In the Court of Appeal of Alberta

Citation: R. v. Tran, 2008 ABCA 209

Date: 20080602
Docket: 0603-0065-A
Registry: Edmonton

Between:

Her Majesty the Queen

Appellant

- and -

Thieu Kham Tran

Respondent

The Court:

The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Stephen Hillier

Reasons for Judgment Reserved of The Honourable Madam Justice Hunt
Concurred in by The Honourable Mr. Justice Hillier

Reasons for Judgment Reserved of The Honourable Mr. Justice Watson
Concurring in the Result

Appeal from the Acquittal by
The Honourable Madam Justice P.L.J. Smith
Dated the 13th day of February, 2006
(Docket: 040453227Q2)

Reasons for Judgment Reserved of The Honourable Madam Justice Hunt

[1] I agree with Watson J.A. that the trial judge erred in concluding that on this record there was an air of reality to the defense of provocation. I would enter a conviction for second degree murder and then return the matter to the trial judge for re-sentencing.

[2] Specifically, in my view there was no air of reality to the assertion that there was a "wrongful act or insult" within the meaning of section 232(2) of the *Criminal Code*, R.S.C. 1985, c. C-46. Although it is a question of fact as to whether "a particular wrongful act or insult" amounts to provocation (section 232(3)), the evidence was incapable of taking the trier of fact past the issue of whether there was a wrongful act or insult.

[3] It is apparent from her reasons that the trial judge carefully sifted the evidence and assessed it in great detail in order to reach the conclusions that she did. Watson J.A. sets out the facts. I simply underscore the following points. Although the trial judge made no explicit finding about how the respondent obtained the key to the apartment door, it is significant that she classified his manner of gaining entrance to the apartment building as a lie (albeit one of convenience). It is also significant that she found that just before the parties separated, the respondent eavesdropped on his wife's conversation with the victim and heard them saying they missed each other. She further found that the night before the crimes, the respondent told his godmother he now knew the man whom his wife was seeing.

[4] As Watson J.A. notes, there is no serious allegation that either the victim or the complainant had committed a wrongful act. The juxtaposition of the terms "wrongful act" and "insult" in section 232(2), however, implies at least a minimum degree of moral wrongdoing on the part of the person "causing" the insult. The balance of the subsection focuses on tests for determining the possible effect of such behaviour on the accused. But issues of effect do not arise if there is no "insult", whatever might be the reaction of an accused to a situation.

[5] Despite her comprehensive reasons, the trial judge said very little about this. She first said that "the accused was not in control of the situation" and that if there was provocation, it was not "self-induced": A.B. F18. Next, in determining that there was an air of reality to provocation she said "[f]inding your previously faithful wife of 15 years in bed and unclothed with another man could be an insult.". In referring to the complainant as "a faithful wife of 15 years", she seemingly overlooked her own previous findings about the respondent's suspicions about his wife and his confirmation to his godmother that he knew who the man was. She then held that the "insult" was not disproven beyond a reasonable doubt.

[6] The Crown appropriately agreed that in some circumstances finding your wife in bed with another could be an insult. But the trial judge's statement was entirely divorced from the context of this case. Moreover, if by saying the provocation was not self-induced she meant to suggest that the victim and the complainant were somehow responsible for the provocation, I consider that a palpable and overriding error on these facts.

[7] At one end of the spectrum, imagine a person returning to the residence where he or she resides with his or her spouse, looking forward to discussing the details of his or her workday with the spouse. He or she finds the spouse engaged in sex with someone else and kills the victim in a rage. Few would dispute that the spouse's behaviour in that context could give at least an air of reality to the existence of an insult, making it necessary to apply the other requirements of section 232(2).

[8] At the other, consider a person who, without permission, enters the home of his former girlfriend with whom he has not had an intimate relationship for several months and whom he knows to be dating another person. Finding her engaged in sex with someone, he kills the lover in a rage. It could not be said there is any air of reality to the suggestion that there is an insult. The former girlfriend and her lover are privately engaging in behaviour that is no one's business but their own, which behaviour the accused has discovered entirely by his own actions. The fact that his discovery may drive him into a homicidal rage will not downgrade his crime.

[9] This case is far closer to the second end of the spectrum than the first. The respondent's discovery of his wife naked in bed with the victim did not occur when they were living together but after they had been separated for about two and a half months. He already had suspicions about her that he told his godmother had been confirmed. Before the day in question, he and his estranged wife had discussed divorce and division of their matrimonial property and made custody and support arrangements. He had written a letter supporting her application for a rent reduction due to her low income, in which letter he confirmed they were separated and that he was paying support.

[10] The evidence was uncontested about arrangements for the respondent's access to the apartment after the complainant returned to live there with the children. The respondent had purported to return both the external building keys and the apartment key to the complainant. The complainant's evidence about the external key was corroborated by the building manager and by the way in which the respondent gained access on the crucial day. The complainant's evidence was that the respondent was permitted access to the apartment only with her permission. Although the trial judge did not explicitly make that finding, her other findings support the same view (for example, the trial judge mentioned that the complainant would leave the apartment to go to work and tell the children to open the door for their father when he arrived; she also noted that he visited the children in the apartment with the complainant's permission and in her absence). There is no evidence that he had permission for access on the day in question.

[11] The trial judge explored these matters only at the end of her judgment in the context of whether the respondent was guilty of break and enter. She said it could not be proven that the respondent's apartment key was wrongly obtained (due to lack of forensic evidence about whether his key was a copy or an original); that he visited the children in the apartment with the complainant's permission and in her absence; that his 911 call suggested he still felt a proprietary interest in the apartment; and that he may have gone to the apartment to collect some of his belongings after he called and ensured that the complainant was not home. On these findings she grounded her conclusion that the intent for break and enter was not proved.

[12] But she failed to consider any of these matters when she held that there had been an insult so as to bring provocation into play. As Watson J.A. says, she looked at the insult issue almost entirely from the subjective perspective of the respondent. That was an error of law.

[13] There was nothing on these facts to meet the accepted definition of insult. In *Taylor v. The King*, [1947] S.C.R. 462, 89 C.C.C. 209 at 223 an insult was described as "injuriously contemptuous speech or behaviour; scornful utterance or action intended to wound self-respect; an affront; indignity". In *R. v. Gibson*, 2001 BCCA 297, 153 B.C.A.C. 61 the Court distinguished between a person deliberately "giving in to anger" and those "lashing out in retaliation", i.e., provoked, see also *R. v. Parent*, 2001 SCC 30, [2001] 1 S.C.R. 761.

[14] A survey of some of the cases where provocation has been found to be in issue demonstrates that there is virtually always some overt act, word or behaviour that is said to provoke the accused. For example, in *R. v. Thibert*, [1996] 1 S.C.R. 37, 131 D.L.R. (4th) 675 , the victim had his hands on accused's wife's shoulders and taunted the accused to shoot him; in *R. v. Olbey*, [1980] 1 S.C.R. 1008, 105 D.L.R. (3d) 385 a black person was called a "two-bit nigger punk"; in *R. v. Simpson*, 1999 BCCA 310, 125 B.C.A.C. 44, the accused's common-law wife threatened to place their child in foster care if the accused left the relationship; in *Director of Public Prosecutions v. Camplin*, [1978] A.C. 705 a fifteen-year old youth was raped then mocked; and in *R. v. Sheridan* (1990), 105 A.R. 122, 55 C.C.C. (3d) 313 (C.A.) the victim threw a bottle after making a death threat.

[15] There are also cases involving matrimonial infidelity where the history of spousal relations is taken into account in assessing provocation. For example, in *R. v. Daniels* (1983), 47 A.R. 149, 7 C.C.C. (3d) 542 (C.A.), it was held that provocation was properly left to the jury when the victim, who had been engaged in a long and public affair with the accused's husband, told the accused to "fuck off" when the latter entered the victim's bedroom looking for her husband. The Court there did not focus on the insult but rather on whether the accused may have acted in the heat of passion. It said the victim's words were a "final taunt" in the context of a situation where the accused had suffered a long series of assaults and indignities from the person who uttered the words.

