COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Khill, 2020 ONCA 151
DATE: 20200226
DOCKET: C65655

Strathy C.J.O., Doherty and Tulloch JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Peter Khill

Respondent

Susan Reid, for the appellant

Michael Lacy and Joseph Wilkinson, for the respondent

Heard: September 30, 2019

On appeal from the acquittal entered by Justice C. Stephen Glithero, sitting with a jury, dated June 27, 2018.

Doherty J.A.:

I

INTRODUCTION

[1] The respondent, Peter Khill, shot and killed Jonathan Styres. He was charged with second degree murder. At trial, Mr. Khill testified that he shot Mr. Styres in self-defence, believing Mr. Styres was armed and about to shoot him.

[2] There were two issues at trial – did Mr. Khill act in self-defence, and if he did not, did he have the *mens rea* required for murder?[1] The self-defence claim, if accepted, would lead to an acquittal. The *mens rea* issue would, at best for Mr. Khill, result in a manslaughter conviction. The jury acquitted, indicating that it had a reasonable doubt on self-defence.

[3] The Crown advances four grounds of appeal. Three allege misdirection in respect of self-defence. The fourth challenges the admissibility of the evidence of Dr. Laurence Miller, an expert called by the defence. The Crown's oral argument focused on the alleged misdirection.

[4] I would allow the appeal and order a new trial. I agree with the Crown's submission that the trial judge failed to instruct the jury to consider Mr. Khill's conduct during the incident leading up to the shooting of Mr. Styres when

---

[1] Although the *mens rea* issue arose on the evidence, the defence did not argue Mr. Khill lacked the requisite intent required for murder. At the outset of the trial, the parties advised the trial judge that self-defence was the sole issue.

assessing the reasonableness of that shooting. I do not agree that the trial judge made the other errors advanced by the Crown.

II

THE EVIDENCE

(i) Overview

[5] It is necessary to review some of the evidence, particularly Mr. Khill's testimony, in detail. However, it is helpful to begin with an overview of the tragic events.

[6] Mr. Khill and his then girlfriend, now wife, Millie Benko, lived in a single-story house in a rural area near Hamilton, Ontario. Mr. Khill was asleep at about 3:00 a.m. on February 4, 2016 when Ms. Benko woke him up and told him she had heard a loud banging. Mr. Khill listened and heard two loud bangs. He went to the bedroom window. From the window, he could see his 2001 pickup truck parked in the driveway. The dashboard lights were on indicating, to Mr. Khill, that some person or persons were either in the truck or had been in the truck.

[7] Mr. Khill had received training as an army reservist several years earlier. This training taught him to assess threat situations and respond to those situations proactively. According to Mr. Khill, his military training took over when he perceived a potential threat to himself and Ms. Benko. He decided to investigate the noises and, if necessary, confront any intruder or intruders. Mr. Khill loaded the shotgun

he kept in the bedroom and, armed with the shotgun, went to investigate the noises.

[8] Using techniques he had learned as an army reservist, Mr. Khill stealthily made his way through his house, ending up at the front door of the breezeway connecting the house to the garage. Mr. Khill could see his truck from this vantage point. The truck was parked in the driveway facing away from the house with the back end near the garage door. The dashboard lights were still on.

[9] Mr. Khill suspected that one or more persons were in or near his truck. He quietly made his way to the back of the passenger's side of the truck. The passenger door was open. Mr. Khill saw the silhouette of a person leaning into the front seat of the truck from the passenger door. It was Mr. Styres. Evidence later gathered at the scene indicated that the lock on the front door of the truck had been punched out. It would appear that Mr. Styres was trying to steal the truck or the contents in the front cab of the truck.

[10] Mr. Khill said in a loud voice, "Hey, hands up." Mr. Styres, who apparently had not seen Mr. Khill, began to rise and turn toward Mr. Khill. As he turned, Mr. Khill fired a shot. He immediately racked the shotgun and fired a second shot. Both shots hit Mr. Styres in the chest. He died almost immediately.

[11] According to Mr. Khill, immediately after he yelled at Mr. Styres to put his hands up, Mr. Styres began to turn toward him. Mr. Styres' hand and arm

movements indicated that he had a gun and was turning to shoot Mr. Khill. Mr. Khill claimed that he believed that he had no choice but to shoot Mr. Styres. Mr. Styres did not have a gun.

(ii) Mr. Khill's Evidence

[12] Mr. Khill was 26 years old at the time of the incident. He and Ms. Benko had moved into their home about six months earlier. The garage was connected to the house by a breezeway. There was, however, no direct access from the garage or the breezeway into the house. There was a window space in the breezeway that had been boarded over by Mr. Khill. If that board was removed, a person could get into the basement of the home from the breezeway and, from the basement, access the rest of the house.

[13] Mr. Khill is a millwright and works on jet engines. He was often required to go out-of-town on short notice for job-related reasons. He worried about Ms. Benko's safety while he was gone. They lived in the country and his neighbours had told him about numerous break-ins in the area. About a week before the homicide, Ms. Benko had told Mr. Khill that she thought she had heard someone using the keypad lock on the door, apparently trying to gain entry to the home. Mr. Khill was concerned that burglars might be watching the house. He changed the entry codes on the door locks.

[14] On the night of the homicide, Ms. Benko awoke to a loud noise outside of the home. She woke Mr. Khill. He heard two loud bangs coming from the area of the garage. Mr. Khill knew that the noises did not come from inside the house but could not tell whether they were from inside or outside of the garage.

[15] Mr. Khill got out of bed and went to the bedroom window. He saw the dash lights in his truck were on. This confirmed to him the presence of one or more intruders in or near the garage and the truck. Mr. Khill knew that his garage opener was in the truck and worried that someone might gain entry to the garage using the opener. Mr. Khill also kept a knife in the truck, which he feared could be used as a weapon by the intruder. He worried that the intruder or intruders could get into the house and put him and Ms. Benko in danger.

[16] Mr. Khill testified that his concerns about possible intruders led him to perform the kind of threat assessment that he had been trained to do as an army reservist. A threat assessment involved considering how many people were outside, the weapons they might have, and what they might want. This training also led Mr. Khill to think proactively about neutralizing the potentially threatening situation. He asked himself:

> What do I need to do to gain control of the whole situation?

[17] Mr. Khill kept a shotgun in the closet of his bedroom. He had ammunition for the shotgun in the bedroom. Mr. Khill explained that he kept the gun and

ammunition in the bedroom because he anticipated that if the need to use the gun to defend himself and Ms. Benko ever arose at night, that need would probably occur when they were in their bedroom.

[18] Mr. Khill had the appropriate licence for the shotgun. He took the shotgun out of its gun sock and removed the trigger lock. Mr. Khill removed two shotgun shells from the drawer and loaded them into the gun, racking one into the chamber. He put the safety on the weapon. Although it was the middle of winter, Mr. Khill left the bedroom in his bare feet wearing only a t-shirt and boxer shorts and carrying the loaded shotgun.

[19] Mr. Khill testified that, in keeping with his military training, he left the bedroom, prepared for the worst, but hoping for the best. He had decided that if he came upon an intruder, he would disarm that intruder, if necessary, and detain him. Mr. Khill insisted that he was instinctively following his military training. In cross-examination, he was asked if he was prepared, when he left the bedroom, to kill somebody if necessary. He responded:

> Yes, I have deadly force with me.

