

Court of Queen's Bench of Alberta

Citation: R v Kody, 2021 ABQB 55

Date: 20210121
Docket: 171509243Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Stephan Kody

Defendant

**Oral Verdict
of the
Honourable Mr. Justice Germain**

A. Introduction

[1] Mr. Stephan Kody is on trial for second degree murder, in the death of Mr. Eddie Melenka plus a count of possession of a weapon for a purpose dangerous to the peace.

[2] The charges relate to the stabbing death of Mr. Melenka in Edmonton on Christmas day 2017. I am now able to deliver my verdict. I intend to start with the background facts. These are not greatly in dispute and many were admitted.

B. Background Facts

[3] On Christmas Eve (December 24, 2017) at least 13 people gathered at the home of Corine Kody for a Christmas meal which started around 7 PM. Alcohol and cocaine were both available. After supper one additional family member arrived but many guests left leaving 3 males and 4 females to continue partying.

[4] The final 7, consisted of Mr. Stephan Kody, (the Accused) his mother Corine Kody, the deceased Mr. Melenka, (Corine Kody's common-law husband, who lived in the home full time with her); Mr. Kody's friend Corey Fisher, Corine Kody's sister Heather Griffin and Heather's two adult daughters- Rain Griffin, and Lorin Griffin. At the trial we heard from Mr. Kody, his mother Corine Kody, and Mr. Kody's friend Jason Fisher.

[5] The party moved to the living room area of this small home, where it continued as the group sang to karaoke music. More alcohol was consumed and from time to time Mr. Melenka, Ms. Kody, Mr. Kody, and Mr. Fisher would go to the master bedroom down a hallway to ingest Cocaine.

[6] Around 3 AM in the morning on December 25, 2017 the party mood changed! An altercation broke out between Mr. Melenka and Mr. Kody in the living room area observed by both Mr. Fisher and Ms. Corine Kody. Perhaps during that initial altercation, a couch in the living room may have been displaced slightly. The witnesses all describe this altercation and its subsequent timing sequence differently. As those facts are critical to the case, I will return to them. However, a short time later Mr. Kody and Mr. Melenka are alone in the bedroom and Mr. Kody stabs Mr. Melenka with a pair of scissors. The police would later find the scissors and seize them as an exhibit.

[7] Mr. Melenka returns to the living room and collapses by the couch where his family members frantically try to stop his bleeding and call 911. It was emotional chaos at the home during this call.

[8] Time recollection is very difficult for all of the witnesses but the 911 call is first recorded at 3:21 AM; police and the ambulance are on site at 3:34. Mr. Melenka is taken to the University Hospital where he succumbs to his wounds.

[9] Mr. Melenka was stabbed 5 times and the pathologist suggests that the scissors marked as an exhibit in this proceeding could be the murder weapon. There is blood on the scissors and the handle is broken.

[10] One of the wounds entered Mr. Melenka between his top second and third rib and proceeded downward into his heart which led to bleeding into the chest cavity and despite prompt, competent and aggressive medical intervention, Mr. Melenka succumbed to his wounds.

[11] Mr. Kody gave evidence in this case. He admitted delivering the fatal blow with the scissors marked as an exhibit. His evidence of the dynamic of the disagreement between he and Mr. Melenka must be considered carefully and I will return to it later.

[12] The issues which I must deal with therefore is whether this homicide was justified on the basis of self defence or if not, whether the Crown has proven beyond a reasonable doubt that Mr. Kody had the requisite intention to kill Mr. Melenka.

C. The Position of the Parties

1. The Crown

[13] I begin by outlining the position of the Crown. The Crown submits that the evidence that Mr. Kody should be convicted of at least manslaughter is very strong. Mr. Kody admits stabbing Mr. Melenka and that the circumstances of the fight are such that the Crown has negated the operation of self defence. The Crown anchors their view around evidence of anger on the part of Mr. Kody for being cut off from continued use of cocaine by Mr. Melenka.

[14] While admitting that the evidence is thin, the Crown points out to the alternate method of proving murder permitted by section 229(a) (ii) which is recklessness as it relates to the infliction of injury and being reckless as to whether death ensues or not. The Crown asserts that picking up a pair of scissors and stabbing someone in the area of their heart is reflective of an intention to kill and there was not sufficient evidence of alcohol consumption to justify any suggestion that Mr. Kody was not in full control of his faculties. In short, Mr. Kody was angry with Mr. Melenka, stabbed him in anger and killed him.

