



SUPREME COURT OF CANADA

CITATION: R. v. Hodgson, 2024
SCC 25

**APPEAL HEARD AND JUDGMENT
RENDERED:** February 15, 2024
REASONS FOR JUDGMENT: July
12, 2024
DOCKET: 40498

BETWEEN:

Daniel Hodgson
Appellant

and

His Majesty The King
Respondent

- and -

Attorney General of Ontario and Criminal Trial Lawyers' Association
Intervenors

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,
O'Bonsawin and Moreau JJ.

**JOINT REASONS
FOR JUDGMENT:** Martin and Moreau JJ. (Wagner C.J. and Karakatsanis, Côté,
Kasirer, Jamal and O'Bonsawin JJ. concurring)
(paras. 1 to 83)

CONCURRING Rowe J.

REASONS:

(paras. 84 to 86)

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Daniel Hodgson

Appellant

v.

His Majesty The King

Respondent

and

**Attorney General of Ontario and
Criminal Trial Lawyers' Association**

Interveners

Indexed as: R. v. Hodgson

2024 SCC 25

File No.: 40498.

Hearing and judgment: February 15, 2024.

Reasons delivered: July 12, 2024.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,
O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NUNAVUT

*Criminal law — Appeals — Acquittal — Right of Crown to appeal against
judgment or verdict of acquittal — Accused acquitted of second degree murder and*

lesser included offence of manslaughter at trial — Crown appealing acquittal — Court of Appeal overturning acquittal and ordering new trial — Whether trial judge committed errors of law giving rise to right of Crown to appeal acquittal — Criminal Code, R.S.C. 1985, c. 46, s. 676(1)(a).

Criminal law — Murder — Elements of offence — Mens rea — Victim dying after being put in chokehold by accused — Trial judge acquitting accused of second degree murder on basis that Crown did not establish mens rea — Crown appealing acquittal — Whether trial judge was required to accept that chokehold is inherently dangerous act when assessing mens rea for murder.

Criminal law — Defences — Self-defence — Victim dying after being put in chokehold by accused — Accused claiming self-defence — Trial judge finding accused not guilty of manslaughter on basis that Crown failed to establish that chokehold was not reasonable in circumstances — Whether trial judge erred in approach to self-defence — Criminal Code, R.S.C. 1985, c. 46, s. 34(2).

H attended a house party and was asked to assist with removing another guest who refused to leave despite repeated requests to do so. A physical altercation ensued during which H used a chokehold to restrain the guest, who lost consciousness and died. The trial judge found that it was proven beyond a reasonable doubt that H caused the guest's death by placing him in a chokehold. However, based on her assessment of the evidence, she acquitted H of second degree murder because the Crown failed to establish the requisite subjective *mens rea*. She also found H not guilty

of the lesser included offence of manslaughter, finding that his defence of self-defence under s. 34 of the *Criminal Code* had an air of reality and that the Crown had failed to establish that the chokehold was not reasonable in all of the circumstances. The Court of Appeal allowed the Crown's appeal of the acquittal and directed that a new trial be held on the basis that the trial judge erred in law in her analysis of the *mens rea* for murder and the application of self-defence to manslaughter.

Held: The appeal should be allowed and the acquittal restored.

Per Wagner C.J. and Karakatsanis, Côté, **Martin**, Kasirer, Jamal, O'Bonsawin and **Moreau JJ.:** The Crown has a limited right of appeal on questions of law alone when it seeks to overturn an acquittal. In the instant case, the Court of Appeal did not articulate the precise errors of law at the root of its intervention and it is not a case in which the appellate court could reach a purely legal conclusion drawn from the evidence without calling into question the trial judge's evaluation of the evidence. Furthermore, even if the alleged errors were ones of law, the trial judge did not commit any such errors. While an inference that a chokehold is an inherently dangerous action can be available in some cases, it is not an error of law for a trial judge to reach a different conclusion about a particular accused's *mens rea* based on the evidence, and there was no error of law in the trial judge's assessment of the evidence on the *mens rea*. As for self-defence, the trial judge followed the framework set out in the *Criminal Code*, specifically addressed each of its three elements, correctly stated the applicable

statutory principles, applied them to the facts as found, and expressed clear conclusions on each element.

The Crown's ability to appeal an acquittal is circumscribed by s. 676(1)(a) of the *Criminal Code*. This provision provides that a court's jurisdiction to hear an appeal of an acquittal depends upon there being an error involving a question of law alone. The restricted nature of the Crown's ability to appeal from an acquittal has deep roots in the principles that underlie the Canadian criminal justice system. The most important justification behind the limited nature of the Crown's right of appeal lies in the principle against double jeopardy. Expanding the Crown's right of appeal beyond its proper scope would have a profound impact on the interests of accused persons, especially due to the considerable anxiety created by the prospect of a new trial after a person has been acquitted.

The scope of the Crown's right of appeal of an acquittal depends on what qualifies as a legal question. An appealable error must be traced to a question of law, rather than a question about how to weigh evidence and assess whether it meets the standard of proof. A trial judge's alleged shortcomings in assessing the evidence may constitute an error of law giving rise to a Crown appeal of an acquittal where the trial judge made a finding of fact for which there is no evidence; there is disagreement with respect to the legal effect of findings of fact or of undisputed facts; an assessment of the evidence is based on a wrong legal principle; and there is a failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence. However, even if

the Crown is able to point to an error of law, acquittals are not overturned lightly. The Crown must also convince the appellate court, to a reasonable degree of certainty, that the verdict of acquittal would not necessarily have been the same had the error not occurred.

Given the circumscribed ambit of the Crown's right of appeal from acquittals and the pressing policy considerations that underpin it, appellate courts should expressly identify the offending errors of law. A failure to precisely identify the error of law risks expanding Crown appeals beyond the scope of s. 676. This risk is especially high when the error pertains to an alleged shortcoming in the trial judge's handling of the evidence. It is not enough to simply assert or state that a trial judge has committed a legal error with respect to their assessment of the evidence. Appellate courts should articulate with precision how the trial judge erred in law.

In the instant case, the Court of Appeal did not adequately explain why the error it claimed to have identified was one of law alone for the purposes of s. 676(1)(a). The court did not find fault with how the trial judge stated or interpreted the legal standard for the mental element for murder. Rather, it alleged that the error of law was based on how the trial judge assessed the evidence. The Court of Appeal did not state precisely what error of law it thought was committed in relation to the *mens rea* for murder. The absence of a clearly articulated error of law makes it difficult to conduct effective appellate review and makes it unclear as to whether the alleged error is one of law. In this case, there is no error of law.

There is no legal rule as to the general dangerousness of chokeholds. Each case must be assessed on its own facts. The dangerousness of a chokehold can vary based on factors such as its nature, force and length. The proposition that a chokehold is always an inherently dangerous act runs the risk of inappropriately injecting an objective element into the *mens rea* analysis for murder. The subjective foresight required for murder is focused solely on what the accused intended, and the analysis cannot consider what the accused ought to have known about the inherent dangerousness of a chokehold. Thus, when considering the *mens rea* for murder, a trial judge should not be and cannot be required to assess an accused's intention against the fact that someone else in their position should have or would have been aware of the danger the chokehold posed. Accordingly, for an accused to be convicted of murder, it is not sufficient for the Crown to prove that a particular accused knew that a chokehold in the circumstances was dangerous or that a reasonable person in the accused's position would have known that the chokehold would cause bodily harm that was likely to cause death. Neither of these findings would meet the requisite level of subjective intent required for a murder conviction, namely that the accused intended to cause death or that the accused intended to cause bodily harm that they knew was likely to cause death but was reckless as to whether or not death ensued.

In the instant case, the trial judge accepted that, at the time, H did not think the chokehold was inherently dangerous and that he also did not have time, in the midst of the altercation, to think about its dangerousness. The trial judge reviewed all the evidence in detail and ultimately concluded that she had a reasonable doubt as to

whether H intended to kill the deceased or knew that the chokehold was likely to do so. The trial judge's conclusion that there was no intent to murder was firmly grounded in the evidence pertaining to H's subjective state of mind. The Court of Appeal disagreed with the trial judge's assessment that the chokehold used in these circumstances was intended to be a regular calm down method. Such a disagreement as to the characterization of a chokehold in these particular circumstances was not an error of law that justified overturning an acquittal.

