

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v*. Gunning, [2005] 1 S.C.R. 627, 2005 SCC 27 | **Date:** 20050519  **Docket:** 30161 |

**Between:**

**Jody James Gunning**

Appellant

v.

**Her Majesty the Queen**

Respondent

**Coram:** McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

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| **Reasons for Judgment:**  (paras. 1 to 44) | Charron J. (McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ. concurring) |

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R. *v*. Gunning, [2005] 1 S.C.R. 627, 2005 SCC 27

**Jody James Gunning** *Appellant*

*v*.

**Her Majesty The Queen** *Respondent*

**Indexed as: R. *v*. Gunning**

**Neutral citation: 2005 SCC 27.**

File No.: 30161.

2005: February 15; 2005: May 19.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for british columbia

*Criminal law — Trial by jury — Respective functions of judge and jury — Murder — Accused fatally shot trespasser who refused to leave his home — Accused claimed that shooting accidental and that he intended to use his gun solely to intimidate trespasser in defence of his property — Careless use of firearm and intent central issues at trial — Whether trial judge exceeded his proper function by directing jury that offence of careless use of firearm had been made out and by failing to instruct jury on defence of property.*

The accused fatally shot C, a person unknown to the accused who had entered his home uninvited during a party. The accused denied that he intended to kill C. Although his memory was sketchy due to his consumption of alcohol, he testified that C had assaulted him and refused to leave his house after they had argued. He claimed that he was scared, so he took out and loaded the shotgun to intimidate C into leaving. He testified that the gun discharged accidentally. The focus of the trial was on whether the shooting was intentional or accidental. The trial judge, however, instructed the jury that the offence of careless use of a firearm had been made out and he refused to instruct the jury on defence of property. Later in his charge, he purported to correct the impugned instruction on careless use of a firearm. The accused was convicted of second degree murder. The Court of Appeal upheld the conviction.

*Held*: The appeal should be allowed. The conviction should be set aside and a new trial ordered.

The trial judge erred in instructing the jury that the Crown had proven the “unlawful act” necessary to prove murder or manslaughter and his recharge did not cure the error. It is a basic principle of law that the jury is to decide whether an offence has been proven on the facts. The judge is entitled to give an opinion on a question of fact but not a direction. A trial judge has no duty or entitlement to direct a verdict of guilty and the duty to keep from the jury affirmative defences lacking an evidential foundation does not detract from this principle. In this case, if the jury was satisfied that the accused intended to kill C, the unlawful act that caused the death would be the shooting itself and the accused would be guilty of murder. If the Crown failed to prove an intent to kill, the accused would be guilty of manslaughter only if he was guilty of the unlawful act of careless use of a firearm. If the jury had a reasonable doubt on this question, he was entitled to an acquittal. In finding that the accused’s use of the firearm was careless within the meaning of s. 86 of the *Criminal Code*, and an unlawful act that caused the death of C, the trial judge encroached on the exclusive domain of the jury. That issue, together with the question of intent to kill, were central in this trial. It was incumbent upon the trial judge to instruct the jury on the law in respect of the careless use of a firearm, including any defences that arose on the evidence, and to leave for the jury the application of the law to the facts. [5] [21-22] [35]

The trial judge also erred in failing to instruct the jury on the defence of house or property under s. 41 of the *Criminal Code*. The accused advanced the defence in respect of his use of the firearm prior and up to what he alleged to have been an accidental shooting. On the evidence, this defence raised a real issue for the jury to decide, but the jurors were never told that a person is entitled at law to forcibly remove a trespasser from his home, so long as he uses no more force than necessary. They were directed, as a matter of law, that the accused’s conduct before the shooting was the unlawful act of careless use of a firearm. The trial judge effectively determined the merits of the defence, a matter that was for the jury to resolve. [6] [22] [37-38]

In view of the fact that the jury was not properly instructed in respect of matters fundamental to the defence, reliance cannot be placed on the verdict to conclude that there is no reasonable possibility that the verdict would have been different without these errors. [7]

**Cases Cited**

**Referred to:** *R. v. Finlay*, [1993] 3 S.C.R. 103; *R. v. Baxter* (1975), 27 C.C.C. (2d) 96; *R. v. Clark* (1983), 5 C.C.C. (3d) 264; *R. v. Bacon*, [1999] Q.J. No. 19 (QL); *Chandler v. Director of Public Prosecutions*, [1964] A.C. 763; *R. v. Wang*, [2005] 1 All E.R. 782, [2005] UKHL 9; *R. v. Cinous*, [2002] 2 S.C.R. 3, 2002 SCC 29; *R. v. Fontaine*, [2004] 1 S.C.R. 702, 2004 SCC 27.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, s. 11(*f*).

