COURT OF APPEAL FOR ONTARIO

CITATION: R. v. King, 2022 ONCA 665
DATE: 20220926
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Fairburn A.C.J.O., Miller and George JJ.A.

BETWEEN

His Majesty the King

Appellant

and

Dale King

Respondent

Leslie Paine and Manasvin Goswami, for the appellant

Jonathan Shime and Owen Goddard, for the respondent

Jonathan Rudin and Sumrana Taher, for the intervener Aboriginal Legal Services

Heard: February 14, 2022 by video conference

On appeal from the acquittal entered on November 27, 2019 by Justice Andrew J. Goodman of the Superior Court of Justice, sitting with a jury.

Fairburn A.C.J.O. and George J.A.:

OVERVIEW

[1] The respondent was charged with second-degree murder after he shot and killed Yosif Al-Hasnawi in downtown Hamilton on December 2, 2017. There is no doubt that the respondent was the shooter. At trial, there were two questions that the jury had to resolve: (1) did the respondent act in self-defence; and, if not, (2) did he have the intention to commit murder? The jury returned a verdict of not guilty.

[2] The Crown appeals this acquittal and advances three grounds of appeal. The first alleges misdirection in respect of self-defence. The second and third allege an imbalanced evidentiary record because the trial judge erred in excluding evidence of the respondent's alleged involvement in a robbery just before the shooting and his prior assault convictions. As for the latter, the trial judge excluded those convictions in his ruling on the respondent's *Corbett* application, in part because he accepted defence counsel's submission that the respondent's Indigeneity impacted the probative value and prejudicial effect of their admission, which the appellant contends was an error: see *R. v. Corbett*, [1988] 1 S.C.R. 670.

[3] For the reasons that follow, we would dismiss the appeal.

FACTUAL CONTEXT

[4] The respondent had a very difficult background, one that will be reviewed in more detail later in these reasons. His parents were alcoholics, and he was placed

into foster care when he was two or three years old. At the time of the shooting, the respondent was 19 years old and had an extensive youth and adult criminal record. He was of no fixed address, moving between the streets, cheap rental locations and friends' homes. He admitted to struggling with multiple drug addictions and was both using and selling crystal methamphetamine daily.

[5] A few weeks before the shooting, the respondent had purchased a gun: a .22 Derringer with 20 hollow-point bullets. He testified that he acquired the gun because he feared for his safety after being violently robbed, which he says left him "really scared" and "paranoid". He decided that he needed to protect himself.

[6] On the evening of the shooting, the respondent testified that he and his close friend from foster care, James Matheson, went to sell drugs to a new client and have a drink at a bar. Both the respondent and Mr. Matheson had already consumed crystal methamphetamine and alcohol earlier that day. The respondent had brought his loaded gun because, as he put it, he "didn't really know" the new client and was not "a hundred percent sure" that he could trust the client "not to try anything."

[7] On route, with the loaded gun in his pocket and Mr. Matheson at his side, the respondent encountered an elderly man on the street. On the other side of the street, standing outside of a mosque, were four young males: 19-year-old Mr. Al-Hasnawi, his 13-year-old brother Ahmed, and his friends from the mosque, 16-

year-old twins Haider and Mustafa Ameer.[1] They had been attending mosque to celebrate the birth of a prophet. Mr. Al-Hasnawi, a university student, had read a passage from the Qur'an at the celebration.

[8] Accounts of what happened next diverge. There was some interaction between the respondent, Mr. Matheson, and the elderly man. Mr. Al-Hasnawi's brother and friends say that from their position outside of the mosque, they saw the respondent and Mr. Matheson bothering the elderly man. The respondent denies this. All agree, however, that Mr. Al-Hasnawi called out to the respondent and Mr. Matheson. Mr. Al-Hasnawi's brother and friends say that Mr. Al-Hasnawi called out to stop the respondent and Mr. Matheson from bothering the man. On any account, Mr. Al-Hasnawi's yell prompted the respondent and Mr. Matheson to cross the street and walk toward the four young males at the mosque.

[9] The interaction between the group was brief. Although it was said to commence with "regular talking", it soon escalated to the point that the respondent showed his firearm, which he said was meant to defuse the situation.

[10] The jury heard conflicting evidence about what transpired next. We will discuss the facts surrounding that interaction in the context of the issue involving self-defence. For now, what is important is that the respondent showing his gun

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[1] To avoid confusion, we refer to Ahmed Al-Hasnawi, Haider Ameer and Mustafa Ameer by their first names in these reasons.

did not defuse the situation at all. Rather, the situation continued to escalate to the point where the respondent and Mr. Matheson took flight. Mr. Al-Hasnawi ran after them and, just as he was catching up to Mr. Matheson, the respondent turned and fired his gun.

[11] At trial, the respondent testified that he acted on instinct when he fired the gun. He explained that he did so because he thought that either he or Mr. Matheson was going to be killed. He believed that the only reason Mr. Al-Hasnawi would have chased him knowing that he had a gun was because Mr. Al-Hasnawi "had one too." At trial, his counsel argued that a reasonable person similarly situated would have thought the same.

[12] The respondent testified that he did not intend to hit Mr. Al-Hasnawi and that he aimed the gun low for this reason. In fact, he testified that he did not think that he had struck Mr. Al-Hasnawi with the bullet, and only learned later that he had. The single bullet hit Mr. Al-Hasnawi in his stomach. He was declared dead about an hour after the whole interaction commenced.

[13] The respondent disposed of his gun, hiding it under some leaves in a back alley near where he had shot Mr. Al-Hasnawi. He and Mr. Matheson then went to a bar. The respondent testified that, later the same night, he and Mr. Matheson were confronted by another person involved in the drug trade. He testified that this man put a machete to his face and demanded money, drugs and his gun. The

respondent said that he retrieved the gun from its hiding place and gave it to the man. The gun has never been located.

[14] Mr. Matheson ultimately struck a plea deal with the Crown, pleading guilty to obstruction of justice. He gave statements to the police that incriminated both himself and the respondent, including suggesting that the respondent had laughed after the shooting and bragged about it to others. Mr. Matheson testified at the respondent's preliminary inquiry, somewhat consistently and somewhat inconsistently with the Crown's theory of the case. However, he became entirely uncooperative at trial, recanting most of what he had said earlier and, in many instances, professing a loss of memory. Mr. Matheson was then cross-examined on the statement of facts he agreed upon at his guilty plea, which was admitted into evidence for the truth of its contents: *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740.

ANALYSIS

OVERVIEW

[15] The criminal law categorizes self-defence as a defence to the commission of an act of killing that would otherwise constitute culpable homicide. Under the criminal law, it is not unlawful for a person to resist the attack of another using whatever means are reasonably necessary to repel the attack, but only to the degree necessary to repel it. Where necessary, and where proportionate to the peril faced, these means can include acts that will foreseeably result in the

assailant's death. Determining whether a killing was legitimately a matter of self-defence would have been an agonizing question for the jury in this case. The death of Mr. Al-Hasnawi was tragic. He was a young university student and beloved son, brother, and friend. He was, as it was later determined, unarmed and posed much less of a threat to Mr. Matheson and the respondent than the respondent believed.

[16] The central question that the jury was called to decide was whether the respondent's actions were deserving of penal sanction or whether they were justified because there was a reasonable doubt about whether he acted in self-defence: *R. v. Khill,* 2020 ONCA 151, 149 O.R. (3d) 639 ("*Khill (ONCA)*"), at para. 45, aff'd 2021 SCC 37, 409 C.C.C. (3d) 141 ("*Khill (SCC)*"); see also *R. v. Perka,* [1984] 2 S.C.R. 232, at p. 246; *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14, at paras. 24-25.

[17] The appellant raises three grounds of appeal. Standing on their own, each error is alleged to be sufficiently serious to warrant a new trial. Together, they are said to make a strong case for concluding that the errors had a material bearing on the acquittal and requiring a new trial: *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14.

[18] We will start by explaining why the instructions on self-defence were adequate. We will then go on to explain why the trial judge's prior disreputable conduct ruling does not contain reversible error. We will conclude by addressing

the *Corbett* issue, specifically explaining why the trial judge was correct to take the respondent's Indigeneity into account in determining the degree to which his criminal record could become admissible in cross-examination.

ISSUE ONE – DID THE TRIAL JUDGE ERR IN THE INSTRUCTIONS TO THE JURY ON SELF-DEFENCE?

(a) Overview

[19] The trial judge reviewed the elements of second-degree murder in his charge to the jury. He explained that the first two elements were non-contentious: (1) that the respondent caused Mr. Al-Hasnawi's death; and (2) that he caused this death by way of an unlawful act. The trial judge told the jury that they should have little difficulty concluding that the Crown had proven these first two elements of murder beyond a reasonable doubt.

[20] Before instructing the jury on intent, the third element of murder and the one that was contentious in this case, the trial judge paused to provide instructions on self-defence. The instructions on self-defence form a central aspect of the jury charge and a central aspect of this appeal.

[21] The appellant raises two objections in relation to how the jury was instructed on self-defence. The first objection has to do with what the jury was told. The second has to do with what the jury was not told.

[22] First, what the jury was told. The appellant contends that the trial judge erred by telling the jury that a “reasonable person” is a person with the “same characteristics and experiences” and the “same age, gender, physical capabilities and background” as the respondent. The appellant acknowledges that all but one of these descriptors of the “reasonable person” exist in the standard jury instruction. The one exception is the addition of the word “background”, which the appellant says would have triggered confusion and caused the jury to consider self-defence from a subjective standard rather than a modified objective one.

[23] Second, what the jury was not told. The appellant contends that the trial judge erred by failing to tell the jury that when assessing whether the respondent’s conduct was “reasonable in the circumstances” (s. 34(1)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46), characteristics and experiences that are antithetical to community norms and values cannot imbue the “reasonable person” standard, and cannot be relied upon to establish the reasonableness of the accused’s belief or acts in their claim of self-defence.

[24] The appellant says that the prejudice arising from what the jury was not told was aggravated by what they were told. In other words, by telling the jury that they could take the respondent’s “background” into account when assessing the reasonableness of his actions, without telling them that backgrounds antithetical to community norms and values cannot be relied upon to establish reasonableness, the charge created a significant risk that the jury’s deliberation

would be based on a fundamental misunderstanding of the law. Taken together, the appellant contends that this amounts to a reversible error. A question posed by the jury during their deliberation is said to demonstrate the confusion they were experiencing over the inadequacies in the instructions provided.

(b) Section 34 of the *Criminal Code*

[25] We start by acknowledging that the law of self-defence rests within a broader social context that places significant limits on the availability of the defence. As self-defence justifies otherwise criminally blameworthy conduct, it cannot turn merely on the accused's subjective perception of the need to act.

[26] To the contrary, justifying conduct that would otherwise result in penal consequence requires that the "broader social perspective" be taken into account. This is reflected in the fact that defensive conduct must be objectively reasonable: *Khill (SCC)*, at para. 2; *Khill (ONCA)*, at para. 46.

[27] Section 34(1) of the *Criminal Code* sets out the three elements of self-defence:

> 34(1) A person is not guilty of an offence if
>
> > (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
> >
> > (b) the act that constitutes the offence is committed for the purpose of defending or protecting

> themselves or the other person from that use or threat of force; and
>
> (c) the act committed is reasonable in the circumstances.