An objective approach is applied to the aspects of the self-defence analysis that measure an accused's actions against those of a reasonable person in similar circumstances. In the instant case, the trial judge's reasons make clear that she understood she was to assess whether H's actions were reasonable in the circumstances and she repeatedly and expressly referred to the appropriate objective standard. The trial judge did not inappropriately focus on what H himself thought at the time of the impugned conduct. The Court of Appeal's failure to clearly identify which element of the self-defence inquiry was engaged was problematic as each has its own considerations and methods of evaluation. There were no grounds for concluding that the trial judge erred in law in her analysis or in her application of the law on self-defence.

Per Rowe J.: There is agreement with the majority that self-defence applies and that the acquittal should be restored. However, separate reasons to clarify the Crown's right to appeal an acquittal are necessary. While the majority emphasizes that

the Crown’s right to appeal an acquittal is narrow and limited, there is an exception that warrants note. As “myths” relating to sexual assault have been characterized as errors of law, where the Crown characterizes an aspect of a trial judge’s reasons as incorporating a “myth”, it would meet the requirement that the appeal be on a question of law alone.

Cases Cited

By Martin and Moreau JJ.

Applied: *R. v. Khill*, 2021 SCC 37; **considered:** *R. v. Lemmon*, 2012 ABCA 103, 65 Alta. L.R. (5th) 177; *R. v. Cooper*, [1993] 1 S.C.R. 146; **referred to:** *LSJPA – 151*, 2015 QCCA 35; *R. v. Budai*, 2001 BCCA 349, 153 B.C.A.C. 98; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *Cullen v. The King*, [1949] S.C.R. 658; *Wexler v. The King*, [1939] S.C.R. 350; *Rose v. The Queen*, [1959] S.C.R. 441; *R. v. Podetz* (1981), 26 A.R. 307; *R. v. W.F.M.* (1995), 169 A.R. 222; *R. v. Orlin* (1945), 85 C.C.C. 150; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Rudge*, 2011 ONCA 791, 108 O.R. (3d) 161; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Evans*, [1993] 2 S.C.R. 629; *McElrath v. Georgia*, 601 U.S. 87 (2024); *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Potvin*, [1993] 2 S.C.R. 880; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021; *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405; *R. v. Cowan*, 2021 SCC 45; *R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *R. v.*

Odeon Morton Theatres Ltd., [1974] 3 W.W.R. 304; *R. v. Chatwin Motors Ltd.*, [1980] 2 S.C.R. 64; *Schuldt v. The Queen*, [1985] 2 S.C.R. 592; *R. v. B. (G.)*, [1990] 2 S.C.R. 57; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. Walle*, 2012 SCC 41, [2012] 2 S.C.R. 438; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Morin*, [1992] 3 S.C.R. 286; *R. v. Seymour*, [1996] 2 S.C.R. 252; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801; *R. v. Rasberry*, 2017 ABCA 135, 55 Alta. L.R. (6th) 134; *R. v. Curran*, 2019 NBCA 27, 375 C.C.C. (3d) 551; *R. v. Berry*, 2017 ONCA 17, 345 C.C.C. (3d) 32; *R. v. Grant*, 2016 ONCA 639, 351 O.A.C. 345; *R. v. Richter*, 2014 BCCA 244, 357 B.C.A.C. 305; *R. v. Constantine*, 2015 ONCA 330, 335 O.A.C. 35; *R. v. A.A.*, 2019 BCCA 389; *R. v. Androkovich*, 2014 ABCA 418.

By Rowe J.

Referred to: *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *R. v. Kruk*, 2024 SCC 7.

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APPEAL from a judgment of the Nunavut Court of Appeal (Schutz, Campbell and Pentelechuk JJ.A.), 2022 NUCA 9, [2022] Nu.J. No. 33 (Lexis), 2022

CarswellNun 35 (WL), setting aside the acquittal of the accused for second degree murder and ordering a new trial. Appeal allowed.

Michael Lacy and Marcela Ahumada, for the appellant.

Julie Laborde and Brendan Green, for the respondent.

Manasvin Goswami, for the intervener the Attorney General of Ontario.

Stacey M. Purser and Daniel J. Song, K.C., for the intervener the Criminal Trial Lawyers' Association.

The reasons for judgment of Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. were delivered by

MARTIN AND MOREAU JJ. —

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I. Introduction

[1] The appellant, Daniel Hodgson, was acquitted of second degree murder following a trial by judge alone. He attended a house party, and was asked to assist with removing Bradley Winsor, another guest, who refused to leave despite repeated requests to do so. A physical altercation ensued during which Mr. Hodgson used a chokehold to restrain Mr. Winsor, who lost consciousness. Tragically, and despite resuscitation attempts, Mr. Winsor died. The trial judge found that Mr. Hodgson lacked the *mens rea* for murder and that because he used the chokehold as a means of self-defence to protect himself and others attending the party, he had a defence to the lesser included offence of manslaughter.

[2] The Crown appealed, arguing that this was one of the exceptional cases in which the trial judge had committed an error of law that would allow an appellate court to review and reverse an acquittal. The Nunavut Court of Appeal agreed and directed that a new trial be held on the basis that the trial judge erred in law in her analysis of the *mens rea* for murder and the application of self-defence to manslaughter.

[3] On further appeal to this Court, after the hearing, we restored Mr. Hodgson's verdict of acquittal and stated that written reasons would follow. These are those reasons.

[4] First, we explain the foundations of the Crown's limited right of appeal on questions of law alone when it seeks to overturn an acquittal. Second, we address whether the trial judge was required as a matter of law to accept that a chokehold is an inherently dangerous action when assessing the *mens rea* for murder. We conclude that while this inference is available in some cases, it is not an error of law for a trial judge to reach a different conclusion about a particular accused's *mens rea* based on the evidence. Third, we explain why there is no legal error in the trial judge's approach to self-defence. While she did not have the benefit of this Court's reasoning in *R. v. Khill*, 2021 SCC 37, her analysis aligns with its principles. She correctly understood what was required under each of the statutory elements in s. 34 of the *Criminal Code*, R.S.C. 1985, c. C-46. We are therefore of the view that the trial judge made no errors of law in her reasons.

II. Facts

[5] Mr. Hodgson and Mr. Winsor (the deceased) both attended a house party in Iqaluit on the evening of May 18, 2017. Earlier in the night, Mr. Hodgson and Mantra Ford-Perkins were out celebrating a friend's birthday. They ran into Crystal Mullin and two others (Margaret Sikkinerik and Samantha Mullin). Crystal Mullin invited all of them to her home. Shawn Burke and his friend, Mr. Winsor, were out on their own and were also invited to Crystal Mullin's home. All of the house party attendees were socializing and drinking together. Mr. Winsor became increasingly intoxicated throughout the night and had, at some point, also consumed cocaine. At various points throughout the night, Mr. Winsor had behaved inappropriately towards Crystal Mullin. For example, when Crystal Mullin had been heading towards her bedroom, Mr. Winsor was aggressive and tried to get into her room because he wanted to be physically intimate with her.

[6] As a result of Mr. Winsor's intoxication, Mr. Burke began to repeatedly ask Mr. Winsor to turn over his truck keys so that Mr. Winsor would not drive while intoxicated. Mr. Burke also repeatedly asked Mr. Winsor to leave Crystal Mullin's home. Mr. Winsor refused to do either. Eventually, a physical altercation broke out between Mr. Burke and Mr. Winsor during which Mr. Winsor pushed Mr. Burke against a wall.

[7] During this period, Mr. Hodgson was sleeping in a nearby spare bedroom. Ms. Ford-Perkins woke Mr. Hodgson to ask for his help in dealing with the situation between Mr. Burke and Mr. Winsor. At the time, Mr. Hodgson was 38 years old, 6 feet

tall, weighed 210 pounds and was quite strong. Mr. Winsor was 23 years old, 5 feet 8 inches tall and weighed 304 pounds. Mr. Hodgson and Mr. Winsor had not had any prior relationship, interaction or communication before that night but had spoken to each other during the house party. There were no indications of any “bad blood” between them.

