IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Pope*, 2021 NLCA 47
Date: August 18, 2021
Docket Number: 201901H0095

BETWEEN:

CRAIG POPE — APPELLANT

AND:

HER MAJESTY THE QUEEN — RESPONDENT

Coram: Welsh, Goodridge and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201801G5227

Appeal Heard: April 9, 2021
Judgment Rendered: August 18, 2021

Reasons for Judgment by: Welsh J.A.
Concurred in by: Butler J.A.
Dissenting Reasons by: Goodridge J.A.

Counsel for the Appellant: Derek Hogan
Counsel for the Respondent: Dana Sullivan

Authorities Cited:

CASES CITED:

Welsh J.A.:

R. v. Druken, 2002 NFCA 23, 211 Nfld. & P.E.I.R. 219; *R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301; *R. v. Head*, [1986] 2 S.C.R. 684; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Neville*, 2015 SCC 49, [2015] 3 S.C.R. 323; *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521*; R. v. Miljevic*, 2011 SCC 8, [2011] 1 S.C.R. 203; *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. Potter*, 2021 NLCA 11; *R. v. Zora*, 2020 SCC 14.

Goodridge J.A. (dissenting):

R. v. *Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301; *R.* v. *Jacquard*, [1997] 1 S.C.R. 314; *R.* v. *Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R.* v. *Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R.* v. *Young*, [1981] 2 S.C.R. 39; *R. v. Creighton*, [1993] 3 S.C.R. 3*; R. v. McKenna*, 2015 NBCA 32; *R. v. McKenna*, 2015 SCC 63, [2015] 3 S.C.R. 1087; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3.

STATUTES CONSIDERED:

Welsh J.A.:

Criminal Code, sections 222, 229, 234 and 686(1)(b)(iii).

Goodridge J.A. (dissenting):

Criminal Code, sections 229, 662(3).

TEXTS CONSIDERED:

Watt's Manual of Criminal Jury Instructions.

Welsh J.A.:

[1] Following a trial by jury, Craig Pope was convicted of second degree murder in the death of David Collins on September 7, 2017. He appeals his conviction on the basis that the jury was not properly instructed regarding the included offence of manslaughter.

BACKGROUND

[2] The parties agree that the jury had the following evidence from which to determine the facts. On September 7, 2017, Mr. Pope, with Mr. Collins, had been driving around in a taxi to various locations in the City from 11:00 a.m. until mid-afternoon. When they arrived at the scene, Mr. Pope was in the front passenger seat and Mr. Collins in the back. A man, who was in a nearby van, approached the taxi and passed some money to Mr. Collins through the window. Mr. Pope told Mr. Collins that he owed him $60. This led to an altercation. Both men got out of the taxi and fisticuffs ensued. While there were witnesses, no one saw the knife or exactly what happened. Both were "throwing punches" until Mr. Collins fell to the ground clutching his stomach. Mr. Pope returned to the taxi and told the driver to "run him over". Instead, the taxi drove off with Mr. Pope, leaving Mr. Collins lying in the street.

[3] One of the witnesses, a registered nurse, lent assistance to Mr. Collins, who had been stabbed once in the lower abdomen. The wound, which was about eleven centimetres deep, punctured the abdominal aorta. Mr. Collins was transported to hospital, but died from loss of blood.

[4] Mr. Pope was charged with second degree murder for which manslaughter is an included offence.

ISSUES

[5] The appeal raises issues with respect to the trial judge's instructions to the jury regarding: (1) the included offence of manslaughter; and (2) Mr. Pope's flight from the scene.

ANALYSIS

[6] The *Criminal Code* provides for the offences of first and second degree murder and manslaughter when an individual unlawfully causes the death of another. Murder is first degree when it is planned and deliberate. In this case, based on the facts, the judge instructed the jury on second degree murder and

manslaughter. That decision is not challenged. Following are the relevant provisions of the *Code*.

The Law

[7] The offences of murder and manslaughter are grounded in the definition of homicide as set out in section 222 of the *Criminal Code*:

> (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
>
> (2) Homicide is culpable or not culpable.
>
> (3) Homicide that is not culpable is not an offence.
>
> (4) Culpable homicide is murder or manslaughter or infanticide.
>
> (5) A person commits culpable homicide when he causes the death of a human being,
>
> (a) by means of an unlawful act,
>
> ...

[8] Murder is defined in section 229 of the *Criminal Code*:

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

[9] The distinction between first and second degree murder is set out in section 231 of the *Criminal Code*:

> (1) Murder is first degree murder or second degree murder.
>
> (2) Murder is first degree murder when it is planned and deliberate.
>
> …

[10] Manslaughter is defined in section 234 of the *Criminal Code*:

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

[11] The intent required for the offence of manslaughter is discussed in *R. v. Druken*, 2002 NFCA 23, 211 Nfld. & P.E.I.R. 219:

> [55] With respect to the mental element required for manslaughter, where death results from an unlawful act, [in *R. v. Creighton*, [1993] 3 S.C.R. 3, McLachlin J.] summarized, at pages 44 to 45:
>
> > So the test for the *mens rea* of unlawful act manslaughter in Canada, ... is (in addition to the *mens rea* of the underlying offence) objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act. Foreseeability of the risk of death is not required.
>
> [56] Accordingly, where an accused is charged with murder, the trial judge would also instruct the jury regarding manslaughter if, based on the evidence, the threshold of an "air of reality" is satisfied regarding the essential components of manslaughter: (1) death caused by an unlawful act, and (2) objective foreseeability of the risk of bodily harm which is neither trivial not transitory, in the context of a dangerous act. ...

