Date: 20150410
Docket: 13/25
Citation: *R. v. Neville*, 2015 NLCA 16

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR COURT OF APPEAL

BETWEEN:

STEVEN MICHAEL NEVILLE APPELLANT

AND:

HER MAJESTY THE QUEEN RESPONDENT

Coram: Welsh, Rowe and Barry JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201201G0947

Appeal Heard: January 8, 2015
Judgment Rendered: April 10, 2015

Reasons for Judgment by Welsh J.A.
Concurred in by Barry J.A.
Dissenting Reasons by Rowe J.A.

Counsel for the Appellant: Derek J. Hogan
Counsel for the Respondent: Lloyd M. Strickland

Welsh J.A.:

[1] On February 1, 2013, Steven Neville was found guilty by a jury and convicted of one count of second degree murder and one count of attempted murder. He appeals against the convictions. An appeal against sentence was not pursued.

[2] Central to the appeal are issues regarding the use of the "rolled-up" charge as it may apply to the trial judge's instructions to the jury, and the manner in which the trial judge answered a question put to him by the jury during their deliberations.

BACKGROUND

[3] During the course of approximately six weeks, Mr. Neville had engaged in confrontations with Ryan Dwyer and Doug Flynn. The jury heard evidence of a continuing dispute originally related to drug trafficking. Threats of violence and death were exchanged back and forth via text messages. There were some physical altercations, sometimes involving mace and baseball bats, along with car chases. Finally, in the early hours of October 9, 2010, Mr. Neville leapt from a vehicle, in which he was a passenger, to confront Mr. Dwyer and Mr. Flynn, who were on foot, yelling and chasing the slowly moving vehicle. The men ran toward each other to fight.

[4] Mr. Dwyer testified that just before Mr. Neville reached him, he saw a knife in Mr. Neville's hand. Having no other defence, he turned to run away and was stabbed three times in his arm and twice in his back, after which he fell to the ground. The stab wounds caused Mr. Dwyer serious injury, including a collapsed lung, for which he was hospitalized for a week.

[5] A separate witness testified that he saw Mr. Neville stabbing Mr. Flynn in the chest and stomach area. Mr. Flynn was fighting back with his fists. The coroner testified that Mr. Flynn had suffered two "sharp force" wounds to the back of his head, a stab wound to his chest, two wounds to his forearm and a cut to his hand, but that he died as a result of a stab wound to his left temple when the knife entered the brain and caused a stroke.

[6] The judge instructed the jury regarding first and second degree murder, manslaughter, attempted murder, aggravated assault, self-defence and provocation as each related to Mr. Flynn and Mr. Dwyer. Crown and defence counsel stated that they were satisfied with the judge's instructions

to the jury. During their deliberations, the jury asked three questions to which the judge responded after consulting with counsel.

[7] The jury found Mr. Neville guilty of second degree murder in respect of Mr. Flynn's death, for which he was convicted and sentenced to life imprisonment without eligibility for parole for twelve years. He was also found guilty of attempted murder in respect of Mr. Dwyer, for which he was convicted and sentenced to ten years imprisonment.

ISSUES

[8] The first issue in this appeal is whether the trial judge erred by failing to instruct the jury that, if they rejected self-defence and provocation, it was necessary for them to consider the cumulative effect of the evidence related to those defences in determining whether Mr. Neville had the intent necessary for murder.

[9] The second issue is whether the trial judge erred in failing to adequately respond to the jury's request to clarify whether "the legal definition of 'to kill' is the same as 'to murder'."

ANALYSIS

[10] Because the issues in this appeal relate to the judge's charge to the jury, I begin with the caution set out in *R. v. Jacquard*, [1997] 1 S.C.R. 314:

> [32] … I cannot emphasize enough that the right of an accused to a properly instructed jury does not equate with the right to a perfectly instructed jury. An accused is entitled to a jury that understand how the evidence relates to the legal issues. This demands a functional approach to the instructions that were given, not an idealized approach to those instructions that might have been given. …

First Issue – The "Rolled-up" Charge

[11] Mr. Neville submits that the trial judge's instructions were insufficient to ensure that the jury properly considered the evidence as it related to the intent necessary for a murder conviction as opposed to manslaughter.