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 41, 86, 222(1), (5), 229, 232(1), (2).

APPEAL from a judgment of the British Columbia Court of Appeal (Southin, Huddart and Mackenzie JJ.A.) (2003), 186 B.C.A.C. 225, 306 W.A.C. 225, [2003] B.C.J. No. 2075 (QL), 2003 BCCA 477, upholding the accused’s conviction for second degree murder. Appeal allowed.

*Glen Orris*, *Q.C.*, for the appellant.

*Richard C. C. Peck*, *Q.C.*, and *Paul Barclay*, for the respondent.

The judgment of the Court was delivered by

Charron J. —

I. Overview

1 Jody James Gunning was charged with second degree murder in respect of the fatal shooting of Chester Charlie, a person unknown to Mr. Gunning who had entered his home uninvited during a party. Mr. Charlie was killed by a single shotgun wound to the neck. In defence to the charge, Mr. Gunning denied that he intended to kill Mr. Charlie. Although his memory of the events was sketchy due to his consumption of alcohol, Mr. Gunning testified that, after Mr. Charlie had assaulted him and refused to leave, he had taken out and loaded the shotgun so as to intimidate or scare him into leaving. In the course of confronting Mr. Charlie, the gun discharged accidentally.

2 Mr. Gunning was tried before a judge and a jury. The focus of the entire trial was on the question of whether the shooting was an intentional killing or a tragic accident. The trial judge instructed the jury on the defences of intoxication and provocation but refused to leave the defence of property for their consideration. The trial judge further instructed the jury that the underlying offence of careless use of a firearm had been made out, thereby precluding any possible verdict of acquittal. Later in his charge, the trial judge purported to correct the latter instruction. Mr. Gunning was convicted of second degree murder.

3 On appeal to the British Columbia Court of Appeal, Mr. Gunning, among other grounds, contended that the trial judge erred by failing to instruct the jury on the defence of property. He argued further that the trial judge overstepped his role by effectively instructing the jury that there were no defences to the underlying offence of careless use of a firearm, thereby wrongfully depriving him of the only avenue to an acquittal.

4 The British Columbia Court of Appeal rejected Mr. Gunning’s arguments on the basis that none of the alleged errors would have affected the verdict of guilty on the charge of murder: (2003), 186 B.C.A.C. 225, 2003 BCCA 477. In essence, the court reasoned that, on the evidence, a jury could not avoid the conclusion that the underlying offence of careless use of a firearm had been made out. The court was further of the view that the question of whether the use of the shotgun prior to the shooting was lawful or unlawful became irrelevant once the jury rejected the defence of accident and was persuaded that the shooting was an intentional killing.

5 With respect, I disagree with the conclusion reached by the Court of Appeal. It is a basic principle of law that, on a trial by judge and jury, it is for the judge to direct the jury on the law and to assist the jury in their consideration of the facts, but it is for the jury, and the jury alone, to decide whether, on the facts, the offence has been proven. It is of fundamental importance to keep these functions separate. The trial judge’s duty to keep from the jury affirmative defences lacking an evidential foundation does not detract from this principle. The lawfulness or unlawfulness of Mr. Gunning’s use of the shotgun prior to the shooting was a question of crucial importance in this case and it was a matter for the jury to determine. By deciding that the underlying offence of careless use of a firearm had been made out, the trial judge overstepped the proper boundaries of his function and, as I will explain, his later recharge did not cure the error.