[16] On the other hand, the mere existence of infidelity combined with a deceased's overt act do not necessarily equate to provocation. In *R. v. Klassen* (1997), 95 B.C.A.C. 136, 35 W.C.B. (2d) 210, during an attempt at reconciliation, the victim made derogatory remarks about the accused's low sperm count and reference to the man with whom she had an affair. The trial judge concluded that, despite these statements which were made immediately before she was killed, there was no air of reality to provocation. In *R. v. Tripodi*, [1955] S.C.R. 438, 4 D.L.R. 445 [*Tripodi* cited to S.C.R] a woman whose husband was abroad for some months told him upon his return that while he was away, she had aborted another man's child. The accused was convicted of second degree murder, and on appeal, a new trial was ordered. The Crown appealed on the ground that the Court of Appeal had erred in holding that there was evidence to support provocation. The majority of Supreme Court restored the conviction because of the husband's previous suspicions of his wife's affairs and its conclusion that the actions of the husband were to avenge his family's honor. In *R. v. Young* (1993), 117 N.S.R. (2d) 166, 78 C.C.C. (3d) 538, the termination of the relationship was found not to be provocation despite the accused's feelings of anger, frustration and a sense of loss at the breakup.

[17] Nothing done by the complainant or the victim comes close to meeting the definition of insult. Their behaviour was not only lawful, it was discreet and private and entirely passive vis-à-vis the respondent. They took pains to keep their relationship hidden. Their motivation for doing so is beside the point in considering whether there was an air of reality to provocation. Their behaviour came to his attention only because he gained access to the building by falsely saying he was there to pick up his mail. Whether or not his intent for break and enter was proven beyond a reasonable doubt, his own choice to enter the apartment, without permission, cannot elevate what he there found to the level of an "insult" for the purposes of provocation.

[18] There is an additional reason why there is no air of reality to provocation on these facts. In *R. v. Faid*, [1983] 1 S.C.R. 265, 2 C.C.C. (3d) 513 (S.C.C.) at 522 Dickson J. quoted with approval that "'[s]uddenness must characterize both the insult and the act of retaliation." See also *Tripodi* at 433 where it was held that an "insult must strike upon a mind unprepared for it.". Even if it could be said there was an "insult", how could it be considered sudden, given that the respondent had suspected the complainant was in a relationship with another man some months earlier (when he overheard their telephone conversation) and the day before had told his godmother he now knew the man's identity? On these facts found by the trial judge it is unpersuasive to suggest that there was suddenness to what he encountered in his estranged wife's bedroom after he lied to gain access to her home and had at least suspected her to be having an affair for more than two months. There was also the additional evidence (not commented upon by the trial judge) that the respondent had confided in a friend on Nov. 24, 2003 that he had discovered that his wife was having an affair again (the "again" referring to a discussion between the respondent and his friend some years earlier when the respondent told the friend that his wife had engaged in an affair on a trip to Vietnam). This uncontradicted evidence further belies any notion of suddenness.

[19] For these reasons I would allow the appeal, substitute a verdict of guilty of second degree murder, and return the matter to the trial judge for re-sentencing.

Appeal heard on March 5, 2008

Reasons filed at Edmonton, Alberta
this 2nd day of June, 2008

Hunt J.A.

I concur:

Hillier J.

Reasons for Judgment Reserved of
The Honourable Mr. Justice Watson
Concurring in the Result

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[20] This appeal centres on the interpretation and application of the excuse of provocation in s. 232 of the *Criminal Code*. Provocation may provide an excuse for murder, although the illegality of the killing is reflected by a lesser conviction for manslaughter. As a policy grounded excuse it has not been free from controversy. The objective aspects of the provocation excuse have been much debated in case law and jurisprudential commentary. The subjective aspects of the excuse also raise policy considerations. Its application is frequently subjected to an 'air of reality' screening.

[21] The respondent was tried on an indictment charging him with five counts, including murder of An Tran, the male friend of the respondent's estranged wife Hoa Le Duong, as well as breaking and entering into Le Duong's apartment and attempting to murder her. An element of the Crown appeal turned on whether the trial judge also erred in her approach to the "breaking and entering" aspects of two counts on the Indictment. That aspect of the Crown appeal was not stressed during the hearing so it is not necessary for us to decide whether the trial judge applied the correct legal test to s. 348(1) of the *Code*. The respondent's state of mind on his arrival at the apartment was, however, found by the trial judge to be relevant to the provocation excuse. At the outset of the trial, the Crown rejected the appellant's guilty plea to manslaughter of Tran and to aggravated assault on Le Duong as included offences.

[22] The trial judge acquitted the respondent of murder and convicted of manslaughter. The Crown appeal seeks either a conviction for murder on appeal or a new trial. The Crown submits that the trial judge erred in law in finding the provocation excuse met from an objective perspective, saying there was neither legal nor factual reality to the excuse. The Crown submits that the trial judge also erred in finding the excuse met from the subjective perspective, asserting that on the evidence, and since the respondent did not testify, there was no air of reality to the excuse. The Crown is correct in both aspects of its position. Moreover, as a conviction for murder was inevitable on the law and on the trial judge's essential fact findings, I would allow the appeal, exercise the discretion contained in s. 686(4)(b)(ii) of the *Criminal Code* and enter a finding of guilty of murder and remit the case to the Court of Queen's Bench for imposition of a lawful sentence.

Context

[23] The respondent and Hoa Le Duong were married in 1989 in Canada. During the marriage, Hoa Le Duong had returned to her family in Viet Nam in 1990, 1993 and 1996. The trial judge found that the marriage became strained after her return from Viet Nam in 1996. The respondent believed that Le Duong had been involved with a man back in Viet Nam.

[24] Although Le Duong ceased loving the respondent in 1997, they continued to live together, occupying separate bedrooms between 1997 to 2003. The complainant remained faithful while they lived together and their marriage problems were not known to others then. The complainant became friends with An Tran, and developed amorous feelings for him in the summer of 2003. Nonetheless, she tried harder at her marriage that summer.

[25] On November 24, 2003, the respondent eavesdropped on a conversation between Le Duong and Tran and heard them saying they missed each other. Le Duong left the respondent following an argument concerning her relationship with Tran. The respondent raised the possibility of divorce. Le Duong and the children moved in with her brother until the respondent agreed to vacate the apartment so that she and the children could return. She did so on January 4, 2004. Although they were separated, the trial judge found that the respondent hoped Le Duong would return to the marriage [F9/45-F10/35]. After incidents of vandalism to Tran's vehicle - which both Le Duong and Tran suspected the respondent of committing - Le Duong told the respondent around the end of December, 2003, that she wanted a divorce. An Tran also encouraged her to divorce the respondent.

[26] The trial judge was not persuaded that the evidence of the vandalism could be attributed to the respondent despite some evidence linking the respondent to those events. Accordingly, she had doubt that the respondent had identified Tran as the man involved with his wife prior to January, 2004 [F14-F16; 1258-1260]. She did, however, find that if the respondent damaged the brake line in Tran's vehicle, then he was "trying to send a message to this deceased to stay away from his wife" [F16/3-8; 1260/3-8]. The trial judge found this conduct to be consistent with not merely animus towards Tran but with the respondent's desire to get his wife back. [F16/3-19].