Relevant Legislation

[12] Section 229(a)(ii) of the *Criminal Code* defines murder. As applicable in this case, the definition reads:

> Culpable homicide is murder
>
> > (a) where the person who causes the death of a human being
> >
> > > …
> > >
> > > (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
> > >
> > > …

[13] Manslaughter is defined in section 234:

> Culpable homicide that is not murder or infanticide is manslaughter.

[14] Provocation, which may reduce murder to manslaughter, is addressed in section 232:

> (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
>
> (2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.
>
> …

[15] Self-defence, as it applied at the time of the offence, was dealt with in section 34(2) of the *Criminal Code*:

> Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
>
> > (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
> >
> > (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

[16] Section 239(1), which establishes the punishment for attempted murder, provides:

> Every person who attempts by any means to commit murder is guilty of an indictable offence …

[17] Aggravated assault is defined in section 268(1):

> Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.

General Principles

[18] Mr. Neville relies on the proposition that the jury must be instructed that, if provocation and self-defence are rejected, the cumulative effect of the evidence related to those defences must still be considered insofar as it may negate the intent necessary for murder or attempted murder. This has been referred to in case law as the "rolled-up charge". Mr. Neville submits that the trial judge erred by failing to include an adequate rolled-up charge in his instructions to the jury.

[19] In *R.v. Robinson*, [1996] 1 S.C.R. 683, Lamer C.J.C., for the majority, referenced the rolled-up charge:

> [59] I wish also to add that in this case, a charge linking the evidence of intoxication with the issue of intent in fact was particularly important since there was also some, albeit weak, evidence of provocation and self-defence. Thus, while the jury may have rejected each individual defence, they may have had a reasonable doubt about intent had they been instructed that they could still consider the evidence of intoxication, provocation and self-defence cumulatively on that issue. This is commonly known as the "rolled-up" charge. See *R. v. Clow* (1985), 44 C.R. (3d) 228 (Ont. C.A.); *R.v. Desveaux* (1986), 51 C.R. (3d) 173 (Ont. C.A.); and *R. v. Nealy* (1986), 54 C.R. (3d) 158 (Ont. C.A.).

[20] The genesis of the rolled-up charge is the compartmentalization of instructions to a jury. To provide the jury with the necessary law and related evidence, each issue is dealt with separately. For example, in this case, separate instructions were given on the defences of provocation and self-defence. To avoid the jury misunderstanding the effect of such compartmentalization, courts have adopted the rolled-up charge to remind the jury that evidence with respect to a defence which has been rejected may, nonetheless, be relevant in assessing the intent element of the offence.

[21] Whether the judge errs by failing to include or provide an adequate rolled-up charge will depend on the particular facts. In *R. v. Nealy* (1987),

30 C.C.C. (3d) 460 (Ont. C.A.) (paragraph 19, above), Cory J.A., for the Court, wrote, at page 469:

> Not every case where the consumption of alcohol and some form of provocation is involved will require a specific direction as to the cumulative effect of these factors. Still, it will be preferable in most cases and essential in some that such a direction be given. In the circumstances of this case, fairness required no less than the addition to the charge of two or three sentences which would be sufficient to bring to the jury's mind the necessity of considering all the pertinent facts in resolving the issue of intent.

[22] In *R. v. Settee* (1990), 55 C.C.C. (3d) 431 (Sask. C.A.), at pages 435 to 436, Sherstobitoff J.A., for the Court, concluded that the defence of intoxication was adequately put to the jury, but added:

> The last ground of appeal is that the judge erred in failing to direct the jury, when dealing with the requisite intent to kill, as to the cumulative effects of intoxication, provocation and all other circumstances surrounding the killing. The appellant complains that the instructions on these aspects were compartmentalized and should have been drawn together for consideration by the jury in determining whether the requisite intent existed. …
>
> We agree with [the] principles [set out in *R. v. Nealy*]. We also agree that the judge in this case did not instruct as to the cumulative effect of intoxication, provocation and the background of fear and anger between the parties on the requisite element of intent, although all of these elements were dealt with in the charge.
>
> This case is one of those in which the lack of such a direction does not constitute reversible error. We have already noted our agreement with the trial judge's view that the defence case for provocation was so weak as to merit comment by him as to its effect. There is doubt that it should have been put to the jury at all. We do not see, on the facts of this case, how the lack of direction on this aspect could have influenced the result. In these circumstances, we find no misdirection, and would, in any event, invoke the curative provisions of s. 686(1)(b)(iii) of the *Criminal Code*.

[23] In *R. v. Kent*, 2005 BCCA 238, 196 C.C.C. (3d) 528, Low J.A., for the majority, cautioned:

> [32] In some of the cases that discuss the rolled-up charge the accused complains that the trial judge compartmentalized the issue of intent and, for example, the defence of provocation. I think this argument is often overstated. Of necessity, every jury charge is compartmentalized. There are numerous topics of law that must be presented discretely with special instruction on each. It is the

> evidence that ought not to be compartmentalized because the jury is to be told that they are to consider the whole of the evidence in the case and all the evidence that bears upon a particular issue in the case, such as intent.
>
> (Emphasis added.)

[24] A further caution about the rolled-up charge is discussed in *R. v. Bouchard*, 2013 ONCA 791, 305 C.C.C. (3d) 240, appeal dismissed for the reasons of Doherty J.A., 2014 SCC 64, [2014] 3 S.C.R. 283. In that case, after charging the jury on the offence of murder, the trial judge went on to provide careful instructions on the defence of provocation, including the definition set out in the *Criminal Code*. In finding the judge's instructions to the jury inadequate Doherty J.A., for the majority, concluded:

> [69] … With respect, on this instruction the jury could well have understood that Mr. Nicholson's allegedly provocative acts and the appellant's reaction to them had relevance to the *mens rea* issue [for murder] only if they met the narrow legal definition of provocation in s. 232. This constitutes misdirection.

[25] To summarize, where applicable, the rolled-up charge, serves to remind the jury to consider all the evidence, including the evidence that relates to defences, when determining the issue of intent to commit murder or attempted murder. Whether a trial judge errs by omitting or not providing an adequate rolled-up charge will depend on the particular circumstances. The purpose of the charge is to alert the jury not to compartmentalize the evidence, but to use it as appropriate for various issues. In instructing the jury, care must be taken not to err as in *Bouchard*. In that case, the effect of the charge was to impose a limitation on the use of certain evidence for purposes of assessing the murder charge.

Application of the Principles

[26] Mr. Neville points to three standard jury charges which address the rolled-up charge somewhat differently. Standard charges are of assistance because they incorporate principles of law drawn from relevant cases, thereby helping to avoid errors by trial judges. However, the decision regarding how a jury should be charged falls within the trial judge's discretion, and will be driven by factors such as the extent and type of evidence, complexity of the case, and so forth.

[27] In this case, the trial judge used the standard charge from "*Model Jury Instructions*" published by the Canadian Judicial Council, which includes:

> However, you are not required to draw that inference [that a person intends the predictable consequences of his actions] about [*the accused*]. Indeed, you must not do so if, on the whole of the evidence, including (*specify evidence of intoxication, mental disorder or other*), you have a reasonable doubt whether [*the accused*] had one of the intents required for murder. In particular, consider whether this evidence causes you to have reasonable doubt whether [*the accused*] knew the [*victim*] was likely to die. It is for you to decide.

[28] In his charge, the trial judge repeatedly referred to the principle that all the evidence must be considered with respect to each issue. As noted by the Crown, the incident happened so quickly, it would have been difficult for the jury to separate the evidence relating to the defences from the evidence relating to murder and, in particular, the intent to commit murder. As discussed below, in answering the first question put by the jury during their deliberations, the trial judge reviewed his original instruction regarding the intent required for murder, including:

> … So, in other words, you must decide whether the Crown has proved beyond a reasonable doubt that Steven Neville meant to kill Doug Flynn or that Steven Neville meant to cause Doug Flynn bodily harm that he knew was so dangerous and serious that he knew it was likely to kill Doug Flynn and proceeded, despite his knowledge of that risk.