See also *R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30, at paragraph 36.

[12] In this case, on the facts, the judge determined that the air of reality threshold was satisfied regarding the elements for manslaughter, and, accordingly, he instructed the jury on both second degree murder and the included offence of manslaughter.

[13] Finally, in reviewing a judge's instructions to the jury for purposes of an appeal, while counsels' position at trial is a factor that may be considered and while counsel is obliged to give assistance, it is the judge's responsibility finally to decide how the jury will be instructed, including what language will be used in both the oral and written instructions. In fact, there may be strategic reasons why counsel proposes or agrees to particular language. In *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, Martin J., dissenting in part, explained the critical role of the judge:

> [161] Trial judges bear the ultimate responsibility for the content, accuracy, and fairness of the jury charge: see *Jaw* [2009 SCC 42, [2009] 3 S.C.R. 26], at para. 44; *Jacquard* [[1997] 1 S.C.R. 314], at para. 37; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 49. ...

In this case, I am satisfied that the position taken by counsel at trial is not a factor of assistance in assessing the judge's instructions to the jury for purposes of this appeal.

Application of the Law

[14] The trial judge was satisfied that the jury should be instructed on both murder and the included offence of manslaughter. In *R. v. Head*, [1986] 2 S.C.R. 684, at pages 687 to 688 (paragraphs 2 and 3), McIntyre J., for the majority, commented on instructing the jury regarding included offences:

> The facts have been set out by Lamer J. and I need not deal with them at great length. I would emphasize, however, that during the course of his charge the trial judge instructed the jury on the offence of attempted murder set out in the indictment, and upon certain included offences on which the accused could be found guilty, depending upon the view the jury took of the evidence. No issue has been raised as to the adequacy of the charge. During the course of their deliberations, the jury returned to the courtroom with a request for further instruction with respect to included offences. The trial judge gave the requested direction and shortly thereafter the jury returned with its verdict of not guilty. ...
>
> The law is well settled that a trial judge, sitting with a jury, must instruct the jury on the principal offence or offences charged in the indictment, as well as any included offences and the verdicts that may be returned upon them. This principle emerges from *R. v. George*, [1960] S.C.R. 871. The *George* case did not involve a jury but the majority of the Court held that it was the duty of the trial judge, in disposing of a criminal case, to consider all included offences of which there is evidence, whether raised by counsel or not. It follows that when sitting with a jury it is the duty of the trial judge to instruct the jury with respect to included offences. There are several cases which follow and apply this principle: [citations omitted].

In this case, the question is whether the jury was properly instructed, particularly regarding the included offence of manslaughter.

Instructions Given to the Jury

[15] In his opening instructions at the commencement of the trial, the judge gave the jurors very general information regarding non-culpable homicide, culpable homicide, manslaughter and murder. The information was provided to the jurors in writing, with the following explanation under the title "Manslaughter":

> If a person causes the death of another human being by means of an unlawful act, that person is guilty of manslaughter regardless of whether he/she intended to cause that death or not.

[16] In his closing instructions, also provided to the jurors in writing, the trial judge first reviewed the elements of the offence of murder using three questions. He instructed the jurors:

> [49] Unless you are satisfied beyond a reasonable doubt that Craig Pope committed the unlawful act of assault with a weapon, you must find Craig Pope not guilty. Your deliberations would be over.
>
> [50] If you are satisfied beyond a reasonable doubt that Craig Pope committed the unlawful act, you must go on to the next question.
>
> ...
>
> [55] If you are satisfied beyond a reasonable doubt that Craig Pope caused David Jonathon Collins' death, you must go on to the next question.
>
> ...
>
> [58] In other words, you must decide whether the Crown has proved beyond a reasonable doubt either that Craig Pope meant to kill David Jonathon Collins, or that Craig Pope meant to cause David Jonathon Collins bodily harm that he knew was likely to kill David Jonathon Collins and proceeded despite his knowledge of that risk.
>
> ...
>
> [62] Unless you are satisfied beyond a reasonable doubt that Craig Pope had the intent required for murder, you must find Craig Pope not guilty of second degree murder, but guilty of the included offence of manslaughter.

[17] In the result, while the trial judge put the included offence of manslaughter to the jury, he did not explain it as a separate offence by identifying the essential components as discussed in *Druken*.

[18] The jury was also provided with a written "decision tree" consisting of a series of questions to assist the jurors during their deliberations. The purpose of the questions is to provide a sequential consideration of whether the essential elements of the charged offence have been proven beyond a reasonable doubt. The decision tree in this case had four boxes that would lead to a conviction for manslaughter:

> Box1: Did Craig Pope use a weapon to commit an unlawful act? If "Yes" then go to Box No. 2 below.

