**Official English Translation of the Judgment of the Court**

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| René c. R. | | | | | 2022 QCCA 1051 |
| COURT OF APPEAL | | | | | |
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| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
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| (765-01-033384-187) | | | | | |
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| DATE: | 4 August 2022 | | | | |
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| CORAM: | | THE HONOURABLE | | JULIE DUTIL, J.A.  PATRICK HEALY, J.A.  CHRISTINE BAUDOUIN, J.A. | |
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| LOÏC RENÉ | | | | | |
| APPELLANT – Accused | | | | | |
| v. | | | | | |
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| HER MAJESTY THE QUEEN | | | | | |
| RESPONDENT – Prosecutor | | | | | |
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| JUDGMENT | | | | | |
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1. This is an appeal against a finding of guilt for second-degree murder on 28 October 2020 by Charbonneau J. of the Superior Court, District of Richelieu.
2. For the reasons of Healy J.A., with which Dutil and Baudouin agree, **THE COURT**:
3. **ALLOWS** the appeal;
4. **ORDERS** a new trial.

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|  | | JULIE DUTIL, J.A. |
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|  | | PATRICK HEALY, J.A. |
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|  | | CHRISTINE BAUDOUIN, J.A. |
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| Mtre Maxime Hébert-Lafontaine | | |
| LATOUR DORVAL | | |
| For the Appellant | | |
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| Mtre Geneviève Beaudin | | |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTORS | | |
| For the Respondent | | |
|  | | |
| Date of hearing: | 4 April 2022 | |

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| REASONS OF HEALY, J.A. |
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1. This appeal arises from a trial in which the appellant was found guilty by a judge of the Superior Court, District of Richelieu, sitting without a jury,[[1]](#footnote-1) of second-degree murder[[2]](#footnote-2) for the killing of his father on 18 August 2018.[[3]](#footnote-3) The defence admitted that the killing was unlawful and the trial proceeded on the issues of intent and provocation.
2. The trial judge concluded first that the killing was intentional. Thus the elements of second-degree murder had been proved. She then considered the partial defence of provocation[[4]](#footnote-4) and concluded, as a matter of law, that the evidence did not meet the evidential burden to warrant consideration by the trier of fact. As explained in her reasons,[[5]](#footnote-5) this decision comprises a conclusion that, having regard to the context of the relations between the appellant and the victim over decades, the victim’s conduct was, objectively, provocation that could cause an ordinary person to lose self-control.[[6]](#footnote-6) It also comprises conclusions that, subjectively, the evidence did not support a perception by him that (1) the victim’s conduct was sudden and unforeseeable, that (2) his reaction to it was sudden, uncontrolled (3) and complete before his passion had cooled.[[7]](#footnote-7) These three components are cumulative and the defence fails if the evidence on any one of them is too weak to permit a reasonable jury, properly instructed, to find a reasonable doubt on the whole of the evidence.
3. The appellant does not suggest that the trial judge committed an error of law concerning the substantive elements of the defence of provocation or the legal standard of the evidential burden. The crux of this appeal is whether she failed to determine that the evidence adduced was sufficient to warrant examination by the trier of fact.
4. As this case was tried without a jury, the judge was responsible both for questions of law and questions of fact. There is typically much overlap between the two but they remain distinct. The determination of questions of law provides guidance and limits with regard to the determination of questions of fact on the general issue of the verdict. Despite the margin of overlap between their functions, the trier of law must not decide questions of fact and the trier of fact cannot decide questions of law. This principle is unambiguous but, as the Supreme Court has noted, the sufficiency of evidence on a matter of defence illustrates that it is not always easily applied.

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

[23]  The ability of the trial judge to engage in “limited weighing” depends on the type of evidence on the record.  “If there is direct evidence as to every element of the defence, whether or not it is adduced by the accused, the trial judge must put the defence to the jury”: *Cinous*, at para. 88.  The trial judge may not engage in any weighing of direct evidence, since this would require a consideration of the inherent reliability of the evidence.