[28] These three lines of inquiry have been described in short form as the catalyst, the motive, and the response: *Khill (SCC)*, at para. 51. The catalyst focusses on the accused's state of mind and asks whether the accused subjectively believed on objectively reasonable grounds that force was being used or threatened against them or another person (s. 34(1)(a)). The motive asks whether the accused did something for the subjective purpose of defending or protecting themself or another (s. 34(1)(b)). The response asks whether the conduct of the accused was reasonable in the circumstances (s. 34(1)(c)) by having regard to the non-exhaustive list of factors in s. 34(2).

[29] There must be an evidentiary foundation, or an air of reality, on each of these three inquiries for the defence to be put before the jury: *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 88. In this case, there was no real dispute at trial that there was an air of reality to the respondent's claim of self-defence. As is always the case when self-defence is raised and there is an air of reality to the defence, the onus fell to the Crown to prove beyond a reasonable doubt that the respondent did not act in self-defence, or, more accurately in this case, in defence of Mr. Matheson.

(c) The Factual Underpinnings to the Self-Defence Claim

[30] Having described the elements of self-defence in s. 34, it is helpful to relate those elements to the facts in this case. At trial, the Crown had to prove beyond a reasonable doubt any one of the following: (1) the respondent did not believe on reasonable grounds that force was being threatened or used against Mr. Matheson; (2) the respondent did not act for the purpose of defending Mr. Matheson from that perceived threat; or (3) the respondent's actions were not reasonable in the circumstances.

[31] If each of the jurors had been satisfied beyond a reasonable doubt on any one of these three points – although not necessarily the same points – then their consideration of self-defence would have come to an end. They then would have had to move along to consider whether the Crown had proven beyond a reasonable doubt that the respondent had the necessary intent to commit a murder.

[32] Evidence in support of the respondent's claim of self-defence came from multiple witnesses, including the respondent himself. It was for the jury to consider this evidence as a whole and to determine the facts.

[33] Although the respondent denied it, Mr. Al-Hasnawi's brother and friends testified that, from their vantage point in front of the mosque, they saw the respondent and Mr. Matheson across the street, bothering an elderly man. Mr. Al-

Hasnawi called out to the respondent and Mr. Matheson, which prompted them to cross the street and approach the four young males in front of the mosque. Both Haider and Mustafa testified that they had never seen Mr. Al-Hasnawi call out to anybody like this before.

[34] According to the respondent, Mr. Al-Hasnawi was angry and hostile. The respondent testified that after the altercation between Mr. Al-Hasnawi and the other young men escalated, he attempted to deescalate matters by showing his gun in warning. It is uncontested by anyone who was present that the respondent said something to the effect of: “I don’t want to use this.”

[35] The respondent testified that he became nervous about the whole encounter when showing his gun did not seem to scare Mr. Al-Hasnawi at all. Indeed, he testified that Mr. Al-Hasnawi said: “you think I’m scared of you … because you have a gun?”. The respondent testified that Mr. Al-Hasnawi kept his hand in his pocket when he said this, which made the respondent believe that he may also be armed. No weapons were found on Mr. Al-Hasnawi. Mustafa testified that Mr. Al-Hasnawi was acting “fearless” after seeing the gun.

[36] The discussion between the young men ended two minutes after it began when Mr. Matheson sucker punched Mr. Al-Hasnawi in the face, saying “Boom” as he landed the punch. The respondent took the position at trial, and maintains in this appeal, that the only reason Mr. Matheson punched Mr. Al-Hasnawi was

because Mr. Al-Hasnawi was acting so aggressively and had taken a step toward him. According to the respondent, Mr. Al-Hasnawi had his hand in his pocket, and began removing it as he advanced toward the respondent.

[37] Multiple witnesses described Mr. Al-Hasnawi as angry during the encounter. His brother Ahmed described him as “really angry”. Haider and Mustafa testified that they had never seen Mr. Al-Hasnawi that angry before, and one of the brothers said it was as if he had “snapped.” They said that Mr. Al-Hasnawi was at his angriest just after he had been punched. Haider testified that after Mr. Al-Hasnawi was punched, Mr. Al-Hasnawi also threw a punch and that was when he said: “you think I’m scared of you ‘cause you have a gun?”. Haider said that this anger was out of character for Mr. Al-Hasnawi.

[38] When the respondent and Mr. Matheson fled the scene, Mr. Al-Hasnawi gave chase. Ahmed ran after him because he worried that Mr. Al-Hasnawi would be hurt. Mustafa ran after him because he felt that what Mr. Al-Hasnawi was doing was unsafe. Haider stayed behind.

[39] Civilian witnesses provided accounts of what they saw and heard next. One person described seeing two people being chased by two others. Another witness described seeing one person being chased by three others. One of the witnesses heard someone in the group giving chase say: “get him”. Another witness heard

someone yell: “what the fuck are you running for now, bitch?”. Although he could not determine who said it, he did not think that it was Mr. Al-Hasnawi.

[40] The chase was nearing its end. Although the respondent remained ahead, Mr. Matheson slowed and was losing ground. He started yelling to the respondent for help and saying that Mr. Al-Hasnawi was catching up to him. It was true that Mr. Al-Hasnawi was gaining on him. Ultimately, he caught up to Mr. Matheson. Ahmed testified that, at this moment, both the respondent and Mr. Matheson looked scared, and he heard Mr. Matheson say “Help me” and then “Oh shit, shoot him.” Ahmed described this as “frantically screaming.”

[41] The respondent slowed down, turned and fired one shot from his gun. He said that he saw Mr. Al-Hasnawi grabbing Mr. Matheson by the hoodie with one hand. He believed Mr. Al-Hasnawi had a knife in the other hand, which was outstretched and in a closed fist. In his testimony, he said that he thought Mr. Matheson was about to be stabbed and killed. One witness described the respondent as being 10 feet from where he fired. The respondent described the distance as between 15 and 20 feet.

[42] The respondent testified that everything leading up to the moment he fired the gun made him believe that Mr. Al-Hasnawi had a knife. In all, he points to the following: (1) Mr. Al-Hasnawi was angry; (2) Mr. Al-Hasnawi had told him during their initial interaction that he “liked to jump people”; (3) Mr. Al-Hasnawi was

behaving aggressively, even after being shown the gun; (4) Mr. Al-Hasnawi said something to the effect of “you think I’m afraid of that gun?”; (5) Mr. Al-Hasnawi kept one hand in his pocket when they were in front of the mosque; (6) Mr. Al-Hasnawi knew that the respondent had a gun yet ran after him anyway; and (7) Mr. Al-Hasnawi grabbed Mr. Matheson’s hood with one hand and reached behind him with the other with what the respondent thought may have been a weapon.

[43] On that basis, the respondent concluded that Mr. Matheson was in grave danger. Accordingly, as the respondent explained in his evidence, he fired one shot from his gun and kept running. He said he was not trying to kill Mr. Al-Hasnawi. He was panicked and, according to him, just wanted Mr. Al-Hasnawi to stop.

(d) The Alleged Error in the Jury Instruction

(i) The Direction Given

[44] To resolve the respondent’s claim of self-defence, the jury was required to consider what a “reasonable person” would have done in comparable circumstances. In accordance with the standard instruction on self-defence, the trial judge carefully followed the three lines of inquiry under s. 34(1): see David Watt, *Watt’s Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 2015), at pp. 1249-55 (Final 74 A-B). The trial judge twice directed the jury on the concept of a reasonable person: first when considering the catalyst question and second when considering the response question.

[45] In relation to the catalyst question, the accused's belief that force was being used or threatened, the trial judge told the jury that they must consider "whether a reasonable person in the same circumstances as [the respondent] would have the similar belief that force was being used or its use threatened against him or another person": s. 34(1)(a). In accordance with the standard instruction, the trial judge defined the reasonable person for the jury as follows:

> A reasonable person is a sane and sober and not exceptionally excitable, aggressive or fearful [person], a person who has the same powers of self-control that we expect our fellow citizens to exercise in society today.

[46] Later in the charge, in relation to the response question, the trial judge directed the jury on the need to consider the "reasonable person" when determining whether the respondent's response was "reasonable in the circumstances": s. 34(1)(c). The trial judge cautioned the jury that the response question is not an inquiry into whether the respondent believed "on reasonable grounds that he had no other course of action" than to shoot Mr. Al-Hasnawi, "but rather, whether what he did was a reasonable thing to do in the circumstances as he knew them or reasonably believed them to be."

[47] Again, in accordance with the standard jury instruction, the trial judge repeated the definition of a "reasonable person" as follows:

> Again a reasonable person is a sane and sober, not exceptionally excitable, aggressive or fearful [person]. He has the same powers of self-control that we expect our fellow citizens to exercise in our society today.

[48] The appellant takes issue with what the trial judge said next:

> A reasonable person who has the same characteristics and experiences as [the respondent] that are relevant to [the respondent's] ability to respond to what he reasonably believed was the use or threatened use of force. The reasonable person is a person of the same age, gender, physical capabilities and background. A reasonable person cannot be expected to know exactly what course of conduct or how much force was necessary or required in self-defence or in defence of another person. [Emphasis added]

[49] This instruction tracks the standard jury instruction, but for the addition of the single underlined word: "background". The addition of this word drew an objection from the trial Crown. While the trial Crown acknowledged that the trial judge could "certainly say what [the respondent's] background is, what his experiences are, [and] what his physical capabilities [are]", the Crown objected to any variation from the standard charge.

[50] The appellant contends that the addition of the word "background" contributes to a reversible error. According to the appellant, by telling the jury that the reasonable person is one who shares the same "background" as the respondent, the jury may have been misled to apply a subjective standard in their assessment of self-defence.

[51] The test for whether there is a reversible error is whether the jury was properly, not perfectly, instructed: *R. v. Jacquard*, [1997] 1 S.C.R. 314. This requires a functional approach. The charge cannot be analyzed in a piecemeal

fashion, but instead requires the reviewing court to look at the charge as a whole from a fairness and functionality perspective: *R. v. Goforth*, 2022 SCC 25, 470 D.L.R. (4th) 617, at para. 21; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at paras. 30-31. As noted by Bastarache J. in *Daley*, at para. 30: “The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge.”

[52] Here, the trial judge added one word to the standard wording asked for by the trial Crown. In our view, that one word added little to the instruction. Its addition did not convey to the jury that they should disregard everything else that had been said and deliberate upon a subjective standard.

[53] To the contrary, having regard to the totality of the instruction in the context of this charge as a whole, the word “background” acted as little more than a synonym for the words used in the immediately preceding sentence, where the jury was instructed that a reasonable person is someone who has the “same characteristics and experiences” as the respondent. It is this aspect of the instruction to which we now turn.

(ii) The Alleged Non-Direction

[54] The appellant’s primary position is that the trial judge erred by failing to instruct the jury that to the extent that the respondent’s characteristics and

experiences are antithetical to community norms and social values, they cannot inform what a reasonable person would have believed or done in comparable circumstances. Therefore, the appellant maintains that while it was alright for the trial judge to tell the jury that the notional reasonable person shares the same characteristics and experiences as the respondent, he should have gone further and instructed the jury that those characteristics and experiences had to be limited to only those that conform with community norms and values. According to the appellant, combined with the impugned addition of the word “background” into the standard instruction, this failure created a significant risk that the jurors applied a subjective standard when assessing self-defence.

