C61409/C61447

# COURT OF APPEAL FOR ONTARIO

BETWEEN:

**HER MAJESTY THE QUEEN**

Respondent

and

**GEORGE COOKE and MATTHEW COOKE**

Appellants

# FACTUM OF THE APPELLANT GEORGE COOKE

## PART I

## STATEMENT OF THE CASE

### Overview

1. On March 25, 2015, the Appellant, George Cooke, and co–Appellant, Matthew Cooke, were convicted of the manslaughter of Jessie Kovacs before Justice Milanetti and a jury. They were also convicted of the charge of robbery, which was subsequently stayed. On July 24, 2015, the Appellant was sentenced to 12 years, less credit for pre-sentence custody, and the co-Appellant was sentenced to 10 years, less credit for pre-sentence custody.

2. The Crown alleged that the Appellant and co-Appellant committed a robbery at Kovacs' apartment in Hamilton. On December 22, 2011 Kovacs was found dead in his apartment. The Crown argued that the actions of the Appellants' during the robbery

were a significant contributing cause of Kovacs' death. The crucial issues at trial were factual and legal causation.

3. The Crown principally relied on the evidence of the pathologist Dr. Elena Bulakhtina, who testified that the causes of death were: 1) diabetic ketoacidosis ("DKA")[1]; 2) morbid obesity; 3) a damaged and vulnerable heart; and 4) positional asphyxia. Notably, Kovacs also had a number of drugs in his system, one of which was at toxic levels.

4. By contrast, Rachelle Wallage, a toxicologist with the Center of Forensic Sciences, and Dr. Michael Shkrum, ruled out the possibility of DKA as a cause of death. Dr. Shkrum further seriously questioned that positional asphyxia was a contributing cause of death. The diagnosis of DKA would end up being discredited and not relied upon by the Crown by the end of the case.

5. The Appellant submits that his trial was unfair. The trial judge's charge failed to meet the functional test as set out by the Supreme Court of Canada and this Court. Specifically, the trial judge erred in the following ways:

> i) The trial judge failed to draft an organized jury charge, and thereby failed to properly assist the jury;
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> ii) The trial judge failed to leave the jury with a clear understanding of the factual issues to be resolved;
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> iii) The trial judge erred as well in failing to assist the jury in clearly understanding the legal principles governing the factual issues and how the evidence related to those issues;
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> iv) The trial judge failed to summarize the evidence for the jury that was relevant to the position of the parties, thereby failing to put the defence position fully and fairly to the jury; and

[1] Diabetic ketoacidosis, otherwise referred to as DKA, is a serious complication of diabetes that occurs when the body produces high level of blood acids called ketones. The condition develops when the body cannot produce enough insulin.

The Appellant also adopts and relies on the grounds of appeal raised by the co-Appellant in relation to the admissibility and corresponding instructions by the trial judge in respect of the evidence of Dr. Bulakhtina. The Appellant also adopts and relies on the co-Appellant's submissions regarding the failure of the trial judge to qualify Dr. Urquhart to testify about "post-mortem toxicology".

**The Offence and the Trial Issues**

6. Jesse Kovacs was a man with many health issues, including heart problems and morbid obesity. He was also a drug dealer who sold, among other things, Fentanyl patches. On December 19, 2011, the Appellants attended Kovacs' apartment, after the Appellant received directions from a friend Danielle Delottinville. Much of the evidence about what happened in the apartment itself came from a statement made by the co-Appellant. The co-Appellant knocked on the door and, when Kovacs answered, he was pushed back. His hands were then bound behind his back with duct tape and zip ties. The Appellants left the apartment after their efforts to steal items met with little if any success. Kovacs was not gagged, his legs were not bound, and there was no evidence of any injuries having been inflicted. Kovacs was found dead in his apartment a few days later by a family member.

7. The pathologist who conducted the autopsy was Dr. Elena Bulakhtina. A lengthy *voir dire* was conducted to determine whether she could be qualified as an expert, in what areas, and whether her evidence was reliable. Dr. Bulakhtina opined that Mr. Kovacs died of DKA, as a result of being restrained and unable to access his insulin and other fluids for his diabetic complications. However, Dr. Bulakhtina's opinion regarding

this cause of death was based on the results of a test done on Kovacs' vitreous fluid, which was inconsistent with tests conducted by the Centre of Forensic Sciences. Dr. Bulakhtina opined that other contributing factors to Kovacs' death were positional asphyxia combined with his heart disease and possibly with some influence from drug toxicity.

8. By the end of the trial, Dr. Bulakhtina's evidence was significantly diminished. The Appellants challenged both her expertise and impartiality. As explained in more detail below and in the co-Appellant's factum, her opinion as to DKA as a cause of death was sufficiently discredited that the Crown did not ask the jury to rely on it. In short, Wallage and Dr. Shkrum testified that the important markers for the presence of DKA, namely the ketones of acetone and BHB, were not found in Kovacs' blood or urine samples. However, the trial judge left the jury to sort out and understand Dr. Bulakhtina's evidence, and ultimately explained that it was up to them whether to accept all, some or none of it.

9. By contrast, Dr. Shkrum concluded that the cause of death was heart disease in an obese man with a toxic level of Desipramine (an anti-depressant), whose wrists were restrained. Dr. Shkrum explained that Kovacs could have experienced a sudden and unexpected death. Dr. Shkrum ultimately opined that the toxic levels of the drugs could by themselves have caused Mr. Kovacs to die, or they could have combined with other factors – such as the deceased's already unhealthy heart – to cause fatal cardio-toxicity. Dr. Shkrum testified that the combination of Kovacs' underlying health issues could have caused his death without any other precipitating event. Dr. Shkrum disagreed with Dr. Bulakhtina that positional asphyxiation (on account of Mr. Kovacs lying semi-prone on his right side) was a contributing cause of death.