6 The trial judge also erred by failing to instruct the jury on the provisions of s. 41 of the *Criminal Code*, R.S.C. 1985, c. C-46, in respect of the defence of house or property. While an intentional shooting could not be justified on this basis, Mr. Gunning never advanced this defence in respect of the shooting. Rather, the defence was advanced in respect of the use of the firearm, prior and up to what he alleged to have been an accidental shooting. On the evidence, this defence raised a real issue for the jury to decide. Rather than limiting his inquiry to the threshold question of whether the defence had any evidential foundation, the trial judge effectively determined the merits of the defence. In doing so, he again exceeded his proper function.

7 In view of the fact that the jury was not properly instructed in respect of matters fundamental to the defence, I respectfully disagree with the Court of Appeal that reliance can be placed on the verdict of guilty of murder to conclude that there is no reasonable possibility that the verdict would have been different without the errors. I would allow the appeal, set aside the conviction and order a new trial.

II. Background

8 In the early morning hours of May 6, 2000, in Fraser Lake, British Columbia, at the end of a long night of drinking, an altercation between two men left one dead and another in police custody. The evening before, Mr. Gunning had a party at his home, inviting some friends. Although the party did not really get started until later in the day, Mr. Gunning started his drinking in the early afternoon of May 5. His common law spouse left the party some time between 11 p.m. and midnight to have a few drinks with some friends at a local pub. She returned around 3 a.m. and many of the pub occupants followed, none of whom were invited. Among them was Chester Charlie. He did not know Mr. Gunning or his common law spouse.

9 Shortly before the shooting, Mr. Gunning found Mr. Charlie sitting on the edge of his bed going through the bottom drawer of his night stand. He became angry and asked Mr. Charlie “what the fuck he was doing”. He told Mr. Charlie to get out, to which Mr. Charlie responded “get the fuck out”. Mr. Gunning told Mr. Charlie that it was his house and that he should get out. Mr. Charlie then laid back on the bed, crossed his feet and said “[m]ake me.” When Mr. Gunning went to brush Mr. Charlie’s feet off the bed, Mr. Charlie kicked him back up against the door. Mr. Gunning testified that he was scared, wanted Mr. Charlie out of his house, felt he needed to intimidate or scare him and was too drunk to fight.

10 Mr. Gunning kept a shotgun, unloaded, in a locked storage locker, the keys to which were kept in a toolbox in the basement. Mr. Gunning had no recollection of going to the basement, getting his keys, opening the locker, obtaining and loading the shotgun or returning upstairs. He did remember going back into the bedroom with the shotgun in hand. Mr. Charlie was sitting on his bed. He testified that he did not threaten or point the gun at Mr. Charlie. When he told Mr. Charlie to get out of his house, Mr. Charlie laughed, called him a “real pussy”, left the bedroom and started walking down the hall.

11 Mr. Gunning testified that, relieved Mr. Charlie was leaving, he followed him down the hall. Believing Mr. Charlie had gone, Mr. Gunning began to go down the stairs to the basement when he heard a noise. He went back upstairs and saw Mr. Charlie leaning over a coffee table in the living room. He asked Mr. Charlie what his problem was. Mr. Charlie responded by saying “fuck you” and spat at him. Mr. Gunning “shook his fists” at Mr. Charlie and said “[j]ust get out.” In that instant, he saw Mr. Charlie lying on the coffee table in a pool of blood. Mr. Gunning testified that he had been holding the shotgun in one hand, “like you’d hold a pistol”. He testified that he ejected the shell from the shotgun, and at that moment “everything closed in on [him]”. The time was around 6 a.m.

12 At approximately 6:10 a.m. Mr. Gunning placed a call to Sgt. Appleton, whom he knew, telling him that he had shot someone and that he had a “shotgun with two shells in it”. Mr. Gunning testified that he did not remember any of the conversation. Mr. Gunning was soon after arrested in his basement. The shotgun was found on a couch in the basement holding an additional shell in its chamber. Another live round was found on the couch beside the weapon. A live shell was also found beside the deceased’s head, along with a spent shell, fired from the weapon, under his leg.

