

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Pappas, 2013 SCC 56, [2013] 3 S.C.R. 452 | **Date:** 20131025  **Docket:** 34951 |

**Between:**

**Bill James Pappas**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and Fish, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 43)  **Reasons Concurring in Result:**  (paras. 44 to 79) | McLachlin C.J. (Abella, Rothstein, Cromwell, Moldaver and Wagner JJ. concurring)  Fish J. |

R. *v.* Pappas, 2013 SCC 56, [2013] 3 S.C.R. 452

Bill James Pappas Appellant

v.

Her Majesty The Queen Respondent

**Indexed as: R. *v.* Pappas**

2013 SCC 56

File No.:  34951.

2013:  April 26; 2013:  October 25.

Present: McLachlin C.J. and Fish, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.

on appeal from the court of appeal for alberta

*Criminal law — Defences — Provocation — Whether objective and subjective elements of provocation established, lending an air of reality to this defence — Whether victim’s provoking comments were sudden, in the sense that accused was caught unprepared and surprised by them — Whether defence of provocation should have been submitted to jury — Criminal Code, R.S.C. 1985, c. C‑46, s.  232.*

In 2006, K’s lifeless body was discovered. He had been shot twice. Days later, P was arrested. He confessed to killing K. According to P, K had been extorting money from him for 18 months by threatening to reveal details about his offshore investments to the Canada Revenue Agency, and by threatening to harm his mother if he chose to stop paying or went to the police. P decided that he had had enough. He went to K’s home to end the extortion and threats. He brought along a loaded handgun in order to intimidate K but did not immediately take out his gun. Rather, he attempted to get K to agree to put an end to the extortion. K responded that he would continue the extortion and that he had “great fucking insurance”, a comment that P took as an implied threat against his mother. At this point, P said he “snapped”. He retrieved his gun and shot K in the back and then in the head.

P was charged with second degree murder. At the trial by jury, P admitted to killing K but argued that the defence of provocation applied. Finding that there was some evidence on the objective and subjective elements of the defence of provocation, the trial judge left the defence with the jury. The jury rejected the defence, and found P guilty of second degree murder. He appealed his conviction, arguing *inter alia* that the trial judge erred in her instructions to the jury on provocation. The majority of the Court of Appeal dismissed the appeal, holding that the defence of provocation was properly left with the jury and that there were no errors in the instructions to the jury.

*Held*: The appeal should be dismissed.

*Per* McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver and Wagner JJ.: On the evidence in this case, there was no air of reality to the defence of provocation and the defence should not have been left to the jury. The conviction for second degree murder, however, is affirmed.

Where the evidence requires the drawing of inferences in order to establish the objective or subjective elements of the defence of provocation, the trial judge may engage in a limited weighing to determine whether the elements of the defence can reasonably be inferred from the evidence. For the purposes of the application of the air of reality test, we must assume that the version of events described in an accused’s confession is true. That said, an air of reality cannot spring from bare, unsupported assertions by the accused. 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.

K’s threat against the safety of P’s mother and the history of the relations between K and P, provide a minimal evidential foundation for the objective element of the defence. However there was no air of reality to the subjective element of the defence of provocation. That element includes a requirement of “suddenness” which applies to both the act of provocation and the accused’s reaction to it. The trial judge committed an error of law by only considering whether there was evidence to support the contention that P had killed K before there was time for his passion to cool. She did not examine whether the record could support a finding that K’s provoking comments were sudden, in the sense that P was subjectively caught unprepared and surprised by them.

The record cannot reasonably support an inference that P was caught unprepared by K’s statements as K had made similar statements repeatedly in the past. Viewed in its totality, the evidence suggests that before setting out to visit K, P contemplated the possibility that K would persist with his extortion and threats, and that in that case, he would need to kill K to end them. A contention that P was caught unprepared is outside the range of reasonable inferences that can be drawn from this evidence. It is supported by little more than P’s bald assertions that he “snapped” and “everything was just automatic”.

*Per* Fish J.: The trial judge did not err in leaving to the jury the defence of provocation, nor did she commit a reviewable error in instructing the jury as she did.