[55] As discussed earlier in these reasons, the objective component is critical to the justificatory nature of self-defence. Both the catalyst and the response questions import a modified objective standard that require the trier of fact to contextualize their analysis of reasonableness.

[56] In relation to the catalyst question – whether the accused reasonably believed that force was being used or threatened – s. 34(1)(a) looks at what a reasonable person in the same situation as the accused and with the same personal circumstances, characteristics and life experiences would have believed: *Khill (SCC)*, at paras. 54-56. The trier of fact cannot focus only on what was in the accused’s mind, nor can the trier of fact focus only on what would have been in the mind of a neutral, impartial reasonable person: David M. Paciocco, “The New

Defense Against Force" (2014) 18 Can. Crim. L. Rev. 269, at p. 278. That is why we call it a "modified" objective test. It is an objective test that is modified to account for the accused's personal circumstances, characteristics and experiences.

[57] Equally, the response question – whether the accused's conduct was reasonable in the circumstances – precludes the trier of fact from either "slipping into the mind of the accused" or from analyzing the claim of self-defence without contextualizing their assessment of reasonableness. This inquiry has been described as a "wide net" because it engages the non-exhaustive list of factors found in s. 34(2) of the *Criminal Code.* While the physical characteristics of an accused person are specifically identified under s. 34(2)(e) – "size, age, gender, and physical capabilities" – it is not an exhaustive list: *Khill (SCC)*, at paras. 64-65.

[58] The appellant argues that the modified objective test can only go so far. According to the appellant, self-defence protects against otherwise punitive consequences and, therefore, it is critical that the modified objective test not be replaced with a strictly subjective one. As we have already explained, we agree. We also agree that to stay rooted in the broader societal perspective, and to ensure that the law only justifies conduct that is acceptable to society at large, it is sometimes necessary to exclude from the modified objective test those characteristics and experiences of an accused that are offensive to society itself. As noted by Doherty J.A. in *Khill (ONCA)*, at para. 49: "The justificatory rationale

for [self-defence] is inimical to a defence predicated on a belief that is inconsistent with essential community values and norms."

[59] The appellant emphasizes that this was particularly important in this case because the respondent lived a criminal lifestyle. The jury heard evidence that the respondent was addicted to drugs, was a drug trafficker, was part of a street culture, and carried a firearm. Against this factual backdrop, the appellant argues that it was essential that the trial judge instruct the jury not to take any of these factors into account when applying the modified objective standard. The failure to give this instruction is said to have resulted in reversible error.

[60] Respectfully, the first difficulty with this argument is that it is being made for the first time on appeal and is, in fact, inconsistent with the position taken by the appellant at trial.

[61] Although lengthy pre-charge conferences were held in this case, the trial Crown never asked for this instruction, the absence of which is now said to constitute reversible error on appeal. There were several opportunities for the parties to make submissions on the draft charge and the completed charge. Yet this request was never made.

[62] What is more, the trial Crown specifically asked the trial judge to stick to the standard jury instructions that were given. Indeed, he made this request emphatically:

> If somebody reads my words one day, I'm, I'm saying that I think that the standard charge is, is the best language.

[63] In addition, the trial Crown delivered a forceful closing address, underscoring why the jury should reject that the respondent behaved reasonably. During that address, the trial Crown told the jury that "you can't inject this street culture into reasonableness." The defence objected to this submission, suggesting that it was wrong in law and that the jury could take this into account because it constitutes part of the respondent's background. The trial Crown defended the submission. According to him, although the trial judge could "certainly say what [the respondent's] background is, what his experiences are, [and] what his physical capabilities [are]", the trial judge could not instruct the jury that, to the extent the respondent was involved in a criminal subculture, that activity could properly inform the reasonableness analysis. The trial judge agreed with the trial Crown and refused to correct the trial Crown's closing submission on this point. Indeed, not only did the trial judge refuse to correct it, he repeated it when summarizing the Crown's position in the charge to the jury: "The code of the street is not reasonable."

[64] In the end, having read the trial judge's instructions on self-defence, with the exception of the one word that departed from the specimen instruction – the addition of the word "background" which we have already addressed – the trial Crown announced that the charge was "eminently reasonable" and "well written".

[65] Therefore, this is not simply a case involving a failure to object to an alleged misdirection: *Jacquard*, at para. 38; *Daley*, at para. 58. Nor is this a situation where counsel simply expressed satisfaction with an allegedly inadequate charge: *R. v. Patel*, 2017 ONCA 702, 356 C.C.C. (3d) 187, at para. 82. Rather, this is a case where counsel asked for almost the exact charge that was given and expressed satisfaction upon its receipt.

[66] Of course, it is true that the failure to object to a jury charge will not invariably carry the day on appeal. The positions taken by counsel on a draft or even completed jury charge are not dispositive of alleged errors on appeal because in the end, with or without the assistance of counsel, the trial judge holds the ultimate responsibility to provide legally correct instructions to the jury.

[67] At the same time, the positions of counsel are a helpful indication of the potential seriousness of any such alleged error. This is particularly true when the alleged error is raised for the first time on appeal: *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 44. In this case, at a bare minimum, it is clear that the trial Crown, who clearly had a good grasp of the law of self-defence, was entirely satisfied that the standard jury instruction did all of the work necessary to impart to the jurors a correct understanding of the law of self-defence.

[68] As we will now explain, this was not an unreasonable conclusion.

[69] The fact is that the respondent has experienced a most troubled life. Much of it has been spent living in ways that are antithetical to societal norms and community values. At the time that he killed Mr. Al-Hasnawi, he was of no fixed address, was unemployed, had a long history of criminality, was an admitted drug trafficker and drug user, and carried a gun for personal protection.

[70] Yet, the respondent never pointed to these life experiences as a way to justify killing Mr. Al-Hasnawi. For instance, when it was suggested to him in cross-examination that he shot Mr. Al-Hasnawi because he was high on drugs or that he felt disrespected by Mr. Al-Hasnawi, the respondent denied having done so.

[71] Instead, the respondent articulated why he became fearful and why he did what he did by relying upon what was said to be Mr. Al-Hasnawi's behaviour, much of which was supported by other witnesses. As the respondent explained, in his mind: "the only reason you would chase after someone with a gun would be because you have, you have one too, or you have something that you're trying to use." According to the respondent, other observations reaffirmed his belief, such as Mr. Al-Hasnawi keeping a hand in his pocket throughout the initial encounter, his continued aggression after seeing the gun, and his decision to chase after the respondent and Mr. Matheson when they attempted to run away. Whether these thought processes were reasonable in the circumstances was for the jury to decide.

[72] The respondent testified that he had “never really seen somebody react like that to a gun or any kind of weapon”. While it is true that this testimony suggests experience in criminal subculture, the respondent did not root his self-defence claim in this fact. Rather, as previously reviewed, the respondent testified that it was a large constellation of factors that inspired fear in him, none of which relied on the norms of or a reasoning peculiar to a criminal subculture. In short, the respondent testified that it was the totality of Mr. Al-Hasnawi’s behaviour throughout the entire encounter that made him believe that Mr. Al-Hasnawi was armed and was about to stab Mr. Matheson.

[73] In any event, having regard to the closing submissions of the parties and the charge as a whole, even without the instruction now advanced by the Crown, the jury would have understood that anti-social values, intoxication, drug-related activity and paranoia arising from drug-related activity could not form the basis of a self-defence claim. To demonstrate why this is so, we focus upon only a few examples of the types of things that the jury was told, all of which repeatedly reinforced that the respondent’s conduct had to be objectively reasonable in the circumstances.

[74] Starting with the closing submissions, the defence closing repeatedly reinforced that self-defence would only apply if the respondent “truly and reasonably believe[d]” that he or Mr. Matheson were facing a threat of grievous

bodily harm or death and that his belief had to be "reasonable in the circumstances".

[75] For its part, the Crown closing repeatedly made the point that the respondent's beliefs were unreasonable and could not ground a claim of self-defence. The Crown reinforced over and over that reasonableness was the critical issue for determination and that the assessment could not be informed by "street culture". By way of example, the Crown said: "[The respondent] is [on] meth, he's drinking alcohol, his belief that there is a weapon is unreasonable objectively"; "Nothing was reasonable about what [the respondent] did that night and that's the operative word here, is reasonable, or proportionate"; and "You can't inject this street culture into reasonableness".

[76] In total, the defence referred to the objective reasonableness component of self-defence on no less than 7 occasions and the trial Crown made at least 15 references to it in his closing. This was followed by the trial judge's charge. The charge, as we have already discussed, included instructions that repeatedly conveyed to the jury that there was an objective reasonableness requirement embedded in self-defence, one that they needed to pay careful attention to.

[77] In addition, the trial judge clearly instructed the jury under the catalyst question that the respondent's belief had to be reasonable in the circumstances. The jury was instructed to consider whether "a reasonable person in the same

circumstances as [the respondent] would have the similar belief." Later, when it came to the response question, whether the respondent's conduct was "reasonable in the circumstances", the trial judge again drew the jury back to the definition of a "reasonable person". He told the jury that the question was whether what the respondent did "was a reasonable thing to do in the circumstances as he knew them or reasonably believed them to be."

[78] In relation to both prongs, the trial judge reinforced for the jury that a "reasonable person" carried a specific definition:

> A reasonable person is a sane and sober and not exceptionally excitable, aggressive, or fearful [person], a person who has the same powers of self-control that we expect our fellow citizens to exercise in society today.

[79] Telling the jury that a reasonable person is "sane and sober" and "not exceptionally excitable, aggressive or fearful" went a good distance to addressing the concerns now raised by the appellant on appeal. After all, the anti-social values that the appellant focusses upon in this court would not have fit within the definition provided for a "reasonable person", as those qualities did not rest in sobriety. In fact, many of these qualities rested in the opposite of sobriety and actually placed the respondent within a category of people who were exceptionally excitable, aggressive and unnecessarily fearful. Therefore, much of what the appellant points to on appeal as evidence of anti-social conduct would have been removed or at least read out by the jury when following the language in the standard charge.

[80] Accordingly, although the trial judge may not have told the jury explicitly what to exclude from their reasonableness considerations, they knew what they could not include when considering the reasonable person. In effect, this landed the jury in the same place.

[81] In our view, having regard to the jury instructions as a whole, the closing addresses, and the positions of the parties at trial, particularly the position taken by the trial Crown, combined with the respondent's evidence about why he did what he did, we see no reversible error in either the trial judge failing to give an instruction he was not asked to give nor in giving the instruction he was asked to give.

(iii) The Jury's Question

[82] About six hours into deliberation, the jury asked a question about two particular paragraphs in the jury charge. They asked:

> there are two different definitions of a reasonable person. Please clarify for us.