[24]  “Direct evidence is evidence which, if believed, resolves a matter in issue”: *Cinous*, at para. 88, citing D. Watt, *Watt’s Manual of Criminal Evidence* (2001), at § 8.0.  However, “the mere assertion by the accused of the elements of a defence does not constitute direct evidence, and will not be sufficient to put the defence before a jury”: *Cinous*, at para. 88.  An air of reality “cannot spring from what amounts to little more than a bare, unsupported assertion by the accused”, which is otherwise inconsistent with the totality of the accused’s own evidence: *R. v. Park*, 1995 CanLII 104 (SCC), [1995] 2 S.C.R. 836, at para. 35, *per*L’Heureux-Dubé J. For example, in *R. v. Gauthier*, 2013 SCC 32, [2013] 2 S.C.R. 403, this Court, *per*Wagner J., suggested that a single statement made by an accused that is otherwise inconsistent with the accused’s “principal narrative” is insufficient to give an air of reality to a defence: paras. 60-61.

[25] Where the evidence instead requires the drawing of inferences in order to establish the elements of a defence, the trial judge may engage in a limited weighing to determine whether the elements of the defence can reasonably be inferred from the evidence.  “The judge does not draw determinate factual inferences, but rather comes to a conclusion about the field of factual inferences that could reasonably be drawn from the evidence”: *Cinous*, at para. 91.  In conducting this limited weighing, the trial judge must examine the totality of the evidence: *Cinous*, at para. 53; *Park*, at para. 13, *per*L’Heureux-Dubé J.

[26]  As discussed in *Cairney*, in cases where there is a real doubt as to whether the air of reality test is met, the defence of provocation should be left to the jury.  However, this principle does not exempt the trial judge from engaging in a limited weighing of the evidence, where appropriate.  The fact remains that the trial judge exercises a gatekeeper role in keeping from the jury defences that have no evidential foundation.  Defences supported only by bald assertions that cannot reasonably be borne out by the evidence, viewed in its totality, should be kept from the jury.[[8]](#footnote-8)

1. An air of reality is a figure of speech that is as gaseous as a whiff of smoke but it conveys a requirement of substance.[[9]](#footnote-9) It is axiomatic that this requirement can only be formulated as a function of the standard of persuasion on the general issue. As applied to an affirmative defence, that test of the evidential burden is whether the trier of fact, acting judicially on proper instructions, could find a reasonable doubt at the end of the case and on the whole of the evidence as a function of this issue.[[10]](#footnote-10) As stated by the Supreme Court, if the evidence on this issue is direct the trial judge is not permitted in any way to weigh its probative value except to the minimal extent that is required to determine whether it is relevant and material. If it is not direct the trial judge may conduct a limited weighing to determine what inferences the evidence can plausibly support but may not draw conclusions from those inferences or otherwise assess the probative value of the evidence.[[11]](#footnote-11) In this exercise the judge must assess all of the evidence and, even where the evidence presents conflicting views, the judge must adopt the view most favourable to the accused.[[12]](#footnote-12) It is no part of the judge’s function to assess whether the defence has any chance of success.[[13]](#footnote-13) Further, the source of the evidence is of no importance and the accused bears no burden to present or to prove evidence of this defence.[[14]](#footnote-14) Whether the evidence meets the evidential burden is a question of law that requires no deference to the assessment of the trial judge.[[15]](#footnote-15)
2. These are the principles that will govern the outcome of the present appeal.

**2. Facts**

1. The facts in this case may be seen in three temporal frames: the history between the appellant and the victim over several decades; the general context of the day on which the killing occurred; and the moments in which the killing occurred. On 18 August 2018 the appellant was 53 years old; the victim was 76.

