

CANADA / JUDGMENT

R. v. Alphonse

2024 BCSC 572

COURT

Supreme Court of British Columbia

DECIDED

5 April 2024

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2024 BCSC 572 R. v. Alphonse

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alphonse,

2024 BCSC 572

Date: 20240405

Docket: Duncan

Registry: 44292

Rex

v.

Andrew Steve Alphonse

Before: The Honourable Justice E. McDonald

Oral Reasons for Judgment

Counsel for the Crown:

J.M.K. Gold

S. Meijers

Counsel for the Accused:

B.R.B. Morahan

Place and Date of Trial/Hearing:

Duncan, B.C.

August 28-31, September 1, 5-8, 11-13, 21, 2023 and

March 11-15, 2024

Place and Date of Judgment:

Duncan, B.C.

April 5, 2024

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I. Overview

- [1] Andrew Steve Alphonse (the accused) is charged with manslaughter of Richard Henry (the "deceased") contrary to s. 236(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The charge relates to an incident, namely a physical fight, which took place on or about January 20, 2020, at a residence in Duncan, British Columbia.
- [2] There is no dispute that on the evening of January 19, 2020, the deceased initially tried, without success, to start a fight with the accused. However, in the early hours of January 20, 2020, the accused and the deceased were involved in a physical fight and the deceased died.
- [3] The main issue is whether the accused acted in self-defence. As I will discuss in these reasons, s. 34(1) of the Criminal Code sets out the requirements for a successful defence of self-defence for what would otherwise be culpable homicide that is manslaughter: s. 234.

II. Evidence

- [4] The trial commenced on August 29, 2023. The evidence completed after 10 days of court time.
- [5] Two agreed statement of facts were entered. The first agreed statement was entered as Exhibit 1. It includes admissions regarding the evidence of the emergency room physician, Dr. Gary Toth; findings regarding blood at the scene; the toxicology report related to the deceased; the seizure of a pair of socks from the bedroom of Eliza George; and, the accuracy and authenticity of photographs and a scene diagram made by the police. The second agreed statement was entered as Exhibit 13. It includes further admissions regarding the seizure of the socks; the blood on the socks; the continuity of the socks seized; and, the admission and accuracy of the photographs of the socks.

- [6] During the trial, the Crown called two police officers, one paramedic, seven civilians and two experts to testify at the trial. The accused testified and the defence called three other civilian witnesses.
- [7] I will not recount the evidence of each witness who testified at the trial. Instead, I will summarize the evidence that I found most relevant to the issues that I am required to resolve.

A. Circumstances of the Incident

- [8] The incident took place in a duplex located at 5363 Mulaqw Road in Duncan, British Columbia (the "Duplex"). The Duplex is located in a small subdivision on a reserve of the Cowichan Tribes.
- [9] On the weekend of January 19, 2020, Mr. Williams, who lived in the Duplex with his family, had several friends over, including the accused. They spent the weekend before the incident socializing, drinking alcohol and watching sports. On the evening of January 19, 2020, a party took place at the Duplex.
1. The deceased, Richard Henry
- [10] At the time of the incident, the deceased was 53 years old. He was described by witnesses as a "big man". The autopsy report confirms that the deceased was just under six feet tall and 220 pounds.
- [11] The deceased and Christine George were involved in a romantic relationship for approximately six months prior to the incident. She and her children lived in a home near the Duplex, but the deceased lived elsewhere. At the time of the incident, Christine George's niece, Eliza George, also lived in her home.
- [12] The deceased, Christine George and Eliza George attended the party together at the Duplex on the evening of January 19, 2020.
2. Evidence of Christine George
- [13] Prior to attending the party, the deceased, Christine George and Eliza George drove to a nearby liquor store. At the time, Eliza George, was 19 years old and she purchased some coolers to take the party. The deceased bought some beer and a mickey of vodka. Eliza George saw the deceased drink the vodka while they were at the liquor store.
- [14] They arrived at the party around 7:00 or 8:00 p.m. There were a number of other people already there. Christine George remembers seeing the accused, Mark George, Donnie Tom and the residents of the Duplex.
- [15] Everyone was socializing in the combined kitchen-dining area at the back of the Duplex. The deceased sat in a folding chair with Christine George on his lap. Some of the people were sitting at the dining table, while others were standing around in the kitchen-dining area.

- [16] Christine George testified that the deceased consumed maybe four to five cans of beer while they were socializing at the party. The accused stood near the dining table, resting against a chest freezer located next to the wall of the dining room. Opposite the chest freezer, across the dining table, there was an open window that looked out to the side of the Duplex.
- [17] It was cold in the kitchen-dining area because of the open window. The accused was dressed in jeans and a t-shirt. At some point, the accused started to shiver, and Christine George handed him a blanket. Eliza George recalled seeing her aunt hand the blanket to the accused.
- [18] Christine George testified that the trouble started when the deceased and Donnie Tom started to argue. Eventually, the deceased turned his anger towards the accused. Christine George confirmed that the deceased was calling the accused names.
- [19] Christine George heard the accused repeatedly tell the deceased that he did not want to fight. In fact, each witness who had attended the party confirmed that the accused essentially ignored the deceased's actions. When the deceased started moving towards the accused, Christine George got between them.
- [20] In cross-examination, Christine George agreed that she could not calm the deceased down and that he was in a state of uncontrolled anger. She asked someone to take the deceased outside and Mark George volunteered. Christine George agreed that the deceased was swearing at her and he called her a "fucking whore".
- [21] Christine George testified that she had experienced the deceased's anger before, and she realized there was no reaching the deceased at this point due to his consumption of hard liquor. I infer that when she described him as unreachable, she meant there was no reasoning with him.
- [22] Christine George decided to go home shortly after the deceased was removed. She agreed that one reason she decided to go home was due to fear of violence from the deceased. When Christine George got home, she locked the doors to her home. She estimated it was after 10:00 p.m. when she arrived home.
- [23] Christine George woke up at some point that evening and she became concerned about the deceased. She called his cell phone but there was no answer. When the deceased did not answer after multiple attempts, Christine George decided to go looking for him.
- [24] She went over to the Duplex, entering through the unlocked back door. It was dark inside and Christine George did not hear anyone moving around. She did not turn on the lights and she did not see the deceased, so she left.

- [25] Christine George then texted Bernadette Alphonse. Ms. Alphonse did not respond, so Christine George went home. Christine George continued worrying about the deceased, so she went back inside the Duplex again. She called out for the deceased and she saw his boots. Christine George then found the deceased in the living room. He was on the floor and on his side close to the wall.
- [26] Mike Bob was the only other person that Christine George saw in the living room. She woke Mr. Bob up and asked him what happened to the deceased. She also called 9-1-1. The dispatcher told her to place the deceased on his back and to administer chest compressions, which she did.
3. Evidence of Eliza George
- [27] Eliza George is the only person, other than the accused, who was in the living room during the incident. She also witnessed events prior to the incident because, as mentioned, she attended the party on January 19, 2020.
- [28] I find Eliza George to be a very credible witness who testified truthfully and thoughtfully. She did her best to tell the court what she observed in a clear manner even though she clearly found the incident to be a very frightening experience. I also find Eliza George to be a reliable witness who was able to explain what she was and was not able to observe and the reasons why.
- [29] While at the party, Eliza George overheard the deceased ask the accused to come outside and fight. She overheard the accused respond to the deceased that he did not want to fight so many times that it was actually annoying.
- [30] Eventually, the deceased made a physical move that indicated he was going to attack the accused. At that point, the women at the party blocked the deceased's path. Christine George told the deceased to "stop this". However, the deceased would not calm down and she overheard him call Christine a "whore". Christine George asked someone to remove the deceased from the Duplex and Mark George volunteered.
- [31] Eliza George testified that after the deceased left the Duplex, the party began to wind down. She saw the accused go into the living room.
- [32] Eliza George saw the deceased outside the Duplex and at some point, she heard him jiggle the front and back doorknobs, which she had locked. She agreed that she had locked the doors because she was concerned about the deceased getting back in and she feared him.
- [33] Eliza George watched the deceased's movements from the living room window. She noticed the deceased going back and forth between some houses and she noticed him go up to Christine George's house. He did not go into Christine George's house, but she saw him talking with someone at a window. After watching the deceased's movements through the window for a while, Eliza George sat down in the living room to look at her phone. The accused was the only other person in the living room with her.

- [34] Eliza George said there was a fold-out cot in the living room up against the north wall. The accused was lying on the outside edge of the cot. His eyes were closed and he appeared to be asleep. Eliza George took a seat on the cot next to the accused and she continued looking at her phone.
- [35] Eliza George agreed that the diagram entered as Exhibit 3 accurately depicts the Duplex and the location of the furniture in the living room after the incident. The cot was located directly across from the entrance to the living room. Outside the entrance to the living room and around a short hallway was the front door to the Duplex.
- [36] Next to the cot, there was a large oval coffee table that was angled near the centre of the living room. Near to the bottom of the cot, where the accused's feet were located, was a two-seat reclining sofa and a television set.
- [37] Eliza George said that a while later, the hallway light turned on and she heard the deceased in the hallway of the Duplex. It was dark in the living room at the time. She noticed that the deceased seemed "pretty aggressive" and "mad". When the deceased came into the living room he said, "What the fuck?". Eliza George felt fearful as she saw the deceased entering the living room.
- [38] The deceased came up to the cot and struck the accused. Eliza George said it looked like the deceased's strike woke the accused up. She said the accused appeared to be shocked and the accused said something like, "What the hell?".
- [39] The deceased told the accused to get up and fight. The deceased began to pull his sweater off and Eliza George noticed that he seemed drunk. The accused also responded to the first strike, which she thought was a slap, by saying he did not want to fight - something that Eliza George heard him say repeatedly.
- [40] The accused moved from laying down to a sitting position on the edge of the cot. The deceased then delivered another punch with his fist to the accused's jawline. At that point, Eliza George testified the accused was still sitting down and the deceased was standing over him near the side of the cot. The living room light had been turned on as the deceased entered the room.
- [41] In cross-examination, Eliza George agreed that when the accused started to get up from the cot, he remained somewhat hunched over. Eventually, the men started to exchange blows with their fists. She said it looked like the accused had had enough and it all happened "so fast". She said the parties were both standing upright at this point, moving backwards from the cot towards the entrance of the living room.