2. The Defence

[15] The defence submits that his client's evidence should be believed as being reasonable, logical, and consistent with all of the background facts. The photos taken of Mr. Kody following his arrest reveal that he had been subject to a beating. Mr. Melenka is a larger man who was beating him in the bedroom at which time Mr. Kody stabbed him with a pair of scissors that were in his hand. Although thereafter Mr. Kody left the scene, in these circumstances, this is not indicative of an admission of any guilt.

[16] Under the circumstances it was not unreasonable for Mr. Kody to utilize the pair of scissors leading to the tragic death of Mr. Melenka.

[17] The fallback position of the defence is that if I reject the evidence of self defence then, nevertheless, the evidence of an intention to kill is weak and when factoring in a failed self defence argument that fails on the basis of over application of force plus the consumption of alcohol then Mr. Kody should be convicted of manslaughter only.

D. Verdict Considerations

[18] It is useful in any case involving an individual charged with a criminal offence that some of the first principles be reviewed as a starting point. By reviewing them, I continuously remind myself that Mr. Kody is presumed to be innocent and that presumption of innocence is to his benefit through the entire course of the trial, unless at the end of the trial I convict him.

[19] To overcome this presumption of innocence, the Crown must prove guilt beyond a reasonable doubt. Proof "beyond a reasonable doubt" goes significantly beyond a mere suspicion of guilt. Proof beyond a reasonable doubt lies closer to absolute certainty than it does to guilt on a probable basis.

[20] Much of the case was not in dispute because it was competently handled by both Crown and defence. Many of the essential elements required in a trial for second-degree murder were not in dispute. The date, time, place and circumstances of the death of Mr. Melenka were obvious. The identity and involvement of Mr. Kody was also admitted by Mr. Kody in his own evidence.

[21] In addition to the presumption of innocence and the Crown's obligation to prove the guilt of Mr. Kody beyond a reasonable doubt, I must also be mindful of special rules which have developed in Canadian law that relate to the handling of the evidence of a defendant who elects to take the witness stand and give evidence in his own defence.

[22] The reason for the special rules is to ensure that judges never lose sight of the fact that it is the Crown that must prove the case beyond a reasonable doubt; the accused does not need to prove his innocence.

[23] Because of this, if I believe Mr. Kody that although he did strike Mr. Melenka multiple times with a pair of scissors, it was while under attack from Mr. Melenka. The stabbing was driven by fear for his own personal safety and not intended to kill or harm Mr. Melenka. If I believe this then I must acquit Mr. Kody of murder, provided that his evidence is sufficient that if believed, amounts to a legal defence.

[24] Second, even if I do not completely believe Mr. Kody, if his evidence taken in the context with all of the evidence at least raises a reasonable doubt about whether the charges and included offenses within them have been proven, he must get the benefit of that doubt and be acquitted.

[25] Finally, even if I do not believe Mr. Kody's evidence and nor does his evidence raise a reasonable doubt, I must remind myself continuously of the Crown's burden to prove guilt beyond a reasonable doubt and consider the evidence which I do accept in forming my conclusion and my verdict.

[26] It is also the reality in criminal prosecutions that weaknesses in the Crown's case that flow from credibility or reliability of witnesses are often enough to prevent the Crown from establishing guilt beyond a reasonable doubt.

[27] Occasionally the words credibility and reliability are used interchangeably; however, as I understand them credibility speaks of a judge's assessment of the general honesty and truthfulness of a person's evidence and their willingness to tell the truth. Reliability deals with frailties in the individual's ability to observe and report on what they have seen or what has occurred to them. For example, an individual who is noted to be a person of great credibility may not be a reliable witness if, at the time they were witnessing or participating in events, they had consumed alcohol or drugs to such extent that it may affect their ability to remember and interpret the situation that was occurring.

[28] In this case, all of the scene witnesses had consumed both alcohol and drugs during the time in question. Mr. Melenka was, according to the medical officer, at a blood alcohol level of 200, and cocaine was also noted in his bloodstream. Mr. Kody's mother conceded that all present had consumed alcohol and drugs that evening as did Crown witness Mr. Fisher who was at the Christmas gathering as a guest of Mr. Kody. It is not an unreasonable inference that the witnesses, all smaller than Mr. Melenka, would also have blood alcohol levels close to 200 if not higher.