[27] Between January 14 and February 10, 2004, when the respondent wanted access to the children, Le Duong would "leave the apartment to go to work and tell the children their father would be there soon and to open the door for him": [F4/20-22; 1248/20-22]. The couple also discussed divorce issues. During this time, the respondent's godmother, Hoa Ai Thai, put pressure on Le Duong to return to the respondent [F9/33-36; 1253/33-36]. She characterized the respondent's mental state leading up to the events of February 10, 2004 as "tormented, perhaps suicidal, sad, lonely, depressed, emotionally deteriorating ..., willing to ask for help and grasping at hope that they would be reunited". The godmother also testified that, on February 9th, the respondent called to say that he now knew who the man was whom his wife was seeing. The godmother told him to do nothing and she would talk to the man: [F10/43-F11/2; 1254/43-1255/2].

[28] On February 10, 2004, the respondent went to work at 5:30 a.m. for the 6:00 a.m. shift, but left around 10:30 a.m., telling the plant manager he was tired. From there he went to help his godfather, Minh Tran, at a store. Although a co-worker thought the respondent was normal, the godmother felt he was tired, dazed and sad. He used a co-worker's cell phone to call the apartment and, receiving no answer, he went to the apartment. Lynn Levine, the building manager, saw him at the door. He said he just needed to check his mail. She told him that would be the last time she let him in as he did not live there anymore. He said "Okay Lynn" and went to check his mail [AB 906/42-907/38].

[29] Meanwhile, Le Duong and Tran were at the apartment taking a nap after having had sex. The phone rang, but Le Duong did not answer as she did not recognize the number (it being the respondent's co-worker's number). The respondent arrived at the apartment seven minutes after his phone call, at 12:41 p.m., as recorded by the security video. He was not intoxicated [F5/4; 1249/4]. The trial judge had a doubt whether the respondent knew Le Duong was at home or was going there to check to see if she was [F16/28-F17/17; 1260/28-1261/17].

[30] Having gained access to the building by the building manager, the respondent used a key to the apartment to unlock the door. Unbeknownst to Le Duong, the respondent still had a key to the apartment itself. She testified that the respondent had turned over his keys to the apartment and the card key to the building when she moved back in [A.B. 268-269]. The respondent was allowed to keep the mail box key in order to pick up mail when permitted into the building by the manager or someone else [A.B. 269]. The respondent entered, and removed his shoes [F21/36-39; 1265/36-39]. The police found that Tran's pair of black boots, one with his socks in it, were located in the front door open area. [A.B. 111/15-18]. The respondent proceeded through the front living space to a hallway where the bedrooms were located. His former bedroom, the master bedroom was at the end of the hallway. He entered the complainant's bedroom and found the wife and her friend in bed nude. The trial judge then found as follows:

> The accused was armed with a sheathed knife in the pocket of his coat. Nevertheless, he ran to the kitchen. The deceased and the complainant hastily put on some clothing, the accused returned with two long kitchen knives. He held them in one hand and stabbed the deceased one time in the chest with them. The deceased asked to talk, but the accused was yelling and angry. It is alleged that the accused made a statement about the deceased's car. I will discuss this more later.
>
> The accused then stepped back to the bedroom door and used his own phone at 12:49 to call his godfather. He began to speak into the phone before his godfather had put the phone to his ear. When the godfather opened his phone, he heard the word "daddy" and noises, quick and very angry swearing and words to the effect of "I'm going to cut it."
>
> Then the accused came at the complainant and chopped her hand. When she showed this to him, he said he would kill her. The deceased was trying to get to the window because he could not breathe. The complainant saw the deceased's face turn yellow. With the deceased behind her near the window, the complainant tried to block the knives and received two cuts to her left forearm. She was cut on her shoulder as well, but cannot say how this happened. The deceased [sic] asked the complainant whether she was beautiful and cut her face in a deep slice from her right ear clear across her right cheek. This was when was the deceased managed to exit the bedroom.

> The complainant remained in the bedroom. She heard sounds from the living room that sounded like punching. She went to the open window and yelled for help and saw her godfather arriving. She stood at her bedroom door. The accused called her out. She refused and she closed the bedroom door. He slammed it open and went to the window, looked out, and then stepped on the complainant's face [sic – deceased] and stomach on his way back out to the living room. [F5/9-48; 1249/9-48].

[31] Although she found that the complainant did not necessarily have the next sequence of events correct, the trial judge accepted Le Duong's description of events as having occurred. Before the respondent's godfather arrived at the apartment, but after she saw the godfather from the window (which the video put at 12:53 p.m.), Le Duong saw the respondent use the knives to chop repeatedly on the deceased's chest and step on his face. The trial judge found that the deceased's body was moved by repeated kicking after he had exsanguinated, in light of two voids in the blood stain pattern. The pathologist identified 17 stab wounds to the deceased as well as twenty other cuts [A.B. E33-E42; F7/29-F8/18; 1251/29-1252/18]. There were also multiple abrasions on the body including the right cheek, left inferior and lateral orbital regions, anterior upper chest and upper arms and the posterior left shoulder region [A.B. E42]. The deceased had some defensive wounds on his hands [F8/15-17; 1252/15-17].

[32] The respondent called 911 at 12:55 p.m. The call lasted four minutes and was in a mix of Cantonese, Vietnamese and a little English and picked up the emotional goings on in the apartment. The trial judge found that the respondent called Le Duong out of the bedroom in a very angry tone, accusing her of adultery and swearing. One could hear the deceased crying and making noises. The respondent was heard to say "sooner or later, I will be in gaol for five years" and "my future is over" which the trial judge found to indicate that it was "beginning to occur to him that he was looking at gaol which is also what he said to the godfather" [F6/38-F7/9; 1250/38-1251/9].

[33] The police arrived at the apartment at 1:05 p.m. The respondent was in the living room and appeared calm [A.B. 157/12-14; 165/15-22; 171/3-44]. He had some wounds, which the trial judge found to be "self-inflicted". The police found a blood stained knife in the outstretched hand of the deceased [A.B. 104/41-45]. The trial judge found that the respondent put the knife in the deceased's hand before the police entered when the deceased's body was laying on the floor: [F7/23-29]. The police found a second knife in the space dividing the living room and dining room. The trial judge found the respondent was "calm, relaxed, cool, collected, unaffected, stoic, emotionless, solemn, flat"after the incident but that "his mental state after the attack proves nothing of significance" [F12/25-26; 1256/25-26].

[34] The trial judge's specific findings as to the objective and subjective aspects of provocation are discussed later in these reasons. The trial judge rejected the Crown's position that the attack upon Tran involved foresight and planning, but she evidently accepted the common position of the parties that the evidence proved the intent to commit second degree murder of Tran [F18/11-16; 1262/11-16]. The trial judge's conviction on aggravated assault of Hoa Le Duong was based upon

her conclusion that the respondent did not kill Le Duong although he had ample opportunity to do so, choosing instead to slash her face: [F20/43-47; 1264/43-47].

Standard of Review

[35] The Crown appeal may only succeed, if at all, on establishment of material error of law by the trial judge in her reasons: s. 675(1) and s. 686(4) of the *Criminal Code*. Moreover, such error[s] must not only undermine the basis of the verdict, but must, in the concrete reality of the case at hand, be found to have potentially had a material bearing on the acquittal, even if the Crown need not show the verdict would necessarily have been different: ***R. v. Graveline***, [2006] 1 S.C.R. 609, [2006] S.C.J. No. 16 (QL), 2006 SCC 16, at para. 14. It is not open to the Crown to contend against specific fact findings unless those findings are clearly affected by dominating error of law.

[36] Moreover, it is not appropriate to read a trial judge's reasons preciously in a spirit of *post-facto* fault finding: ***R. v. Gagnon***, [2006] 1 S.C.R. 621, [2005] S.C.J. No. 17 (QL), 2006 SCC 17 at para. 19. Equally, an appeal court is not to "cherry pick" through reasons in a process of isolating words and phrases from their contexts: ***R. v. Davis***, [1999] 3 S.C.R. 759, [1999] S.C.J. No. 67 (QL) at para. 103; ***Gagnon,*** *supra* at paras. 19 to 20; ***R. v. Stirling***, [2008] S.C.J. No. 10 (QL), 2008 SCC 10 at para. 13.