**2.1 *Family relations***

1. The appellant was born in 1964. Beginning in his childhood, relations within his family were marked by physical and psychological abuse because his father was violent toward him and his mother. The slightest misconduct was severely punished by slaps, beatings with a belt and other violent gestures. The most striking incident occurred when the appellant was twelve and had stolen forty dollars from his aunt’s wallet, which he confessed when confronted by his father. To teach him a lesson his father struck him thirty times in the face, thinking the appellant had stolen thirty dollars. The appellant’s face was disfigured as a result and he explained in his testimony that he was never the same after this incident because he no longer loved his father and that this event had not only broken any bond between them but shattered any trust he had in his father. With one exception, the appellant never again spoke of this incident for fear that it would reignite hostilities between them.
2. At the age of seventeen, the appellant confronted his father when he tried to hit him and as he was now bigger than his father he successfully put an end to the physical violence. Thereafter the “only” violence that persisted was psychological in the form of insults and denigrating comments.
3. The appellant testified that at a family gathering when he was twenty-two his father made him eat his own dog, unbeknown to him, and told him what he had done in the ensuing minutes.
4. The appellant also testified that he failed his first year of CEGEP and subsequently held numerous jobs that could best be described as “precarious.” At the same time he developed problems of drug abuse (psychoactive substances, cannabis, *etc*.) and made several attempts at suicide.
5. Following a fight with his brother in 2003, during which he threw balls for *pétanque*, he was hospitalised and diagnosed with personality disorder and antisocial tendencies. Between 2003 and 2014 he was treated by psychologists and took medication, which he discontinued in 2014 because he wanted to stop watching television and feeling lifeless.
6. As an adult the appellant saw little of his father. He saw him when his father was in Quebec, about six months a year, and about once a month. He liked to go to the family house in Yamaska and to stay there for several days. The appellant testified that after three or four days conflicts would arise and he would return home. As he was on social assistance, the appellant explained that he enjoyed doing odd jobs on the property for pocket money and fishing on the river nearby, and that these activities caused him to return to see his father despite the conflicts.

### **2.2 *18 August 2018***

1. At the time of the killing the appellant had been staying at his father’s house for four or five days. The morning went well. He got up around nine o’clock and did some jobs in the yard such as collecting fallen apples. He then had lunch with his father, who decided to take a nap.
2. At around 12h50 the appellant was watching television and decided to heat some pie in the microwave oven. His father was annoyed by the noise and demanded that the appellant stop, which he did not do. He returned with his snack to the television and as he was finishing his father came into the kitchen. He began to yell at his son that it was not normal to eat pie in the middle of the afternoon and that he should get medical care. The appellant explained that he could not understand his father’s reaction and tried unsuccessfully to apologise. The words repeated by his father about his “normality” angered him and he replied, “ben moi me faire dire que je suis pas normal par quelqu’un qui m’a donné 30 coups de poing quand j’avais 12 ans, je le prend pas.”
3. In response his father delivered a punch in the face and said, “en vl’a un autre.” The appellant then took a butcher’s knife from a drawer in the kitchen while his father seized a chair to strike the appellant. The appellant blocked the chair with his hand and hurt himself. He decided to put down the knife because the situation had gone too far. His father then taunted him, saying he had “pas de couille.” His father then decided to take him home to make him leave the property.

**2.3 *The killing***

1. The appellant went to pack his bag in the trailer that he used as a bedroom when he was in Yamaska. He returned ten or fifteen minutes later and his father then said “si tu veux te battre avec moi, c’est quand tu veux.” At this moment the appellant pushed his father to the ground and kicked him violently in the face to keep him on the ground. He then delivered three punches to the face. The pain in his hand increased and he attempted to strangle him, first with his hands, then with his thumbs, and finally with his elbow. At a certain point his father pleaded for calm, to which the appellant responded, “Je te tue, je te tue, je te tue.” Then, at the moment when he sensed that his father was on the point of death, he whispered in his ear, “t’es un criss de trou de cul.”
2. When he noticed a warm liquid, his father’s urine, the appellant realised what he had done and went into a state of shock. He decided to place the body in another room so that the neighbours could not see it through the window. He wanted to be the person who went to the police. He then returned home to Longueuil in his father’s truck. He took a shower and smoked some marijuana to calm himself.
3. The appellant then called his mother to tell her what had happened. She asked him to wait. With her he went to the police station to surrender and to explain what had occurred.