> Box 2: If Craig Pope committed an unlawful act with a weapon, did the unlawful act cause David Jonathon Collins' death? If "Yes" then go to Box No. 3 below. If "No" then go to Box 2A.
>
> Box 3: If the unlawful act with a weapon caused David Jonathon Collins' death, did Craig Pope have the intent required for murder? If the answer is "Yes" go to Box 3A, if it is "No" go to box No. 4.
>
> Box 4: If Craig Pope did not mean to cause the death of David Jonathon Collins and did not mean to cause him bodily harm then you must convict Craig Pope of manslaughter.

(Emphasis added.)

[19] Regarding the offence of murder, the decision tree continued after Box 3:

> Box 3A: Did Craig Pope mean to cause David Jonathon Collins' death?
>
> Did Craig Pope mean to cause David Jonathon Collins bodily harm that he knew was likely to cause death but he was reckless as to whether death ensued?
>
> If your answer to either of these questions is "Yes" go to Box 4A.
>
> Box 4A: If your answer to either of the above two questions is "Yes" – that is – he meant to cause Collins' death, or he meant to cause Collins bodily harm and was reckless as to whether Collins would die as [a] result, then he would have the intent required for murder and you must find Craig Pope guilty of second degree murder.

[20] While the decision-tree questions, Boxes 3A and 4A, address the two avenues by which intent for murder may be established, Box 4, dealing with conviction for manslaughter, does not state the relevant intent approved by the Supreme Court of Canada: foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act. Further, the language in Box 4, "did not mean to cause him bodily harm", does not reflect that intent. Rather, on the facts, and considering the question in Box 1 regarding the use of a weapon to commit an unlawful act, the language in Box 4 would have been misleading. Where the trial judge included an explanation in Box 4, it was essential that he use the correct language. This became particularly relevant when the jury returned during their deliberations to ask for a definition of manslaughter (discussed below).

[21] The value of a decision tree to assist jurors during their deliberations is acknowledged in the case law. However, if not crafted carefully, a decision tree

may have the effect of confusing the jury. In *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, Fish J., in his dissenting reasons, commented:

> [130] With respect, moreover, the inadequacy of the judge's charge in this regard was compounded by a striking omission in the detailed decision tree he remitted to the jury as a roadmap to their verdict. ... If the judge's instructions failed – as I believe they did – to explain the position of the defence clearly and fairly, the judge's decision tree adds an additional layer of concern. Taken together, the charge and the decision tree conveyed to the jury an inadequate and incomplete understanding of the issues the jury was required to consider in reaching its verdict.

[22] Similarly, in *R. v. Neville*, 2015 SCC 49, [2015] 3 S.C.R. 323, McLachlin C.J.C., for the Court, explained:

> [2] The jury in its final question asked the judge to clarify the distinction between "to kill" and "to murder". This raised the question of intent in relation to the charges of murder and attempted murder. The judge should have clarified the nature of the concern, and then addressed it. …
>
> [3] Viewing the record as a whole, we are satisfied that there is a <u>possibility</u> that the jury could have misunderstood what had to be proved for them to return guilty verdicts. We note in this regard the Crown's concession that the decision tree given to the jury was in error on the issue of provocation.
>
> (Emphasis added.)

[23] In this case, the jurors indicated their uncertainty regarding the law when they asked the judge for further explanation and an example. In particular, "Can we please have further explanation of what manslaughter is. A better definition and possibly an example."

[24] The importance of questions from the jury is discussed in *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521. Cory J., for the majority, cautioned, at page 528, that "questions from the jury require careful consideration and must be clearly, correctly and comprehensively answered." Continuing at pages 530 and 531:

> There can be no doubt about the significance which must be attached to questions from the jury and the fundamental importance of giving correct and comprehensive responses to those questions. With the question the jury has identified the issues upon which it requires direction. It is this issue upon which the jury has focused. ...

> ... [The jury's] subsequent deliberations will be based on the answer given to their question. That is why the recharge must be correct and why a faultless original charge cannot as a rule rectify a significant mistake made on the recharge.

[25] The potential difficulty with giving an example as requested by the jury here is referenced in *R. v. Miljevic*, 2011 SCC 8, [2011] 1 S.C.R. 203. Cromwell J., for the majority, noted:

> [2] ... The judge declined to give the jury examples for fear that they would not make the difference between murder and manslaughter any clearer. He explained to the jury that each case is driven by its own facts, and the facts of one case or one example might not truly help them. ...

[26] That concern is particularly relevant in respect of offences such as manslaughter which may be committed in a wide variety of circumstances from "an unintentional killing while committing a minor offence" to "an unintentional killing where the circumstances indicate an awareness of risk of death just short of what would be required to infer the intent required for murder" (*R. v. Creighton*, [1993] 3 S.C.R. 3, at page 48). An example too similar to the case at hand may interfere with the jury's independence; one too far removed may be of little value or may result in confusion.