Where there is direct evidence as to all elements of a defence, the trial judge must put the defence to the jury. Whether the evidence is true, or at least raises a reasonable doubt as to the guilt of the accused, is a matter ultimately reserved to the jury. In this case, the accused’s evidence at trial constitutes direct evidence and relates the facts upon which his defence of provocation rests. Accordingly, the appellant discharged his evidentiary burden with respect to both the objective and subjective components of his defence of provocation. The mere fact that the deceased had made similar threats in the past does not mean that the accused would have anticipated, or been prepared for, subsequent threats of the same sort. A reiterated threat or insult can cause a previously unprovoked person to “snap”. Here, the alleged provocative act was not the deceased’s failure to end the extortion; rather, it was his sudden utterance — “I got great fucking insurance” — which P understood as a threat to his mother’s life. P’s detailed evidence of the circumstances surrounding the alleged provocation can hardly be equated with a “bare assertion” that he was provoked. The passages in P’s confession identified by the Chief Justice as supporting a loss of self‑control constitute direct evidence of the suddenness of the provocation and must be taken as true. Whether those passages are inconsistent with other evidence, however, is a determination that must properly be left to the jury. In the result, the appeal fails for the reasons of the majority in the Court of Appeal.

**Cases Cited**

By McLachlin C.J.

**Referred to:** *R. v. Cairney*, 2013 SCC 55, [2013] 3 S.C.R. 420; *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702; *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828; *R. v. Park*, [1995] 2 S.C.R. 836; *R. v. Gauthier*, 2013 SCC 32, [2013] 2 S.C.R. 403; *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350; *R. v. Parent*, 2001 SCC 30, [2001] 1 S.C.R. 761; *R. v. Tripodi*, [1955] S.C.R. 438.

By Fish J.

**Referred to:** *Henderson v. The King*, [1948] S.C.R. 226; *R. v. Buzizi*, 2013 SCC 27, [2013] 2 S.C.R. 248; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702; *R. v. Gauthier*, 2013 SCC 32, [2013] 2 S.C.R. 403; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Faid*, [1983] 1 S.C.R. 265; *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162; *R. v. Thibert*, [1996] 1 S.C.R. 37; *Parnerkar v. The Queen*, [1974] S.C.R. 449; *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350; *R. v. Cairney*, 2013 SCC 55, [2013] 3 S.C.R. 420.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 11(*d*), (*f*).

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 232.

APPEAL from a judgment of the Alberta Court of Appeal (Berger, O’Brien and Rowbotham JJ.A.), 2012 ABCA 221, 533 A.R. 294, 65 Alta. L.R. (5th) 359, 288 C.C.C. (3d) 323, 264 C.R.R. (2d) 211, 557 W.A.C. 294, [2012] A.J. No. 716 (QL), 2012 CarswellAlta 1191, affirming the accused’s conviction for second degree murder. Appeal dismissed.

*Michael Bates*, *Jennifer Ruttan* and *Geoff Ellwand*,for the appellant.

*Jolaine Antonio*, for the respondent.

The judgment of McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver and Wagner JJ. was delivered by

The Chief Justice —

I. Background

1. On November 10, 2006, Brian Kullman’s body was discovered in the Elbow Falls area southwest of Calgary, Alberta. He had been shot twice — once in the back, and once in the head.
2. Five days later, the appellant, Bill Pappas, was arrested as he was about to board a plane for London, England. The police interrogated him and he confessed to killing Kullman.
3. Pappas explained to the police his version of the events leading to Kullman’s death. Pappas contended that Kullman had been extorting money from him for approximately 18 months by threatening to reveal details about his offshore investments to the Canada Revenue Agency, and by threatening to harm his mother if he chose to stop paying or went to the police. According to Pappas, two of Kullman’s associates had visited his mother as a threatening gesture, and had thereafter told him, “You say no to Brian — you say no to Brian and next time it won’t be a social visit”: A.R., vol. II, at p. 239.
4. Pappas, as he put it, decided that he had had enough. He loaded his 9 millimetre handgun with four hollow point bullets and went to Kullman’s condominium. The ostensible purpose of the visit was to store a bicycle in Kullman’s basement. The real purpose was to end the extortion and threats. Pappas told the police that he brought the gun along only to intimidate Kullman. But he also explained that he chose this kind of bullet because it was particularly lethal.
5. During his visit to the condominium, Pappas raised the subject of extortion several times with Kullman, attempting to get him to agree to put an end to it. He did not immediately take out his gun, but instead kept it concealed on his hip. On the way to the basement where the bike would be stored, Pappas tried one more appeal, saying, “Brian, just please — let’s just end this”. In response, Kullman said, “Buddy, why the fuck should I? You’re the best cash out I have and I got great fucking insurance”: A.R., vol. II, at p. 241.
6. Pappas took the reference to “insurance” as an implied threat against his mother. At this point, he said, he just “snapped”, his “mind shut down and everything was just automatic”: A.R., vol. III, at p. 64, and vol. II, at p. 304. He retrieved the gun, cocked the hammer, and shot Kullman in the back at close range. Kullman screamed and began to fall, and Pappas fired again. Finally, as the victim lay on the floor in distress, Pappas moved the handgun to within 7 or 8 inches of Kullman’s head and shot him in the left side of his head.
7. Pappas pulled Kullman’s body up the stairs and loaded it in Kullman’s car. After returning to the basement and setting a fire to cover his tracks, he drove to Elbow Falls where he rolled the body down an embankment. Several days later, he also disposed of Kullman’s credit card and of bloodstained clothes in the garbage cans behind a convenience store and a gas station.
8. In his confession, Pappas admitted that he had forged a cheque from Kullman to himself for $2,500 and deposited it into his bank account, and that he had used Kullman’s credit card.
9. Throughout, Pappas insisted that he had murdered Kullman to save his mother from harm.
10. Pappas was charged with second degree murder for the killing of Kullman.