[83] The paragraphs of the charge that the jury was referring to contains the following definitions for a reasonable person:

> Again, a reasonable person is a sane and sober, not exceptionally excitable, aggressive or fearful [person]. He has the same powers of self-control that we expect our fellow citizens to exercise in our society today. A reasonable person who has the same characteristics and experiences as [the respondent] that are relevant to [the

> respondent's] ability to respond to what he reasonably believed was the use or threatened use of force.
>
> The reasonable person is a person of the same age, gender, physical capabilities and background. A reasonable person cannot be expected to know exactly what course of conduct or how much force was necessary or required in self-defence or in defence of another person.

[84] The appellant argues that the jury's question demonstrates that the jury was confused by the instructions as they relate to the reasonable person. According to the appellant, the jury seemed to perceive a disconnect between defining a reasonable person as one with reasonable self-control who is "sane and sober, not exceptionally excitable, aggressive or fearful", with a reasonable person imbued with a series of traits specific to the respondent, including his characteristics, experiences and background.

[85] We do not agree that the jury's question is as revealing as the appellant suggests. In fact, looking at the jury's process of deliberation as a whole, in our view, while the question may well reveal some initial confusion, it does not on its face suggest that the jury went on to apply a subjective test in its consideration of the reasonable person in this case. Indeed, there is nothing about the question that suggests that the jury was confused as to whether they should apply an objective or subjective test.

[86] We agree with the respondent that the more plausible explanation is that the paragraphs that the jury requested clarification on define the reasonable person in slightly different ways.

[87] What is important is that the trial judge canvassed with counsel, before recalling the jury, the answer that he should provide to the question posed. While the trial Crown again noted his objection to the addition of the word “background”, he agreed with the trial judge and defence counsel that the trial judge should simply repeat the instruction already given: “I don’t think there’s much you can say in addition.”

[88] The trial judge recalled the jury. He said that he may not have understood the question “as to perhaps two different versions” of the reasonable person in the charge. He then said that he was going to re-read to them the paragraphs they had asked about. He then emphasized that, in the very next paragraph, there were bullet points for them to consider in addressing the question of the reasonable person. Each bullet point was taken from s. 34(2) of the *Criminal Code.*

[89] The trial judge acknowledged that his answer may not have been “totally responsive to the way” that the jury had posed the question. He instructed them that they could “delineate further or clarify further” if there was still “some confusion.” He told the jury to think about what he said and that if there were

questions remaining, to not hesitate to ask them the next day. The court adjourned for the evening. The jury never returned with another question.

[90] In our view, while it may have been better for the trial judge to seek clarification from the jury as to exactly what was troubling them about the definition, we see no basis to conclude that their single question demonstrates that they improperly applied a subjective test in determining whether the respondent's actions were reasonable in the circumstances: *R. v. Grandine*, 2017 ONCA 718, 355 C.C.C. (3d) 120, at para. 62. To the contrary, read as a whole, the instructions provided to the jury, even with the largely superfluous addition of the word "background", clearly directed them away from a subjective test and properly directed them into a modified objective test.

[91] We would therefore reject this ground of appeal.

ISSUE TWO – DID THE TRIAL JUDGE IMPROPERLY EXCLUDE EVIDENCE OF THE RESPONDENT'S INVOLVEMENT IN A ROBBERY SHORTLY BEFORE THE SHOOTING?

(a) Overview

[92] The respondent is said to have been involved in an alleged robbery less than an hour before he killed Mr. Al-Hasnawi.

[93] Prior to trial, the Crown brought an application to elicit this prior disreputable conduct evidence through Mr. Matheson. That application failed. Then, nearing the

end of trial, following the respondent's testimony in-chief, the Crown asked the trial judge to revisit his ruling, claiming that the respondent had painted a picture that bolstered the relevance of the previously excluded evidence. As a remedy, the trial Crown asked that he be permitted to cross-examine the respondent on the alleged robbery. That application also failed.

[94] The appellant claims that the trial judge erred by dismissing both applications. For the reasons that follow, we see no reversible error.

(b) The Impugned Rulings

(i) The Pre-Trial *Voir Dire*: The Trial Crown Seeks Admission of Prior Disreputable Conduct

[95] Prior to the start of trial, the trial Crown brought an application to admit prior discreditable conduct evidence attributable to the respondent. The evidence giving rise to the application for admission related to the respondent's use and sale of drugs, purchase and possession of the firearm used in the shooting, and alleged participation in a robbery shortly before the shooting. The parties were able to agree on the admission of all matters except the evidence involving the alleged robbery.

[96] At the admissibility *voir dire,* the sole evidence supporting the respondent's involvement in the alleged robbery came from the transcript of Mr. Matheson's testimony at the preliminary inquiry. That transcript reveals the following.

[97] In examination-in-chief, Mr. Matheson testified that he and the respondent robbed Aaron Porter, also known as “Angel”, about an hour before the shooting. He testified that upon seeing Angel, he and the respondent crossed the street and “demanded” money from Angel, after which Angel gave them a “handful of cash and [they] just took the money and left.” It was about $400 in total. Mr. Matheson said that if Angel had not given them the money, they “would have taken it” anyway.

[98] In cross-examination, Mr. Matheson’s memory of this alleged robbery waned substantially. He agreed that he had not been entirely truthful with the police on this point. He also agreed that he lies for no reason. He admitted that not only had he lied about the alleged robbery but that, in fact, all the details about it were “a little bit blurry” and “hazy” to him. For example, he could not remember what was said during the alleged interaction with Angel, who spoke to Angel, or whether the respondent had a gun at the time. In the end, he agreed that he had no “clear memory” of any of it, assuming, of course, that there was any such interaction. This was the entire evidentiary foundation upon which the initial admissibility ruling rested.

[99] Relying upon that evidentiary foundation, the trial Crown sought the admission of the alleged robbery evidence. The trial Crown argued that it was relevant for two reasons: (1) it was a central component to the narrative and contextual background of the events that culminated in the shooting of Mr. Al-Hasnawi; and (2) it informed the respondent’s state of mind when he encountered

Mr. Al-Hasnawi, a state of mind that would be important to the claim of self-defence.

[100] The trial judge dismissed the application.

[101] First, he rejected the use of the robbery evidence for narrative purposes. According to him, other evidence could be adduced to assist the jury in making sense of the narrative in the case.

[102] This left only the question of whether the evidence ought to be admitted as relevant to the respondent's state of mind. The trial judge rejected that position, concluding that the alleged robbery evidence lacked probative value and had "no bearing or relevance" to assessing the respondent's self-defence claim. The trial judge went on to specifically note that the alleged robbery evidence was supported only by Mr. Matheson's "vacillating recollection", "changing narrative" and "admitted mendacity". The trial judge pointed out that, taken at its highest, the evidence was "less than stellar" and "in fact, somewhat confusing". As he said in his oral ruling: "It seemed that the probative value of the evidence is minimal."

[103] In addition, the trial judge found that the prejudicial impact of admitting the alleged robbery evidence through Mr. Matheson, even assuming he would testify to it, was high because it held out a strong invitation for the jury to inappropriately reason that the respondent was a person of violent character and therefore, more likely to have committed the offence. The trial judge concluded that, even with a

mid-trial and final jury instruction cautioning the jury about improper propensity reasoning, the risk of prejudice was simply too high.

[104] In all, the trial judge held that any probative value of the alleged robbery evidence was far outweighed by its prejudicial impact given both the concessions already made by the respondent and Mr. Matheson's difficulties with memory. Nonetheless, the trial judge made his ruling subject to revisitation.

(ii) The Request to Revisit the Initial Ruling

[105] After the respondent testified in-chief, the trial Crown indeed sought to revisit the issue. According to the trial Crown, the respondent had unfairly portrayed himself in his testimony as a sympathetic victim who had been robbed, beaten and otherwise victimized throughout his life. More specifically, the trial Crown alleged that the respondent had created a distorted picture of his state of mind on the night in question by testifying that he was not looking to do any damage or to harm anyone, that he was nervous when he headed out for the evening, and that he was merely concerned with protecting himself. The trial Crown maintained that the alleged robbery incident shortly before the shooting belied the sympathetic picture that the respondent attempted to paint for himself during his in-chief testimony.

[106] The trial Crown also submitted that the respondent had opened up his character. In support of this submission, the trial Crown pointed to the respondent's testimony, when he said that "[he] couldn't believe that something that [he] did

caused … another person to die" because he "didn't think [he] was ever capable of such things and [he is] still, still not."

[107] The trial judge agreed with the trial Crown that the overall "thrust" of the respondent's testimony provided a "distorted picture to the jury" because it "portrayed [him]…as a victim in all the circumstances leading up to the night in question". This was relevant to his self-defence claim because, as the trial judge put it when summarizing the trial Crown's submissions, such testimony lends support to the inference that the respondent is "non-aggressive in nature", "a victim of all of the events" in this case, and "a sympathetic victim".

[108] Similarly, the trial judge found in favour of the trial Crown to a limited extent when it came to whether the respondent had put his character in issue when he said that he did not think he was capable of such things. Although it was a close call, the trial judge held that the door had been opened "slightly to the introduction of good character, albeit ever so slightly".

[109] For the trial judge, the key question in need of answer was one of remedy.

[110] According to the trial Crown, the appropriate remedy was: (1) revisiting the *Corbett* ruling, a ruling we will discuss below, to allow the Crown to elicit more convictions than initially permitted; and (2) permitting the Crown to question the respondent about the alleged robbery.

[111] The trial judge refused to revisit the *Corbett* application. In his view, having regard to the fact that the respondent had already testified in-chief about the convictions that had been the subject of admissibility in the *Corbett* ruling, too much prejudice would flow to the respondent if the Crown were permitted to introduce additional convictions during cross-examination. As the trial judge said, the jury would be left wondering why the defence was "holding back such an important conviction" and what they were "trying to hide".

[112] The trial judge also rejected the trial Crown's request to ask the respondent about the alleged robbery of Angel. He held that, despite the sands having shifted as a result of the respondent's testimony in-chief, the prejudicial effect of the jury hearing about the alleged robbery still outweighed its probative value. To this end, as he had done in the initial ruling, the trial judge restated and reinforced his view about the quality of the robbery evidence. He again highlighted the fact that the transcript of Mr. Matheson's evidence at the preliminary inquiry showed that he had only a "blurry" recollection of the alleged robbery, did not "really remember the details" and admitted to lying about aspects of it. As the trial judge said, "[b]ased on Matheson's evidence I frankly do not know what occurred by reading the preliminary inquiry transcripts back [during the *voir dire*] and I still do not know what occurred based on his consistent obfuscation, mendacity, [and] lack of recall that continues to this trial." The reference to Mr. Matheson's "lack of recall" continuing to trial is a reference to the fact that when Mr. Matheson testified before the jury

during the Crown's case, he proved to be a most difficult, "forgetful" and unhelpful witness.

[113] In any event, despite the trial judge's recognition that "things [had] evolved" since his initial ruling, he remained convinced that the probative value of the alleged robbery was outweighed by its prejudicial effect. Accordingly, he held that there was no "good faith basis" to cross-examine the respondent on this point.

[114] This does not mean, though, that the trial Crown was left without a remedy. The trial judge allowed the Crown to expand the scope of its cross-examination by permitting questions about not only the respondent's use of drugs, but also about his involvement in the sale of drugs, including crystal methamphetamine. Even further, the trial judge opened up a new line of cross-examination on prior bad acts, allowing the Crown to pose questions about the respondent's prior use of weapons or firearms, including those he possessed for protection or otherwise. The trial judge provided the trial Crown with what he described as "wide latitude" on both lines of inquiry.