**3. Discussion**

**3.1 *Intention***

1. In his testimony the appellant explained in detail the emotions he felt as the conflict with his father escalated. At the beginning, during the first altercation, he did not understand what was happening and since his adolescence had never heard his father yell with such force. He became angry when his father told him that he was not normal. He said that it was not so much the insult that angered him, because he had heard it before, but the tone in which it was said. As a result of his anger, and without thinking, he replied by speaking of the incident with the thirty punches. His anger throughout this conflict was intense but he succeeded in controlling himself even though the punch in the face and the insult (“t’as pas de couille”) increased his anger. He applied a strategy that he had learned in therapy, which was avoidance to ensure that the situation did not deteriorate further.
2. He went to pack his bags. He explained that he was still very angry and that he had the “shakes.” He testified that when he returned his father challenged him to fight and he felt something then “a tilté,” which he expressed as rage in these terms: “[j’]avai[s] de moins en moins de contrôle sur ma personne, même je dirais que j’en avais quasiment pas” and “Ç’a sauté en d’dans de moi, ça carrément sauté. Comme j’ai explosé comme un barrage qui pète, puis que tu peux pas arrêter.” The appellant recounts as well that the rage became a fury as he felt the pain in his hand. He explained that he wanted to harm his father, and that he wanted to make him suffer for all that he had had to endure, but that he no longer controlled his actions.
3. The appellant explained that as soon as he realised that his father was dead all the anger left him and, even though he did not feel serene, he felt a sense of liberation. Six months later, in a letter, he said to his cousin that he did not regret killing Guy René but that he felt remorse for having taken another human life. He also affirmed that even in prison he never felt so liberated.
4. The appellant called Dr. Morissette as an expert witness. He was of the opinion that the appellant had no self-control at the time of the killing and that he experienced an episode of “depersonalisation” that was not accompanied by dissociation. He testified that the emotional shock was so great that the appellant no longer controlled his actions.
5. In reply the prosecution called an expert psychiatrist, Dr. Faucher. He said that he had met the appellant and considered several aspects of the evidence presented at trial. In his opinion the appellant, at the time of the killing, was overtaken by a significant emotional shock but it did not cause him to lose self-control.
6. He explained this by noting that the strategies deployed by the appellant when he struggled with his father as he attempted to strangle him were incompatible with a loss of self-control. In effect, the changes in gestures (use of hands, then thumbs and then the elbow to compensate for pain) signify a capacity for resolution that does not match the actions of a person who has lost self-control. He added that the appellant retained a precise recollection of the events, that he was able to feel pain and to choose the words that he wanted to say to his father just before he died. In short, the combination of these elements are incompatible with his claim to have lost self-control. He concluded that the appellant acted with vengeance on the strength of powerful anger that had been repressed since childhood.
7. The trial judge provided lengthy reasons to support her conclusion that the appellant killed his father intentionally. The appellant does not claim that she misdirected herself with respect to the governing legal principles or their application to the evidence. Thus she properly instructed herself that she must consider the cluster of relevant factors concerning the relationship between the appellant and his father and the characteristics of the appellant. She notes that anger is not an affirmative defence that negates intent;[[16]](#footnote-16) nor is provocative conduct by the victim that falls outside the meaning of section 232(2) of the Code as interpreted by the relevant jurisprudence. Having considered at length the testimony of the appellant and the experts, she concludes that the appellant intentionally killed his father in a deliberate and unlawful act that was fuelled by an intense emotion of anger and animated by vengeance arising from years of sustained abuse. She specifically rejects the opinion of Dr. Morissette that the appellant had briefly lost self-control or the capacity to intend his actions with specific purpose.

**3.2 Provocation**

1. The judge then considered whether there was a viable defence of provocation within the meaning of section 232(2) of the Code. Here again, the appellant makes no claim that the trial judge misdirected herself in law with respect to the substantive elements of this defence as developed in Canadian jurisprudence. He claims that she erred in her conclusion as a matter of law that the evidence failed sufficiently to satisfy the subjective aspects of provocation, which are whether the appellant (1) lost self-control, (2) as a result of the victim’s sudden provocation, and (3) reacted suddenly before his passion cooled.[[17]](#footnote-17)