[20] Mr. Khill exited the house using the back door and then entered the breezeway. The lights in the breezeway went on automatically. Mr. Khill could see into the garage from the breezeway. He did not see anybody in the garage.

[21] Mr. Khill exited the breezeway through its front door. This put him near the driveway and beside his truck. He passed between the garage and the truck, taking up a position on the back-passenger side corner of the truck. Mr. Khill was moving as quietly as he could, using techniques he had learned as a reservist to avoid alerting the intruder.

[22] From his vantage point by the back of the truck, Mr. Khill saw that the passenger door was open. He could also see a person, Mr. Styres, leaning across the front passenger seat of the truck. Mr. Styres' feet were on the ground beside the passenger door. Mr. Khill did not know Mr. Styres and Mr. Styres did not appear to be aware of Mr. Khill's presence. It was dark. Mr. Khill could not see Mr. Styres' face. Based on his observations to this point, Mr. Khill believed that there was a single intruder breaking into his truck.

[23] Mr. Khill said in a loud voice, "Hey, hands up." Mr. Khill saw Mr. Styres begin to turn toward him in response to Mr. Khill's voice. He had been taught to focus on the target's hands. Mr. Khill saw Mr. Styres' hands moving in unison downward toward his waist. His hands came together at the waist and pointed toward Mr. Khill. Based on these movements and his army reservist training, Mr. Khill believed Mr. Styres had a gun and was turning to point it at Mr. Khill. Mr. Khill testified that Mr. Styres was about twelve feet away from him. The forensic evidence suggested the two men were three to twelve feet apart.

[24] Mr. Khill testified that he believed he faced “a life or death situation”: shoot or be shot. He raised his shotgun, removed the safety, and fired, aiming at Mr. Styres’ chest. He immediately racked the gun and fired a second time, again aiming at the chest. Mr. Khill testified that he had been trained to fire twice and aim at “centre mass”. Both shots struck Mr. Styres. One entered his chest directly, the other passed through his arm and into his chest.

[25] Mr. Styres fell to the ground. Mr. Khill quickly searched Mr. Styres for a gun. Mr. Styres was unarmed. Mr. Khill went into the house. Ms. Benko was on the phone with the 911 operator.

[26] Mr. Khill put his shotgun in the house and went back outside to try and help Mr. Styres. He applied CPR for several minutes to no avail. He returned to the house and spoke to the 911 operator. Mr. Khill went back outside to wait for the arrival of the police.

[27] Mr. Khill was arrested at the scene and eventually charged with murder. He made statements to the 911 operator, to the police at the scene, and later to the police at the station to the effect that he had acted in self-defence and believed Mr. Styres was about to shoot him.

[28] In cross-examination, Mr. Khill was asked why he did not call 911 from his bedroom and wait for the police. He acknowledged that he could have done so but indicated, “There was nothing that I was ever trained on to dial 911.”

[29] Mr. Khill also agreed in cross-examination that there were other reasonable things he could have done rather than seeking out and confronting the intruder in the manner he did. Mr. Khill indicated that none of these other options came to his mind. He insisted that he feared for his and Ms. Benko's safety and was "falling back on my military training".

[30] The jury heard a great deal of forensic evidence. Much of that evidence related to Mr. Styres' position when he was shot by Mr. Khill. Not surprisingly, some of that evidence was equivocal. As I understand that evidence, it did not necessarily contradict Mr. Khill's testimony in any material way.

(iii) Mr. Khill's Military Training

[31] Mr. Khill joined the army reserve while in high school in 2007. He remained involved with the reserves until 2011. Mr. Khill participated in weekly training sessions and some weekend training sessions. He took longer training sessions during the summers. In 2010, Mr. Khill also trained to assist in the security efforts surrounding the G8 Summit in Huntsville, Ontario.

[32] Mr. Khill testified that he was taught how to react to various situations that soldiers encounter in a war zone. The training emphasized repetition so soldiers would react instinctively. Mr. Khill believed this part of his training remained with him long after he left the reserves and affected the way he reacted during the fatal encounter with Mr. Styres on the night of February 4, 2016.

[33] Mr. Khill was taught to assess potential threats and take proactive measures to neutralize threats. His teaching involved the use of teamwork and various techniques when seeking out and neutralizing threats. Mr. Khill also learned how to use deadly force when necessary. He was taught to aim for the target's centre mass and fire twice in rapid succession when using deadly force.

[34] Mr. Khill agreed that all of his training, with the exception of the training relating to the G8 Summit, assumed operations in a theatre of war. The training was not intended for encounters in civilian situations. Although Mr. Khill testified he could see "some overlap" in wartime situations presented in his training and the situation he faced in the early morning of February 4, 2016, he understood that military training had to be kept separate from civilian life.

[35] Walter Sroka, an officer who trained Mr. Khill in the army reserves, testified for the defence. He described the army reservist training and acknowledged that the training was designed to teach soldiers how to address situations, including threatening situations, that arose in a combat situation. The training included learning tactics to be used when protecting structures at night. Mr. Sroka agreed that soldiers had to be careful to keep their military training separate from their daily civilian lives.

[36] Mr. Sroka testified that the reservist training taught soldiers to operate as a unit and not as individuals when responding to perceived threats. The training also

used repetition so soldiers could perform the necessary tasks without thinking about them. Mr. Sroka described the training as allowing soldiers to turn on a switch and go into a “military mindset”. He further testified that because of the nature of the training, one could be away from the training for quite some time and it would return very quickly should a threatening situation arise.

[37] Mr. Sroka testified that, unlike the rest of the reservist training, the G8 Summit training did not involve war conditions. In that training, the reservists were taught that they must act in coordination with, and in cooperation with, the civilian police.

III

A: The Self-Defence Instructions

(i) Overview of s. 34

[38] Self-defence renders an act that would otherwise be criminal, not culpable. The nature of the defence is evident in the jury instruction routinely used in murder cases. Jurors are told to first decide whether the accused caused the victim’s death. If the jury is satisfied the accused caused the victim’s death, the jury goes on to decide whether the accused acted unlawfully in causing the victim’s death. In answering this question, the jury considers self-defence. An act done in self-defence is not unlawful and death caused by that act is not culpable: see David

Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 2015), at p. 657 (Final 229-A).

[39] Section 34 of the *Criminal Code*, R.S.C., 1985, c. C-46, codifies the law of self-defence in Canada. The section also speaks of the defence of others. Mr. Khill claimed to be protecting Ms. Benko in addition to defending himself when he shot Mr. Styres. For the purposes of the appeal, however, I will focus exclusively on the self-defence component of Mr. Khill's defence. In the circumstances of this case, his defence stands or falls on his claim that he shot Mr. Styres to save his own life.