II. The Trial and Appeal

1. At the trial by jury, Pappas’ confession was entered by the Crown as evidence. Pappas did not testify, but relied on his confession as evidence on the issue of provocation. Maintaining that he “snapped” and killed Kullman following the implied threat to harm his mother, he argued that the defence of provocation applied to reduce the verdict from murder to manslaughter.
2. The trial judge initially took the view that the provocation defence lacked an air of reality. However, after hearing defence submissions on the matter, she concluded:

I am satisfied that if the jury were to believe the evidence of Mr. Pappas on this issue of provocation properly, there is some evidence upon which a reasonable jury properly instructed could find there has been provocation. I acknowledge that the evidence on the objective and subjective test is not strong. But it is there. [A.R., vol. I, at p. 5]

1. The jury rejected the defence of provocation, and found Pappas guilty of second degree murder.
2. Pappas appealed his conviction, arguing *inter alia* that the trial judge’s instructions to the jury on provocation contained several errors. The Crown argued that the instructions were error-free. In addition, the Crown contended that there was no air of reality to the defence and that it never should have been left with the jury.
3. The majority of the Court of Appeal, *per* O’Brien and Rowbotham JJ.A., dismissed the appeal. It held that the defence of provocation was properly left with the jury and that there were no errors in the instructions to the jury: 2012 ABCA 221, 533 A.R. 294.
4. Berger J.A., dissenting, agreed with the majority that the defence was properly left with the jury but found several errors in the instructions to the jury.
5. Mr. Pappas now appeals to this Court. Before us, four issues arise:

(1) Was the defence of provocation properly left to the jury? (The Crown contends it was not, making it unnecessary for this Court to consider whether the charge on the defence was in error.)

(2) Did the trial judge fail to adequately instruct the jury that the post-offence conduct had no bearing on the issue of provocation?

(3) Did the trial judge misstate the accused’s motive?

(4) Did the trial judge err by stating the suddenness instruction disjunctively, requiring rejection of the defence if either the extortion or the threat was not sudden?

1. For the reasons that follow, I would accept the Crown’s argument that there was no air of reality to the defence of provocation. This makes it unnecessary for me to consider the other issues raised by the appellant.

III. Discussion

1. For ease of reference, I set out s. 232 of the *Criminal Code*, R.S.C. 1985, c. C-46:

**232.** (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.

(3) For the purposes of this section, the questions

(*a*) whether a particular wrongful act or insult amounted to provocation, and

(*b*) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

*Was the Defence of Provocation Properly Left to the Jury?*

1. The Crown contends that on the evidence in this case, there was no air of reality to the defence of provocation. I agree. I will first discuss the air of reality test, and then the objective and subjective elements of the defence of provocation.