**Overview of Grounds of Appeal**

**I. Conviction**

**A. Grounds Related to the Charge to the Jury**

***1. The trial judge failed to draft an organized jury charge, and thereby failed to properly assist the jury***

10. The trial judge erred in failing to draft a charge to the jury that was organized and that assisted the jury in resolving the difficult issues related to factual and legal causation. The trial judge's charge to the jury was disorganized, confusing, and failed to explain how the evidence was relevant to the factual and legal issues that needed to be resolved.[2]

***2. The jury did not have a clear understanding of the factual issues to be resolved***

11. The trial judge failed to explain the significance of the evidence she summarized for the jury in her charge. The trial judge did not clarify the factual issues, and the jury was not provided the tools to resolve the differences in the evidence on the crucial issues of factual and legal causation.

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[2] Counsel were provided with drafts of only the law portion of the charge to the jury for the purposes of the pre-charge conference. This draft contained no facts. Counsel did not receive an amended charge or a copy of the final charge to the jury that included the facts before the trial judge started addressing the jury. Therefore, counsel were not in a position to assist the trial judge before she charged the jury, with any suggestions on how to approach her task of integrating her summaries of the evidence with the legal issues and defence positions. This greatly limited counsels' ability to provide the trial judge with the usual assistance expected of counsel: See *R. v. Polimac* (2010), 263 C.C.C. (3d) 5 (Ont. C.A.) at paragraphs 95-96. The draft charges are found in the Appeal Book, Vol. 3 at pp. 98-296; 321-369

### 3. *The trial judge erred in failing to assist the jury in clearly understanding the legal principles governing the factual issues and how the evidence related to those issues*

12. Factual and legal causation were the crucial issues in this trial. When Justice Milanetti discussed factual causation, she did not refer to the competing expert opinions. There was no discussion about how the expert witnesses' evidence related to the factual issues to be resolved, or how the facts interacted with the legal principles. Her Honour's instruction on legal causation was equally deficient.[3]

### 4. *The trial judge failed to summarize the evidence for the jury that was relevant to the position of the parties, thereby failing to put the defence position fully and fairly to the jury*

13. The trial judge failed to relate the evidence to the positions of the defence, especially in relation to the issue of cause of death. For example, the defence disputed Dr. Bulakhtina's evidence that positional asphyxia was a contributing cause of death by introducing its own expert pathologist, Dr. Shkrum. In his testimony, Dr. Shkrum explained in detail why being prone and obese did not lead to a conclusion that positional asphyxiation was a contributing cause of death. Inexplicably, Justice Milanetti failed to mention this piece of Dr. Shkrum's evidence in her jury charge and refused to re-charge the jury after a defence objection.

## B. Grounds Related to the Evidence of Dr. Bulakhtina and Dr. Urquhart

14. As noted above, the Appellant George Cooke respectfully adopts and relies on the submissions of co-Appellant Matthew Cooke.

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[3] After the charge, counsel forcefully objected and requested that the jury be re-charged on the issues of factual and legal causation. Justice Milanetti insisted that Crown and defence counsel draft the proposed re-charge together. She took the position that the only way she would re-charge the jury was if all counsel reached an agreement on the wording of the re-charge. When counsel could not reach an agreement, she abdicated her duties and refused to re-charge the jury.

## II. Sentence

### A. Response to Crown Appeal of Sentence

15. The Crown argues that the trial judge erred in granting the Appellant credit for pre-sentence custody at a rate of 1.5 to 1. Enhanced credit is justified on the basis of quantitative and qualitative rationales. The granting of enhanced credit is a matter of judicial discretion, which was exercised reasonably in this case, having regard to the applicable authorities. The Crown's appeal on sentence should therefore be dismissed.

### B. Defence Appeal of Sentence

16. The trial judge sentenced the Appellant to 12 years minus credit for the pre-sentence custody. While this Court has eschewed the practice of "labeling" subcategories of manslaughter for the purpose of sentencing, the authorities do support a range of 7 to 8 years for a person in the Appellant's position: a manslaughter that falls closer to an inadvertent killing rather than "near murder", committed by a person with a significant criminal record. The trial judge erred by failing to, as this Court said in *Devaney*, impose a sentence that fits the facts of the particular case and the particular offender, having regard to similar offenders and offences.

*R. v. Devaney* (2006), 213 C.C.C. (3d) 264 at para. 34 (Ont. C.A.) [*Devaney*]

## PART II

## SUMMARY OF THE FACTS

***Evidence of Danielle Delottinville***

17. Danielle Delottinville met Jesse Kovacs at a farmer's market in about 2009. She was drawn to Kovacs when she overheard him speaking about different medications he had, specifically Fentanyl – one of the many drugs she was using at the time.

Delottinville was a hairdresser and Kovacs quickly became her client. He would pay her in Fentanyl patches.

Transcript: February 9, 2015 at p. 30 lines 10-15; p. 32 line 21

18. At this time, Delottinville was also roommates with the Appellant. They had been roommates for about year and a half. Delottinville introduced the Appellant to Kovacs. She hoped that the Appellant could "do business" with Kovacs, since he also used Fentanyl patches. The Appellant and Kovacs had an arrangement: the Appellant would give money to Kovacs ahead of time, so that when Kovacs received his Fentanyl patches, he would put some aside for the Appellant to pick-up later.

Transcript: February 9, 2015 at p. 42, lines 9-13; p. 43, lines 1-3; p. 45 lines 6-20 pp. 46-47;

19. On December 18, 2011, the Appellant sent Delottinville a text that he needed a place to crash. The Appellants came over that night. The Appellants awoke early on December 19, 2011 and left. They came back between 4:30pm and 7:30pm, and smoked drugs. The Appellant pulled her aside and explained to her that Kovacs owed him money. He asked for Kovacs' address, because he wanted to rob him. Delottinville was assured that Kovacs would remain unharmed. When the Appellants returned to the apartment that night they advised Delottinville that their attempt to rob Kovacs was unsuccessful. They left shortly after by bus back to Port Hope.

Transcript: February 9, 2015 at pp. 52-56; 58-61; 67-69; 71-72; 74-75

***Evidence of Matthew Cooke***

20. Matthew Cooke, the co-Appellant, provided a statement to police. The co-Appellant told police that he and the Appellant had originally gone to Hamilton to bring

Chase – the Appellant's son – home. They arrived in Hamilton and spent the night at Delottinville's place. The co-Appellant stated that at this time he was high on heroin and used Benzodiazepines from time-to-time.

