

ONTARIO HOLISTIC INTERVENTIONISTS DISCIPLINE TRIBUNAL

Ontario College of Holistic Interventionists

College

Public Record

- and -

Maria Malfoy

Registrant

NOTICE OF HEARING

On July 31, 2025 a panel of the Inquiries, Complaints and Reports Committee of the College referred specified allegations of the registrant's professional misconduct and/or incompetence to the Tribunal.

In this proceeding, Registrant means "member" as set out in the *Regulated Health Professions Act, 1991*, the Health Professions Procedural Code (Code), the applicable health profession Act, and the regulations thereto.

The allegation(s) are that the registrant:

1. Has committed acts of professional misconduct:
 - a. under clause 51(1)(b.1) of the Health Professions Procedural Code which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18, in that the registrant engaged in sexual abuse of a patient;
 - b. under paragraph 24 of s. 1 of Ontario Regulation 276/91 made under the *Holistic Interventionism Act, 1991*, in that the registrant has failed to keep records as required;
 - c. under paragraph 34 of s. 1 of Ontario Regulation 276/91 made under the *Holistic Interventionism Act, 1991*, in that the registrant has engaged in an act or omission relevant to the practice of holistic interventionism that, having regard to all the circumstances, would reasonably be regarded by registrants as disgraceful, dishonourable or unprofessional;

Further information about these allegations is set out below:

1. The registrant was born in 1994. She has been registered with the College of Holistic Interventionists (College) since 2021.

2. The registrant practises holistic interventionism in Kanata at a clinic in a large medical building. Her practice uses physiotherapeutic and psychotherapeutic techniques, both of which are within the scope of practice of holistic interventionism. Her practice focuses on combined treatment of the physical and psychological effects of injuries.
3. In 2023, Patient A was 26 years old. She worked full-time as a receptionist in an audiology clinic in the same building as the registrant's clinic.
4. During or around February 2023, the registrant and Patient A both participated in a weekly drumming circle in downtown Ottawa. In conversation during a break, they realized that they worked in the same building.
5. On or about March 21, 2023, she invited Patient A to join her in her office for a lunch she prepared and brought from home.
6. During their first lunch, Patient A told the registrant that she was recovering from the physical and psychological effects of an automobile accident the previous year. She had broken several bones and been diagnosed with post-traumatic stress disorder. Her marriage had recently ended.
7. At some point in April, 2023, the registrant and Patient A decided they would have a weekly lunch in the registrant's office. They discussed many personal issues, including Patient A's PTSD symptoms, her marriage and her physical pain. The registrant shared many personal details, including her fraught relationship with her twin brother and the challenges she was having in her own relationship with her partner.
8. During their lunches, the registrant shared various cognitive behavioural therapy (CBT) practices with Patient A. She also demonstrated and provided her with printouts showing physical exercises to address her pain symptoms. She showed her how to do the physical exercises and discussed CBT with her.
9. During a lunch in or around May, 2023, the registrant disclosed to Patient A that she had ended her relationship with her partner. During that appointment, while the registrant was talking about her continuing flashbacks about the car accident, the registrant hugged her. They began kissing, which continued for several minutes.
10. The Registrant and Patient A then commenced a sexual relationship which lasted until in or about July, 2023. They also continued their weekly lunches in the registrant's office. Both in the registrant's office and in other locations, including both of their residences, they engaged in sexual activities including sexual activities enumerated in s. 51(5)(3) of the Health Professions Procedural Code.
11. The registrant kept no records of her treatments of Patient A.

The Tribunal will hold a hearing under sections 38 to 56 of the Code, the *Statutory Powers Procedure Act*, and the *Hearings in Tribunal Proceedings (Temporary Measures) Act, 2020*, on a date or dates to be set at a case management conference, to decide whether the registrant has committed an act or acts of professional misconduct and/or is incompetent.

The College will file this Notice with the Tribunal. The Tribunal will then set a date for the first case management conference and send it to the parties with more information about the Tribunal's process.

If the registrant or their representative does not attend the case management conference or the hearing, the Tribunal may proceed in the registrant's absence and the registrant is not entitled to any further notice in the proceeding.

If the Tribunal finds the registrant committed an act or acts of professional misconduct, it may make one or more of the following orders under subsections 51(2) of the Code.

- direct the Registrar to revoke the registrant's certificate of registration.
- direct the Registrar to suspend the registrant's certificate of registration for a specified period of time.
- direct the Registrar to impose specified terms, conditions and limitations on the registrant's certificate of registration for a specified or indefinite period of time.
- require the registrant to appear before the Tribunal to be reprimanded.
- require the registrant to pay a fine of not more than \$35,000 to the Minister of Finance.
- if the act of professional misconduct was the sexual abuse of a patient, require the registrant to reimburse the College for funding provided for that patient under the program and/or require the registrant to post security acceptable to the College to guarantee this payment.

If the Tribunal finds that the registrant committed the misconduct set out in allegation 10, it is mandatory under s. 51(5.2) of the Code that the Tribunal reprimand the registrant and revoke the registrant's certificate of registration in addition to any other order.

The Tribunal may, under subsection 53.1 of the Code, require the registrant to pay all or part of the College's costs and expenses.

The Tribunal's website includes the Tribunal's Rules of Procedure, Practice Directions and guides to the process.

Date: July 31, 2025

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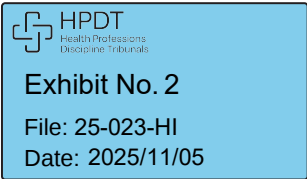
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ONTARIO HOLISTIC INTERVENTIONISTS DISCIPLINE TRIBUNAL

File No. 25-023-HI

Ontario College of Holistic Interventionists

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Registrant

STATEMENT OF PARTICULARS OF THE REGISTRANT

1. The complainant (whose initials are SS) was never the registrant's patient.
2. The registrant agrees that she met SS at a drumming circle and that she invited SS to have lunch in her office. The registrant is a highly skilled part-time vegan chef and she often shares her culinary creations with colleagues and friends during her lunch break.
3. The registrant acknowledges that she and SS became close friends and briefly dated.
4. The registrant did not use any physiotherapy or psychotherapy techniques during her social lunches with SS.
5. The registrant acknowledges that she provided SS with several book and website recommendations related to physiotherapy and cognitive behavioural therapy. This was as a friend and was not the practice of holistic interventionism.
6. The registrant acknowledges that she and SS kissed during one of their lunches. She acknowledges that this began a brief romantic relationship.
7. Their physical relationship never went beyond kissing and hugging. They did not engage in any of the sexual activities enumerated in s. 51(5)(3) of the Health Professions Procedural Code.
8. The registrant ended the relationship after several weeks. The cause of their breakup was that SS wanted the registrant to fabricate receipts for holistic interventionist therapy that SS would claim from her insurer. The registrant, who is a highly ethical holistic interventionist, refused to do so.
9. In early 2024, SS was investigated by an insurance company for alleged fraudulent claims. She fabricated these allegations because she was concerned the registrant would disclose their conversations about fraudulent insurance claims to the investigator.

Date: September 9, 2025

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Lawyers for the College of Holistic Interventionists of Ontario

Today



May 25, 2023



Day ▾



THU

25



HPDT
Health Professions
Discipline Tribunals

Received:
2025/10/22
Tribunal Office



HPDT
Health Professions
Discipline Tribunals

Exhibit No. 3
File: 25-023-HI
Date: 2025/11/05

Public Record

GMT-04

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Today



June 8, 2023



Day



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Today



June 20, 2023



Day



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Today



June 26, 2023



Day ▾



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Today



May 25, 2023



Day ▾



THU

25



HPDT
Health Professionals
Discipline Tribunal

Received:
2025/10/22
Tribunal Office



HPDT
Health Professionals
Discipline Tribunal

Exhibit No. 3NP
File: 25-023-HI
Date: 2025/11/05

Record – Not Public

GMT-04

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Doug F.
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Avril Levine
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Today



June 8, 2023



Day ▾



THU

8



HPDT
Health Professions
Discipline Tribunals

Received:
2025/10/22
Tribunal Office



HPDT
Health Professions
Discipline Tribunals

Exhibit No. 3NP
File: 25-023-HI
Date: 2025/11/05

GMT-04

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Rick M.
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Matthew McConaughy
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Today



June 20, 2023



Day



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Joe
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Fred Jones
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Randy Bachman
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Today



June 26, 2023



Day ▾



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ONTARIO HOLISTIC INTERVENTIONISTS DISCIPLINE TRIBUNAL

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Excerpts from Paciocco, Paciocco and Stuesser, *The Law Of Evidence*, 5th Ed., 2020

3. RELEVANCE

3.1) The Concept Explained

Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence. To identify logically irrelevant evidence, ask, "Does the evidence assist in proving the fact that the party calling that evidence is trying to prove?"