1. Self Defence

[29] The next issue that I wish to deal with in a general way is the issue of self defence. The manner in which self defence is advanced in a trial begins with understanding that the evidence presented about self defence must be sufficient enough to at least lead to a judicial determination that there is "an air of reality" to the defence. The amount of evidence necessary to trigger this conclusion is significantly less than that required to rebut the existence of self defence. In this case, there was little doubt after the Crown's case that self defence was a potential issue here, and after Mr. Kody gave evidence indicating that he was afraid of being beaten by Mr. Melenka, then the 'air of reality' to self defence was fairly conceded by the Crown.

[30] Once there is an air of reality raised about the issue of self defence, the Crown must prove beyond a reasonable doubt that self defence does not exist. To do this, they must negate at least one of three requirements for self defence set out in section 34 (1) of the *Criminal Code*,

using factors which may be defined in section 34 (2). It is always critical in considering self defence for a trial judge to remind himself that the individual on trial does not have to prove his innocence by proving the existence of self defence. It is the Crown which must prove beyond a reasonable doubt that the requirements of self defence have not been met.

[31] Self defence is a lot easier to identify in practice than to articulate in law, and the criminal code legislative framework on self defence had long been criticized as being complex and convoluted, difficult for jurors to understand, and often the subject matter of appellate review. In 2013, there was a significant restructuring relating to the *Criminal Code* provisions on self defence and it is clear that for crimes which occurred after that restructuring, the current section 34 applies.

[32] I need not develop a treatise on the concept of self defence and a simple reference to the 2021 *Tremear's Criminal Code* provides an adequate summary at page 109 about the three requirements to justify self defence.

[33] The first requirement is that the accused must have a reasonable belief that force is being used against him. The second is that his activity that characterizes self defence must be for the purpose of defending or protecting him, not as is often the case, retaliatory aggression. Finally, the response must be reasonable.

[34] Quoting with paraphrasing, and removal of superfluous commentary, from 2021 *Tremear's*, the authors in their commentary [page 109] point out as follows:

The first requirement, created by section 34 (1) (a) *belief*, relates to the defendant's state of mind, his belief that force is being used or threatened against him. A mistake by the defendant about the existence or threat of force is not fatal to his claim under this section but the mistake must be reasonable. The defendant need not believe that the force is likely to cause him death or serious bodily harm.

The purpose requirement in section 34 (1) (b) refers to the defendant's subjective *purpose* in doing the act that constitutes the offensive. The inquiry and standard is subjective. The defendant's purpose must be to defend himself. The defendant's purpose must not be to seek vengeance, visit punishment, or vindicate honour against another who has used or threatened force against him.

The third requirement, response, is often the critical issue. The defendant's acts must be *reasonable* in the circumstances. The standard is objective and requires a contextual analysis of all the circumstances including but not only the mandatory factors listed in section 34 (2).

2. Post-Offence Conduct

[35] The last introductory area I wish to deal with is the impact of post-offence conduct. This includes leaving the home. However, under the family dynamic that existed, nothing from conduct of flight affects the outcome of this verdict as it does not amplify nor provide any evidence of intention to commit murder or negate self defence. Further, the Crown very fairly advised the Court not to consider the line of questioning attempted by the Crown to elicit from the defendant in cross-examination why the defendant did not act differently or say differently when he was communicating with third parties and his mother after the offence.

[36] The thesis of the Crown is that all of the verbal commentary of the accused to his mother after the incident seemed to concede the likelihood he would do time in jail (which he in fact did). The difficulty with this line of questioning from the defence point of view is that it violates the constitutional right of silence and any helpful defence commentary would have not been admissible by the defendant as being a prior self-serving consistent statement. So, it was unfair for the Crown to elicit as post-conduct, either prior inconsistent statements or statements implying guilt.

[37] The Crown specifically requested that I not consider this; however, there were two important statements identified by many witnesses that were picked up by 911 recordings that may be important and are admissible as spontaneous exclamations or part of the *res gestae*. First, shortly after the 911 operator is on the line, a background male voice identified as that of Mr. Kody indicates “you hit me first”, and a background voice identified as Mr. Melenka asserts “I didn’t touch you”.