[8] Mr. Hodgson left the bedroom and intervened in the altercation between Mr. Burke and Mr. Winsor after he believed that he saw Mr. Winsor make a fist. At the time, Mr. Hodgson’s dominant hand was injured. Mr. Hodgson unsuccessfully tried to pull Mr. Winsor to the ground by pulling on his shoulders from behind. Mr. Winsor responded by elbowing Mr. Hodgson in the head. Mr. Hodgson then put Mr. Winsor in a chokehold. As Mr. Winsor and Mr. Hodgson struggled, the two fell to the floor.

[9] At this point, Crystal Mullin, Ms. Sikkinerck and Samantha Mullin had entered the living room, where the altercation was taking place. They, along with Mr. Burke, shouted at Mr. Hodgson to “stop”. Mr. Burke noticed that Mr. Winsor’s face was turning blue and that Mr. Hodgson was not listening to their calls for him to stop. Mr. Burke then pulled Mr. Hodgson and Mr. Winsor apart. The chokehold incident was over quite quickly, and the eyewitnesses were all surprised that Mr. Winsor did not recover. Samantha Mullin called an ambulance. Ms. Sikkinerck and Mr. Burke performed CPR on Mr. Winsor, but he died from his injuries.

III. Judgments Below

A. *Nunavut Court of Justice (Charlesworth J.)*

[10] The evidence before the court included an agreed statement of facts, the testimony of Mr. Hodgson and the individuals at the party, and expert evidence from the Crown and defence opining on the cause of death. It was not disputed that a significant amount of pressure fractured Mr. Winsor's hyoid bone, bruised the muscles in his neck, and caused internal hemorrhaging. Neck compression can lead to unconsciousness in as little as 10 seconds, but it is not uncommon for someone to become unconscious and survive without permanent injury. While the pathologists saw the neck compression as the primary factor in Mr. Winsor's death, they disagreed as to the role other factors may have played in causing it. Dr. Chiasson, the defence pathologist, viewed Mr. Winsor's enlarged heart and the consumption of alcohol and cocaine as contributing factors to his death. The Crown expert, Dr. Milroy, disagreed, although he acknowledged that these factors could make Mr. Winsor less likely to survive the chokehold.

[11] The trial judge conducted a thorough review of the evidence of Mr. Hodgson and each witness and made explicit findings of facts, including conclusions on credibility and reliability.

[12] The trial judge found that it was proven beyond a reasonable doubt that Mr. Hodgson caused Mr. Winsor's death by placing Mr. Winsor in a chokehold. However, based on the trial judge's assessment of the evidence, she acquitted Mr. Hodgson of second degree murder because the Crown failed to establish the

requisite subjective *mens rea* attaching to this serious crime, that is, proof beyond a reasonable doubt that “Mr. Hodgson intended to kill or intended to cause bodily harm that he knew was likely to kill” (trial reasons, at para. 93, reproduced in A.R., part I, at p. 24).

[13] The trial judge determined that all requirements for manslaughter, including the mental element, were present as Mr. Hodgson caused Mr. Winsor’s death by the unlawful act of intentionally applying force to Mr. Winsor without his consent. The trial judge next considered Mr. Hodgson’s claim to have acted in self-defence and defence of others under s. 34 of the *Criminal Code*. She concluded that the defence had an air of reality and then went on to consider each of the elements of s. 34 of the *Criminal Code*. She found, with respect to s. 34(1)(a), that Mr. Hodgson believed on reasonable grounds that Mr. Winsor was making a threat of force against the others. In relation to s. 34(1)(b), Mr. Hodgson used the chokehold for the purpose of defending or protecting himself and the others from the threat posed by Mr. Winsor. As to s. 34(1)(c), the trial judge considered each of the factors set out in s. 34(2), related each factor to the facts as she found them, and concluded that the Crown had failed to establish that the chokehold was not reasonable in all of the circumstances. While indicating that proportionality was the factor causing the most concern, the trial judge found that Dr. Chiasson’s evidence raised the possibility that the chokehold may have only been fatal because of factors specific to Mr. Winsor, which were not known to Mr. Hodgson. Given her doubt as to whether Mr. Hodgson’s use of a chokehold was

disproportionate in the circumstances, the trial judge found Mr. Hodgson not guilty of manslaughter.

B. *Nunavut Court of Appeal, 2022 NUCA 9 (Schutz, Campbell and Pentelechuk JJ.A.)*

[14] In a brief decision, the Nunavut Court of Appeal allowed the Crown's appeal from the acquittal and ordered a new trial.

[15] The court was of the view that the trial judge erred in failing to address the Crown's argument based on *R. v. Lemmon*, 2012 ABCA 103, 65 Alta. L.R. (5th) 177, that a chokehold is an inherently dangerous act. The critical portion of the Court of Appeal's reasons in respect of the perceived errors concerning the *mens rea* for murder is set out in para. 5 (CanLII):

... the trial judge did not address [the issue of inherent dangerousness] in her reasons for acquittal, either in respect of the intent for murder or manslaughter, but, rather, appeared to accept that a chokehold was a "regular 'calm down' method" or a "known calm down move". While [Mr. Hodgson] admitted he was trying to stop Mr Winsor from struggling, including possibly rendering him unconscious, the trial judge did not assess this evidence with respect to what [Mr. Hodgson] believed or intended considering the dangerousness of squeezing Mr Winsor's neck to the point of unconsciousness, or the possible recklessness of his actions. But for this error, the verdict on second degree murder may well have been different. [Emphasis added.]

[16] With respect to self-defence, the Nunavut Court of Appeal concluded that the trial judge erred in law by failing to assess Mr. Hodgson's actions in relation to

what a reasonable person would have done in the circumstances. Instead of doing so, the trial judge assessed Mr. Hodgson's response through a purely subjective lens.

[17] The court concluded that the Crown had met its burden of demonstrating that the errors of law had a material bearing on the acquittal.

IV. Issues

[18] This appeal raises three issues:

1. What does it mean that a Crown appeal of an acquittal under s. 676(1)(a) of the *Criminal Code* is limited to a ground of appeal that involves a question of law alone?
2. Did the trial judge err in law regarding the *mens rea* for second degree murder?
3. Did the trial judge err in law in relation to self-defence?

A. *What Does It Mean That a Crown Appeal of an Acquittal Under Section 676(1)(a) of the Criminal Code Is Limited to a Ground of Appeal That Involves a Question of Law Alone?*

[19] In Canadian law, the Crown's ability to appeal an acquittal is circumscribed by s. 676(1)(a) of the *Criminal Code*. It reads:

676 (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

A court's jurisdiction to hear and address an appeal of an acquittal thus depends upon there being an error involving "a question of law alone".

[20] Mr. Hodgson concedes that the error identified by the Court of Appeal in relation to self-defence, if made, would qualify as an error of law under s. 676(1)(a). However, with respect to the *mens rea* for murder, Mr. Hodgson submits there was no question or error of law that would allow the Court of Appeal to intervene.

[21] To address this argument, we look to the principles and historical foundations informing the narrow scope of the Crown's right to appeal from an acquittal; canvass the meaning of the term "question of law alone"; give guidance on the level of specificity that Crown counsel and appellate courts must provide when invoking a question of law alone to overturn an acquittal; and explain why the Court of Appeal failed to identify an error of law with respect to the intent for murder.

(1) Historical Foundations of the Crown's Limited Right of Appeal

[22] The restricted nature of the Crown's ability to appeal from an acquittal has deep roots in the principles that underlie our criminal justice system and was

[TRANSLATION] “[d]eveloped in a particular historical context characterized by the reluctance of Anglo-Canadian law to allow for [it]” (*LSJPA – 151*, 2015 QCCA 35, at para. 57 (CanLII), per Kasirer J.A., as he then was). Indeed, “[t]here is a historical aversion to Crown appeals that grounds the differing limitations placed on appellate access as between the Crown and a convicted person” (*R. v. Budai*, 2001 BCCA 349, 153 B.C.A.C. 98, at para. 123, per Ryan J.A.).

