R. v. Cheveldayoff, [2018] O.J. No. 3855

Ontario Judgments

Ontario Superior Court of Justice

S.A.Q. Akhtar J.

Heard: June 4, 2018.

Judgment: July 16, 2018.

Court File No.: CR-17-70000526-0000

[2018] O.J. No. 3855 | 2018 ONSC 4329

Between Her Majesty the Queen, and Bradley Cheveldayoff

(63 paras.)

Case Summary

Criminal Law — Defences — Provocation — Application by defence for determination that partial defence of provocation be left with jury allowed — Accused was charged with second-degree murder — Following brief fight with victim, accused retrieve gun and shot victim six times in back — There was evidence that victim and others confronted accused and that victim grabbed accused from behind — There was some foundation for finding that accused's reaction was sudden and that he lost control — Defence was left to jury — Criminal Code, s. 232.

Criminal Law — Evidence — Witnesses — Compellability — Application by defence for order that Crown be required to call witness dismissed — Accused was charged with second-degree murder in shooting death of victim — Witness was friend of accused who gave statements to police and Crown and testified at preliminary hearing and on voir dire — Crown indicated intention to call witness in opening address but later elected not to call witness — There was no obligation on Crown to call witness — Defence had full disclosure of witness' statements and could call witness if it felt he had necessary evidence to give.

Applications by the defence for an order that the Crown be required to call a witness and a determination that the partial defence of provocation be left with the jury. The accused Bradley Cheveldayoff was charged with second-degree murder. It was alleged that, following a brief fight, he retrieved a gun and shot the victim six times in the back. Malique Kamara was with the victim when he encountered Cheveldayoff. Kamara gave two statements to the police and testified at the preliminary hearing and at a voir dire. There were inconsistencies in the various accounts given by Kamara, both between the different statements and internally within each statement. Notwithstanding the difficulties, the Crown indicated in her opening address that she would be calling Kamara as a witness. Kamara provided a new statement shortly before he was to be called as a witness which was radically different from his earlier statements. As a result, the Crown elected not to call him as witness at trial. The defence submitted that it would be unfair not to direct the Crown to call Kamara given the Crown's undertaking to call him as a witness in her opening address. The defence also sought to leave the partial defence of provocation with the jury based on the fight between Cheveldayoff and the victim before the shooting. The Crown argued that there was no air or reality to the defence of provocation.

HELD: Applications allowed in part.

There was no obligation on the Crown to call a witness. The defence had full disclosure of Kamara's statements

and could call him as witness if it felt he had necessary evidence to give. Moreover, it was not in the interests of justice to force the Crown to call a witness if felt unnecessary, was untruthful, or might damage its case by assisting the defence. There was evidence that Kamara, the victim and others confronted Cheveldayoff and that the victim grabbed him from behind, leading to the fight. The fact that the shooting occurred seconds after the end of the fight provided some foundation that Cheveldayoff's reaction was sudden and that he lost control. The defence of provocation was left to the jury.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 232

Counsel

B. Richards and E. Weis, for the Crown.

M. Murphy and J. Collins, for Mr. Cheveldayoff.

S.A.Q. AKHTAR J.

RULING # 5 - DEFENCE APPLICATION TO ORDER THE CROWN TO CALL MALIQUE KAMARA

Background

1 Bradley Cheveldayoff stands charged with second degree murder. The charge relates to of an incident that occurred outside the Tim Hortons coffee shop located at Yonge Street north of Bloor Street.

2 The allegation arises out of a shooting that followed a short fight between Mr. Cheveldayoff and the deceased, Gabriel Nikov. The Crown's position is that Mr. Nikov, in the company of two other men, Malique Kamara and Matthew Desir, encountered the accused, Mr. Cheveldayoff, along with a female friend, Rhyza Monroe, outside Tim Horton's, and an acrimonious exchange occurred between them.

3 When Mr. Cheveldayoff exited the Tim Hortons with Ms. Monroe, he was bear hugged from behind by Mr. Nikov and a short fight, lasting approximately 20 seconds, ensued. When it ended, Mr. Nikov proceeded to walk away northbound on Yonge Street whilst Mr. Cheveldayoff ran south, doubled back, brandishing a gun, and shot Mr. Nikov six times in the back.