3. Cause of Death

[38] An autopsy report was completed on Mr. Eddie Melenka, by medical Ofc. Dr. Enrico Risso. In summary, Risso observed that:

There were multiple stab wounds to the body, all but one of which was superficial. A single stab wound to the upper left chest region penetrated the chest wall and injured the heart. The injury was associated with blood within the left chest cavity (hemothorax). The direction of wound path was from left to right front to back and downwards. The other superficial stab wounds were to the left side of the chest and back and to the left side of the face. The stab wounds had squared off edges, and lacked a sharp edge. Additionally, present were multiple superficial scrapes to the face and arms.

[39] The conclusion is that the cause of death is a stab wound to the chest. Based on his experience, the Medical Examiner also concluded that the wounds did not have the characteristic of a sharp knife but perhaps have the characteristic of a blunt object such as closed scissors. On December 28, 2017, the police did find a pair of scissors in the bedroom with broken handles (Exhibit 5) plus identified blood on the scissors. At trial, the Medical Examiner identified these as a potential cause of the injuries. During the autopsy an alternate, but nearly identical pair of scissors was placed against 2 superficial wounds and the V pattern was consistent with two blades of a pair of scissors held slightly apart.

4. Returning to the Facts

[40] It is now appropriate that I return to the facts and focus on the altercation between Mr. Kody and Mr. Melenka described by his mother, Ms. Kody, and his friend Mr. Fischer. Let me begin by pointing out that both had been consuming alcohol all day, there was no intention on the part of Mr. Kody and his friend to drive home and so there were no natural prohibitions or barriers to the use of alcohol stimulated by the good time of a family gathering on Christmas Eve and into Christmas Day. Both Mr. Fisher and Ms. Kody can be forgiven for frailties in their evidence. In terms of evaluation of their credibility, I would assess Ms. Kody as more credible than Mr. Fisher who appeared to have memory lapses around certain areas; by example, his own cocaine use.

[41] I review the start of hostilities as described by these two witnesses. At some point in the early morning on Christmas Day, a dispute developed in the living room between Mr. Melenka and Mr. Kody. Mr. Melenka pushed Mr. Kody. Mr. Kody pushed back. Mr. Melenka pushed Mr. Kody a little harder. Mr. Kody pushed back and finally Mr. Melenka pushed Mr. Kody onto the couch. In the evidence given by both Ms. Kody and Mr. Fisher, none of them appeared to react very strongly to this pushing and shoving and it leads to the inference that it was not a serious event and not as serious and as frightening as Mr. Kody opines in mounting his defence. There is no bloodletting at this point and, as the Coroner would point out, even after all the violence described by the witnesses, Mr. Melenka's hands were both bruise and cut free which militates against an over zealous pummeling inflicted by him against Mr. Kody, at least by his hands.

[42] At this point, Ms. Kody indicates that her son fled to the back bedroom and that Mr. Melenka chased after him. Mr. Fisher observes Mr. Kody being pushed back onto the couch but is very unclear about the dynamic by which Mr. Kody runs to the master bedroom with Mr. Melenka in pursuit.

[43] No one in the house moves to the back bedroom initially which again leaves me with the impression that no one in the home viewed the dispute between Mr. Melenka and Mr. Kody as one that might escalate with tragic results. Only after some unidentified length of time does Mr. Fisher react to Mr. Kody's Pitbull dog barking in the bedroom and obviously excited. Mr. Fisher indicates he goes to the bedroom where he observes Mr. Kody on the bed with his feet on the floor being struck by Mr. Melenka. Mr. Melenka is now described as shirtless. Mr. Fisher sees no weapon, but he sees his friend in trouble so he pulls Mr. Melenka off Mr. Kody. After he brings Mr. Melenka out of the bedroom, Mr. Fisher notices that he has blood on his hands and goes to wash up in the bathroom. Mr. Melenka moves down the hall towards the living room where he collapses on the floor. Ms. Kody and later her niece attempt to stop the bleeding while calling 911.

