

Case Name:

R. v. Cote

**Between
Her Majesty the Queen, Respondent, and
Gaetan Cote, Appellant**

[2018] O.J. No. 5685

2018 ONCA 870

367 C.C.C. (3d) 322

150 W.C.B. (2d) 597

143 O.R. (3d) 333

2018 CarswellOnt 18083

Docket: C62515

Ontario Court of Appeal

M.L. Benotto, L.B. Roberts and D. Paciocco JJ.A.

Heard: October 9, 2018.

Judgment: October 31, 2018.

(66 paras.)

Criminal law -- Procedure -- Trial judges duties -- Charge or directions -- Defences -- Evidence of witnesses -- Appeal by accused from conviction for second degree murder dismissed -- Appellant stabbed victim during a fight -- Trial judge adequately instructed jury regarding assessment of witness testimony, reviewed the evidence including that of several witnesses to the effect that the appellant typically was not physically aggressive, and repeatedly instructed jury to consider all the evidence -- Trial judge did not err in charging jury on s. 34(1) and correctly charged the jury on both the subjective and objective elements of ss. 34(1) and s. 34(2).

Criminal law -- Evidence -- Admissibility -- Prejudicial evidence -- Hearsay rule -- Exceptions --

Necessary and reliable evidence -- Appeal by accused from conviction for second degree murder dismissed -- Appellant stabbed victim during a fight -- Trial judge did not err in admitting statements made by victim ante-mortem -- Since testimony about victim's statements satisfied state of mind exception, it was sufficient to meet the threshold indicia of reliability criterion of the principled exception -- Evidence of victim's peaceful disposition was relevant because appellant had raised and was relying on self-defence -- Trial judge did not err in law in admitting into evidence photographs depicting possible anatomical positions of deceased at time of the stabbing.

Criminal law -- Sentencing -- Criminal Code offences -- Offences against person and reputation -- Homicide -- Second degree murder -- Particular sanctions -- Imprisonment -- Parole ineligibility -- Appeal by the accused from sentence imposed for second degree murder dismissed -- Appellant stabbed victim during a fight -- He was sentenced to life imprisonment without parole eligibility for 12 years -- While trial judge erred in finding that that appellant's attempt to lay blame on the deceased constituted an aggravating factor, the error had no impact on the sentence imposed.

Appeal by the accused from conviction and sentence for second degree murder. The appellant was sentenced to life imprisonment without parole eligibility for 12 years. The appellant stabbed the victim during a fight. The appellant testified that the victim was the aggressor and that the victim introduced the knife into the fight. The appellant argued that the trial judge made a series of errors regarding the admission of evidence and in his charge to the jury. He also argued that the trial judge erred on sentencing by considering, as an aggravating factor, the appellant's attempt to blame the victim for his death.

HELD: Appeals dismissed. Although the trial judge admitted statements made by the victim ante-mortem to a friend under the principled exception to the hearsay rule, both the friend's proposed evidence and the hearsay statements that were ultimately presented would satisfy the state of mind exception relied upon by the Crown. The statements attributed to victim that he was on the appellant's kill list purported to narrate his present state of mind, fear that he would be killed by the appellant, or fear because he was at the top of the appellant's kill list. Since the friend's testimony about the victim's statements satisfied the state of mind exception, it was sufficient to meet the threshold indicia of reliability criterion of the principled exception. The trial judge gave extensive guidance to the jury on how to assess testimony, and fairly identified the problems with the friend's evidence when summarizing it. It was for the trial judge to decide whether more was required, and he was not asked by the appellant to give a sharp warning about the friend's evidence. The trial judge did not err in admitting evidence of the victim's peaceful disposition. The evidence admitted was relevant because the appellant had raised and was relying on self-defence. A specific instruction regarding this evidence was not essential because the trial judge instructed the jury regarding the assessment of witness testimony, he reviewed the evidence including that of several witnesses to the effect that the appellant typically was not physically aggressive, and he repeatedly instructed the jury to consider all the evidence. The trial judge did not err in law in admitting into evidence photographs depicting possible anatomical positions of the deceased at the time of the

stabbing. The evidence was not speculative. The photographs were demonstrative evidence, helpful in understanding and evaluating the analyst's testimony. The trial judge's instructions to the jury appropriately guarded against prejudicial effect, to the extent there was any. The trial judge did not err in charging the jury on s. 34(1). That part of the charge was expressly requested by the appellant during the pre-charge conference. In addition, a charge on s. 34(1) was logical because the appellant testified that the first stab wound was not inflicted intentionally. The trial judge correctly charged the jury on both the subjective and objective elements of ss. 34(1) and s. 34(2). The trial judge did not err in increasing the period of parole ineligibility. While the trial judge erred in finding that the appellant's attempt to lay blame on the deceased constituted an aggravating factor, the error had no impact on the sentence imposed. The period of 12 years was not demonstrably unfit. Sentence: Life imprisonment; 12 years' parole ineligibility.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 34(1), s. 34(2)