- [42] Eliza George saw the parties fall down behind the recliner sofa. Her view was blocked by the sofa at that point. She could see the deceased's feet sticking out from behind the sofa from where she sat on the cot. After they were on the ground behind the sofa, she noticed the deceased's feet stopped moving, except when she heard the sound of strikes. While she could hear the blows, she could not see them.
- [43] When asked how many punches happened behind the couch, Eliza George estimated it was more than three and when asked about how many kicks took place behind the sofa, she estimated three because the accused "didn't kick long". When asked how those kicks looked, Eliza George said it looked like someone crushing a pop can with their foot. She saw the accused's knee go up, but she could not see where his foot landed because of the sofa blocking her view.
- [44] She said the fight stopped when the accused came out from behind the sofa and walked towards the coffee table. He grabbed some DVD cases from the coffee table and threw them towards the deceased. Eliza George said that the deceased was not moving at this point.
- [45] The accused sat down on the edge of the cot and placed his head in his hands. He then looked over at Eliza George and asked her if she was okay. After a few moments, the accused asked her if he should flip the deceased on his side. He got up from the cot and went back to the deceased and placed him on his side. He told Eliza George that he didn't want the deceased to choke on blood.
- [46] After she saw the accused had turned the deceased on his side, Eliza George got up and walked out of the living room without saying anything. She did not see the deceased's injuries and she did not see any blood. She went directly home to her bedroom in Christine George's house.
- [47] Eliza George did not see the accused again until approximately 20 minutes later when he knocked on her bedroom door. He came into her bedroom and they had a brief conversation. She remembers the accused telling her that he felt bad about the fight and saying that he had not wanted to fight.
- [48] The accused removed his socks to show Eliza George an injury on his foot. Eliza George could not remember what the injury looked like. Days later, the police seized a pair of blood-stained socks from Eliza George's bedroom. When shown a photograph of her bedroom floor, Eliza George confirmed that the socks pictured near her bedside were the socks that the accused had removed while he was in her bedroom following the incident.

4. Evidence of Mike Bob

- [49] Mr. Bob was at the Duplex during the day on January 19th prior to the party. He was also in the kitchen-dining area during the party when the deceased and the accused were there.

- [50] Mr. Bob denied any memory of a beer can being thrown into the dining room from outside of the window. However, when shown his police statement, he said it refreshed his memory and he agreed that the deceased had thrown a can into the dining room. He said the beer can smashed onto the wall after passing between him and Mr. Williams. The can hit the area near to where the accused was standing.
- [51] Mr. Bob testified that he was extremely intoxicated at the party. At a time when he believed everyone had left the party, he described passing out on a recliner sofa in the living room. Mr. Bob did not see anyone else in the living room.
- [52] Mr. Bob got up once after that to use the bathroom. He did not see the deceased when he got up. He walked to the washroom in his stocking feet. Mr. Bob said he did not think he got anything on his socks, such as blood when he went to use the bathroom. He did not recall leaving any footprints in the hallway on the way to and from the bathroom.
- [53] In cross-examination when shown his police statement, Mr. Bob agreed that after Christine George woke him and asked him what happened, he noticed that he had left footprints on the floor on the way to the washroom.
- [54] Mr. Bob testified that early in the morning of January 20, 2020, while he was asleep on the sofa, Christine George woke him up. She was screaming and yelling, asking him "What did you do to Rick?".
- [55] Mr. Bob got up from the sofa and saw the deceased lying on the ground. The deceased was lying on his left side near the wall behind the sofa that Mr. Bob had been sleeping on. Except for Christine George and the deceased, Mr. Bob did not see anyone else in the living room. Mr. Bob told Christine George that he had done nothing to the deceased. Mr. Bob testified that he had no idea how the deceased ended up on the floor because he was very intoxicated and was a heavy sleeper.
- [56] Mr. Bob remembered little about the events at the party or how he came to be in the living room on January 20th. Mr. Bob said he did not hear anyone fighting in the living room.
- [57] Overall, I found Mr. Bob's evidence to be unreliable and I place little weight on it. He testified to being highly intoxicated during the party and in the day leading up to the party.
- [58] Neither the accused nor Eliza George recall seeing Mr. Bob in the living room during the incident. Therefore, I find it reasonable to infer that Mr. Bob entered the living room and began sleeping on the recliner sofa after the incident had taken place.

5. Evidence of Joseph Mark George

- [59] Mark George was at the party because his brother-in-law, Mr. Bob, had invited him. The deceased was Mark George's uncle. Mark George said that when the deceased first arrived at the party he seemed "okay". When the deceased started to get aggressive towards the accused, Mark George took the deceased out through the back door of the Duplex.

- [60] In cross-examination, Mark George agreed that he heard the deceased say lots of "fighting words" at the party. He reluctantly agreed that the deceased told the accused he would be waiting for him outside of the Duplex. Mark George agreed that the deceased was very angry when he left the party.
- [61] The deceased resisted Mark George's efforts to get him out of the Duplex. He had to push the deceased hard to get him out and he did his best to calm him down. After Mark George got the deceased outside, they walked around the side of the Duplex to where Mark George had parked his car. That was near the front door of the Duplex.
- [62] Mark George opened his car trunk and handed the deceased a full can of beer. The deceased opened the beer and after taking a sip, he walked back towards the dining room window of the Duplex.
- [63] The deceased threw the full, or nearly full, beer can through the open window into the dining room. In his evidence in chief, Mark George testified that he stayed by his car while this happened and he could not see where the can landed. However, in cross-examination, Mark George agreed that he saw the beer can nearly hit someone inside the Duplex. Mark George also agreed that it looked like the deceased was trying to go back inside the Duplex.
- [64] Other witnesses in the kitchen-dining room of the Duplex, such as Eliza George, testified that the accused was standing right next to the spot where the beer can hit. The can came flying through the open window, hitting the wall not far from the accused's head. The can contained liquid because the liquid splashed and ran down the wall.
6. Observations of the deceased at Bernadette Alphonse's House
- [65] After the deceased threw the beer can, Mark George noticed his nephew, Bradley Sylvester, walking by. Mark George and the deceased began talking with Mr. Sylvester. Mark George denied that the deceased behaved aggressively towards Mr. Sylvester by initially saying to him, "What the fuck do you want?"
- [66] However, Mr. Sylvester testified that when they first started talking, the deceased seemed angry at someone. Mr. Sylvester recalled that when the deceased first saw him, the deceased said to Mark George "Who the fuck is that?", or something like that. The deceased's mood appeared to improve once Mark George told him who Mr. Sylvester was.
- [67] Mr. Sylvester told the men that he was going over to Bernadette Alphonse's house, which was located across the street from the Duplex. They all ended up going over to Bernadette Alphonse's house.
- [68] Mark George described that when they got to Ms. Alphonse's house, they went inside to socialize and have some drinks. Mark George said the deceased was acting kind of "mouthy" and aggressive at Ms. Alphonse's house. He assumed this was because of the events that had just taken place at the party at the Duplex.

- [69] Mr. Sylvester said that initially, the deceased appeared to be in a good mood and "tipsy" at Bernadette's house. However, Mr. Sylvester noticed the deceased starting to get mad at him, so he was keeping an eye on him. The deceased tried punching Mr. Sylvester on the cheek, but Mr. Sylvester managed to dodge the punch.
- [70] Mr. Sylvester said that afterwards, the deceased apologized. He had no concerns for his safety, but Ms. Alphonse asked the deceased to leave. According to Mr. Sylvester, the deceased did not seem angry when asked to leave and he continued to apologize.
- [71] In cross-examination, Mr. Sylvester agreed that he told the police the deceased was getting ready to "trip out" at Ms. Alphonse's house, which meant his anger was going up and up to the point of rage. He agreed that the deceased was angry about the accused and he wanted to go back to the Duplex, but Mark George or Ms. Alphonse were stopping him. Mr. Sylvester also agreed that the deceased had a reputation for getting aggressive and angry when he drank alcohol.
- [72] At some point, Mark George, Mr. Sylvester and Ms. Alphonse decided to drive to the liquor store. Mark George drove them in his car, but the deceased did not go with them. Mark George agreed that when they returned from the store, he saw the deceased standing near the end of Ms. Alphonse's driveway which was close to the Duplex. Mr. Sylvester also saw the deceased standing there.
- [73] Ms. Alphonse is the accused's cousin. She testified that on the evening of January 19, 2020, she had invited Mr. Sylvester over. However, he showed up with the deceased and Mark George.
- [74] Ms. Alphonse said the deceased appeared to be very intoxicated and in an "ornery" mood. Mark George assured her that the deceased would not cause any problems, so she let them all inside her home. Ms. Alphonse said that at one point, she overheard the deceased asking Mark George and Mr. Sylvester to go "jump" the accused but they said no.
- [75] Ms. Alphonse said that the deceased started chasing Mr. Sylvester around and there was screaming and yelling. When the deceased tried to punch Mr. Sylvester, she told the deceased to leave. Ms. Alphonse said that the deceased was so angry she was worried he was going to hit her. Ms. Alphonse testified that the deceased apologized and promised to behave, but she said no and closed the front door on him. She did not think that the deceased was calming down at that point.
- [76] Neil Alphonse was home with his mother, Ms. Alphonse, on the evening of January 19, 2020. Neil Alphonse mostly stayed in his bedroom but he overheard his mother and her guests socializing during the evening. He came out of his bedroom a few times to have a cigarette or to check on his dog.