[44] I conclude that Mr. Kody had to have stabbed Mr. Melenka before Mr. Fisher came into the bedroom because Mr. Fisher immediately pulled Mr. Melenka off Mr. Kody starting him out of the room and did not see anything in Mr. Kody's hand. Further, because he could see Mr. Melenka's shirtless back than either Mr. Melenka's T shirt had been removed seconds earlier or it was bunched up around Mr. Melenka neck. The shirt was on Mr. Melenka during the stabbing because of matching tears in the fabric. The shirt did end up at the Medical Examiner's Office but it is unclear whether it was on Mr. Melenka, bunched around his neck or whether one of the police officers brought the clothing to the hospital to go with the body to the Coroner's office. It is an interesting discrepancy not made completely clear in the evidence but not determinative of the outcome of this case.

5. Mr. Kody's Evidence

[45] I now focus on the evidence given by Mr. Kody. He indicates that after supper, he fell asleep on the loveseat and was awoken around 10 o'clock at night by Mr. Melenka slapping him in the face with a bag of cocaine. Mr. Melenka was willing to share his cocaine initially with Mr. Kody and Mr. Fisher as part of the holiday festivity. Mr. Kody indicates that it was Mr. Melenka that got him onto drugs and would share cocaine with him. The cocaine appears to have revived the party and karaoke music was played as he sang along. The cocaine was set up in the master bedroom. Over the course of the evening, Mr. Fisher, Ms. Kody, Mr. Kody and Mr. Melenka were all described as going to the master bedroom in isolation to do cocaine. Mr. Kody admits

that he did at least 3 or 4 lines of cocaine, which he ingested by sniffing it into his nose. Mr. Kody also indicates that a dispute did develop late in the evening over whether he could count on Mr. Melenka to leave him another line of cocaine. Mr. Melenka said no and it is clear that this was the trigger for the pushing and shoving that went on in the living room.

[46] Mr. Kody's continuing narrative is that he was frightened by Mr. Melenka when he was pushed over the couch so to get away, he ran back around the living room into the dining area of the kitchen where he grabbed a pair of scissors that were sitting on the kitchen table and ran back to the bedroom. He identifies that route as taking him furthest away from Mr. Melenka to escape the rage of Mr. Melenka.

[47] He indicates that Mr. Melenka followed him into the bedroom and Mr. Kody was standing with arms at his side and the scissors in his hand when Mr. Melenka indicated 'so you want to stab me', after which Mr. Kody says he was attacked by Mr. Melenka and he fought back with the scissors. Although he did deliver a fatal blow at that time, he was not successful in repelling Mr. Melenka because it required Mr. Fisher to pull Mr. Melenka off Mr. Kody.

[48] Despite aggressive and extremely competent cross-examination, Mr. Kody repeats in various ways that he had ample reason to fear Mr. Melenka. He had seen Mr. Melenka knock people unconscious historically and that he had been choked by Mr. Melenka some years earlier at a camping trip. He indicates that his fear was sufficient that he grabbed the scissors to protect himself and ran to the bedroom to get as far away as he could from Mr. Melenka. When he could retreat no further, he stood his ground with the scissors. Although he admits that he felt Mr. Melenka was not out of cocaine, and that it was in the master bedroom; he resists all suggestion that he went there for cocaine .

[49] As the Crown must disprove the claim of self defence, it is useful for me to put on the record the Crown's assessment of this evidence. The Crown asserts that the scissors used in the stabbing were most likely found in the bedroom and might even have been part of the cocaine consumption process and not picked up from the table as Mr. Kody says. The Crown asserts that the altercation in the living room was nothing because it did not arouse any anxiety on the part of any other witness. The Crown asserts that Mr. Kody ran toward master bedroom for the cocaine and not to avoid Mr. Melenka. He had ample opportunity to run either outside or down into the basement or even lock himself in the bathroom on route to the master bedroom.

[50] The Crown asserts that Mr. Kody was not in any fear of injury because he did not call out for help. The Crown asserts that if Mr. Kody was really fearful of Mr. Melenka, he would've stayed right in the living room with his friend and family members to help him and bear witness to any beating. The Crown asserts that Mr. Fisher, who is over 6'4" and over 200 pounds, would be more than able to help if he truly saw Mr. Kody being beaten in the living room.

[51] The penultimate position of the Crown is that I should reject Mr. Kody's evidence as being improbable, fanciful, and wishful thinking. Instead, I should conclude that Mr. Kody was angry that Mr. Melenka, during such a happy Christmas occasion, would cut him off the cocaine and that when he ran into the bedroom with a pair of scissors he was running in there to get cocaine not to escape Mr. Melenka. Whether Mr. Kody armed himself with scissors from the dining room table or armed himself with scissors in the bedroom, nevertheless, he had a pair of scissors in his hand and attacked Mr. Melenka with them out of anger.