(1) The Air of Reality Test

1. As discussed in the companion case *R. v. Cairney*,2013 SCC 55, [2013] 3 S.C.R. 420, before leaving the defence to the jury, the trial judge must find that there is an air of reality on both the objective and subjective elements of the defence. The question is whether a properly instructed jury acting reasonably could be left in a state of reasonable doubt as to whether the accused is guilty of murder, on the basis of the defence of provocation. There must be an evidential foundation for both the objective and subjective elements of the defence, which s. 232(3) of the *Criminal Code* states are questions of fact.
2. 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.
3. 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.
4. “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] 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.
5. 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.
6. 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.
7. In the present appeal, Pappas relies upon his confession as providing the grounds for the defence of provocation. For the purposes of the application of the air of reality test, we must assume that the version of events described in that confession is true: *Cinous*, at paras. 53 and 119. The question is whether a properly instructed jury acting reasonably could be left in a state of reasonable doubt as to the presence of each of the elements of the defence of provocation. There must be an evidential foundation for both the objective and subjective elements of the defence. I will now examine each of these in turn.

(2) The Objective Element

1. The objective element asks whether there was a wrongful act or insult by the deceased, sufficient to deprive an ordinary person of the power of self-control. Pappas argues that his confession provides evidence of a wrongful act or insult, in the form of Kullman’s statement that he had “great fucking insurance”. Pappas’ confession describes a sequence of events in which he had been consistently extorted for an 18-month period and in which his mother had been the target of threats. He contends that Kullman’s reference to insurance caused him to finally snap.
2. Unlike the companion case *Cairney*, this appeal does not raise the issue of self-induced provocation. Pappas did not initiate an aggressive confrontation. He did not confront Kullman at gunpoint; his weapon remained concealed on him until the moment when he was allegedly provoked. Nor did he approach Kullman in an otherwise aggressive manner that could predictably have induced threatening behaviour. Rather, Pappas contends that he tried to reason with Kullman, by asking him if the extortion could cease.
3. The relevant question is thus whether an ordinary person, placed in Pappas’ circumstances, would have been deprived of self-control upon being told, “You’re the best cash out I have and I got great fucking insurance”.
4. On the one hand, the ordinary person standard must be contextualized to take into account the history of the relations between Pappas and Kullman. Pappas had been the target of ongoing extortion and the safety of his mother had repeatedly been threatened.
5. On the other hand, the ordinary person standard seeks to ensure that only “behaviour which comports with contemporary society’s norms and values will attract the law’s compassion”: *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at para. 30. The particular circumstances in which the accused finds himself are relevant in determining the appropriate standard of human behaviour against which to measure the accused’s conduct: *Tran*, at para. 34. Pappas had engaged in tax evasion that Kullman was threatening to reveal to the Canada Revenue Agency. He did not go to the police with respect to Kullman’s extortion or threats. Rather, he armed himself and attempted to dissuade Kullman in person. Arguably, this behaviour runs contrary to the ordinary person standard.
6. Nevertheless, as discussed in the companion case *Cairney*, what would suffice to cause an ordinary person to lose self-control is a question of degree that the jury is well placed to decide, and one which, in cases of doubt, should be left to the jury. The nature of Kullman’s comments — a perceived threat against the safety of Pappas’ mother — and the history of the relations between Kullman and Pappas, provide a minimal evidential foundation for the objective element of the defence.

(3) The Subjective Element

1. In my view, there was no air of reality to the subjective element of the defence of provocation. The subjective element is two-fold: “. . . (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.
2. Of particular relevance to this appeal is the requirement of “suddenness”. The defence of provocation does not apply to killings that are purely the result of vengeance or of anger, without any attendant loss of self-control: *Tran*, at para. 38; *R. v. Parent*, 2001 SCC 30, [2001] 1 S.C.R. 761, at para. 10. To determine whether there was an actual loss of self-control, the common law has long asked whether the accused acted “on the sudden”. The requirement of suddenness has two dimensions: (i) the wrongful act or insult must be sudden, in that the accused is subjectively unprepared for it and is caught by surprise, and (ii) the accused must kill “on the sudden”, before there is time for his passion to cool: *Tran*, at para. 38; *R. v. Tripodi*, [1955] S.C.R. 438, at p. 443.
3. In my view, the trial judge committed an error of law by only considering one of the two dimensions of “suddenness”. She considered whether there was evidence to support the contention that Pappas had killed Kullman suddenly, before there was time for his passion to cool. Indeed, the trial judge reasoned that there was an air of reality to the subjective element on the following basis:

Mr. Pappas did say that it was the word “insurance” that set him off, and he reacted immediately to that. It is not up to me to weigh the sufficiency of that evidence. I am satisfied that there is an air of reality to the defence. [Emphasis added; A.R., vol. I, at p. 5.]