(c) The Alleged Error in the Trial Judge's Initial Ruling on the Crown's Prior Disreputable Conduct Application

[115] The appellant maintains that the trial judge erred in his initial ruling. The error is said to be rooted in the trial judge's finding that the alleged robbery "had no bearing or relevance" to the jury's assessment of the respondent's self-defence

claim. The appellant maintains that the proposed evidence about the alleged robbery went directly to the respondent's state of mind, which is relevant to whether an act is done in self-defence or in defence of another. The appellant contends that if the trial judge had properly understood the connection between the challenged evidence and its importance to the self-defence claim, he would have invariably concluded that the probative value of the proposed evidence outweighed its prejudicial effect.

[116] There is some traction to what the appellant says. The fact is that there was at least some relevance to the evidence about the alleged robbery because it could have triggered a chain of inferences that informed the claim of self-defence: see *R. v. Watson* (1996), 30 O.R. (3d) 161 (C.A.), at p. 173. That chain of reasoning went something like the following: participating in a robbery shortly before a shooting could tend to support an inference that the respondent was in an aggressive or hot-headed state of mind on the night in question which, in turn, could tend to support an inference that the respondent was the aggressor in the confrontation with Mr. Al-Hasnawi. Equally, it could tend to neutralize the suggestion that he was a scared victim on the night in question. If the Crown could prove the respondent was the aggressor, that would bear on the crucial issue of self-defence. This chain of inferences, even if tenuous, was sufficient to satisfy the threshold criterion of relevance.

[117] However, we see no reversible error in the trial judge's conclusion. The fact is that the trial judge focussed heavily on the highly questionable nature of the evidentiary foundation upon which the question of admissibility rested. It was the Crown who bore the burden of showing that the probative value of the evidence outweighed its prejudicial effect. Even if the trial judge had adverted to the inferential chain of reasoning that could arise from the alleged robbery evidence, his ruling is clear that he found Mr. Matheson's evidence about the alleged robbery incredible and unreliable, and his account vague and uncertain.

[118] While the ultimate assessment of credibility is always for the jury, the strength and believability of the evidence establishing that the alleged discreditable conduct in fact occurred can be an important consideration in evaluating the probative value of proposed extrinsic discreditable conduct evidence: *R. v. Aragon*, 2022 ONCA 244, 413 C.C.C. (3d) 79, at para. 40. Indeed, when performing their gatekeeping function as it relates to prior discreditable conduct evidence, trial judges will frequently have regard to whether the subject evidence is "reasonably capable of belief": *R. v. Handy,* 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 134 (emphasis in original). This is particularly true where the prejudicial impact of admitting the evidence is high: *Handy*, at para. 134; see also *Aragon*, at para. 40; *R. v. MacCormack*, 2009 ONCA 72, 241 C.C.C. (3d) 516, at para. 54; *R. v. Johnson*, 2010 ONCA 646, 262 C.C.C. (3d) 404, at para. 93; and *R. v. J.W.*, 2013 ONCA 89, 302 O.A.C. 205, at para. 43.

[119] Read in context, the trial judge's reasoning is clear. In his view, Mr. Matheson's testimony about the alleged robbery, as reflected in the preliminary inquiry transcript filed at the *voir dire*, was not reasonably capable of belief. In contrast, the prejudicial impact that would flow from admission would have outweighed the probative value.

[120] Therefore, despite seemingly having missed the mark in his finding on the theoretical relevance of the evidence, the trial judge's ruling really turned on the fact that Mr. Matheson was not reasonably capable of belief and that, pitted against the highly prejudicial nature of the alleged robbery evidence, any probity that it may have had was well outweighed. We are satisfied that even if the trial judge had identified the relevance of the evidence in the first place, having regard to the rest of his ruling, he undoubtedly would have arrived in the same place.

(d) The Alleged Error in the Trial Judge's Refusal to not Allow Cross-Examination on the Robbery Evidence After the Respondent Testified

[121] Even if this court finds that the trial judge did not engage in reversible error in his initial ruling, the appellant contends that this court should find error in the second ruling, where the trial judge precluded the trial Crown from cross-examining the respondent on the alleged robbery. The appellant argues that the trial judge was wrong to conclude that there was no "good faith basis" to conduct that line of cross-examination. The error, according to the appellant, is said to be rooted in a

conflation of the “reliability” of information and a “good faith” basis upon which to question a witness. The appellant maintains that a party should be able to cross-examine in good faith even on “incomplete or uncertain” information, provided that the suggestions are not recklessly put to a witness: *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at para. 48. That questioning need only be “honestly advanced on the strength of reasonable inference, experience or intuition”: *Lyttle*, at para. 48.

[122] We take no issue with the appellant’s summary of the legal principles. In our view, though, these legal principles are not the ones that answer this ground of appeal.

[123] The trial judge’s reference to the lack of a good faith basis to put the alleged robbery to the respondent in cross-examination must be considered in its proper context. The evidentiary foundation for the requested cross-examination was the preliminary inquiry transcript. Of course, the transcript left the trial judge entirely uncertain about whether Mr. Matheson’s version of events had even happened: “I frankly do not know what occurred by reading the preliminary inquiry transcripts back”.

[124] In addition, by the time the Crown sought to revisit the initial ruling, the trial judge had more than just Mr. Matheson’s preliminary inquiry transcript before him. He also had the benefit of having seen and heard Mr. Matheson testify during the prosecution’s case, albeit not about the alleged robbery. As the trial judge noted,

during his testimony before the jury, Mr. Matheson continued to engage in "consistent obfuscation, mendacity, [and] lack of recall that continues to this trial."

[125] If anything, the trial judge's grave concern for Mr. Matheson's ability to speak any truth was magnified significantly during the trial proper. As it turned out, the trial judge's concerns were shared by the trial Crown. Indeed, Mr. Matheson was so lacking in honesty and forthrightness that the trial Crown, in his closing submissions, said:

> You, you watched his testimony, how can you know what to believe with him? I, I, I don't know where to begin, I doubt you do either. I don't expect you to walk into his labyrinth of lies at various stages of this investigation.

[126] In other words, by the end of Mr. Matheson's testimony at trial, even the trial Crown accepted that Mr. Matheson was a liar, cautioning the jury not to "walk into his labyrinth of lies". Indeed, it was Mr. Matheson's labyrinth of lies that triggered consensus during the pre-charge conference that a *Vetrovec* caution be given to the jury as it related to anything incriminating that Mr. Matheson testified to: *R. v. Vetrovec*, [1982] 1 S.C.R. 811.

[127] Interestingly, had the trial Crown decided not to call Mr. Matheson as a witness at trial for the reason that he was wholly lacking in credibility and reliability, the Crown could not have put suggestions to the respondent arising from Mr. Matheson's statement: *R. v. Mallory,* 2007 ONCA 46, 217 C.C.C. (3d) 266, at para. 253.

[128] In our view, the trial judge was entirely responsive to the issues that arose. His reasons make clear that he appreciated both that the respondent had put his character in issue and that he had painted a somewhat distorted picture of his state of mind during his evidence in-chief. Importantly, however, the trial judge also appreciated that he had to look at the matter from the perspective of the entire trial and find a fair solution. In the end, the trial judge navigated a careful course forward.

[129] While the trial judge did say that the alleged robbery incident could not be put to the respondent in cross-examination because there was “no good faith basis” to do so, the terminology he used does not matter. What the trial judge was saying is that, in light of the entire context of the trial, it was simply not fair to introduce into the jurors’ minds the suggestion that the respondent was involved in a robbery with such uncertain contours, which may or may not have happened, and was only supported by a *Vetrovec* witness who the Crown ultimately agreed was a complete liar.

[130] Most importantly, the trial judge remained focussed upon his obligation to forge a path toward remedying the problem that the respondent had created during his examination-in-chief. The appellant was not left without a remedy. While the appellant could not resort to the alleged robbery, the trial judge ensured that the appellant was given “wide latitude” to explore other areas of evidence to ensure

that any imbalance created by the respondent during his examination-in-chief was brought back into balance during the cross-examination.

[131] This was a discretionary call and one with which we would not interfere.

ISSUE THREE – DID THE TRIAL JUDGE ERR IN THE *CORBETT* RULING BY EXCLUDING THE RESPONDENT'S PRIOR CONVICTIONS FOR ASSAULT?

(a) Overview

[132] The respondent has a lengthy criminal and youth record. It contains a total of 21 findings of guilt under the *Youth Criminal Justice Act*, S.C. 2002, c. 1, and 8 convictions as an adult.[2] For ease, we will refer to all 29 of these matters as "convictions".

[133] The respondent brought a *Corbett* application at the close of the Crown's case, seeking the exclusion of multiple convictions. One of the arguments advanced in support of the *Corbett* application rested on the application of what counsel described as "*Gladue* principles": see *R. v. Gladue*, [1999] 1 S.C.R. 688. Ultimately, the trial judge excluded many of the convictions, including all those related to assault. He made clear that, if it were not for the application of *Gladue* principles, a couple of the assault-related convictions may have been available to the Crown for cross-examination.

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[2] It was agreed at trial that the youth matters were properly the subject of disclosure and available for cross-examination: *Youth Criminal Justice Act*, s. 82.

[134] The appellant maintains that the trial judge erred in his application of the *Gladue* principles. While the appellant accepts that *Gladue* principles can be relevant to a *Corbett* analysis, the trial judge is said to have erred in the methodology he used when considering those principles. Absent that error, the appellant contends that at least one of those convictions would have been available to the trial Crown for purposes of cross-examining the respondent.

[135] This court has previously left open whether *Gladue* principles are relevant to a *Corbett* analysis: *R. v. M.C.*, 2019 ONCA 502, 146 O.R. (3d) 493, at para. 87. The time has arrived to decide this issue.

[136] We will explain why we agree with the trial judge, the parties and the intervener, Aboriginal Legal Services ("ALS"), that an accused's Indigeneity is a relevant, although not dispositive, factor to take into account in a *Corbett* application. We will then explain the correct methodology to apply in this context. We will conclude by explaining why we would not interfere with the trial judge's exercise of discretion in this matter.

(b) *Corbett* Applications in General

[137] In order to understand the issue in dispute, it is first necessary to orient ourselves to the general principles that apply to *Corbett* applications.

[138] This orientation starts with s. 12(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. Section 12(1) provides that once a witness takes the stand, thereby

putting their credibility at issue, cross-examining counsel are presumptively allowed to adduce evidence of prior convictions. It states: “A witness may be questioned as to whether the witness has been convicted of any offence…”. This applies to all witnesses, including an accused who chooses to testify in their own defence.[3]

[139] The presumptive admissibility of prior convictions rests on the theory that they are relevant to a witness’ credibility when testifying: *Corbett*, at pp. 685-86; *R. v. Stratton* (1978), 42 C.C.C. (2d) 449 (Ont. C.A.), at p. 461; *R. v. Brown* (1978), 38 C.C.C. (2d) 339 (Ont. C.A.), at p. 342; and *R. v. P. (N.A.)* (2002), 171 C.C.C. (3d) 70 (Ont. C.A.), at para. 20. Indeed, as Dickson C.J. said in *Corbett*, at p. 685: “There can surely be little argument that a prior criminal record is a fact which, to some extent at least, bears upon the credibility of a witness”, “a fact which a jury might take into account in assessing credibility.”