Appeal From:

On appeal from the conviction entered on November 25, 2015, and the sentence imposed on January 11, 2016, by Justice Irving W. André of the Superior Court of Justice, sitting with a jury, with reasons reported at 2016 ONSC 226.

Counsel:

Paul Calarco, for the appellant.

Lisa Joyal, for the respondent.

The following judgment was delivered by

1 THE COURT:-- The appellant and his friend, James "Jim" McQuhae, were in a fight. The altercation began as a fist fight and became a knife fight; McQuhae was stabbed and died. The appellant admitted causing his death. The appellant was convicted by a jury of second-degree murder and sentenced to life imprisonment without parole eligibility for 12 years. He appeals the conviction and sentence.

2 The appellant submits that the trial judge made a series of errors regarding the admission of evidence and in his charge to the jury. He further submits that the trial judge erred on sentencing by considering, as an aggravating factor, the appellant's attempt to blame McQuhae for his death.

FACTS

3 The appellant and McQuhae had known each other as neighbours since the appellant was a teenager. At the time of his death McQuhae was 65 and the appellant was 51.

4 In December 2007, the appellant developed heart problems. The following May, the appellant moved into McQuhae's home in Mississauga. His heart problems worsened, which affected his ability to work and pay his monthly rent. In April 2012, McQuhae told the appellant to move out. By that time the appellant owed him approximately \$14,000. The appellant stayed with different siblings and eventually began living on his brother's property in Waubaushene, Ontario.

5 Late in the evening of June 18, 2012, the appellant drove from Waubaushene to Mississauga to retrieve some items from McQuhae's garage. The appellant testified that he found a crate of garbage sitting on his possessions in the garage.

6 Feeling upset and angry that the garbage was sitting on his possessions, the appellant took the crate inside and confronted McQuhae. This quickly sparked an argument and the appellant testified that, "before [he knew] it", McQuhae began punching him in the back of his head and in the face. The appellant responded by dumping the crate of garbage on McQuhae.

7 The appellant testified that McQuhae then came at him. The appellant put McQuhae in a headlock, and they wrestled and fell to the ground. The appellant released him from the headlock and the men briefly separated. The appellant testified that as he rested on his hands and knees, trying to catch his breath, McQuhae approached him holding a knife. The appellant grabbed McQuhae's hand and the two men wrestled for control over the knife. The appellant threw McQuhae off balance and "pushed the knife into him". The appellant testified that the rest was a "blur". During cross-examination the appellant admitted that he remembered stabbing McQuhae at least three times.

8 The appellant left McQuhae's house and drove north. After stopping for gas, the appellant pulled into a parking lot in Bolton and tried to commit suicide using a utility knife to slash his neck. The wound to his neck stopped bleeding and the appellant recovered sufficiently to drive himself to a police station in Barrie where he arrived at approximately 2:45 a.m. At the police station, the appellant advised Barrie police that he thought he had hurt his friend in a fight after his friend attacked him with a knife. Police were dispatched to McQuhae's home where they discovered his body at approximately 3:30 a.m. on June 19, 2012.

9 Two forensic pathologists concluded that McQuhae's death was caused by some combination of stabbing and compression of the neck or strangulation. He had been stabbed five times: twice in the chest, once in the abdomen, and twice in the back. The deceased's neck was bruised, his thyroid cartilage (larynx) was fractured, and there were very small hemorrhages on the surface of his eyelids. These injuries were consistent with considerable force being applied to his neck. McQuhae's severe heart disease may have also contributed to his death.

10 The appellant was charged with second-degree murder.

11 The appellant argues that the trial judge erred in allowing the Crown to admit: (1) ante-mortem statements purportedly made by McQuhae; (2) evidence of McQuhae's peaceful disposition; and (3) photographs of a model depicting the blood spatter on McQuhae's shirt.