III. The Proceedings at Trial

13 During a pre-charge discussion of the draft instructions to the jury, counsel for Mr. Gunning raised self-defence or defence of property as a possible route to a verdict of not guilty, based on an accidental discharge of the shotgun during Mr. Gunning’s legitimate use of the firearm as a means of evicting Mr. Charlie. Counsel reviewed eight items of evidence in support of his contention. The trial judge ruled that there was no air of reality to the defence. In his exchange with counsel, he explained his reasoning as follows:

I just don’t think there’s any chance, any possibility whatsoever that a properly instructed jury could come to the conclusion that this was a justified . . . intentional shooting. I just don’t think that’s there. [Emphasis added.]

Counsel quickly resiled from this part of his argument. The trial judge added:

Okay. No, I thought that you might be fashioning an argument for acquittal even on manslaughter on the basis that the taking up of the gun itself was within — was not unlawful by virtue of the right to defend property and that an accident occurred in the course of that . . . . And I just don’t see any way you can get away from careless use of a firearm. The defence of property does not relate to careless use of a firearm. [Emphasis added.]

14 In response to the trial judge’s comments, counsel argued further that there was a question for the jury to decide: whether, in all the circumstances, Mr. Gunning’s conduct in taking the gun, loading it in his own home and exposing it to somebody was “without lawful excuse” within the meaning of the *Criminal Code* definition of the offence of careless use of a firearm. The trial judge rejected this argument, stating as follows:

And, you know, the taking — a perfectly sober person having to load a gun because somebody is not only not leaving but being insulting may not be unlawful, but all we have to go on about how that happened is his evidence that he, with a blood alcohol reading of 260, pointed the gun, shaking his fist with his finger on the trigger. And you know, I get into the same air of reality analysis there as I do with the defence itself. I just don’t see how a properly instructed jury could conclude that a reasonable person wouldn’t think that was likely to cause harm. [Emphasis added.]

15 Following this discussion, counsel made their respective closing addresses to the jury. In his main charge, the trial judge then instructed the jury on the ingredients that must be proved by the Crown to make out the offence of murder. He stated:

For the Crown to succeed in proving murder, it must prove beyond a reasonable doubt the following ingredients: first, the identity of Mr. Gunning as the offender; second, the time and place of the offence as set out in the Indictment; third, that Mr. Gunning caused the death of Chester Charlie; fourth, that Mr. Gunning caused the death by means of an unlawful act; fifth, that Mr. Gunning intended to cause the death.

After brief instructions in respect of the first three ingredients, the trial judge instructed the jury on the fourth ingredient as follows:

The fourth ingredient or element the Crown must prove is that Mr. Gunning caused the death by means of an unlawful act. I will simplify your task slightly by telling you that as a matter of law this element is satisfied in this case. Regardless of any argument that might be fashioned around the justifiable use of force in defence of house or real property against a trespasser, which might conceivably be found in some circumstances to justify at least taking up a firearm, I am satisfied that in all the circumstances of this case, quite apart from whether the discharge was accidental or not, and assuming the truth of the accused’s version of the discharge itself, there could be no arguable reality-based defence to a charge of careless use of a firearm. There could also be no doubt that this careless use of the loaded shotgun, while highly intoxicated, was likely to cause harm in the eyes of the reasonable person and was a nontrivial contributing cause of the death. [Emphasis added.]

16 Both Crown and defence counsel initially approved this instruction as being consistent with the trial judge’s earlier rulings. However, after the trial judge had completed all but the last part of his instructions to the jury and adjourned to the next morning, counsel reconsidered their position and urged the trial judge to leave the jury with the possibility of finding Mr. Gunning not guilty. The trial judge acceded to the request. The following morning, he asked the jurors to make changes to the written instructions he had provided to them the previous day so as to properly include the possibility of reaching a “not guilty to anything verdict”. Notably, the jurors had been permitted to take these instructions home with them. He then instructed them further in the following terms.

17 After acknowledging that he had made some presumptions about the jury’s findings of fact and reminding them that the main issue in the trial was the intention to cause death, the trial judge briefly reviewed the five elements of murder. With respect to the first three elements — identity, time and place and causing death — the trial judge explained to the jury that they would have no difficulty finding that they had been met. On the fourth element, the unlawful act, the trial judge repeated the relevant part of his instructions quoted above, and then explained:

I have also there made some presumptions about what your findings of fact will be, and they may be something different, and you are the exclusive judges of the facts and so technically any one of these, not only the element of intent, which is the fifth element, but technically any one of these other elements, if you don’t agree with what I said there as to the factual component of it — I’m not talking about the legal component of it, but the factual component, if you don’t agree with me, then technically, hypothetically, there still is a possibility that you might come back with a not guilty verdict. So that is why that should be added as the third possibility. [Emphasis added.]