Malique Kamara's Statements

4 Mr. Kamara provided two *K.G.B.*-style *[1993] 1 S.C.R. 740* statements to the police, and also testified at the preliminary inquiry as well as on a *voir-dire* in this trial.

5 There were inconsistencies in the various accounts given by Mr. Kamara, both between the different statements and internally within each statement.

6 In each version of events, Mr. Kamara recounted that he and Mr. Nikov were socialising before they went to Tim Hortons on 13 April 2016. Upon arriving there, they encountered Ms. Monroe and Mr. Cheveldayoff and the atmosphere became somewhat fractious. According to Mr. Kamara, Mr. Cheveldayoff told him, Mr. Nikov and Mr. Desir that he would "be back".

7 Mr. Kamara's statement to the police also included an utterance by Mr. Nikov that he intended to rob Mr. Cheveldayoff when he left Tim Hortons. Mr. Kamara added that he attempted to dissuade Mr. Nikov from doing anything untoward. After a *voir-dire* to determine the admissibility of this hearsay statement, I ruled that it could be adduced by the defence. See: *R. v. Cheveldayoff*, *2018 ONSC 4287*.

8 During the course of the *voir-dire*, it became clear that Mr. Kamara had given contradictory accounts of what was said by Mr. Nikov. For example, even though he told the police that Mr. Nikov intended to rob Mr. Cheveldayoff, implying that to be the reason for the attack, Mr. Kamara also told the police that he heard Mr. Nikov say "why did you touch my sister?" to Mr. Cheveldayoff when they were fighting. In his preliminary inquiry testimony, Mr. Kamara repeated his assertion that Mr. Nikov evinced an intention to rob Mr. Cheveldayoff but later on appeared to change his testimony and indicate that he thought Mr. Nikov wished to talk to Mr. Cheveldayoff but could not remember why that was.

9 Notwithstanding these difficulties, the Crown, Ms. Richards, in her opening address to the jury, indicated that she would be calling Mr. Kamara as a Crown witness, and read out a brief outline of his evidence.

The New Statement

10 On 22 May 2018, shortly before he was to be called as a witness, Mr. Kamara met with the Crown and the officer in charge, Detective Flis, and told them that he wanted to provide a new statement, which was recorded and transcribed.

11 Mr. Kamara radically changed the content of his account, contradicting and undermining his earlier statements and preliminary inquiry testimony. The following list outlines the changes to his evidence:

* In his earlier statements, Mr. Kamara said that he spent the day socialising with Mr. Nikov before going to Tim Hortons. In the 22 May statement, Mr. Kamara disowned that version of events, telling the police that prior to attending Tim Horton's, he and Mr. Nikov had been robbing people in the Queen and Spadina area and sharing the spoils. Mr. Kamara added that they both intended to continue their spree by robbing Mr. Cheveldayoff.
* When speaking of events occurring outside the Tim Hortons, Mr. Kamara stuck to the basic core of his previous accounts but altered the exchange that occurred with Mr. Cheveldayoff. On 22 May, Mr. Kamara told Detective Flis that after stopping Mr. Cheveldayoff outside Tim Horton's, Mr. Kamara asked him where he was from to which Mr. Cheveldayoff responded by saying "Empringham". Mr. Kamara told Mr. Cheveldayoff that his friend needed to talk to him, and Mr. Cheveldayoff replied "Ok. Hold on. Give me a bit" and then headed for the washroom. This new account directly contradicted Mr. Kamara's earlier assertions that Mr. Cheveldayoff had uttered words to the effect of "I'll be back".
* Mr. Kamara's earlier recounting of events had included Mr. Nikov expressing an intent to rob Mr. Cheveldayoff. That account varied from statement to statement including a contradiction at the preliminary inquiry referred to earlier. At the *voir-dire* to admit the hearsay utterance, Mr. Kamara indicated that he could not remember what Mr. Nikov had said. In the 22 May statement, however, Mr. Kamara claimed to recall the entire conversation with Mr. Nikov and told the police that he

directed Mr. Nikov to rob Mr. Cheveldayoff when he came out of Tim Horton's. This contradicted his earlier statement that he had been trying to restrain Mr. Nikov from doing anything to Mr. Cheveldayoff.