[27] In this case, the trial judge gave the following instruction, including an example which was approved by trial counsel, in response to the question from the jury:

> ... Now manslaughter is any culpable homicide that is not first degree murder or second degree murder. If a person caused the death of another human being by means of an unlawful act, regardless of whether he intended to cause that death, he would be guilty of manslaughter. I am going to give you an example. I am at a soccer game where my team has lost. I get into a fight in the parking lot with a fan of the opposing team. We argue back and forth. I pull out a knife. My opponent lunges at me, the knife goes into his chest and he dies as a result. I caused my opponent's death even if indirectly, but I did so by an unlawful act when I brought the knife to the fist fight. Even though I didn't intend to kill him, when I pulled out the knife, I'm guilty of manslaughter because he died of an injury that he sustained as a result of the bodily harm that could be foreseen and which I was reckless about. There was no planning and deliberation. There was no intention to kill or cause bodily harm that I knew could result in death and in respect of which I was reckless. But because the person died, because there was an unlawful act, I'm guilty of manslaughter.
>
> (Transcript, volume XI, at pages 133 to 134.)

[28] That explanation and example were ambiguous in drawing a distinction between murder and manslaughter. For murder, if Mr. Pope did not intend to cause Mr. Collins' death, the question is whether he intended to cause Mr. Collins "bodily harm of such a nature that it is likely to result in death". This is different from the description used by the trial judge, that is, bodily harm that Mr. Pope "knew could result in death". That statement could have led the jury to misunderstand, and indeed, to dismiss the possibility of manslaughter which requires "objective foreseeability of the risk of bodily harm which is neither trivial nor transitory in the context of a dangerous act." (See paragraph 11, above.)

[29] The failure of the trial judge to draw the jurors' attention to the language that describes the intention required for the offence of manslaughter, including in the answer to the jury's question, and instead, simply stating that "if it isn't murder, then it's manslaughter", resulted in ambiguity and potential misunderstanding by the jury. This was exacerbated by the failure in Box 4 of the decision tree to refer to the foreseeability of the risk of harm that is neither trivial nor transitory in the context of a dangerous act, which would distinguish the intention for murder described in Boxes 3A and 4A. Indeed, as discussed at paragraph 20, above, the language in Box 4 was misleading.

[30] In the circumstances, in order to give the jurors a full understanding of the legal principles they were required to apply to the facts of this case, particularly in light of their uncertainty as reflected in their question, a clear statement regarding the intent necessary for the included offence of manslaughter was required. Indeed, in these circumstances, a correct charge regarding the offence of murder was not sufficient. The Supreme Court of Canada has provided the courts with a clear statement describing the intent for manslaughter. This was exactly what the jury requested, but was not given. (See also *Watt's Manual of Criminal Jury Instructions*; *R. v. Potter*, 2021 NLCA 11, at paragraph 14.) There is no reason to have limited the explanation to describing manslaughter only in terms of murder.

[31] In the result, I am satisfied that the trial judge erred insofar as the decision tree, Box 4 in particular, was inaccurate and misleading, and he failed to clearly answer the jury's question by giving them the necessary comprehensive information. This was especially important given the facts in this case where no witness saw the knife, the stabbing, or exactly what happened during the fistfight.

[32] The Crown submits that the curative proviso pursuant to section 686(1)(b)(iii) of the *Criminal Code* would apply with the result that a new trial is not necessary. In *R. v. Zora*, 2020 SCC 14, Martin J., for the Court, considered the curative proviso:

> [124] This is not a case where the curative proviso allows this Court to dismiss an appeal under s. 686(1)(b)(iii) because there was "no substantial wrong or miscarriage of justice" despite an error of law. The curative proviso is only appropriate where the "error is harmless or trivial" or "where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict" (*R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272 (S.C.C.), at para. 53). ...

[33] In this case, neither basis for application of the curative proviso applies. The error was not harmless or trivial and the evidence is not so overwhelming that the trier of fact would inevitably convict Mr. Pope of murder. In the result, a new trial is necessary. Given this conclusion, it is unnecessary to address the second ground of appeal regarding Mr. Pope's leaving the scene.

SUMMARY AND DISPOSITION

[34] The trial judge erred by failing to properly instruct the jury on the included offence of manslaughter. The difference between murder and manslaughter, particularly regarding the question of intent, was not explained with sufficient clarity.

[35] Accordingly, I would allow the appeal and order a new trial.

_____

B. G. Welsh J.A.

I concur: _____

G. D. Butler J.A.

Dissenting Reasons by Goodridge J.A.:

[36] The appellant was found guilty, following a two-week jury trial, of second degree murder in the death of David Jonathan Collins. He appeals the conviction

on the grounds that the trial judge erred when instructing the jury on the included offence of manslaughter. In particular, the appellant says that the trial judge erred as follows:

- A decision tree attached to the jury charge failed to properly define the included offence of manslaughter;
- The example of manslaughter given to the jury, in response to a question, was misleading because it involved an assailant who caused death by accidentally stabbing the victim; and
- The jury charge failed to alert the jury that the appellant's flight from the scene was of no probative value in choosing between second degree murder and manslaughter.

BACKGROUND

[37] My colleague in her reasons has succinctly stated the facts. To those facts, I add a few points.