> Appeal Book, Vol. 2, Exhibit 11: Transcript of Statement of Matthew Cooke dated January 18, 2012 at pp. 6-9, 17-18, 46-47

21. At some point while at Delottinville's home, it came up that there was a guy in the neighbourhood who had Fentanyl patches they could get. That "guy" was Kovacs. The Appellants decided to rob Kovacs at his apartment.

> Appeal Book, Vol. 2, Exhibit 11: Transcript of Statement of Matthew Cooke dated January 18, 2012 at pp. 48-49

22. No one was at Kovacs' building when the Appellants first arrived. In an effort to buy time, they wandered into a nearby hospital. They ended up with surgical masks, though the co-Appellant could not recall if the masks had been retrieved at the hospital. After this brief visit, they returned to the Kovacs' building.

> Appeal Book, Vol. 2, Exhibit 11: Transcript of Statement of Matthew Cooke dated January 18, 2012 at pp. 51-53

23. The Appellants knocked at Kovacs' door. When he answered, the co-Appellant stated that he pushed Kovacs back and stepped into the apartment. The Appellant followed and demanded to know where the drugs were. Kovacs tried to run for the door, but the Appellant pushed him against the wall and wrestled him to the floor. Together, the Appellants bound Kovacs' arms together with duct tape and ties. The co-Appellant stayed beside Kovacs as the Appellant raided the apartment.

> Appeal Book, Vol. 2, Exhibit 11: Transcript of Statement of Matthew Cooke dated January 18, 2012 at pp. 53, 74-75

24. The Appellants' efforts to rob Kovacs met with little success. Before they left the apartment, the co-Appellant stated that they ripped the phone off the wall so that Kovacs

could not immediately call the police. After they left, the Appellants returned to Delottinville's apartment and spent the night. The following morning, they returned to Oshawa via a GO bus.

Appeal Book, Vol. 2, Exhibit 11: Transcript of Statement of Matthew Cooke dated January 18, 2012 at pp. 55, 58, 63-65

***Evidence of Rachelle Wallage***

25. Ms. Rachelle Wallage, a toxicologist at the Centre of Forensic Science ("CFS"), testified that tests of Kovacs blood taken at autopsy revealed that he had Desipramine (an anti-depressant), Bupropion (an anti-depressant), Quetiapine (an anti-psychotic) and morphine in his system at time of death. Desipramine is very cardio-toxic. The level of Desipramine found in Kovacs was at least four times the normal therapeutic levels. The drug could have very serious adverse effects and could be potentially fatal at those levels. Specifically, it could cause problems with heart function, arrhythmia, fluctuating blood pressure, seizures and breathing difficulties.

Transcript: March 4, 2015 at pp. 23-29; 32-34; 41-44; 51-52

26. While Ms. Wallage testified that the levels of Bupropion, Quetiapine and morphine were in the therapeutic range, the combination of these cardio-toxic drugs, even if in therapeutic concentrations, is significant. Notably, if a heart is already compromised by disease, there is an increased likelihood of toxicity from the cardio-toxic drugs. This in turn could lead to an increased likelihood of impairment of heart functioning and possible death.

Transcript: March 4, 2015 at pp. 35-37; 45-46; 53-55

27. Wallage also dispelled the notion that there was any evidence of DKA in this case. Simply put, the 2 main ketones or markers for the presence of DKA (acetone and

BHB), were absent. No acetone was found in the blood or urine and no significant level of BHB was found either. While Dr. Bulakhtina claimed to find evidence of unidentified ketones in the vitreous fluid of Kovacs as a result of a dipstick test, a newly developed test in January of 2015 at the CFS that revealed nothing beyond "incidental" levels of BHB that would be found in the general population (less than 40 milligrams per liter of blood). This test, according to Wallage, was far superior to the dipstick test relied on by Dr. Bulakhtina. Further, Wallage was not surprised by these results. She explained that as she did not find the marker acetone in the urine or blood, she did not expect to find any BHB. To put it another way, if there was indeed BHB in the vitreous fluid, she would have expected to find acetone in the urine or blood.

Transcript: March 4, 2015 at pp. 58-69

Appeal Book, Vol. 2, Exhibit 60: Report of Wallage dated January 13, 2015 at pp. 306-311

***Evidence of Dr. Elena Bulakhtina***

28. Dr. Elena Bulakhtina conducted the autopsy and provided the initial cause of death. A lengthy *voir dire* was conducted to determine whether she was qualified as an expert and, if so, in what areas. Dr. Bulakhtina was ultimately qualified as an expert in forensic pathology.[4]

29. Dr. Bulakhtina testified that Kovacs died of a combination of factors, or as she put it, the cause of death was "multi-factorial". She explained her conclusions about the cause of death in various ways during her evidence. Initially, she testified that the cause of death was "complications of diabetes, hypertensive and atherosclerotic

[4] As noted above, the Appellant adopts the co-Appellant's submissions with respect to the trial judge's ruling on the *voir dire* and related issues.

cardiovascular diseases and morbid obesity and semi-prone position restrained". The combination of the drugs in his system, while a "significant contributing" factor, was not causally connected to his death directly.[5] She acknowledged that a combination of drugs could cause an abnormal heart rate, even in an otherwise healthy person. Later she restated her views of the cause of death this way: (i) restraints; (ii) semi-prone position;[6] (iii) limited ability to walk because of the morbid obesity; (iv) the morbid obesity itself; and (v) heart disease[7] and diabetes.

Transcript: February 26, 2015 at pp. 117-120; February 27, 2015 at pp. 14-15

30. A consistent theme in her testimony was her position that Kovacs was suffering from DKA and that this was a significant, contributing cause of his death. Dr. Bulakhtina's opinion was based on the results of a test done on Kovacs' vitreous fluid at the Hamilton General Hospital, the results of which were inconsistent with tests conducted by the CFS and with the evidence of Wallage. According to Dr. Bulakhtina, the testing of the vitreous fluids showed the presence of "2+ ketones" (which could not be specifically or separately identified). To her, this meant that Kovacs was in a "diabetic crisis", since the presence of ketones is a byproduct of diabetic complications. According to her, Kovacs' cells could not utilize glucose and switched to processing fat.