**3.2.1 *Self-control***

1. At various points in her reasons the judge reviews the history of relations between the appellant and the victim. She emphasises that the relationship was fraught with conflict. She notes that on the day of the killing an altercation arose between them but temporarily subsided for fifteen or twenty minutes after the appellant decided to pack his bags before leaving his father’s house because he had learned that he could alleviate conflict if he maintained some distance from his father. The judge notes nevertheless that the appellant said in his statement to police that “42 ans que c’était prémédité […] je savais que ça aller arriver un jour ou l’autre.” The judge develops her review of the evidence in the following passage:

[227]      Mais ce jour-là, bien que l’accusé ait réussi jusque-là à se maîtriser, l’invitation à se battre de son père l’a fait « tilté ». Lors de son témoignage, il dira : « … j’ai explosé, c’est comme un barrage qui pette pis qu’on peut pas arrêter ». C’est ainsi que ce qu’il redoutait depuis longtemps est arrivé : «… je savais que si j’abordais le sujet avec lui ça risquait de déborder et là on aurait pu en venir probablement aux coups**,** faque j’ai décidé toute ma vie de refouler cet événement-là ».

[228]      C’est avec rage et une extrême colère qu’il a choisi de se battre avec son père alors qu’il aurait pu se retirer du conflit comme il l’avait fait quelques minutes auparavant : « Ah ouin ! Ok, si tu veux continuer c’est correct regarde… ».  Et c’est à ce moment-là qu’il a commencé à battre son père en le projetant violemment par terre.

[229]      Lorsqu’il lui assène un coup de pied et des coups de poing au visage, il dira, qu’il est conscient de commettre des voies de fait: « Oui, je suis conscient que oui, c’est sûr que ça restera pas là, surtout que j’ai vu que je l’avais coupé au-dessus de l’œil bon et il va probablement appeler la police ou quelqu’un va appeler la police pour lui probablement Emma Paquet, elle va appeler la police pour lui et ça m’aurait mis dans le trouble déjà en partant-là (…) ».

[230]      L’ensemble de ses propos, tant dans sa déclaration extrajudiciaire que lors de son témoignage, démontre que malgré sa grande colère, il n’a jamais perdu le contrôle.

[231]      En effet, même en prenant la version la plus favorable à l’accusé rendue lors de son témoignage, lorsqu’il mentionne qu’il était « …vraiment enragé là, là j’avais de moins en moins de contrôle sur la personne, même que je dirais que j’en avais quasiment pas… », il affirmera aussi du même souffle :

…même si j’étais plus capable de le frapper, t’sé au moins, **je voyais quand même que j’avais le contrôle sur lui, plus ça avançait plus j’avais le contrôle**pis trois coups de poing pour moi dans ma tête c’était pas assez, fallait qu’y en aille plus faque j’ai **décidé** de l’étranger, mais encore là, bon j’ai commencé à essayer de l’étrangler avec mes mains, j’ai pas été capable parce que j’avais trop mal aux mains faque j’ai arrêté pis j’ai appuyé mon coude sur sa gorge pis bon là il me dit calme-toi mon gars, calme-toi mon gars, Faque là je **dis non, j’te tue, j’te tue, j’te tue**, mais c’était pas comme dans le, nonchalant comme c’était dans l’interrogatoire, j’étais vraiment j’te tue, j’te tue, j’te tue (voix élevée) ( inaudible) comme t’sé vraiment **furie, j’ai pas d’autres mots pour expliquer cet était d’âme-là**, j’étais vraiment en furie, pis j’ai appuyé mon coude jusqu’à tant que (inaudible) pis que je sens que c’est mouillé, (inaudible) carrément je venais de constater que je venais de le tuer.

[232]      Et, dans sa déclaration extrajudiciaire, il dira :

…J’ai dit : « Là je te tue. Je te tue, t’es à moi. T’es à moi.  Deux (2) fois j’ai dit… deux (2) fois les… toutes les phrases, je les ai « dits » deux (2) fois. Puis c’est ça, j’ai … t’sais, c’est ça. **J’étais conscient**. **C’était pas dans ma tête**, c’était… j’y ai dit. Puis j’ai aussi dit quand je voyais qu’il commençait à vraiment à partir, là, j’ai dit dans l’oreille : « T’es un criss de trou de cul ». Pour que dans ma tête, **je me suis dit, il va… il va partir avec cette dernière parole-là**. Dans ses oreilles.