[40] Sections 34(1) and (2) provide:

> 34(1) A person is not guilty of an offence if
>
> > (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;
> >
> > (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
> >
> > (c) the act committed is reasonable in the circumstances.
>
> (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 communication between the parties to the incident;
>
> (g) the nature and proportionality of the person's response to the use or threat of force; and
>
> (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[41] The present s. 34 came into force on March 11, 2013. It aimed at simplifying the previous law[2] by replacing four different overlapping statutory definitions of self-defence with a single definition: *Citizen's Arrest and Self-defence Act*, S.C. 2012, c. 9, s. 2; Canada, Department of Justice, "Bill C-26 (S.C. 2012, c. 9) Reforms to Self-Defence and Defence of Property: Technical Guide for Practitioners", March 2013, at pp. 7-10; *R. v. Bengy*, 2015 ONCA 397, 325 C.C.C.

---

[2] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 34-37, as they appeared on March 10, 2013, referred to throughout this judgment as the "previous" or "prior" provisions.

(3d) 22, at paras. 27-30; *R. v. Evans*, 2015 BCCA 46, 321 C.C.C. (3d) 130, at paras. 29-33.

[42] Self-defence, as defined in s. 34(1), has three elements:

- the accused must believe, on reasonable grounds, that force is being used or threatened against him: s. 34(1)(a) [the trigger];
- the act of the accused said to constitute the offence must be done for the purpose of defending himself: s. 34(1)(b) [the motive]; and
- the act said to constitute the offence must be reasonable in the circumstances: s. 34(1)(c) [the response].[3]

(a) The Trigger

[43] Section 34(1)(a) reads:

> 34(1) A person is not guilty of an offence if
>
> (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;

[44] Section 34(1)(a) focuses on the accused's state of mind. The accused must have a subjective belief that force is being used or threatened against them.

---

[3] I have borrowed the trigger/response terminology from David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed. (Oxford: Oxford University Press, 2011) at pp. 380-382. See also *Bengy*, at para. 28; *R. v. Mohamad*, 2018 ONCA 966, 369 C.C.C. (3d) 211, at para. 213.

Absent that belief, the defence is not available. That belief, however, does not itself trigger the defence. For the defence to be triggered, the belief must be based on "reasonable grounds".

[45] Self-defence has traditionally been regarded as a justificatory defence rooted in necessity founded on the instinct for self-preservation. Justification treats an act that would normally be regarded as criminal as morally right, or at least morally acceptable in the circumstances: *R. v. Perka*, [1984] 2 S.C.R. 232, at p. 246; *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14, at paras. 24-25. Because an act done in self-defence justifies as morally acceptable an act that would otherwise be criminal, the defence cannot depend exclusively on an individual accused's perception of the need to act. Put another way, killing another cannot be justified simply because the killer believed it was necessary. Justification defences demand a broader societal perspective. Consequently, self-defence provisions contain a reasonableness component. For example, the previous s. 34(2) justified deadly force if the accused caused death "under reasonable apprehension of death or grievous bodily harm" and believed "on reasonable grounds" that he could not otherwise save himself.

[46] The requirement in s. 34(1)(a) that the belief be based on "reasonable grounds" imports an objective assessment of the accused's belief. Reasonableness is ultimately a matter of judgment. A reasonableness assessment allows the trier of fact to reflect community values and normative expectations in

the assignment of criminal responsibility. To brand a belief as unreasonable in the context of a self-defence claim is to declare the accused's act criminally blameworthy: see *R. v. Cinous*, [2002] 2 S.C.R. 3, at para. 210, *per* Arbour J. in dissent but not on this point; *R. v. Pilon*, 2009 ONCA 248, 243 C.C.C. (3d) 109, at para. 75; *R. v. Philips*, 2017 ONCA 752, at para. 98; George P. Fletcher, "The Right and the Reasonable" in Russell L. Christopher, ed., *Fletcher's Essays on Criminal Law* (Oxford: Oxford University Press, 2013) 150, at p. 157.

[47] My colleague, Paciocco J.A., writing extrajudicially in his influential article, "The New Defense Against Force" (2014) 18 Can. Crim. L. Rev. 269, describes the purpose of the reasonableness component of the defence in these terms, at p. 278:

> When the law uses an objective component it does so to ensure that the acts or beliefs it accepts are "reasonable" ones. It is a quality control measure used to maintain a standard of conduct that is acceptable not to the subject, but to society at large.

[48] Canadian courts consistently interpreted the reasonableness requirements in the previous self-defence provisions as blending subjective and objective considerations. Reasonableness could not be judged "from the perspective of the hypothetically neutral reasonable man, divorced from the appellant's personal circumstances": *R. v. Charlebois*, [2000] 2 S.C.R. 674, at para. 18. Instead, the court contextualized the reasonableness assessment by reference to the accused's personal characteristics and experiences to the extent that those

characteristics and experiences were relevant to the accused's belief or actions. For example, an accused's prior violent encounters with the other person or her knowledge of that person's propensity for violence had to be taken into account in the reasonableness inquiry: see *R. v. Pétel*, [1994] 1 S.C.R. 3, at p. 13; *R. v. Lavallee*, [1990] 1 S.C.R. 852, at pp. 874, 899; *Charlebois*, at para. 14; *R. v. Currie* (2002), 166 C.C.C. (3d) 190, at paras. 43-44 (Ont. C.A.), leave to appeal refused, [2003] S.C.C.A. No. 410; *R. v. Sheri* (2004), 185 C.C.C. (3d) 155, at para. 77 (Ont. C.A.). Similarly, an accused's mental disabilities were factored into the reasonableness assessment: see *R. v. Nelson* (1992), 8 O.R. (3d) 364, at pp. 383-384 (C.A.); *R. v. Kagan*, 2004 NSCA 77, 185 C.C.C. (3d) 417, at paras. 37-45.

[49] Not all characteristics or experiences of an accused were, however, relevant to the reasonableness inquiry under the previous self-defence provisions. An accused's self-induced intoxication, abnormal vigilance, or beliefs that were antithetical to fundamental Canadian values and societal norms were not relevant to the reasonableness assessment: see *R. v. Reilly*, [1994] 2 S.C.R. 396, at p. 404; *Cinous*, at para. 130, *per* Binnie J. concurring; *R. v. Boucher*, 2006 QCCA 1079, at paras. 34-41; *Pilon*, at para. 75. For example, an accused's "honest" belief that all young black men are armed and dangerous could not be taken into account in determining the reasonableness of that accused's belief that the young black man he shot was armed and about to shoot him. To colour the reasonableness inquiry with racist views would undermine the very purpose of that inquiry. The justificatory

rationale for the defence is inimical to a defence predicated on a belief that is inconsistent with essential community values and norms.

[50] Contextualizing the reasonableness inquiry to take into account the characteristics and experiences of the accused, does not, however, render the inquiry entirely subjective. The question is not what the accused perceived as reasonable based on his characteristics and experiences, but rather what a reasonable person with those characteristics and experiences would perceive: see *Pilon*, at para. 74.

[51] The language of the present s. 34(1)(a), and in particular the phrase, “on reasonable grounds”, tells me that Parliament intended the same kind of reasonableness inquiry conducted under the previous self-defence provisions should be conducted under s. 34(1)(a). To the extent that Mr. Khill’s personal characteristics and experiences informed his belief that he was about to be shot by Mr. Styres, those characteristics and experiences had to be taken into account in assessing the reasonableness of his belief, unless excluded from that assessment by policy-based considerations.