However, she did not examine whether the record could support a finding that Kullman’s provoking comments were sudden, in the sense that Pappas was subjectively caught unprepared and surprised by them. This is an error of law, as “suddenness applies to both the act of provocation and the accused’s reaction to it”: *Tran*, at para. 38.

1. The record cannot reasonably support an inference that Pappas was caught unprepared by Kullman’s statement that he would continue the extortion and that he had “great fucking insurance”. Kullman had made similar statements repeatedly in the past. Viewed in its totality, the evidence suggests that before setting out to visit Kullman, Pappas contemplated the possibility that Kullman would persist with his extortion and threats, and that, in that case, he would need to kill Kullman to end them.
2. The principal narrative of Pappas’ confession is that he had resolved to put an end to the extortion and to the threats against his mother, through whatever means necessary. He brought a gun loaded with hollow point bullets to his encounter with Kullman. When asked why he chose these bullets, he explained:

If you want to stop someone you use a hollow point. You don’t use a regular ball round ‘cause that goes through them. It doesn’t do any kind of damage. . . . It wasn’t supposed to be like that but it kept building up. So, I bought them. [A.R., vol. II, at p. 262]

1. At several points in his confession, Pappas referenced his decision to do whatever was necessary to end the extortion and the threats to his mother. He described that he felt that the threats left him with little choice other than to confront Kullman:

You can’t imagine what it feels like being put in [a] corner and then having to choose. I didn’t wanna hurt him. I didn’t care about me but it was my mom. What was I supposed to? [*sic*] He gave me no choice when he sent his friends — when he sent his friends there. He gave me no choice after that. I started — I made — I made my decision. [A.R., vol. II, at p. 255]

He described how the ongoing extortion and threats led him to make the “choice”, and how “[a]fter 18 months [of extortion] it became very simple” — “[i]t was either [Kullman] or my mom”: A.R., vol. II, at p. 259-61. He went on to explain how, when he was standing outside the door to Kullman’s condominium, he flashed back to the moment when Kullman’s associates visited his mother. He said, “So, as soon as that image crossed my mind that’s it, ‘Gun’s staying with me’. . . . [Kullman] made his choice, I made mine right there”: A.R., vol. II, at p. 294. He described in detail how Kullman’s repeated refusals to put an end to the extortion gradually made it clear he would have to resort to using the gun he had brought:

We just started talking about things and I was trying to tell him — I was trying to literally put my foot down right there, trying to draw the line right there. . . . And, ah, he’s going, “Well, like I say, you know, I mean I’ve got really good insurance”, you know? “And I’ve got a good pay day coming up”, you know? . . . or so and he had good insurance. And it just, you know, I’m trying to talk him out of it or so. It’s like I’m trying to, you know, “Don’t go there, Brian. Come on, man. Don’t go there”, because I had something here on my hip . . . and I’m trying to do everything I can to keep — to steer Brian away from that . . . .

. . .

I mean literally every time he would open his goddamned mouth he would take one step closer to making me do what I had to do and I didn’t want to go there. [Emphasis added; A.R., vol. II, at pp. 299 and 302.]

1. The only passages in Pappas’ confession that support a loss of self-control are the ones in which he describes his reaction upon hearing Kullman once again make reference to the fact that he had “insurance”:

It — it was just the way he said it. It was just the way he said the word “insurance”. I knew what that meant. . . . [A]fter that it was just my mind shut down and everything was just automatic. I drew my gun, I chambered a round, I fired. [A.R., vol. II, at p. 303]

At this point, Pappas said that he “snapped”.

1. The contention that Pappas was caught unprepared by Kullman’s comments is outside the range of reasonable inferences that can be drawn from this evidence. It is supported by little more than Pappas’ bald assertions that he “snapped” and “everything was just automatic”. Viewed in its totality, the evidence suggests that Pappas’ mind was prepared for the possibility that Kullman might reject his pleas to end the extortion, “making [him] do what [he] had to do”. His narrative, viewed as a whole, describes a progressive building up of the resolve to kill Kullman. Accepting Pappas’ evidence that he “snapped” as true, this was not the result of a sudden insult striking an unprepared mind. It was simply the final stage of doing what he had come to do — killing Kullman if that was necessary to stop the extortion and threats.
2. For these reasons, I conclude that there was no air of reality to the subjective element of the defence of provocation on the evidence. The defence should not have been left to the jury. Any errors in the trial judge’s instructions to the jury regarding provocation were thus irrelevant, and I need not examine the appellant’s other grounds of appeal.