[23] Historically, the Crown’s ability to appeal from an acquittal in Canada has been limited to questions of law alone. Although the provisions that set out the Crown’s right of appeal have evolved over the years, this constraint has remained consistent. For example, when Canada’s *Criminal Code* was enacted in 1892, “an appeal by the Crown against an acquittal was possible only when a question of law had been reserved for the opinion of the Court of Appeal” or through a leave process which allowed the case to proceed as though the question had been reserved (*Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 662; see *The Criminal Code, 1892*, S.C. 1892, c. 29, ss. 743 and 744; see also B. L. Berger, “Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals” (2006), 10 *Can. Crim. L.R.* 1, at p. 36). There were further amendments in 1900¹ and 1909², and the Crown’s right to appeal an acquittal on a question of law was repealed altogether in 1923 (S.C. 1923, c. 41, s. 9). It is not clear whether this removal was intentional, but the right was later “restored” in 1930 (*Morgentaler*, at pp. 662-63; see the explanatory note

¹ In 1900, the requirement for a party to seek leave of the Attorney General was removed (S.C. 1900, c. 46, s. 3).

² In 1909, the Crown effectively obtained “a right of appeal from an acquittal on any question of law by leave of the trial judge or of the Court of Appeal” (*Morgentaler*, at p. 662; S.C. 1909, c. 9, s. 2).

accompanying s. 38 of House of Commons Bill 138, *An Act to amend the Criminal Code*, 4th Sess., 16th Parl., 1930 (first reading, May 14, 1930)). The amended text of the relevant provision, s. 1013(4) of the *Criminal Code*, R.S.C. 1927, c. 36, granted the Attorney General the right to appeal an acquittal on an indictable offence “on any ground of appeal which involves a question of law alone” (S.C. 1930, c. 11, s. 28). Unlike previous iterations of the Crown’s ability to appeal from an acquittal, this amendment did not include a requirement of leave by the trial judge or the Court of Appeal (see the discussion of the 1900 and 1909 amendments in *Morgentaler*, at p. 662).

[24] This latter amendment — which also reflects the present law — has been described as an “extraordinary remedy” (Department of Justice and Public Safety, *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador*, 2022 (online), at p. 23-2). The Crown’s ability to appeal an acquittal has been viewed as an “innovation in the procedure of criminal law” that was a “striking departure from fundamental principles of security for the individual” (*Cullen v. The King*, [1949] S.C.R. 658, at pp. 665-66, per Rand J., dissenting), having “created an exception to the general rule that no person should be tried twice on the same charge” (*Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador*, at p. 23-2). Commentators have referred to it as “drastic”, “exceptional”, “special”, “unusual” and “limited” in an “extrem[e]” or “narrow” manner (see, e.g., *Wexler v. The King*, [1939] S.C.R. 350, at p. 358; *Rose v. The Queen*, [1959] S.C.R. 441, at p. 442; *R. v. Podetz* (1981), 26 A.R. 307 (C.A.), at

para. 10; *R. v. W.F.M.* (1995), 169 A.R. 222 (C.A.), at para. 5; M. L. Friedland, *Double Jeopardy* (1969), at p. 295; *R. v. Orlin* (1945), 85 C.C.C. 150 (Que. K.B. (App. Side)), at p. 153; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 33; *R. v. Rudge*, 2011 ONCA 791, 108 O.R. (3d) 161, at para. 35).

[25] Many other countries also restrict Crown appeals from acquittals. Indeed, the Crown’s right of appeal from an acquittal is broader in Canada than in most other common law jurisdictions (see *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 46, and *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 13, both citing *R. v. Evans*, [1993] 2 S.C.R. 629, at pp. 645-46). The United Kingdom imposes significant limitations on the scope of Crown appeals (see *Criminal Justice Act 2003* (U.K.), 2003, c. 44, ss. 57(4), 63, 67, 76(3), 76(4), 77, 78 and 79; H. Stewart, “Procedural Rights and Factual Accuracy” (2020), 26 *Legal Theory* 156, at pp. 170-71), and many foreign jurisdictions do not allow appeals from acquittals at all (see S. Coughlan, *Criminal Procedure* (4th ed. 2020), at p. 587).

(2) Rationales for the Crown’s Limited Right of Appeal

[26] The absence of a “principle of parity of appellate access in the criminal process” as between the Crown and the accused is explained on the basis of the different policy considerations underlying the Crown’s right of appeal against acquittals (*Biniaris*, at para. 33).

[27] Avoiding wrongful convictions is one rationale that explains why the scope of the accused's right of appeal is wider than the Crown's. As explained in *Biniaris*, "[e]rror-free trials are desirable as such, but even more so as a safeguard against wrongful convictions" (para. 26).

[28] In the case of jury trials, appellate courts' respect for a jury acquittal is another reason for limiting the Crown's right of appeal to questions of law alone (T. Desjardins, *L'appel en droit criminel et pénal* (2nd ed. 2012), at para. 72).

[29] The most important justification behind the limited nature of the Crown's right of appeal, however, lies in the principle against double jeopardy. In the United States, it is for this reason that the Supreme Court has concluded that an appeal against an acquittal would violate the Fifth Amendment (see, e.g., *McElrath v. Georgia*, 601 U.S. 87 (2024), at p. 94). The protection against double jeopardy is also part of the framework that governs the Crown's ability to obtain a retrial after an acquittal in the United Kingdom (*Criminal Justice Act 2003*, s. 76(4)(c)).

[30] This rationale is also crucial in Canadian law. Our Court has held that the Crown's ability to appeal an acquittal does not violate s. 11(h) of the *Canadian Charter of Rights and Freedoms* (*R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 155-56, per McIntyre J., dissenting, but not on this point). Nevertheless, as Kasirer J.A. noted in *LSJPA – 151*, the Crown's [TRANSLATION] "limited right of appeal seeks to prevent an appeal on the facts to protect acquitted persons from the double jeopardy associated with a new trial" (para. 57 (footnote omitted)). As explained in *Cullen*, "[a]t the

foundation of criminal law lies the cardinal principle that no [individual] shall be placed in jeopardy twice for the same matter It is the supreme invasion of the rights of an individual to subject [that individual] by the physical power of the community to a test which may mean the loss of [their] liberty or [their] life; and there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy” (p. 668).³

[31] Thus, expanding the Crown’s right of appeal beyond its proper scope would have a profound impact on the interests of accused persons, especially due to the considerable anxiety created by the prospect of a new trial after a person has been acquitted (see *Budai*, at para. 125, quoting *R. v. Potvin*, [1993] 2 S.C.R. 880, at p. 890, per McLachlin J., concurring in the result). Allowing the Crown’s restricted right of appeal to expand beyond its scope would undermine the provision’s protection against wrongful convictions and double jeopardy.

(3) Defining the Scope of the Crown’s Limited Right of Appeal

[32] The history and rationale of s. 676(1)(a) is important for understanding the purpose and scope of the Crown’s limited right of appeal and helps answer “the vexed question of what constitutes, for jurisdictional purposes, an error of law alone” (see *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 24). In *Biniaris*, this Court held

³ While Rand J. was dissenting in *Cullen*, commentators have subsequently invoked this passage to explain the parameters of the Crown’s limited right of appeal (see, e.g., *LSJPA – 151*, at para. 57; *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador*, at p. 23-2; Friedland, at p. 3).

that a “question of law alone” is “used in contrast to the right of the accused to appeal both on questions of law, questions of fact, and questions of mixed fact and law” (para. 30). The Court declined the invitation to distinguish between a “question of law alone” and a “question of law”, holding that there is “nothing different” between them and that both terms must receive the same interpretation (para. 31).

[33] Consequently, the scope of the Crown’s right of appeal of an acquittal depends on what qualifies as a legal question. This assessment will generally turn on the character of the alleged error, rather than on its severity (*R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 17). A legal question generally flows from an accepted or uncontested factual situation; the appellate court can then reach a purely legal conclusion drawn from the evidence without calling into question the trial judge’s evaluation of the evidence (M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2023* (30th ed. 2023), at para. 51.55). Clear examples of legal questions which do not depend on the facts of a given case include, for instance, statutory interpretation, the scope of a constitutional right, and the definition of the essential elements of an offence (para. 51.58).