[52] The Crown argues that Mr. Khill’s previous military training should not have been taken into account in assessing the reasonableness of his belief that force was being used or threatened against him by Mr. Styres. I address that argument below.

(b) The Motive

[53] The second element of self-defence is set out in s. 34(1)(b):

> A person is not guilty of an offence if,
>
> (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.

[54] Section 34(1)(b) looks to the motive of the accused. Why did he do the "act" which is said to constitute the offence? This inquiry is subjective. The requirement that the "act which constitutes the offence" be done for defensive purposes was not explicit in the prior *Criminal Code* definitions of self-defence. It is, however, implicit in any legitimate notion of self-defence: see *R. v. Craig*, 2011 ONCA 142, at para. 35; David Paciocco, "Applying the Law of Self-Defence" (2007) 12 Can. Crim. L. Rev. 25, at p. 29. Absent a defensive or protective purpose, the rationale for the defence disappears. Vengeance, even if righteous, is blameworthy and cannot be camouflaged as self-defence.

(c) The Response

[55] The third element of the s. 34 defence is found in s. 34(1)(c):

> A person is not guilty of an offence if,
>
> (c) the act committed is reasonable in the circumstances.

[56] This element examines the accused's response to the perceived or actual use of force or the threat of force. That response – "the act" – which would otherwise be criminal, is not criminal if it was "reasonable in the circumstances".

[57] Section 34(2) directs that, in determining the reasonableness of the accused's act, the court must consider "the relevant circumstances of the person, the other parties and the act". This language signals that the reasonableness inquiry in s. 34(1)(c), like the reasonableness inquiry in s. 34(1)(a), blends objective and subjective considerations.

[58] The "relevant circumstances of the accused" in s. 34(2) can include mistaken beliefs held by the accused. If the court has determined, under s. 34(1)(a), the accused believed wrongly, but on reasonable grounds, force was being used or threatened against him, that finding is relevant to, and often an important consideration in, the court's assessment under s. 34(1)(c) of the reasonableness of "the act in the circumstances".[4]

[59] Other mistaken beliefs by an accused that are causally related to the "act" that gives rise to the charge will also be relevant to the assessment of the reasonableness of "the act in the circumstances". Those beliefs may be reasonable or unreasonable. To the extent that the court determines that a

---

[4] Of course, if the jury is satisfied beyond a reasonable doubt that the accused did not have reasonable grounds to believe force was being used or threatened against him, his self-defence claim will fail before the jury reaches the question of the reasonableness of the act in the circumstances.

mistaken belief causally related to the “act” is reasonable, that finding will offer support for the defence claim that the “act” was reasonable. However, if the court assesses a mistake as honest but unreasonable, that finding may tell against the defence assertion that the accused’s “act” was “reasonable in the circumstances”. For example, if the jury concluded that when Mr. Khill decided to arm himself and go outside to investigate the noises he mistakenly believed he and his wife were in danger, the jury’s assessment of the reasonableness of that mistaken belief would factor into their assessment of the reasonableness of the shooting under s. 34(1)(c.

[60] The blending of objective and subjective considerations to determine the reasonableness of the accused’s act is made all the more apparent by reference to the specific factors identified in s. 34(2) as relevant to the reasonableness inquiry. Some of those factors explicitly incorporate characteristics and experiences of the accused: see s. 34(2)(e)(f), (f.1). In addition to the specific factors identified in s. 34(2), the section also indicates that the trier of fact must consider all factors relevant to the circumstances of the accused, the other parties, and the act. Clearly, s. 34(2) invites the kind of contextualization of the reasonableness inquiry developed under the previous self-defence provisions and described above in relation to s. 34(1)(a) (see paras. 43 to 52 above).

[61] The factors listed in s. 34(2) as relevant to the determination of the reasonableness of the accused’s act include many of the considerations that were

relevant to self-defence under the previous definitions of that defence. For example, the imminence of the threat and the nature of the threat are relevant in deciding the reasonableness of the accused's act under ss. 34(2)(a) and (b). They were also relevant to the availability of the defence under the previous statutory definitions.

[62] Section 34(2) does, however, make one important change in the law. Under the prior self-defence provisions, some specific factors identified in the definitions of self-defence were preconditions to the availability of the defence. For example, under the previous s. 34(1), the force used could not be "more than is necessary" for the purposes of self-defence. Under s. 34(2), the nature of the force used is but one factor in assessing the reasonableness of the act. The weight to be assigned to any given factor is left in the hands of the trier of fact: see *Bengy*, at paras. 46-47.

[63] The approach to reasonableness in s. 34(1)(c) and s. 34(2) renders the defence created by s. 34 more open-ended and flexible than the defences created by the prior self-defence provisions. At the same time, however, the application of the new provision is less predictable and more resistant to appellate review. Assuming the trier of fact is properly alerted to the relevant considerations, there would seem to be little direction or control over how the particular factors are weighed and assessed in any given case. Reasonableness is left very much in the eye of the beholder, be it judge or jury. Especially where the reasonableness

assessment is reflected in the verdict of a jury, that assessment will be largely beyond the reach of appellate review: see Kent Roach, “A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions” (2012) 16 Can. Crim. L. Rev. 275, at pp. 286-287; The New Defense Against Force, at pp. 286-287; Alan Brudner, “Constitutionalizing Self-Defence”, (2011) 61 U. Toronto L.J. 867, at pp. 896-897.

(d) The Elements of Self-Defence in this Case

[64] Having described the elements of self-defence as defined in s. 34, it is helpful to relate those elements to the facts of this case. The jury, in deciding whether Mr. Khill should be acquitted on the basis of his self-defence claim, had to address three questions:

- Did Mr. Khill believe, on reasonable grounds, that Mr. Styres was about to shoot him? (s. 34(1)(a))

- Did Mr. Khill shoot Mr. Styres for the purpose of defending himself from being shot by Mr. Styres? (s. 34(1)(b))

- Was it reasonable in the circumstances for Mr. Khill to shoot Mr. Styres? (s. 34(1)(c))

[65] Mr. Khill could only be convicted if the Crown convinced the jury, beyond a reasonable doubt, that the answer to at least one of the three questions posed

above was “no”: see *R. v. Cormier*, 2017 NBCA 10, 348 C.C.C. (3d) 97, at para. 40; *R. v. Curran*, 2019 NBCA 27, 375 C.C.C. (3d) 551, at para. 13; *R. v. Levy*, 2016 NSCA 45, 374 N.S.R. (2d) 251, at para. 158; *R. v. McPhee*, 2018 ONCA 1016, 143 O.R. (3d) 763.

IV

THE ALLEGED ERRORS IN THE JURY INSTRUCTIONS

[66] Crown counsel, Ms. Reid, submits the trial judge made three errors in his instructions on self-defence. She argues the trial judge:

- failed to instruct the jury that, in deciding whether Mr. Khill acted reasonably when he shot Mr. Styres, they had to consider Mr. Khill’s role in the incident and whether either Mr. Khill or Mr. Styres had or threatened to use a weapon during the incident;

- erred in instructing the jury that Mr. Khill’s military training was relevant to the jury’s assessment of the reasonableness of his belief that he was about to be shot as well as the reasonableness of his act when he shot Mr. Styres; and

- erred in instructing the jury that they should acquit Mr. Khill if they accepted his testimony that he acted in self-defence.