[37] The trial judge's reasons are quite revelatory of her legal conception of the operational scope of the provocation excuse and are also clear as to her core fact findings. Under s. 686(4)(b)(ii) of the *Code*, a Court of Appeal may substitute a verdict of guilty "with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error of law". The Court of Appeal may do so if the legal effect of the fact findings made at trial constitutes guilt of the offence: ***R. v. Audet*** , [1996] 2 S.C.R. 171, [1996] S.C.J. No. 61 (QL), at para. 48; ***R. v. Skalbania***, [1997] 3 S.C.R. 995, [1997] S.C.J. No. 97 (QL), at paras.9 to 15; ***R. v. Ewanchuk***, [1999] 1 S.C.R. 330, [1999] S.C.J. No. 10 (QL), at para. 59; ***R. ex rel Merk v. I.A.B.S.O.R.I.W., Local 771***, [2005] 3 S.C.R. 435, [2005] S.C.J. No. 72 (QL), at para. 48.

Positions of the Parties

[38] S. 232 of the *Code* reads as follows:

> Murder reduced to manslaughter
>
> 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.
>
> What is provocation

> (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.
>
> Questions of fact
>
> (3) For the purposes of this section, the questions
>
> (a) whether a particular wrongful act or insult amounted to provocation, and
>
> (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,
>
> are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.
>
> Death during illegal arrest
>
> (4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

[39] In brief, the Crown contends that there was not a reality in law or fact as to essential ingredients of the provocation excuse in this case. The respondent submits that there was no error, and that the Crown's objection to the trial verdict comes down to a disagreement on fact findings.

[40] The parties before us both subdivided their submissions as to the test for provocation. The respondent, in particular, proposed that it had four parts drawn from s. 232 of the *Code*: (1) wrongful act or insult, (2) deprivation of an ordinary person of the power of self-control, (3) factual causing of the respondent to lose self control and to kill intentionally while still out of control, and (4) suddenness. For its part, the Crown also approached the test in a somewhat segmented fashion. The trial judge also addressed the features of the excuse severally in her reasons.

Analysis

Overview

[41] In my view, Parliament has set out a legal test which, though it contains a variety of elements, should be understood as a whole and not in pieces. The legal test is not merely a collection of discrete words to be parsed for their exclusively subjective or objective implications. While it is practically necessary to consider Parliament's meaning of specific words in s. 232 when the excuse arises for consideration, it is erroneous in so doing to consider each word as if they were entirely freestanding. Approaching the section in an entirely piecemeal manner de-links the words from the public policy basis and the conceptual core of the excuse.

[42] The grammatical and ordinary sense of the language, and its context – for example, being associated with the murder crime definition and not with general defence provisions in the *Code* – shows Parliament's intent in relation to the excuse. Parliament has chosen to allow, on a case by case basis, the application of a form of public policy to a set of circumstances which are otherwise proven beyond a reasonable doubt to be murder under s. 229(a) of the *Criminal Code*. The animating thesis of the excuse is to recognize that there may be circumstances which absolve even murder, not by holding that the *actus reus* is justified, but by absolving the murderous *intent* as an extreme outburst of shared human frailty. That public policy is Canadian society saying that it will excuse the intent of the specific accused person under the circumstances defined by s. 232 – but not less. The entirety of the definitive features of s. 232 must apply in order to exonerate the killer of the murderous intent he was already proven beyond a reasonable doubt to possess.

[43] Provocation is unique amongst the subtractions from criminal liability in that it does not raise doubt about proof of guilt nor operate to justify or excuse the conduct. Provocation is triggered only when murderous intent is established. Where applicable, it forgives the intent. As such, it is not a topic for which the notion of strict construction of crime definitions – a secondary rule of statutory construction in any event – has logical application. As stated in ***R. v. McIntosh***, [1995] 1 S.C.R. 686, [1995] S.C.J. No. 16 (QL) at para. 28, by McLachlin J. (as she then was, albeit in dissent on the interpretation of the *Code* self-defence provisions), at para. 82: "Life is precious; the justification for taking it must be defined with care and circumspection."

[44] To recognize the essentials of objectivity of the provocation excuse when reading it with "care and circumspection" does not "lightly brand" the offender's conduct criminal: see by comparison, ***R. v. Beatty***, [2008] S.C.J. No. 5 (QL), 2008 SCC 5, at para. 34, referring to ***R. v. Creighton***, [1993] 3 S.C.R. 3, [1993] S.C.J. No. 91 (QL) at para. 113. It starts and remains criminal conduct. The stigma and punishment are greatly adjusted if the excuse applies. Moral innocence does not arise, howsoever impulsive the conduct. The objectivity of the provocation excuse cannot logically embody an amorphous or fluctuating subjective standard – particularly one which would favour the bad-tempered, ill-minded or vicious.

[45] Indications of subjectivity in the language in s. 232 of the *Code* do not fundamentally convert that policy objectivity. The language centred on the specific person in s. 232 mainly functions to explain how the excuse may be considered relevant in a given situation. Even that language makes the objective requirements more plain. This is not to suggest that the objective character of the overall test is a harshly purist legislative invention. Section 232 embodies language needing realistic interpretations that accord to the characteristics and values of modern society and to human nature as our evolving society understands it. The excuse is therefore connected, even in its objective essentials, to a range of acceptable limitations of human self-control as recognized in 21st Century society – though not as might have been thought acceptable in 19th Century society. Parliament provided for scope of application of the excuse by making it potentially applicable to a variety of situations within its essentially objective framework. In deciding whether the case at bar is one of those situations, one looks at the specific circumstances and the specific offender to see if the test has any reality in the case. At its core, the test reflects what Canadian society can excuse as to murderous intent. Therefore, the *Code* does not replace general and objective norms with the subjective inclinations, limits or personality defects of the offender.

[46] All essential elements of the excuse must be found to exist or else it does not apply: ***R. v. Roberts***, [2004] A.J. No. 356, 2004 ABCA 114; affirmed as regards no air of reality supporting the objective components of the test for the defence of provocation at [2005] 1 S.C.R. 22, [2005] S.C.J. No. 5 (QL). To require completeness is not too rigourous a standard for provocation. The same principle of precision applies to complete justifications, such as self-defence: see ***R. v. Hebert***, [1996] 2 S.C.R. 272, [2006] S.C.J. No. 65 (QL), at paras. 24 to 25.

[47] Public policy infuses all the words of s. 232, giving all of them meaning and knitting them together into a coherent and socially acceptable whole. While words and phrases in s. 232 are often examined severally in the cases for analytical purposes, they do not have meaning uninfluenced by the whole effect of the section.

[48] On the other hand, it is essential that the legal definition of s. 232 be manageable for judges and juries. In practical terms, this means that judges and juries will consider the parts set out by Parliament on a step by step basis in the manner described, for example, by the Canadian Judicial Council in its standard criminal jury instructions which can be found online:<http://cjc-ccm.gc.ca.>. The Council recommends the following opening:

> NOA must be acquitted of murder, but found guilty of manslaughter on the basis of provocation, only if all of the following four conditions are present.
>
> 1. There was a wrongful act or insult that was sufficient to deprive an ordinary person of the power of self-control; and
>
> 2. When NOA killed NOC s/he had lost the power of self-control as a result of the wrongful act or insult; and

> 3. The wrongful act or insult was sudden; and
>
> 4. NOA's acts that caused NOC's death were committed suddenly and before there was time for his/her passion to cool.
>
> Unless the Crown proves beyond a reasonable doubt that at least one of these conditions for provocation was absent, you must acquit NOA of murder but find him/her guilty of manslaughter.
>
> NOA is not required to prove that the defence of provocation applies. The Crown must prove beyond a reasonable doubt that it does not.