[29] The evidence about how the altercation began and ensued was relevant to the jury's determination regarding Mr. Neville's intention, as well as the possible application of self-defence and provocation. This was not a circumstance in which, as a result of the instructions on the defences, the jury, having rejected the defences, would have been led to err by failing to consider the evidence as to the intent necessary for murder. Unlike the charge to the jury in *Bouchard*, the judge's instructions in this case do not provide a basis for concluding that the jury may have mixed the elements of the offences and defences with the use of the evidence for the purpose of analyzing each.

[30] I conclude that, insofar as a rolled-up charge was necessary or desirable on the facts of this case, the trial judge's instructions to the jury satisfied the appropriate standard. I turn, then, to Mr. Neville's submissions on anger which require separate consideration.

The Relevance of Anger to the Intention Required for Murder

[31] In addition, Mr. Neville submits that anger may be a relevant consideration in determining the intent element of murder or attempted murder. The Crown responds that the Supreme Court of Canada has rejected this proposition, and that to hold otherwise would essentially undermine the defence of provocation.

[32] In *R. v. Parent*, 2001 SCC 30, [2001] 1 S.C.R. 761, McLachlin C.J.C., for the Court, discussed the possible relevance of anger:

> [9] … This passage suggests that anger, if sufficiently serious or intense, but not amounting to the defence of provocation, may reduce murder to manslaughter. It also suggests that anger, if sufficiently intense, may negate the criminal intention for murder. These connected propositions are not legally correct. Intense anger alone is insufficient to reduce murder to manslaughter.
>
> [10] The passage cited overstates the effect of anger. Anger can play a role in reducing murder to manslaughter in connection with the defence of provocation. Anger is not a stand-alone defence. It may form part of the defence of provocation when all the requirements of that defence are met: (1) a wrongful act or insult that would have caused an ordinary person to be deprived of his or her self-control; (2) which is sudden and unexpected; (3) which in fact caused the accused to act in anger; (4) before having recovered his or her normal control: *R. v. Thibert*, [1996] 1 S.C.R. 37. Again, anger conceivably could, in extreme circumstances, cause someone to enter a state of automatism in which the person does not know what he or she is doing, thus negating the voluntary component of the *actus reus*: *R. v. Stone*, [1999] 2 S.C.R. 290. However the accused did not assert this defence. In any event, the defence if successful would result in acquittal, not reduction to manslaughter.
>
> [11] So it seems clear that the trial judge misdirected the jury on the effect of anger in relation to manslaughter. His directions left it open to the jury to find the accused guilty of manslaughter, on the basis of the anger felt by the accused, even if they concluded that the conditions required for the defence of provocation were not met. The directions raise the possibility that the jury's verdict of manslaughter may have been based on erroneous legal principles, unless they were corrected in the recharge to the jury.

[33] Mr. Neville submits in his factum that the decision in *Parent* "does not foreclose a trier of fact from considering anger in combination with other factors in determining intent for murder". Mr. Neville has not demonstrated how this proposition would apply in this case. The relevant principles are clearly set out in the above quotation from *Parent*. On the facts of this case,

if anger were a relevant consideration, it would fall under the assessment of provocation, which was put to the jury and rejected. There was no suggestion that he was reduced to a state of automatism as a result of anger or a combination of factors.

[34] In summary, the trial judge's instructions to the jury regarding the application of the evidence to the issues of intent to commit murder or attempted murder, self-defence and provocation were adequate in the circumstances when the charge is read as a whole. The judge did not err by failing to provide a more fulsome rolled-up charge or in respect of the issue of anger.