- [77] Neil Alphonse was aware that Mr. Sylvester had come over and that his mother's guests included Mark George and the deceased. At some point, the men were arguing in the living room. Neil Alphonse described the deceased's voice as angry and erratic. He seemed quite drunk and he noticed him staggering a little bit.
- [78] Neil Alphonse testified that he overheard the deceased trying to gather people to go and "get after" or "jump" the accused. He also heard the deceased say that if they didn't want to help, he would beat the accused up himself. Neil Alphonse said he was not really concerned about the deceased because he assumed it was just "drunk talk".
- [79] I found Mark George's evidence to lack credibility in some respects. It was apparent that he was reluctant to give evidence that cast the deceased in a poor light. For example, he said he could not recall the deceased trying to punch Mr. Sylvester. He denied that the deceased asked him and Mr. Sylvester to go back to the Duplex to "jump" the accused. Where his evidence differs from Mr. Sylvester's and Ms. Alphonse's evidence, I accept their evidence. I found Mr. Sylvester, Ms. Alphonse and Neil Alphonse to be credible and reliable witnesses. They did their best to recall the events of the evening and I find they testified truthfully.
7. Police and Paramedic Observations at the Scene
- [80] RCMP officers Constable Matthew Baines and Constable Richens were dispatched to the Duplex on January 20, 2020, shortly before 5:00 a.m. When they arrived at the Duplex, there was a large number of people inside. They eventually entered the living room to find Christine George administering CPR to the deceased. They saw the deceased lying on the living room floor. He was parallel to the east wall behind the recliner sofa. Constable Baines said it was obvious to him that the deceased was badly beaten up.
- [81] Constable Baines saw a large pool of blood near the deceased's head. As there was not enough room to render first aid to the deceased, they took the deceased by his socked feet and pulled him away from the wall. Constable Richens testified that they pushed the recliner sofa two to three feet straight out to make space to assist the deceased.
- [82] Constable Richens then took over administering CPR. Constable Richens saw blood around the deceased's mouth, and he saw blood "spray" or "spurt" out during the CPR. Constable Baines spoke to Mike Bob and Christine George, among others, and took photographs and made notes at the scene.
- [83] When the ambulance and paramedics arrived a few minutes later, the police officers assisted the paramedics. It was not long before the deceased was transported to the hospital in an ambulance. Constable Richens left with the paramedics and he attended at the Emergency Room with the deceased.
- [84] Mr. Rauer-Reis, one of the paramedics who attended the scene also testified. Mr. Rauer-Reis said when he arrived, the deceased was in a semi-prone position facing the wall. He saw a small pool of blood near his head.

[85] The deceased was in cardiac arrest, so they rolled him over and saw his facial injuries. Mr. Rauer-Reis said it was very difficult and practically impossible to initiate a proper airway for the deceased. He could not get the device inserted and he could not get the deceased's jaw open so they continued CPR and transported him to hospital. They also tried using the automatic electronic defibrillator ("AED") on the deceased but there was no shockable rhythm.

B. Forensic Examination of the Scene

[86] In admissions of fact entered as Exhibit 1, the accused admits, among other things, the following concerning blood found at the Duplex:

Blood found at Scene

5. On or after January 20, 2020, Forensic Investigators conducted a thorough examination of the residence at 5363 Mulaqw Road in Duncan, British Columbia (the "scene").
 6. Investigators found what they believed to be blood on the floor and walls of the living room of the scene. DNA testing confirmed this to be the blood of the deceased, Mr. Henry.
 7. Investigators located a red substance they believed to be blood in the south hallway of the scene near the exterior door. DNA testing confirmed this to be the blood of the deceased, Mr. Henry.
- [87] The accused also admits the photographs taken at the scene by Corporal Zayonc on January 20 and 21 and, at the autopsy of the deceased on January 24, 2020, are accurate and authentic. The accused further admits that the January 20, 2020, scan of the scene and the Scene Diagram by Corporal Winchell are accurate.
- [88] Approximately one week after the incident, police investigators attended the home of Christine George where they seized a pair of socks. In further admissions of fact entered as Exhibit 13 at the trial, the accused admits as follows regarding the socks:
1. On January 28, 2020, Detective Constable Campbell seized a pair of socks with apparent blood stains from Eliza George's bedroom in Christine George's Residence (the "Socks").
 2. The blood on the sole and ankle of the socks [sic] was confirmed by DNA testing to be the blood of the deceased Mr. Henry.
 3. The continuity of the socks [sic] seized is admitted.
 4. On August 29, 2023, Cpl. Winchel [sic] attended the Duncan/North Cowichan RCMP detachment and retrieved and photographed the Socks. Cpl. Winchell documented his actions in the attached Report which is admitted.
 5. The photographs taken by Cpl. Winchell are admitted.

- [89] Sergeant Thomas Watts testified as an expert in blood stain pattern analysis which is the examination of the size, shape, location, and distribution patterns of blood stains in order to provide an interpretation of physical events that led to their origin. Sergeant Watts prepared a report that was entered as Exhibit 8 at the trial.
- [90] On January 22, 2020, Sgt. Watts attended the scene at the Duplex. He and other officers found blood stains in the north-east corner of the living room, living room floor, cot on the west wall of the living room, as well as the floor of the hallway, bathroom and bathroom sink. The blood stains at the scene were a match to the deceased's DNA profile.
- [91] Based on Sgt. Watt's analysis of the blood stains at the scene, there was an impact pattern consisting of a minimum of 150 spatter stains located on the walls of the north-east corner of the living room. This is the corner behind the recliner sofa.
- [92] The spatter stains had an upward and radiating directionality consistent with an object striking a source of liquid blood at least once in the north-east corner. The area of origin was calculated to indicate the origin was near the north-east corner of the room and 33 centimeters from the floor. There were also blood swipes on the east wall with upward and downward directionality as well as wipes on the floor.
- [93] On the floor of the living room, there was a variety of types of blood stains including a large pool of blood near the north-east corner and large drips and wipes up to the entrance area of the living room. Most of the blood was found in the north-east area behind the recliner sofa and around the east side of the living room near the entrance. Some blood was also found on the cot and near the floor of the cot.
- [94] Sergeant Watts agreed that the large pool of blood on the floor was likely due to a person actively shedding blood for an indeterminate amount of time. He also agreed that some of the swipes of blood on the walls could be caused by hands or fingers. He opined that certain swipes were likely the result of the deceased's blood-contaminated fingers touching the east wall, with movement, and likely at standing height. He agreed that some of the swipes, which were all measured, could be described as above his shoulder height or near his waist height.
- [95] Sergeant Watts said the floor swipes were likely caused by first responders moving the deceased away from the corner. That is consistent with the evidence from the first responders who described pulling the deceased away from the corner to create space to give the deceased assistance.

C. Injuries sustained by the deceased

- [96] By way of Admissions of Fact entered as Exhibit 1 at trial, the accused admits, among other things, the following concerning the deceased's injuries:

Evidence of Dr. Gary Toth

1. Dr. Gary Toth was the attending physician who treated the deceased, Mr. Richard Henry, on his arrival at Cowichan District Hospital on [sic] at 5:21 am on January 20, 2020. Dr. Toth declared Mr. Henry deceased at 5:33 the same day.
 2. It appeared to Dr. Toth that there had been no heart activity for a few hours due to the presence of lividity, which is a reddish to bluish-purple discolouration of the skin due to the settling and pooling of blood following death.
 3. Dr. Toth found that Mr. Henry's airway was distorted which made intubation difficult. Intubation here refers to the insertion of an artificial ventilation tube into the trachea (windpipe).
 4. Dr. Toth observed blunt force trauma to Mr. Henry's face.
- [97] Dr. Matthew Orde testified as an expert in forensic pathology including autopsy and causes and mechanisms of death generally as well as specific causes of the deceased's death. Dr. Orde's post-mortem examination report was entered as Exhibit 12 at the trial. Dr. Orde examined the deceased on January 24, 2020, and determined the immediate cause of the deceased's death was blunt force craniocervical injuries. Dr. Orde states it was suspected that the deceased was repeatedly punched and possibly kicked, and he ended up behind the sofa and became unconscious sometime during the altercation.
- [98] Dr. Orde's post-mortem findings are that the deceased sustained multiple severe recent blunt force injuries, primarily involving the head and neck, with multiple skin tears, bruises and bleeding. The deceased also sustained fracturing of the facial skeleton, including a fracture that caused his jaw to separate from the skeleton, and a fracture of the hyoid bone at the base of the tongue. Fractures to the facial skeleton also included the sides of both eye sockets and upper cheekbones. Dr. Orde noted scattered relatively minor abrasions and bruises on the deceased, including on the backs of both of his hands. The toxicology analysis indicates a high level of alcohol and cannabinoid substances.
- [99] While Dr. Orde opines that the deceased's death would have been due to the blunt force injuries sustained, Dr. Orde said it was difficult to determine how many blows caused the injuries or death. He said it was likely "several blows" and "at least a few" but he could not provide a precise number. The extent of the facial injuries on multiple sides suggested a few blows to the facial region. Dr. Orde said that the facial bones in an adult male are robust and that it takes "considerable force" to fracture one.

- [100] Dr. Orde said that kicking and punching were both consistent with the deceased's injuries and possible causes of the fractures. He said the exact mechanism of the deceased's death, or the sequence of the injuries, were unclear. He could not say whether the deceased remained alive for a period of time after receiving all of the injuries or whether he died during the process of receiving the injuries. There was nothing catastrophic that allowed him to pinpoint the exact cause of death.
- [101] Dr. Orde also opined that an injury-associated airway obstruction may well have been operative. Dr. Orde also opines it is possible the deceased's heart disease may have rendered him more susceptible by way of a risk of cardiac arrest.