IV. Conclusion

1. I would dismiss the appeal and affirm the conviction for second degree murder.

The following are the reasons delivered by

Fish J. —

I

1. Like the Chief Justice, but for different reasons, I would dismiss this appeal and affirm the appellant’s conviction at trial.
2. Unlike the Chief Justice, however, and with the greatest of respect, I agree with the Court of Appeal’s unanimous conclusion that the trial judge did not err in leaving to the jury the appellant’s defence of provocation (2012 ABCA 221, 533 A.R. 294).
3. The Court of Appeal divided only as to the adequacy of the trial judge’s charge to the jury. In this regard, I agree with the majority that the trial judge committed no reviewable error in instructing the jury as she did.
4. In the result, the appeal fails.

II

1. There is no dispute that trial judges must leave for the jury’s consideration every defence available on the record, subject only to exceptional circumstances which have no application here. To do otherwise is to usurp the function of the jury and to deprive the accused of an enshrined right under our system of justice.
2. This is not new law. In *Henderson v. The King*, [1948] S.C.R. 226, for example, Kellock J. recognized that “[i]t is a paramount principle of law that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury” (p. 241; see also Taschereau J., at p. 237).
3. For some offences, the accused may choose trial by jury; for others, as in this case, trial by jury is mandatory. In either instance, absent a directed verdict of acquittal, the determination of guilt or innocence falls exclusively within the province of the jury. That bedrock principle is violated whenever a trial judge withholds from the jury a defence that it is entitled — indeed, required by law — to consider.
4. This case hardly invites concern over the submission of weak defences to juries. On the contrary, it illustrates why our system of justice supposes that juries, properly instructed by judges, can be trusted to reject defences that do not raise in their minds a reasonable doubt as to the guilt of the accused. That is what happened here. The trial judge felt bound to put to the jury the appellant’s defence of provocation — though she found, understandably, that the evidence in support of the defence was “not strong”. And the jury, properly instructed and acting reasonably, rejected the defence.
5. In determining whether a defence must be submitted to the jury, trial judges must take care not to infuse what has come to be known as the “air of reality” test with any significance beyond the governing standard that has prevailed for centuries. That standard, though not always formulated in identical terms, has never varied in substance: A defence must be put to the jury if there is any evidence upon which a properly instructed jury, acting reasonably, could be left with a reasonable doubt as to the guilt of the accused.
6. The phrase “air of reality” connotes neither plausibility nor likelihood. The “air of reality test [is not] intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day”: *R. v. Buzizi*, 2013 SCC 27, [2013] 2 S.C.R. 248, at para. 16, citing *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 54. Moreover, in determining whether to leave a defence to the jury, the trial judge assumes that the evidence relied upon by the accused is true: *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702, at para. 72; *Cinous*, at para. 53.
7. The trial judge is not permitted to make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences: *R. v. Gauthier*, 2013 SCC 32, [2013] 2 S.C.R. 403, at para. 25; *Fontaine*, at para. 72; *Cinous*, at para. 54. Indeed, the “air of reality” test has been found by this Court to be “reasonable” and “valid” *precisely because the trial judge* *does not weigh the evidence* and thus “cannot be accused of usurping the role of the jury or violating the accused’s rights”:  *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 691.
8. In the present context, I find particularly apt this passage from the concurring reasons of Sopinka J. in *Osolin*, at pp. 653-54:

With respect to the defence of mistaken belief, I agree with Cory J. that s. 265(4) “simply sets out the basic requirements which are applicable to all defences” (p. 676) and that it requires no more of the accused than the discharge of an evidentiary burden to adduce or point to some evidence on the basis of which a reasonable jury properly instructed could acquit. I believe we are all in agreement in this respect. Indeed, this is the basis for our determination that it is constitutional. The term “evidentiary burden” and the definition I have set out are well known to trial judges and well accepted. I cannot understand how the addition of the term “air of reality” helps in understanding the duty of a trial judge with respect to this defence. I am concerned that when an attempt is made to add to the definition of a basic concept in the criminal law, it only creates confusion.