Following a comment about a “typo”, he continued:

So I don’t want to distract you from the main issue in this trial, but that is I think bringing my charge into more precise technical compliance with the law on the division of labour between the judge and the jury.

What I consider a reasonable conclusion on the facts is only me, it isn’t necessarily decisive on you. There is a concept in our law, believe it or not, that there is the privilege on the part of a jury to reach a perverse verdict. In other words, that they may come to a completely different conclusion on the facts than I might or that I might think any reasonable person might, and because a jury’s deliberations are theirs alone and secret, of course we can’t inquire into that. So that’s what that’s all about.

IV. Analysis

18 I will deal with the issues raised on this appeal in the following manner. First, I will explain how the offence of careless use of a firearm was related to the offence of murder in the circumstances of this case. Second, I will review the elements of the defence of property and describe how Mr. Gunning sought to rely on it in defence to the included offence of manslaughter. Third, I will describe the respective functions of the judge and the jury, more particularly in respect of any defences advanced by an accused at trial. Fourth, I will apply these principles to this case and determine whether the trial judge overstepped his role when (a) he instructed the jury that the fourth element of the offence had been made out, and (b) when he refused to instruct the jury on the defence of property. Finally, I will deal briefly with an additional issue raised by Mr. Gunning about the sufficiency of the trial judge’s instructions on provocation.

A. *The Underlying Offence of Careless Use of a Firearm*

19 I will now describe how the offence of careless use of a firearm relates to the charge of murder in this case. The relevant *Criminal Code* provisions in respect of the offence of murder are the following:

**222.** (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

. . .

(5) A person commits culpable homicide when he causes the death of a human being,

(*a*) by means of an unlawful act;

. . .

**229.** Culpable homicide is murder

(*a*) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

20 As set out in the above-noted excerpt from the charge, the trial judge correctly instructed the jury on the necessary ingredients to prove the offence of murder. Of the five ingredients, only two were of true contention: the fourth, that Mr. Gunning caused the death by means of an unlawful act; and the fifth, that Mr. Gunning intended to cause the death. The fourth element, the unlawful act, could be proven in two ways. On the one hand, if the jury was satisfied that Mr. Gunning intended to kill Mr. Charlie, the unlawful act that caused the death would be the shooting itself and Mr. Gunning would be guilty of murder. On the other hand, if the Crown failed to prove an intent to kill but proved all of the other ingredients, Mr. Gunning would be not guilty of murder but would be guilty of the lesser included offence of manslaughter. The “unlawful act” relied upon by the Crown in support of a finding of guilt in respect of manslaughter was the careless use of a firearm.

21 The offence of careless use of a firearm is defined as follows:

**86.** (1) Every person commits an offence who, without lawful excuse, uses, carries, handles, ships, transports or stores a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any ammunition or prohibited ammunition in a careless manner or without reasonable precautions for the safety of other persons.

The gravamen of the offence is conduct that constitutes a marked departure from the standard of care of a reasonably prudent person. If a reasonable doubt exists, either that the conduct in question did not constitute a marked departure from that standard of care, or that reasonable precautions were taken to discharge the duty of care in the circumstances, a person cannot be found guilty of the offence: *R. v. Finlay*, [1993] 3 S.C.R. 103, at p. 117. In addition, in order to attract criminal liability, the person’s conduct must be without lawful excuse. The question of whether Mr. Gunning was guilty of this unlawful act was central to his defence to the included offence of manslaughter. If the jury had a reasonable doubt on this question, he was entitled to an acquittal.