D. Testimony of the Accused

- [102] At the time of the incident, the accused was 43 years old. He is 6'1" tall and during the incident, he weighed approximately 197 pounds.
- [103] The accused was at the Duplex socializing during the weekend before the party. He described consuming lots of beer prior to and during the party. When the party began, he said they were socializing in the kitchen-dining area. He recalled seeing Mr. Williams and his family, who lived in the Duplex, Mr. Bob, Mr. Tom, Mark George, the deceased and Christine George at the party. The accused said he was very tired during the party, so he would occasionally go to the living room to take a nap and then return to the kitchen-dining area.
- [104] The accused recalled that the dining room was cold because the window was open and the blinds were pulled up. The accused did not recall saying he was cold. He did not recall whether Christine George handed him a blanket at some point.
- [105] The accused thought he said something to Mr. Bob, at which point, the deceased said to him, "Fuck you, Steve". The accused said he did not respond to the deceased but the deceased kept swearing and trying to get him to fight. The accused said the deceased continued acting like this for about a half-hour. He said Christine George and others were trying to get the deceased to calm down.
- [106] Eventually, the deceased pushed Christine George off of his lap and he came over to the accused. The accused said he felt afraid of the deceased because the deceased wanted to beat him up. The accused made no aggressive moves towards the deceased and he told the deceased he didn't want to fight him.
- [107] The accused testified that Christine George was grabbing the deceased and then Mark George stood up and tried to help. The accused said they tried to get the deceased outside and eventually Mark George succeeded in pushing him out.

- [108] The accused could see the deceased outside the Duplex through the dining room window. At one point, the deceased threw a beer can at the accused through the window. The beer can hit the wall near the accused's head.
- [109] The accused said the party slowly wound down after the deceased left. He said everyone started to go to bed, so he went into the living room to lie down. He got on the cot in the living room but he could not remember whether Mike Bob and Eliza George were also in the living room with him at the time.
- [110] The accused fell asleep on the cot. His next memory was waking up to hear the sound of voices. He heard the voices of Vincent Stewart, who lived in the Duplex, and the deceased at the back door of the Duplex. The accused heard the deceased approaching and the deceased turned on the light to the living room before saying, "Oh, there you are, you little bitch". The accused kept his eyes closed but the deceased kept swearing at him and telling him to get up and fight.
- [111] The accused said the deceased struck him on the head, near his temple. He said it felt like a punch. At the time of the initial strike, the accused was lying on his side facing the entrance to the living room. The accused said he sat up and put his hands on top of his knees, saying to the deceased "Fucking brother, I don't want to fight".
- [112] The deceased was in a rage and he just kept swearing and telling the accused to "be a man" and "get up and fight me". The accused said he felt terrified and he did not want to fight. The accused said again, "Bro, I don't want to fight" but his words had no effect on the deceased.
- [113] The accused felt scared that the deceased was going to beat him up. The accused said the deceased had a general reputation for being jealous and turning violent, especially when he was drinking.
- [114] The deceased kept swearing and then he punched the accused again. The second punch also landed on the accused's head. The accused said it hurt his head and his next thought was that he had to get out of there.
- [115] The accused got up and initially tried to get past the coffee table that was sitting next to the cot but the deceased was right in his way. The accused thought he had to push the deceased back so that he could get out of the front door of the Duplex but the deceased had grabbed onto the accused's t-shirt near the collar.
- [116] The accused was slightly crouching to block the punches that the deceased was throwing. The accused said that as the deceased was throwing punches he knew that he just had to get the deceased off of him and defend himself.
- [117] When asked what his emotional state was at this time, the accused answered: "I was terrified. I --- because I was terrified for my life and because he wouldn't stop wanting to come after me. Like he just wanted to beat me up. And I was scared, and all I knew was I wanted to get out of that house."

- [118] The accused testified that he does not remember much about what happened next. He clenched his right hand and he came up to throw a punch at the deceased. He could not recall whether he connected with the deceased or not. He said everything happened so fast and he could not remember if he and the deceased were actually fighting. He said he could only remember a little bit here and there.
- [119] When asked about his next memory, the accused said he remembered saying, "Brother, I told you I didn't want to fight" and then seeing a little stack of DVDs, which he picked up and threw. The accused said his heart was racing and he was breathing heavy and he felt scared. He also remembered sitting down on the edge of the cot in the living room and trying to catch his breath because he was "hyperventilating or something".
- [120] The accused had difficulty describing his state as he sat on the cot. However, he said he eventually looked over and saw the deceased and he said "Holy Fuck" to himself because he did not remember what happened. He recalled looking over to see Eliza George sitting with her legs up on the cot, her hands were covering her mouth and she was shaking. He asked her if she was okay and she nodded at him.
- [121] When asked if he remembered the motions of his leg before he sat down on the cot, the accused said he remembered in the "scruffle" seeing his leg go up, but he did not remember it coming down or where the deceased was at that time.
- [122] Once the accused saw the deceased, he went over to him but he did not recall what he looked like. He remembered he was on his back so the accused took hold of the deceased's waistband and turned him onto his side. When asked why he did this, the accused said it was so the deceased could breathe. He could not recall seeing any blood or injuries, but he said he did not look at the deceased's face.
- [123] After the accused left the Duplex, he sent a message to Eliza George asking if she was still up. He went over to Christine George's house to talk with Eliza George. At some point a while later, he remembers Christine George asking him where the deceased was and to help find him. He also remembers Christine George removing his socks while he was in Eliza George's bedroom.
- [124] The accused said he went back to the Duplex and he saw the deceased lying on the living room floor. He saw "all the blood" and he could not "wrap my head around like what had happened". He went over and touched the deceased and he felt cold to the touch. The accused said he just panicked and he did not know what to do. He testified that he went to back Christine George's house and told her the deceased was at the Duplex. He remembers Christine George telling him to call 9-1-1. While he remembers dialing his phone, the accused said he could not make the call.
- [125] The accused said he then went over to his cousin Roberta Goldsmith's house. Ms. Goldsmith lived close to the Duplex. When he got to Ms. Goldsmith's house, he told her that Christine George wanted him to call 9-1-1. The accused said Ms. Goldsmith called 9-1-1. The accused

said he was so scared that he did not know what to do. He remembers repeating over and over again at Ms. Goldsmith's house, "Fuck, what did I do?". He testified about going out of the house with Ms. Goldsmith to stand on the street to watch the ambulance and police arrive at the Duplex.

- [126] The accused did not recall much about his conversation with Ms. Goldsmith or whether he had told her that he was injured. He did not remember Ms. Goldsmith taking any photographs of him with a cell phone.
- [127] As mentioned, the defence called a number of civilian witnesses, including the accused's cousin, Roberta Goldsmith to testify at the trial. Ms. Goldsmith described what happened on January 20, 2020, when the accused appeared unexpectedly at her house in the early morning.
- [128] Ms. Goldsmith testified that when the accused told her that the deceased was the Duplex, she called 9-1-1 to ask for an ambulance. Ms. Goldsmith did not notice any injuries or blood on the accused at first. However, at some point, the accused told her his neck and jaw hurt.
- [129] Ms. Goldsmith then noticed red marks like fingerprints on the accused's neck and a bruise on his jawline. She took some photographs of the marks with a cell phone. Photographs of the accused's neck and jaw were entered as Exhibit 15 at the trial. The photographs show faint marks and bruises on the accused in these areas.
- [130] I believed Ms. Goldsmith when she testified about seeing red marks on the accused's neck and a bruise on his jawline, even though she did not tell the police about them. I accept Ms. Goldsmith's explanation about why she did not tell the police, including because she was emotional when initially speaking with the police. Later, when she emailed the police, she did so without assistance despite having a disability that affects her ability to write.
- [131] In any event, the defence position is not that the accused suffered significant injuries at the hands of the deceased. I do accept that the accused had a sore neck and jaw as a result of the fight with the deceased. I find that the deceased was the cause of the accused's injuries but the injuries were not severe.

III. Positions of the parties

A. Defence

- [132] Counsel for the accused submits that the only issues are whether the Crown has proved beyond a reasonable doubt that: (1) the accused caused the deceased's death by means of an unlawful act as provided by s. 222(5)(a) of the Code; (2) the act committed by the accused was not made for the purpose of defending or protecting himself as provided by s. 34(1)(b); or (3) the act committed by the accused was unreasonable in the circumstances as provided by s. 34(1)(c).

- [133] The accused argues that he acted in a pro-social manner in all respects for a number of hours prior to the incident by doing everything he could to avoid the conflict until he was trapped by the deceased. The accused points out that he was extremely fearful of the deceased, which is why he went to such lengths to avoid him.
- [134] The accused submits that Eliza George is a credible witness and her evidence establishes that he acted in a pro-social manner even after the deceased began hitting him as he lay on the cot. The accused also submits that his evidence is credible and reliable, including his evidence that he has no, or only partial, memory of the physical contact between himself and the deceased during the incident.
- [135] According to the accused, the Crown is essentially inviting the court to improperly infer, based on the severity of the injuries suffered by the deceased, that the accused must have acted unreasonably in all of the circumstances. The accused submits that since the Crown has failed to prove the offence beyond a reasonable doubt, he should be acquitted of the offence. The accused also submits that his evidence, as well as the evidence taken as a whole, should raise a reasonable doubt.

B. The Crown

- [136] The Crown concedes that under s. 34(1)(a) of the Code, the accused believed on reasonable grounds that force was being used against him at the time of the incident.
- [137] However, the Crown's position is that it has disproved that ss. 34(1)(b) and (c) are available to the accused. The Crown submits the accused did not punch, kick and/or stomp on the deceased for the purpose of defending himself and the acts he committed were not reasonable in the circumstances. The Crown submits that the accused's evidence is not credible or reliable, especially as it relates to claiming that he was very fearful that the deceased would beat him up.
- [138] The Crown submits that the evidence demonstrates that the accused was not particularly fearful of the deceased and he had no reasonable basis to believe that the deceased would injure him. The accused suffered no serious injuries in the incident while the deceased sustained multiple fractures to his eyes, nose and jaw. The Crown also submits that I ought to accept that the accused punched, kicked and/or stomped on the deceased while he was on the floor, not moving, and possibly unconscious.
- [139] The Crown's position is that it has proved beyond a reasonable doubt that the accused committed manslaughter when he caused the deceased's death by means of an unlawful act. The Crown says it is not required to prove beyond a reasonable doubt which punch, kick or stomp, or combination thereof, caused the deceased's death. The Crown submits that the serious injuries inflicted on the deceased, as described by Dr. Orde, establish the unlawful act beyond a reasonable doubt.