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[5] Dr. Bulakhtina ruled out that drug toxicity could have been the "sole" cause of death. She did say that in the drugs could play a role in the death, especially by increasing the likelihood of an abnormal heart rate given Kovacs underlying problems with his heart: February 27, 2015 at pp. 14-15.

[6] Dr. Bulakhtina testified that because of his semi-prone position, Kovacs would have difficulty breathing.

[7] Dr. Bulakhtina testified that Kovacs' heart was enlarged, his heart muscle was thickened, he had calcified arteries and there was a 90% occlusion or blockage of his arteries.

As a result, his body was not producing enough insulin. Therefore, he was in need of insulin and fluids, which he could not access because he was restrained.

Transcript: February 27, 2015 at pp. 9-10; 17; 50-51

31. Dr. Bulakhtina maintained her position, in spite of the report of Wallage, the CFS toxicologist, who determined that there was no acetone in the blood and urine and an insignificant level of BHB. Despite not being qualified as an expert in toxicology, she said that acetone is just one of the markers for DKA, but not a "major marker". In her view, BHB is the major marker for DKA. She maintained that the vitreous test supported her diagnosis even though the CFS test revealed the insignificant level of BHB and no acetone in the blood or urine. In short, Dr. Bulakhtina's position was that the vitreous test is "the only way to test" for DKA, and that it is the "best and only source" to diagnose DKA.[8]

Transcript: February 27, 2015 at pp. 54-76; 91

***Evidence of Dr. Michael Shkrum***

***General Overview***

32. Dr. Michael Shkrum was qualified as an expert in forensic pathology. He testified on behalf of the defence. He reviewed voluminous materials related to this case, including the CFS reports and the autopsy report. Dr. Shkrum concluded that the cause of death was heart disease in an obese man with a toxic level of Desipramine, whose wrists were restrained. With respect to the timing of the death, he concluded that it was "relatively sudden", because of the underlying heart disease, the elevated levels of

[8] By the end of the trial, Dr. Bulakhtina's opinion as to DKA being one of the causes of death was so weakened, that the Crown ultimately did not rely on it before the jury as a cause of death.

Desipramine, and the lack of any evidence of a struggle (he noted that there was no evidence of any bruising to the surface or underlying tissues of the wrists that would have indicated a struggle against the restraints). He noted that there was no other trauma to the body that could have contributed to the death. Dr. Shkrum testified that the combination of Kovacs' health issues alone, could have caused his death without any other precipitating event.

Transcript: March 9 at pp. 47-49; 51-52; 78-79

***Specific Health Issues***

33. Prior to his death, Kovacs' heart was in very poor health. He had an enlarged heart, and the left ventricle of the heart appeared thickened. His coronary arteries were severely narrowed; in fact they were 90% occluded (or blocked). There was also fibrosis (or "scarring") that was related to high blood pressure. The combination of these difficulties alone could result in a sudden, unexpected death. Adding to Kovacs' underlying health issues was his "morbid obesity", a term defined as having a Body Mass Index over 40 (Kovacs' BMI was measured at 42.8). Dr. Shkrum opined that morbid obesity is quite often a contributing factor to heart disease. The presence of the multiple drugs in Kovacs' system was also concerning. These drugs could act in concert with the other underlying disease processes to cause death. Dr. Shkrum noted that these are all common findings in sudden, unexpected deaths in his practice.

Transcript: March 9, 2015 at pp. 39-43; 49-50; 101

***Positional Asphyxia***

34. With respect to Dr. Bulakhtina's view of the role of positional asphyxia, Dr. Shkrum noted this was an issue most commonly found in cases where the deceased is found in a prone position, that is to say lying face down. That was not the case here, as

Kovacs was found in a semi-prone position, lying mainly on his right side. Based on the available evidence and his knowledge of this area, Dr. Shkrum could not say that Kovacs was at risk of suffering from positional asphyxia. His conclusion was based on 3 points: (i) the issue of how a body is found and its role in positional asphyxia is, generally speaking, a very controversial area in forensic pathology; (ii) as noted above, Kovacs was not prone, but rather was semi-prone; and (iii) controlled experiments recently conducted, including with obese individuals, have shown that lying in a prone position has "minimal if any effect on the individuals". As a result, at best it would be speculative to draw any conclusions about the role of positional asphyxia in this case.

Transcript: March 9, 2015 at pp. 44-45; 75-76

***The Absence of DKA***

35. With respect to DKA, Dr. Shkrum concluded that it did not contribute to Kovacs death in any way. He based this conclusion on the toxicological findings of Wallage that yielded no evidence of the markers, acetone and BHB, to make a finding of DKA. He also noted that the dipstick test relied on by Dr. Bulakhtina was of limited assistance in the face of the superior test conducted by the CFS which he suggested be done. In addition, another indicator of DKA, apart from the presence of the ketones, namely the presence of fat in the kidneys was tested for and produced negative results.

Transcript: March 9, 2015 at pp. 32-38; 56; 71

## PART III

## ISSUES AND LAW

### I. CONVICTION APPEAL

### A. The Trial Judge's Charge to the Jury Failed to Meet the Functional Test

#### (i) Governing Principles

36. There is no question that a functional approach should be taken to jury instructions, having regard to their purpose in the circumstances of the particular case. The purpose of the functional approach is to organize and clarify the issues and the applicable evidence for the jury. The evidence must be left to the jury in a way that will permit the jurors to fully appreciate the issues raised and the defences advanced. In all but the rarest of cases, a trial judge has a duty to review with the jurors the issues to be resolved and the evidence they may consider in resolving those issues. In *R. v. Daley* Justice Bastarache adopted what he described as "[o]ne of the classic statements describing the trial judge's duty to review the evidence in the charge" from *R. v. Azoulay* at pp. 497-98:

> The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them.