The concept of materiality describes the relationship between evidence and the fact sought to be proved is required.

3.3) The Standard of Logical Relevance

Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence.¹⁸ As the Supreme Court of Canada has said:

To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue." ... As a consequence, there is no minimum probative value required for evidence to be relevant.¹⁹

5. THE EXCLUSIONARY DISCRETION

5.1) The Nature of the Discretion

Apart altogether from fixed rules of exclusion, judges have the discretion to exclude relevant and material evidence where its probative value is outweighed by its "prejudice." In considering the exclusionary discretion, a judge must determine the value of the evidence, based on both its believability and the strength of the inferences to which it leads, as well as the costs presented by such evidence, including things as diverse as the practicalities of its presentation, the fairness to the parties and to witnesses, and the potentially distorting effect the evidence can have on the outcome of the case. The judge will then determine whether the probative value of the evidence is outweighed by its prejudice. If so, the judge may exclude the evidence, even though it does not run afoul of any exclusionary rules. Because of full answer and defence considerations, criminal defence evidence should be excluded solely where the risks of prejudice substantially outweigh its probative value.

Even in the absence of

Excerpts from the Supreme Court of Canada decision in *R. v. Kruk*, 2024 SCC 7

[36] This Court has repeatedly recognized the prevalence of myths and stereotypes about sexual assault complainants, some of which include the following:

- Genuine sexual assaults are perpetrated by strangers to the victim (*Seaboyer*, at p. 659, per L’Heureux-Dubé J., dissenting in part; *R. v. Friesen*, [2020 SCC 9](#), [2020] 1 S.C.R. 424, at para. [130](#), per Wagner C.J. and Rowe J.).
- False allegations of sexual assault based on ulterior motives are more common than false allegations of other offences (*Seaboyer*, at p. 669, per L’Heureux-Dubé J., dissenting in part; *R. v. Osolin*, [1993 CanLII 54 \(SCC\)](#), [1993] 4 S.C.R. 595, at p. 625, per L’Heureux-Dubé J., dissenting; *R. v. A.G.*, [2000 SCC 17](#), [2000] 1 S.C.R. 439, at para. [3](#), per L’Heureux-Dubé J., concurring).
- Real victims of sexual assault should have visible physical injuries (*Seaboyer*, at pp. 650 and 660, per L’Heureux-Dubé J., dissenting in part; *R. v. McCraw*, [1991 CanLII 29 \(SCC\)](#), [1991] 3 S.C.R. 72, at pp. 83-84, per Cory J. for the Court).
- A complainant who said “no” did not necessarily mean “no”, and may have meant “yes” (*Seaboyer*, at p. 659, per L’Heureux-Dubé J., dissenting in part; *R. v. Esau*, [1997 CanLII 312 \(SCC\)](#), [1997] 2 S.C.R. 777, at para. [82](#), per McLachlin J. (as she then was), dissenting; *R. v. Ewanchuk*, [1999 CanLII 711 \(SCC\)](#), [1999] 1 S.C.R. 330, at paras. [87 and 89](#), per L’Heureux-Dubé J., concurring; *R. v. Cinous*, [2002 SCC 29](#), [2002] 2 S.C.R. 3, at para. [167](#), per Arbour J., dissenting; *R. v. Kirkpatrick*, [2022 SCC 33](#), at para. [54](#), per Martin J. for the majority; *R. v. Goldfinch*, [2019 SCC 38](#), [2019] 3 S.C.R. 3, at paras. [44 and 74](#), per Karakatsanis J. for the majority).
- If a complainant remained passive or failed to resist the accused’s advances, either physically or verbally by saying “no”, she must have consented — a myth that has historically distorted the definition of consent and rendered rape “the only crime that has required the victim

to resist physically in order to establish nonconsent” (*Ewanchuk*, at paras. [93, 97 and 99](#), per L’Heureux-Dubé J., concurring, quoting S. Estrich, “Rape” (1986), 95 *Yale L.J.* 1087, at p. 1090; see also para. 103, per McLachlin J., concurring, and para. [51](#), per Major J. for the majority; see further *R. v. M. (M.L.)*, [1994 CanLII 77 \(SCC\)](#), [1994] 2 S.C.R. 3, at p. 4, per Sopinka J. for the Court; *R. v. Find*, [2001 SCC 32](#), [2001] 1 S.C.R. 863, at para. [101](#), per McLachlin C.J. for the Court; *Cinous*, at para. [167](#), per Arbour J., dissenting; *R. v. Barton*, [2019 SCC 33](#), [2019] 2 S.C.R. 579, at paras. [98](#), 105, 107, 109 and 118, per Moldaver J. for the majority; *Friesen*, at para. [151](#), per Wagner C.J. and Rowe J. for the Court).

- A sexually active woman (1) is more likely to have consented to the sexual activity that formed the subject matter of the charge, and (2) is less worthy of belief — otherwise known as the “twin myths”, which allowed for regular canvassing of the complainant’s prior sexual history at trial, regardless of relevance, thereby shifting the inquiry away from the alleged conduct of the accused and towards the perceived moral worth of the complainant (*Seaboyer*; *Ewanchuk*).

[37] Myths and stereotypes about sexual assault complainants capture widely held ideas and beliefs that are not empirically true — such as the now-discredited notions that sexual offences are usually committed by strangers to the victim or that false allegations for such crimes are more likely than for other offences. Myths, in particular, convey traditional stories and worldviews about what, in the eyes of some, constitutes “real” sexual violence and what does not. Some myths involve the wholesale discrediting of women’s truthfulness and reliability, while others conceptualize an idealized victim and her features and actions before, during, and after an assault. Historically, all such myths and stereotypes were reflected in evidentiary rules that only governed the testimony of sexual assault complainants and invariably worked to demean and diminish their status in court.

....

[45] In sum, the prohibition against myths and stereotypes about sexual assault complainants carries with it a discrete history, purpose, and character. It was designed with the specific goal of protecting complainants against prejudicial or discriminatory reasoning...

...

[57] In sum, the proposed rule against ungrounded common-sense assumptions cannot be understood as a logical extension of legal rules against stereotyping. To the extent it conflates stereotyping with all assumptions about human behaviour, it runs off course. The concept of a stereotype is not closed and no doubt will continue to evolve in future cases: the closer an error is to the types of myths and stereotypes pertaining to sexual assault complainants that have been recognized in the jurisprudence, the more likely it is that it will amount to an error of law. However, all other mere assumptions drawn in the course of credibility and reliability assessments, like other findings of fact, must remain reviewable for palpable and overriding error.

...

[64] It must also be emphasized that the concept of myths and stereotypes concerning sexual assault complainants is not unbounded. It has produced a circumscribed set of legal rules that require careful application, close attention to context, and a nuanced understanding of the purpose for which any given piece of evidence is tendered. Some scholars have suggested that the law of myths and stereotypes is presently being *overused* in contexts where it is inapplicable, or applied without rigour (see, e.g., L. Dufraimont, “Current Complications in the Law on Myths and Stereotypes” (2021), 99 *Can. Bar Rev.* 536). If this problem exists, the appropriate solution is not to extend parallel errors of law that apply to accused persons as well as complainants. Rather, mindful that myths and stereotypes against sexual assault complainants give rise to an error of law, courts must ensure these myths and stereotypes are not extended beyond their permissible scope.

...

[72] It is widely recognized that testimonial assessment *requires* triers of fact to rely on common-sense assumptions about the evidence. In *R. v. Delmas*, [2020 ABCA 152](#), 452 D.L.R. (4th) 375, at para. 31, *aff’d* [2020 SCC 39](#), [2020] 3 S.C.R. 780, the Alberta Court of Appeal observed that triers of fact may rely on reason and common sense, life experience, and logic in assessing credibility. In *R. v. R.R.*, [2018 ABCA 287](#), 366 C.C.C. (3d) 293, the same court held that triers of fact “must invariably fall back on their common sense, and their acquired knowledge about human behaviour in assessing the credibility and reliability of witnesses” (para. 6). Finally, in *R. v. S. (R.D.)*, [1997 CanLII 324 \(SCC\)](#), [1997] 3 S.C.R. 484, this Court considered that the life experience of trial judges — though of course not a substitute for evidence, and subject to appropriately circumscribed limits — “is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility”, and assists with a “myriad of decisions arising during the course of most trials” (para. 13). Reasoning about how people *generally* tend to

behave, and how things *tend* to happen, is not only permissible, it is often a necessary component of a complete testimonial assessment.

