apply, which led to the accused's conviction.

[72] In *Villaroman*, the Supreme Court clarified that the role of the appellate court in reviewing a conviction based on circumstantial evidence is whether, having regard to the standard of proof, the inferences drawn were ones that were reasonably open to the trial judge (see para 67).

[73] In my view, the possibility that the deceased suffered the blows that contributed to his death prior to confronting the accused is not a reasonable one. Therefore, the trial judge's failure to consider such a possibility does not demonstrate that he erred in his analysis regarding the reasonableness of the use of force pursuant to section 34(1)(c).

[74] First, the injuries suffered by the deceased were significant. I agree with the Crown that, even accepting that the deceased may have suffered some injury prior to arriving at the residence, the trial judge was entitled to infer, based on the accused's version of the deceased's behaviour, that the deceased had suffered the catastrophic injuries that led to his demise because of the actions of the accused. There was no evidence that the deceased's face was caved-in due to multiple fractures or that he suffered anything close to the most significant injuries, including the large laceration to the left side of his forehead that went through to the bone (which would have led the deceased to be incapacitated) prior to his altercation with the accused.

[75] It was based on the accused's own evidence that the trial judge found that the deceased had attempted to leave the residence but that the altercation

continued outside. The accused admitted that all the blows that he inflicted on the deceased were to the face, although perhaps he may have hit the deceased's neck. Evidence of the blood splatters confirms that they were more plentiful and significant outside of the residence, also suggesting the deceased was not suffering the injuries that led to his demise when he was inside of the residence. The pool of blood found under the deceased's head supported the conclusion that he suffered the most serious blow that would have led to his incapacitation at the location where he was found. It bears repeating that the pathologist described the injuries suffered by the deceased as typically being associated with "high speed motor vehicle collisions or . . . [where] someone falls or jumps from a multistorey building."

[76] The above evidence is significant. The inferences suggested by the accused that the deceased either suffered the injuries that caused his death before engaging with the accused or after by simply falling to the ground after the altercation are neither plausible theories nor other reasonable possibilities. Thus, no *Villaroman* error has been demonstrated and the verdict is not unreasonable.

[77] Regarding *W(D)*, the trial judge performed a modified *W(D)* analysis to account for the objective element of the defence of self-defence. He considered the police statement along with all the other evidence (see *R v Menow*, 2013 MBCA 72 at paras 23-28). It was his findings of fact that were fatal to the accused's assertion of self-defence. I am not persuaded that the trial judge erred in making the findings of fact that he did, nor in the inferences that he drew that were essential to his conclusion that the Crown had proven beyond a reasonable doubt that the accused's actions were not reasonable in the circumstances.

[78] In my view, this ground of appeal turns wholly on the *Villaroman* and *W(D)* arguments regarding the inferences of fact made by the trial judge and his consideration of the police statement. Therefore, I need not consider the standard of review to be applied to a determination pursuant to section 34(1)(c). I am also of the view that the argument regarding standard of review was not sufficiently developed or explored in these proceedings. It is contained in a footnote in the Crown's factum and not significantly responded to by the accused. The argument does not discuss the significance of the fact that the Court in *Khill* ONCA was dealing with a jury trial or the comments made by Martin J in *Khill* SCC regarding the distinction between jury trials and those conducted by a judge alone. Without limiting the discussion, a more detailed examination of this Court's decisions in *R v Tanner*, 2024 MBCA 87 and *R v King*, 2023 MBCA 37, as well as other jurisprudence, such as *R v Araujo*, 2000 SCC 65, *R v Shepherd*, 2009 SCC 35 and *R v Jeremschuk*, 2024 ABCA 268, would be of assistance.

Did the Trial Judge Err in Concluding That the Accused Formed the Requisite Intent for Murder?

[79] Section 229(a)(ii) of the *Code* provides that culpable homicide is murder where the person who causes the death of a human being "means to cause him bodily harm that he knows is likely to cause death, and is reckless whether death ensues or not".