IV. Governing Legal Principles

- [140] The Crown must prove beyond a reasonable doubt that the accused caused the deceased's death by means of an unlawful act manslaughter. The provisions dealing with manslaughter are set out in ss. 222, 236 and 234 of the Code.
- [141] The predicate unlawful act alleged by the Crown is assault causing bodily harm as defined by ss. 265(1)(a) and 267(b) of the Code.
- [142] Consent may provide a defence to assault, but consent is vitiated where the force intentionally applied results in serious hurt or non-trivial bodily harm: *R. v. Jobidon*, [1991] 2 S.C.R. 714, 1991 CanLII 77 at para. 127.
- [143] All that is required for a manslaughter conviction, in addition to the actus reus and mens rea of the underlying act, is the reasonable foreseeability of the risk of bodily harm, but foreseeability of risk of death is not required. The unlawful act must be objectively dangerous that is likely to injure the other person: *R. v. Creighton*, [1993] 3 S.C.R. 3, 1993 CanLII 61 at paras. 8 and 12.
- [144] The defence submits that the Crown has not defined or identified the unlawful act. The defence relies on *R. v. K.T.*, 2005 MBCA 78 at para. 19, for the principle that in order to determine whether the essential elements of the offence have been proved, it is essential for the Crown to identify the unlawful act being relied upon. In *T. (K.R.)*, the information did not specify whether the manslaughter alleged was caused by means of an unlawful act or by criminal negligence.
- [145] In *K.T.*, in allowing the appeal from the manslaughter conviction, Hamilton J.A. states as follows:
19. It was essential that the Crown identify the unlawful act being relied upon and for the judge to determine whether the Crown had proved the actus reus and mens rea of that offence beyond a reasonable doubt. If she had been so satisfied, the judge would have had to address whether the Crown had proved beyond a reasonable doubt the objective reasonable foreseeability of risk for the offence of manslaughter.
 20. In conclusion, the judge erred when she convicted *K.R.T.* of unlawful act manslaughter because his actions were dangerous when she did not find that the essential elements of the offence were proved beyond a reasonable doubt.
- [146] The accused submits that there is no evidence of a specific act that caused the alleged injuries to the deceased. The accused also submits that defending himself during the heat of an attack from the deceased is lawful and not an unlawful act.

[147] The Crown submits that it had proved beyond a reasonable doubt the alleged predicate "unlawful act" of assault causing bodily harm pursuant to ss. 265 and 267 of the Code. The Crown also submits that it has proved beyond a reasonable doubt the objective foreseeability of risk of bodily harm in the context of the unlawful act.

[148] In K.T at para. 5, citing Creighton, Hamilton J.A. sets out the elements for unlawful act manslaughter:

1. The actus reus of unlawful act manslaughter is the actus reus of the predicate offence (the unlawful act);
2. The mens rea of unlawful act manslaughter is twofold: a) the mens rea of the predicate offence, and b) the objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act;

[149] The accused's evidence is that he was extremely fearful of the deceased. He submits that everything he did after the deceased began striking him was in self-defence.

Self-Defence

[150] Therefore, a central issue before the court, is whether the defence of self-defence is available to the accused.

[151] Section 34 of the Code governs the defence of self-defence:

Defence -- use or threat of force

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.

Factors

- (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
 - (a) the nature of the force or threat;
 - (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
 - (c) the person's role in the incident;

- (d) whether any party to the incident used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (f.1) any history of interaction or 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.

[152] Self-defence may not be considered unless an air of reality exists on all elements of the defence: *R. v. Cinous*, 2002 SCC 29 at para. 47. In the present case, there is no submission by the Crown that there is no air of reality to the defence of self-defence. I have no difficulty finding that there is an air of reality to the defence of self-defence.

[153] In *R. v. Tremblay*, 2019 BCSC 410 at paras. 172-174, Justice DeWitt-Van Oosten (as she then was) described the onus on the Crown and the legal principles that apply to self-defence:

172 The Crown bears the burden of disproving the defence of self-defence. To meet this burden, it need only prove beyond a reasonable doubt that one of the three elements of the defence does not apply. All three of the s. 34(1) criteria must be present for the defence to be available: *R. v. Randhawa*, 2019 BCCA 15 (B.C. C.A.) at para. 34. [Internal references omitted.]

173 In deciding whether the Crown has met its burden, the Court must consider the whole of the evidence: *R. v. Fontaine*, at para. 12. Throughout the course of the analysis, I must also remain mindful of the fact that the accused is presumed innocent unless and until the Crown meets its burden of proof.

174 The law does not require that an accused retreat before acting in self-defence: *R. v. Sandhu*, 2018 BCPC 122 (B.C. Prov. Ct.) at para. 11, although a failure to do so may be relevant to the ss. 34(1) and (2) analysis. It is also well-established that a person who is under attack, and defending themselves, cannot be expected to weigh, to a nicety, the exact measure of the defensive action required: *R. v. Sandhu* at para. 13, citing *Palmer v. R.* (1971), 55 Cr. App. R. 223 (Jamaica P.C.) at p. 242. See also *R. v. Kandola*.

[154] The accused testified at the trial, so I instruct myself as provided by *R. v. W. (D.)*, [1991] 1 S.C.R. 742, 1991 CanLII 93 (S.C.C.) at p. 758:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[155] In addition, a fourth step has also been recognized which provides that, "if, after careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit": *R v. C.W.H.*(1991) 68 C.C.C. (3d) 146, 1991 CanLII 3956 (B.C.C.A.) at p. 155.

[156] In *Tremblay*, at para. 180, DeWitt-Van Oosten J., citing *R. v. Reid* (2003), 65 O.R. (3d) 723, 2003 CanLII 14779 (Ont. C.A), notes that the first two steps in *W.(D.)* may be expressed in a different language for cases involving self-defence:

180 In *R. v. Reid* (2003), 65 O.R. (3d) 723 (Ont. C.A.), Justice Moldaver, as he then was, suggested that in self-defence cases, the first two principles of the *W.(D.)* analysis are appropriately cast in this language:

- If I accept [the accused's] evidence and on the basis of it, I believe or have a reasonable doubt that he was acting in lawful self-defence, I must find him not guilty.
- Even if I do not accept [the accused's] evidence, if, after considering it alone or in conjunction with other evidence, I believe or have a reasonable doubt that he was acting in lawful self-defence, I must find him not guilty.

181 Finally, the principle of reasonable doubt applies to the issue of credibility. On any given point, I may believe a witness, disbelieve a witness, or not be able to decide. I do not have to fully believe or disbelieve one witness or a group of witnesses: *R. v. Tom*, 2014 BCSC 2660 (B.C. S.C.). If I have a reasonable doubt about the guilt of Mr. Tremblay arising from the credibility of the witnesses, I must find him not guilty.

[157] The leading authority regarding the defence of self-defence under s. 34 of the Code is *R. v. Khill*, 2021 SCC 37. The Supreme Court of Canada clarifies the approach to the amended self-defence regime and emphasizes that the contours of self-defence "are tied to our notions of culpability, moral blameworthiness and acceptable human behaviour", and thus that it "demands a broader societal perspective": *Khill*, at para. 2.

[158] In *Khill*, at para. 51, Justice Martin for the majority, describes the inquiries under s. 34 in the following way: "The three inquiries under s. 34(1) can usefully be conceptualized as (1) the catalyst; (2) the motive; and (3) the response".

[159] Under the "catalyst" in s. 34(1)(a), the court considers whether the accused believed on reasonable grounds that force was being used against him or another person. Again, this element is not in dispute since the Crown concedes the accused had a reasonable belief that force was being used against him by the deceased.

- [160] Under the second element related to "motive" in s. 34(1)(b), the court considers the "accused's personal purpose in committing the act that constitutes the offence": Khill, para. 59. Justice Martin explains the inquiry required under this element as follows:
- [59] Section 34(1)(b) requires that the act be undertaken by the accused to defend or protect themselves or others from the use or threat of force. This is a subjective inquiry which goes to the root of self-defence. If there is no defensive or protective purpose, the rationale for the defence disappears (see *Brunelle v. R.*, 2021 QCCA 783, at paras. 30-33; *R. v. Craig*, 2011 ONCA 142, 269 C.C.C. (3d) 61, at para. 35; *Paciocco* (2008), at p. 29). The motive provision thus ensures that the actions of the accused are not undertaken for the purpose of vigilantism, vengeance or some other personal motivation.
- [60] The range of reasonable responses will be different depending on whether the accused's purpose is to defend property, effect an arrest, or defend themselves or another from the use of force.
- [61] An accused's purpose for acting may evolve as an incident progresses or escalates. . Clarity of purpose is not meant to categorize the accused's conduct in discrete silos, but instead appreciate the full context of a confrontation, how it evolved and the accused's role, if any, in bringing that evolution about
- [161] Under the third element of self-defence, being the "response", the court considers the accused's response and whether it was reasonable in the circumstances pursuant to s. 34(1)(c). Parliament provides an express structure in s. 34(2) for determining whether an act of self-defence was reasonable in the circumstances: Khill, paras. 62-64.
- [162] The components of this third, "response" element of self-defence include:
- a) an examination of the accused's response to the threat of force and a requirement that "the act committed [be] reasonable in the circumstances": Khill, at para. 62;
 - b) the reasonableness inquiry operates to ensure conformity with "community norms of conduct": Khill, at para. 62;
 - c) grounding the law of self-defence in "the conduct expected of a reasonable person in the circumstances" achieves an appropriate balance between respecting the security of the person acting and security of the person acted upon: Khill, at para. 62;
 - d) "reasonableness" under s. 34(1)(c) is the new legislative scheme's orientation towards "broad and flexible language" making the law of self-defence "more comprehensible and accessible" to the public: Khill, at para. 63.
- [163] The structure provided by s. 34(2) to decide whether an act of self-defence was reasonable in the circumstances is explained by Martin J. as follows:

- [64] Through s. 34(2), Parliament has also expressly structured how a decision maker ought to determine whether an act of self-defence was reasonable in the circumstances. As the language of the provision dictates, the starting point is that reasonableness will be measured according to "the relevant circumstances of the person, the other parties and the act". This standard both casts a wide net of inquiry covering how the act happened and what role each person played and modifies the objective standard to take into account certain characteristics of the accused -- including size, age, gender, and physical capabilities (s. 34(2)(e)). Also added into the equation are certain experiences of the accused, including the relationship and history of violence between the parties (s. 34(2)(f) and (f.1)).
- [65] Nevertheless, the trier of fact should not be invited to simply slip into the mind of the accused. The focus must remain on what a reasonable person would have done in comparable circumstances and not what a particular accused thought at the time. For example, even if Mr. Khill's military training qualifies as a relevant personal characteristic, it does not convert the reasonableness determination into a personal standard built only for him, much less a lower standard than would otherwise be expected of a reasonable person in his shoes. The law of self-defence cannot offer different rules of engagement for what happens at the homes of those with military experience or allow "training" to replace discernment and judgment. Section 34(1)(c) asks whether the "act committed is reasonable in the circumstances". It does not ask whether Mr. Khill's military training makes his act reasonable nor whether it was reasonable for this accused to have committed the act. The question is: what would a reasonable person with similar military training do in those civilian circumstances?
- [66] As observed by Doherty J.A. at para. 58 of his reasons, the "relevant circumstances of the accused" in s. 34(2) can also include any mistaken beliefs reasonably held by the accused. If the court determines that the accused believed wrongly, but on reasonable grounds, that force was being used or threatened against them under s. 34(1)(a), that finding is relevant to the reasonableness inquiry under s. 34(1)(c). However, while s. 34(1)(a) and (b) address the belief and the subjective purpose of the accused, the reasonableness inquiry under s. 34(1)(c) is primarily concerned with the reasonableness of the accused's actions, not their mental state.
- [67] Courts must therefore avoid treating the assessment of the reasonableness of the act under s. 34(1)(c) as equivalent to reasonable belief under s. 34(1)(a). Beyond honest but reasonable mistakes, judges must remind juries that the objective assessment of s. 34(1)(c) should not reflect the perspective of the accused, but rather the perspective of a reasonable person with some of the accused's qualities and experiences. As simply put by the then-Parliamentary Secretary to the Minister of Justice at second reading, "If a person seeks to be excused for the commission of what would otherwise be a criminal offence, the law expects the person to behave reasonably, including in the person's assessment of threats to himself or herself, or others" (House of Commons Debates, vol. 146, No. 58, at p. 3834 (emphasis added) (Robert Goguen)).

- [68] Parliament provides further structure and guidance because the fact finder "shall" consider all factors set out in paragraphs (a) to (h) of s. 34(2) that are relevant in the circumstances of the case.
- [69] The "act committed" is the act that constitutes the criminal charge -- in this case, the shooting. Given s. 34(1)(c), the question is not the reasonableness of each factor individually, but the relevance of each factor to the ultimate question of the reasonableness of the act. There is thus no requirement for the Crown to show that a "person's role in the incident" was itself unreasonable before it may be considered as a factor under s. 34(1)(c). As long as "the person's role in the incident" is probative as to whether the act underlying the charge was reasonable or unreasonable it may be placed before the trier of fact. Once a factor meets the appropriate legal and factual standards, it is for the trier of fact to assess and weigh the factors and determine whether or not the act was reasonable. This is a global, holistic exercise. No single factor is necessarily determinative of the outcome.
- [70] As previously explained, Parliament's choice of a global assessment of the reasonableness of the accused's otherwise unlawful actions represents the most significant modification to the law of self-defence. While new to the law of self-defence, this is not the first time Parliament has asked judges and juries to assess the reasonableness of an accused's conduct or used a multifactorial legal test. The clear and common methodology which applies in such instances also operates under s. 34(2). The parties can be expected to make submissions about the legal interpretation of the factors, which apply, the evidence that may support or refute them and the weight to be assigned to each applicable factor. Indeed, whether a certain factor needs to be considered at all or the weight to be given to it will often be contested in final argument and/or when counsel makes submissions concerning what should be left to the jury.

[164] With these legal principles in mind, I turn to my analysis.

ANALYSIS

A. Section 34(1)(a) - Force or Threat of Force

- [165] As mentioned, the Crown concedes that when the incident began and the accused began to physically fight with the deceased, the accused believed on reasonable grounds that force was being used against him.
- [166] In my view, that is an appropriate concession for the Crown to make in light of the testimony of the accused and Eliza George that the deceased entered the living room and proceeded to strike the accused twice while he was on the cot.

- [167] I find that the deceased was in an uncontrolled state of anger when he came into the living room and started to strike the accused. I find that over the course of the evening of January 19, 2020, the deceased was single-mindedly and persistently focussed on physically fighting the accused. I find that the deceased's anger was due, at least in part, to some jealousy and resentment he felt towards the accused. The deceased's initial angry outburst directed at the accused also appeared to involve his girlfriend, Christine George.
- [168] I have no difficulty finding that when the incident began, the accused believed on reasonable grounds that force was being used against him by the deceased.

B. Section 34(1)(b) - Whether the Act was Defensive

- [169] At the next element of the self-defence analysis, the Crown is required to prove that the accused did not commit the act that constitutes the offence for the "purpose of defending" himself.
- [170] The Crown submits that at some point during the incident, the deceased was no longer a threat to the accused. Despite posing no threat, the Crown submits the accused continued punching, kicking or stomping the deceased to cause the deceased's death. The Crown submits that the accused was acting out of anger and frustration because the deceased would not accept being repeatedly told that the accused did not want to fight.
- [171] The Crown also submits that the accused was not fearful of the deceased. The Crown says this is evident because the accused did not try very hard to avoid the deceased when he came into the living room. The Crown says the accused knew that the deceased was extremely intoxicated and not really an able fighter.
- [172] The accused testified that the deceased grabbed his t-shirt near the collar. Eliza George confirmed that she saw the deceased grab the accused's t-shirt and punch the accused. She could not recall if the deceased ever let go of the accused's t-shirt.
- [173] Eliza George testified about seeing the men exchange blows with their fists. While punching, the two men moved backwards towards the entrance of the living room. The accused's back was to Eliza George as they moved towards the entrance. The parties fell down behind the recliner sofa that was next to the entrance of the living room in the north-east corner.
- [174] Eliza George testified to hearing blows, but she could not see the blows because her view was blocked by the sofa. She saw the deceased's feet sticking out from behind the sofa. His feet only moved when she heard the blows. She could not see who was making or receiving the blows nor what area of the body made or received the blows. She said it all happened so fast.

- [175] Eliza George testified that prior to the fall, she saw at least three punches exchanged by the men. She saw the accused get up and at least twice, lift his knee as if to crush a pop can. She heard the accused saying something to the deceased to the effect of "I told you I didn't want to fight". Eliza George also testified that she then saw the accused move to the coffee table, grab some DVDs and throw them toward the deceased. The accused sat down on the cot with his head in his hands.
- [176] Regarding the accused's evidence that he has no memory of the actual fight, I believed his testimony. When I consider the full context of the incident, including the accused's state of fear and the fight beginning unexpectedly mere seconds after the accused was awoken by the sound of the deceased's voice at the back door, I do not find the accused's lack of memory about the details surprising.
- [177] I agree with the defence that the accused's lack of memory regarding the details of the incident is not particularly helpful to him. His lack of memory meant he could not give evidence, for example, about whether the deceased continued his aggressive movements towards the accused.
- [178] The accused was firm about the events he said he could remember. The accused also did not avoid agreeing that he had a fragment of memory about seeing his own leg coming up, but not going down, while the deceased was on the ground.
- [179] When I consider the evidence as a whole, including the details about the deceased's determination to get back into the Duplex that night, his direct movement from the back door to the living room, his actions in striking the accused while he appeared to be asleep, and the overall unprovoked nature of the confrontation, as well as the things that the accused heard about the deceased being a jealous-type, a tough fighter with a tendency to become violent when intoxicated, I accept the accused's assertion of a defensive purpose in fighting with the deceased. I find that the accused believed the deceased, who by all accounts was in an uncontrolled rage and fixated on fighting, could beat the accused up and badly hurt him.
- [180] Eliza George was unsure if the deceased ever let go of the accused's t-shirt, but she agreed the deceased was holding onto the shirt when she saw the men fall down. Eliza George said it all happened so quickly. After the men fell behind the sofa, she did not know who was hitting whom. She observed the accused get up and lift his knee, maybe twice, while continuing to tell the deceased he didn't want to fight.
- [181] I find that from the time the men began to exchange punches, there was one continuous engagement that unfolded in a matter of a few minutes at most. The incident quickly escalated from unprovoked punches being delivered by the deceased to the accused to a situation where both men were fighting and they ended up on the floor together with blows continuing.
- [182] I find the following events took place during the physical altercation between the parties:

- a) the deceased punched the accused twice on the head while the accused was on the cot;
- b) the accused got up and the parties began exchanging punches;
- c) the deceased grabbed and held onto the accused's t-shirt;
- d) the parties moved back a few steps closer to the entrance of the living room;
- e) while the deceased was holding onto the accused's t-shirt, the parties fell to the ground, landing behind the recliner sofa;
- f) the exchange of blows continued while the parties were on the ground behind the recliner sofa;
- g) the accused stood up while the deceased remained on, or near, the floor;
- h) the accused twice raised his knee before bringing his socked foot down as a kick or stomp motion onto the deceased's face and neck areas;
- i) while the parties were behind the couch, the accused continued speaking to the deceased saying words to the effect that he did not want to fight;
- j) the accused walked out from behind the sofa to the coffee table, where he grabbed a small stack of DVDs and threw them at the deceased;
- k) the accused sat down on the cot in the living room; and
- l) within a couple of minutes, the accused went back behind the sofa and turned the deceased onto his side.