[38] Keith Doran, one of the eyewitnesses at the scene, was a passenger in a commercial van driven by the appellant's father. The van pursued and caught up with the taxi as it drove away from the scene with the appellant. There was a brief conversation between the appellant and his father, through the open windows, as the two vehicles drove adjacent and parallel while east bound on Columbus Drive. Mr. Doran, sitting in the passenger front seat of the van, overheard that conversation and testified that the appellant admitted that he had stabbed the victim:

> Q. When you say caught up, what do you mean?
>
> A. We drove up and matched the speed of the taxi so Senior [appellant's father] could ask his son what happened.
>
> Q. And what, if anything, was said from the cab?
>
> A. Senior [appellant's father] said, "What did you do to the poor young fella," and Junior [appellant] said that he stabbed him.
>
> (Transcript, volume VII, at page 55)

[39] At trial, the appellant elected not to testify. The appellant defended the charge on the basis that the Crown had not proven, beyond a reasonable doubt,

that he was the person who committed the unlawful act of stabbing the victim. The appellant noted that none of the eyewitnesses saw a knife in his hand and none of the eyewitnesses saw a stabbing. In his final words to the jury, appellant's counsel stated:

> No one saw a knife; no one saw a stabbing. There are other possible explanations. All of that brings you up to a reasonable doubt.
>
> (Transcript, volume XI, at page 43)

STANDARD OF REVIEW

[40] The appeal is based on alleged errors in the jury instructions. In reviewing for errors in jury instructions an appellate court undertakes a functional approach, asking whether the instructions as a whole enabled the jury to decide the case according to the law and the evidence (*Calnen*, at paragraph 8).

[41] In applying this standard of review an appellate court must examine the entirety of the jury instructions, rather than isolated passages. In *R. v. Jacquard*, [1997] 1 S.C.R. 314, Lamer C.J., for the majority, stated:

> [20]… You must look at a jury charge in its entirety.…
>
> [62]… appellate courts must adopt a functional approach to reviewing jury charges. The purpose of such review is to ensure that juries are properly — not perfectly — instructed.

ANALYSIS

INSTRUCTIONS ON MANSLAUGHTER

[42] The appellant was charged with a single count of second degree murder. Pursuant to subsection 662(3) of the *Criminal Code*, manslaughter is a lesser offence, but an included offence, to second degree murder. Even though there was no charge of manslaughter on the Indictment, it was a possible verdict in this matter. The trial judge, as required, instructed the jury on second degree murder, and instructed the jury on the possible alternate verdict for the lesser included offence of manslaughter.

[43] The appellant agrees that the judge did not err in his instructions on second degree murder, but argues that he erred in three respects (as listed in paragraph 36 above) regarding the included offence of manslaughter.

Decision tree

[44] The appellant says that the trial judge made an error in the decision tree that had been attached to the typed copy of the jury charge. The alleged error appears in the last box (Box 4) at the base of the decision tree. At trial, both Crown and Defence counsel approved the format of the decision tree, and the wording of the statement in Box 4 of the decision tree, before it was given to the jury.

[45] The decision tree is a one-page document with a series of questions and statements, inside separate boxes, set out in flow chart style. The judge did not reference the decision tree during his final charge, but he gave a printed copy of it to the jury as an aid to deliberations. The questions and statements inside each box of the decision tree followed a logical order corresponding to each element of the offence. Box 1 and 2 addressed the first two elements of the offence. A 'yes' answer for the questions inside these first two boxes meant that the jury was satisfied that the appellant committed an unlawful act with a weapon, and that the unlawful act caused the victim's death. After a 'yes' answer to these first two questions, acquittal was no longer an available option on the decision tree. The choices reduced to conviction for second degree murder or manslaughter, depending on whether the jury was satisfied that the appellant had the requisite intent for murder.

[46] Box 3 on the decision tree posed the question dealing with the requisite intent for murder, "… did Craig Pope have the intent required for murder?" A "yes" answer to the Box 3 question redirected the jury to Boxes 3A and 4A, which repeated the two intents for murder and indicated that, if either intent is satisfied "you must find Craig Pope guilty of second degree murder". A "no" answer to the Box 3 question redirected the jury to Box 4, which dealt with the manslaughter option. It says:

> If Craig Pope did not mean to cause the death of David Jonathan Collins and did not mean to cause him bodily harm then you must convict Craig Pope of manslaughter.

[47] The intent of this statement in Box 4 was to direct the jury to convict for manslaughter if the appellant did not have either of the requisite intents for murder. The alleged error in this Box 4 statement is that it does not fully set out the requirement for the second of the two intents for murder. The appellant says

that the second of the two intents for murder should have been fully set out, as it was in the adjacent Box 4A, and that the Box 4 statement should have stated (the added wording is in bold):

> If Craig Pope did not mean to cause the death of David Jonathan Collins and did not mean to cause him bodily harm **that he knew was likely to cause his death and was reckless whether death ensued or not** then you must convict Craig Pope of manslaughter.

[48] I agree that the Box 4 statement, in setting out the second of the two intents for murder, is incomplete; it does not track fully the language of section 229(a) of the *Criminal Code*, which sets out definitions of murder with the requisite intents. However, as I explain below, this abbreviated reproduction in Box 4 of the intent required for murder was not a serious omission and does not amount to a reviewable error.