Second Issue – Response to Jury's Question

The Law

[35] Principles that guide the manner in which a trial judge should deal with questions put by the jury are discussed in *R. v. Layton*, 2009 SCC 36, [2009] 2 S.C.R. 540. After noting that the original charge to the jury was unassailable, Rothstein J., for the majority, wrote:

> [20] However, as explained by Cory J. in *R. v. S.(W.D.)*, [1994] 3 S.C.R. 521, the implication of a question from the jury is that, on the issue raised in the question, there is confusion. Assistance must be provided. At p. 528, Cory J. stated:
>
> > A question presented by a jury gives the clearest possible indication of the particular problem that the jury is confronting and upon which it seeks further instructions. Even if the question relates to a matter that has been carefully reviewed in the main charge, it still must be answered in a complete and careful manner.
>
> And at p. 530:
>
> > With the question the jury has identified the issues upon which it requires direction. It is this issue upon which the jury has focused. No matter how exemplary the original charge may have been, it is essential that the recharge on the issue presented by the question be correct and comprehensive. No less will suffice. The jury has said in effect, on this issue there is confusion, please help us. That help must be provided.
>
> …

> [23] Here, the trial judge essentially repeated her original charge verbatim. In some cases, repeating the original charge verbatim might be all that is required to assist the jury. For example, where the original charge was not provided to the jury in writing and the jury indicates in its question that it has forgotten the original charge, repeating the instructions may be all that is necessary. …
>
> [24] However, in this case, the jury had the original charge in writing. Deliberations had gone on for a full day and the jury's question not only uses terms included in the original charge but also cites a specific page of that charge. There can be little doubt that there was some confusion on the part of one or more of the members of the jury about the standard of proof to be met by the Crown in order to secure a guilty verdict and there can be little doubt that the jury had reread the charge.
>
> [25] … Explaining the idea the jury has asked to have clarified in different words may be what is necessary for the jury to understand.
>
> …
>
> [29] … [Where the judge decided to reply using the original charge], even though it would have been preferable for the judge to provide clarifications to the jury, if she chose not to provide any, it was imperative to leave the door open for the jury to come back with further, more precise, questions should it remain unclear on the concept of reasonable doubt.

[36] In *Layton*, the error by the trial judge in responding to the jury's question was her statements that further explanation would only lead to more confusion rather than clarification and that there was little she could do to provide clarification. Rothstein J. found that these statements implied that the judge could not assist the jury with their confusion and, further, that "there was no reason for the jury to return with another question or to try to clarify more precisely what was causing the confusion" (paragraph 31). Rothstein J. continued:

> [32] A verbatim reiteration of the initial charge would not have been fatal had the judge made it absolutely clear to the jury that it was welcome to return with further questions if jury members were still confused. But the jury was discouraged from doing so by the words the trial judge used.

[37] Rothstein J. went on to note that the "common sense" that is to be applied by the jury pertains to whether the accused is guilty "only after it understands the relevant law" (paragraph 34). In dissenting, McLachlin C.J.C. and Cromwell J. did not disagree with the relevant principles, but rather, their application in determining whether the trial judge had erred.

[38] Mr. Neville also points to the earlier decision in *R. v. Allen*, 2003 SCC 18, [2003] 1 S.C.R. 223, in which the Court allowed the appeal, substantially for the dissenting reasons of O'Neill J.A. of this Court (2002 NFCA 2, 208 Nfld. & P.E.I.R. 250), because the trial judge "did not answer the jury's question with the clarity and comprehensiveness required by the applicable jurisprudence" (paragraph 3). In his dissent, referring to *R. v. Naglik*, [1993] 3 S.C.R. 122, and *R. v. Pétel*, [1994] 1 S.C.R. 3, O'Neill J.A. emphasized that the answer to a jury's question should be correct and comprehensive, regardless of a faultless original charge, because the question indicates that the jury did not understand or remember the original instructions.