12 The appellant also argues that the trial judge erred in the jury charge with respect to self-defence, provocation, the exculpatory value of the evidence led by the Crown, and the *W.(D.)* analysis.

ISSUES

13 The appellant raises the following issues:

1. Did the trial judge err in law in admitting into evidence ante-mortem statements purportedly made by McQuhae?
2. Did the trial judge err in law in admitting evidence of McQuhae's peaceful disposition?
3. Did the trial judge err in law in admitting into evidence photographs depicting possible anatomical positions of the deceased at the time of the stabbing?
4. Did the trial judge err in law in failing to properly charge the jury on the elements of self-defence?
5. Did the trial judge err in law in failing to properly charge the jury on the issue of provocation?
6. Did the trial judge err in law in failing to charge the jury on the exculpatory value of evidence led by the Crown?
7. Did the trial judge err in law in the *W.(D.)* instruction by isolating the appellant's evidence and character evidence in his charge to the jury?
8. Did the trial judge err in increasing the period of parole ineligibility?

ANALYSIS

Issue 1: Did the trial judge err in law in admitting into evidence ante-mortem statements purportedly made by McQuhae?

14 In a pre-trial ruling, the trial judge held that the Crown could present hearsay evidence from Todd Starr, a long-time friend of McQuhae. Starr was permitted to testify that approximately two or three days before his death, McQuhae told Starr that he was concerned that he might be on the top of the appellant's kill list and that he was thinking of changing the locks.

15 The Crown had argued that this testimony was admissible under the "state of mind" or "present intentions" exception to the hearsay rule recognized in *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, or alternatively, pursuant to the "principled exception" described in *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787. The trial judge relied on the latter exception to find this evidence admissible.

16 During trial, the evidence did not materialize precisely as expected. Instead, Starr testified that McQuhae was "worried that [the appellant] was going to kill him." No evidence was offered about changing the locks.

17 When cross-examined, Starr adopted his earlier statement about McQuhae being concerned that he was at the top of the appellant's kill list. Starr then testified that it was after McQuhae made this comment that he said he was worried that the appellant was going to kill him. Later in the cross-examination Starr said that McQuhae's concern about being at the top of the appellant's kill list "says the same thing" as being worried about the appellant killing him.

18 The appellant argues that the trial judge erred in admitting this testimony. He challenges the sufficiency of the indicia of reliability of the statements to meet the threshold reliability required by the principled exception. He also urges that this evidence should not have been admitted because its probative value is outweighed by its prejudicial effect.

19 The appellant does not take issue with the jury directions relating to the proper use of the evidence. The appellant did argue, however, that the trial judge erred by not giving a sharp warning about credibility problems with Starr's testimony.

20 We would not give effect to these grounds of appeal.

(i) The Threshold Reliability Challenge

21 Although the trial judge admitted the evidence under the principled exception to the hearsay rule, both the proposed evidence and the hearsay statements that were ultimately presented would satisfy the "state of mind" exception relied upon by the Crown. This is enough, in the circumstances, to demonstrate that the threshold "indicia of reliability" requirements of the

principled exception were met. We will explain.

22 In *Starr*, at para. 168, Iacobucci J., for the majority, quoted *R. v. Smith*, [1992] 2 S.C.R. 915 at p. 925 stating that an "exception to the hearsay rule arises when the declarant's statement is adduced in order to demonstrate the intentions, or state of mind, of the declarant at the time when the statement was made". He endorsed the conditions for this exception expressed in J.H. Wigmore, *Evidence in trials at common law*, revised ed. by J.H. Chadbourn (Boston: Little Brown, 1976) vol. 6 at para. 1725, p. 129, that the statement must "be of a *present existing state of mind*, and must appear to have been made in a natural manner and not under circumstances of suspicion" (emphasis in original). Naturally, the present state of mind of the declarant must also be relevant to the proceedings: *R. v. C.(M.)*, 2014 ONCA 611, 314 C.C.C. (3d) 336, at para. 63.

23 Each of these requirements is met in this case.

24 The statements attributed to McQuhae purport to narrate his present state of mind -- fear that he would be killed by the appellant, or fear because he was at the top of the appellant's kill list.

25 The trial judge found that the proposed statements appeared to have been made without leading questions or improper influence, or in contemplation of any legal proceedings. In other words, the statements were made in a natural manner.