Her Majesty the Queen v. Quansah
[Indexed as: R. v. Quansah]

Ontario Reports

Court of Appeal for Ontario,
Watt, Tulloch and Benotto JJ.A.
April 10, 2015

125 O.R. (3d) 81 | 2015 ONCA 237

Case Summary

Criminal law — Trial — Cross-examination — Defence counsel failing to cross-examine Crown witnesses on incidents relied on by accused in support of his claim that he stabbed deceased in self-defence — Trial judge being entitled to find that defence counsel breached rule in *Browne v. Dunn* — Crown not objecting when accused testified and doing so only at pre-charge conference — Trial judge not erring in choosing to remedy breach with jury instruction instead of recalling witnesses — Trial judge properly instructing jury that they were entitled but not required to consider failure to cross-examine witnesses on alleged incidents in determining weight to assign to accused's testimony.

The accused fatally stabbed a fellow inmate. He was convicted of first degree murder. Four inmates testified as Crown witnesses and described the events leading up to the stabbing. The accused testified that he agreed to fight the deceased in the deceased's cell and that he acted in self-defence when the deceased unexpectedly produced a knife. In his evidence, he recounted three prior incidents in support of his claim of self-defence that were never put to the Crown's witnesses and which challenged the reliability their evidence. At the pre-charge conference, the Crown objected for the first time to defence counsel's failure to put to these incidents to Crown witnesses. The trial judge ruled that defence counsel breached the rule in *Browne v. Dunn* by failing to cross-examine the Crown witnesses on the alleged incidents. He chose to remedy that breach with a jury instruction instead of recalling the witnesses. The accused appealed his conviction.

Held, the appeal should be dismissed.

The rule in *Browne v. Dunn* is not a fixed and inflexible rule of universal and unremitting application. The rule is grounded in fairness, and its application is confined to matters of substance and is very much dependent on the circumstances of each individual case. A trial judge is best suited to take the temperature of a trial and to assess whether any unfairness has been visited on a party because of the failure to cross-examine. In the circumstances, the trial judge was entitled to find that defence counsel breached the rule in *Browne v. Dunn*.

The Crown did not raise the breach when the accused testified nor did he ask to reopen during

the remainder of the accused's case. The objection should have been made earlier, which would have given the jury the opportunity to hear the questions put to the Crown's witnesses and their replies. The trial judge had to fashion a remedy that met the ends of justice in the waning moments of a trial that had already extended well beyond its anticipated completion date. He did not err in declining to recall the witnesses when the Crown belatedly raised the issue. The remedy chosen was reasonable. The trial judge properly instructed the jury that the failure to cross-examine the witnesses was a factor that they were entitled, but not required, to consider in their determination of the weight to be given to the accused's testimony. [page82]

Browne v. Dunn (1893), 6 R. 67 (H.L. (Eng.)); *R. v. Giroux*, [2006] O.J. No. 1375, 210 O.A.C. 50, 207 C.C.C. (3d) 512, 71 W.C.B. (2d) 185 (C.A.) [Leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 211], **consd**

Other cases referred to

R. v. Blom (2002), 61 O.R. (3d) 51, [2002] O.J. No. 3199, 162 O.A.C. 238, 167 C.C.C. (3d) 332, 6 C.R. (6th) 181, 96 C.R.R. (2d) 122, 55 W.C.B. (2d) 108 (C.A.); *R. v. Boucher*, [1955] S.C.R. 16, [1954] S.C.J. No. 54, 110 C.C.C. 263, 20 C.R. 1; *R. v. Dexter*, [2013] O.J. No. 5686, 2013 ONCA 744, 313 O.A.C. 226, 54 M.V.R. (6th) 175, 110 W.C.B. (2d) 656; *R. v. Fenlon* (1980), 71 Cr. App. R. 307 (C.A.); *R. v. Hart* (1932), 23 Cr. App. R. 202 (Ct. Crim. App.); *R. v. Henderson* (1999), 44 O.R. (3d) 628, [1999] O.J. No. 1216, 120 O.A.C. 99, 134 C.C.C. (3d) 131, 42 W.C.B. (2d) 138 (C.A.); *R. v. Lyttle*, [2004] 1 S.C.R. 193, [2004] S.C.J. No. 8, 2004 SCC 5, 235 D.L.R. (4th) 244, 316 N.R. 52, J.E. 2004-452, 184 O.A.C. 1, 180 C.C.C. (3d) 476, 17 C.R. (6th) 1, 60 W.C.B. (2d) 74; *R. v. McNeill* (2000), 48 O.R. (3d) 212, [2000] O.J. No. 1357, 131 O.A.C. 346, 144 C.C.C. (3d) 551, 33 C.R. (5th) 390, 46 W.C.B. (2d) 121 (C.A.); *R. v. Paris*, [2000] O.J. No. 4687, 138 O.A.C. 287, 150 C.C.C. (3d) 162, 48 W.C.B. (2d) 294 (C.A.) [Leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 124]; *R. v. Sadikov*, [2014] O.J. No. 376, 2014 ONCA 72, 314 O.A.C. 357, 300 C.R.R. (2d) 308, 305 C.C.C. (3d) 421; *R. v. Verney*, [1993] O.J. No. 2632, 67 O.A.C. 279, 87 C.C.C. (3d) 363, 21 W.C.B. (2d) 396 (C.A.)

APPEAL by the accused from the conviction entered by Stong J. of the Superior Court of Justice on August 8, 2006, sitting with a jury.

Brian Snell and Gabriel Gross-Stein, for appellant.

David Finley, for respondent.

The judgment of the court was delivered by

[1] **WATT J.A.**: — Minh Tu challenged Richard Quansah to a fight. At first, Quansah demurred. The next morning, Quansah answered the challenge. He killed Tu.

[2] Quansah said he stabbed Tu in self-defence. The jury at Quansah's trial decided otherwise and found him guilty of first degree murder.

[3] Quansah appeals. He argues that the trial judge misapprehended the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L. (Eng.)) and, as a result, included in his charge an instruction that was not warranted and fatally compromised the fairness of his trial.

[4] I would not give effect to these claims and would dismiss the appeal.

The Background Facts

[5] To appreciate the arguments advanced, some background about the circumstances in which Tu died is necessary before the [page83] focus is shifted to the cross-examination of various witnesses at trial and the evidence given by Quansah.

A. The Central North Correctional Centre

The floor plan

[6] Central North Correctional Centre ("CNCC") is a prison that houses inmates awaiting trial, as well as those serving sentences of up to two years less one day. The prison consists of six living units. Each unit houses six trapezoidal ranges. The ranges are arranged in a circular fashion, like pieces of a pie, around a central rotunda.

[7] A common area or "day room", which contains tables and stools fixed to the floor, occupies the central part of each range.

[8] Two levels of cells are located along the outside walls of each range. Food is passed through two "feeding hatches" in the wall separating the range from the rotunda.

[9] From a control module in the centre of the rotunda, guards have a clear line of sight into the range, but not into the interior of the cells or the shower area.

The cell doors

[10] The cell doors are unlocked or "cracked" at 9:00 a.m. and remain unlocked for one hour. The doors can be opened by cell occupants during this time but relock if they are pushed closed. To enter or exit a cell, without being locked in or out, the door must be left to rest gingerly on its pins or an object inserted in the space between the door and the door frame.

The range

[11] In early May 2004, Tu and Quansah were both inmates in Unit 1-A. Tu had been there about three weeks, Quansah for about half that time. Tu was skilled in martial arts and, according to some inmates, "the toughest guy on the range".

[12] Tu was a late sleeper. He often remained asleep in his cell after the doors had been "cracked" at 9:00 a.m.

The social circles

[13] Allegiances in Unit 1-A divided along racial lines. Tu was aligned with white and Asian inmates, including the Crown witnesses Dean Ireland, Edward Clare and Michael Ayres. Quansah was associated with a group of black and Arab prisoners including David Clarke, Nana

Prempeh and Jawad Mir, none of whom testified at trial. [page84]

The inmate code

[14] An informal inmate "code" regulates life among the prisoners. The code requires any inmate challenged to a fight by another inmate to fight. An inmate who fails to respond to the challenge may be beaten, stabbed or kicked off the range, as determined by senior inmates. An inmate who at first fails to respond to a challenge to fight may restore his reputation by "showing up" subsequently through arrangements made with senior inmates.

[15] The areas best suited for fights between inmates are those not visible to the guards from the control module: the shower area and inside individual cells. The best time for cell fights is in the morning after the cell doors have been "cracked".

B. Events leading up to the stabbing

The game of "Risk"

[16] Inmates at CNCC played the board game "Risk" at tables in the day room.

[17] On May 4, 2004, inmate Lavallee, Tu and some other inmates were about to begin a game of "Risk". Quansah was in the shower. Lavallee yelled at Quansah to hurry up. Quansah responded angrily. Quansah left the shower area, walked over to the table where the "Risk" game was underway and assaulted Lavallee, although Lavallee claimed Quansah did not hit him.

The challenge

[18] Tu stood up by the table. He challenged Quansah to a fight. Tu stripped down to his shorts and walked over to the shower area where he practised a few kicks. He called out to Quansah again. Quansah said he was scared or scared to fight Tu. Another inmate yelled "six up", indicating that guards were watching.