6. The Section 34(2) Factors

[52] To assist juries in jury trials and judges in judge-alone trials deal with issues flowing from self defence, section 34 (2) lists 9 factors in a non-exhaustive list. These factors help define whether under all the circumstances, the force applied was reasonable.

[53] The first of these factors is the nature of the force or threat. In this particular case, it is a threat with a beating by fist. This factor militates against the use, for example, of a dangerous weapon to repel a fistfight but not exclusively so. The second factor is the extent to which the force was imminent and whether there were other means available to respond to the potential threat of force. Here, there had been earlier force applied and witnessed by others, followed by a brief interruption then relocation to a new location, but there were ample opportunities for Mr. Kody to handle it differently. For example, he was a few short steps from being out the door; second, it was closer to run downstairs; third, it was closer to lock himself in the bathroom and in the bottom-line analysis, it was safer for him to stay right where he was to get the benefit of other protection.

[54] The next factor to consider is Mr. Kody's role in the incident. He picked up a set of scissors before making his exit to the bedroom and while in the bedroom retained the scissors in his hand until, based on his evidence, Mr. Melenka attacked him. Up to that point in time, the only implicit threat on the part of anybody to use a weapon was Mr. Kody's armament of himself with the scissors.

[55] The next factors to consider are the size, age, gender and physical capabilities of the parties in the incident. Mr. Melenka was a large capable man and Mr. Kody, at the time, was an emaciated individual flirting with a drug addiction. Mr. Melenka could be reasonably described as a brawler and in a fist fight there would be no comparison between his noted historic skill and sufficient power to knock people out and Mr. Kody's rather slender build with no incident described as reputation for violence.

[56] The next factor is the nature, duration and history of any relationship between the parties. Mr. Melenka and Mr. Kody were well known to each other as Mr. Melenka had filled the role of a father figure for approximately a decade. From time to time, he was generous in his training of Mr. Kody in mechanics and assisted Mr. Kody by buying him a welding machine when he entered a welder's apprentice program. Their strengths, weaknesses and nature were well known to each other; however, included in this is the reality that Mr. Kody had been attacked historically by Mr. Melenka and had what could be best described as at least two close calls. One, a choking, the other where a piece of mechanical equipment was thrown at him in anger.

[57] The next factor is a modification of the one which I have described and relates to the history of interaction or communications between the parties to the incident. Here there is nothing to add.

[58] And finally, there is the question of the nature and proportionality of Mr. Kody's response to the use of or threat of force. It is here that the Crown makes its strongest stand. Citing from a Court of Appeal decision, the Crown submits that it is not proportional to bring a knife to a fistfight. The Alberta Court of Appeal implies that whenever a weapon such as a firearm or a knife (which I would equate with scissors) is utilized to counter a fight with hands, there is greater probability that the force may not be reasonable in all of the circumstances.

[59] In *R. v Kong* 2005 ABCA 255, at para 116 the Chief Justice indicates:

Therefore, while responsive force need not be measured with precision, it must nevertheless meet the objective proportionality requirement-as relaxed as that might be. While we do not expect “ an accused facing an uplifted knife ... to weigh to a nicety the exact measure of responsive force” . So too we do not expect an accused facing an uplifted arm to respond by shooting someone in the heart or, for that matter stabbing them in the abdomen.

This view from the Alberta Court of Appeal makes common sense, but it does not describe, delineate or define a hard and fast rule that self defence must fail every time something we consider a weapon is used to counter fists. The reality is that fists too can be deadly and Mr. Melenka was skilled with his fists.

7. My Interpretation of Self Defence in this Case

[60] Of the three elements that make up the defence of self defence: the belief of the accused, the purpose of the act of defence, and the reasonableness of the response to the threat, the Crown’s position is extremely weak on the first two elements. The accused had been attacked, and was observed being attacked even after the stabbing by a much stronger and arguably more violent individual. It is therefore difficult to see how I should not accept Mr. Kody’s evidence that he felt threatened and that I should not accept his evidence that he was not in retaliation but defending himself by using the scissors.