22 The Crown contends, and the British Columbia Court of Appeal agreed, that this whole question of careless use of a firearm becomes irrelevant because we must take it from the verdict of guilty of murder that the jury was convinced that the shooting was intentional. I will explain at the outset why I disagree that the appeal should be dismissed on that basis. Undoubtedly, a verdict of guilty on the murder charge can only rest on a finding that the shooting was intentional. However, we do not know what reasoning led the jury to its verdict. What we do know, as we shall see, is that these jurors were never told that a person is entitled at law to forcibly remove a trespasser from his home, so long as he uses no more force than necessary. Rather, they were directed, as a matter of law, to base their determination on the critical question of intent on the premise that Mr. Gunning’s conduct prior and up to the time of the shooting was unlawful. In these circumstances, it is my respectful view that it would be unsafe to rely on the jury’s verdict in this case as a basis for dismissing the appeal.

B. *The Defence of House or Property*

23 In the circumstances of this case, the defence of house or real property was intrinsically connected to the underlying offence of careless use of a firearm. Mr. Gunning alleged that he took out his shotgun, loaded it and carried it upstairs to confront Mr. Charlie in the hope of intimidating or scaring him into leaving the house. He argued that he was justified in doing so as he was legitimately defending his property within the meaning of the *Criminal Code.*

24 Mr. Gunning relies on the provisions of s. 41(1) of the *Criminal Code.* It reads as follows:

**41.** (1) Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

25 There are four elements to the defence raised by Mr. Gunning: (1) he must have been in possession of the dwelling-house; (2) his possession must have been peaceable; (3) Mr. Charlie must have been a trespasser; and (4) the force used to eject the trespasser must have been reasonable in all the circumstances. Only the fourth element was really contentious in this case — the reasonableness of the force used. Where the defence arises on the facts, the onus is on the Crown to prove beyond a reasonable doubt that Mr. Gunning did not act in defence of property.

26 It is common ground between the parties that the intentional killing of a trespasser could only be justified where the person in possession of the property is able to make out a case of self-defence: see *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.), at pp. 114-15; *R. v. Clark* (1983), 5 C.C.C. (3d) 264 (Alta. C.A.), at pp. 272-73; *R. v. Bacon*, [1999] Q.J. No. 19 (QL) (C.A.), at para. 24. Mr. Gunning does not raise self-defence in respect of the shooting; he raises the defence of accident. Rather, the defence of property is raised in justification of his use of the shotgun prior to its discharge.

C. *The Respective Functions of the Judge and the Jury*

27 It is perhaps trite but nonetheless fundamental law that on a jury trial, it is for the judge to decide all questions of law and to direct the jury accordingly; but the jury, who must take its direction on the law from the judge, is the sole arbiter on the facts. The judge also has the duty, insofar as it is necessary, to assist the jury by reviewing the evidence as it relates to the issues in the case. The judge is also entitled to give an opinion on a question of fact and express it as strongly as the circumstances permit, so long as it is made clear to the jury that the opinion is given as advice and not direction.

28 Subject to one exception, it is also the exclusive domain of the jury to determine the verdict. An exception lies where the judge is satisfied that there is no evidence upon which a properly instructed jury could reasonably convict, in which case, it is the judge’s duty to direct the jury to acquit the accused. This exception is made in order to safeguard against wrongful convictions. However, there is no corresponding duty or entitlement to direct a jury to return a verdict of guilty. As Lord Devlin so aptly put it in *Chandler v. Director of Public Prosecutions*, [1964] A.C. 763 (H.L.), in answer to the argument that it should be open to the judge to direct a verdict of guilty in certain circumstances:

With great respect I think that to be an unconstitutional doctrine. It is the conscience of the jury and not the power of the judge that provides the constitutional safeguard against perverse acquittal. [pp. 803-4]

See *R. v. Wang*, [2005] 1 All E.R. 782, [2005] UKHL 9, for an instructive analysis on why a judge under English law is not entitled to direct a jury to return a verdict of guilty. The principles discussed in *Wang* are all the more applicable in Canadian law where the accused exercises his constitutional right to the benefit of a trial by jury: s. 11(*f*) of the *Canadian Charter of Rights and Freedoms.*

29 As a corollary of the trial judge’s duty to instruct the jury on the law, it is a well-established principle that a judge should withdraw a defence from the consideration of the jury when there is no evidence upon which a properly instructed jury acting reasonably could find in the accused’s favour. In these circumstances, it only stands to reason that there is no need to direct the jury on an issue not raised in the case. It would only serve to confuse the jury and detract from their duty to return a true verdict. This threshold test, requiring that a defence be put to the jury only if there is an evidential foundation for it, is often referred to as the “air of reality” test.