[183] The Crown submits that the accused knew he was no longer at risk from the deceased, so he was not acting for a defensive purpose. The Crown submits that, in effect, the accused was engaging in a gratuitous, overwhelming, violence against the deceased. The Crown did not specify when the accused knew he was no longer at risk from the deceased.

[184] I do not accept the Crown's submission that at some point, the accused knew he was no longer at risk from the deceased during the physical altercation making up the incident. Eliza George saw the deceased grab hold of the accused's shirt and she did not see him let go as the parties fell. She heard the sound of blows while the parties were behind the sofa. She only saw the deceased's feet move when she heard the sound of a blow.

[185] When I consider the accused's evidence, which provides little regarding the details of the fight, as well as the evidence of Eliza George, I am unable to find that the accused was the only party delivering blows behind the sofa. I am also unable to find that the deceased was incapacitated or no longer being aggressive. As I previously mentioned, I find that the parties exchanged blows when they were behind the sofa and I find the accused had a defensive purpose in delivering blows behind the sofa.

- [186] When I consider whether the accused knew the deceased was not a threat as the accused stood up and twice raised his knee before kicking or stomping the deceased, I am unable to find that such acts were not defensive. The fact that the accused continued speaking to the deceased saying he did not want to fight, raises a reasonable doubt as to whether the deceased had really stopped moving and acting aggressively towards the accused at this time.
- [187] The accused then sat down and spoke to Eliza George. He asked whether he should turn the deceased on his side. It is at this point that I find there was a physical break in the contact between the two men. After that break, the accused went to turn the deceased on his side and he did not undertake gratuitous after-the-fact violence against the deceased.
- [188] The Crown says I ought to disbelieve the accused when he testified that he did not see the deceased's injuries or the blood and find him lacking in credibility. It should be noted that Eliza George testified that when she left the living room immediately after the incident, she did not see blood or the deceased's injuries. Mike Bob also testified that he did not see blood when he was in the living room before Christine George woke him up.
- [189] Eliza George recalled the accused asking her whether he ought to turn the deceased on his side so he didn't choke on blood. I find it reasonable to infer the accused asked about this because he knew the deceased was bleeding. It is an obvious explanation for the accused's concern that the deceased might choke. Despite Eliza George's evidence about the accused asking her this, which I accept as true, I do not find that it strikes significantly against the accused's overall credibility just because I disbelieve his evidence about not seeing the blood or the deceased's injuries.
- [190] I have considered the accused's testimony with the principles from W.(D.) in mind. The accused's testimony about the defensive purpose of his acts, together with my consideration of Eliza George's testimony, causes me to believe that the accused was acting in self-defence. I conclude the Crown has not proved beyond a reasonable doubt that the accused's acts during the incident were not committed for a defensive purpose.

C. Section 34(1)(c) - Reasonableness of the Acts

- [191] The starting point is "reasonableness will be measured according to 'the relevant circumstances of the person, the other parties and the act'": Khill, at para. 64. The required standard casts a "wide net of inquiry" that examines how the act happened, and the role each person played and it "modifies the objective standard to take into account certain characteristics of the accused" along with certain experiences of the accused: Khill, at para. 64. Importantly, the focus remains on "what a reasonable person would have done in comparable circumstances not what a particular accused thought at the time": Khill, at para. 65.

- [192] The factors in paragraphs (a) to (h) of s. 34(2) must be considered but they are not exhaustive. The question is not the reasonableness of each factor individually, but the relevance of each to the ultimate question of the reasonableness of the act. Once a factor meets the required standards, it is for the trier of fact to "assess and weigh the factors and determine whether or not the act was reasonable": Khill, at para. 69. As Martin J. explains, "This is a global, holistic exercise. No single factor is necessarily determinative.": Khill, at para. 69.
- [193] I will canvass applicable factors in s. 34(2)(a) to (h) to determine the reasonableness of the acts. As there were no weapons involved in the incident and as the act committed was not in response to a use or threat of force that the accused knew was lawful, paragraphs (d) and (h), respectively, have no application.
1. Nature of Force or Threat - s. 34(2)(a) of the Code
- [194] Regarding the nature of the force or threat, the accused testified that he was very fearful of the deceased and in my view, his testimony regarding his level of fear and his reasons for fearing the deceased remained consistent and was not undermined during his cross-examination. The accused said the deceased had told him about fighting and not backing down from fights.
- [195] The accused knew that the deceased had behaved violently towards his romantic partners and that he was a jealous, tough fighter, especially when he was drinking alcohol. I believed the accused's evidence that he was extremely fearful of the deceased. As well, I also found the accused's testimony about being fearful of the deceased on January 19th to be consistent with the evidence of how other witnesses perceived the deceased at the time.
- [196] Christine George testified about her fear of the deceased on January 19th. I accept her evidence on this matter as truthful. Given that the deceased was in a rage on January 19th, potentially due to jealousy about Christine George and the accused, I find the accused had good reason to fear the deceased as a significant threat at the time of the incident.
- [197] Despite being ejected from the party, the deceased continued acting aggressively. For example, the deceased threw a near-full can of beer almost hitting the accused and others. The deceased also told the accused he would be waiting for him outside the Duplex. I find the deceased said this to make it clear he did not regard his being ejected from the party as the end of the matter.
- [198] The deceased continued his aggressive and confrontational behaviour at Ms. Alphonse's house. When outside of Ms. Alphonse's house, the accused was observed standing at the end of the driveway looking towards the Duplex. There was evidence from Neil Alphonse and Bernadette Alphonse, which I accept, that the deceased said he wanted to go back to the Duplex to "jump" the accused.

- [199] Eliza George testified that she locked the doors to the Duplex to keep the deceased out. She watched the deceased's movements through a window and at one point, she heard him jiggle the locked doors of the Duplex. I find Eliza George was fearful of the deceased because she believed the deceased intended to attack the accused.
2. Whether use of force was imminent and were there other means available to respond - s. 34(2)(b) of the Code
- [200] As to whether the use of force was imminent and whether there were other means available to respond, I find it obvious the force was imminent. Eliza George and the accused both testified to the deceased delivering blows to the accused while he lay on the cot with his eyes closed.
- [201] The Crown submits that there were other means available to the accused. The Crown says the fact that the accused stayed on the cot with his eyes closed demonstrates he failed to avail himself of other means to avoid the deceased.
- [202] Again, Eliza George's evidence was the deceased hit the accused twice, and after the accused had repeated that he did not want to fight, the accused rose from the cot. The accused was in a crouching-type stance as he tried to protect his head with his arms.
- [203] The accused testified about the ways that he tried to avoid the incident with the deceased. He said repeatedly he didn't want to fight but those words had no effect on the deceased. Many witnesses confirmed hearing the accused tell the deceased he did not want to fight, including in the moments before the incident began.
- [204] The accused described his reasons for lying on the cot and keeping his eyes closed when he heard the deceased approaching. The accused hoped the deceased would see he was asleep and leave.
- [205] The Crown is critical of the accused for not, for example, immediately dashing towards the front door the moment he awoke and heard the deceased approaching the living room. In my view, the Crown's criticism ignores the reality of the situation. The accused had barely woken up when he heard the deceased talking with someone at the back door. There was little time for the accused to process what was happening and nicely weigh the pros and cons of avoidance strategies before the deceased stepped into the living room.
- [206] The accused's decision to feign sleep was not an unreasonable strategy. It is mere speculation that had the accused tried running out of the living room, he would have successfully avoided the deceased.
- [207] I find the accused employed several other avoidance strategies when the deceased entered the living room and started hitting him. Despite the deceased standing over him and having received a punch, the accused sat on the cot with his hands open on his knees. When the deceased punched the accused a second time, the accused rose from the cot in a crouched position, covering his head with his arms. I believed the accused's testimony when he said

that at that moment, he considered whether he could get over the coffee table and out of the living room to the front door. I believed the accused when he testified that the coffee table and the deceased blocked that potential escape route.

[208] I believed the accused when he testified that he considered escaping out of a living room window but he reasonably concluded that he might get hurt by breaking the glass. I believed the accused's testimony that he realized he needed to get closer to the entrance of the living room and to the front door because that was his only chance of getting out of there.

[209] As mentioned, I believe the accused's testimony on these matters for the reasons explained. I also find that Eliza George's testimony largely corroborates the accused's testimony about these matters.

3. Person's role in the incident - s. 34(2)(c) of the Code

[210] When I consider the accused's role in the incident, I find the evidence shows the accused repeated many times, including during the incident itself, that he did want to fight the deceased. He stayed inside the Duplex hoping to avoid the deceased. He did not react when the deceased verbally abused him and then came at him during the party. Even after the deceased had struck him, the accused told the deceased he didn't want to fight.

[211] The Crown submits the accused is at fault for failing to talk with the deceased about why he was so angry. I reject the submission that this was a reasonable alternative because the accused was not the only person who avoided engaging verbally with the deceased that evening.

[212] Again, Christine George concluded the deceased's angry and intoxicated state made him "unreachable" that night. She asked for the deceased to be removed from the party and she thought it best to go home and lock her doors. It is mere speculation that the accused could have avoided the incident by talking with the deceased.

[213] I agree with the defence that the accused's role in the incident was largely pro-social, including after the deceased first struck the accused. The accused avoided the deceased's aggression until he concluded there was no alternative but to take steps towards self-defence.

[214] As Martin J. explains in Khill, the court is called upon to evaluate this factor to determine how the accused's role impacts the "equities of the situation" and the extent to which the accused bears responsibility for the confrontation: Khill, at paras. 85-86.

[215] I find the accused bears no responsibility for the confrontation and his many pro-social role has a favourable impact the equities of the situation.