[49] The Box 4 statement in the decision tree must be considered in the context of the all of the jury instructions (see *Calnen*, at paragraph 8 and *Jacquard*, at paragraphs 20 and 62). The jury charge is the main part of the jury instructions and it correctly set out the two requisite intents for murder, and the difference between manslaughter and murder. The portion of the jury charge addressing the two requisite intents for murder, and the difference between manslaughter and murder, followed the model jury instructions approved and published by the Canadian Judicial Council. This portion of the jury charge (reproduced below) also addressed, by exclusion, the essential components of manslaughter:

> To prove that Craig Pope had the intent required for murder, the Crown must prove beyond a reasonable doubt one of two things. First of all either that Craig Pope meant to cause David Jonathan Collins' death, or secondly that Craig Pope meant to cause David Jonathan Collins' bodily harm that he knew was likely to cause death and was reckless whether death ensued or not. In other words you must decide whether the Crown has proved beyond a reasonable doubt either that Craig Pope meant to kill David Jonathan Collins' or that Craig Pope meant to cause David Jonathan Collins bodily harm that he knew was likely to kill him and proceeded despite his knowledge of that risk. The Crown does not have to prove both. Nor do all of you have to agree on the same intent. So long as each of you are satisfied that one or the other has been proven beyond a reasonable doubt.
> …
>
> Unless you are satisfied beyond a reasonable doubt that Craig Pope had the intent required for murder, you must find him not guilty of second degree murder but guilty of the included offence of manslaughter. If you are satisfied

> beyond a reasonable doubt that Craig Pope had the intent required for murder you must find him guilty of second degree murder.
>
> (Transcript, volume XI, at pages 59 to 62)

[50] I do not agree with the conclusion of my colleague, Welsh J.A., that the trial judge failed to identify the essential components for manslaughter. These components are addressed in the above portion of the jury charge.

[51] The decision tree in Boxes 3A and 4A, repeated the two requisite intents for murder. The portion of the jury charge reproduced above directs the jury to convict for manslaughter if not satisfied that the appellant had the requisite intent for murder, and, in the alternative, convict for second degree murder if satisfied that the appellant had the requisite intent for murder.

[52] Appellant's counsel argued that the opening instruction on manslaughter was "less than clear" and that increased the potential for confusion arising from the abbreviated definition of manslaughter in Box 4 of the decision tree. I do not agree that the opening instruction was unclear, and I therefore do not agree that it has relevance in assessing the alleged error in Box 4 of the decision tree. The opening instruction on manslaughter was in the context of distinguishing manslaughter and murder. The relevant portion of this opening instruction, as read to the jury, stated:

> Culpable homicide on the other hand is a criminal offence. And for our purposes maybe classified as either manslaughter or murder. If murder, it may be either first or second degree. You do not have to worry about first degree murder in this case. The accused is charged only with second degree murder. Now with manslaughter, if a person causes the death another human being by means of an unlawful act that person is guilty of manslaughter regardless of whether he or she intended to cause the death or not. Sometimes culpable murder is murder – sorry, sometimes culpable homicide is murder, not manslaughter. The difference between murder and manslaughter lies in the intention of the person who caused the death. The *Criminal Code* says that culpable homicide is murder if the person who causes the death (a) means to cause that death or (b) means to cause bodily harm that he or she knows is likely to cause death and is reckless about whether death ensues or not.
>
> (Transcript, volume I, at page 46)

This opening instruction provides a simplified, but correct, overview of the difference between manslaughter and murder.

[53] I also note that appellant's trial counsel had requested this wording in the opening instruction that the appellant now says is incorrect. When discussing the opening instruction, before delivery to the jury, appellant's trial counsel stated:

> DEFENCE: Well, we would like to see, the four of us, under manslaughter: "If a person causes the death of another human being by means of an unlawful act, that person is guilty of manslaughter regardless of whether or not she intended to cause that death or not". Stop.
>
> (Transcript, volume I, at page 26)

[54] The jury charge was correct and clear on the manslaughter option, indicating, "Unless you are satisfied beyond a reasonable doubt that Craig Pope had the intent required for murder, you must find him not guilty of second degree murder but guilty of the included offence of manslaughter" (Transcript, volume XI, at page 61). This correct and clear instruction to the jury, read in court, and tracking the Canadian Judicial Council's model jury instructions, was sufficient to fill any gap resulting from the abbreviated statement in Box 4 of the decision tree. The jury was satisfied beyond a reasonable doubt, that the appellant had the requisite intent for murder, with the result that the manslaughter option was no longer in play.

[55] Approval of the opening instruction, the final charge and the attached decision tree by appellant's trial counsel is a factor supporting my conclusion that the jury instructions, overall, including the decision tree, were adequate.

[56] In *Daley*, at paragraph 58, Bastarache J., writing for the majority, noted that a failure of counsel to object to the jury instructions is a factor in appellate review:

> While not decisive, failure of counsel to object is a factor in appellate review. The failure to register a complaint about the aspect of the charge that later becomes the ground for the appeal may be indicative of the seriousness of the alleged violation. See *Jacquard*, at para. 38: "In my opinion, defence counsel's failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection."