[49] In other words, the Council, well supported by the authorities, sets out an approach for reasoning based upon Parliament's language. Nothing in these reasons is intended to deflect such an approach. What I suggest to be important is that in the course of following this approach, the trier of fact should not lose sight of the core policy of s. 232 as reflected in each segment. With this background in mind, I turn to the case at hand.

Wrongful Act or Insult

[50] The respondent does not press the term "wrongful act" in argument. This is not surprising, as there was no "act" that emanated from the victim towards the respondent, and not one that was *legally* wrongful. The respondent, however, offers a perspective as to "insult". The respondent's position is that, there being no evidence that the respondent knew that his wife had been engaged in adulterous conduct with the deceased (although he knew that she had some romantic feelings for this other man), he suffered something which clearly amounts in law to an "insult" for the purposes of s. 232 of the *Criminal Code* when he discovered the two of them nude in a bedroom together: respondent's factum at para. 33. The respondent's contention places much of the burden of his position on the divided decision of the Supreme Court in ***R. v. Thibert***, [1996] 1 S.C.R. 37, [1996] S.C.J. No. 2 (QL), and in particular the following passage by Cory J, at paras. 18 to 19:

> 18 In my view, so long as the provocation section remains in the Criminal Code in its present form certain characteristics will have to be assigned to the "ordinary person" in assessing the objective element. The "ordinary person" must be of the same age, and sex, and share with the accused such other factors as would give the act or insult in question a special significance and have experienced the same series of acts or insults as those experienced by the accused.
>
> 19 In summary then, *the wrongful act or insult must be one which could, in light of the past history of the relationship between the accused and the deceased, deprive an ordinary person, of the same age, and sex, and sharing with the accused such other factors as would give the act or insult in question a special significance, of the power of self-control.* [Emphasis added]

[51] That the trial judge acceded to the respondent's reading of ***Thibert*** is clear in her reasons. She referred to "reputation evidence" called for the respondent to the effect that he was "a good provider, good worker, good tenant" and that he was "nonviolent, honest, not a troublemaker". She also referred to the dim view taken in the respondent's community of divorce and adultery, adding:

> Culturally, divorce is shameful in the Edmonton community of ethnic Chinese from Vietnam and particularly in the community of people who associated with the complainant and the accused. This is perhaps no different than the norm in other cultures where the marriage vow is taken seriously. There was evidence in this case which supports a conclusion that the complainant's extramarital love interest was viewed as a serious mistake. Considerable pressure was put on her by her godmother and others to return to the accused. The complainant was not open with others about her feelings for the deceased, even when directly confronted by the godfather. She and the deceased did not go out in public after the separation, in part because there was no divorce. [F9 25-39; 1253/25-39].

[52] In noting this, I hasten to add that this case is not one which gives rise to concerns about whether considerations of ethnicity should specially colour the interpretation of s. 232. The trial judge later said that she regarded the cultural heritage to which she referred to be consistent with other traditional views in other cultures in Canada. Accordingly, it is not necessary to offer opinion regarding the controversy about ethnicity factors in relation to provocation: see ***R. v. Humaid***, (2006) 208 C.C.C. (3d) 43, [2006] O.J. No. 1507 (QL), (Ont. C.A.), leave denied [2006] S.C.C.A. No. 232 (QL); ***R. v. Van Dongen***, [2005] EWCA Crim 1728; ***R. v. Mohammed***, [2005] EWCA Crim 1880; ***Attorney General v. Holley***, [2005] UKPC 23; Helen Power, "*Provocation and Culture*", (October, 2006) The Criminal Law Review 871. It is sufficient to say that, plainly, the considerations so far mentioned by the trial judge are person specific.

[53] The trial judge found that "[f]inding your previously faithful wife of 15 years in bed and unclothed with another man could be an insult": F18/24. She was satisfied that the respondent "was so insulted by finding the deceased unclothed with his wife, in her bed, that he attacked spontaneously and without reserve": [F18/43-45; 1262/43-45]. In referring to ***Thibert***, the trial judge concluded as follows, addressing loss of control more than wrongful act or insult, but blending the two topics to a degree:

> Whether the second element is disproven depends on the definition of the ordinary person. I would put to the jury, if I had one, that they should consider an ordinary person of the accused's sex, age, culture as the evidence disclosed it relevant to the nature of the insult, and antecedents related to the insult, such as problems from 1996, the not sharing of bedrooms, the improvement in the marriage in 2003, the discovery of yet another man, and the accused's state of mind and heart during the separation from November 2003 to February 10th, 2004.

> I would likely suggest to them that the ordinary person test is a filter to prevent the accused from relying on his own violent tendencies, or short fuse, as a partial justification for murder. I might say that the purpose of this objective test is to define the boundaries of the conduct accommodated by the defence and that these boundaries do not extend to characteristics which are peculiar or idiosyncratic. I might quote from Cory, J, in *Thibert*, where he says at paragraph 19:
>
>> In summary, then, the wrongful act or insult must be one which could, in light of the past history of the relationship between the accused and the deceased, deprive an ordinary person of the same age and sex and sharing with the accused such other factors which could give the act or insult in question a special significance of the power of self-control.
>
> In *Thibert*, the accused had a tortured history with his wife's lover. Here, the history is different but still relevant. That ordinary person must be driven by the insult to lose self-control. These are some of the things I might tell a jury.
>
> I accept that an ordinary man of the accused's age and culture would be greatly offended, shamed and moved to reaction of some sort by the insult presented to him by his wife and her boyfriend nude in her bed. When I say culture, I am not necessarily referring to ethnic culture, although it may be so. Rather, it is the seriousness with which the witnesses in this trial, all of whom were Vietnamese or ethnic Chinese from Vietnam, take their marriage vows. With some exception for the complainant, the evidence is quite overwhelming that divorce and adultery are shameful and transgressions of one's wife ought to be forgiven to maintain the marriage and family. The evidence is that both the complainant and the accused were moved to great sadness, to the point of considering suicide after their separation.
>
> I add to the ordinary person the accused's antecedents which are relevant to the insult. That ordinary person was in an emotional decline, desperately wanted his marriage back, had not lost hope that he could do something to get it back, and had, just the prior night, sought help to have the boyfriend's sensibilities appealed to. That ordinary person was largely kept in the dark about the extent of the relationship. He faced a sight in a bedroom which he had never seen before and did not expect to see. I find it is not proven, beyond a reasonable doubt, that that ordinary person would not have lost self-control. [F19/2-F20/18; 1263/2-1264/18]

[54] In so doing, the trial judge erred in law in effectively defining “insult” in an almost purely subjective manner. This was not conduct in the nature of a final insult after a pattern of insults or in a context of aggressive or contumacious conduct. What the respondent saw was not confrontational towards the respondent, intentionally or otherwise. It was something that could have made him upset under the circumstances which the trial judge found. She found it made him angry.

Nonetheless, the respondent's definition of "insult" is divorced from the public policy and legal principles set out in s. 232. This approach invests "insult" with a meaning not limited to s. 232 situations. Occasional affronts to one's dignity are the common lot of mankind. Not all of them are wrongful or illegal or even intentional. To constitute "insult" for s. 232, the nature of what the victim does must rise to the high and shocking level required to fit the essentials of s. 232.

[55] Moreover, human beings often create for themselves the contexts in which such affronts arise. The trial judge did not find the insult here to be self-inflicted; were it open to me to question that finding I would respectfully disagree. If the victim has done nothing intended to insult the accused, and yet is still to be found in law to have done so, that definition would replace "insult" with "being a part of upsetting circumstances". Such an approach would randomize the target of the murderous violence in a manner inconsistent with s. 232. It might even take in innocent bystanders: ***R. v. Seyed-Fatemi***, (2003) 177 C.C.C. (3d) 231, [2003] B.C.J. No. 1824 (QL), 2003 BCCA 0439.