* In the 22 May statement, Mr. Kamara told the police that after the robbery plan had been agreed, he and Mr. Nikov were "high-fiving" each other. They talked about specific items that should be taken from Mr. Cheveldayoff, and Mr. Kamara gave detailed instructions on how to carry out the robbery. This was a clear divergence from his previous statements and, as the Crown points out, no "high fives" can be seen being exchanged on the video.

* Finally, Mr. Kamara told the police in the 22 May statement that he started the incident by grabbing Mr. Cheveldayoff by the hood because he thought Mr. Cheveldayoff was going to flee after stepping out of Tim Hortons. He then threw Mr. Cheveldayoff in the corner. This evidence is contradicted by the video which shows that there was no physical contact between Mr. Kamara and Mr. Cheveldayoff.

12 Mr. Kamara's explanation for giving the new version of events was that he was not "thinking straight" when he first spoke to the police and was fearful of the consequences of telling the truth.

13 After receiving the 22 May statement, the Crown indicated to the court, at the end of its case, that it was no longer intending to call Mr. Kamara as a witness.

Position of the Parties

14 The Crown submits that it no longer views Mr. Kamara as a reliable witness and is unwilling to call him as part of its case. Mr. Kamara's evidence, already riven by inconsistencies, has, in the Crown's words, gone "beyond the pale" with the 22 May statement. Notwithstanding the inconsistencies, the core of the account given prior to 22 May remained substantially the same. However, the content of the new statement is so diametrically opposed to those earlier accounts that Mr. Kamara's credibility as a witness has evaporated.

15 Ms. Murphy brings an application to force the Crown to call Mr. Kamara. She submits that it would be unfair not to direct the Crown to do so given Ms. Richards' "undertaking" to call him as a witness in her opening address. Ms. Murphy claims that it is the Crown's primary duty to present the case fairly and to secure a just result: calling Mr. Kamara fulfils that obligation.

16 Ms. Murphy asserts that even though the evidence assists the defence in advancing the partial defence of provocation, it also speaks to main issue that the jury has to decide: the intention of Mr. Cheveldayoff at the time of the offence.

17 Ms. Murphy further submits that the defence should not be prejudiced by having to call Mr. Kamara and lose the right to (a) cross-examine him and (b) address the jury after the Crown.

Legal Principles

18 In *R. v. Cook*, *[1997] 1 S.C.R. 1113*, the accused was charged with assault causing bodily harm on a male and two counts of sexual assault on a female. Only the female complainant was called at trial, with the Crown relying upon her testimony along with supporting evidence as the basis of proof on all counts. A jury convicted the accused of the assault upon the male but was unable to reach a verdict with respect to remaining two counts on the female. Upon appeal, the accused argued that there was an obligation on the Crown to call the male victim. A majority of the New Brunswick Court of Appeal agreed and overturned the conviction. However, the Supreme Court of Canada reversed and restored the conviction. After a thorough analysis of the historical background, L'Heureux-Dubé J. concluded there was no obligation on the Crown to call a witness. In summarising the position in law, and writing for a unanimous court, she stated, at paras. 55-56:

> In summary, I conclude that there is no duty upon the Crown to call witnesses nor a more specific duty to call the complainant or victim. Decisions on how to present the case against an accused must be left to the Crown's discretion absent evidence that this discretion is being abused.
>
> It has also been suggested in at least two decisions (R. v. Black *(1990), 55 C.C.C. (3d) 421* (N.S.C.A.); R. v. Taylor *(1970), 1 C.C.C. (2d) 321* (Man. C.A.)) that the Crown might wish to call witnesses with material evidence and simply make them available for cross-examination. I would certainly not go so far as to impose such a requirement, nor do I think that a trial judge should ever order the Crown to produce a witness. If the Crown wished to adopt such a procedure in a given case, however, this would, of course, be within the legitimate exercise of its discretionary authority.