[34] In other situations, drawing the line between questions of law and questions of fact or of mixed fact and law can become more challenging. This is often the case when the alleged error concerns a trial judge’s assessment of the evidence. As this Court explained in *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405, “[a]n appealable error must be traced to a question of law, rather than a question about how to weigh

evidence and assess whether it meets the standard of proof” (para. 10 (citations omitted)). There are, however, situations in which a “trial judge’s alleged shortcomings in assessing the evidence constitute an error of law giving rise to a Crown appeal of an acquittal” (*J.M.H.*, at para. 24).

[35] In *J.M.H.*, the Court identified four non-exhaustive such situations:

1. Making a finding of fact for which there is no evidence — however, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule;
2. The legal effect of findings of fact or of undisputed facts;
3. An assessment of the evidence based on a wrong legal principle;
4. A failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence.

[36] Even if the Crown is able to point to an error of law, acquittals are not overturned lightly (see *R. v. Cowan*, 2021 SCC 45, at para. 46). The Crown must also convince the appellate court, to a reasonable degree of certainty, that the verdict of acquittal would not necessarily have been the same had the error not occurred (*Graveline*, at para. 15; *R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595, at para. 2). While the Crown need not persuade the appellate court that the verdict would

necessarily have been different, its burden in this respect is a very heavy one (see *Graveline*, at paras. 14-15 and 19, quoting *R. v. Morin*, [1988] 2 S.C.R. 345, at p. 374; see also *Sutton*, at para. 2).

(4) Failure to Articulate an Error of Law for the *Mens Rea* for Murder

[37] The Court of Appeal did not find fault with how the trial judge stated or interpreted the legal standard for the mental element for murder. Rather, the court alleged that the error of law was based on how the trial judge assessed the evidence regarding the characterization of a chokehold and the weight assigned to its gravity. Specifically, she failed to apply *Lemmon* and “did not assess this evidence with respect to what [Mr. Hodgson] believed or intended considering the dangerousness of squeezing Mr Winsor’s neck to the point of unconsciousness, or the possible recklessness of his actions” (para. 5).

[38] With respect, there are two main problems with this approach. First, we are not convinced that the Court of Appeal articulated an error of law with respect to the trial judge’s handling of the mental element for murder. Second, the Court of Appeal did not adequately *explain* why the error it claimed to have identified was one of law alone for the purposes of s. 676(1)(a). It acknowledged that Crown appeals are limited to errors of law that have a material bearing on the acquittal and then asserted at para. 9: “Having reviewed the evidence and the reasons in this matter, we find [the Crown] has met that burden in this case and appellate intervention is warranted”. However, the Court of Appeal did not state precisely what error of law it thought was committed in

relation to the *mens rea* for murder. The absence of a clearly articulated error of law makes it difficult to conduct effective appellate review (see *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869).

[39] Given the circumscribed ambit of the Crown's right of appeal from acquittals and the pressing policy considerations that underpin it, appellate courts should expressly identify the offending errors of law. Courts and counsel must remain vigilant in this regard, because it is sometimes difficult to distinguish questions of law alone from questions of mixed fact and law or from questions of fact. Courts especially must remain vigilant because "[i]t is not usually difficult for an experienced Crown counsel to frame an appeal in language suggesting that a question of law is there involved" when in fact it is not (*R. v. Odeon Morton Theatres Ltd.*, [1974] 3 W.W.R. 304 (Man. C.A.), at pp. 304-5; see also *R. v. Chatwin Motors Ltd.*, [1980] 2 S.C.R. 64, at p. 76, quoting this passage with approval).

[40] A failure to precisely identify the error of law risks expanding Crown appeals beyond the scope of s. 676. This risk is especially high when the error pertains to an alleged shortcoming in the trial judge's handling of the evidence. Such expansion would undermine important principles, including that against double jeopardy. Thus, it is not enough to simply assert or state that a trial judge has committed a legal error with respect to their assessment of the evidence. Appellate courts should articulate with precision how the trial judge erred in law.

[41] Beyond invoking two decisions — *Lemmon* and *R. v. Cooper*, [1993] 1 S.C.R. 146 — the Court of Appeal did not explain why the error it claims to have identified with respect to the intent for murder is one of law. On this point, it is worth noting that “[t]he determination of the intent or foresight of a person at the time of his participation in a homicide is often a difficult question of fact” (*Biniaris*, at para. 51 (emphasis added)); see also, on intent as a question of fact, *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at pp. 599-600, and *R. v. B. (G.)*, [1990] 2 S.C.R. 57, at pp. 68-69). We agree with Mr. Hodgson that, in this case, the determination of criminal intent was a quintessential factual conclusion based on an assessment of the evidence by the trier of fact. As stated in *George*, at para. 24: “. . . no legal error arises from mere disagreements over factual inferences or the weight of evidence”

[42] The Crown identified the error of law as the trial judge’s failure to consider the inherent dangerousness of the chokehold used by Mr. Hodgson. The Crown claims the legal errors committed fall within the second, third and fourth categories from *J.M.H.*, in that the trial judge erred in relation to the legal effect of findings of fact, assessed evidence based on a wrong legal principle or failed to consider all of the evidence in relation to guilt or innocence.

[43] We disagree; the alleged error is not one of law. As this Court explained in *Chung*, the second and third errors identified in *J.M.H.* “address errors where the trial judge’s application of the legal principles to the evidence demonstrates an erroneous understanding of the law, either because the trial judge finds all the facts necessary to

meet the test but errs in law in its application, or assesses the evidence in a way that otherwise indicates a misapprehension of the law” (*Chung*, at para. 11 (emphasis added)). It is this “erroneous understanding” or “misapprehension” of *the law* that an appellate court must precisely identify and articulate when overturning an acquittal. For example, if a court concludes that the trial judge erred in assessing the evidence based on the wrong legal principle, it should explain which principle is at issue, which of its components or aspects is at the root of the error, and how the trial judge’s reasons demonstrate an erroneous understanding or misapprehension of that component or aspect. With respect, the Court of Appeal did not articulate the precise error of law at the root of its intervention. This is not a case in which the appellate court can reach a purely legal conclusion drawn from the evidence without calling into question the trial judge’s evaluation of the evidence.

[44] Furthermore, even if we proceed on the basis that the alleged errors are ones of law, as we explain in the next section, the trial judge did not commit any such errors.

B. *Did the Trial Judge Err in Law Regarding the Mens Rea for Second Degree Murder?*

[45] The Court of Appeal held that the trial judge erred in her analysis of the *mens rea* for murder by not considering the proposition, from *Lemmon*, that a chokehold is an inherently dangerous act (C.A. reasons, at para. 5). The court was also

of the view that blocking someone's airway "is always an act which is more than merely transient or trifling in nature" (para. 6).

[46] We instead conclude that the trial judge made no error of law concerning the *mens rea* for murder. The Court of Appeal's approach on this point inappropriately imported an objective element to the assessment of the *mens rea* for murder and read the *Lemmon* case too widely. Nor was the trial judge required to mention the proposed common sense inference that Mr. Hodgson intended to kill Mr. Winsor because the natural and probable consequence of choking someone forcefully to the point of unconsciousness is death. This argument erroneously discredits the trial judge's specific findings as to Mr. Hodgson's *mens rea* based on a generally available inference. In the result, the Court of Appeal effectively reweighed the evidence in a manner not available to an appellate court.

(1) The Legal Test for *Mens Rea*

[47] The Court of Appeal's reference to the proposition that a blocked airway is more than a "transient or trifling" injury relates only to the *mens rea* for manslaughter — which requires an objective foreseeability of the risk of bodily harm that is neither trivial nor transitory in the context of a dangerous act (*R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 961; *R. v. Creighton*, [1993] 3 S.C.R. 3, at pp. 44-45). Foreseeability of death is not required. The objective *mens rea* of manslaughter is not concerned with what the accused intended or knew; rather, "the mental fault lies in failure to direct the mind to a risk which the reasonable person would have appreciated" (*Creighton*, at p. 58). Thus,

a conviction for manslaughter requires that the underlying unlawful act be one that is objectively dangerous (p. 43). The trial judge understood this framework; it is clear from her reasons that she considered the objective dangerousness of a chokehold and that in the absence of self-defence, Mr. Hodgson had the requisite objective mental fault to be found guilty of manslaughter.