[39] An additional principle referenced by O'Neill J.A. is that, in responding to a question, the trial judge should be satisfied that he understands the jury's concern:

> [108] … In my view, it was incumbent on the trial judge to question the foreman of the jury to ascertain clearly what the jury's concern was.
>
> [109] The opening remarks of the trial judge in his re-instructing the jury when the jury was brought back following the question clearly indicate that the trial judge felt that he was precluded from questioning the jury as to the real concern it was having or from entering into any discussion with it. …

[40] The proposition that the judge could not enter into any discussion with the jury was rejected by O'Neill J.A. Reliance was placed on *R. v. Mohamed* (1991), 64 C.C.C. (3d) 1 (BCCA), from which O'Neill J.A. quoted as follows:

> [118] …
>
> > "Before us it was argued that there is an inherent risk of inappropriate disclosure in any dialogue with the jury, but that risk can be minimized or even eliminated if the judge takes the initiative by asking leading questions and cautioning the foreman not to disclose any views which the members of the jury may have on the evidence while answering those questions. I do not think that the risk of improper disclosure by the foreman was much of a real, as opposed to a theoretical, concern. It certainly was not a proper reason to refrain from any attempt to clarify the question in this case. …"

See also: *R. v. Fleiner* (1985), 23 C.C.C. (3d) 415 (Ont. C.A.), at page 420, referenced by O'Neill J.A. at paragraphs 115 to 117.

[41] To summarize, when a question is put by the jury, what is required is "meaningful assistance" (*Layton*, at paragraph 21). The following propositions are gleaned from the above jurisprudence:

> If the question has been discussed in the original instructions, it must still be answered completely, carefully and correctly.
>
> Where the issue was dealt with in the original instructions, it may be adequate simply to repeat the instructions, particularly where the question suggests that the jury has forgotten, is having trouble recollecting, or is unsure of the earlier instructions. This may occur, for example, where the instructions were not provided to the jury in writing, or where the jury's deliberations have been lengthy.
>
> It may be necessary to explain the issue to be clarified using different language from the original charge, while taking care to remain within the confines of judicially established principles.
>
> It is important for the judge to ensure that the jury understands that they may return with a further or more precise question if the uncertainty has not been sufficiently clarified. The jury should never be discouraged from asking a question or seeking clarification.
>
> If the question is unclear, the judge may take careful steps to ascertain what is meant, or may seek to find a way to answer the question in a manner that addresses any ambiguity.

Application of the Law

[42] In this appeal, the jury asked three questions at different times. The answers to the first two are not in issue, but I have included them to demonstrate the approach taken by the judge. The first question asked by the jury was:

> With respect to: 'Was Steven Neville's murder of Doug Flynn both planned and deliberate?'
>
> Does the plan have to be to murder Doug Flynn, or can it also be a plan to cause grievous bodily harm to Doug Flynn that can result in his death?

[43] After discussing the question with counsel, the trial judge addressed the jury and, after pointing out that the answer was in the written instructions, he said:

> … I'll just run through the instruction again for you – to prove that Steven Neville had the intent required for murder, the Crown must prove beyond a reasonable doubt one of two things: either (1) that Steven Neville meant to cause Doug Flynn's death or (2) that Steven Neville meant to cause Doug Flynn bodily harm that he knew was likely to cause his death and was reckless whether death ensued or not. So, in other words, you must decide whether the Crown has proved beyond a reasonable doubt that Steven Neville meant to kill Doug Flynn or that Steven Neville meant to cause Doug Flynn bodily harm that he knew was so dangerous and serious that he knew it was likely to kill Doug Flynn and proceeded, despite his knowledge of that risk. …

The jury then retired to continue deliberating.

[44] The jury's second question was:

> Instructions – 4th section
>
> Please define deliberate
>
> Instructions – 5th section
>
> Please define provocation

[45] Again, after discussions with counsel, the trial judge addressed the jury, thanking them for taking care to understand the words, noting that he was going to tell them what he had already told them in his instructions. Beginning with "deliberate", the judge said:

> … So, the word deliberate means "considered, not impulsive", "slow in deciding". Okay, so am I okay then to go to the – you've got – you've heard me okay? Alright. The next question is provocation defined. The answer to your question is that provocation is prescribed and defined by the *Criminal Code*, so you have the provocation section 232. Do you have it with you?