[19] No fight occurred.

The aftermath

[20] Accounts differ about what happened between Tu and Quansah after Tu challenged Quansah to a fight.

[21] According to Quansah, Tu emerged from the shower with three other inmates, including Quansah's cellmate, Ayres. They blocked Quansah's view of the television. Tu accused Quansah of causing trouble on the range. A guard came to the window and Tu retreated. Soon after, another guard took Quansah to the rotunda and asked if there was a problem. When Quansah [page85] returned, Tu accused Quansah of "ratting" him out and then walked away.

[22] Other inmates talked to Tu later and testified that Tu considered the altercation over and was prepared to let things die down.

[23] Quansah was concerned about the consequences of having backed down when Tu called him out to fight. He would be labelled a "punk" and his position with other inmates would be compromised. Other inmates noticed that Quansah was uncharacteristically quiet and stared

at Tu. There was some evidence that Quansah wrote out a "kite" -- a written message to inmates on another range -- and passed it through the door to the adjacent range.

The evening meeting

[24] That same evening, some senior inmates on the range met with Quansah in the common area. They told Quansah he had to fight with Tu or he would be kicked off the range. Quansah was concerned he would be "rushed" by Tu's friends but was assured by one of the inmates that he would be backed.

[25] Quansah agreed to fight Tu one-on-one.

After lock-up

[26] When the cells were locked for the evening, the guards conducted a search for weapons. Quansah was strip searched. No weapons were found.

[27] Ayres was Quansah's cellmate. According to Ayres, Quansah remained angry about the argument with Tu. Quansah said "that guy doesn't know me. I'm not a punk. This isn't over." Quansah testified that Ayres, a friend of Tu, threatened him. Quansah was afraid that Ayres might harm him during the night. Quansah did not fall asleep until Ayres left the cell early in the morning to go to court.

C. The stabbing

[28] It was uncontested at trial that Quansah stabbed Tu to death in Tu's cell after the doors were "cracked" at 9:00 a.m. on May 5, 2004. Quansah and Tu were the only persons in the cell at the time of the stabbing. Nobody saw Quansah with a knife when he entered Tu's cell that morning.

[29] The accounts varied about what happened shortly before Quansah entered and after he left Tu's cell. [page86]

The account of Edward Clare

[30] Clare was an ally of Tu. After the cell doors had been "cracked", he saw Clarke (who did not testify), a member of Quansah's group, open and shut the door to Billy Tran's cell, locking Tran inside. Locked in the cell, Tran, a friend of Tu, could not help in any altercation with Quansah.

[31] Quansah walked by another inmate, Brooks, and said it "better be one-on-one". Quansah walked into cell number nine, Tu's cell, as Clarke opened the cell door and held it open. Clare heard some noise from the cell. The cell door opened. Clarke almost fell down. The door partially closed and then opened again. Clare could see blood. Clarke put a bottle in the door to prevent it from closing all the way. Somebody yelled from inside the cell: "you thought you had me last night".

[32] According to Clare, when Quansah left the cell, his shirt was pulled down at the front. Quansah said "holy fuck" as he left Tu's cell.

The account of Dean Ireland

[33] Ireland, another member of Tu's group, saw Quansah and Clarke walk up the stairs to the upper level of cells after the doors were "cracked" at 9:00 a.m. on May 5. Quansah gave Mir, an ally, a "Muslim hug", then entered Tu's cell and closed the door so that it would not lock behind him.

[34] Ireland heard a loud banging from inside the cell. He saw Quansah's arm come out of the door and then quickly disappear from view. He did not see a knife. Clarke inserted a shampoo bottle between the door and the doorframe to prevent the door from locking. Seconds later, Quansah walked out of the cell, his T-shirt stretched at the shoulder. Quansah held a bloody knife in his right hand.

The Robert Fallis version

[35] Fallis saw Quansah walk up the stairs to the second level of cells, hug Mir, and then walk down the corridor with Clarke and Prempeh towards Tu's cell. Quansah walked into the cell. Mir looked over the railing towards the rotunda area. Prempeh looked in the window of Tu's cell. Clarke held the door against his foot to prevent it from opening or closing.

[36] About 30 seconds later, Fallis heard a noise from inside Tu's cell. The cell door opened. Quansah's leg came out the door and then returned inside the cell. The door partially closed. Soon afterwards, Quansah walked out of the cell. He stared [page87] straight ahead. His left hand was cupped, his shirt ripped on the left side.

Richard Quansah's account

[37] Quansah gave evidence at trial. He testified that when the cell doors were "cracked" on May 5, he walked from his cell to Tu's cell, intending to have a consensual fight with Tu without weapons. En route, he learned from Clarke that something had been done to ensure that Tu's ally, Tran, would not get involved. When he arrived at the second level of the range, Quansah met Mir. They hugged "in the Muslim style". Together with Clarke, Quansah walked towards Tu's cell. The door to the cell rested on its latch. A shoe kept the door open.

[38] Through the window in the cell door, Quansah saw Tu seated, facing the bed. Quansah entered. Tu jumped up. The fight began. Tu tried to knee and kick Quansah in the crotch. They exchanged punches. Tu doubled over from a punch and then rammed Quansah backwards into the door. Tu broke free, turned and grabbed something from the desk. He made a throwing motion. Quansah heard "a clatter" and then saw a knife on the ground.

[39] The men exchanged looks. Both lunged for the knife. Tu bent over to grab the knife. Quansah pushed Tu back and then grabbed the knife with his right hand. Tu tried to pry the knife out of Quansah's hand. Quansah told Tu to stop. Quansah began to panic. He pushed Tu away. Tu jumped back. Quansah stabbed Tu as Tu continued to advance towards him. Tu draped himself over Quansah. Quansah then stabbed Tu in the back. Tu moaned. Quansah ran out of the cell.

D. After the stabbing

The denouement

[40] After leaving Tu's cell, Quansah walked to the cell occupied by Mir and Ireland. There, he washed and disposed of the knife and changed his shirt. The knife was never recovered. Some strips of cloth were found in the plumbing in the cell occupied by Mir and Ireland.

[41] When a lockdown was announced, Quansah returned to his cell. There he was strip searched. He had a cut on one of his hands, but very little blood on his clothing and no blood on his shoes.

The knife

[42] Ireland claimed that he had seen a knife in Quansah's right hand when Quansah left Tu's cell. Ireland described it as a pocket knife with a three inch blade and a string attached to it. [page88]Ireland's sketch of the knife was filed as an exhibit at trial. No one else gave evidence about seeing a knife in Quansah's hand before he entered or after he left Tu's cell.

[43] About three or four days before the argument over the board game, Ireland said he had seen Tu with a knife. When Ireland asked Tu about the knife, Tu said: "you'll never know when you need it".

The cause of death

[44] When paramedics arrived, Tu was conscious. He would not say what had happened, but did tell the first responders that he had returned to his cell after breakfast. Tu suffered six stab wounds, divided equally between his chest and his back, as well as a defensive wound to his left hand.

[45] Tu died from stab wounds to his chest.

The Positions of the Parties at Trial

[46] It was the position of the trial Crown (not Mr. Finley) that Quansah, humiliated by Tu during the argument about the game of "Risk", got together with Clarke, Prempeh and Mir after the incident and plotted Tu's murder. The murder was to take place the next morning in Tu's cell. To ensure that Tu was alone, Clarke confined Tu's ally, Tran, to his cell. Quansah entered Tu's cell as he slept and stabbed Tu to death with a knife he had taken there for that very purpose.

[47] At trial, counsel for Quansah (not Mr. Snell, who is counsel on appeal) contended that Quansah had been humiliated by Tu in their altercation over the game of "Risk". To restore his reputation sullied by his failure to fight Tu when challenged, and to ensure his continued safety in the institution, Quansah went to Tu's cell early the next morning. Quansah's purpose was to engage in a consensual one-on-one fight. The fight began as a fist fight. As the fight progressed, Tu produced a knife. The men struggled over the knife. Quansah gained control of the knife and stabbed Tu in self-defence.

The Grounds of Appeal

[48] The appellant advances two related grounds of appeal.

[49] First, the appellant says the trial judge erred in holding that trial counsel had breached the rule in *Browne v. Dunn* by failing

- (i) to cross-examine Clare, Fallis and Ireland about a shoe propping open the door to Tu's cell before the appellant arrived on the morning of the stabbing; [page89]
- (ii) to cross-examine Fallis on Quansah's alleged remark, "your friend needs help", as Quansah left Tu's cell after the stabbing; and
- (iii) to cross-examine Ayres on whether he threatened Quansah in their cell the night before the stabbing.