19 Three years later, in *R. v. Jolivet*, *2000 SCC 29*, *[2000] 1 S.C.R. 751*, the court revisited the issue, this time in circumstances where the Crown had advised the jury that a particular witness was to be called. Later, the Crown informed the trial judge that it had changed its mind and was no longer calling that witness as it did not believe that he was truthful. The Supreme Court of Canada held that once the trial judge had accepted the Crown's explanation, there was no duty to call the witness. At para. 16, the court considered the Crown's comments in its opening address and remarked:

> Imposition of a duty to call particular witnesses would unnecessarily constrain the exercise of the Crown's prosecutorial discretion. The statements made in opening and in the course of trial were consistent only with the Crown's intention at that time to call [the witness], but a statement of intention does not necessarily amount to an undertaking or commitment and the trial judge found in favour of the Crown on that point.

20 In both *Cook* and *Jolivet*, the court explored potential remedies that might be appropriate if the Crown's failure to call a witness occasioned an unfairness to the accused. It suggested that the defence could choose to comment on the gap in the Crown's case caused by the absence of the witness. Alternatively, "in rare cases", the judge might exercise his or her discretion to call the witness themselves.

Analysis

21 In addition to the above legal principles, it is also clear that the Crown has flexibility in the way it presents its case and may, during the course of the trial change its strategy: *Jolivet*, at para. 21.

22 In *R. v. Pickton*, *2010 SCC 32*, *[2010] 2 SCR 198*, the court quoted, with approval, the comments of Binnie J. in *R. v. Rose*, *[1998] 3 S.C.R. 262*, at para. 27, where he said, "The notion that it is sufficient for the accused to respond to the 'Crown theory of the case' also suffers from the practical difficulty that the Crown's theory of the case is a moving target that has to adjust to meet new or changing circumstances during the trial, including what the Crown hears in the defence closing address" [emphasis added].

23 In *Jolivet*, at para. 21, the court also remarked that irrespective of the Crown's belief that the witness was not truthful, it had the right to change its mind and not call him:

> Apart from his concern about Bourgade's truthfulness, Crown counsel may have reasoned that Riendeau's evidence went into the record better than he expected and at that stage he had no desire to expose it to inconsistent statements (which may themselves have been untruthful) emanating from Bourgade. If this was a concern that entered into the exercise by Crown counsel of his discretion, it is a concern shared by any prudent counsel faced with running his case effectively in an adversarial system. It is not the duty of the Crown to bend its efforts to provide the defence with the opportunity to develop and exploit potential conflicts in the prosecution's testimony. This is the stuff of everyday trial tactics and hardly rises to the level of an "oblique motive". Crown counsel is entitled to have a trial strategy and to modify it as the trial unfolds, provided that the modification does not result in unfairness to the accused. Where an element of prejudice results (as it did here), remedial action is appropriate. [emphasis added]

24 It is therefore clear that had the Crown not referred to Mr. Kamara in its opening address and declined to call Mr. Kamara because he was not necessary or reliable, there could be very little cause for complaint. The Crown was entitled to adopt a wait-and-see approach, assessing its case as it unfolded.

25 Here, however, Ms. Richards chose to tell the jury that she was calling Mr. Kamara and outlined his evidence in the context of what could be seen in the video.

26 At the outset, I note that the defence does not allege an oblique motive or abuse of process on the part of the Crown. That is not surprising as there is no evidence of the Crown acting improperly. Prior to the 22 May statement, Mr. Kamara's evidence was, at best, unreliable. The 22 May statement more than justifies the Crown's view that Mr. Kamara is an untruthful witness. Accordingly, I accept the Crown's explanation for not calling Mr. Kamara.

27 I also reject Ms. Murphy's characterisation of Mr. Kamara as a "Crown witness". Ms. Richards' comments to the jury were not an undertaking but, as explained in *Jolivet*, the expression of an intention to call Mr. Kamara.