[56] To fit the legal test, therefore, the insult must be capable of producing, in the mind of an otherwise reasonable person – when it strikes that mind unprepared for it – a murderous rage and an excusable loss of control that can be found, within the range of acceptable human characteristics, with such loss of control continuing until the killing is done. As long ago as ***Taylor v. The King***,[1947] S.C.R. 462, 89 C.C.C. 209 (S.C.C.) at p. 223 a "wrongful act" or "insult" meant: "an act, or the action, of attacking or assailing; an open and sudden attack or assault without formal preparations; injuriously contemptuous speech or behaviour; scornful utterance or action intended to wound self-respect; an affront; indignity". This definition was approved in ***Thibert***, *supra* at para. 62. ***Thibert,*** relying on the earlier decision in ***R. v. Hill***, [1986] 1 S.C.R. 313, [1986] S.C.J. No. 25 (QL), found that the "ordinary person" was not a person without gender or age, or other relevant circumstances that were not idiosyncratic or peculiar to him. ***Thibert*** does not go so far as to suggest that any insult that might anger someone will qualify under s. 232. As pointed out in ***Hill:***

> 34 What lessons are to be drawn from this review of the case law? I think it is clear that there is widespread agreement that the ordinary or reasonable person has a normal temperament and level of self-control. *It follows that the ordinary person is not exceptionally excitable, pugnacious or in a state of drunkenness.*
>
> 35 In terms of other characteristics of the ordinary person, it seems to me that the "collective good sense" of the jury will naturally lead it to ascribe to the ordinary person any general characteristics relevant to the provocation in question. For example, if the provocation is a racial slur, the jury will think of an ordinary person with the racial background that forms the substance of the insult. To this extent, particular characteristics will be ascribed to the ordinary person. Indeed, it would be impossible to conceptualize a sexless or ageless ordinary person. Features such as sex, age, or race, do not detract from a person's characterization as ordinary. Thus particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test of provocation. As Lord Diplock wrote in *Camplin* at pp. 716-17:

> ...the "reasonable man" has never been confined to the adult male. It means an ordinary person of either sex, *not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today.*

36 It is important to note that, in some instances, *certain characteristics will be irrelevant*. For example, the race of a person will be irrelevant if the provocation involves an insult regarding a physical disability. Similarly, the sex of an accused will be irrelevant if the provocation relates to a racial insult. *Thus the central criterion is the relevance of the particular feature to the provocation in question*. With this in mind, I think it is fair to conclude that age will be a relevant consideration when we are dealing with a young accused person. For a jury to assess what an ordinary person would have done if subjected to the same circumstances as the accused, the young age of an accused will be an important contextual consideration.

37 I should also add that my conclusion that certain attributes can be ascribed to the ordinary person is not meant to suggest that a trial judge must in each case tell the jury what specific attributes it is to ascribe to the ordinary person. The point I wish to emphasize is simply that in applying their common sense to the factual determination of the objective test, jury members will quite naturally and properly ascribe certain characteristics to the "ordinary person"." [Emphasis added]

[57] To qualify as an "insult", even under this adaptable form of "ordinary person" standard, the "insult" must still be one that would be of such a quality and character in the context that it would drive an ordinary person (who is not especially excitable, pugnacious or intoxicated) not merely into an uncontrollable and homicidal rage at the author of the insult but into also acting upon that rage by a violent attack and further yet that such be a sustained state of rage that it would last until the accused has killed the victim: ***R. v. Flegel*** (2005), 196 C.C.C. (3d) 146, [2005] O.J. No. 1602 (QL) (Ont. C.A.) at paras. 16 and 26 to 28. Accordingly, the fact that an accused personally takes in a set of circumstances as being an "insult" to him does not of itself mean that the "insult" therefore exists in law: ***R. v. Nieto***, (2007) 222 C.C.C. (3d) 510, [2007] M.J. No. 238 (QL), 2007 MBCA 82 at para. 45, leave denied, [2007] S.C.C.A. No. 483 (QL) in relation to whether the guidance in ***R. v. W. (D.)***, [1991] 1 S.C.R. 742, [1991] S.C.J. No. 26 (QL) at para. 28 should be applied to the objective aspects of either provocation and self-defence. The standard jury charge proposed by the Canadian Judicial Council puts the topic of wrongful act or insult in this way:

> A wrongful act or insult must be sufficient to deprive an ordinary person of the power of self-control. In law, an ordinary person is someone who is not exceptionally excitable, combative or in a state of intoxication, who has a normal temperament and a normal level of self-control, and who has the same (specify the

> relevant 3 characteristics that relate to the wrongful act or insult such as age, race, sex, disability, sexual orientation, etc.) as NOA.
>
> *The question is not whether the ordinary person would have reacted by killing NOC, but rather whether the ordinary person, confronted with the same wrongful act or insult in the same circumstances, would have lost the power of self control.*
>
> You must take into account everything that was said or done at the time and you must also consider NOA and NOC's relationship and history, including any previous exchanges between them. [Emphasis added]

[58] The respondent's position reduces the objective meaning of "insult" and moves ***Thibert*** much further down the road to subjectivity and does so erroneously. As pointed out by the Canadian Judicial Council's proposed standard jury charge, an insult is "a statement or conduct that is deliberately offensive or an affront to a person's dignity or self-respect". But inasmuch as a wide variety of forms of statement or conduct by a person might fit such words, the causation of "loss of control" by the "ordinary person" is an associated and essential characteristic of the concept of "insult" for the jury to consider.

[59] The respondent contends that the "adultery" of the respondent's wife was sufficient to constitute an insult within the meaning of s. 232 so as to excuse the intent associated with killing of the wife's new male friend. That neither the wife nor male friend had taken any steps to bring that adultery to the attention of the respondent, and that the respondent already suspected some involvement in any event, are set aside by the respondent's argument. That the respondent was trespassing in his wife's bedroom uninvited is also set aside. The "insult" is defined only by the respondent in terms of what the respondent, in his personal life experience and expectations, is inferred to have found to be insulting. It did not emanate from the deceased or the respondent's wife in the ordinary sense of an insult.

[60] In ***R. v. Young***, (1993) 78 C.C.C. (3d) 538, [1993] N.S.J. No. 14 (QL) at p. 542 (C.C.C.), the victim told the accused that she hated him and did not wish to have anything more to do with him. The Court of Appeal wrote:

> *It would set a dangerous precedent to characterize terminating a relationship as an insult or wrongful act capable of constituting provocation to kill. The appellant may have been feeling anger, frustration and a sense of loss, particularly if he was in a position of emotional dependency on the victim as his counsel asserts, but that is not provocation of a kind to reduce murder to manslaughter.* The appellant says he does not remember where or when he picked up the knife, but he was obviously armed with it when he left the apartment. [Emphasis added]

[61] This passage was quoted approvingly in another marital breakdown case relating to the objective perspective of insult in ***R. v. Lees*** (2001), 156 C.C.C. (3d) 421, [2001] B.C.J. No. 249 (QL), 2001 BCCA 0094, leave denied, [2001] S.C.C.A. No. 143 (QL) at paras. 21 to 23.

[62] The decision in ***R. v. Nahar*** (2004), 181 C.C.C. (3d) 449, [2004] B.C.J. No. 278 (QL), 2004 BCCA 77, appears to read ***Thibert*** to mean that the test is still "objective" even if the attributes ascribed to the "ordinary person" include age, gender, and "such other factors as would give the act or insult in question a special significance". I do not read this, however, as re-defining what is an "insult", but as relating to whether the conduct said to be an "insult" could have an elevated effect upon the mind of the person. If this reflects a different view than ***Humaid*** and ***Young*** on the legal character of "insult," I would respectfully disagree. In any event, the Court in ***Nahar*** wrote that the insult had to be "an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control", adding at para. 39 that "even taking into account Mr. Nahar's cultural background, the ordinary person would not in the circumstances have lost his power of self-control. Indeed, I consider that was the only sound conclusion."