[61] So, this brings us to the third element as is often the case in self defence – allegations, where in a nutshell the Crown asserts that the force of stabbing Mr. Melenka was not reasonable under all of the circumstances. To deal with that issue, lets suppose the Crown’s suppositive factual basis is justifiable on the evidence by inference.

[62] In this reality, we would have to discredit completely Mr. Kody’s evidence against the suppositions. We would first assume that the pushing and shoving in the living room didn’t hurt or affect Mr. Kody but what was bothersome to him was the potential that Mr. Melenka would cut him off the cocaine, cold turkey. Next, to give the Crown their due, we would assume that Mr. Kody runs to the bedroom to get more cocaine which he knows is there in the expectation he can beat Mr. Melenka to the cocaine stash. Describing the events in this manner puts the Crown’s case on its strongest platform and Mr. Kody’s on its weakest.

[63] However, it does not militate against self defence. Even if Mr. Kody went to the bedroom to consume cocaine that Mr. Melenka didn’t want him to consume, it is absolutely clear in the evidence that Mr. Melenka followed Mr. Kody to the bedroom. It is also clear in the evidence that in the narrow space between the bed and the door, a short time after the stabbing, Mr. Fisher had to pull Mr. Melenka off Mr. Kody. That leaves me with two narrow evidentiary options!

[64] First, trying to determine whether Mr. Kody was standing there with the scissors while the very annoyed Mr. Melenka became upset and rushed a man holding a pair of scissors. Or second, whether Mr. Kody was the aggressor and stabbed Mr. Melenka to give him more time to get cocaine. In the second option, the defence of self defence fails, but in the first it succeeds.

[65] There is absolutely no definitive evidence whatsoever, including the 911 call which overheard Mr. Kody say “you hit me first”, and Mr. Melenka say “I didn’t touch you”, to illuminate that narrow gap of who struck first. If Mr. Kody was standing there with the scissors and Mr. Melenka still moved in and attacked him, then the Crown has failed to prove that self defence does not apply, as resistance with the scissors, in that case, is reasonable with only one

serious wound struck. If the facts are that Mr. Kody attacked Mr. Melenka with the scissors at the point Mr. Melenka reached the door, then the defence fails.

[66] Both versions could reasonably be correct and the first version is supported by the evidence of Mr. Kody. Mr. Kody says Mr. Melenka attacked him and the other witnesses say that Mr. Melenka chased Mr. Kody down the hall. When Mr. Fisher came into the bedroom, the stabbing was already done but Mr. Melenka was still aggressively striking Mr. Kody. Mr. Kody was around the same height as Mr. Melenka but 50% lighter. Police photographs show that some injuries were sustained by Mr. Kody in this altercation.

[67] Frankly, there is no basis for me to conclude that Mr. Kody was the aggressor here and I have no reason to reject his evidence about what happened in that bedroom before Mr. Fisher pulled Mr. Melenka off Mr. Kody. Under all the circumstances, I am not able to say that the Crown has established beyond a reasonable doubt that Mr. Kody's response was unreasonable. Had the blow to the front of the chest been perhaps one centimetre elsewhere, this would not have been a fatal outcome. Mr. Eddie Melenka's loss is a tragedy to his family and loved ones, but I conclude that Mr. Kody is entitled to the benefit of the doubt about self defence.

[68] In light of this, I do not need to consider count number 2 nor do I need to consider whether absent self defence, the Crown has proven beyond a reasonable doubt second-degree murder. Given the amount of alcohol and cocaine consumed that night and the circumstances of this homicide, I could not, under any basis, conclude that the requirements for second-degree murder have been proven beyond a reasonable doubt. Therefore, if I am wrong about the Crown's failure to prove that self defence did not apply, Mr. Kody would've been convicted only of manslaughter. In the event of successful appellate review by the Crown which does not result in a retrial, arrangements to sentence Mr. Kody on the basis of manslaughter should be considered.

E. Conclusion

[69] The Crown has not negated Mr. Kody's plea of self defence and in result he is entitled to the benefit of the doubt. The homicide in this trial will have to remain a non-culpable homicide.

[70] Mr. Kody would you please stand. I find you not guilty. You may leave the prisoner's dock.

Heard from January 11 to 15, 2021.

Dated at Edmonton, Alberta this 19th day of January, 2021.

A.W. Germain
J.C.Q.B.A.

Appearances:

M. Huyser-Wierenga
for the Crown

S. Fix
for the Defendant