[50] Second, the appellant contends that the trial judge erred in instructing the jury.¹ The appellant alleges the trial judge erred in telling the jury they could consider, as a factor in assessing the weight to be assigned to Quansah's evidence, the failure to cross-examine these witnesses and thus afford them an opportunity to respond to the contradictory version offered by the appellant. Quansah's version was the sole support for self-defence. The appellant also alleges the trial judge should have reminded the jury that counsel's failure to cross-examine could have been inadvertent.

Ground #1: Breach of the rule in Browne v. Dunn

A. Three specific incidents

[51] The first ground of appeal alleges that the trial judge erred in finding that trial counsel for the appellant breached the rule in *Browne v. Dunn* by failing to put, in cross-examination of four inmate witnesses, three specific incidents about which the appellant testified in advancing self-defence.

[52] One incident involved a threat allegedly made by the appellant's cellmate, Ayres, several hours before Tu was killed. The second related to the state of Tu's cell door when the appellant entered shortly after 9:00 a.m. on May 5. The third had to do with a remark the appellant allegedly made to Fallis in the presence of two other inmates as he left Tu's cell and proceeded to Mir's cell to dispose of the knife and some clothing.

[53] A brief reference to the evidence of the appellant and the inmate witnesses about each incident provides a basis upon which to assess the validity of this claim.

The Ayres threat

[54] The appellant testified that he and his cellmate, Ayres, did not get along. The appellant wanted Ayres moved out of their cell. Ayres was a friend of Tu and had threatened the appellant after the incident with the game of "Risk". The appellant was [page90]concerned that Ayres might "jump" him. After lockdown, Ayres talked about the incident and said that bad things were going to happen. The appellant said he slept little that night in fear that Ayres would attack him.

[55] Ayres gave evidence that, in their discussion about the incident with the board game, the appellant, in describing himself, told Ayres that he was not a "punk". It seemed the appellant did not consider the incident with Tu to be over.

[56] Trial counsel for the appellant never suggested to Ayres in cross-examination that he had threatened the appellant that bad things would happen to him or said anything which might lead the appellant to believe that anything of that nature would occur.

The shoe in the door

[57] The appellant testified that when he arrived at the door to Tu's cell shortly after 9:00 a.m. on May 5, he noticed a shoe already in place to prevent the door from locking. Clarke was with the appellant to ensure the fight was one-on-one. The appellant saw Tu, sitting down in his cell, apparently "collecting his thoughts". Clarke remained outside the cell when the appellant entered and began his fight with Tu.

[58] Clare saw Clarke open the door to Tu's cell. The appellant entered. Clarke held the door to prevent it from closing. The door opened twice during the altercation inside. Each time the door opened, Clarke pushed it back. Clarke also put a bottle on the floor to prevent the door from locking.

[59] Clare was not cross-examined about the door to Tu's cell. Nor was he asked about Clarke's activities there. No suggestion was put to Clare that a shoe was already in the doorway when Clarke and the appellant approached Tu's cell. Clare confirmed that Tu was usually a late sleeper. Clare had no idea what Tu was doing in his cell as the appellant and Clarke approached or what happened inside the cell after the appellant entered.

[60] Fallis saw Clarke open the door for the appellant and hold it open using his hand and foot after the appellant entered Tu's cell.

[61] Fallis was not cross-examined about the condition of the door to Tu's cell when the appellant and Clarke approached. Counsel did not put any suggestion to Fallis that the door was held open by a shoe. Fallis was not cross-examined about what Clarke did at the door after the appellant had entered.

[62] Ireland, a very reluctant and uncooperative witness for the Crown, gave evidence that the appellant entered Tu's cell [page91]and rested the door so that it would not lock. Later, Clarke put a shampoo bottle on the floor to prevent the door from locking.

[63] In cross-examination, Ireland confirmed that Clarke held or wedged something in Tu's cell door to ensure that it did not lock. It was never suggested to Ireland that the cell door was held open by a shoe already in place when the appellant and Clarke arrived.

[64] Clarke did not testify.

The post-offence remark

[65] In his testimony, the appellant said that, as he left Tu's cell after the stabbing and went to Mir's cell, he passed inmates Brooks and Fallis. He said to Fallis: "your friend needs some help".

[66] Fallis gave no evidence about any remark made by the appellant after he left Tu's cell. It was not suggested to Fallis in cross-examination that the appellant had made such a remark as he headed toward Mir's cell.

B. The positions of the parties

[67] Mr. Snell, counsel on appeal, says trial counsel did not violate the rule in *Browne v. Dunn* in connection with any of the issues found by the trial judge.

[68] So far as the alleged threat by Ayres is concerned, Mr. Snell contends that the rule in *Browne v. Dunn* was neither engaged nor violated. The appellant took no issue with Ayres' claim that the appellant did not sleep the night before he killed Tu. The appellant offered a contrary explanation to the inference of planning that emerged from Ayres' evidence -- fear of reprisal due to Ayres' threats. In the overall context of the case, the point was of no great significance. Failure to cross-examine on it did not offend the rule in *Browne v. Dunn* and worked no great mischief.

[69] In connection with the failure to cross-examine Fallis, Ireland and Clare about the shoe in the doorway to Tu's cell when the appellant and Clarke arrived, Mr. Snell says this evidence held no impeachment value and thus did not engage the rule in *Browne v. Dunn*. The important point was the consensual nature of the fight, not what held Tu's door open permitting the appellant to enter. Ireland and Fallis confirmed the consensual nature of the fight and nothing the appellant said later contradicted this core feature of their testimony. Clare was, and demonstrated himself to be, a highly suspect witness prone to exaggeration and unworthy of belief. Trial counsel was under no obligation to slog [page92]through every detail of the appellant's version to forestall a possible *Browne v. Dunn* objection.

[70] Nor was the rule in *Browne v. Dunn* offended by the failure to cross-examine Fallis on the "your friend needs some help" comment as the appellant walked away from Tu's cell after the stabbing. Fallis gave no evidence-in-chief about whether the appellant said, or did not say, anything to him at that time. It follows that the appellant's evidence claiming he made such a comment did not, indeed could not, impeach Fallis on his account of what the appellant said after the killing. Further, this evidence was insignificant in the context of the case as a whole.

[71] For the respondent, Mr. Finley contends that each admitted failure of cross-examination implicated and offended the rule in *Browne v. Dunn*.

[72] The failure to cross-examine Ayres about the threats he made the previous evening offended the rule in *Browne v. Dunn* though not to the same extent as the other breaches. Ayres' evidence-in-chief, buttressed to some extent by other evidence, supported the Crown's position that the appellant was angry and ruminating over his impending attack on Tu. This supported the Crown's claim that Tu's murder was planned and deliberate. The appellant's claim that Ayres threatened him undermined Ayres' account and weakened the force of the evidence about the appellant's state of mind shortly before the killing. This was important and should have been put to Ayres in cross-examination.

[73] Mr. Finley says the failure of the appellant's trial counsel to cross-examine Clare, Ireland and Fallis about the shoe in the doorway to Tu's cell was a serious breach of the rule. None of Fallis, Ireland or Clare said they saw anything in Tu's doorway holding the door ajar as Clarke and the appellant approached. Nothing was placed in the doorway or held the door open until *after* the appellant had entered. On the basis of this evidence, the jury could have concluded there was no dispute that Tu's door was open but unlocked before the appellant's arrival. A shoe in the door further suggested the Crown's witnesses were unreliable. In addition, the shoe in the door suggested Tu was up, not sleeping in as he usually did, and was waiting for the appellant. The inmate witnesses should have been confronted with this version of events.

[74] Mr. Finley also characterizes the failure to cross-examine Fallis on the "your friend needs some help" remark as a serious breach of the rule. From Fallis' evidence-in-chief, the jury could reasonably conclude the appellant had said nothing, one way or the other, as he passed by Fallis en route from Tu's cell to [page93] Mir's cell, with a knife in his hand. The appellant's remark tended to show a state of mind inconsistent with a planned and deliberate murder and consistent with a consensual fight gone wrong. The remark could also be summoned to neutralize some post-offence conduct such as disposing of the knife and damaged clothing.

C. The governing principles

[75] In *Browne v. Dunn*, Lord Herschell L.C., explained that if a party intended to impeach a witness called by an opposite party, the party who seeks to impeach must give the witness an opportunity, while the witness is in the witness box, to provide any explanation the witness may have for the contradictory evidence: *Browne v. Dunn*, pp. 70-71; *R. v. Henderson* (1999), 44 O.R. (3d) 628, [1999] O.J. No. 1216, 134 C.C.C. (3d) 131 (C.A.), at p. 141 C.C.C.; and *R. v. McNeill* (2000), 48 O.R. (3d) 212, [2000] O.J. No. 1357, 144 C.C.C. (3d) 551 (C.A.), at para. 44.