[63] More broadly, the respondent's submission would eliminate any significance of the maturity of Canadian social norms regarding the only two acceptable responses to adultery: forgiveness and family rehabilitation, or civilized termination of the marriage. There is no justification for rolling social standards back to the era of coverture. Indeed, Parliament and the Legislature, decades ago, eliminated adultery from relevance on the subject of division of matrimonial property or other collateral relief associated with divorce. It no longer causes the adulterer to completely forfeit the regard of society. Adultery is not outlawry. No support exists for clawing back legal opprobrium for adultery by the declaratory effect of adding it to the legal definition of provocation. At the very least, no explosion of intentional killing should be excusable by the mere fact of discovering 'adultery' done by a person who has elected to live separate and apart from her spouse. The 'ordinary person' should not be fixed with beliefs that are irreconcilable with fundamental Canadian values: ***Humaid***, *supra* at para. 93.

[64] In consequence, I conclude that the trial judge erred in law in her approach to the legal term "insult" and that the verdict of manslaughter cannot stand. Specifically, she accepted as an "insult" capable of supporting the application of s. 232 of the *Code* the appellant's observation of evidence of his estranged wife's involvement with another man after she had left him. In my view, this cannot in law be sufficient to constitute an insult capable of causing a loss of control in the form of a homicidal rage. In my view, a jury should not be charged on provocation on this basis, as there is no air of reality to this as "insult" constituting an excuse for the ordinary person of whatever personal circumstances or background. Disposing of this point adversely to the respondent is sufficient to justify appellate intervention: ***Humaid,*** *supra* at 63; ***R. v. Kent***, (2005) 196 C.C.C. (3d) 528, [2005] B.C.J. No. 911(QL), 2005 BCCA 238 at para. 17.

[65] Although the trial judge's self mis-direction of law as to "insult" is sufficient to dispose of the appeal, I would turn to other aspects of the trial judge's reasons in the event I am in error.

Suddenness of Trigger and Response

[66] The question whether there is any evidence that an insult is acted on the "sudden" is initially a question of law for the trial judge: ***R. v. Tripodi***, [1955] S.C.R. 438, 112 C.C.C. 66. According to ***Tripodi**, supra*, at p. 223 (C.C.C.), the insult must "strike upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame". The issues of suddenness also have both an objective and subjective character within s. 232 of the *Code*. In addition, Courts apply the 'air of reality' test to its specific application to the case so as to move the case past mere assertion: ***R. v. Faid***, [1983] 1 S.C.R. 265, [1983] S.C.J. No. 21 (QL); ***R. v. Point***, (2003) 327 A.R. 96, [2003] A.J. No. (QL) at paras. 5 to 9; also ***R. v. Cinous***, [2002] 2 S.C.R. 3, [2002] S.C.J. No. 28 (QL), 2002 SCC 29 and ***R. v. Fontaine***, [2004] 1 S.C.R. 702, [2004] S.C.J. No. 23 (QL), 2004 SCC 27 at para. 21 and paras. 55 to 58. That air of reality is essential to be met before calling upon the Crown to disprove the excuse.

[67] The trial judge's finding on suddenness rested on two essential points: (a) she inferred that the discovery of the wife and her male friend in the bedroom nude was a surprise to the respondent, and (b) he reacted with anger quickly to what he saw:

> He faced a sight in a bedroom which he had never seen before and did not expect to see. I find it is not proven, beyond a reasonable doubt, that that ordinary person would not have lost self-control.
>
> As to the fourth element, the timing evidence proves this event was quick. Was there time for the accused's passion to cool? There were two breaks in the attack. Clearly, the initial attack was on the sudden. The accused went to the kitchen and was quickly back with knives, despite being armed. This is consistent with both a loss of control and an intent to better arm. It was after the knives were obtained and the first stab wound was imparted that the accused made the call to his godfather. [F20/15-28; 1264/15-28]

[68] Segregating the concept of suddenness from both the rest of the language and policy centre of s. 232 reduces the concept to little more than surprise. Once again, the position of the respondent effectively contends for that to be the legal outcome here. However, all of humankind will be surprised from time to time, and often shockingly so. Surprises may even include developments which are objectively foreseeable, such as the escalations of a pre-existing bad relationship between two parties: see *e.g.* ***R. v. Reilly***, [1984] 2 S.C.R. 396, [1984] S.C.J. No. 46 (QL), referring to the "daily conversational exchange" between the parties.

[69] The trial judge clearly regarded the discovery by the respondent of his wife and her male friend in her bedroom as being a surprise to him. This she inferred as there was no evidence from the appellant as to what he expected to see in that room. There was no evidence in the trial directly *from the appellant* as to the following: (1) why he went to the apartment building, (2) why he phoned first, (3) why he lied to the building manager to get in the building, (4) why he was carrying

a knife, (5) why he went to the bedroom after he entered the apartment, (6) why he removed his footwear, (7) whether he would have seen the male friend's footwear at the door, (8) that he expected to find his children or any property of his there or intended to retrieve either, (9) that he believed that his wife had no more than a platonic relationship with her male friend, (10) why on finding the two together, he went to the kitchen to retrieve two larger and sturdy knives. Although it is not this Court's function to re-try the trial judge's view of surprise, any such surprise must in law strike a mind unprepared and be such as is logically causative of the loss of the power of self control. Again, the Canadian Judicial Council's standard jury charge is revealing:

> *The question is not simply whether NOA was angry. Anger alone, even extreme anger, is not a defence. However, an angry person might lose the power of self-control.*
>
> Here the focus is on NOA him/herself. Even if an ordinary person would have lost the power of self-control as a result of the wrongful act or insult this does not necessarily mean that NOA did.
>
> Review all the circumstances and consider whether NOA had *actually lost his/her power of self-control* when s/he killed NOC. Here you must take into account all of NOA's personal characteristics and circumstances, including such things as age, background, idiosyncrasies, temperament, mental state, and any consumption of alcohol or drugs.

and

> A wrongful act or insult is sudden *if NOA did not expect it, his/her mind was not prepared for it, and its immediate effect was to cause him/her to lose the power of self-control.* Take into account all the circumstances, and the entire sequence of events, including the history of relations between NOA and NOC. [Emphasis added]

[70] What the respondent saw was not an unpredictable step in the ending of his marriage. Indeed, he believed her to be involved with another man whose identity he had previously determined. If seeing evidence of her involvement surprised him, that had to be due to his inability to "get over it", as compared with his wife. It would therefore be a personal and idiosyncratic state of mind or belief - and not a feature of the ordinary person - that he did not see his marriage as ending, or at least that he should leave Le Duong alone. Moreover, when one considers the pattern over time that the parties were separated and moving apart, his expectations as to her behaviour when apart from him would not conform to an objective standard as under s. 232, but to a subjective hope or belief held by him which was unreasonable.

[71] The trial judge found the respondent's belief that there was a prospect of reconciliation to be "reasonable" but she did so from the respondent's vantage point. Moreover, his belief in a prospect of reconciliation with her is not the same as a right to expect how she will behave. His

belief, whatever it actually was, would be unreasonable from the perspective of separated spouses generally, which generality must figure in the legal test in s. 232. In 21st Century Canada, it is not realistic for a separated man, particularly one who knows that his wife is seeing another man, to not expect to see them together. It is not realistic for that man to assume that they will not be together at her residence. It is not realistic for the man to assume that his estranged wife, who does not want to answer his phone calls, will nonetheless want him back in her life. For the purposes of the sudden shock contemplated by s. 232, it is incorrect in law to define the level of surprise, let alone the level of suddenness, on speculation solely as to how the man might have hoped to see his situation.