[48] In contrast, “a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight” (*R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at p. 654 (emphasis added); *R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 646). Murder is distinguished from manslaughter “only by the mental element with respect to the death” (*Vaillancourt*, at p. 654, quoted in *Creighton*, at p. 17, per Lamer C.J., concurring). The requisite intent for murder is “an intent to kill or an intent to cause bodily harm that the offender knows is likely to cause death and is reckless as to whether or not death ensues” (*R. v. Walle*, 2012 SCC 41, [2012] 2 S.C.R. 438, at para. 3).

[49] A conviction for murder requires subjective intent because it is an offence that “carries with it the most severe stigma and punishment of any crime in our society” (*Martineau*, at p. 645). The law requires subjective foresight of death because the criminal liability for murder is of the highest kind and cannot be justified except where the actor possesses a culpable mental state in respect of that result (*Martineau*, at p. 645, citing *R. v. Bernard*, [1988] 2 S.C.R. 833). Thus, the harsh stigma and punishment associated with murder is reserved for “those who choose to intentionally

cause death or who choose to inflict bodily harm that they know is likely to cause death”
(*Martineau*, at p. 646).

[50] Given this rationale, any slippage from the high bar of subjective intent required for murder must be avoided. The accused’s actions are not to be measured against the objective standard of a reasonable person in the same circumstances. The *mens rea* for murder requires more than an intention to cause bodily harm that the accused knew was dangerous; an accused must have intended to cause bodily harm that they knew was likely to cause death. Thus, the proposition that a chokehold is *always* an inherently dangerous act runs the risk of inappropriately injecting an objective element into the *mens rea* analysis for murder. This is because the subjective foresight required for murder is focused solely on what the accused intended, and the analysis cannot consider what the accused *ought to have known* about the inherent dangerousness of a chokehold.

[51] Thus, when considering the *mens rea* for murder, a trial judge should not be (and indeed *cannot* be) required to assess an accused’s intention against the fact that someone else in their position should have or would have been aware of the danger the chokehold posed. Accordingly, for an accused to be convicted of murder, it is not sufficient for the Crown to prove that a particular accused knew that a chokehold in the circumstances was dangerous or that a reasonable person in the accused’s position would have known that the chokehold would cause bodily harm that was likely to cause death. Neither of these findings would meet the requisite level of subjective intent

required for a murder conviction, namely that the accused intended to cause death or that the accused intended to cause bodily harm that they knew was likely to cause death but was reckless as to whether or not death ensued.

[52] Consequently, accepting the proposition that a chokehold is *always* an inherently dangerous act in every case would inappropriately import an objective element into the analysis of the *mens rea* of murder. Accepting this proposition would also usurp the role of the trier of fact, who must assess the dangerousness of a chokehold based on the facts of the particular case.

[53] In light of the fact that the trial judge in this case found that Mr. Hodgson would have been guilty of manslaughter if not for the act having been committed in self-defence, or in defence of others, it is clear that she properly considered that a chokehold can be dangerous. Indeed, the evidence demonstrates that, as a method of restraint, chokeholds can certainly carry with them a degree of danger. As Dr. Milroy explained, strangulation prevents breathing and deprives the brain of blood and, thereby, of oxygen. Thus, unlike a headlock — which merely immobilizes someone by limiting their movement — a neck compression chokehold can rapidly lead to unconsciousness. The tragic consequences that Mr. Winsor suffered, including serious injuries in addition to a loss of consciousness and death, speak to how dangerous chokeholds can be.

[54] However, in respect of the subjective *mens rea* for murder, the trial judge accepted the testimony of Mr. Hodgson as to his state of mind when he used the

chokehold on Mr. Winsor. Mr. Hodgson testified that the chokehold was meant to “restrain [Mr. Winsor] and try and throw him to the ground” and that he maintained the chokehold until Mr. Winsor “stopped struggling” because he was afraid of Mr. Winsor (transcript, reproduced in A.R., part V, at pp. 423-24). The trial judge accepted that, at the time, Mr. Hodgson did not think the chokehold was inherently dangerous and that he also did not have time, in the midst of the altercation, to think about its dangerousness. His personal experience included viewing videos in the media of law enforcement using chokeholds to induce unconsciousness; he witnessed such a technique used effectively when he was a bouncer in 1998 and had used it himself in 2016. Although the person he had used it on in 2016 was rendered unconscious, that person did not die and instead “got up and started fighting immediately after” (p. 446). While Mr. Hodgson acknowledged seeing news stories of people dying as a result of being placed in chokeholds by police, he testified that he could not “say for sure” whether he knew that chokeholds were dangerous at the time of the party (p. 462).

[55] The trial judge also considered other available evidence that could realistically bear on Mr. Hodgson’s intent, including the circumstances in which Mr. Hodgson became involved in the altercation, the short duration of the chokehold, the evidence of the other guests who were surprised that Mr. Winsor did not recover quickly after being put in the chokehold, and the experts’ opinions on how long it might take for a chokehold to lead to unconsciousness and death. She found that this party “suddenly took an unpleasant turn”; Mr. Hodgson was asked to intervene and “he did what he could” to control Mr. Winsor (para. 94). The trial judge also accepted that

Mr. Hodgson's injured right hand meant "many [other] forms of potential control were likely unavailable" (para. 120). When Mr. Hodgson initially tried to pull Mr. Winsor away from the confrontation, he elbowed Mr. Hodgson in the head, and the trial judge accepted that it did not appear that non-physical means were reducing the threat Mr. Winsor posed at the time. Mr. Hodgson only put Mr. Winsor in a chokehold for a "fairly short period of time", and everyone at the party was surprised that Mr. Winsor was not responsive afterwards (para. 94).

[56] The trial judge characterized the chokehold as a "known 'calm down' move" that would have seemed proportional in all of the circumstances (para. 120). In this case, it was open to the trial judge to make this factual finding. Mr. Burke testified that he had seen the chokehold manoeuvre used on others and believed the chokehold that Mr. Hodgson used was just a regular "calm down" method. One of the experts also testified that the same type of chokehold is regularly used in martial arts.

[57] The trial judge reviewed all this evidence in detail and ultimately concluded that she had a reasonable doubt as to whether Mr. Hodgson intended to kill Mr. Winsor or knew that the chokehold was likely to do so. She found there "was no evidence that satisfie[d] [her] beyond a reasonable doubt that Mr. Hodgson intended to cause death or knew that what he did would have that result" (para. 97 (emphasis added)). Her conclusion that there was no intent to murder was firmly grounded in the evidence pertaining to Mr. Hodgson's subjective state of mind.

[58] With respect, the Court of Appeal seems to have simply disagreed with the trial judge's assessment that the chokehold used in these circumstances was intended to be a regular "calm down" method. Such a disagreement as to the characterization of a chokehold in these particular circumstances is not an error of law that justifies overturning an acquittal.

(2) No Error of Law in Respect of *Lemmon* and *Cooper*

[59] In *Lemmon*, the Alberta Court of Appeal noted that chokeholds are, by their very nature, inherently dangerous. The Court of Appeal in the present case quoted *Lemmon* for the proposition that

[r]endering a person unconscious, whether by choking, strangulation or suffocation, is an inherently dangerous act that is easily capable of causing death, or brain injury with devastating lifelong consequences. . . . The difference in the outcome, between unconsciousness, brain damage and death, may be only a matter of a few additional seconds of pressure.

(C.A. reasons, at para. 6, quoting *Lemmon*, at para. 28.)

[60] Respectfully, *Lemmon* is being read too widely if taken to establish a general legal proposition that a chokehold is always an inherently dangerous act. *Lemmon* was a sentencing decision in which the Alberta Court of Appeal was commenting on the gravity of offences committed under s. 246 of the *Criminal Code*, in which the attempt to choke, suffocate, or strangle another person is for the purpose of rendering another person insensible, unconscious or incapable of resistance: in essence, to "overcom[e] resistance to [the] commission of [an] offence" (para. 26). In

Lemmon, the accused choked the victim to unconsciousness for the purpose of subduing her and sexually assaulting her. In such a case, the very purpose and intent behind the act of choking was for the accused to overcome the intended victim by rendering her unconscious in order to commit another indictable offence. That there is an inherently dangerous quality to such actions, however, does not mean that trial judges must in every case conclude that every chokehold or action that affects a person's airways is always an inherently dangerous act.