A: Did the trial judge fail to instruct the jury that, in considering the reasonableness of Mr. Khill's act, they were required to consider his role in the incident and whether either Mr. Khill or Mr. Styres had or used a weapon?

[67] Sections 34(2)(c) and (d) identify two of several specific factors the court must take into account in deciding whether the act committed by the accused, which would otherwise be criminal, was reasonable in the circumstances. Under those provisions, the court must consider:

- the person's role in the incident (s. 32(2)(c));
- whether any party to the incident used or threatened to use a weapon (s. 32(2)(d)).

[68] I will first address s. 34(2)(d) and the trial judge's instruction with respect to the use or threatened use of weapons. The trial judge did not identify Mr. Khill's use of the shotgun as a separate factor for the jury to consider in determining the reasonableness of Mr. Khill's shooting of Mr. Styres. The use of the shotgun was, however, the essence of the act. It is impossible to imagine how the jury could divorce the use of the weapon by Mr. Khill from the assessment of the reasonableness of the shooting.

[69] A trial judge is under no duty to repeat verbatim the language in s. 34(2) of the *Criminal Code*. The trial judge's responsibility is to ensure the jury appreciates the parts of the evidence relevant to the reasonableness inquiry required under s. 34(1)(c). I have no doubt they appreciated the significance of Mr. Khill's possession

and use of the shotgun to their determination of the reasonableness of the shooting.

[70] The trial judge did instruct the jury to "consider whether Jonathan Styres used or threatened to use a weapon". There was evidence from which it could be inferred that Mr. Styres was in possession of a screwdriver when he was shot. There was no evidence that he actually used or threatened to use that screwdriver or anything else as a weapon when confronted by Mr. Khill.

[71] There was evidence Mr. Khill believed Mr. Styres was armed and was about to shoot him when he fired on Mr. Styres. Indeed, that belief was central to Mr. Khill's defence. The trial judge did put Mr. Khill's belief to the jury as a relevant consideration in assessing the reasonableness of the actions. He also reminded the jury that the belief, though mistaken, must be reasonable.

[72] It may have been better had the trial judge avoided any reference to the possibility of Mr. Styres using or threatening to use a weapon. Mr. Khill's defence depended on his mistaken belief that Mr. Styres had a gun and was about to use it. The possibility that Mr. Styres had a screwdriver in his hand would not significantly advance the defence.

[73] I would not, however, hold that the brief reference to the possibility of Mr. Styres using or threatening to use a weapon led to reversible error. Viewed as a whole, the jury would understand this was not a case about Mr. Styres having a

weapon or threatening to use the weapon, but rather a case about Mr. Khill believing that Mr. Styres had a gun and was about to use it.

[74] Turning to s. 34(2)(c), nowhere in his instructions did the trial judge tell the jury to consider Mr. Khill's role in the incident in assessing the reasonableness of the shooting of Mr. Styres. For reasons I will explain, this was an important omission.

[75] Section 34(2)(c) introduced a factor into the reasonableness inquiry that had no equivalent under the previous legislation. The court is required to examine the accused's behaviour throughout the "incident" that gives rise to the "act" that is the subject matter of the charge. The conduct of the accused during the incident may colour the reasonableness of the ultimate act. Placed in the context of the evidence in this case, Mr. Khill's behaviour from the moment he looked out his bedroom window and saw that the dash lights in his truck were on, until the moment he shot and killed Mr. Styres, had to be examined when assessing the ultimate reasonableness of the shooting.

[76] Section 34(2)(c) renders an accused's conduct during the "incident" relevant, even though the conduct is not unlawful or provocative as that word was defined in the prior self-defence provisions. The court must consider whether the accused's behaviour throughout the incident sheds light on the nature and extent of the accused's responsibility for the final confrontation that culminated in the act

giving rise to the charge. It is for the trier of fact, judge or jury, to decide the weight that should be given to the accused's behaviour throughout the incident when deciding the ultimate question of the reasonableness of the act giving rise to the charge: The New Defence Against Force, at pp. 290, 293-94.

[77] The Department of Justice's Technical Guide for Practitioners, at p. 26, accurately describes the effect of s. 34(2)(c):

> This factor in part serves to bring into play considerations surrounding the accused's own role in instigating or escalating the incident. Under the old law, the distinction between section 34 and 35 was based on the defender's role in commencing the incident, creating higher thresholds for assessing the defence where the accused was the provoker of the incident as opposed to an innocent victim. As the new law contains only one defence that does not distinguish between conflicts commenced by the accused and those commenced by the victim, this paragraph signals that, where the facts suggest the accused played a role in bringing the conflict about, that fact should be taken into account in deliberations about whether his or her ultimate response was reasonable in the circumstances. [Emphasis added.]

[78] On the evidence, the jury could have taken different views of Mr. Khill's role in the incident. On one view, the jury could have found Mr. Khill took a series of steps, bringing about the confrontation with Mr. Styres, while at the same time failing to take measures that could well have avoided the ultimate conflict. For example, Mr. Khill could have called the police and waited in the house for their arrival. If the jury concluded that Mr. Khill's conduct leading up to the shooting was in some respects unreasonable, if not reckless, and contrary to his military training,

the jury may have decided that Mr. Khill bore significant responsibility for the confrontation that ended in Mr. Styres' death. On that view of the evidence, Mr. Khill's role in the incident would not support his claim that he acted reasonably when he shot Mr. Styres.

[79] The jury could also have taken a different view of Mr. Khill's role in the incident. The jury could have determined that Mr. Khill had good reason to be concerned about the safety of his wife and himself. The jury could further have determined that, in the circumstances, it was reasonable for Mr. Khill to take the proactive measures he had been taught as an army reservist to find and neutralize the threat before it materialized. On that assessment of the evidence, Mr. Khill's conduct during the incident leading up to the shooting supported the defence position that the shooting was reasonable in the circumstances.

[80] Under the open-ended reasonableness inquiry mandated by s. 34(2), it would have been entirely for the jury to decide how much or how little weight to give their findings about Mr. Khill's role in the incident in their ultimate reasonableness assessment: see Preliminary Assessment of the New Self-Defence, at p. 290.

[81] The potential importance of an instruction on the relevance of Mr. Khill's role in the incident to the reasonableness assessment required by s. 34(1)(c) is demonstrated by a consideration of findings that were reasonably open to this jury

on the evidence. The jury could have concluded that Mr. Khill acted recklessly and contrary to his military training by arming himself with a loaded shotgun, sneaking up on Mr. Styres, and startling him while standing only a few feet away with a loaded shotgun pointed at him. If the jury took that view of the evidence, they could well have determined that Mr. Khill bore significant responsibility for the shooting. At the same time, however, the jury could have concluded that at the moment Mr. Khill fired at Mr. Styres he believed, on reasonable grounds, that Mr. Styres was armed and was about to shoot him.

[82] In deciding whether, on the basis of the factual findings outlined above, the shooting was reasonable under s. 34(1)(c), the jury would have to understand that the reasonableness of the shooting could not be determined exclusively by Mr. Khill's reasonable perceptions and beliefs at the moment he fired, but that other factors, including Mr. Khill's "role in the incident" had to be taken into account. The jury would also have to understand that the weight to be assigned to the various relevant factors, some of which clearly conflicted, was for them and only for them to determine.