30 It is important to note that the “air of reality” test has no application in respect of the question of whether the Crown has proved beyond a reasonable doubt each essential element of the offence. By his plea of not guilty, the accused in effect advances the “defence” that the Crown has not met its burden in respect of one or more of the necessary ingredients of the offence. In every trial where there is no plea of guilty or an admission by the accused as to one or more of the essential elements of the offence, the question of whether the Crown has met its burden is necessarily at play and must be put to the jury for its determination. This “defence” is squarely before the jury. There is no further threshold to meet. The imposition of any additional hurdle would run counter to both the presumption of innocence and the burden of proof on the Crown.

31 Hence, it is never the function of the judge in a jury trial to assess the evidence and make a determination that the Crown has proven one or more of the essential elements of the offence and to direct the jury accordingly. It does not matter how obvious the judge may believe the answer to be. Nor does it matter that the judge may be of the view that any other conclusion would be perverse. The trial judge may give an opinion on the matter when it is warranted, but never a direction.

32 The “air of reality” test applies, rather, in respect of affirmative defences that may or may not arise depending on the particular facts. For example, it is not in every case that defences such as the following will arise: intoxication, necessity, duress, provocation, alibi, automatism, self-defence, mistake of fact, honest but mistaken belief in consent or defence of property. It is not incumbent on the Crown in every trial to negative all conceivable defences no matter how fanciful or speculative they may be. A certain threshold must be met before the issue is “put in play”: *R. v. Cinous*, [2002] 2 S.C.R. 3, 2002 SCC 29, at para. 52. A defence will be in play whenever a properly instructed jury could reasonably, on account of the evidence, conclude in favour of the accused: *R. v. Fontaine*, [2004] 1 S.C.R. 702, 2004 SCC 27, at para. 74.

33 The basic features of the “air of reality” test and the evidential standard that must be met were thoroughly canvassed by this Court in *Cinous* and the analysis need not be repeated here. In the context of this case, it is important, however, to repeat what the threshold test is not aimed at. At para. 54, McLachlin C.J. and Bastarache J. stated:

The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. See *Finta*, *supra*; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330. The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. See *R. v. Bulmer*, [1987] 1 S.C.R. 782; *Park*, *supra*. Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.

D. *Application to This Case*

34 It is important to note at the outset that Mr. Gunning did not offer a plea of guilty to the lesser and included offence of manslaughter and made no admission in respect of the underlying offence of careless use of a firearm. The Crown argues and, to a certain extent the British Columbia Court of Appeal accepted, that the trial judge’s instructions to the jury essentially accorded with the position adopted by counsel for Mr. Gunning at trial. References are made to counsel’s closing address and to the exchange that followed in support of the position that counsel himself could not articulate a possible route to an acquittal. With respect, counsel’s closing address and the exchange that followed must be viewed in context. By that time the trial judge had already ruled that he saw no air of reality to any defence to the underlying charge of careless use of a firearm, including defence of property. Indeed, in light of this ruling, there was no other possible route to an acquittal and counsel’s position at that stage of the trial is hardly surprising. But it cannot be held against Mr. Gunning.

35 It follows from the foregoing analysis that the trial judge erred in instructing the jury that the fourth ingredient of the offence of murder, or alternatively of manslaughter, had been proven by the Crown. In making the finding of fact that Mr. Gunning’s use of the firearm on the morning in question was careless within the meaning of s. 86 of the *Criminal Code*, and hence an unlawful act that caused the death of Mr. Charlie, the trial judge usurped the exclusive domain of the jury. Rather than deciding the issue himself, it was incumbent upon the trial judge to instruct the jury on the law in respect of the offence of careless use of a firearm, including any defences that arose on the evidence, and to leave for the jury the ultimate application of the law to the facts. That issue, together with the question of whether there was an intent to kill, were central in this trial. Mr. Gunning was entitled to have a jury of his peers, not the judge, determine whether his use of the shotgun was unlawful and constituted a marked departure from the standard of care of a reasonably prudent person in his circumstances on the morning in question.