28 The question here is whether any prejudice has occurred and, if so, what remedy must follow.

29 The defence have provided three cases where the court ordered the Crown to call a witness against its wishes: *R. v. Hillis*, 2016 ONSC 451; *R. v. Flynn*, 2017 ONSC 4034; and *R. v. S.G.*, [2007] O.J. No. 2185. Respectfully, and for the reasons set out below, I decline to follow these cases.

30 First, in the binding authority of the cases previously cited, the principle that emerges is that there is no obligation on the Crown to call a witness. Neither *Cook* or *Jolivet* make reference to directing the Crown to call a witness as a potential remedy. It is worth noting that one of the suggested remedies,- the court using its discretion to call the witness - was deemed to be an extraordinary measure to be used only in "rare" situations. One wonders, therefore, how extraordinary the situation would have to be to force the Crown to call the witness.

31 Secondly, as noted in *Jolivet*, the Crown is under no obligation to assist the defence by calling a witness it deems unnecessary to its case but might assist the accused. As explained in *Cook*, the defence has full disclosure of the witness's statement and is more than capable of calling the witness themselves, if they feel that that witness has necessary evidence to give. On this point, I note that the reasoning deciding the issue in *Hillis* appears to conflict with para. 21 of *Jolivet*, and para. 39 of *Cook*.

32 Thirdly, I would hardly consider it in the interests of justice to force the Crown to call a witness it felt unnecessary, was untruthful, or might damage its case by assisting the defence. It is the Crown who bears the heavy burden in proving its case beyond a reasonable doubt and it should not be restricted in presenting its case in the manner and with the witnesses of its choosing. As observed in *Cook*, at paras. 30-31, when the Crown fails to call a witness, it runs the risk of falling short in discharging its burden of proof beyond a reasonable doubt. That, however, is a matter for the Crown to weigh.

33 In this case, Ms. Murphy has full possession of all of Mr. Kamara's statements. The thrust of her argument is the unfairness that befalls the defence by having to call the witness and (1) lose the right to cross-examine and (2) forgo the right to address the jury last. Both of these arguments were addressed directly in *Cook* and I find that they fail in this case. See also: *R. v. Rybak*, 2008 ONCA 354, at para. 173.

34 This is not one of the "rare" instances in which the court should intervene in the adversarial process and call Mr. Kamara. His evidence is both helpful and harmful to both sides. It is a matter of tactical strategy for the defence whether they wish him to testify on Mr. Cheveldayoff's behalf.

35 The application is accordingly dismissed.

PROVOCATION

Background

36 At the close of evidence, Ms. Murphy asked that the partial defence of provocation be left with the jury when deliberating.

37 Ms. Murphy's submissions are based on the fight that occured between Mr. Cheveldayoff and Mr. Nikov after Mr. Cheveldayoff stepped out of the Tim Horton's.

38 Provocation is a partial defence in that if successful, second degree murder is reduced to manslaughter.

39 If I accede to this request and the Crown fails to disprove, beyond a reasonable doubt, that Mr. Cheveldayoff was legally provoked into killing Mr. Nikov, the jury would return a verdict of manslaughter. If, however, the Crown is successful in rebutting the defence, and proves the requisite *mens rea* beyond a reasonable doubt, Mr. Cheveldayoff would be convicted of second degree murder.

Legal Principles

40 Section 232 of the *Criminal Code* reads as follows:

> 232 (1) 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.
>
> (2) Conduct of the victim that would constitute an indictable offence under this Act that is punishable by five or more years of imprisonment and 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 their passion to cool.

41 The defence of provocation has five components:

<u>The Objective Components</u>

> (a) Does the conduct of the victim constitute an indictable offence punishable by five or more years imprisonment?

42 This component is relatively new and was created by statutory amendment to replace the old requirement of "wrongful act or insult".

> (b) Is the conduct of a nature that would be sufficient to deprive an ordinary person of self-control?