In *Azoulay*, *supra*, Justice Estey also held as follows:

> The authorities contemplate that in the course of his charge a trial judge should, as a general rule, explain the relevant law and so relate it to the evidence that the jury will appreciate the issues or questions they must pass upon in order to render a verdict of guilty or not guilty. Where, as here, the evidence is technical and somewhat involved, it is particularly important that he should do so in a manner that will assist the jury in determining its relevancy and what weight or value they will attribute to the respective portions [emphasis added].
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> *R. v. Azoulay*, [1952] 2 S.C.R. 495 at pp. 497-498; 503 [*Azoulay*]

*R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523 at para. 54 [*Daley*]
*R. v. Jacquard*, [1997] 1 S.C.R. 314 (S.C.) [*Jacquard*]
*R. v. MacKinnon* (1999), 43 O.R. (3d) 378 (Ont. C.A.) [*MacKinnon*]
*R. v. Maugey* (2000), 146 C.C.C. (3d) 99 at para. 25 (Ont. C.A.)
*R. v. Almarales*, 2008 ONCA 692, 237 C.C.C. (3d) 148 at paras. 60-61
*R. v. Hall,* 2010 ONCA 498, [2010] O.J. No. 2958 at paras 98-115 [*Hall*]
*R. v. B. (P.J.)*, 2012 ONCA 730, 97 C.R. (6th) 195 at paras. 48-50 [*PJB*]
*R. v. Garon*, 2009 ONCA 4, 240 C.C.C. (3d) 516 at para. 65
*R. v. S. (J.)*, 2012 ONCA 684, 292 C.C.C. (3d) 202 at paras. 35-46
*R. v. Minor*, 2013 ONCA 557, 303 C.C.C. (3d) 382 at paras. 77-83 [*Minor*]

37. The fact that counsel have reviewed the evidence in the course of their closing addresses, or that the judge has read summaries of the positions of the Crown and the defence to the jury, does not relieve the trial judge of the duty to perform an independent review of the evidence. Further, as Chief Justice Strathy noted in *Minor*, counsel are advocates and not neutral arbiters. As such, the jury depends on the trial judge to "separate reason from rhetoric".

*PJB, supra* at para. 47
*Minor, supra* at para. 84
*MacKinnon, supra* at p. 387
*R. v. Selbie*, 2002 ABCA 58, 361 A.R. 202

38. In *MacKinnon, supra*, Justice Doherty held that a trial judge's final instructions must leave the jury with a clear understanding of (i) the factual issues to be resolved; (ii) the legal principles governing the factual issues and the evidence adduced at trial; (iii) the positions of the parties; and (iv) he evidence relevant to the positions of the parties on the issues.

39. Organized instructions are more likely to inform the understanding of the jury than

are unorganized or disorganized directives. Final instructions that display an overall organization, as well as an organized approach to individual parts, seem inherently more likely to fulfill the purposes for which instructions are given. This Court has noted the dangers of unorganized or disorganized final instructions. Among the resulting pitfalls of such deficient instructions are: (i) the omission of essential instructions; (ii) the inclusion of irrelevant or superfluous instructions; and (iii) the unnecessary repetition of instructions already given.

*PJB, supra* at para 51

40. As a result, the instructions may become needlessly complex, lengthy and confusing to the jury, and distract jury members from making an informed decision on the essential and controversial issues in the case. In some cases, the unnecessary complexity of a jury charge may divert the jury's attention from the critical issues in the case to such an extent that a new trial may be required, solely on that basis.

*R. v. Rowe*, 2011 ONCA 753, 281 C.C.C. (3d) 42, at para. 52 [*Rowe*]

41. A trial judge must summarize the relevant evidence for a jury in her charge. A review of the evidence need not be lengthy or exhaustive, but it must refer to the evidence sufficiently in the context of the case and the entirety of the charge, so as to alert the jury to the particular parts of the evidence, which are significant to issues taken by the parties. The role of a trial judge when charging a jury is to "decant and simplify" the evidence. It is unnecessary that the jury's attention be directed to all of the evidence, and how far a trial judge should go in discussing it must depend in each case upon the nature and character of the evidence in relation to the charge, the issues raised and the conduct of the trial.

*Rowe*, *supra* at para. 52

*PJB, supra* at para 52

*MacKinnon, supra* at para. 29

*Jacquard, supra* at para. 13

### (ii) The Principles Applied

42. The jury charge in this trial was disorganized, confusing and unhelpful to the jury. Justice Milanetti's instructions to the jury failed to meet the four requirements laid out by this Court in *MacKinnon*. For the specific reasons that follow, the Appellant submits that the trial judge's charge failed to meet the functional test and resulted in an unfair trial.

#### *1. The trial judge erred in failing to draft an organized jury charge, and thereby failed to properly assist the jury*

43. The trial judge's instruction to the jury was one that would leave even a trained legal mind understandably adrift. The charge to the jury was poorly constructed and failed to focus on the issues that the jury needed to resolve. Rather than providing a sense of guidance and direction, the charge left the jury with an abundance of what was at times irrelevant evidence to sift through.

44. There was a complete absence of instruction regarding *how* the jury should resolve the crucial factual issues. The trial judge's charge to the jury was more akin to an overall summary of the testimony of the witnesses, untethered from any instruction on what to do with the evidence and how it related to the factual and legal issues the jury had to resolve in relation to the positions of the parties before it.