26 In *Starr*, at para. 178, the ante mortem statement of the deceased that he intended to go to meet the accused was made in circumstances of suspicion, namely, the prospect that the deceased lied to his girlfriend about his present intention to cover up his actual intention to see another woman. No such circumstances of suspicion attend McQuhae's statements concerning his state of mind of fear.

27 And, as in *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, at para. 63, the deceased's fear of the appellant was relevant in that it showed that the relationship between the men was acrimonious or strained, which in turn is capable, along with other evidence, of supporting an inference that the appellant had an animus or intention to act against the deceased. Although the distinction is not without its subtlety, it was determined authoritatively in *Griffin*, at paras. 58-64, that this line of reasoning does not offend the prohibition in *Starr* against treating a declarant's hearsay statement about his own state of mind as proof of another person's state of mind.

28 Since Starr's testimony about McQuhae's statements satisfies the "state of mind" exception, it is sufficient to meet the threshold "indicia of reliability" criterion of the principled exception. This is clear because in *Starr*, at para. 168, Iacobucci J. adopted the foregoing requirements to the "state of mind" exception precisely because they satisfy the demands of reliability under the principled approach. Although the trial judge could properly have acceded to the Crown's request to use the fixed "state of mind" hearsay exception, his holding that the circumstances satisfied the threshold reliability requirement of the principled exception was not wrong. He took an alternative, and available, route to the same outcome.

29 The appellant argued that, in the circumstances of this case, there were important indicia of unreliability that should nonetheless have prevented Starr from offering McQuhae's statements. He focused specifically on Starr's unreliability as a witness. The appellant urged that the evidence showed Starr to be biased against the appellant, and that he may have fabricated his testimony to prevent the appellant from relying on self-defence.

30 This argument is misdirected. The credibility and reliability of a hearsay witness such as Starr is not relevant to the threshold reliability inquiry because the threshold reliability inquiry is meant to serve as a substitute for cross-examination of the declarant, and because the hearsay witness is fully available to be cross-examined at trial: *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at paras. 47-52; *R. v. Humaid* (2006), 81 O.R. (3d) 456 (C.A.), at paras. 50-51, leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 232. The jury in this case was in a position to test fully the truthfulness and accuracy of Starr's claim that the hearsay statements were made and what was said. The threshold reliability inquiry focuses on the reliability of the hearsay statements themselves based on the circumstances in which the statements were made. As indicated, in this case the indicia of reliability were sufficient.

(ii) Probative Value versus Prejudicial Effect

31 Even when hearsay evidence is technically admissible there is a discretion to exclude it where its potential probative value is exceeded by its potential prejudicial effect: *Blackman*, at para. 51; *R. v. Candir*, 2009 ONCA 915, 250 C.C.C. (3d) 139, at para. 59, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 8. In *Humaid*, at para. 57, Doherty J.A. recognized that, in rare cases, the evidence of a hearsay witness can be incredible or unreliable enough to deprive the evidence of its probative value and necessitate discretionary exclusion.

32 The appellant asked the trial judge to exercise his discretion and exclude the hearsay evidence in this case. He pointed to the problems with Starr's credibility and reliability. He also argued that the hearsay evidence lacked probative value because the evidence, taken as a whole, showed that the appellant's kill list was not serious. Further, in the circumstances, the jury would be prone to inflate its importance. He said that if the hearsay statements were to be admitted, he would have no choice but to show that he made threats of death lightly without any intention to carry them out, evidence that would cast him in a poor light before the jury. The trial judge declined to exercise his exclusionary discretion. The appellant argues that he erred in doing so.

33 We would not interfere. It is for trial judges to determine whether to exercise the exclusionary discretion. Appellate deference is owed to those decisions: *R. v. Moo*, 2009 ONCA 645, 247 C.C.C. (3d) 34, at para. 101; *R. v. S.(S.)*, 2008 ONCA 140, 232 C.C.C. (3d) 158, at paras. 29-31. The appellant has been unable to identify any legal errors or errors in principle in the way that discretionary decision was made, or show any material misapprehension of the evidence. Nor was the trial judge's balancing of factors unreasonable.