[140] The nature of the previous conviction directly affects the extent to which it bears upon credibility. Historically, convictions for offences such as direct acts of deceit, fraud, cheating, theft and disrespect for the administration of justice have been considered particularly informative of a witness’ honesty: *Brown*, at p. 342; *M.C.*, at para. 56; and *R. v. Gayle* (2001), 54 O.R. (3d) 36 (C.A.), at para. 81, leave

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[3] Of course, a non-accused witness may also be questioned about criminal acts that did not result in conviction.

to appeal refused, [2001] S.C.C.A. No. 359. At the same time, convictions for other types of offences can also inform credibility assessments. As noted in *Corbett*, at p. 686, in a passage adopted from *State v. Duke* (1956), 123 A.2d 745 (S.C.N.H.), at p. 746: even where convictions are disconnected from what are thought to be classic crimes of dishonesty, they have the potential to demonstrate a "[l]ack of trustworthiness" on the part of the witness, one that is "evinced by [an] abiding and repeated contempt for laws which [the accused] is legally and morally bound to obey": see also *Gayle*, at para. 81; *R. v. Thompson* (2000), 146 C.C.C. (3d) 128 (Ont. C.A.), at para. 31; and *M.C.*, at para. 56.

[141] With respect to a non-accused witness, typically there is no problem with the trier of fact learning about their history for prior discreditable conduct. For an accused, however, the concern is that when their criminal record follows them to the witness stand there is a risk that the convictions will be used not only to assess credibility but also for an improper line of reasoning: that the accused's prior offending conduct means that they are the type of person to have committed the offence with which they are now charged.

[142] Accordingly, two important limitations have been placed on the use of an accused's prior convictions. The first limitation is that, unlike other witnesses, the cross-examination of an accused on their criminal record is confined to convictions alone. The second limitation is that, in the normal course, barring the accused doing something that justifies a broader approach, they may only be cross-

examined on three narrowly circumscribed areas: (1) the offence convicted of; (2) the date and place of the conviction; and (3) the punishment imposed in the wake of the conviction: *Corbett*, at pp. 696-97; *Stratton*, at pp. 466-67; *M.C.*, at para. 55; and *R. v. A.J.K.*, 2022 ONCA 487, at para. 50.

[143] But these limitations are not always sufficient to protect against the prejudice that can arise from the trier of fact learning of the accused's offending past. Accordingly, in some circumstances, an accused who wishes to testify will seek to have their entire criminal record, or at least some convictions, excluded from the Crown's arsenal for cross-examination. The presumptive admissibility of these convictions pursuant to s. 12(1) of the *Canada Evidence Act* places the onus for any such application directly on the defence.

[144] This is where the "*Corbett* application" comes in. A *Corbett* application is brought at the end of the Crown's case and ruled upon before the accused is asked to say whether they will be calling a defence: *R. v. Underwood*, [1998] 1 S.C.R. 77, at paras. 7-9.

[145] The decision on a *Corbett* application is a discretionary one. Where the trial judge is satisfied on a balance of probabilities that the probative value arising from the criminal record is outstripped by the prejudicial effect that may arise from its admission, otherwise admissible convictions will be excluded. While not an exhaustive catalogue of factors, in calibrating the probative value and prejudicial

effect of admitting the accused's prior convictions, trial judges typically consider: (1) the nature of the convictions; (2) their remoteness or nearness to the matter under prosecution; (3) the similarity between the offences charged and the prior convictions; and (4) the risk of presenting a distorted picture to the jury: see *Corbett*, at p. 698, *per* Dickson C.J., and at pp. 740-44, *per* La Forest J. (dissenting); *M.C.*, at para. 59; and *R. v. McManus*, 2017 ONCA 188, 353 C.C.C. (3d) 493, at para. 82.

[146] The question for purposes of this appeal is whether the Indigeneity of an accused should also be considered in the calculus.

(c) The Respondent's Criminal Record and the Parties' Positions at Trial

[147] On its face, the respondent's criminal record speaks loudly of an obviously traumatic and troubled childhood and early adulthood. The respondent was born in December of 1997. He was 19 years of age by the time of trial and had accumulated 29 convictions, the vast majority of which he accrued in youth court.

[148] The record spans about four years of the respondent's life, from 15 to 19 years of age. It contains multiple different convictions, including: fail to attend court; dangerous driving causing bodily harm; possession of a controlled substance; multiple counts of breaching probation; possession of property obtained by crime and over $5,000; break and enter; theft; mischief; and assault, including with a weapon and causing bodily harm.

[149] Of the five assaults for which the respondent has been convicted, only one was committed as an adult. He received a sentence of 1 day concurrent in addition to 90 days of time served. He also received a firearms prohibition for five years. The other four assault-related matters were dealt with when the respondent was still a youth, including two assaults with a weapon and two assaults. For these, the respondent mainly received sentences of community service and probation, in addition to short periods of time served.

[150] After the Crown completed its case in-chief, the respondent brought a *Corbett* application to have many of his convictions edited from the record. He took particular aim at the assault-related convictions. It was his position that it was simply not necessary that the jury know about these convictions to aid them in assessing his credibility.

[151] While the respondent advanced many of the same arguments typically heard at a *Corbett* application, a novel argument was tacked onto the end of his submissions. This argument was that because of the respondent's Indigeneity, if the jury were to learn about the extent of his criminal record, there was a heightened risk that it could cause an increased degree of prejudice to him.

[152] The trial Crown took the position that there were sufficient trial safeguards already in place to reduce the risk of jurors engaging in discriminatory reasoning based on stereotypes and unconscious bias against Indigenous people. These

safeguards included, among other things, a race-based challenge for cause that had occurred at the outset of trial. Therefore, the trial Crown encouraged the trial judge to engage in a traditional *Corbett* analysis, one that should lead to the exclusion of fewer convictions than the defence sought. While the trial Crown acknowledged that the respondent's entire criminal record need not be revealed to the jury, he maintained that at least a "representative sampling" of the assault-related convictions should be admitted. In the end, the Crown sought the admission of three of these convictions.

(d) The *Corbett* Ruling and the Evidentiary Foundation for the Ruling

[153] The trial judge initially gave his *Corbett* ruling from the bench. He excluded all assault-related convictions, all convictions from when the respondent was only 15 years of age and a few other convictions that were repetitive of the ones admitted. In the end, he winnowed the convictions available for cross-examination to 14 in total, including 1 failure to attend court, 4 breaches of probation, 2 thefts, 1 break and enter, 4 possessions (including of drugs), 1 mischief and 1 dangerous driving causing bodily harm.

[154] In providing the initial oral ruling, with written reasons to follow, the trial judge said:

> I am saying this "but for" the "*Gladue* principles" I may have indeed put in an assault level one, a couple of assaults in there and perhaps convictions or findings of guilt before 2013.

[155] The next morning, just prior to the respondent taking the witness stand, the trial judge announced that he had “expanded the *Corbett* application pursuant to [his] ruling”. He wanted an undertaking that the respondent would adduce “some evidence with respect to his … Indigenous background and how he was disadvantaged or discriminated against.” The defence gave this undertaking, agreeing to lead the evidence during the respondent’s examination-in-chief.

[156] The respondent took the stand. He took an oath with an eagle feather and held it as he testified. He spoke about the fact that his parents lived with alcoholism and were unable to care for him or his six siblings. He testified about the abuse that he had suffered and witnessed as a child. He explained that, at two or three years of age, he and his siblings were taken by Child Protective Services. He was put up for adoption and adopted out, only to be returned to foster care. Although he stayed in contact with his mother until he was six years of age, that relationship eventually dwindled. He said that he never really got to know his father.

[157] The respondent also spoke of his difficulties with alcohol and drugs. He started abusing substances around the age of 13 or 14. By 17 or 18, this had escalated to the daily use of crystal methamphetamine. Although the Hamilton Regional Indian Centre had assisted him in finding a job and an apartment, he was ultimately laid off and lost the apartment. By the time of trial, he was of no fixed address.

[158] The trial judge released his written ruling after the respondent testified: see *R. v. King*, 2019 ONSC 6851. The trial judge noted that, while the fact of the respondent's Indigeneity alone was not enough to invoke the application of the *Gladue* principles in a *Corbett* analysis, evidence to support the assertion that the accused had been "disadvantaged as an Indigenous person in society" could trigger such considerations. The trial judge found that the respondent had met this burden.

[159] The trial judge concluded that numerous convictions on the respondent's record should be excluded. For purposes of this appeal, we focus on his reasons pertaining to the excluded assault convictions because these are the ones that the appellant challenges on appeal. In excluding the assaults, the trial judge concluded as follows:

> Considering [the respondent's] Indigenous status, I am of the view that cross-examination on crimes of violence, especially those while he was a youth, would add very little, if anything, to the jury's ability to assess the respondent's credibility. Despite the best efforts of the jury, that insight could taint their ability to properly assess the evidence, and more importantly the credibility of [the respondent].

(e) The Positions on Appeal

[160] The appellant argues that the trial judge erred by relying upon *Gladue* principles to tip the balance in favour of excluding the assault-related convictions. As the appellant puts it, but for his errors in relying upon the "*Gladue* factors, the

trial judge would have admitted at least one of [the respondent's] past convictions for assault."

[161] While the appellant agrees that, in appropriate cases, *Gladue* principles are properly taken into account in a *Corbett* analysis, the trial judge is said to have engaged incorrectly with these principles. According to the appellant, *Gladue* principles are only properly considered when they are linked to either the probative value or prejudicial impact of admitting past convictions. That linkage evidence is said to reside in the context of individual cases, requiring a case-specific analysis each time.

[162] As for their connection to the probative value of a conviction, the appellant acknowledges that *Gladue* principles could be relevant to rebutting the specific inference for which the convictions are tendered to support. In a *Corbett* application, that inference is always about the accused's credibility. The appellant maintains that the disadvantage experienced by Indigenous people will often have no bearing upon this inference.

[163] As for their connection to the prejudicial impact of a conviction, again the appellant acknowledges that *Gladue* principles may well be relevant in some cases. While the appellant accepts what Moldaver J. said in *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 199, that Indigenous people have been the "target of hurtful biases, stereotypes, and assumptions, including stereotypes

about credibility, worthiness, and criminal propensity", the appellant contends that taking judicial notice of this fact is not enough to find a prejudicial impact. Case-specific factors designed to reduce the risk of jurors engaging in discriminatory reasoning must also be taken into account.

[164] In this case, the appellant maintains that there was no evidence to rebut the "strong presumption" that the jurors would assess the respondent's past convictions without prejudice. Rather, according to the appellant, there was evidence to the contrary, including that there was a race-based challenge for cause, peremptory challenges were exercised by the defence, and instructions were given to the jury reinforcing the need to be impartial. Combined, these factors are said to have administered a strong "antidote" against any prejudice that might otherwise have arisen as a result of the jury learning about the fact that the Indigenous respondent had been convicted of at least one assault.