[80] In *Khill* SCC, Martin J emphasized that a conviction for murder (as opposed to manslaughter) does not automatically flow from a defeated claim of self-defence. Rather, the jury must continue to consider whether the

accused acted with the requisite intent for murder. In doing so, "the jury must consider the cumulative effect of all the relevant evidence" (*ibid* at para 121).

[81] Relevant evidence includes evidence related to specific defences or justifications that have been rejected or are not available. Aside from self-defence, this includes evidence relating to issues such as intoxication, provocation or mental disorder. This is often referred to as the *rolled-up instruction* or *rolled-up charge* in jury trials. As explained in the Ontario Court of Appeal case of *R v Fraser*, 2001 CanLII 8611 at para 25:

> Ordinarily, evidence that has a bearing on the issue of intent will already have been raised by way of a justification defence such as self-defence, or there may be evidence of provocation directed towards the accused. While the jury may have rejected each individual defence, they may still have a reasonable doubt about the accused's intent to commit murder having regard to the cumulative effect of the evidence as a whole. The purpose of a rolled-up charge is to prevent the jury from compartmentalizing the evidence and to draw to the jury's attention those pieces of evidence that have a bearing on intent so that they may assess its cumulative effect. The cumulative effect of the evidence bearing on intent may result in the verdict being one of manslaughter as opposed to murder.
>
> [citations omitted]

[82] The accused argues that, like the case in *R v Harris*, 2023 ABCA 90, the trial judge failed to consider the cumulative effect of the evidence in determining intent. He argues the trial judge erred to the extent that he relied on the police statement to conclude that the first two elements in sections 34(1)(a) and 34(1)(b) had been met, but did not consider these findings in his ultimate conclusion that, in the circumstances of this case, it

was “a matter of common sense” (*trial decision* at para 93) that the accused knew what the predictable consequences of his actions would be.

[83] In addition, the accused argues that this case is similar to *R v Mousseau*, 2023 MBKB 7 [*Mousseau*]. In that case, Edmond J found that despite rejecting the accused’s assertion of self-defence under section 34(1)(c), he accepted that the accused had been acting spontaneously and did not intend the result of his actions and therefore did not have the required intent for murder pursuant to section 229(a)(ii).

[84] The trial judge was alive to and considered *Khill* SCC. The application of the rolled-up charge was discussed during closing submissions and the trial judge acknowledged that, even if he found that provocation or self-defence did not apply, he was still required to consider whether he had a reasonable doubt regarding the issue of intent.

[85] The trial judge considered that the accused was not impaired by drugs or alcohol at the time of the incident. He considered that the accused maintained that he was calm and considered the accused’s evidence that prior to him disarming the deceased, the deceased was “losing his temper, and verbally abusing [the accused] and physically attempting to assault [the accused]” (*trial decision* at para 92). Nonetheless, after considering the severity of the injuries inflicted by the accused and the way that they were inflicted, he found that the common sense inference that the accused knew the predictable consequences of his actions applied. It was on that basis that the trial judge found the necessary intent to commit murder.

[86] In my view, *Mousseau* is distinguishable on its facts. In that case, the accused had stabbed the deceased a single time as the deceased approached him "ready to strike" (*ibid* at para 114).

[87] Moreover, I agree with the Crown that there is no inherent conflict in finding that a person acted for the purpose of defending themselves pursuant to section 34(1)(b) and that they appreciated their actions were likely to cause bodily harm likely to cause death. That is, a finding favourable on the first two prongs of the test in section 34(1) does not necessarily lead to the conclusion that an accused lacked the required intent to commit murder pursuant to section 229(a)(ii).

[88] I am not convinced that the reasons of the trial judge demonstrate that he failed to consider the cumulative effect of all the evidence.

[89] Similarly, as I have earlier discussed, the trial judge did not violate the principles enunciated in *Villaroman* or *W(D)*. These arguments relate mainly to the findings of fact that the trial judge made. Based on those findings, the trial judge could reasonably conclude that the accused had the requisite intent for murder.

Disposition

[90] In the result, I would dismiss the appeal.

Cameron JA

I agree: Kroft JA

I agree: Turner JA