43 This form of the objective test requires an inquiry into how an ordinary person would react to the victim's conduct. In *R. v. Hill*, 2015 ONCA 616, 330 C.C.C. (3d) 1 (*Hill 2015*), at para. 79, the court set out the following description of "the ordinary person" for the purposes of provocation:

> The ordinary person, for the purposes of s. 232(2), is a sober person of "normal temperament "who is not exceptionally excitable or pugnacious: *R. v. Hill*, at para. 34. The ordinary person also assumes any general characteristic of the accused that is relevant either to the level of self-control expected of a normal person, e.g. age, or to the significance of the provocation in question, e.g. race if the provocative act is a racial slur.

44 This limb of the test does not require an analysis of whether the ordinary person, having lost control, would do as the accused did in a given case. What needs to be ascertained is whether the victim's action was sufficient to cause an ordinary person to lose control to the extent that the ordinary person would form the necessary intention for murder and act on that intention: *Hill 2015*, at para. 94.

45 This component of the test is designed to ensure that conduct complies with societal standards of reasonableness and responsibility: *R. v. Hill*, [1986] 1 S.C.R. 313, at pp. 324-325; *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162, at para. 26.

The Subjective Components

(c) Was the conduct of the victim sudden?

46 The subjective component of provocation will fail if the accused expected the victim's actions and, as a result, did not act on the sudden: *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350; *R. v. Cairney*, 2013 SCC 55, [2013] 3 S.C.R. 420, at para. 43. For provocation to succeed, the action must not be something that the accused was unprepared for and must make an unexpected impact: *R. v. Pappas*, 2013 SCC 56, [2013] 3 S.C.R. 452, at para. 35; *R. v. Boukhalfa*, 2017 ONCA 660, at para. 92

(d) Did the accused react in response to the provocation?

47 The accused must react to the provocation and not to another factor or incident.

(e) Was the accused's action "sudden" before there was time for his or her passion to cool?

48 The "suddenness" requirement has two prongs. First the victim's action must be sudden, as above, and second, the accused's reaction must be sudden before there is time "for his passion to cool": *R. v. Thibert*, [1996] 1 S.C.R. 37; *Tran*, at paras. 36-38; *Cairney*, at para. 34; *Pappas*, at para. 92.

49 One of the clear distinctions between the defence of self-defence and provocation is the fact that in the latter, reasonableness does not a play a part in deciding whether there was provocation: *Tran*, at para. 22; *Hill 2015*, at para. 88.

Positions of the Parties

50 Ms. Murphy submits that there is an air of reality to the partial defence of provocation. She argues that Mr. Nikov's conduct outside Tim Horton's, whether it was a robbery or an assault, would constitute an offence punishable by five years or more in prison under the *Criminal Code*. Moreover, she submits that there can be no dispute that both Mr. Nikov's actions and Mr. Cheveldayoff's reactions were sudden and that there is an air of reality to the inference that Mr. Cheveldayoff shot Mr. Nikov before there was time for his passion to cool. Finally, she claims that there should be "little difficulty" in deciding that Mr. Nikov's action would have been sufficient to cause an ordinary person to lose their self-control, form the required intention for murder and act upon it.

51 Ms. Weis, for the Crown concedes that the attack on Mr. Cheveldayoff outside Tim Hortons would constitute an act punishable by five years or more. However, she argues that there is no air of reality to the other aspects of the provocation test.

52 First, Ms. Weis submits that the "ordinary person" test cannot be met as the ordinary person would not, after the brief conflict that occurred between Mr. Nikov and Mr. Cheveldayoff, lose their self-control to the extent that they would form an intent to murder and seek to carry that out. Second, she says the evidence refutes any signs of suddenness both in Mr. Nikov's actions or in Mr. Cheveldayoff's reaction to them. Since these components do not satisfy the air of reality test, provocation cannot be left with the jury.

Analysis

53 Since the accused chose not to testify, the only evidence of the subjective components of provocation can be found in the video recording and, to an extent, the evidence of Malique Kamara.

54 As the Crown points out, there is some evidence that when Mr. Cheveldayoff made his way out of Tim Horton's, he was fully aware that some sort of conflict was forthcoming. Mr. Kamara's evidence of an unpleasant exchange outside Tim Hortons and Mr. Cheveldayoff's comments that he would "be back", indicates that Mr. Cheveldayoff contemplated a continuation of the fractious exchange when he left Tim Horton's.