[72] Further, suddenness is also required by Parliament to be associated with the response at the time of killing, not merely at some earlier time. Even if there were the profoundly shocking form of wrongful act or insult which suddenly struck a reasonable mind unprepared for it, and even if it produced a murderous rage and excusable loss of control, the infliction of a fatal attack upon the victim must occur before the accused has had a chance for his passions to cool and to come back to reason: ***R. v. Willis***, (2007) 224 O.A.C. 159, [2007] O.J. No. 1861 (QL), 2007 ONCA 365 at para. 25. The uncontrolled state of mind is an essential element of the public policy that runs throughout s. 232. This is not a standard which is met merely because the person's "heat of passion" starts and thereafter some form of anger continues. An objectively recognizable loss of the power of self control must coexist with the killing. Logically, loss of the power of self control can be discounted once the person starts making decisions and choices about alternative courses of action.

[73] The element of the s. 232 requirement that loss of the power of self control must continue and there not be "opportunity" for it to cool is not answered merely by the fact that the accused does not change his mind from an initial impulse. The Court should consider whether he had "time to reflect": ***R. v. Merasty***, (1999) 30 C.R. (5th) 274, [1999] S.J. No. 899 (QL) (Sask.C.A.) leave denied, [2000] S.C.C.A. No. 75 (QL) at para. 18. Whether the respondent, as an individual, completely calmed down or not is not the decisive issue in s. 232. The first question is whether an ordinary person would have had the opportunity to move out of the state of uncontrolled frenzy. On that side of the question, it is not decisive that the accused did or did not completely calm down or lose anger. The trial judge found acts of reason and making of choices. This suggests that the respondent had the opportunity to regain control and did act with a measure of control. The law expects this of the ordinary person even with the respondent's characteristics if s. 232 is to have the meaning intended by Parliament. The facts found here describe controlled conduct. Only anger continued. Again, as pointed out by the Canadian Judicial Council's standard jury charge:

> Provocation is a defence only if NOA's killing of NOC was a spontaneous reaction to the wrongful act or insult that caused him/her to lose the power of self-control. *The question is whether NOA acted suddenly, while s/he still had no self-control. This is what is meant by acting "in the heat of passion".*
>
> Even if NOA did lose the power of self-control, you must consider whether s/he had regained it before s/he killed NOC. *Review the entire sequence of events in considering whether NOA acted suddenly and before there was time for his/her*

> *passion to cool*. Once again, you must take into account all of NOA's personal characteristics and circumstances. [Emphasis added]

[74] As noted above, the respondent places much emphasis on the decision in ***Thibert***. In ***Thibert***, however, Cory J referred to human frailties which respond to provocation of such a shocking quality and suddenness that it can "sometimes lead people to act irrationally and impulsively" to kill. In other words, the question is not simply whether the accused got angry, or even whether he lost control. To apply the excuse, there must be evidence that, having regard to current social mores, the accused could have been so deprived of *the power of self-control* by the sudden shock of the wrongful act or insult, that the accused was in actuality deprived of that power of self-control. Moreover, the findings must be that the loss of *the power of self-control* persisted such that in actuality the accused is in that irrational and impulsive state when the killing is done.

[75] The respondent's position would nullify the objective requirements of suddenness and amount to error of law. From the inception of the events, the respondent was conversing with his wife, albeit angrily. He attacked the victim with one stab wound. He made a phone call to his godfather and complained about his discovery. He turned his attention to his wife. He wounded her hand, and in response to her speaking to him, made a callous remark and inflicted a cruel wound upon her for an intellectually selected and expressed reason. He specifically refrained from killing her and was found by the trial judge to have not intended to kill her. He thereafter turned his attention back to completing the killing of the victim, followed up with an effort to implicate the victim in a use of a knife himself. Angrily carrying out acts of reason is malice, not uncontrollable passion: ***R. v. Parent***, [2001] 1 S.C.R. 761, [2001] S.C.J. No. 31 (QL), at para. 10.

[76] As for the subjective side of the question of loss of power of self control, the trial judge's finding of excitement and anger overheard on the phone call falls within the range of fact finding for which deference is required. Outward excitement and anger, however, were not decisive when the respondent did not testify about his state of mind. The respondent was measuring his actions on what he was saying and doing. The trial judge should have addressed whether he could have regained his self control by the time he went into the living room and finished off the victim – not merely whether he was still angry and excited. The trial judge found his anger continued but she failed to direct herself to consider whether the continuation of his anger amounted to a continuing lack of the power of self control without an opportunity to recover it.

[77] Therefore, in my respectful view, the trial judge erred in law in failing to apply the proper test to deciding (a) whether the fact of an angry response by the respondent to what he saw constituted a response to a sudden mental onslaught on a mind unprepared which caused a loss of the power of self control as defined in law, and (b) even if she found an initial loss of the power of self control, as opposed to mere anger and excitement on the part of the respondent, whether there was an opportunity for his passions to cool, and whether he was still deprived of the power of self control when he killed the deceased. In my respectful view, there was on the trial judge's fact findings no air of reality to his acting on the sudden at the time of the killing.

Summary

[78] In sum, it is my respectful view that it is error of law to sift through the components of s. 232 as if they were entirely and conceptually separate and distinct from the rest of s. 232. To do so can produce a collection of subjectively re-cast pieces that, when putatively re-assembled, lose touch with the essentially objective policy theme of the provocation excuse, and thus do not accurately constitute the excuse defined by Parliament. While in practical terms the terms of s. 232 of the *Code* require a methodical and step by step process, such as described in the Canadian Judicial Council's proposed standard jury charge, the steps in that process are not conceptually isolated from one another. The policy theme of s. 232 recurs at each step.

[79] In my respectful view, the learned trial judge was persuaded to apply the words of s. 232 of the *Code* in a discrete manner which caused her to misdirect herself in law as to crucial features of the concepts of "insult" and "suddenness" contemplated by the section.

[80] In closing, I would add that the absence of evidence bearing directly on the state of mind of the accused affects its reality, having regard to the various ways in which the relevance of the excuse is dependent upon the state of mind of the accused. The excuse must apply to the specific case; the actual state of mind of the specific accused is crucial. Unless the accused is in the uncontrolled mental state in s. 232, he is not eligible for the statutory excuse. There is no obvious injustice in imposing on an accused, who would invoke this excuse, the practical burden of having to provide direct evidence as to his state of mind in order that the trier of fact may address whether he lost control and why: see by analogy, ***R. v. Stone***, [1999] 2 S.C.R. 290, [1999] S.C.J. No. 27 (QL); ***R. v. Daviault***, [1994] 3 S.C.R. 63, [1994] S.C.J. No. 77 (QL).

Conclusion

[81] As regards remedy under s. 686(4)(b)(ii) of the *Code*, the Court has discretion to substitute a conviction if the accused "should have been found guilty". In light of the law, and of the trial judge's findings of fact, and of the overwhelming evidence, a conviction for murder was unavoidable. The errors of the trial judge within reach of the Crown appeal relate to the legal implications of her fact findings and do not leave open a realistic possibility of an alternative verdict to guilt of murder. The *actus reus* and *mens rea* for murder were proven and the trial judge's findings of fact reach those conclusions. The defence of provocation was unavailable on any characterization or interpretation of the evidence that is comprised within or available from her fact findings. No other defence arises. In brief, a conviction for murder was inevitable and a new trial would serve no purpose.

[82] Accordingly, I conclude that the respondent "should" have been convicted of murder. A verdict of guilty of murder should be substituted by this Court. Inasmuch as the respondent and the Crown may have evidence to lead relevant to the sentence disposition to be made under s. 745.4 of the *Code*, I would exercise the jurisdiction under s. 686(4)(b) of the *Code* and return the matter to the Court of Queen's Bench to "impose a sentence that is warranted in law".

Appeal heard on March 5, 2008

Reasons filed at Edmonton, Alberta
this 2nd day of June, 2008

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Watson J.A.

Appearances:

S.D. Hughson, Q.C.
for the Appellant

P.J. Royal, Q.C.
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