[83] The jury was not told that they must consider Mr. Khill's conduct during the incident that ended with Mr. Styres' death and Mr. Khill's responsibility for the confrontation when assessing the reasonableness of Mr. Khill's shooting of Mr. Styres. The trial judge did review the evidence concerning Mr. Khill's conduct. However, without a clear instruction, I do not think the connection between Mr.

Khill's role in the incident leading up to the shooting and the reasonableness of the shooting itself would necessarily be clear to the jury. Instead of considering reasonableness in the broader context of the incident ending with the shooting, the jury may have focused on the reasonableness of Mr. Khill's act judged exclusively by reference to what he reasonably believed was about to happen when he opened fire.

[84] As with all jury instructions, the adequacy of this instruction requires a functional evaluation: *R. v. Calnen*, 2019 SCC 6, at para. 8. The failure to refer to specific factors identified in s. 34(2) in any given jury instruction is not necessarily an error, much less a reversible error. The need to refer to specific factors in s. 34(2) depends on the evidence and the positions of the parties: *R. v. Srun*, 2019 ONCA 453, 146 O.R. (3d) 307; see also *R. v. Harvey*, [2009] EWCA Crim. 469, at para. 23; *R. v. McGrath*, [2010] EWCA Crim. 2514, at para. 20.

[85] Mr. Khill's role in the incident leading up to the shooting was potentially a significant factor in the assessment of the reasonableness of the shooting. The failure to explain that relevance and to instruct the jury on the need to consider Mr. Khill's conduct throughout the incident in assessing the reasonableness of the shooting left the jury unequipped to grapple with what may have been a crucial question in the evaluation of the reasonableness of Mr. Khill's act. On this basis, the acquittal must be set aside and a new trial ordered.

[86] I appreciate there was no objection to the charge. I also appreciate that this is a Crown appeal. Appellate courts should be reluctant to set aside acquittals based on legal arguments that were not made at trial. There is, however, no suggestion that the failure to object to the charge was in any way a tactical consideration. Given the very real possibility that a jury could have given substantial weight to Mr. Khill's conduct leading up to the shooting when assessing the reasonableness of the shooting, and given that s. 34 gives the jury a virtually unfettered discretion in weighing the various factors to be taken into account, I am satisfied that the Crown has met its burden to show that, "in the concrete reality" of this case, the non-direction with respect to Mr. Khill's role in the incident had a material bearing on the verdict: *R. v. Barton*, 2019 SCC 33, at para. 160.

B: Did the trial judge err in instructing the jury that Mr. Khill's military training was relevant to the reasonableness inquiries under s. 34(1)(a) and s. 34(1)(c)?

(i) The Appellant's Argument

[87] The Crown submits the trial judge erred in law in instructing the jury that Mr. Khill's military training was relevant to the reasonableness of his belief under s. 34(1)(a) and the reasonableness of his act (the shooting) under s. 34(1)(c). The Crown concedes that evidence of Mr. Khill's military training was relevant to his subjective belief that he was in immediate danger but argues that, by instructing the jury that the evidence was also relevant to the reasonableness of that belief

and the reasonableness of the shooting of Mr. Styres by Mr. Khill, the trial judge made the reasonableness inquiry purely subjective. Crown counsel contends that, based on the trial judge's instructions, the reasonableness inquiry no longer reflected community standards and norms. Instead it became a norm made to measure for Mr. Khill.

[88] Crown counsel further submits that the prejudicial effect of the instruction was amplified by the trial judge's answer to the single question posed by the jury. In answering the question, the trial judge told the jury that, in considering s. 34(1)(c) and, in particular, the reasonableness of Mr. Khill's shooting of Mr. Styres, the jury should determine:

> Whether it's, in your view, would be a reasonable reaction to the circumstances as viewed through the eyes of a person with all of Mr. Khill's qualities, but keeping in mind the military training, but also keeping in mind that he has to obey the law… [Emphasis added.]

[89] Crown counsel stresses the phrase, "all of Mr. Khill's qualities". She contends that this language would confirm for the jury that they were to assess the reasonableness of Mr. Khill's actions exclusively through the eyes of Mr. Khill.

(ii) The Trial Proceedings

[90] As summarized above, the jury heard a great deal of evidence about Mr. Khill's military training in the army reserve. The evidence began during the case for the Crown when the Crown elicited evidence of statements Mr. Khill made to

the police at the scene. There was no objection to any of the evidence tendered at trial pertaining to Mr. Khill's training in the military reserves.

[91] During the pre-charge discussions, before counsel addressed the jury, counsel for Mr. Khill argued that his military training was one of the factors relevant to the jury's assessment of whether the killing was "reasonable in the circumstances". I do not read Crown counsel's submissions as taking issue with the defence position. Crown counsel did argue there was no need to review that evidence in the jury instructions. Alternatively, Crown counsel submitted that if the evidence was reviewed, it should be reviewed in a balanced way, as there were parts of the evidence about Mr. Khill's military training that were inconsistent with his actions and arguably damaged his assertion that he acted reasonably in the circumstances.

[92] Counsel for the Crown and Mr. Khill accepted that the trial judge, in instructing the jury on s. 34(1)(c), should follow the instruction set down in *Watt's Manual of Criminal Jury Instructions*, at p. 1253 (Final 74-B). It provides:

> A *reasonable* person is sane and sober, not exceptionally excitable, aggressive or fearful. S/he has the same powers of self-control that we expect our fellow citizens to exercise in our society today. A reasonable person has the same characteristics and experiences as [the accused] that are relevant to [the accused's] ability to respond to (what he reasonably believes was) the use or threatened use of force. The reasonable person is a person of the same age, gender, physical capabilities, as well as past interaction and communication with [the

> complainant] as [the accused]. [Italics in original; Underlining added.]

[93] Both counsel referred extensively to Mr. Khill's military training in their closing arguments. Not surprisingly, they urged the jury to use that evidence for different purposes. Counsel for Mr. Khill stressed that the training triggered a mindset in dangerous situations that emphasized proactive responses intended to gain control of the situation. Counsel also referred to the focus placed in the training on watching the hands of one's target. Crown counsel reminded the jury that the training drew a clear distinction between conduct that was appropriate in a war zone and conduct that might be appropriate on the driveway of one's home. Crown counsel contended that, tested against Mr. Khill's army reserve training, his actions in the early morning of February 4, 2016 were anything but reasonable.

[94] In his instructions, the trial judge told the jury that Mr. Khill's military training in risk assessment "may well be relevant to all three of the self-defence questions". He specifically told the jury that when considering whether Mr. Khill's shooting of Mr. Styres was reasonable in the circumstances, the jury must:

> Consider as well the evidence you have heard about the military training previously received by Mr. Khill.

[95] The trial judge reviewed the evidence of Mr. Khill's military training at length. He did so in a balanced manner that would enable the jury to appreciate the significance of that evidence both from the perspective of the accused and the Crown.