55 The Crown also refutes the position that Mr. Cheveldayoff suddenly lost control. As Ms. Weis points out, mere anger is not enough: *R. v. Parent*, *2001 SCC 30*, *[2001] 1 S.C.R. 761*, at para. 9. She argues that the totality of evidence shows a great degree of control by the accused, in the manner in which he ran north on Yonge Street, circled round and fired six shots into Mr. Nikov.

56 The question is whether there is an air of reality to the notion of suddenness. The air of reality test does not concern itself with whether the defence will succeed. The focus is whether a properly instructed jury acting reasonably could have a reasonable doubt as to whether provocation is made out: *Cairney*, at para. 21; *Mayuran*, at para. 21.

57 In *Pappas*, at para. 22, the court summarised the air of reality test in the following way:

> The air of reality test requires courts to tread a fine line: it requires more than "some" or "any" evidence of the elements of a defence, yet it does not go so far as to allow a weighing of the substantive merits of a defence: *R. v. Mayuran*, *2012 SCC 31*, *[2012] 2 S.C.R. 162*, at para. 21. A trial judge applying the air of reality test cannot consider issues of credibility and reliability, weigh evidence substantively, make findings of fact, or draw determinate factual inferences: *R. v. Cinous*, *2002 SCC 29*, *[2002] 2 S.C.R. 3*, at para. 87; *R. v. Fontaine*, *2004 SCC 27*, *[2004] 1 S.C.R. 702*, at para. 12. However, where appropriate, the trial judge can engage in a "limited weighing" of the evidence, similar to that conducted by a preliminary inquiry judge when deciding whether to commit an accused to trial: see *R. v. Arcuri*, *2001 SCC 54*, *[2001] 2 S.C.R. 828*, cited by McLachlin C.J. and Bastarache J. in *Cinous*, at para. 91.

58 Whilst I accept that there may be some evidence that Mr. Cheveldayoff knew of the possibility of a fight when he made his way out of Tim Hortons, the video evidence does reveal Mr. Kamara and his group obstructing Mr. Cheveldayoff's path when he stepped out of the coffee shop. It also confirms that Mr. Nikov grabbed Mr. Cheveldayoff from behind without warning. In other words, there is evidence consistent with a sudden assault upon Mr. Cheveldayoff.

59 Moreover, the fact that the shooting occurred seconds after the end of the fight provides some foundation that Mr. Cheveldayoff's reaction was sudden and that he lost control.

60 I disagree, however, with Ms. Murphy's assertions that the "ordinary person" test is easily made out. As Ms. Weis correctly suggests, the ordinary person test exists to "reflect contemporary society's values": *R. v. Grant*, *2016 ONCA 639*, *342 C.C.C. (3d) 514*, at para. 91. The question therefore is whether there is an air of reality to the notion that an ordinary person subjected to the assault by Mr. Nikov would form the intention to commit murder and act upon it?

61 In *Grant*, the accused were robbed at a flea market and taunted afterwards when the robbers pulled up alongside their car as they were driving home. In response the accused fired 13 shots into the robbers' car, killing one of the occupants and wounding three others. The court found that the trial judge had been correct in refusing to put provocation to the jury.

62 Acknowledging the merit of Ms. Weis' submissions, I find this to be an extremely close case. Here, Mr. Nikov's actions were more egregious than the conduct in *Grant*, where the court found that taunting was insufficient to

deprive an ordinary person of self-control. However, the question boils down to whether there is an air of reality that Mr. Cheveldayoff's response was "well outside the threshold of self-control we expect of all persons in our society": *Grant*, at para. 95.

63 I repeat that this case comes down to a very close call, I remind myself that if there is a real doubt as to whether the test is met, the defence of provocation should be left with the jury: *Pappas*, at para. 26. I find that doubt to exist in this case. Accordingly, the defence application is granted and provocation will be left to the jury.

S.A.Q. AKHTAR J.

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