[61] The Court of Appeal also quoted this Court's statement in *Cooper*, indicating that "[s]ince breathing is essential to life, it would be reasonable [though not required] to infer the accused knew that strangulation was likely to result in death" (C.A. reasons, at para. 6 (text in brackets in original), quoting *Cooper*, at p. 159).

[62] In *Cooper*, the accused was mad at the victim, grabbed her by the throat with both hands and choked her for up to two minutes until she died. Based on this specific evidence, it was open to the trier of fact to "infer [that] the accused knew that strangulation was likely to result in death" because "breathing is essential to life" (p. 159). However, the Court also specifically stressed that "the jury was, of course, not required to make such an inference" (p. 159 (emphasis added)). Accordingly, *Cooper* should not be read as a blanket legal statement as to the dangerousness of all forms of chokeholds in every scenario.

[63] The dangerousness of a chokehold can vary based on factors such as its nature, force and length. For example, Dr. Milroy explained that certain recreational

martial arts forms use chokeholds similar to the one Mr. Hodgson used in order to render a person unconscious or nearly unconscious. Even in that context, however, it is possible for chokeholds to have fatal consequences. In assessing the facts of each case, trial judges must be fully attuned to the potential dangerousness of the chokehold before them. The Court, however, cannot pre-emptively establish a single way of characterizing chokeholds. There is thus no “legal rule” that follows from either *Lemmon* or *Cooper* as to the general dangerousness of chokeholds. Rather, each case must be assessed on its own facts.

[64] Further, while the Crown made arguments based on the *Lemmon* case, the trial judge committed no error by failing to refer to it by name or to explicitly deal with this authority. According to *R. v. Morin*, [1992] 3 S.C.R. 286, at p. 296, there is “no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts”.

(3) Did the Trial Judge Err in Law in Failing to Consider the Common Sense Inference?

[65] The Crown next argues that the trial judge erred in law by failing to consider the common sense inference, namely that sane and sober individuals intend the natural and probable consequences of their actions, in light of all the relevant evidence (*Walle*, at paras. 58-63). The common sense inference the Crown proposes is that choking someone forcefully to the point of unconsciousness amounts to an intentional infliction of bodily harm where the natural consequence is death.

[66] We are of the view that this argument is ill founded. While it was certainly open to the trial judge to consider the common sense inference, she was not bound to draw it.

[67] While the common sense inference can serve as a helpful “marker against which to measure the rather amorphous concept of intent”, it does not replace a trial judge’s evaluation of subjective intent (*Walle*, at para. 63). It is a *permissive* inference, not a presumptive one (*R. v. Seymour*, [1996] 2 S.C.R. 252, at para. 20; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 104; *Walle*, at para. 63). Thus, it cannot be an error for a trial judge to not seize it. A trier of fact must carefully consider the evidence that points away from the common sense inference before acting on it, as this Court aptly put in *Walle*:

If, however, there is no evidence that could realistically impact on whether the accused had the requisite mental state at the time of the offence, or if the pertinent evidence does not leave the [trier of fact] in a state of reasonable doubt about the accused’s intent, then the [trier of fact] may properly resort to the common sense inference in deciding whether intent has been proved. [para. 67]

[68] In this case, the trial judge chose not to infer Mr. Hodgson’s mental state and based on the evidence she did accept, she had a reasonable doubt as to whether Mr. Hodgson intended to cause death or bodily harm that he knew was likely to result in death. The trial judge had the benefit of Mr. Hodgson’s testimony that he did not think the chokehold was dangerous and that he did not intend to kill or harm Mr. Winsor (trial reasons, at para. 88). Having accepted his testimony, this put an end to her *mens*

rea analysis, and there was no need for her to consider the common sense inference. The trial judge is presumed to know the law and need not state reasons for every inference that was or was not drawn (*R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 74). The absence of an express refusal on the trial judge’s part to engage with the common sense inference cannot constitute an error of law in circumstances where she clearly articulated her findings in relation to the *mens rea* for murder.

[69] In sum, we see no error, and certainly no error of law, in the trial judge’s assessment of the evidence on the *mens rea* for manslaughter or murder.

C. *Did the Trial Judge Err in Law in Relation to Self-Defence?*

[70] At trial, Mr. Hodgson also argued that he acted in self-defence and defence of others as contemplated by s. 34 of the *Criminal Code*. The trial judge found that there was an air of reality to the defence and considered each of the section’s three elements and held that the Crown had failed to disprove self-defence on the lesser and included charge of manslaughter.

[71] The Court of Appeal concluded that the trial judge erred in law because she “improperly took a solely subjective approach to assessing [Mr. Hodgson’s] response to the perceived threat posed by Mr. Winsor” (para. 8). While recognising that the trial judge did not have the benefit of this Court’s reasoning in *Khill*, the Court of Appeal noted that previous case law had consistently measured an accused’s response to a perceived threat by considering what a reasonable person would have done in like

circumstances. The court quoted *Khill* for the proposition that “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” (C.A. reasons, at para. 8, quoting *Khill*, at para. 65).

[72] While the trial decision was released before *Khill* and could not have included its terminology and phrasing, we are of the view that the trial judge nevertheless understood what s. 34 required of her. She followed the framework for self-defence as set out in the *Criminal Code*, specifically addressed each of its three elements, correctly stated the applicable statutory principles, applied them to the facts as found, and expressed clear conclusions on each element.

[73] In some respects, it is difficult to understand what precise legal error motivated the Court of Appeal to order a new trial on this ground. While the critique that a solely subjective approach was taken is clear, it is less clear to which element of the s. 34 analysis this criticism attaches. The Court of Appeal’s holding that the trial judge did not assess Mr. Hodgson’s actions in “considering what a reasonable person would have done in like circumstances” suggests that it was of the view the trial judge erred in her analysis of s. 34(1)(c) (para. 7); however, the phrase the Court of Appeal chose to describe the perceived error — “[Mr. Hodgson’s] response to the perceived threat” (para. 8) — can encompass one, some, or all of the statutory elements of s. 34. The Court of Appeal’s failure to clearly identify which element(s) of the self-defence

inquiry under s. 34(1)(a) to (c) was engaged is problematic as each has its own considerations and methods of evaluation.

[74] First, under s. 34(1)(a), the accused must have subjectively believed that force or a threat thereof was being used against their person or against that of another (*Khill*, at para. 52). However, the accused's belief must also be held on reasonable grounds. In order to assess the reasonableness of the accused's belief, the trier of fact will apply a modified objective standard that takes into account what a reasonable person with the relevant characteristics and experiences of the accused would perceive (*Khill*, at para. 57). That the accused's actual belief must be held "on reasonable grounds" imports an objective component to ensure conformity with community norms and values when weighing the moral blameworthiness of the accused's actions (*Khill*, at para. 53). The trial judge applied this modified objective standard and held, based on the evidence she accepted from Crystal Mullin, Mr. Hodgson, Mr. Burke and Ms. Ford-Perkins, that "Mr. Hodgson believed on reasonable grounds that there was a threat of force being made by Mr. Winsor against the others. When Mr. Hodgson went to deal with that threat, as requested by Ms. Ford-Perkins, force was applied against him by Mr. Winsor" (para. 107). On this element, the trial judge specifically turned her mind to the reasonable grounds component of s. 34(1)(a) and did not adopt a solely subjective analysis.

[75] Second, under s. 34(1)(b), whether the accused committed the act that constitutes the offence for the purpose of defending or protecting themselves or others

from the use or threat of force depends upon the accused's subjective state of mind; if the purpose is not to defend or protect, then the whole basis of self-defence falls away. Indeed, for this second element, a *failure* to consider the accused's personal purpose, a subjective inquiry which goes to the root of self-defence, would have been an error of law (*Khill*, at para. 59). The trial judge expressly found that there was no other reason Mr. Hodgson used the chokehold but to calm Mr. Winsor down and "thereby protect himself and the others at the party from the threat being posed by Mr. Winsor" (para. 111). No error has been demonstrated in respect of the trial judge's treatment of this element.