(iii) The Jury Direction

34 Although not pressed during oral argument, the appellant contended in his written argument that the trial judge erred in not giving a sharp warning to the jury about Starr's evidence. We disagree. The trial judge gave extensive guidance to the jury on how to assess testimony, and fairly identified the problems with Starr's evidence when summarizing it. It was for the trial judge to decide whether more was required, and he was not asked by the appellant to give a sharp warning about Starr's evidence.

Issue 2: Did the trial judge err in law in admitting evidence of McQuhae's peaceful disposition?

35 The Crown sought to lead the following evidence: (1) evidence of Starr that McQuhae was generally slow to anger; (2) evidence of John Eaton, McQuhae's neighbour, that McQuhae was not of an aggressive nature; and (3) evidence of Mike Cote, the appellant's brother, that McQuhae was a "nice guy" and that he had never seen McQuhae upset or lose his temper.

36 The Crown argued that where an accused raised the issue of self-defence, and specifically alleged that McQuhae was the initial physical aggressor, evidence of McQuhae's peaceful disposition was relevant and probative towards potentially refuting the appellant's claim and properly admissible.

37 The appellant submitted that evidence of McQuhae's peaceful disposition lacked relevance and probative value because, in raising the defence of self-defence, the appellant was not asserting that McQuhae had a violent disposition. Even if the character of the deceased was put in issue, evidence that a person is typically peaceful does not prove how such a person would react in extreme circumstances. Finally, trial counsel for the appellant argued that the appellant could be prejudiced by this evidence because it could be juxtaposed against evidence that the appellant had quick temper.

38 The trial judge admitted only the second part of Cote's evidence, that he had never seen McQuhae lose his temper, because it was evidence of McQuhae's peaceful disposition. For the same reason, the trial judge admitted the evidence of Starr to the effect that McQuhae was generally slow to anger, and the evidence of Eaton to the effect that McQuhae was not of an aggressive nature.

39 We do not agree that the trial judge erred in admitting the evidence. The evidence admitted was relevant because the appellant had raised and was relying on self-defence. This court has held that evidence of a deceased's peaceful disposition is relevant to the issue of self-defence, because the jury has to determine if McQuhae acted in a way that caused the accused to fear that his life was in danger or that he would suffer grievous bodily harm: *R. v. Krasniqi*, 2012 ONCA 561, 291 C.C.C. (3d) 236, at para. 63. Such evidence is therefore admissible where its probative value outweighs its prejudicial effect: *R. v. Krasniqi*, at para. 63. The appellant has not persuaded us that, in this case, the prejudice caused by the character evidence required its exclusion.

40 The appellant also argues that the trial judge erred by not instructing the jury about the use of

this evidence, a non-direction amounting to a misdirection. He claims that this error was made worse because the trial judge re-iterated the evidence of peaceable disposition in a prejudicial way. This court has stated that non-direction only becomes misdirection, "when something left unsaid makes wrong something that was said, or where what was left unsaid is essential to an accurate instruction on the subject": *R. v. Bradey*, 2015 ONCA 738, 127 O.R. (3d) 721, at para. 131. A specific instruction regarding this evidence was not essential because the trial judge instructed the jury regarding the assessment of witness testimony, he reviewed the evidence including that of several witnesses to the effect that the appellant typically was not physically aggressive, and he repeatedly instructed the jury to consider all the evidence. Further, the appellant did not request that the trial judge provide a charge to the jury as he now submits. This could have been a strategic decision not to call attention to this evidence. The fact that counsel had a full opportunity to raise this issue with the trial judge but remained silent is a factor in assessing the adequacy of the instruction on appeal: *R. v. Minor*, 2013 ONCA 557, 303 C.C.C. (3d) 382, at para. 89; *R. v. Royz*, 2009 SCC 13, [2009] 1 S.C.R. 423, at para. 3.

Issue 3: Did the trial judge err in law in admitting into evidence photographs depicting possible anatomical positions of the deceased at the time of the stabbing?

41 The trial judge admitted photographs depicting possible anatomical positions of the deceased at the time of the stabbing. He concluded that photographs of the deceased's bloodstained shirt worn by a model demonstrating the possible anatomical positions of the deceased was necessary in order to explain the bloodstain pattern analyst's conclusion that the only anatomical positions that accounted for the bloodstains on the deceased's pants and shirt were either a prone position leaning over at the waist, or a prone position with hands and knees on the ground. The trial judge concluded that the photographs helped explain the expert opinions, would assist the jury in following the evidence, and were probative with respect to the issues of intention and self-defence.