45. The charge in transcript form is 175 pages. Of that 175 pages, approximately 122

pages comprises the trial judge's recitation of the evidence presented at trial.[9] The trial judge did not relate any of the evidence to counsels' positions. In closing what she called "the evidence book", Her Honour simply reminded the jury of the reasonable doubt standard with respect to the charge of manslaughter.[10]

46. Further, the trial judge abdicated her responsibility to "decant and simplify" the evidence put before the jury. Rather, the trial judge would conclude a section of her charge on a particular piece of evidence by stating that it was simply up to the jury how to decide what to do with it and how much weight to give the evidence. For example:

> It will be for you to decide, in the same way as you decide how much or how little weight you will give to the evidence of this witness, as to any of the other witnesses that we have. These are things that you can bear in mind or not, as you so choose, it will be your decision.
>
> Jury Charge, at p. 118 lines 27-33

### 2. *The jury did not have a clear understanding of the factual issues to be resolved*

47. The trial judge did not organize the evidence for the jury. The trial judge provided her "recollection" of *all* the evidence that had been put before the court. The trial judge gave the same weight to evidence on issues that were conceded or peripheral, as she did to evidence that went to the crux of the case. For example, the trial judge stated that

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[9] As noted above, before the pre-charge conference, the trial judge only provided counsel with drafts of the "law portion" of her charge, much of which contained the usual "boiler plate" portions.

[10] At page 159 of the Jury Charge, starting at line 8, Justice Milanetti said: "The good news is, I just closed the evidence book. If you are not satisfied beyond a reasonable doubt that George Cooke and/or Matthew Cooke caused Jesse Kovacs' death unlawfully... you must find George Cooke and/or Matthew Cooke not guilty. If you are satisfied beyond a reasonable doubt that George Cooke and/or Matthew Cooke caused Jesse Kovacs' death unlawfully, you must find George Cooke and/or Matthew Cooke guilty of manslaughter."

the Crown would not be relying on DKA as the cause of death. Following that, she instructed the jury that it will be for them to decide what, if any, impact the non-reliance on DKA would have on the credibility and reliability of Dr. Bulakhtina's evidence. Several pages later, DKA is discussed again as Her Honour recites Dr. Bulakhtina's evidence, but this time it is not followed by a specific instruction on its non-relevance in the Crown's case. The trial judge recited this evidence several times to the jury without clearly reminding the jury of its non-relevance or providing any helpful direction as to what the jury was to do with it in respect of the defence position and in relation to the issue of cause of death.

Jury Charge, at p. 117 line 20; p. 118 lines 1-13, 30; p. 127 line 12

### 3. *The trial judge erred in failing to assist the jury in clearly understanding the legal principles governing the factual issues and the evidence adduced at trial*

#### *The Objections and the Trial Judge's Response*

48. Following the charge, counsel for the Appellants made multiple objections. Counsel for the Appellant noted that Her Honour failed to delineate the several candidates for the cause of death. Likewise, counsel for the co-Appellant raised the issue that Her Honour failed to relate any of the medical evidence back to cause of death, or possible *mens rea* issues. As Mr. Bryant, counsel for Matthew Cooke put it, the evidence "sat out there in the open without being related to a specific point".

Jury Charge, at p. 201 lines 20-25; p. 206 lines 15-20

49. Further, counsel for the Appellant noted that Her Honour failed to clearly specify the issues to be dealt with in regards to her instruction on manslaughter, that is factual and legal causation. Counsel, including the Crown, suggested to Her Honour how the

jury should be re-charged on manslaughter, with respect to the evidence and the defence position.

Jury Charge, at p. 208 line 5; p. 220 line 15; p. 222 line 30; p. 225 line 5

50. In response to these requests to re-draft an instruction on manslaughter, Her Honour essentially ordered the Crown and defence to take on the task for her. Specifically, she said: "...if you're all agreeing it should be done, I want you to do it. Because it's less expedient for me to try it...[i]f you all think that it should be re-done...". This is a clear example of the trial judge abdicating her judicial responsibility. As Chief Justice Lamer observed in *Jacquard*: "the jury charge is the responsibility of the trial judge and not defence counsel".

Jury Charge, at p. 224 line 18

*Jacquard, supra* at 37-38

51. Notably, the Crown also submitted that the instruction on manslaughter should be re-drafted. The Crown, Mr. Milko, suggested to Her Honour that she should take the task of re-drafting the charge seriously. He explained that it was not a "monumental task", but that the issues of "causation and foreseeability" were of monumental importance. To that, Her Honour responded: "Don't talk about it anymore, you're going to do it. If it's got to be just da, da, da, da, da, da, then agree on the da, da, das. If it's not a monumental task, then it should be easy to carve out". Further, she added she was not going to "...go through all the evidence and tie the things that I think are relevant to it and find that I've missed something". Counsel continued to explain their respective positions, which Her Honour continued to deflect. At one point she said, "I've done my best to do it, I spent lots of time on it, so if you think that something needs to be re-jigged, away you go".

Jury Charge, at pp. 225-227

52. Despite her evident reluctance to engage in a re-drafting process, all counsel continued to submit to her the importance and need for her to re-draft her charge. In response, Her Honour suggested that counsel "get sandwiches downstairs and work on this at the same time". Not surprisingly, the parties could not agree over lunch on a single version for how the trial judge should re-charge the jury. As the Crown succinctly put it before the lunch break: "here's the problem: because relating evidence to the issue of causation – we have completely different perspectives on that". It also appeared impossible for the parties to provide an adequate draft of a re-charge relating the evidence to their positions, when the trial judge forbade them from addressing any of the evidence on which she already charged the jury. Instead of attempting to correct the charge herself or to work with counsel toward that end, the trial judge "resolved" the issue by ignoring it. She decided not to re-charge the jury and provided the following reasons for her decision: "Remember I told you to have lunch together, all of you, and to work it out together. That never happened. I am not going to do any amendment to this, it is staying as is". [11]

Jury Charge, at p. 233 line 15; p. 249 line 15

### 4. *The trial judge failed to present evidence to the jury that was relevant to the position of the parties, thereby failing to fairly put the defence position to the jury*

53. The closing addresses of counsel do not relieve the trial judge of the obligation to ensure that the jury understands the significance of the evidence to the issues in the

[11] Ultimately, the Crown and defence did prepare proposals as how the trial judge may have considered re-charging the jury: See Appeal Book, Vol. 3, Exhibit AA at pp. 386-389.

case and to the positions of counsel. This is inherent in the role of a trial judge. It is the trial judge's duty to review substantial parts of the evidence and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as found.