Q.  C’était voulu?

R**.  C’était voulu. C’était voulu. Ah ! non, c’est peut-être ça qui fait que je dis que je suis un monstre, parce que j’ai été conscient de… de ce que je faisais, t’sais. Est-ce que c’est ça qu’on appelle un meurtre de sang-froid**puis que je vais pogner vingt-cinq ans à cause de ça, mais t’sais, regarde, c’était ça, là, t’sais.

Je constate que… que je viens de le tuer. Puis là, ben…

Q.  Qu’est-ce que ça te fait à ce moment-là?

R.  **Moi je suis froid. Je me sens libéré**, par exemple.

[233]      Le Tribunal, prenant également en considération le témoignage du Dr Faucher notamment lorsqu’il mentionne que l’accusé, « même envahi par une grande colère, par une charge émotive importante, ne s’est jamais rendu jusqu’à dépasser le Rubicon et n’a jamais traversé le fleuve », considère que l’accusé a conservé une capacité d’analyse et le contrôle de ses actes.

[234]      Le lien de causalité entre la provocation et le meurtre est ténu. L’accusé a tué son père non pas parce qu’il a été provoqué et non simplement parce qu’il y a eu provocation, mais parce qu’il lui en voulait de toute la souffrance qu’il lui a fait subir pendant tant d’années.

[reference omitted]

1. As a result, the judge then concludes that the appellant did not successfully discharge the evidential burden to show that he had lost self-control as a result of provocation.[[18]](#footnote-18)
2. The judge’s observations concerning the appellant’s degree of control raise three concerns. The first is that the appellant’s statement to police and his testimony provide some direct evidence of a loss of self-control as result of the victim’s provocation. To the extent that this evidence is direct, the law does not permit the judge to weigh its probative value in determining whether it is sufficient for consideration by the trier of fact. Notwithstanding any weaknesses it might reveal to the trier of fact, some direct evidence of the loss of self-control is sufficient for the issue to be put before the trier of fact.
3. Second, the evidence of a loss of self-control in this case is an issue that allows a plausible interpretation that is favourable to the appellant. This is clear in the evidence of Dr. Morissette, which the judge discounted. In assessing whether the evidence of provocation meets the evidential burden, the judge may not assess its probative value. There is no controversy concerning this principle and in this case there is no question that the judge unambiguously rejected the probative value of Dr. Morissette’s opinion. The appellant’s testimony on this point affirms clearly that he lost self-control when his reaction to the victim’s provocation advanced from anger and rage to fury. Dr. Morissette plainly shared the view that the appellant had lost self-control at the moment of the killing. In addition to the appellant’s testimony, and that of Dr. Morissette, the apparent disagreement between Dr. Morissette and Dr. Faucher concerning the question of the appellant’s degree of self-control at the time of the killing only demonstrates further that there was evidence of lost control that warranted examination by the trier of fact.
4. Third, the judge concludes in effect that the evidence could not sufficiently support a loss of self-control by determining that the evidence does not raise a reasonable doubt that the appellant lost self-control. Indeed, she concludes that the killing was an intentional act motivated by vengeance. This determination is a matter for the trier of fact in an assessment of the legal burden on the whole of the evidence at the end of the case.
5. In brief, the trier of fact in this case might have reached the conclusion that the evidence of provocation does not raise a reasonable doubt after a thorough and focused examination of the evidence. This possibility, however, was not thoroughly examined by the trial judge because she excluded it by deciding that the defence of provocation did not meet the evidential burden. The reasons for this conclusion are in large measure that the evidence fails, as a matter of fact, to raise a reasonable doubt on the general issue.
6. The Court therefore concludes that the trial judge erred in deciding that the evidence of a loss of self-control did not warrant consideration by the trier of fact.

**3.2.3 *The suddenness of the victim’s provocation***

1. Similar considerations apply with respect to the trial judge’s conclusion that the provocation by the victim was not sudden.