[76] The rule in *Browne v. Dunn*, as it has come to be known, reflects a confrontation principle in the context of cross-examination of a witness for a party opposed in interest on disputed factual issues. In some jurisdictions, for example, in Australia, practitioners describe it as a "puttage" rule because it requires a cross-examiner to "put" to the opposing witness in cross-examination the substance of contradictory evidence to be adduced through the cross-examiner's own witness or witnesses.

[77] The rule is rooted in the following considerations of fairness:

- (i) Fairness to the witness whose credibility is attacked:
The witness is alerted that the cross-examiner intends to impeach his or her evidence and given a chance to explain why the contradictory evidence, or any inferences to be drawn from it, should not be accepted: *R. v. Dexter*, [2013] O.J. No. 5686, 2013 ONCA 744, 313 O.A.C. 226, at para. 17; *Browne v. Dunn*, at pp. 70-71;
- (ii) Fairness to the party whose witness is impeached:
The party calling the witness has notice of the precise aspects of that witness's testimony that are being contested so that the party can decide whether or what confirmatory evidence to call; and
- (iii) Fairness to the trier of fact:
Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment [page94] to be unfounded and thus compromise the accuracy of the verdict.

[78] In addition to considerations of fairness, to afford the witness the opportunity to respond during cross-examination ensures the orderly presentation of evidence, avoids scheduling problems associated with re-attendance and lessens the risk that the trier of fact, especially a jury, may assign greater emphasis to evidence adduced later in trial proceedings than is or may be warranted.

[79] Failure to cross-examine a witness at all or on a specific issue tends to support an inference that the opposing party accepts the witness' evidence in its entirety or at least on the specific point. Such implied acceptance disentitles the opposing party to challenge it later or, in a closing speech, to invite the jury to disbelieve it: *R. v. Hart* (1932), 23 Cr. App. R. 202 (Ct. Crim. App.), at pp. 206-207; *R. v. Fenlon* (1980), 71 Cr. App. R. 307 (C.A.), at pp. 313-14.

[80] As a rule of fairness, the rule in *Browne v. Dunn* is not a fixed rule. The extent of its application lies within the sound discretion of the trial judge and depends on the circumstances of each case: *R. v. Paris*, [2000] O.J. No. 4687, 150 C.C.C. (3d) 162 (C.A.), at paras. 21-22, leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 124; *R. v. Giroux*, [2006] O.J. No. 1375, 207 C.C.C. (3d) 512 (C.A.), at para. 42, leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 211.

[81] Compliance with the rule in *Browne v. Dunn* does not require that every scrap of evidence on which a party desires to contradict the witness for the opposite party be put to that witness in cross-examination. The cross-examination should confront the witness with matters of substance on which the party seeks to impeach the witness' credibility and on which the witness has not had an opportunity of giving an explanation because there has been no suggestion whatever that the witness' story is not accepted: *Giroux*, at para. 46; *McNeill*, at para. 45. It is only the nature of the proposed contradictory evidence and its significant aspects that need to be put to the witness: *Dexter*, at para. 18; *R. v. Verney*, [1993] O.J. No. 2632, 87 C.C.C. (3d) 363 (C.A.), at pp. 375-76 C.C.C.; *Paris*, at para. 22; and *Browne v. Dunn*, at pp. 70-71.

[82] In some cases, it may be apparent from the tenor of counsel's cross-examination of a witness that the cross-examining party does not accept the witness' version of events. Where the confrontation is general, known to the witness and the witness' view on the contradictory matter is apparent, there is no need [page95] for confrontation and no unfairness to the witness in any failure to do so.

[83] It is worthy of reminder, however, that the requirement of cross-examination does not extend to matters beyond the observation and knowledge of the witness or to subjects upon which the witness cannot give admissible evidence.

[84] The potential relevance to the credibility of an accused's testimony of the failure to cross-examine a witness for the prosecution on subjects of substance on which the accused later contradicts the witness' testimony depends on several factors. The factors include but are not limited to

- (i) the nature of the subjects on which the witness was not cross-examined;
- (ii) the overall tenor of the cross-examination; and
- (iii) the overall conduct of the defence.

See *Paris*, at para. 23.

[85] Where the subjects not touched in cross-examination but later contradicted are of little significance in the conduct of the case and the resolution of critical issues of fact, the failure to cross-examine is likely to be of little significance to an accused's credibility. On the other hand, where a central feature of a witness' testimony is left untouched by cross-examination, or even

implicitly accepted in cross-examination, the absence of cross-examination is likely to have a more telling effect on an accused's credibility: *Paris*, at para. 23.

[86] The confrontation principle is not violated where it is clear, in all the circumstances, that the cross-examiner intends to impeach the witness' story: *Browne v. Dunn*, at p. 71. Counsel, who has cross-examined the witness on the central features in dispute, need not descend into the muck of *minutiae* to demonstrate compliance with the rule: *Verney*, at p. 376 C.C.C.

D. The principles applied

[87] I would not give effect to this ground of appeal.

[88] Two preliminary and oft-made observations serve as my point of departure for the discussion that follows.

[89] First, it is too easily overlooked that the rule in *Browne v. Dunn* is not some ossified, inflexible rule of universal and unremitting application that condemns a cross-examiner who defaults to an evidentiary abyss. The rule is grounded in fairness, its application confined to matters of substance and very much dependent on the circumstances of the case being tried: [page96] *Verney*, at p. 376 C.C.C.; *R. v. Sadikov*, [2014] O.J. No. 376, 2014 ONCA 72, 305 C.C.C. (3d) 421, at para. 49.

[90] Second, and as a consequence of the fairness origins of the rule, a trial judge is best suited to take the temperature of a trial proceeding and to assess whether any unfairness has been visited on a party because of the failure to cross-examine. Consequently, the trial judge's decision about whether the rule has been offended and unfairness has resulted is entitled to considerable deference on appeal: *Giroux*, at para. 49.

The shoe in the door

[91] The state of Tu's cell door and Tu's position in the cell as the appellant approached and entered were of some importance to both the prosecution and defence at trial. It was not controversial that Tu slept late, at least as a general rule. Nor was it disputed that the appellant approached Tu's cell after the doors had been cracked open at 9:00 a.m. on May 5.

[92] Fallis and Ireland gave evidence for the Crown about the appellant's approach to the door with Clarke. Clarke stayed outside the cell to ensure that the door did not close locking the appellant inside and that no one else entered during the fight. Neither reported seeing the door propped open by a shoe.

[93] The appellant's account of the shoe in place when he approached the door and entered Tu's cell does not directly contradict a specific denial of the presence of a shoe by Fallis and Ireland. But the appellant's evidence about the shoe was central to his claim that Tu, contrary to his usual habit of sleeping late, was awake and awaiting the appellant's arrival. That Tu had taken the time to open the door and to secure it against accidental or premature closure could also render it more probable that he took other precautions to protect himself against a surprise attack, such as having a knife accessible to him in his cell. These arrangements tended to support the appellant's claim of self-defence and neuter the Crown's theory that the appellant took the knife with him when he entered Tu's cell, caught Tu off guard and then stabbed him to death.

[94] None of Clare, Ireland or Fallis testified about seeing anything in the doorway to Tu's cell holding the door ajar as the appellant and Clarke approached and the appellant entered. According to both Clare and Ireland, it was only *after* the appellant had entered Tu's cell that his backup, Clarke, put a shampoo bottle in the doorway to ensure the door did not lock the appellant inside the cell with Tu. Fallis testified that Clarke's foot in the doorway was what prevented locking. [page97]

[95] The appellant's version challenged the reliability of the evidence of Clare, Ireland and Fallis, and the accuracy of their observations. The placement of the shoe in the door in advance of the appellant's entry was a matter of significance to the facts of the case and not some inconsequential detail. It was a subject on which both Fallis and Ireland should have been cross-examined. The failure to do so was of sufficient significance to permit the trial judge to find that counsel had not complied with *Browne v. Dunn*. The failure to cross-examine Clare was of less significance since it was clear to all parties that his evidence was of "so incredible and romancing a character" as to be unworthy of credit on any issue of significance: *Browne v. Dunn*, at p. 79.

The Ayres threat

[96] Ayres and the appellant were cellmates, but not friends. Ayres was a friend of Tu. Both testified that the appellant was awake during the night immediately preceding the killing. Ayres said the appellant was awake, stewing in anger over the deceased. The appellant said he stayed awake because he was concerned Ayres would attack him during the night. Ayres was not cross-examined about any threats made to the appellant or about anything he may have said to the appellant about future consequences of the failure to respond to Tu's challenge.

[97] The appellant's state of mind within hours of killing Tu was an important issue at trial. The appellant's account of his interaction with Ayres created an impression that the appellant was fearful of an attack from him, not that he was stewing over what Tu had done and was thus more likely to have been the aggressor in the fight the following morning.