[165] The respondent agrees that *Gladue* principles can inform a *Corbett* analysis, but takes a broader view in terms of how they apply. The respondent emphasizes that, despite all of the safeguards in place, there is still a significant risk that harmful biases will be brought to bear on the jury's deliberative process. In any event, regardless of whether the trial judge erred in how he incorporated *Gladue* principles into his analysis, the respondent says that, with or without those principles, the assault convictions were properly excluded from evidence at trial.

[166] For its part, ALS emphasizes that the prejudicial impact of admitting the criminal record of an Indigenous accused feeds stereotypes and biases that can give rise to prejudice not present for a non-Indigenous accused. ALS notes that it is a well-documented fact that Indigenous people are more likely than non-Indigenous people to plead guilty to crimes they did not commit. Therefore, ALS contends that where the defence has established that a past conviction arises from a guilty plea, trial judges should closely examine the nature of the conviction and consider whether to exercise their discretion to exclude it by specifically having regard to the realities of guilty plea wrongful convictions for Indigenous accused persons.

(f) *Gladue* Principles

[167] We start this discussion with the following conceptual explanation.

[168] In this case, the parties and ALS, as well as the trial judge, rely on the term "*Gladue* principles". This term was coined following the ground-breaking 1999 *Gladue* decision. The decision in *Gladue* provided guidance to sentencing judges on factors to be taken into account when sentencing Indigenous offenders. These considerations inform a sentencing methodology that is designed to focus upon the particular circumstances of Indigenous offenders that could "reasonably and justifiably impact on the sentence imposed": *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 72. The *Gladue* factors that courts are directed to consider in

particular exercises of judicial reasoning include the systemic or background factors that may have impacted the Indigenous offender's path to court and the types of sentencing procedures and sanctions that may be appropriate in the circumstances because of the offender's particular Indigenous heritage or connection: *Gladue*, at para. 66; *Ipeelee*, at para. 72. Ultimately, as in all sentencing matters, the aim is to achieve a fit and proper sentence in the individual circumstances of the case.

[169] As noted by Sharpe J.A. in *Leonard*, *Gladue* factors are not limited to criminal sentencing decisions. Rather, "they should be considered by all 'decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system' (*Gladue*, at para. 65) whenever an Aboriginal person's liberty is at stake in criminal and related proceedings": *Leonard*, at para. 85. *Gladue* principles have been used in multiple contexts beyond the sentencing environment to inform exercises of judicial discretion. These include, for example, extradition hearings, bail hearings, publication ban applications, applications to withdraw guilty pleas, not criminally responsible findings and Review Board hearings, disciplinary hearings, correctional authority decisions and more: see e.g., *United States v. Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496, at paras. 60, 85, leave to appeal refused, [2012] S.C.C.A. No. 490 *(Leonard)*, and [2012] S.C.C.A. No. 543 *(Gionet)*; *United States v. Norton*, 2017 ONCA 866, at paras. 9, 14; *Carter v. Canada (Attorney General)*, 2021 SKCA 91, at paras. 31-33; *R. v. Robinson*, 2009

ONCA 205, 95 O.R. (3d) 309, at para. 13; *R. v. Hope*, 2016 ONCA 648, 133 O.R. (3d) 154, at paras. 9-12; *R. v. Magill*, 2013 YKTC 8, at paras. 16-17; *R. v. Louie*, 2019 BCCA 257, at para. 35; *R. v. Cake*, 2014 ONCJ 126, at paras. 43-51, aff'd 2014 ONSC 3413, at para. 39; *R. v. C.K.*, 2021 ONCA 826, 159 O.R. (3d) 81, at para. 63; *R. v. Sim* (2005), 78 O.R. (3d) 183 (C.A.), at paras. 17-22; *Jacob (Re)*, 2019 CarswellOnt 366 (Rev. B.), at paras. 40-43; *Megan (Re)*, 2020 CarswellOnt 16128 (Rev. B.), at para. 36; *Oakes (Re)*, 2019 CarswellOnt 18071 (Rev. B.), at para. 39; *Chickite (Re)*, 2008 CarswellBC 3953 (Rev. B.), at para. 39; *Law Society of Upper Canada v. Robinson*, 2013 ONLSAP 18, [2013] 4 C.N.L.R. 129, at para. 74; *Twins v. Canada (Attorney General)*, 2016 FC 537, [2017] 1 F.C.R. 79, at paras. 57, 64; and *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at paras. 57-58.

[170] As can be seen, the term "*Gladue* principles" has thus become a short form way of adverting to the idea that those involved in the criminal justice system, particularly judges exercising discretionary power, ought to be aware of the realities of the Indigenous people appearing before them. By this, we mean the historical and present-day treatment of Indigenous people that continues to perpetuate patterns of discrimination and has resulted in "lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples": *Ipeelee*, at para. 60. Failing to recognize these realities can lead to further

discrimination against Indigenous people and undermine efforts to apply the law impartially and equitably. We can put it no better than Moldaver J. in *Barton*, at para. 199: “when it comes to truth and reconciliation from a criminal justice perspective, much-needed work remains to be done.”

[171] While *Gladue* principles have particular salience in criminal sentencing, as noted above, they have been transposed to guide decision making in other legal contexts as well. The one at issue in this particular appeal is the *Corbett* application, where a trial judge must determine whether it would prejudice an accused’s right to a fair trial to admit into evidence some or all of the accused’s criminal record.

(g) *Corbett* Applications and the *Gladue* Principles

(i) Overview

[172] To be clear, both parties and ALS agree that trial judges hearing a *Corbett* application ought to be aware of and take into account the realities of an Indigenous accused appearing before them, including the consequences of overt and systemic racism experienced by Indigenous people. Where they differ is on the methodology to be engaged. Accordingly, we now turn our minds to the correct methodology.

[173] Trial fairness is the overarching concern in a *Corbett* application. Indeed, the whole purpose of a *Corbett* application, and the corresponding discretion to

exclude or excise parts of the accused's criminal record, is to ensure the "preservation of the right to a fair trial": *R. v. Saroya* (1994), 36 C.R. (4th) 253 (Ont. C.A.), at para. 5.

[174] Fairness is best served when the accused's credibility can be properly and accurately scrutinized by the trier of fact. This requires trial judges to pay particular attention in a *Corbett* analysis to the unique circumstances of an Indigenous accused, where those circumstances affect the probative value and prejudicial impact of their criminal record. As will be seen, this particularized *Corbett* analysis will help guard against the discrimination that, "as experience demonstrates, will occur where decision-makers fail to advert to the specific and particular problems faced by [Indigenous] Canadians in our system of justice": *Leonard*, at para. 63; see also *Ipeelee*, at paras. 59, 67-68; *Ewert*, at paras. 58-59.

(ii) The *Corbett* Analysis and Indigeneity: Weighing Probative Value Against Prejudicial Effect

[175] We agree with the appellant's observation that, like in the sentencing context, taking into account the realities facing Indigenous people, including the consequences of overt and systemic racism, does not necessarily direct a different result on *Corbett* applications. The application of the *Gladue* principles in this context is not intended as a vehicle to redress broad social problems or to remedy past disadvantage: see *Ipeelee*, at paras. 68-69, 71; *R. v. Wells*, 2000 SCC 10,

[2000] 2 S.C.R. 207, at para. 44; and *Leonard*, at para. 52. Rather, it is intended to advance trial fairness by permitting trial judges to take all relevant factors into account – factors that might otherwise be overlooked – when exercising their discretion to exclude evidence that is more prejudicial than probative.

[176] The *Corbett* analysis requires courts to weigh the probative value of introducing an accused's criminal record into evidence against the prejudicial effect that may result. It is the connection between the fact of the prior conviction and the credibility – or testimonial trustworthiness – of the accused that informs the probity of a prior criminal conviction. It is the danger of propensity reasoning that informs the prejudice that may arise from the trier of fact being informed of that conviction. Trial judges are frequently called upon to calibrate this balance in criminal trials.

[177] As previously reviewed, there are four non-exhaustive factors that trial judges typically consider when engaging in this exercise: (1) the nature of the prior convictions; (2) the similarity between the prior convictions and the charge(s) faced by the accused; (3) the recency or remoteness of the prior convictions to the offence(s) alleged; and (4) the risk of presenting a distorted picture to the jury. In relation to the final factor, the trial judge typically focusses on the defence being advanced by the accused, including whether it involves a "deliberate attack" on the credibility of a Crown witness and if the case "boils down to a credibility contest between the accused and that witness": *Corbett*, at p. 742, *per* La Forest J.

(dissenting, but not on this point); *R. v. Talbot*, 2007 ONCA 81, 217 C.C.C. (3d) 415.

[178] In the context of a trial involving an Indigenous accused, several of the *Corbett* factors may require further specification in order to put the trier of fact into an adequate position to accurately assess the prejudice and probative value of admitting past convictions. For the purposes of the analysis, it does not matter whether the application of the *Gladue* principles is conceptualized as a separate step in the *Corbett* analysis or a further specification of the existing *Corbett* factors – the substance of the analysis will be the same.

Probative Value

[179] When weighing probative value, it is necessary for trial judges to place the Indigenous accused's criminal record within the context in which it has been accumulated, one that corrects for possible systemic biases, stereotypes and assumptions: *Barton*, at para. 199; *Gladue*, at para. 65; *Ipeelee*, at paras. 59-60, 67; *Ewert*, at para. 57; and Jillian Rogin, "*Gladue* and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95 Can. Bar. Rev. 325, at pp. 333-34.

[180] This context is important because it can inform the probative value of admitting the criminal record by detracting from the strength of the credibility inference that could otherwise be taken. The probative value of a prior conviction

in a *Corbett* application is always rooted in the strength of the inference that can be drawn from the fact of the conviction to the testifying accused's credibility. Accounting for any distortions caused by the possibility of stereotyping and systemic biases against Indigenous people may reveal that the criminal record is much less reflective of an Indigenous accused's subjective disregard for the truth or contempt for the law than would otherwise appear. This, of course, drives down the probative value of its admission.

[181] Judges and others are not new to this contextual exercise. As previously noted, "*Gladue* principles" have informed decision making in a myriad of ways. Therefore, trial judges are well positioned to engage in the contextual exercise necessary when considering the probative value of an Indigenous accused's convictions. That context involves the history and intergenerational impact of colonialism, the residential school system, dislocation, cultural assimilation and oppression, poverty, low education, loss of self-government, and social inequality: *Ipeelee*, at para. 83; *R. v. Collins*, 2011 ONCA 182, 104 O.R. (3d) 241, at paras. 34-36. Understanding and recognizing this context when considering the probative value of a conviction is fundamental to fair decision making and the preservation of the fair trial right.

[182] Trial judges need not insist on evidence of a direct causal link between a conviction and the overt and systemic racism experienced by Indigenous people before this context can be considered. While there must be some evidence to

support the circumstances that have impacted the accused's life, much like the evidence led in this case, there need not be a direct causal link established between those circumstances and the past offending conduct that resulted in the conviction. As in the sentencing context, it would be nearly impossible to draw a direct link between an accused's experience of disadvantage resulting from historical discrimination and an accused's criminal record: "the interconnections are simply too complex": *Ipeelee*, at para. 83.