36 In my view, the trial judge’s belated explanation to the jury was insufficient to cure the error. The Crown conceded as much before the British Columbia Court of Appeal, although not before this Court. The trial judge’s main instructions were forceful and definitive. They were given to the jury in writing. The instructions were repeated during the course of the later explanation. The purported correction described the jury’s option of coming back with a not guilty verdict as a “possibility” that “technically”, “hypothetically” could be reached. In addition, the unfortunate comment about the privilege on the part of a jury to reach a perverse verdict may have further detracted the jury from any serious consideration of Mr. Gunning’s position in respect of the events that led to the tragic death of Mr. Charlie.

37 In my view, the trial judge also erred by failing to instruct the jury on the defence of property. As noted earlier, there are four elements to the defence. There was no question that Mr. Gunning was in peaceable possession of his dwelling-house and that Mr. Charlie, at least after he was told to leave, was a trespasser. The fourth element, the reasonableness of the force used, was more contentious. However, as stated in *Cinous*, at para. 54, “[t]he question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.”

38 It is my view that the trial judge erred first, by taking too narrow a view of the scope of the defence advanced by Mr. Gunning and second, by deciding its merits. It is apparent from the above-noted excerpts of the pre-charge discussions that the trial judge initially misunderstood Mr. Gunning to be raising this defence in respect of the shooting. He then appeared to take the erroneous view that the defence could only be raised in respect of the “use” that actually caused the death (presumably the discharge of the weapon) and that it could not be raised in respect of Mr. Gunning’s actions in taking and loading the gun for the purpose of intimidating Mr. Charlie into leaving the house. However, all of the events preceding the shooting had to be taken into account in determining whether Mr. Gunning had used reasonable force in his attempt to eject Mr. Charlie. In the end result, in determining whether there was any air of reality to this fourth element of the defence of property (i.e., the reasonableness of the force used to eject the trespasser), it becomes clear that the trial judge overstepped his role and decided the substantive merits of the defence. This is particularly apparent from his comment reproduced above that “a perfectly sober person having to load a gun because somebody is not only not leaving but being insulting may not be unlawful”, but that the matter was otherwise in the case of this intoxicated accused. This weighing of the evidence and ultimate determination of the merits of the defence were matters for the jury to resolve.

E. *The Defence of Provocation*

39 The defence of provocation was also raised at trial and the jury was instructed accordingly. Section 232(1) provides that:

Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

Provocation is defined under s. 232(2):

A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.

40 Mr. Gunning takes no issue on the instructions that were given to the jury but submits that the trial judge erred by failing to instruct the jury on the deemed assault provision under s. 41(2). It reads as follows:

**41.** . . .

(2) A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property, or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation.

41 Mr. Gunning submits that the trial judge should have instructed the jury that, as a matter of law, Mr. Charlie’s actions in resisting his attempts to remove him were deemed to be an unjustified and unprovoked assault and thus constituted the wrongful act or insult required to found the defence of provocation under s. 232 of the *Criminal Code*.

42 In rejecting this ground of appeal, the British Columbia Court of Appeal first expressed some doubt about whether the defence of provocation should have been left to the jury at all. I make no comment on this aspect of the matter. This issue was not raised at trial, nor was it raised by the parties before the Court of Appeal. Whether the defence of provocation arises on the evidence is a question better left to the trial judge on the new trial.

43 However, I agree with the Court of Appeal that the trial judge did not err by failing to put s. 41(2) to the jury in relation to the defence of provocation. Counsel did not refer the trial judge to s. 41(2) and, in my view, understandably so. The defence of provocation only applies in respect of the offence of murder, in this case the alleged intentional shooting of Mr. Charlie. Mr. Gunning never asserted that he shot Mr. Charlie for the purpose of removing him from his property. In any event, the defence of property would have no application to an intentional killing of a trespasser; the killing could only be justified in self-defence: *Baxter*, at p. 114. Hence, I would not give effect to this ground of appeal.

V. Disposition

44 For these reasons, I would allow the appeal, set aside the conviction and order a new trial.

*Appeal allowed.*

*Solicitor for the appellant: Glen Orris, Vancouver.*

*Solicitors for the respondent: Peck and Company, Vancouver.*