1. While the Court has recognized that a “limited weighing” of the evidence will be permitted, exceptionally, where the evidence relied on by the accused is circumstantial, no weighing is permitted with respect to direct evidence. As the Chief Justice explains, “[t]he trial judge may not engage in any weighing of direct evidence, since this would require a consideration of the inherent reliability of the evidence” (para. 23).
2. Accordingly, where there is direct evidence as to all elements of a defence, the trial judge must put the defence to the jury since, “[b]y definition, the only conclusion that needs to be reached in such a case is whether the evidence is true” (*Cinous*, at para. 88). And whether the evidence is true, or at least raises a reasonable doubt as to the guilt of the accused, is a matter ultimately reserved to the jury.
3. In this case, the appellant’s evidence at trial constitutes direct evidence and relates the facts upon which his defence of provocation rests. Where an accused gives evidence as to all the elements of the defence, as the appellant did in this case, the trial judge is bound to leave the assessment of that evidence to the jury: *R. v. Faid*, [1983] 1 S.C.R. 265, at p. 276.
4. According to the Chief Justice, “[t]he air of reality test . . . requires *more* than ‘some’ or ‘any’ evidence of the elements of a defence” (para. 22 (emphasis added)). In my respectful view, one should not impute to this passage a meaning that it cannot have been intended to bear.
5. As the Court made plain in *Cinous*:

The full question is whether there is evidence (some evidence, any evidence) upon which a properly instructed jury acting judicially could acquit. If there is any or some such evidence, then the air of reality hurdle is cleared. If there is no such evidence, then the air of reality hurdle is not cleared. [Emphasis in original; para. 62.]

And, leaving no room for doubt in this regard, the Court later reiterated “the full question, which is whether there is evidence (*some evidence, any evidence*) on the basis of which a properly instructed jury acting reasonably could base an acquittal if it believed the evidence to be true” (para. 83 (emphasis added)).

1. I recognize that the Court, in *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162, at para. 21, stated that “[i]t is not enough for there to be ‘some evidence’ supporting the defence (*Cinous*, at para. 83).” This passage must be read in line with established authority, including the paragraph in *Cinous* to which it refers. As appears from that very paragraph, the Court has consistently held that *the decisive question is whether there is evidence upon which a properly instructed jury could reasonably acquit*: *Fontaine*, at para. 71; *Cinous*, at para. 83; *R. v. Thibert*, [1996] 1 S.C.R. 37, at para. 7; *Faid*, at p. 276; *Parnerkar v. The Queen*, [1974] S.C.R. 449, at p. 454.
2. These principles are well settled. They align with the trust our criminal justice system places in the collective good sense of juries. And, they breathe life into the accused’s *Charter* rights to be presumed innocent (s. 11(*d*)) and to have the benefit of a jury trial where the maximum punishment for the alleged offence is at least five years imprisonment (s. 11(*f*)).

III

1. I turn now to the application of these principles to the facts of this case.
2. I agree with the Chief Justice that the appellant discharged his evidentiary burden on the *objective* component of his defence of provocation. In my respectful view, he met his evidentiary obligation on the *subjective* component as well.
3. The subjective component (or “element”) of the defence of provocation requires that the accused acted (1) in response to the provocative act or conduct; and (2) on the sudden before there was time for his or her passion to cool:  *Criminal Code*, R.S.C. 1985, c. C-46, s. 232; see also *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at para. 36. The Chief Justice emphasizes that the second, “suddenness” portion of the inquiry applies to both the provocation itself and the accused’s reaction to it (para. 36). In her opinion, there is no evidentiary basis upon which a jury could reasonably conclude that the wrongful provocation was sudden, in the sense that it surprised Mr. Pappas by catching his mind unprepared.
4. The appellant’s evidence was that the deceased had been extorting him for 18 months leading up to the killing (A.R., vol. II, at p. 238). When Mr. Pappas resisted, the deceased implied that he was prepared to have Mr. Pappas’s mother killed (p. 239). On the night in question, the appellant did carry a concealed weapon. He testified, however, that he did not intend to use it (pp. 242, 245 and 292-93). The deceased responded to Mr. Pappas’s overtures by again implicitly threatening to kill his mother (p. 303). At this point, according to Mr. Pappas, his “mind shut down and everything was just automatic. I drew my gun, I chambered a round, I fired” (p. 304).
5. The sudden and unexpected nature of the deceased’s provocative act emerges from the timeline of events on the night of the killing. Describing the deceased’s offer to give him money for a plane ticket, and the deceased’s subsequent veiled threat to kill his mother, Mr. Pappas testified:

He does me a favour from his point of view one minute . . . and then the next minute he just told me what’s going to happen . . . if I don’t get back and [indiscernible] his fucking expensive toys. [A.R., vol. II, at p. 244]