*Daley, supra*

*Azoulay, supra* at pp. 497-498

54. Specifically, Her Honour failed to direct the jury's attention to the important evidence that was capable of supporting the Appellants' position. For example, when discussing factual causation, Her Honour made no mention of the expert evidence on this point, especially Dr. Shkrum's evidence on the role, if any, of positional asphyxia in this case. The differing expert opinions on the potential causes of death were the crux of the case, yet there was no discussion on how the expert opinions could be related to the facts. Most troubling is that there was no reference to how the expert opinions fit into the defence position.

55. As noted above, after the charge was delivered, counsel registered strong objections. Both defence teams and the Crown voiced concern that their positions were not properly relayed to the jury. In his submissions, counsel for the Appellant, stressed to Justice Milanetti that she "[has] to tell the jury what the position of defence is". He went on to explain that the position has to be presented to the jury, along with the facts and legal principles, namely factual and legal causation. Counsel for the Appellant concluded his submissions by reiterating the importance of putting the defence position to the jury: "I can't stress enough to Your Honour the importance of stating the position of the defence to the jury and making that clear".

Jury Charge, at pp. 210 lines 18-19; 215 lines 15-30

56. Her Honour took issue with counsel's submissions. She defended her charge by stating that she read the statement of defence as counsel prepared it. With respect to re-drafting her charge regarding Dr. Shkrum, Her Honour dismissively stated: "I'm not, I'm just not going to do it." She then asked Mr. Hicks where in the case law it says that it is her duty to connect the defence position with each and every review of the evidence. Mr. Hicks, in response, quoted many of the same cases referred to in this factum, including *Azoulay, McKinnon*, *Crooks*, *Jacquard* and *PJB* – all cases that stand for the proposition that the trial judge is to review the evidence and relate the evidence to the position of defence. Mr. Bryant endorsed the submissions of Mr. Hicks.

Jury Charge, at p. 216 lines 7-8, 10-12; p. 238 lines 22-23

57. Even the Crown weighed in, submitting that the evidence as it related to causation needed to be clearly laid out to the jury. The Crown went on to suggest how Her Honour could work in the positions of counsel. Her Honour's responses to the Crown's suggestions were met with apparent frustration. Despite counsel's repeated requests, Justice Milanetti refused to draft a re-charge and insisted that counsel work together on it. As noted, she stated that if all parties agree that a change should be made, they should do it, not her. Her Honour, seemingly dismayed that the parties did not reach a consensus, decided that she was not going to include any of the suggested amendments, and that her charge, as previously stated, would remain the same.

Jury Charge, at p. 224 lines 18-19; p. 249 lines 19-21

58. Where there is disagreement among counsel on the appropriate re-charge, as there was here, it is for the trial judge to conduct an analysis of the nature of the disagreement, viewed in the context of the whole case and make a ruling on the appropriate way of re-charging the jury. The trial judge cannot simply acknowledge the

existence of the problem, note the disagreement between counsel, and conclude as a result that nothing should be said to the jury by way of supplementary and corrective instructions.

*R. v. Gray*, 2012 ABCA 51, 285 C.C.C. (3d) 539 at para 21; citing *Daley, supra*

### B. Admissibility of Dr. Bulakhtina's Evidence and Dr. Urquhart Issue

59. To the extent that they apply to the Appellant, he respectfully adopts and relies on the submissions of the co-Appellant Matthew Cooke on these issues.

## II. THE SENTENCE APPEALS

### A. Response to the Crown Appeal of Sentence

60. The Crown is appealing the trial judge's decision to credit the Appellant's pre-sentence custody at a rate of 1.5 to 1. The Crown argues that enhanced credit was unwarranted as a result of the reasons for the Appellant's pre-trial detention, namely his own misconduct while on a strict form of pre-trial release in respect of another charge. The Appellant respectfully disagrees and submits that the trial judge properly exercised her discretion to grant the enhanced credit.

61. Section 719(3.1) recognizes that there are circumstances in which an offender should be credited *more* than one day per day spent in pre-sentence custody. There are two rationales for this "enhanced credit." First, the "quantitative rationale" takes into account parole eligibility timelines. Federal inmates are eligible for parole at one-third of their sentence, with statutory release available at two-thirds. In reality:

> the "vast majority of those serving reformatory sentences are released on 'remission'...at approximately the two-thirds point in their sentence", and

only two to three percent of federal prisoners are not released either by way of parole or 'statutory release.'

*Criminal Code*, R.S.C. 1985, c. C-46, s. 719(3.1)

*R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575 at paras 23-25 [*Summers*]

62. Justice Karakatsanis, writing for a majority in Summers, stated at paragraph 71: "The loss of early release, taken alone, will generally be a sufficient basis to award credit at the rate of 1.5 to 1, even if the conditions of detention are not particularly harsh, and parole is unlikely." Statutory rules regarding parole eligibility and early release do not take pre-sentence custody into account. As such, crediting pre-sentence custody at a rate *higher* than 1:1 is necessary to ensure that "an offender who is released after serving two thirds of his sentence serves the same amount of time in jail, whether or not he is subject to pre-sentence detention."

*Summers*, *supra* at para 71

63. Second, the "qualitative" rationale is founded on the scarcity of educational or rehabilitative programs, and the onerous conditions offenders face in "remand detention centres." While awaiting sentencing, offenders tend not to have access to the "educational, retraining or rehabilitation programs that are generally available when serving a sentence in corrections facilities." Furthermore, as Justice Cronk of this Court noted in *Summers*, "overcrowding, inmate turnover, labour disputes and other factors also tend to make pre-sentence detention more onerous."

*Summers, supra* at para 28

64. While the onus is on the offender to demonstrate that he should be awarded enhanced credit as a result of pre-sentence detention, that burden is not an onerous one. Generally speaking, the fact that pre-sentence detention has occurred will usually

be sufficient to give rise to an inference that the offender has lost eligibility for parole or early release, justifying enhanced credit under the quantitative rationale. In cases following *Summers*, trial judges have awarded credit on a 1.5 to 1 basis for pre-sentence custody, notwithstanding any prior misconduct that diminished the chance of release. The concern over "double counting" is very real, and the trial judge was rightly alive to this issue. The Appellant submits that the import of his conduct while on bail before his arrest in respect of the Kovacs' matter, is properly reflected in the overall sentence that the Appellant received, and is not then also to be used as a relevant factor on enhanced credit. This would amount to "double counting" an aggravating factor.