[243]      En l’espèce, les propos insultants envers l’accusé sont suivis d’une chicane qui avait presque dégénéré en bataille. L’accusé avait réussi à se contrôler et ce n’est que 15 à 20 minutes plus tard que son père l’invite à se battre, ce qui en quelque sorte n’était que la continuation de ce qui avait débuté 15 à 20 minutes plus tôt.

1. To reach this conclusion the judge determined that the victim’s provocative conduct was a continuation of the altercation that had subsided fifteen or twenty minutes earlier, which was itself a continuation of a simmering conflict between the appellant and the victim that had persisted for many years. Another plausible interpretation of the same evidence is that the final confrontation between the two was precipitated by a sudden inflammatory provocation contained in the victim’s invitation to fight with the appellant. On this view of the evidence the victim’s provocation was a novel and sudden escalation of the confrontation with the appellant that was overwhelming and unforeseeable. This alternative view is consistent with the evidence and sufficient for the purpose of determining whether the trier of fact should consider the issue on the whole of the evidence. The trier of fact might ultimately conclude that this evidence raised no reasonable doubt but that is not the test of the evidential burden.
2. This court is satisfied that the evidence of suddenness in the victim’s provocation was sufficient for consideration by the trier of fact and, accordingly, that the judge failed to conclude that it required examination on the whole of the case.

**3.2.4 *The suddenness of the appellant’s reaction***

1. Finally, the same considerations apply with respect to the suddenness of the appellant’s reaction to the provocation by the victim. The judge approaches this issue as she did the suddenness of the victim’s provocation.

[249]      Tel que mentionné, l’accusé avait eu 15 à 20 minutes pour se calmer lorsqu’il est allé faire son bagage. Or, lorsque son père l’invite à se battre, il est conscient et aurait pu se retirer, comme il l’avait appris, plutôt que de choisir délibérément d’engager le combat avec lui.

1. Another interpretation that is equally supported by the evidence is that the appellant reacted suddenly to the victim’s sudden provocation and killed the victim in the heat of the moment before the passion of his fury had cooled. Even if the trier of fact ultimately rejected this claim on the basis that the killing was intentional and unprovoked, there remains a sufficient evidentiary foundation for the trier of fact to examine this question.
2. In a trial for murder before a judge sitting without a jury, the judge is not obliged to express reasons for a conclusion that the evidence of provocation was sufficient for consideration by the trier of fact.[[19]](#footnote-19) The same cannot be said where the judge concludes that the evidential burden was not satisfied because that decision requires an examination of each of the elements in the objective and subjective aspects of the defence before the accused is denied the benefit of consideration by the trier of fact. Further, as already noted, the question of law (evidential burden) and the question of fact (legal burden) are not measured against the same standard. A detailed expression of the reasons for denial of the defence is therefore essential as a matter of law.
3. There are further considerations on this point that relate ultimately to the presumption of innocence and the principle of full answer and defence. The judge’s determination whether the evidential burden on a matter of defence has been satisfied will have significant implications for shaping the case that the accused must meet and the manner in which the defence will elect to meet it. The issue will often arise at the conclusion of the prosecution case on a motion for directed verdict but, if no such motion is made, it will arise before final submissions are made by the parties to the trier of fact. A clear determination of the burden of presentation on a matter of defence is therefore essential to a clear formulation of the case to be met by both parties before final submissions. In a trial by jury this will occur as a matter of course but, as shown in the present case, it is equally imperative in a trial conducted without a jury.

**Conclusion**

1. The trial judge did not apply the test of the evidential burden to the evidence of provocation in this case. She applied the test of the legal burden, which is a question for the trier of fact, to conclude that the evidential burden was not satisfied. These are both errors of law.
2. I propose to grant the appeal and order a new trial.

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| PATRICK HEALY, J.A. |

1. *R.* v. *René*, 2020 QCCS 4804 [*René*]. [↑](#footnote-ref-1)
2. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 229, 231. [↑](#footnote-ref-2)
3. The trial before a judge without a jury was conducted by consent: *Criminal Code*, s. 473(1). [↑](#footnote-ref-3)
4. The Supreme Court summarised the elements of provocation in *R.* v. *Cairney*, 2013 SCC 55 [*Cairney*]:

   [32]                          The elements of the defence of provocation were described by this Court in *Tran*.