After reviewing section 232, the judge continued:

> So, I don't go to the dictionary and look up the word because the *Criminal Code* prescribes what it is for the purposes of your deliberations, and then of course you have, on the page preceding that, the elements that comprise your consideration of provocation. So, I'm not in a position to add any more to it because of the fact that it's prescribed in the words, that is by the *Criminal Code*. …

Again, the jury retired to continue deliberating.

[46] The third and final question, the one at issue, was:

> We realize that this may be a ridiculous question …
>
> We would like to clarify that the legal definition of 'to kill' is the same as 'to murder'.
>
> Thank you.

[47] The transcript indicates that this question posed some difficulty for the judge and counsel who were of the view that the answer to the question depended on the context within which it was raised. They were clearly concerned about causing confusion for the jury if the question were answered in the absence of context. Nonetheless, there seemed to be consensus that it would be improper to seek clarification from the jury. In the result, the judge replied to the question as follows:

> … We've reviewed [your question] and considered it. It's a very specific question and the – I don't want you to feel offended by the answer that I'm going to give you. What I have to say to you is that the instructions that you have, that I have given you should be sufficient to address the question that you raise. And that is the best way that I feel I can answer that question. If you – the general instructions are still there. Don't feel that you are being precluded from asking questions. I don't want you to take it that way at all. You still have that prerogative. But that's the answer that I have to give you to the question at the present time. …

[48] The conundrum resulting from the apparent lack of context to the question could have been avoided by the judge instructing the jury on the answer to the question in the various contexts in which the issue may have arisen. Alternatively, to obtain a focus for the question, he could, with care, have sought information from the chairperson of the jury in line with the approach set out in *Allen*, as discussed above. Since these options were not pursued by the trial judge, it is necessary to determine whether he erred by answering the question in the way he did.

[49] First, I note that the question, whether the "legal definition of 'to kill' is the same as 'to murder'", indicates that the jury felt that they understood the legal concept of murder since the question does not seek further information regarding the elements of murder.

[50] The word "kill" does not appear in the relevant *Criminal Code* provisions. Rather, "cause death" is used. In the written instructions to the jury, the word "kill" appears in three contexts. First, under attempted murder, the first element listed is "that Steven Neville meant to kill Ryan Dwyer" (emphasis added). A copy of section 229 of the *Criminal Code*, which defines culpable homicide as murder, was not included in the written instructions. However, the elements under murder, which were included in the written instructions, use the language of the *Code*, "that Steven Neville caused the death of Doug Flynn" (emphasis added). The use of similar language under the elements for attempted murder would have avoided possible confusion. Nonetheless, it is difficult to see how using the language "meant to kill" instead of "meant to cause the death" would have led the jury into error.

[51] The second place where the word "kill" is used in the written instructions is under self-defence where a combination of "kill" and "caused death" are used:

> Steven Neville is justified in killing or causing grievous bodily harm to defend himself and must be acquitted if all of the following three conditions are present:
>
> > 1. Steven Neville caused the death or grievous bodily harm to repel an unlawful assault or what he reasonably perceived to be an unlawful assault by Doug Flynn and Ryan Dwyer;
> >
> > 2. Steven Neville reasonably believed that he would be killed or suffer grievous bodily harm as a result of Doug Flynn's or Ryan Dwyer's assault;
> >
> > 3. Steven Neville reasonably believed that he could not otherwise preserve himself from death or grievous bodily harm.
>
> (Emphasis added.)

Again, it is difficult to see how the words "killing" or "killed" as used here, which clearly meant "cause the death", could have led the jury into error.

[52] There is a final reference to "kill" in the written instructions under provocation:

> A killing that would otherwise be murder is reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

> Steven Neville must be acquitted of murder, but found guilty of manslaughter on the basis of provocation, only if all of the following four conditions are present:
>
> > 1. There was a wrongful act or insult that was sufficient to deprive an ordinary person of the power of self-control; and
> >
> > 2. When Steven Neville killed Doug Flynn he had lost the power of self-control as a result of the wrongful act or insult; and
> >
> > 3. The wrongful act or insult was sudden; and
> >
> > 4. Steven Neville's acts that caused Doug Flynn's death were committed suddenly and before there was time for his passion to cool.
>
> (Emphasis added.)