[183] Furthermore, to turn a *Corbett* application, necessarily occurring at the end of the Crown's case and when the jury is on hold, into a complex evidentiary hearing, involving proof of linkage between convictions and Indigeneity, would create profound and unnecessary delay. We must remain ever mindful of imposing more demands on an already overly burdened and complex criminal justice system. The criminal law is not calling for more complexity. If anything, it is calling out for simplicity and, most importantly, quality justice delivered with efficiency: *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at paras. 3, 27, 45.

[184] At all times, the focus must remain on preserving the fair trial right by placing evidence before the trier of fact that will assist their credibility assessment, without risking improper propensity reasoning. What the accused must do within the *Corbett voir dire* is what the respondent did in this case, albeit during his evidence in-chief (a process we would not endorse) – demonstrate that the systemic and

background factors affecting Indigenous people in Canada is tied in some way to the particular accused and the conviction.

[185] Once this evidence is adduced, the trial judge can determine whether an inference can safely be drawn from the fact and nature of the conviction to a lack of credibility. Looking at the conviction in the context of discrimination – whether direct, indirect, or systemic – allows the trial judge to determine whether the accused's criminal record makes it more likely that the accused is not the type of person to tell the truth or respect the authority of the law, or whether the impact of the experience of racism on this particular accused's life renders the credibility inference so tenuous that admission of the conviction is gutted of its probative value.

[186] An informed jurist will be able to assess the probity of a criminal record within the context of the accused's background.

[187] This is not a new exercise for judges. For example, the bail context – and convictions consequent to failure to comply with bail conditions – is instructive. Section 493.2(a) of the *Criminal Code* requires that in making a decision under Part XVI of the *Criminal Code*, the decider "shall give particular attention to the circumstances of … Aboriginal accused." As noted in *R. v. Papequash*, 2021 ONSC 727, at para. 22, an Indigenous accused's prior criminal record must be "seen through a *Gladue* lens" in the bail context: see also: *R. v. E.B.*, 2020 ONSC

4383, at para. 37; *R. v. Vickers*, 2021 ONSC 3895, at paras. 58-61, 101-2. For example, in *Papequash*, at para. 22, the court applied this "*Gladue* lens" and observed that some of the accused's prior convictions arose from Fetal Alcohol Syndrome and addiction, noting:

> These impairments can originate from the dislocation and hardship caused by colonialism and residential schools. While this does not extinguish the secondary ground concerns, it provides an explanation and a context for this criminal record.

[188] This sentiment was also expressed in *R. v. Chocolate,* 2015 NWTSC 28, 11 W.W.R. 575, at para. 50, where the court noted that an Indigenous offender's history may lessen that offender's culpability for accumulating convictions and failing to abide by pre-trial release conditions:

> An examination of the intergenerational impact of the residential school system, cultural isolation, substance abuse, family dysfunction, inadequate housing, low education levels and un- or underemployment on an Aboriginal offender may inform questions about *why* an accused has an extensive criminal record and, if applicable, *why* that person has demonstrated an inability to comply with pre-trial release conditions in the past [Emphasis in original.]

[189] This is true in the bail context and it is equally true in the *Corbett* context. The "why" may well weaken the inferential link from the conviction to the testifying accused's credibility. To use the words of Turnbull J. in *R. v. Silversmith* (2008), 77 M.V.R. (5th) 54 (Ont. S.C.), at para. 23, repeated infractions related to offences rooted in addiction, by way of one example, may well be "as consistent with alcohol

addiction as with a flagrant desire to ignore court orders." As the Supreme Court of Canada observed in *R. v. Zora*, 2020 SCC 14, 388 C.C.C. (3d) 1, at para. 79, the fact is that "Indigenous people, overrepresented in the criminal justice system, are also disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges": see also Abby Deshman & Nicole Myers, *Set up to Fail: Bail and the Revolving Door of Pre-Trial Detention* (Canadian Civil Liberties Association and Education Trust, 2014). Put simply, where a conviction stems at least in part from circumstances of disadvantage, rather than subjective contempt for the law or truthfulness, the degree to which it advances the credibility inquiry will be reduced. Therefore, placing the criminal record of an Indigenous accused within its proper context is essential to understanding the probity of the convictions as they relate to credibility.

[190] Convictions arising from guilty pleas and convictions for offences against the administration of justice are of particular note in this context. As for guilty pleas, this court has previously commented upon the fact that Indigenous people plead guilty at materially higher rates than non-Indigenous accused: *C.K.*, at paras. 62-63. There are myriad reasons for why this may be so, but the Honourable Frank Iacobucci, in his important report, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by the Honourable Frank Iacobucci* (Toronto: Ontario Ministry of the Attorney General, 2013), at para. 215, shared his considered view that Indigenous people often resolve their criminal charges by

pleading guilty because they “believe they will not receive a fair trial owing to racist attitudes prevalent in the justice system”. This suggests that, for Indigenous people, a conviction arising from a guilty plea may be less probative of credibility because of the despair that they “no doubt face when caught up in the criminal justice system”: *C.K.*, at para. 64.

[191] This is not to suggest that a conviction arising from a guilty plea means anything other than a conviction. A trial judge must accept a conviction based on a guilty plea as justly imposed. However, as in all cases, the conviction must be placed in context when assessing its probity.

[192] At the end of the day, trial judges are well-positioned to consider the probity of an Indigenous accused’s convictions within that individual’s own history, including disadvantage resulting from historical and present-day treatment of Indigenous people that continues to perpetuate patterns of discrimination. In assessing the probative value of an Indigenous accused’s convictions, trial judges will continue to take into account all of the well-known and long-applied guiding criteria set out in *Corbett.* All that is changing is that, when determining the degree to which the conviction will assist in advancing the credibility inquiry, or, the probative strength of the conviction-to-credibility inference, trial judges will now also consider the matter within the context of the discriminatory effects of the historical and current treatment of Indigenous people.

Prejudicial Effect

[193] Of course, as in all *Corbett* applications, the less challenging aspect of the calculus is determining the prejudicial impact that may flow from the trier of fact learning about the accused's criminal past. The danger that lurks is the possibility that the trier of fact will, consciously or subconsciously, draw the prohibited character inference by reasoning along propensity lines: that the accused is the type of person to have committed the offence for which they stand trial because of their offending past. In the normal course, trial judges will consider the pre-existing *Corbett* criteria to calibrate that danger within the context of the individual trial and having regard to carefully crafted instructions that may be given to assuage concern over improper reasoning and ensure trial fairness.

[194] When an Indigenous accused is before the court, racist stereotypes lend considerable credence to the risk of propensity-based reasoning. As a result, when calibrating the prejudice that could result from the admission of prior convictions, trial judges must take notice of the fact that Indigenous people are often the objects of racism outside and inside the criminal justice system: *Williams*, at paras. 28, 54 and 58; *Gladue*, at para. 65; *Ipeelee*, at paras. 59-60; *Ewert*, at para. 57; and *Barton*, at para. 199. As the Supreme Court said in *Williams*, at para. 58, this racism "includes stereotypes that relate to credibility, worthiness and criminal propensity". These beliefs are pervasive within Canadian society. They cause

analytical problems in applying the law and may prevent triers of fact from assessing the credibility of Indigenous people fairly and accurately.

[195] While we accept the appellant's position that the other safeguards built into the criminal justice system, designed specifically to guard against juror bias, are strong antidotes to racism, these antidotes will not always be sufficient. Of course, *Corbett* itself, paving the way to displace the statutory presumption of admission, is a recognition that the pre-existing procedural safeguards will not always be sufficient to guard against improper propensity reasoning. As Moldaver J. put it in *Barton*, at para. 176, while important, juror oaths and juror instructions directed at purging biases from the courtroom "are not a panacea".

[196] Accordingly, it is imperative that the *Corbett* analysis direct trial judges to consider whether in the context before them, the accused is at elevated risk of prejudice because of racist stereotypes.

(h) Application to this Case

[197] In this case, the trial judge correctly considered the respondent's Indigenous ancestry, history and personal circumstances, and the broader context of widespread racism experienced by Indigenous people. While it would have been preferrable had the trial judge conducted an evidentiary *voir dire* and not simply left it to defence counsel to elicit relevant evidence during examination-in-chief, no harm was occasioned by how the matter proceeded.

[198] The respondent's testimony about his life as a young Indigenous male, who has experienced family separation, transience, addiction and abuse, was considered by the trial judge within the context of the overt and systemic racism experienced by Indigenous people. In the end, the trial judge excluded about half of the respondent's criminal record. We see no error in that approach nor in the final conclusion that he reached. Indeed, the trial judge navigated a carefully balanced path that demonstrated his keen appreciation for how the respondent's Indigeneity, placed in its proper context and considered alongside the other traditional *Corbett* factors, weighed in favour of numerous convictions being excluded. At the same time, the trial judge ensured that this did not leave the jury without the tools to assess the respondent's credibility, allowing them to hear about 14 other convictions in total.

[199] In the end, the appellant's main contention is that the trial judge should have allowed at least one of the assault convictions to be placed before the jury. The trial judge's decision to the contrary is owed deference. We would simply point out that four of the five assault-related convictions resulted from when the respondent was a youth and, while the jury may not have known about these convictions, they certainly knew that the respondent was a recidivist. To this end, we adopt what Doherty J.A. had to say in *Talbot*, at para. 35, a case similar to this one, where the jury heard about 19 prior crimes but did not hear about the respondent's 6 assault-related convictions:

> The jury would no doubt see the very direct connection between many of the crimes the respondent had committed and his trustworthiness. It is difficult to think that the jury's assessment of the respondent's credibility based on his criminal record would have been different had they known that he had committed not only some nineteen crimes, many of which involved dishonesty, but had also committed six additional crimes of violence.

[200] Moreover, the fact is that the jury learned that the respondent had committed many prior offences, including multiple crimes involving traditional acts of dishonesty. By the end of the trial, having regard to the respondent's own evidence, and particularly what was elicited during the cross-examination, the jury knew a great deal about his drug-related lifestyle and assaultive behaviours. In the context of the evidentiary record as a whole, the exclusion of the assaults would not have affected the availability of the credibility inference to the jury.

[201] Trial judges are afforded a wide berth of discretion in making their *Corbett* determinations: *R. v. Charland*, [1997] 3 S.C.R. 1006, at pp. 481-82; *R. v. Wilson* (2006), 210 C.C.C. (3d) 23 (Ont. C.A.), at para. 32. We owe that exercise of discretion deference. As Doherty J.A. said in *Talbot*, at para. 37, "this court does not review the correctness of the decision arrived at by the trial judge." In this case, the trial judge's exercise of discretion was not unreasonable, reflects no error in principle and is not tainted by a misapprehension of the material facts: see *R. v. R.D.*, 2019 ONCA 951, 382 C.C.C. (3d) 304, at para. 13.

[202] This ground of appeal must fail.

CONCLUSION

[203] For the reasons given, we would dismiss the appeal. The trial judge was in a difficult position, presiding in a proceeding requiring several highly variable and case-specific exercises of discretion that he reasoned through and released on the go in the middle of a four-week murder trial. His hard work and sound efforts to ensure that the jury was properly charged and that admissible evidence was placed before them reveals no reversible error.

Released: September 26, 2022

J.M.F.

Fairburn A.C.J.O.

D. Gerge J.A.

I agree J.A.