[57] In *R.* v. *Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at paragraph 150, Moldaver, J., for the majority, cited with approval comments from Doherty J.A. suggesting that counsels' approval of the jury charge is a factor that may be considered in assessing whether an error occurred.

[58] There was discussion among trial counsel and the judge before a final form of the decision tree was settled. Various changes were requested to the

wording inside Boxes 1 to 3, but counsel raised no concern regarding the wording of the Box 4 statement. This was understandable since the intent required for murder was clearly and correctly articulated in both the jury charge and the decision tree, and since the jury was instructed to convict for manslaughter if not satisfied that the appellant had the requisite intent for murder.

[59] *R. v. Young*, [1981] 2 S.C.R. 39, is another case where the Court referenced a failure of counsel to object to the jury instructions as a factor in appellate review, but it has other parallels to the current matter. In *Young* the offender was charged with murder, and the included offence of manslaughter was a possible verdict. The trial judge, as here, was required to instruct the jury on both murder and manslaughter. On two occasions during the reading of the jury charge, the trial judge omitted the phrase "that he knows is likely to cause death", when discussing the intent required for murder. This omission is similar to the omission in our current situation where the trial judge, on one occasion (in Box 4 of the decision tree) omitted the phrase "that he knew was likely to cause his death and was reckless whether death ensued or not".

[60] Martland J., for the majority, at paragraph 28 of *Young*, agreed with the conclusion of the Ontario Court of Appeal that there was no error in the charge, such that a new trial was required. Martland J. noted that on other occasions in the charge the trial judge had properly defined the intent required for murder, "… the Court of Appeal pointed out that on four occasions prior to these passages the judge had correctly defined the purport of s. 212(*a*)(ii) [now s. 229(a)(ii)], and he did so again on two occasions thereafter [and] no objection was taken to the charge". Martland J. agreed that, taking the charge as a whole, the jury could not have been misled. The same reasoning applies here, considering that the charge read to the jury in the current matter, and the printed copy provided, as well as the re-charge (in response to a question) correctly set out the two requisite intents for murder.

[61] As stated above, I would find that the Box 4 statement in the decision tree does not amount to a reviewable error.

Example of manslaughter in response to jury question

[62] The appellant argues that the trial judge erred in his recharge, in response to a question seeking a further explanation of manslaughter, by giving the jury an example of manslaughter arising from an unintended stabbing. The example described an unlawful act (introducing a knife into a fistfight), possession of the

knife during the fight results in the stabbing injury (albeit by accident), and death results from the injury. This was an acceptable example of manslaughter and there is no error.

[63] I do not agree with the view of my colleague, Welsh J.A., that this example is ambiguous. Appellant's trial counsel approved the example. In fact, it was the specific example that he had requested. Counsel's approval of this example is a factor to consider on appellate review (see *Daley*, *Barton* and *Young*). The relevant extract from the re-charge, which included this example, is as follows:

> In order to convict of second degree murder, you need: One, an unlawful act. Two, either an intention to kill or causing bodily harm that the accused knows is likely to cause death and that the accused is reckless about it, whether or not death takes place. Now manslaughter is any culpable homicide that is not first degree murder or second degree murder. If a person causes the death of another human being by means of an unlawful act, regardless of whether he intended to cause that death, he would be guilty of manslaughter. I am going to give you an example. I am at a soccer game where my team has lost. I get into a fight in the parking lot with a fan of the opposing team. We argue back and forth. I pull out a knife. My opponent lunges at me, the knife goes into his chest and he dies as a result. I caused my opponent's death even if indirectly, but I did so by an unlawful act when I brought the knife to the fistfight. Even though I did not intend to kill him, when I pulled out the knife, I'm guilty of manslaughter because he died of an injury that he sustained as a result of the bodily harm that could be foreseen and which I was reckless about. There was no planning and deliberation. There was no intention to kill or cause bodily harm that I knew could result in death and in respect of which I was reckless. But, because the person died, because there was an unlawful act, I'm guilty of manslaughter.
>
> (Transcript, volume XI, at pages 133 to 134)

[64] In *Creighton*, at pages 44 to 45, McLachlin C.J., writing concurring reasons, set out the test for manslaughter:

> … [A] conviction for manslaughter requires that the risk of bodily harm have been foreseeable. After referring to the statement in *Larkin*, supra, that a "dangerous act" is required, Sopinka J. stated that English authority has consistently held that the underlying unlawful act required for manslaughter requires "proof that the unlawful act was 'likely to injure another person' or in other words put the bodily integrity of others at risk" (at p. 959). Moreover, the harm must be more than trivial or transitory …
>
> So the test for the *mens rea* of unlawful act manslaughter in Canada, as in the United Kingdom, is (in addition to the mens rea of the underlying offence)

> objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act. Foreseeability of the risk of death is not required.