Again, it is difficult to see how the use of the words "killing" and "killed", as opposed to "causing or caused death" could have resulted in confusion for the jury.

[53] The trial judge referred the jury back to the written instructions, leaving open the opportunity for further questions. His failure to re-read the instructions, to seek clarification of the context for the question in order to answer it specifically, or to answer the question in all of the possible contexts must be considered in light of the specific question and the use of the word "kill" in the written instructions.

[54] All the references to "kill" or its derivatives could be replaced with "cause the death of". None engages a question of intention, which may have been confused with the intention required for murder. Accordingly, reference back to the written instructions, while not the best option, together with the reminder that additional questions could be put, was a sufficient answer to the question in these circumstances.

[55] The conclusion follows that the trial judge's failure to answer the question using one of the preferred approaches suggested above, nonetheless, did not result in error. As stated in *Settee*, I "find no misdirection, and would, in any event, invoke the curative provisions of s. 686(1)(b)(iii) of the *Criminal Code*" (paragraph 22, above).

SUMMARY AND DISPOSITION

[56] In summary, insofar as a rolled-up charge was necessary or desirable on the facts of this case, the trial judge's instructions to the jury satisfied the appropriate standard. The judge did not err by failing to provide a more fulsome rolled-up charge or in respect of the issue of anger. Regarding the answer to the third question, reference back to the written instructions, together with the reminder that additional questions could be put, was a sufficient answer in the particular circumstances.

[57] Accordingly, I would dismiss the appeal.

_____

B. G. Welsh J.A.

I Concur: _____

L. D. Barry J.A.

Dissenting Reasons by Rowe, J.A.

Rowe J.A.:

[58] I have read the reasons of my sister Welsh. I am in accord with her regarding the "Rolled-up Charge", the "Relevance of Anger" and her statement of the law concerning "Response to the Jury's Question". Where I differ is in the "Application of the Law" as set out in paragraphs 42-55.

[59] I would note again the operative part of the jury's question:

> We would like to clarify that the legal definition of "to kill" is the same as "to murder."

Justice Welsh correctly points out that the phrase used in the *Criminal Code* is to "cause death", rather than to "kill". They are, however, synonymous.

Thus, any confusion by the jury as between "kill" and "murder" would also exist as between "cause death" and "murder."

[60] What uncertainty was it that the jury sought to have resolved by posing this question? We cannot be sure, as the trial judge failed to ascertain this. However, logically, it seems to me that the point of uncertainty must have related to intention. I say this, first, because intent is necessary for someone who has caused a death to be guilty of murder and, second, because intention was the critical issue in this case.

[61] There was no question that Stephen Neville caused Doug Flynn's death. Rather, the issue was whether Neville had the requisite intent for the killing to constitute murder. If the jury was left with a reasonable doubt as to the requisite intent for murder, then they would have convicted Neville for manslaughter. (I ignore self-defence, which had no air of reality.) To me, the inference is inescapable that the jury sought the clarification they did because they were struggling with the issue of requisite intent for murder.

[62] I would recall what Cory J. wrote in *R. v. S. (W.D.)*, at pages 528 and 530, (see paragraph 35 above):

> A question presented by a jury gives the clearest possible indication of the particular problem that the jury is confronting and upon which it seeks further instructions. Even if the question relates to a matter that has been carefully reviewed in the main charge, it still must be answered in a complete and careful manner.
>
> . . .
>
> With the question the jury has identified the issues upon which it requires direction. It is this issue upon which the jury has focused. No matter how exemplary the original charge may have been, it is essential that the recharge on the issue presented by the question be correct and comprehensive. No less will suffice. The jury has said in effect, on this issue there is confusion, please help us. That help must be provided.
>
> (Emphasis added.)

[63] In this instance, no such help was provided (other than to refer the jury to the written charge which they already had). That was an error of law. The judge did not cure his error by telling the jury they could ask further questions. They had already asked and received no reply.

[64] In the result, I would have granted the appeal and ordered a new trial.

_____

M. H. Rowe J.A.