42 The appellant submits that the trial judge erred because the photographs depicted anatomical positions that were merely possible, rather than probable. It was improper to admit photographs depicting how McQuhae may have been positioned without any testing of the accuracy of that depiction.

43 We do not agree that the evidence was speculative. The analyst testified during his examination-in-chief as follows:

So what position would the decedent have to be in in order to only get [blood] stains on the sleeves and on the inner part of the -- the shirt and not basically anywhere else in the scene other than that pooling position?

...

I did some experimentation using a model that was the same height as our decedent and went through basic scenarios. So in order to expose both sleeves and the inner portion of both the left and right panels of the shirt, the only way that would make sense ... is if the shirt and wearer are in some sort of prone position; bent over.

...

[T]he theory was that the person was in this or a similar position for a period of time while bleeding. It's the only position that accounts for the staining we're seeing at the scene and the staining we're seeing on both the -- the pants and shirt of the decedent [Emphasis added.]

44 The photographs were demonstrative evidence, helpful in understanding and evaluating this testimony. They illustrated the analyst's observations and conclusions as to the position of the deceased when he was stabbed in a more effective way than a simple verbal description would have done.

45 The trial judge's instructions to the jury appropriately guarded against prejudicial effect, to the extent there was any. He advised the jury that the photographs and reports filed as exhibits were only as good as the evidence on which they were based, and that in deciding how much or little to rely on them, the jury should consider not only how they were prepared, but also the evidence on which they were based. The trial judge did not err either in admitting the photographs, or in his instructions to the jury on how the photographs should be used.

Issue 4: Did the trial judge err in law in failing to properly charge the jury on the elements of self-defence?

46 The appellant submits that, even though both the Crown and defence requested a charge on both s. 34(1) and 34(2), the trial judge erred in charging on s. 34(1). He submits that, because the appellant admitted to intentionally stabbing McQuhae as a proportionate response to a deadly situation, a *prima facie* case had been made out that the appellant likely intended to cause significant bodily harm. That should have disqualified s. 34(1).

47 He further submits that the s. 34(1) charge was wrong. He argues the jury should have been instructed that the appellant could have used force to repel McQuhae's attack if he did not intend to cause death or grievous bodily harm, so long as he used no more force than was necessary based upon the appellant's *honest and reasonable* perception of the attack. The jury should have been told that s. 34(1) applies even if great bodily harm was inflicted and that the force used need not be measured to a nicety. These principles were either not explained or were not explained with sufficient detail. As a result, the trial judge failed to properly emphasize the *honesty* of the

appellant's belief and the *reasonableness* of that belief. Instead, the trial judge simply referred to a reasonable belief, rather than an honest belief reasonably held. In other words, the trial judge failed to tell the jury that the appellant could be mistaken.

48 The appellant also alleges that the charge on s. 34(2) was in error because the trial judge did not properly identify the actions of McQuhae that attracted s. 34(2). More specifically, the trial judge should have drawn a sharp distinction between the initial argument and fight, and McQuhae's introduction of the knife. As a result, the jury was left with the impression that the original fight was a basis for measuring the force used by the appellant.

49 As with s. 34(1), the appellant submits that trial judge over-emphasized the objective elements of the defence under s. 34(2). The trial judge referred to reasonable belief rather than instructing the jury to ask whether the appellant honestly believed, even if he was mistaken, that he was being assaulted, and that his belief was reasonable in the circumstances.

50 We do not agree.

51 The trial judge did not err in charging the jury on s. 34(1). That part of the charge was expressly requested by appellant during the pre-charge conference. In addition, a charge on s. 34(1) was logical because the appellant testified that the first stab wound was not inflicted intentionally. Moreover, the appellant's counsel's closing address to the jury left it open to the jury to consider s. 34(1). Therefore, the instruction on s. 34(1) was correct.

52 The trial judge correctly charged the jury on both the subjective and objective elements of s. 34(1). In particular, the trial judge explicitly referred to the appellant's belief and the fact that self-defence could be made out even if the appellant was honestly mistaken about the facts. When viewed as a whole, the charge also made clear that self-defence was available even when great bodily harm was caused so long as it was unintended. This aspect of the charge properly stressed the appellant's intention rather than the consequences of his actions.