[76] Third, s. 34(1)(c) requires that "the act committed is reasonable in the circumstances", and s. 34(2) provides a list of nine non-exhaustive factors for the court to consider in making this determination. Parliament expressly structured how a decision maker ought to determine whether an act of self-defence was reasonable in the circumstances. What is called for is an assessment of the overall reasonableness of the accused's conduct according to the statutory factors. Reasonableness is measured according to "the relevant circumstances of the person, the other parties and the act" (*Criminal Code*, s. 34(2); see also *Khill*, at para. 64). When a factor is relevant it becomes a mandatory consideration, as s. 34(2) provides that the fact finder "shall" consider all factors set out in paras. (a) to (h) that are relevant in the circumstances of the case (*Khill*, at para. 68). This objective determination, with its focus on what a reasonable person would have done in comparable circumstances, strikes the appropriate balance between respecting the security of the person who acts and the

security of the person acted upon. It also underscores that the law of self-defence “cannot rest exclusively on the accused’s perception of the need to act” (*Khill*, at para. 2; see also paras. 62 and 65).

[77] Given its reference to the consideration of “what a reasonable person would have done in like circumstances”, it seems most likely that the Court of Appeal took issue with the trial judge’s handling of s. 34(1)(c) (C.A. reasons, at para. 7). The proposition from *Khill* cited by the Court of Appeal about not slipping into the mind of the accused was directed towards and addressed the type of reasonableness analysis required under s. 34(1)(c). By relying on this quotation, it is likely the Court of Appeal was suggesting that the trial judge had conducted a solely subjective assessment of this element of the section, being the overall reasonableness of Mr. Hodgson’s acts under s. 34(1)(c). However, even on that basis, the trial judge’s treatment of this element discloses no such error.

[78] The trial judge discharged the obligation s. 34(2) places on the finder of fact to consider a wide range of factors in order to determine what a reasonable person would have done in a comparable situation. She separately addressed all factors that the parties argued were relevant, applicable, and worthy of consideration. Under every factor, the trial judge considered and evaluated the material evidence. She tied each relevant factor to the facts as found in the following manner:

- (a) *The nature of the threat:* Mr. Winsor was a large man who could likely harm someone and was not complying with requests to

leave the house. He was quite intoxicated, tried to impose himself on Crystal Mullin, and pushed Mr. Burke into the wall. That said, he was likely not posing a threat to someone's life.

- (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:* Mr. Winsor was not complying with requests to leave and elbowed Mr. Hodgson in the head when he tried to intervene. It did not seem to the trial judge that non-physical means were reducing the threat he posed.
- (c) *The person's role in the incident:* Mr. Hodgson was a strong man who was requested to help remove Mr. Winsor from the home.
- (d) *The use or threatened use of a weapon:* No weapons were involved.
- (e) *The size, age, gender and physical capabilities of the parties to the incident:* Mr. Hodgson was 38 years old, 6 feet tall, weighed 210 pounds, and was quite strong. Mr. Winsor was 23 years old, 5 feet 8 inches tall and weighed 304 pounds. The trial judge did not see a significant difference between them.

(f) (f.1) *The nature, duration and history of any relationship between the parties to the incident and any history of interaction or communication between the parties to the incident:* Mr. Hodgson and Mr. Winsor had no relationship, interaction or communication before that night, although they had spoken for a long time during the party. While Mr. Hodgson was uncomfortable with the way Mr. Winsor was talking about Crystal Mullin and treating Mr. Burke, nobody suggested that there was “bad blood” between the two.

(g) *The nature and proportionality of the person’s response to the use or threat of force:* A person in a threatening situation need not carefully assess the threat and thoughtfully determine the appropriate response. The situation was a sudden and upsetting one, in which a very heavy man was using violence and ignoring requests to leave. Ms. Ford-Perkins asked Mr. Hodgson to help. Mr. Hodgson observed Mr. Winsor physically resisting attempts to get him to leave. He was not able to pull him away and was hit in his attempt to do so. Given that his dominant hand was injured, many forms of potential control were likely unavailable. In all of the circumstances, a known “calm down” move that could be carried out from behind would have seemed proportional.

- (h) *Response to use or threat of force that the person knew was lawful*: Not applicable.

[79] The trial judge then addressed the key question of whether, after assessing all the relevant factors, Mr. Hodgson's act was reasonable in the circumstances. This assessment of the s. 34(2) factors reveals no error of law. The trial judge's references to Mr. Hodgson by name operated only to particularize the inquiry to the circumstances of the case at bar. This personalization did not transform the analysis into a solely subjective exercise. Indeed, the trial judge's reasons make clear that she understood she was to assess whether Mr. Hodgson's actions were reasonable in the circumstances, and she repeatedly and expressly referred to the appropriate objective standard. For example, she stated:

Similarly, if Mr. Hodgson's evidence were believed, there is some evidence to suggest that his actions were reasonable in the circumstances

. . .

Did the Crown prove beyond a reasonable doubt that the choke hold applied by Mr. Hodgson was not reasonable in the circumstances?

. . .

. . . A known "calm down" move that could be executed from behind would have seemed to be proportional in all of the circumstances.

. . .

. . . the Crown has not proven beyond a reasonable doubt that the choke hold was not reasonable in all of the circumstances. [Emphasis added; paras. 104, 112, 120 and 122.]

[80] Although *Khill* was released after the trial judge's reasons, she nevertheless engaged in the correct analysis. Even before *Khill*, prior case law consistently applied an objective approach to the aspects of the self-defence analysis that measured an accused's actions against those of a reasonable person in similar circumstances (see, e.g., *R. v. Raspberry*, 2017 ABCA 135, 55 Alta. L.R. (6th) 134, at para. 12; *R. v. Curran*, 2019 NBCA 27, 375 C.C.C. (3d) 551, at para. 16; *R. v. Berry*, 2017 ONCA 17, 345 C.C.C. (3d) 32, at para. 73; *R. v. Grant*, 2016 ONCA 639, 351 O.A.C. 345, at para. 63; *R. v. Richter*, 2014 BCCA 244, 357 B.C.A.C. 305, at para. 37; *R. v. Constantine*, 2015 ONCA 330, 335 O.A.C. 35, at para. 30; *R. v. A.A.*, 2019 BCCA 389, at para. 33 (CanLII); *R. v. Androkovich*, 2014 ABCA 418, at para. 9 (CanLII)).

[81] The trial judge's reasons make clear that she correctly assessed whether Mr. Hodgson's actions were reasonable in the circumstances under s. 34(1)(c) and that she did not inappropriately focus on what Mr. Hodgson himself thought at the time of the impugned conduct.

[82] Accordingly, we do not see any grounds for concluding that the trial judge erred in law in her analysis or in her application of the law on self-defence.

V. Disposition

[83] For the reasons given, the appeal is allowed, and the acquittal is restored.

The following are the reasons delivered by

ROWE J. —

[84] I am persuaded that self-defence applies and, thus, I agree in the result. I write separately to clarify the Crown’s right to appeal an acquittal. My colleagues deal with this at length, emphasizing how narrowly this is limited. However, there is an exception that warrants note.

[85] At paragraph 34, my colleagues write: “There are . . . situations in which a ‘trial judge’s alleged shortcomings in assessing the evidence constitute an error of law giving rise to a Crown appeal of an acquittal’” (quoting *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 24). In *J.M.H.*, the Court identified four such situations, one being an “assessment of the evidence based on a wrong legal principle” (Martin and Moreau JJ.’s reasons, at para. 35).

[86] “Myths” relating to sexual assault have been characterized as errors of law (*R. v. Kruk*, 2024 SCC 7). These are not confined to the “twin myths” referred to in s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46. Rather, this is an open category, further myths being identified from time to time. Thus, where the Crown characterizes an aspect of a trial judge’s reasons as incorporating a “myth”, this would meet the requirement in s. 676(1)(a) that the appeal be on a “question of law alone”.

Appeal allowed.

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