The post-offence remark

[98] The appellant walked by Fallis and Ireland after leaving Tu's cell. In their testimony, neither Fallis nor Ireland mentioned a comment by the appellant as he headed towards Mir's cell with the knife in his hand. At the very least, it was implicit in the account provided by Fallis and Ireland that the appellant had said nothing as he passed them by.

[99] In his testimony, the appellant claimed that he said to Fallis "your friend needs some help" as he left Tu's cell and walked toward Mir's cell. Fallis then went to Tu's cell to check on him.

[100] The appellant's testimony contradicted Fallis' evidence. Fallis' version reflects a lack of concern on the appellant's part for Tu, which tends to rebut the appellant's later claim of a killing in lawful self-defence. The appellant's version, and expressed [page98]concern about Tu's condition, provides some support for a claim that Tu died as a result of an unfortunate consequence of a consensual fight in which the appellant acted lawfully, rather than as a result of a previously formulated plan to kill.

E. Conclusion

[101] Whether the rule in *Browne v. Dunn* is offended by failure to cross-examine on a specific matter in a particular case cannot be determined in the abstract. Each case is different. The rule is flexible, not rigid. It is rooted in fairness. Reasonable people may differ about on which side of the line a failure to cross-examine on a particular point falls. A trial judge should be accorded considerable deference on a decision about its application. A trial judge has a reserved seat at trial. We have a printed record.

[102] Another trial judge may not have considered what occurred here as offensive to the flexible rule in *Browne v. Dunn*. But that is beside the point. This trial judge did. I am unable to conclude that he abused his discretion in reaching that conclusion.

Ground #2: The remedy for the breach

[103] The second ground of appeal has to do with the remedy applied by the trial judge for the breach of the rule in *Browne v. Dunn*.

[104] It is helpful to begin with a brief outline of the circumstances in which the breach of the rule was first raised at trial.

A. The complaint

[105] The trial Crown made no complaint about any breach of the rule in *Browne v. Dunn* when the appellant testified at trial.

[106] In a pre-charge conference held on July 5, 2006, prior to the closing addresses of counsel, the trial Crown raised the issue about breach of the rule. In a subsequent pre-charge conference held on July 7, 2006, he sought an instruction in the jury charge that the jury could take the failure of defence counsel to cross-examine Fallis, Ireland, Ayres and Clare on contradictory evidence given by the appellant into account in assessing the weight to assign to the appellant's (and the witnesses') testimony.

[107] Trial counsel for the appellant took issue with Crown counsel's request. He submitted that Crown counsel was required first to seek leave to recall the witnesses and to obtain from them, under oath and subject to cross-examination, their response to the contradictory evidence. A failure to seek to recall the witnesses, trial counsel submitted, disentitled the Crown to the instruction it sought. [page99]

[108] The trial Crown disputed the necessity for such a request as a condition precedent to the requested jury instructions. The Crown pointed out that Ayres was in custody and Fallis was in custody outside the province, rendering it impractical to recall them.

B. The ruling of the trial judge

[109] The trial judge was satisfied that Crown counsel had established breaches of the rule in *Browne v. Dunn*. He found that the breaches warranted a jury instruction similar to what was given by the trial judge in *Giroux*, at para. 43.

[110] The trial judge said nothing about the obligation of the Crown to first seek to recall the witnesses or the relevance of Crown counsel's failure to do so on the availability or content of

the jury instruction Crown counsel sought.

C. *The position of the parties*

[111] For the appellant, Mr. Snell says the proper remedy for breach of the rule in *Browne v. Dunn* in this case was to recall the witnesses to obtain their evidence about the contradictory version offered by the appellant. The trial Crown offered no explanation about the whereabouts of Clare and Ireland, thus no reason why they could not be recalled. Ayres and Fallis were both in custody. Their attendance could be easily secured by a judge's order. The authorities emphasize witness recall as the first option. The trial judge should have required the Crown to choose whether to recall the witness.

[112] Mr. Snell submits that where the Crown fails to take up the recall option or, as here, fails to request it, the Crown is *not* entitled to a *Browne v. Dunn* instruction. In either of these circumstances, only the traditional "you may believe some, all or none of what a witness says" instruction need be given and it is wrong to include the *Browne v. Dunn* instruction.

[113] In the alternative, Mr. Snell says the instruction here was seriously flawed because it failed to remind jurors that counsel's failure to cross-examine may have been due to inadvertence, and thus should not be a factor the jurors could consider in assessing the appellant's credibility or the reliability of his evidence.

[114] For the respondent, Mr. Finley replies with a reminder that once a breach of the rule has occurred, a trial judge has broad discretion to choose a remedy that best assures justice. Sometimes, the proper choice is to recall a witness. But not always. On other occasions, as here, justice is best served by a jury instruction. [page100]

[115] Mr. Finley says the instruction remedy chosen by the experienced trial judge here demonstrates, by necessary implication, that the trial judge did not view the recall of witnesses as a viable solution, even though he made no specific mention of that alternative in his reasons. The choice of remedy is discretionary and dependent on a variety of factors, which in this case included completing the case expeditiously in advance of the long-standing commitments of jurors made on the basis of an estimate trial time long surpassed.

[116] Mr. Finley acknowledges the trial Crown should have raised the *Browne v. Dunn* issue before the defence had closed its case when witness recall was a viable alternative. That said, the failure of trial Crown to ask for an order to permit recall of the witnesses does not bar the remedy applied here -- the jury instruction that left failure to cross-examine as a factor, one of many, in assessing the appellant's credibility as a witness. The omission of a reference to inadvertence was not an error, particularly in light of the trial judge's conclusion that the failure was a deliberate and a tactical choice by trial counsel.

D. *The governing principles*

[117] It should scarcely surprise that breaches of a rule grounded in fairness do not attract a single or exclusive remedy. The remedy is a function of several factors including, but not only,

-- the seriousness of the breach;

-- the context of the breach;

- the timing of the objection;
- the position of the offending party;
- any request to permit recall of a witness;
- the availability of the impugned witness for recall; and

- the adequacy of an instruction to explain the relevance of failure to cross-examine.
-

See *Dexter*, at para. 20; *R. v. Lyttle*, [2004] 1 S.C.R. 193, [2004] S.C.J. No. 8, 2004 SCC 5, at para. 65.

[118] In the absence of a fixed relation between breach and remedy, appellate courts accord substantial deference to the discretion exercised by a trial judge in deciding what remedy is appropriate for breach of the rule: *Dexter*, at para. 22; *Giroux*, at para. 49; and *R. v. Blom* (2002), 61 O.R. (3d) 51, [2002] O.J. No. 3199 (C.A.), at para. 20. [page101]

[119] In the menu of remedies available to a trial judge who has determined that the rule in *Browne v. Dunn* has been breached are recall of the witness and an instruction to the jury about the relevance of the failure to cross-examine as a factor for them to consider in assessing the credibility of an accused as a witness and the reliability of his or her evidence: *Dexter*, at para. 21; *McNeill*, at paras. 46-47 and 49.

[120] In many cases, the first remedy a trial judge might consider is the availability of the witness for recall. In cases in which the witness is available without undue disruption of trial continuity and disjoinder of the narrative, the aggrieved party has the option of recalling the witness or declining to do so. Failure to take advantage of the opportunity to recall a witness may mean that the aggrieved party may not get the benefit of a *Browne v. Dunn* instruction in the charge to the jury: *McNeill*, at para. 48. But the rule is not inflexible, nor is the failure to seek or to recall an available witness the death knell for a specific jury instruction: *Giroux*, at para. 48; *McNeill*, at para. 50. Said another way, recall is not always a condition precedent to inclusion of a *Browne v. Dunn* instruction: *Giroux*, at para. 48.

[121] A trial judge who decides to give a specific instruction to the jury about the failure to comply with the rule in *Browne v. Dunn* as a factor to consider in the jury's credibility assessment need not pronounce a specific word formula to achieve that purpose. The instructions should not be characterized as a "special instruction", but should make it clear that the failure has relevance for the credibility of the witness who was not confronted with the contradictory evidence, as well as the credibility of the witness who gave the contradictory evidence. The instruction need not elaborate on the obligations of counsel: *Paris*, at paras. 27-29; *Dexter*, at para. 43.

[122] A final point about the timing of a *Browne v. Dunn* objection is appropriate.

[123] The trial Crown did not raise his *Browne v. Dunn* complaint until the pre-charge conference. The basis for the complaint arose when the appellant testified. The trial Crown said nothing then and nothing during the remainder of the defence case. After the defence had closed its case, the trial Crown did not ask the trial judge to recall the affected witnesses so that contradictory evidence could be put to them and their response heard by the jury.

