

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Miljevic, 2011 SCC 8, [2011] 1 S.C.R. 203 | **Date:** 20110216  **Docket:** 33714 |

**Between:**

**Marko Miljevic**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 4)  **Dissenting Reasons:**  (paras. 5 to 27) | Cromwell J. (Abella, Charron and Rothstein JJ. concurring)  Fish J. (McLachlin C.J. and Deschamps J. concurring) |

R. *v.* Miljevic, 2011 SCC 8, [2011] 1 S.C.R. 203

**Marko Miljevic** *Appellant*

*v.*

**Her Majesty The Queen** *Respondent*

**Indexed as: R. *v.*** Miljevic

2011 SCC 8

File No.: 33714.

2010: December 17; 2011: February 16.

Present: McLachlin C.J. and Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for alberta

*Criminal law — Trial — Charge to jury — Questions from jury — Whether trial judge erred in response to jury’s questions.*

The accused was charged with second degree murder. At trial, he admitted that he was guilty of manslaughter but argued that he did not have the required mental state for murder. During deliberations, the jury asked the trial judge to explain the difference between manslaughter and second degree murder, to provide examples, and to provide a specific definition of manslaughter. The trial judge responded to the questions but did not provide examples or a definition of manslaughter. The jury convicted the accused of second degree murder.

*Held* (McLachlin C.J. and Deschamps and Fish JJ. dissenting): The appeal should be dismissed.

*Per* Abella, Charron, Rothstein and Cromwell JJ.: The trial judge responded correctly to the jury’s questions. He explained that the difference between manslaughter and second degree murder is in the accused’s mental state. There is no reasonable possibility that the jury misunderstood what had to be proved for a conviction of second degree murder or that they should find the accused guilty of manslaughter if murder was not proved.

*Per* McLachlin C.J. and Deschamps and FishJJ. (dissenting): The failure to explain the difference between manslaughter and second degree murder was fatal. Jurors should not be required to convict an accused of one of two offences without understanding the elements of each offence and how the evidence relates to each offence. The jury should have been informed that the mental element of the offence required both the intentional application of force and the objective foreseeability of the risk of bodily harm, which is neither trivial nor transitory, in the context of the dangerous act. The trial judge gave the wrong definition of the bodily harm required for murder and failed to draw the jury’s attention to the question whether the accused lacked the subjective foresight that distinguishes murder from manslaughter because of his extensive consumption of alcohol and drugs.

**Cases Cited**

By Cromwell J.

**Distinguished:** *R. v. Layton*, 2009 SCC 36, [2009] 2 S.C.R. 540.

By Fish J. (dissenting)

*R. v. MacKay*, 2005 SCC 75, [2005] 3 S.C.R. 607; *Azoulay v. The Queen*, [1952] 2 S.C.R. 495; *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 229(*a*)(ii), 691(1)(*a*).

**Authors Cited**

Watt, David. *Watt’s Manual of Criminal Jury Instructions*. Toronto: Thomson/Carswell, 2005.

APPEAL from a judgment of the Alberta Court of Appeal (Côté, O’Brien and McDonald JJ.A.), 2010 ABCA 115, 25 Alta. L.R. (5th) 135, 482 A.R. 115, 490 W.A.C. 115, 254 C.C.C. (3d) 25, [2010] 9 W.W.R. 279, [2010] A.J. No. 384 (QL), 2010 CarswellAlta 637, upholding the accused’s conviction for second degree murder. Appeal dismissed, McLachlin C.J. and Deschamps and Fish JJ. dissenting.

Noel C. O’Brien, Q.C., for the appellant.

Goran Tomljanovic, Q.C., and *Iwona Kuklicz*, for the respondent.

The judgment of Abella, Charron, Rothstein and Cromwell JJ. was delivered by

1. Cromwell J. — The appellant admitted that he unlawfully caused the death of the victim and was therefore guilty of manslaughter. The jury convicted on the charge of second degree murder. The only live issue at trial was whether the appellant had the required mental state for murder, that is, whether he intended to cause death or intended to cause bodily harm that he knew was likely to cause death and was reckless as to whether death ensued. This appeal as of right brought pursuant to s. 691(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46, turns on whether the trial judge erred in his answer to questions from the jury about the offence of manslaughter, an offence which as noted the appellant admitted having committed. The formal judgment of the Court of Appeal sets out the grounds of the dissent as follows:

In this case, where the unlawful act had been admitted, it should have been explained to the jury that the *actus reus* had been admitted, namely the deliberate throwing of a heavy object into the crowd — an inherently dangerous act (which, in the circumstances of this case, amounted to an assault). Further, the jury should have been informed that the mental element of the offence, in this instance, required both the intentional application of force (which was admitted) and the objective foreseeability of the risk of bodily harm, which is neither trivial nor transitory, in the context of the dangerous act.