*Summers*, *supra* at paras. 79, 80, 83

*R. v. Nelson* 2014 ONCA 853, 318 C.C.C. (3d) 476 at para. 53

65. When evaluating the qualitative rationale for granting enhanced credit, the onus continues to on the offender, but it will generally not be necessary to lead extensive evidence. The conditions and overcrowding in remand centres are generally well known and often subject to agreement between the parties. Of further note is that the Crown did not rely on any misconducts in their sentencing submissions, despite the Appellant's 3.5 years in pre-sentence custody. The Appellant respectfully submits that the trial judge was well within her discretion to grant 1.5 to 1 pre-sentence credit, as such a finding is reasonably justified by the quantitative and qualitative rationales. The Appellant submits, therefore, that the Crown appeal on sentence should be dismissed.

**B. Defence Appeal of Sentence**

66. The trial judge sentenced the Appellant to 12 years minus credit for the pre-sentence custody. The defence requested an 8-year sentence, while the Crown asked

for 18 years. While this Court has eschewed the practice of "labeling" subcategories of manslaughter for the purpose of sentencing, the authorities do support a range of 7 to 8 years for a person in the Appellant's position: a manslaughter that fell closer to an inadvertent killing without aggravating circumstances, rather than a "near murder", nevertheless committed by a person with a significant criminal record. In the circumstances, the trial judge erred by failing to, as this Court said in *Devaney*, impose a sentence that fits the facts of the particular case and the particular offender, having regard to similar offenders and offences.

> *Devaney, supra* at para. 34
> *R. v. Clarke*, [2003] O.J. No. 1966 (Ont. C.A.)
> *R. v. Robinson* (1997), 121 C.C.C. (3d) 240 (B.C.C.A.)

67. Some of the factors that place this manslaughter at the lower end of the appropriate range are (i) the lack of any subjective intent to harm Kovacs; (ii) the fact that no weapons were used; (iii) the fact that no injuries were occasioned by the Appellant on the deceased; and (iv) the lack of any gratuitous violence during the robbery; and (v) the cause of death was multi-faceted, and included factors beyond the Appellant's control, such as the deceased's underlying serious health issues.

68. With respect to the background of the Appellant, he acknowledges an extensive criminal record, but one whose seriousness does not match its length. Further, the Appellant while in custody showed some progress in rehabilitation, including his participation in a methadone program in respect of his drug problems. He has also participated in numerous educational programs and received positive feedback from supervisors. In his pre-sentence report, the Appellant is also noted as being personable, someone that is easy to get along with. As well, the Appellant expressed

what the trial judge found was genuine remorse in respect of his expression of shame and his apologies to the deceased's family for the harm he caused.

> Reasons for Sentence: July 24, 2015 at p. 28 lines 15-20; p. 30 lines 20-25; p. 33 line 20; p. 34 line 5
>
> Appeal Book, Vol. 5, Tab 9 Pre-Sentence Report at pp. 20-22

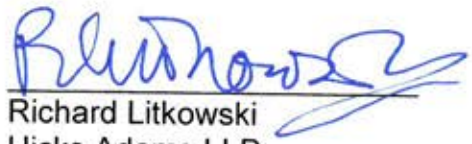
## PART IV

## ORDER REQUESTED

69. The Appellant respectfully submits that the appeal be allowed, the conviction quashed, and that a new trial be ordered.

70. In the alternative, the Appellant respectfully submits that the leave to appeal sentence be granted and that the sentence be lowered.

All of which is respectfully submitted by:



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The Appellant submits that he will require 2 hours for oral argument

Dated this 16th day of March, 2017.

## SCHEDULE A

## AUTHORITIES CITED

1. *R. v. Polimac* (2010), 263 C.C.C. (3d) 5 (Ont. C.A.)
2. *R. v. Devaney* (2006), 213 C.C.C. (3d) 264 (Ont. C.A.)
3. *R. v. Azoulay,* [1952] 2 S.C.R. 495 (S.C.)
4. *R. v. Daley,* 2007 SCC 53, [2007] 3 S.C.R. 523
5. *R. v. Jacquard,* [1997] 1 S.C.R. 314 (S.C.)
6. *R. v. MacKinnon* (1999), 43 O.R. (3d) 378 (Ont. C.A.)
7. *R. v. Maugey* (2000), 146 C.C.C. (3d) 99 (Ont. C.A.)
8. *R. v. Almarales,* 2008 ONCA 692, 237 C.C.C. (3d) 148
9. *R. v. Hall,* 2010 ONCA 498, [2010] O.J. No. 2958
10. *R. v. B. (P.J.),* 2012 ONCA 730, 97 C.R. ($6^{th}$) 195
11. *R. v. Garon,* 2009 ONCA 4, 240 C.C.C. (3d) 516
12. *R. v. S. (J.),* 2012 ONCA 684, 292 C.C.C. (3d) 202
13. *R. v. Minor,* 2013 ONCA 557, 303 C.C.C. (3d) 382
14. *R. v. Selbie,* 2002 ABCA 58, 361 A.R. 202
15. *R. v. Rowe*, 2011 ONCA 753, 281 C.C.C. (3d) 42
16. *R. v. Hebert,* [1996] 2 S.C.R. 272 (S.C.)
17. *R. v. Gray,* 2012 ABCA 51, 285 C.C.C. (3d) 539
18. *R. v. Summers,* 2014 SCC 26, [2014] 1 S.C.R. 575
19. *R. v. Nelson* 2014 ONCA 853, 318 C.C.C. (3d) 476
20. *R. v. Clarke,* [2003] O.J. No. 1966 (Ont. C.A.)
21. *R. v. Robinson* (1997), 121 C.C.C. (3d) 240 (B.C.C.A.)

## SCHEDULE B

## LEGISLATION CITED

None