1. Accepting this evidence as true, Mr. Pappas plainly acted “on the sudden” — he “didn’t think about it” (A.R., vol. II, at p. 241), but reacted immediately to the deceased’s provocation before there was time for his passion to cool. Indeed, the Chief Justice accepts that this satisfies one dimension of the subjective “suddenness” inquiry.
2. According to the Chief Justice, however, the record cannot support a finding that the *provocation itself* was sudden because the deceased “had made similar statements repeatedly in the past” (para. 37).
3. In *R. v. Cairney*,2013 SCC 55, [2013] 3 S.C.R. 420, Justice Abella addresses the manifest difficulties presented by a “predictability of consequences” approach with regard to the objective element of provocation. The same holds true for the subjective element — the mere fact that the deceased had made similar threats to the accused in the past does not mean that the accused would have anticipated, or been prepared for, subsequent threats of the same sort. Plainly, a reiterated threat or insult can cause a previously unprovoked person to “snap”.
4. The Court explicitly addressed this very possibility in *Thibert*. In considering whether a provocation is “sudden” in the sense that it strikes upon a mind unprepared for it, the Court held that

the background and history of the relationship between the accused and the deceased should be taken into consideration. This is particularly appropriate if it reveals a long history of insults, leveled at the accused by the deceased. . . . “[T]he last affront may be comparatively trivial, merely the last straw that makes the worm turn, so to speak”. [para. 20]

(Citing G. Williams, *Textbook of Criminal Law* (2nd ed. 1983).)

1. In this regard, the Chief Justice focuses on whether Mr. Pappas’s “mind was prepared for the possibility that Kullman might reject his pleas to end the extortion” (para. 41). With respect, however, the alleged provocative act was *not* the deceased’s failure to end the extortion; rather, it was his sudden utterance — “I got great fucking insurance” — which Mr. Pappas understood as a threat to his mother’s life (A.R., vol. II, at p. 241). This is amply supported by Mr. Pappas’s evidence that he shot the deceased in order to protect his mother (A.R., vol. II, at pp. 240-42, 247 and 254-55).
2. Nor am I able to share the Chief Justice’s characterization as “little more than . . . bald assertions” the appellant’s evidence that he was unprepared for the deceased’s comments (para. 41).
3. In *Osolin*, this Court affirmed that, in order for a defence to be put to the jury, there must be “evidence beyond [a] mere assertion” of the elements of the defence (pp. 686-87). Using the defence of provocation as an example, the Court held that while a “bare assertion” by the accused — “I was provoked” — would not suffice, the “requisite evidence may come from *the detailed testimony of the accused alone*” (p. 687 (emphasis added)).
4. Read in this light, Mr. Pappas’s detailed evidence of the circumstances surrounding the alleged provocation, including his perceptions and explanations for his actions, can hardly be equated with a “bare assertion” that he was provoked.
5. Neither can Mr. Pappas’s description of the provoking act be considered a single statement that is inconsistent with his “principal narrative”: *Gauthier*, at para. 61, cited by the Chief Justice, at para. 24.
6. I agree with the Chief Justice that the “only passages in [Mr.] Pappas’ confession that support a loss of self-control are the ones in which he describes his reaction upon hearing Kullman once again make reference to the fact that [Kullman] had ‘insurance’” (para. 40). These descriptions constitute direct evidence of the suddenness of the provocation and must be taken as true. As such, they demonstrate that the appellant discharged his evidentiary burden on the “sudden provocation” element of the defence.
7. Whether these passages are “inconsistent” with other evidence, however, necessarily requires a weighing of the evidence and an assessment of its reliability. That determination must properly be left to the jury. And the trial judge’s decision whether to leave the defence to the jury must, in any event, be based on “the construction of the evidence most favourable to the accused’s position” (*Cinous*, at para. 98). The trial judge in this case therefore committed no error in finding that Mr. Pappas’s evidence — if accepted as true in whole or in part — was capable of supporting the inference that the deceased’s comments constituted a sudden and unexpected act of provocation.

IV

1. For the foregoing reasons, I am unable to agree with the Chief Justice that the trial judge committed a reviewable error in leaving the appellant’s defence of provocation to the jury. As mentioned at the outset as well, I would nevertheless dismiss the appeal for the reasons of the majority in the Court of Appeal.

*Appeal dismissed.*

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