[124] Timely objection is consistent with the duty of Crown counsel under *R. v. Boucher*, [1955] S.C.R. 16, [1954] S.C.J. No. 54, at pp. 23-24 S.C.R.; *Dexter*, at para. 37. Lying in the weeds to seize upon the failure to cross-examine as a basis for [page102] instruction that counsel's default tells against the credibility of an accused is inimical to the Crown's duty of fairness. At the very least, Crown counsel should provide some explanation for the lack of timely objection: *Giroux*, at para. 49; *Dexter*, at para. 37. No special rule applies to inmates or otherwise problematic witnesses. Absence of a timely objection to an alleged breach of the rule is a factor for the trial judge to consider in determining the nature of the remedy, if any, best suited to respond to the breach. On appeal, the absence of a timely objection is also a factor to be taken into account in determining whether the lateness of the objection, coupled with the remedy applied, caused sufficient unfairness that a miscarriage of justice resulted.

E. The principles applied

[125] Several reasons persuade me not to give effect to this ground of appeal.

[126] First, the trial judge's choice of remedy, a jury instruction about the impact of the breach as a factor in the assessment of the appellant's credibility, is entitled to considerable deference: *Dexter*, at para. 22; *Giroux*, at para. 49; and *Blom*, at para. 20. The remedy applied by the trial judge for the breach was one of several available to him under the existing jurisprudence in this province and elsewhere. The trial judge made no error in principle.

[127] Second, the trial judge had the unenviable task of fashioning a remedy that met the ends of justice in the waning moments of a trial that had already extended well beyond its anticipated completion date. He had to take into account commitments jurors had made on the basis of the original trial estimate. The alternative of witness recall would have disrupted trial continuity and pushed the addresses of counsel and the charge further into the future, exacerbating the problems arising from the jurors' commitments. In the real world of trial management, perfect solutions are unattainable. The remedy chosen here was reasonable, took into account the relevant circumstances and met the ends of justice.

[128] Third, the substance of the instruction was consistent with the governing authorities: *Dexter*, at para. 43. The trial judge told the jury that the failure to cross-examine the inmate witnesses on the contradictory aspects of the appellant's evidence was a *factor* that they were entitled, but not required, to consider in their determination of the weight to assign to the appellant's testimony. Permitted, in other words, but not required. The instruction did not expressly say or suggest by necessary implication that the failure to cross-examine required [page103] the jury to draw an adverse inference against the appellant's credibility or the reliability of his testimony.

[129] Fourth, the trial judge characterized his instruction as a "comment" on the testimony of the appellant, having earlier apprised the jury that they were not bound by his comments on issues of fact. He also made it clear that the tactical decisions of counsel were not to be visited

on the appellant. His failure to go further, for example, to refer to the obligations of counsel in cross-examination or to make specific mention of "negligence", "inadvertence" or "oversight", did not render erroneous or otherwise compromise a proper instruction: *Paris*, at paras. 28-29.

[130] Finally, on the issue of timing, this is yet another instance of Crown counsel waiting until the penultimate stage of the trial to register an objection based on a failure to comply with *Browne v. Dunn*. In cases like this, the *Browne v. Dunn* objection crystallizes when an accused gives evidence on a point of substance about which a relevant Crown witness was not cross-examined. The time is then ripe for an objection, despite the inevitable compromise of trial continuity that occurs when any objection is taken to the introduction of evidence in a jury trial.

[131] This court and others have emphasized the importance of timely objections based on alleged failure to comply with the rule in *Browne v. Dunn*. Yet Crown dilatoriness persists, as in this case, as if some "Gotcha" principle were at work. Nothing is to be gained by such an approach which, in some cases at least, may compromise trial fairness and perhaps even integrity. The desired instruction will not always be given: *McNeill*, at para. 47; *Paris*, at para. 29.

Conclusion

[132] For these reasons, I would dismiss the appeal.

Appeal dismissed.

APPENDIX "A"

Regina v. Richard Quansah

Let me comment on Mr. Quansah's testimony that Tu had a shoe propping his door open in expectation of Quansah's arrival. It is for you to determine whether in fact a shoe was placed as Mr. Quansah says. To assist you in that determination I want to tell you a couple of factors, that you may, but you are not obliged to consider, as you determine how much weight you want to assign to Mr. Quansah's evidence.

It is clear that the presence of the shoe is an important piece of evidence capable of supporting the consensual nature of the confrontation in cell 9. [page104] While the consequences of tactical decisions made by his counsel at trial are not to be visited upon the accused, one factor you can consider as you determine how much weight to give Mr. Quansah's evidence is the opportunity given to other witnesses to challenge the evidence, the credibility of which you are assessing.

Messrs. Clare, Ireland and Fallis were all in a position to view the door to Tu's cell and possibly confirm the presence of a shoe, if that were so. They were thoroughly cross-examined to test their credibility and reliability on many issues, but none was asked about this material point, that is, whether they saw a shoe propping the door open before

Quansah entered the cell. On a critical point to the defence which is a matter of substance upon which Mr. Quansah seeks to impeach the credibility of those witnesses, they were not afforded the opportunity to give an explanation by reason of there having been no suggestion whatsoever in the course of their evidence that their testimony would not be accepted on the issue of whether or how the door was situated in its unlocked state.

This simply means that Mr. Quansah's evidence, which came after that of Clare, Ireland and Fallis, was not held up to scrutiny to the same extent as was the testimony of Clare, Ireland and Fallis. You may consider that to be a factor that could reduce the weight that you may give to Mr. Quansah's evidence in regard to the presence of Tu's shoe holding his cell door open in anticipation of Quansah's arrival, given that none of Clare, Ireland or Fallis was given an opportunity to comment.

While I am dealing with the matter of the weight to be given to Mr. Quansah's testimony, there are other matters about which none of Clare, Ireland or Fallis was given an opportunity to comment because while they were being questioned there was no suggestion that their story was not being accepted.

Mr. Quansah testified that he did not plan and deliberate the murder of Tu. Michael Ayers testified that he was Quansah's cell mate at the time and Quansah was awake the whole night brooding. Quansah admitted being awake the whole night until early morning when Ayers was taken from the cell in order to go to court. He testified that the reason he was awake was not because he was planning and deliberating what was to take place when the cell doors were unlocked later that morning, but he was awake all night because Ayers, who he regarded as a friend of his, taunted him when he went into the cell and he was afraid Ayers would harm him.

Ayers who testified before Quansah was never asked about threatening Quansah during the night as Quansah later testified. For the reasons I stated previously, that is a factor you may, but you are not required to, take into account in assessing Mr. Quansah's credibility.

Notes

1 The relevant part of the trial judge's charge is excerpted in Appendix "A".

Health Professions Procedural Code, s. 1(6)

(6) For the purposes of subsections (3) and (5),

“patient”, without restricting the ordinary meaning of the term, includes,

(a) an individual who was a member’s patient within one year or such longer period of time as may be prescribed from the date on which the individual ceased to be the member’s patient, and

(b) an individual who is determined to be a patient in accordance with the criteria in any regulations made under clause 43 (1) (o) of the *Regulated Health Professions Act, 1991*; (“patient”)

Ontario Regulation 260/18

1. The following criteria are prescribed criteria for the purposes of determining whether an individual is a patient of a member for the purposes of subsection 1 (6) of the Health Professions Procedural Code in Schedule 2 to the Act:

1. An individual is a patient of a member if there is direct interaction between the member and the individual and any of the following conditions are satisfied:

- i. The member has, in respect of a health care service provided by the member to the individual, charged or received payment from the individual or a third party on behalf of the individual.
- ii. The member has contributed to a health record or file for the individual.
- iii. The individual has consented to the health care service recommended by the member.
- iv. The member prescribed a drug for which a prescription is needed to the individual.

Excerpt from CPSO.vj.Redhead, 2013 ONCPSD 18

In considering whether or not there was a doctor-patient relationship at the time of the affair, the Committee looked at previous cases for guidance, including *Leering* and *College of Physicians and Surgeons of Ontario v Rabin* (2003). In these cases, discipline committees considered various factors in deciding whether or not the complainant was a patient of the health care professional at the time of the sexual activity. These included:

- a) Whether the professional had a patient file for the patient, including history, physical examination, diagnosis, plan of management, prognosis, diagnostic imaging reports, and a written record of treatments;
- b) Whether there were OHIP billing records for services provided by the professional to the patient;
- c) The number and nature of treatments received by the complainant from the professional, and the location in which those treatments were received;
- d) Whether any of the medical services provided involved psychotherapy;
- e) Whether the complainant ever completed a consent to treatment form;
- f) Whether there was any documentary evidence in which the professional referred to the complainant as his or her patient;
- g) Whether there were any letters of consultation written to the complainant's primary physician;
- h) Whether there were any letters reporting back to the professional about the complainant;
- i) Whether the complainant was seeing other physicians, and particularly, whether the complainant had her own family physician when the sexual relationship began;
- j) Whether there were referrals of the complainant by the professional to other professionals;
- k) Whether the professional prescribed medication to the complainant under his or her signature.