(iii) Analysis

[96] As I read the trial record, the Crown and the defence both accepted Mr. Khill's military training had to be taken into account in deciding the reasonableness of his belief that he was about to be attacked and the reasonableness of his response. I come to the same conclusion for three reasons. First, an instruction that Mr. Khill's military training was relevant in assessing the reasonableness of his belief that he was about to be attacked and the reasonableness of his response was consistent with the law as it stood under the previous self-defence provisions. Under those provisions, Mr. Khill's military training fell easily within the scope of his "characteristics and experiences". For the reasons discussed earlier, I think the present s. 34 requires the same contextualized objective assessment of the reasonableness of the accused's belief and conduct.

[97] The cases decided under s. 25 of the *Criminal Code*, which provides a defence for a police officer's use of deadly force in the execution of police duties, are instructive. Section 25 declares that deadly force is justifiable if the officer "believes on reasonable grounds that it is necessary" to preserve his life. Like the previous self-defence provisions, s. 25 takes a blended subjective/objective approach to the question of whether the officer had reasonable grounds: see *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 34-35; *R. v. DaCosta*, 2015 ONSC 1586, at paras. 97, 103.

[98] In cases in which an officer advances a defence under s. 25, the court routinely hears evidence about the officer's training and the relevance of that training to the officer's decision to use deadly force. The same kind of evidence is offered when a police officer relies on self-defence to justify the use of force: see *R. v. Forcillo*, 2018 ONCA 402, 141 O.R. (3d) 752, leave to appeal refused, [2018] S.C.C.A. No. 258. If the proper contextualization of the reasonableness assessment required when a police officer uses force requires taking into account the officer's training, I see no reason why the same should not hold true in the case of Mr. Khill who, like the police officer, had received training that impacted on his belief that he was under attack and his response to that perceived attack.

[99] The second reason I reject the Crown's argument flows directly from the language used in s. 34(2). The section directs that, in assessing the reasonableness of the accused's act, the court must consider "the relevant circumstances" of the accused. Clearly, Mr. Khill's military training was, on the evidence, relevant to the events that culminated in Mr. Styres' tragic death. That training played a key role in Mr. Khill's belief that Mr. Styres was armed and about to shoot him and an equally crucial role in his decision to respond with deadly force. Mr. Khill's military training was, on a plain reading, a "relevant circumstance of the person" and had to be taken into account in assessing the reasonableness of the shooting of Mr. Styres.

[100] The third reason the Crown argument must fail flows from the rationale for self-defence. Self-defence is a justificatory defence. An act done in self-defence is morally justifiable or at least acceptable. Mr. Khill's military training figured prominently in any assessment of the moral acceptability of his conduct. Nothing in that training suggests that it should be discounted or eliminated from a community norm-based assessment of the justifiability of Mr. Khill's act. To the contrary, training as a military reservist is seen as socially appropriate, if not laudable, conduct. To the extent that the availability of self-defence should mirror public perceptions of the circumstances in which otherwise criminal conduct is morally acceptable, the morality of Mr. Khill's shooting of Mr. Styres is only fairly assessed having regard to the training he had received and the effect it had on his state of mind and the actions he took.

[101] It is important to emphasize that, while the evidence of Mr. Khill's military training is relevant to the reasonableness of his belief and the act of shooting Mr. Styres, that evidence does not necessarily support Mr. Khill's contention that he acted in self-defence. As counsel for Mr. Khill acknowledged in this court, the military training evidence was a "two-edged sword". In some ways, the evidence suggested that Mr. Khill's actions were inconsistent with his training. Certainly, the trial Crown forcefully advanced that interpretation of the evidence.

[102] Nor does a recognition that Mr. Khill's military training was relevant to the reasonableness inquiry render that inquiry a subjective one. The question was not

whether Mr. Khill, given his characteristics and experiences, regarded his act as reasonable, but rather whether the jury, with regard to Mr. Khill's characteristics and experiences, including his military training, considered the shooting of Mr. Styres reasonable.

[103] I am also satisfied that the trial judge's response to the jury's question (see para. 88, above) did not constitute misdirection. He correctly told the jury that Mr. Khill's military training was relevant to their assessment of the reasonableness of Mr. Khill's shooting of Mr. Styres. The trial judge's instruction that the jury should consider "all of Mr. Khill's qualities" when assessing the reasonableness of the act, while potentially misleading in some circumstances, caused no harm in this case. There was no evidence of any "qualities" possessed by Mr. Khill that would not properly be taken into account in the contextualization of the reasonableness inquiry required under s. 34(1)(c).

[104] The trial judge did not err in instructing the jury that Mr. Khill's military training was relevant to their inquiries under both s. 34(1)(a) and s. 34(1)(c).

C: Did the trial judge misdirect the jury on the application of the *W.(D.)* instruction to self-defence?

[105] Early in his instructions, after telling the jury that he would give them a detailed direction about self-defence the next day, the trial judge instructed the jury on the application of the burden of proof to the claim of self-defence. The trial judge

did so, using the familiar three-step analysis described in *R. v. W.(D.)*, [1991] 1 S.C.R. 742:

> If you believe the testimony of Peter Khill, that he shot Jonathan Styres with a shotgun while acting in self-defence, as Mr. Styres turned or started…to turn towards him, then you must find Peter Khill not guilty. If you do not believe the testimony of Peter Khill, that he shot Jonathan Styres while acting in self-defence, but you are left with a reasonable doubt about that, you must find Peter Khill not guilty. Even if you do not believe the testimony of Peter Khill and it does not cause you to have a reasonable doubt that he did not act in self-defence, you may only find that Peter Khill was not acting in self-defence when he shot Jonathan Styres with a shotgun on the basis of the evidence that you do accept you were satisfied beyond a reasonable doubt that he did not act in self-defence when he caused the death of Jonathan Styres by shooting him.

[106] Crown counsel argues that, in this instruction, the trial judge wrongly told the jury that if they believed or had a doubt about Mr. Khill's claim that he acted in self-defence, they must acquit. She submits that this instruction ignores the objective components of self-defence in s. 34. Counsel maintains that it was open to the jury, even if it accepted Mr. Khill's testimony or had a doubt about its truth, to conclude beyond a reasonable doubt that Mr. Khill's mistaken belief was not based on reasonable grounds or that his act was unreasonable in the circumstances. If the jury took that view, the self-defence claim failed regardless of the jury's assessment of Mr. Khill's credibility: see *R. v. Reid* (2003), 65 O.R. (3d) 723, at para. 72 (C.A.); *R. v. Scott*, 2001 BCCA 657, 159 C.C.C. (3d) 311, at para. 31.

[107] Counsel relies heavily on *Reid*. In *Reid*, at para. 72, Moldaver J.A., as he then was, set out a modified *W.(D.)* instruction that could be used to explain the burden of proof as applied to self-defence:

> If you accept the accused's evidence and on the basis of it, you believe or have a reasonable doubt that he/she was acting in lawful self-defence as I have defined that term to you, you will find the accused not guilty.
>
> Even if you do not accept the accused's evidence, if, after considering it alone or in conjunction with the other evidence, you believe or have a reasonable doubt that he/she was acting in lawful self-defence as I have defined that term to you, you will find the accused not guilty. [Emphasis added.]