[65] The example provided by the trial judge, as set out in paragraph 63 above, meets this *Creighton* test as an example of manslaughter. Possession of a knife, in hand, during a fistfight is an unlawful act that is likely to injure the other person. In addition, the risk of bodily harm that is neither trivial nor transitory is objectively foreseeable when one is wielding a knife during a fistfight. It is not a defence, in the context of this example of manslaughter, that the stabbing occurred by accident (see paragraph 23 of *R. v. McKenna*, 2015 NBCA 32, aff'd 2015 SCC 63).

[66] I would find that the trial judge made no error in the example of manslaughter that he gave to the jury.

Flight from the scene

[67] The appellant argues that the trial judge erred in failing to provide the jury with a limiting instruction, advising that the appellant's flight from the scene was of no probative value in choosing between second degree murder and manslaughter.

[68] I agree that the trial judge was obliged to provide a limiting instruction. In *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at paragraph 39, Rothstein J., writing for the majority, noted "flight *per se* may be relevant in determining the identity of the assailant, but may not be relevant in determining the accused's level of culpability as between murder and manslaughter". This lack of relevance on the latter is understandable since there is no reason to think that a person who has committed manslaughter would be more likely to stay at the scene of the crime than one who has committed murder.

[69] In the current matter, the appellant's flight from the scene was equally explained by, or equally consistent with, murder or manslaughter. In *White*, Rothstein J. referenced authorities supporting the obligation to provide a limiting instruction in such a situation:

> [37] *Arcangioli*, and its successor case *White (1998)*, stand for the proposition that a "no probative value" instruction will be required when the accused's post- offence conduct is "equally explained by" or "equally consistent with" two or more offences (*White (1998)*, at para. 28; *Arcangioli*, at pp. 145 and 147).

[70] In my view, the trial judge provided an adequate limiting instruction in which he addressed the appellant's flight from the scene. The limiting instruction did not state the specific words 'no probative value in choosing between second degree murder and manslaughter', but it did state that (i) the post offence conduct has only an indirect bearing on the issue of guilt; (ii) a person could leave the scene for legitimate reasons; (iii) the jury was not to infer guilt from that evidence unless, when considered with all the other evidence, it was consistent with his guilt and inconsistent with any other reasonable conclusion; (iv) the jury must be careful about inferring guilt from this evidence because there might be other explanations; and (v) the jury may not use the evidence to support an inference of guilt unless it rejected all other explanations for this conduct. The relevant limiting instruction, set out more fully, was as follows:

> You have heard evidence about certain things that Craig Pope is alleged to have said and done after the incident charged in the indictment. For convenience I'll refer to this as after the fact conduct. In this case, it is alleged that Craig Pope told the taxi driver to drive over Collins as he lay on Mundy Pond Road. Craig Pope also left the scene of the altercation very quickly.
> …
> After the fact conduct such as the comment I've just mentioned is simply a type of circumstantial evidence. As with all circumstantial evidence you must consider what inference if any, is proper to draw from that evidence. You may use this evidence along with all the other evidence in the case in deciding whether the Crown has proved Craig Pope's guilt beyond a reasonable doubt. However, you must not infer Craig Pope's guilt from the evidence unless, when you consider it along with all the other evidence, you are satisfied that it is consistent with his guilt and is inconsistent with any other conclusion. Any other reasonable conclusion. Keep in mind that evidence of after the fact conduct has only an indirect bearing on the issue of Craig Pope's guilt. You must be careful about inferring Craig Pope's guilt from this evidence because there might be other explanations for this conduct. You may use evidence of after the fact conduct to support an inference of guilt only if you have rejected any other explanation for this conduct.
> …
> A person could leave the scene of an altercation for legitimate reason.
>
> (Transcript, volume XI, at pages 101 to 103)

[71] There is no obligation for a trial judge to use specific words in the limiting instruction; what matters is the general sense that the words conveyed to the mind of the jury. The particular words used are within the discretion of the judge, and will change depending on the particular circumstances of the case. In

Daley, Bastarache J., said that what is important is the general sense which the words used conveyed:

> 30 … The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case.
>
> 31 In determining the general sense which the words used have likely conveyed to the jury, the appellate tribunal will consider the charge as a whole. The standard that a trial judge's instructions are to be held to is not perfection. The accused is entitled to a properly instructed jury, not a perfectly instructed jury: see *Jacquard*, at para. 2. It is the overall effect of the charge that matters.

[72] A more specific limiting instruction, such as ‘flight from the scene has no probative value in choosing between second degree murder and manslaughter’ would have been better, however, the limiting instruction given was adequate in the circumstances. The general sense of the words used in the limiting instruction conveyed the message that flight from the scene was of little probative value generally and could not be used in deciding on guilt unless there was no possible other explanation. Applied in the context of murder and manslaughter, this instruction was adequate to alert the jury that the flight from the scene could be equally explained by murder or manslaughter, and therefore could not be used to infer guilt, as between the two. As stated by Moldaver, J, writing for a unanimous court at paragraph 48 of *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, tracking comments of Lamer C.J. from paragraph 62 of *Jacquard*, “an accused is entitled to a jury that is properly — not perfectly — instructed”.

[73] I would find that the trial judge gave an adequate limiting instruction and made no error in that regard.

DISPOSITION

[74] I would dismiss the appeal.

W. H. Goodridge J.A.