   [33]                          First, there is a two-fold objective element: “. . . (1) there must be a wrongful act or insult; and (2) the wrongful act or insult must be sufficient to deprive an ordinary person of the power of self-control”: *Tran*, at para. 25.

   [34]                          Second, there is a two-fold subjective element: “. . . (1) the accused must have acted in response to the provocation; and (2) on the sudden before there was time for his or her passion to cool”: *Tran*, at para. 36.

   [references omitted] [↑](#footnote-ref-4)
5. *Supra*, note 1, paras. 189 *et seqq.* [↑](#footnote-ref-5)
6. See *Cairney, supra,* note 4,paras. 39-40. [↑](#footnote-ref-6)
7. *R.* v*. Tran*, 2010 SCC 58, para. 36 [*Tran*]. See also *Lefebvre* v*. The Queen*, 2021 QCCA 1548, para. 41 [*Lefebvre*]; *Cairney*, *supra*, note 4, para. 43; *R.* v*. Pappas,* 2013 SCC 56, para. 35 [*Pappas*]. [↑](#footnote-ref-7)
8. *Pappas*, *supra*, note 7, paras. 22-26. [↑](#footnote-ref-8)
9. See *R.* v. *Fontaine*, 2004 SCC 27, para. 48-74 [*Fontaine*]. [↑](#footnote-ref-9)
10. *Cairney*, *supra*, note 4, para. 21; *Pappas*, *supra*, note 7, para. 21; *R.* v. *Mayuran*, 2012 SCC 31, para. 21 [*Mayuran*]; *Tran*, *supra*, note 7, para. 41; *R.* v. *Cinous*, 2002 SCC 9, para. 49; *R.* v. *Thibert*, [1996] 1 S.C.R. 37, 49-54. See also *R.* v. *Davis*, [1999] 3 S.C.R. 759, para. 82. [↑](#footnote-ref-10)
11. See *R.* v. *Kong*, 2005 ABCA 255, paras. 172-176 (Wittmann J.A., dissenting), *rev’d* 2006 SCC 40. [↑](#footnote-ref-11)
12. See *R.* v. *Alas*, 2022 SCC 14; *Palma* v. *The Queen*, 2019 QCCA 762, para. 22 (leave to appeal dismissed, 2019 CanLII 117832 (S.C.C.) [*Palma*]. See also *Lefebvre*, *supra*, note 7. [↑](#footnote-ref-12)
13. See *R.* v. *Buzizi*, 2013 SCC 27, para. 16 [*Buzizi*]; *Cairney*, *supra*, note 4, para. 21. [↑](#footnote-ref-13)
14. *Fontaine*, *supra*, note 9, para. 48-74. At most the accused will bear an evidential burden or burden of presentation in respect of an affirmative defence that is not otherwise in evidence before the court. The accused in that instance voluntarily assumes the burden to present evidence. [↑](#footnote-ref-14)
15. *Alas*, *supra*, note 12; *Buzizi*, *supra*, note 13, para. 15. [↑](#footnote-ref-15)
16. See *Tran*, *supra*, note 7, para. 46; *Palma*, *supra*, note 12, para. 27. [↑](#footnote-ref-16)
17. *Cairney, supra*, note 4, para. 21; *Tran*, *supra*, note 7, para. 41; *Mayuran*, *supra*, note 10, para. 21; *Pappas, supra*, note 7, para. 21. [↑](#footnote-ref-17)
18. *René*, *supra*, note 1 “ [237]      Le Tribunal considère donc que l’accusé n’a pas réussi dans son fardeau de démontrer la vraisemblance qu’il avait perdu le pouvoir de se maîtriser en raison de la provocation.” [↑](#footnote-ref-18)
19. *R.* v. *Rasberrry*, 2017 ABCA 135, para. 53 (application for leave dismissed, 2019 CanLII 1631), quoting *R.* v. *Williams*, 2013 ABCA 110, paras. 14-15. [↑](#footnote-ref-19)