[108] The trial judge's instructions do not contain the phrase "acting in self-defence as I have defined that term", or any equivalent instruction. Clearly, the instruction in *Reid* is preferable in that it expressly alerts the jury to the need to apply the definition of self-defence provided by the trial judge when deciding whether the testimony of the accused, or the evidence as a whole, leaves the jury with a reasonable doubt in respect of that defence. As the definition of self-defence includes objective components, the jury must understand that the availability of that defence cannot be determined exclusively by an assessment of Mr. Khill's credibility.

[109] This ground of appeal turns on whether, despite the absence of an express direction, this jury would have understood the trial judge's reference to "acting in

self-defence" in the *W.(D.)* instruction was a reference to self-defence as he would define it for them and not as simply asserted by Mr. Khill.

[110] The instructions must be considered as a whole: *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581 at para. 39; *Bengy*, at para. 92. The trial judge, as he told the jury he would, dealt with the law of self-defence and the application of the burden of proof to that defence in detail later in his instructions. He began those instructions with this caution:

> Each of you may have your own idea about when, where, how and to what extent a person is or should be permitted to defend or protect him or herself. Under our law, however, self-defence is not a loose term – quite the contrary. The law defines the circumstances in which and prescribes the nature and extent of what a person is lawfully entitled to do for the purposes of defending or protecting themselves from the actual or threatened use of force against them.

[111] Before addressing the constituent elements of the defence, the trial judge told the jury:

> It is not Peter Khill's responsibility to prove that what he did was in lawful self-defence or protection of himself and Ms. Benko. It is the Crown's responsibility to prove beyond a reasonable doubt that Peter Khill was not acting in lawful self-defence or protection of himself or Ms. Benko when he shot Jonathan Styres with the shotgun.[5]

[5] The trial judge gave this direction twice in less than one page of transcript.

[112] The trial judge proceeded to instruct the jury on each of the three elements of self-defence. After explaining each component and reviewing the evidence, he returned to the burden of proof. For example, in relation to the "reasonable belief" elements in s. 34(1)(a), the trial judge told the jury:

> It is up to you, ladies and gentlemen, to decide how much, if any, of the testimony of Peter Khill you will accept and rely on in deciding this case. You may accept some, none or all of it. If you are satisfied beyond a reasonable doubt that Peter Khill did not believe, on reasonable grounds, in the circumstances as he knew or believe [*sic*] them to be, that force was being used or threatened against him by Jonathan Styres, then Peter Khill was not acting in lawful self-defence. Your consideration of self-defence would be at an end. Your finding would be that Peter Khill caused the death of Jonathan Styres unlawfully and you would, you must then go on to the third essential element question for murder.
>
> If you accept or have a reasonable doubt that Peter Khill believed on reasonable grounds in the circumstances as he knew or believed them to be that force was being used or threatened against him by Jonathan Styres, then you must go on to the second self-defence question. [Emphasis added.]

[113] The trial judge gave similar instructions in respect of the second and third elements of the defence of self-defence. None of these instructions are challenged on appeal.

[114] Considering the instructions as a whole, I am satisfied the jury understood the trial judge's references to self-defence throughout the charge were references to self-defence as he had defined it as a matter of law for the jury. With that

understanding, the jury could not have been misled by the impugned *W.(D.)* instruction.

[115] I find support for my conclusion in Crown counsel's position at trial. There were extensive pre-charge discussions. There was no objection to the *W.(D.)* instruction as it related to self-defence, either before or after the instruction was given. Counsel was clearly satisfied that the jury would understand the reference to self-defence, as a reference to that term as defined by the trial judge. So am I.

V

THE ALLEGED ERROR IN ADMITTING THE OPINION EVIDENCE OF DR. MILLER

[116] Dr. Laurence Miller is a clinical psychologist. He had extensive experience in the United States with the military and the police. That experience included involvement in training programs and the assessment and treatment of military and police personnel after potentially traumatic events.

[117] The defence sought to elicit various opinions from Dr. Miller. After a *voir dire*, the trial judge ruled that Dr. Miller could give opinion evidence but only on a narrow issue. He held that Dr. Miller could give an opinion on whether the kind of training Mr. Khill received as an army reservist could remain "operative" several years later in a situation like that faced by Mr. Khill on February 4, 2016.

[118] In his evidence, Dr. Miller explained the kind of repetitive physical training associated with military and police training causes physical changes in the brain structure. Those changes become reinforced and deeply embedded in the brain. Dr. Miller testified that his years of clinical experience with military and police personnel were consistent with the kind of neurological change he had described.

[119] At one point in examination-in-chief, Dr. Miller appeared to be going beyond the limited scope of the evidence the trial judge had ruled he could give. The witness was excluded and, after discussion with counsel, the witness returned to the stand. As directed by the trial judge, counsel put two further questions to the witness. In answer to the first, Dr. Miller indicated the military training received by Mr. Khill could be “operative” for as long as five years after the training ceased. In answer to the second question, Dr. Miller agreed the effect of the training Mr. Khill had received could have been “operative” during the encounter that led to Mr. Styres’ death, even though that incident was a “non-military situation”.

[120] Crown counsel chose not to cross-examine Dr. Miller. The trial judge, in his instructions to the jury, which included a detailed summary of the evidence, made only a very brief reference to Dr. Miller’s evidence.

[121] On appeal, the Crown argues Dr. Miller’s evidence should not have been admitted, first, because Dr. Miller had no experience in training in the Canadian

military context and, second, because his evidence was unnecessary and amounted to no more than the suggestion that “practice makes perfect”.

[122] It was not necessary, for the purposes of his evidence, that Dr. Miller have experience in the Canadian military. Dr. Miller was aware of the training Mr. Khill had received. The nature and content of that training was not in dispute in this trial. It was sufficient, for the purposes of the very limited opinion offered by Dr. Miller, that he was aware of, and appreciated, the nature of the training Mr. Khill had received.

[123] There is merit to the Crown’s argument that Dr. Miller’s evidence was unnecessary. In the end, it seems to have come down to little more than the common sense proposition that intensive training involving the repetition of physical actions can influence behaviour in certain circumstances even years after the training has stopped. The absence of any cross-examination by the Crown would suggest that Dr. Miller’s evidence was hardly contentious.

[124] Although I agree with the Crown that Dr. Miller’s evidence added little, I think it did offer something. Dr. Miller’s evidence offered some neurological and clinical support for the “common sense” proposition that the kind of training received by Mr. Khill would remain operative even years after the training ceased.

[125] While Dr. Miller’s evidence added little of substance to the evidentiary pool, it did not cause any risk of confusion or prejudice. Most of the Crown’s argument

directed at prejudice said to be caused by admitting Dr. Miller's evidence is really an argument about the relevance of evidence concerning Mr. Khill's military training to the reasonableness inquiries under the s. 34 defence. I have rejected that argument.

[126] I do not accept the Crown's submission that the trial judge erred in allowing Dr. Miller to give evidence on the narrow issue identified by the trial judge. I would also conclude that even if the evidence should have been excluded as unnecessary, its admission caused no prejudice to the Crown and could not justify setting aside the acquittal.

VI

CONCLUSION

[127] I would allow the appeal, set aside the acquittal, and order a new trial on the charge of second degree murder.

Released: "G.S." "FEB 26 2020"

"Doherty J.A."
"I agree G.R. Strathy C.J.O."
"I agree M. Tulloch J.A."