53 The trial judge correctly instructed the jury on s. 34(2) and properly explained both the subjective and objective components of the defence. The trial judge's instructions clearly conveyed that the appellant's belief that he was being assaulted could be mistaken, so long as it was honestly and reasonably held. Similarly, the instructions clearly conveyed that the appellant could be mistaken regarding whether he was in danger, so long as he honestly and reasonably believed that he was. The same is true of the trial judge's instructions regarding whether the appellant honestly and reasonably believed that he had to use force to save himself.

54 We therefore would not give effect to these grounds of appeal.

Issue 5: Did the trial judge err in law in failing to properly charge the jury on the issue of provocation?

55 The appellant submits that the trial judge failed to relate the evidence that was capable of constituting provocation to the legal requirements of the defence. The appellant testified to an initial fight and then the introduction of a knife by McQuhae. However, the trial judge did not distinguish between the initial fight and the introduction of the knife. The introduction of the knife fundamentally altered the nature of the conflict by significantly escalating the danger faced by the appellant.

56 We do not agree.

57 The trial judge's charge on provocation was requested by the appellant and modelled after the standard charge on provocation. The trial judge's references to "insult" and McQuhae's initial attack on the appellant using fists followed the appellant's own submissions at trial: that McQuhae's initial attack using fists was part of the wrongful act or insult.

58 In any event, the trial judge clearly communicated to the jury that there had to be either a wrongful act or an insult. Moreover, given the appellant's testimony and closing address characterizing the altercation as a continuous event, the trial judge properly included the initial fight as part of the context leading up to the introduction of the knife.

Issue 6: Did the trial judge err in law in failing to charge the jury on the exculpatory value of evidence led by the Crown?

59 The Crown introduced the appellant's statements made to police in Barrie when he admitted to killing McQuhae, but asserted self-defence. The appellant submits that, the trial judge did not explain to the jury that his statements to the police were exculpatory.

60 We do not agree. The trial judge clearly instructed the jury that all the appellant's statements in evidence before them may be used for or against the appellant. Indeed, the trial judge specifically instructed the jury that they "must" consider remarks that may help the appellant. Further, the appellant did not object to this aspect of the charge at the time of trial: see *R. v. Polimac*, 2010 ONCA 346, 254 C.C.C. (3d) 359, at paras. 85-87.

Issue 7: Did the trial judge err in law in the *W.(D.)* instruction by isolating the appellant's evidence and character evidence?

61 Mr. Cote testified in his defence. He also offered additional defence evidence through other witnesses. Yet when the trial judge charged the jury on the *W.(D.)* test the trial judge described the analysis the jury should give to "Mr. Cote's evidence". The appellant submits that this charge was in error because the *W.(D.)* analysis should be applied to all of the defence evidence, and not simply Mr. Cote's testimony.

62 Again, we disagree that the trial judge erred. He did not isolate Mr. Cote's testimony. He spoke of "Mr. Cote's evidence", an expression capable of including all of the evidence Mr. Cote

called. In this case, the trial judge's use of the word "evidence" would not have been misunderstood by the jury as being confined to the appellant's testimony. Read as a whole, the charge instructs the jury, at many points, to consider all of the evidence, and clearly directs the jury to consider all evidence which assists the appellant. The jury could not have been under any misunderstanding about its duty to consider all of the evidence in determining whether it raised a reasonable doubt about the appellant's guilt: *R. v. Fogah*, 2018 ONCA 564, 362 C.C.C. (3d) 4, at para. 73.

Issue 8: Did the trial judge err in increasing the period of parole ineligibility?

63 The appellant submits that the trial judge erred by considering the appellant's rejected s. 34 defence to be an aggravating factor, characterizing it as an attempt to shift responsibility to McQuhae.

64 We agree with the appellant that the trial judge erred in finding that that the appellant's attempt to lay blame on the deceased constituted an aggravating factor. This was the essence of his assertion of self-defence. That said, we do not agree that the error had an impact on the sentence imposed, or that the sentence is unfit.

65 The period of 12 years is not demonstrably unfit. Nor does it constitute an unreasonable departure from the principle that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender": *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 53. We do not interfere with the period of parole ineligibility imposed by the trial judge.

DISPOSITION

66 The appeal as to conviction is dismissed. Leave to appeal the sentence is granted but the appeal as to sentence is dismissed.

M.L. BENOTTO J.A.

L.B. ROBERTS J.A.

D. PACIOCCO J.A.

---- End of Request ----

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