4. Size, age, gender and physical capabilities of the parties - S. 34(2)(e) of the Code

- [216] Regarding the size, age, gender and physical capabilities of the parties, I find they were relatively evenly matched. The accused was slightly taller than the deceased, but not as heavy.
- [217] The Crown submits that the deceased was so intoxicated that he posed little risk to the accused. However, both parties consumed significant quantities of alcohol before and during the party and the accused could not have known the amount of alcohol the deceased consumed after he was removed from the party.
- [218] I have already found that just prior to the incident, the accused had been sleeping and the deceased roused him from his sleep. It is reasonable to infer that those circumstances had some effect on the accused. Overall, I do not find any significant difference in the physical capabilities of the parties.
5. Nature, duration and history of any relationship - s. 34(2)(f) of the Code
- [219] The nature, duration and history of the relationship between the accused and the deceased were not acrimonious. They knew each other and had worked and socialized together in the past. There was no evidence of any prior conflicts between them.
- [220] Some of the things that witnesses testified the deceased said to the accused at the party indicate the deceased resented and felt jealousy towards the accused. One witness recalled the deceased complaining that he was not getting respect from the accused. I find that the deceased was jealous and resentful towards the accused on the evening in question. However, there is no evidence that the accused felt the same way or had any bad intentions towards the deceased.
- [221] Ultimately, I find that there was no history of conflict or poor relations between the parties. Rather, the conflict arose shortly before the incident and the deceased instigated it.
6. Any history of interaction or communication between the parties - S. 34(2)(f.1) of the Code
- [222] As to the history of interaction and communication between the parties, I find that the deceased told the accused about his being a tough fighter who would not back down from a fight. The accused believed the deceased had fought a man, Mr. Johnnie and the accused believed him to be a tough fighter. I accept the accused's evidence in this regard and I found he testified consistently and truthfully about his beliefs and fear of the deceased.
- [223] There was no long-standing threatening communication or interaction between the parties. However, on the night in question, the deceased let the accused know the matter was not over when the deceased was removed from the party.
7. Nature and proportionality of the person's response to the use or threat of force - s. 34(2)(g) of the Code
- [224] The factor related to the nature and proportionality of the accused's response is the most difficult to assess and weigh in this holistic exercise.

[225] The deceased's injuries were very severe. However, the law recognizes some level of tolerance "to the objective measurement of proportionate force" in cases of genuine self-defence: *R. v. Kandola* (1993), 80 C.C.C. (3d) 481, 1993 CanLII 774 (B.C.C.A.) at para. 27.

[226] The court is not to focus on the physical consequences of the path taken as DeWitt-Van Oosten J. notes in *Tremblay*, at para. 225:

The extent of the injuries sustained by a complainant may be considered as evidence of the degree of force used, but their seriousness, standing alone, does not mean that the force must have been unreasonable: *R. v. S.(F.)*, [2017] O.J. No. 244 (Ont. C.J.) at paras. 45-46.

[227] Dr. Orde testified that the injuries of the type sustained by the deceased are sometimes seen in persons who are involved in motor vehicle collisions. However, there is no expert opinion on the degree of force necessary to inflict the wounds sustained by the deceased.

[228] The evidence concerning the nature and proportionality of the accused's response to the deceased's attack comes mainly from the accused and Eliza George. However, the accused's evidence is limited by his lack of memory about the details of the fight with the deceased. I have accepted the accused's evidence that he does not have a complete memory of the events that took place during the incident.

[229] The accused testified about his memory that after he was struck, he remembers the deceased grabbing hold of his t-shirt near the collar. The accused remembers standing up after forming one hand into a fist, but he remembers almost nothing about the actual exchange of blows with the deceased.

[230] The accused remembers they fell over by the recliner sofa; he remembers standing up; he remembers seeing his leg come up, but not where his foot landed; and, he remembers throwing some DVD cases towards the deceased.

[231] The accused's next memory is of sitting back down on the cot. He recalls breathing extremely heavily and consciously trying to slow down his rapid breathing. The accused had difficulty putting into words the state that he was in.

[232] Eliza George's evidence supports the accused's recollection of how the fight began. Eliza George agreed that she saw the accused try to get past the deceased but the deceased looked as if he was trying to keep the accused in the fight. She observed the deceased grab onto the accused's t-shirt, the men exchanged punches, but the accused's punches appeared to have no effect on the deceased. The men fell on the ground behind the recliner sofa.

[233] After the men fell, Eliza George could see the deceased's feet sticking out from behind the sofa. She noticed the deceased's feet only moving when she heard blows. However, she could not see who was making or receiving the blows that she heard.

- [234] Eliza George said it all happened so fast. She thought there were more than three punches. She saw the accused stand up and his knee come up and go down, maybe once or twice. Eliza George testified the accused did not kick long. She heard the accused say a few times that he did not want to fight.
- [235] Eliza George agreed that while she saw the men exchanging blows, she worried that someone would be seriously hurt. She agreed that as the accused was walking back towards the coffee table, he was still talking to the deceased and saying that he did not want to fight.
- [236] When I consider these factors, there are some elements that suggest disproportionality in the accused's response. The fact that the deceased was on the ground with his feet not moving while the accused was able to stand up, and the severity of the injuries to the deceased, are examples of such elements.
- [237] I have assessed the testimony of the accused in accordance with the principles of W.(D.) and I have applied a holistic approach to the self-defence factors as directed by Khill.
- [238] I accept the accused's evidence regarding what he recalls doing and saying around the time of the incident. I believe the accused when he describes the fear he felt for the deceased, especially when he heard him approaching the living room. I accept that the accused believed the deceased, who by all accounts was in a rage, was determined to beat him up and capable of seriously injuring him. However, I acknowledge that the accused has little recollection of the events during the fight.
- [239] On the basis of the accused's evidence, as well as the evidence of Eliza George which I have already described and which I accept, I have a reasonable doubt that the nature and proportionality of the accused's response to the deceased's use of force was unreasonable in the circumstances. Put another way, I am not satisfied that the Crown has met its burden of proving beyond a reasonable doubt that what the accused did was not what a reasonable person would have done in comparable circumstances.
- [240] I have already found that the accused used his fist and his socked foot to punch, kick or stomp, the deceased. He did not do so for very long - as confirmed by Eliza George - and there was no break in the fight such that the accused can be said to have engaged in gratuitous after-the-fact violence. As there was evidence that I have accepted about the accused continuing to speak to the deceased during the fight, I have a reasonable doubt as to whether the deceased was obviously unconscious and incapable of holding onto the accused in some way during this time.
- [241] Dr. Orde could not give an opinion on the number of blows that caused the deceased's injuries or his death, although he said it was at least one and probably a few blows with considerable force. Dr. Orde could not provide an opinion on the exact mechanism of the deceased's death, or the sequence of the injuries, but he concluded it was the accumulation of all of the injuries that caused his death. Based on the evidence of Dr. Orde, I cannot determine the precise sequence in which the injuries were inflicted on the deceased.

- [242] Given the medical evidence and the other evidence, it is not possible to determine the exact moment the fatal injury was inflicted on the deceased. The Crown appears to suggest it was when the accused raised his leg once or twice to kick or stomp on the deceased with his stocking foot, but I am left in a reasonable doubt as to that.
- [243] I find the entire incident happened very quickly. At some points, both of the parties were throwing punches and it was a rapid and dynamic interaction between them. I find that given the speed of the incident, the accused had very little time to think or weigh options. Persons who defend themselves in the kind of circumstances that took place here are not "expected to know exactly how to respond or to deal with the situation or to know how much force to use to achieve [their] purpose": Tremblay at para. 233, citing R. v. Randhawa, at para. 24.
- [244] The Crown relies on R. v. Robinson, 2019 ABQB 889, where the court considered whether the Crown had proven that the accused was guilty of second-degree murder. In Robinson, the accused shot the deceased three times, which the court found to be objectively unreasonable in the circumstances and excessive. The Crown also relies on R. v. S.L., 2016 BCPC 2 where the accused stabbed the complainant four times, which stabbing was found to be excessive. In both of these cases, the accused brought a weapon to the scene in anticipation of a confrontation with the victim. In both of these cases, the court found the accused had time to run away or to take reasonable alternatives to avoid the conflict, but the accused failed to do so. None of those circumstances have been found to exist in the present case.
- [245] The present case is also different from R. v. Parr, 2019 ONCJ 842, where the court found self-defence was unavailable to the accused. In that case, the complainant punched a woman in the face who had been walking with the accused. The complainant then went up to the accused and challenged her to a fight but the accused said she did not want to "go to jail".
- [246] In Parr, the complainant began to kick the accused in the stomach and goad the accused into fighting. Eventually, the accused grabbed the complainant's foot and flipped her onto her back. The parties agreed that both of the complainant's wrists were broken in that fall. The accused then kneeled on the complainant's chest. The complainant was heard asking the accused to get off of her. However, rather than safely retreat at that point, the accused began repeatedly punching the complainant for 45 to 60 seconds causing serious injuries.
- [247] The court in Parr, at para. 29, found the complainant was subdued when the accused was kneeling on her chest; at that point, the complainant was "unable to defend herself and had given up the fight". Despite bystanders and the complainant yelling at the accused to stop punching the complainant, the accused did not stop. The court found the accused's state of mind at that stage was "rage" and her response was clearly disproportionate: Parr, at paras. 29-30.

[248] In the present case, for the reasons I have explained, I have concluded that the evidence concerning when, and whether, the deceased was subdued and no longer a threat to the accused is significantly different from Parr, Robinson and S.L. I find the present circumstances are factually distinguishable from the cases cited by the Crown.

V. Disposition

[249] For the reasons provided, and after applying the principles of W.(D.) and the holistic approach described in Khill, I find the Crown has not proved that one of the three criteria provided in s. 34(1) of the Code is not available to the accused. The accused is therefore entitled to be acquitted on the offence charged against him.

[250] Mr. Alphonse, I find you not guilty on count 1 the indictment.

"E. McDonald J."

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