In my view, the trial judge did not err and for the reasons of the majority of the Alberta Court of Appeal (2010 ABCA 115, 25 Alta. L.R. (5th) 135), at paras. 21-26, I would dismiss the appeal.

1. I would add only that the judge responded helpfully and correctly to the jury’s questions. Moreover, unlike the situation in *R. v. Layton*, 2009 SCC 36, [2009] 2 S.C.R. 540, the trial judge in this case encouraged the jury to pose a further question if his answer did not assist them. The jury asked: “In ‘layman terms’ what is the difference between murder 2 and manslaughter? Examples? . . . A specific definition of manslaughter?” With the approval of both Crown and defence counsel, the judge told the jury that the difference is in the accused’s mental state and then reviewed the portion of his original charge setting out the mental element of second degree murder. He added that the jury was to take it as established that the appellant had killed the victim unlawfully but that to establish that this killing was murder, the Crown had to establish something more, the state of mind required for murder. The judge declined to give the jury examples for fear that they would not make the difference between murder and manslaughter any clearer. He explained to the jury that each case is driven by its own facts, and the facts of one case or one example might not truly help them. With respect to the jury’s inquiry about a “specific definition of manslaughter”, the judge told the jury that there is no specific definition of manslaughter in the *Criminal Code*, but he could help them by saying that the killing in this case was either murder or manslaughter and that if the appellant was not proved to have had the mental state required for murder, then the killing is manslaughter. He concluded by encouraging the jury to formulate a further question if his answers did not assist them.
2. In my view, there is no legal error as contended by the appellant in these instructions. There is no reasonable possibility that the jury could have misunderstood what had to be proved in order for them to return a guilty verdict on the charge of second degree murder. There is similarly no reasonable possibility that they could have misunderstood that if murder was not proved, they should return a guilty verdict on the offence of manslaughter, as defence counsel had urged them to do. The instructions focussed the jury on the sole issue it had to decide and gave them the correct legal principles necessary for them to do so.
3. I would dismiss the appeal.

The reasons of McLachlin  C.J. and Deschamps and Fish JJ. were delivered by

Fish J. (dissenting) —

# I

1. Like O’Brien J.A., dissenting in the Court of Appeal (2010 ABCA 115, 25 Alta. L.R. (5th) 135), and for substantially the same reasons, I would allow the appeal and order a new trial.
2. As Justice O’Brien points out (at para. 75), the trial judge directed the jury that they were bound to convict the appellant of either murder or manslaughter. He directed the jury on the essential elements of murder but gave them no definition and no instructions *at all* on the essential elements of manslaughter.
3. After deliberating for some time, the jurors evidently needed ― and expressly requested ― further guidance. They asked the judge to explain the difference between manslaughter and second degree murder, and to provide them with a “specific definition of manslaughter”.
4. The judge concluded that the jury was having difficulty understanding the distinction between manslaughter and murder, notwithstanding what he had said in his charge. That they had asked for a definition of manslaughter, the judge said, “would tend to suggest that they are wrestling as to whether or not it is”. He nonetheless refused to give them the definition they had requested, or to provide them with any instructions as to the essential elements of manslaughter.
5. In my view, no 12 jurors should be required by a trial judge to convict the accused placed in their charge of one or the other of two offences *without understanding how the elements of both might relate to the evidence before them* (see *R. v. MacKay*, 2005 SCC 75, [2005] 3 S.C.R. 607, at para. 1, citing *Azoulay v. The Queen*, [1952] 2 S.C.R. 495, at p. 503). Yet that is what happened here.
6. With respect for those who are of a different view, I agree with O’Brien J.A. that the trial judge thereby committed an error fatal to the jury’s verdict and that a new trial should be ordered for that reason.

# II

1. Speaking for the majority in *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521, Cory J. reaffirmed the particular significance of questions from the jury and the paramount duty of trial judges to answer them “clearly, correctly and comprehensively” (p. 528). “Even if the question relates to a matter that has been carefully reviewed in the main charge,” Justice Cory added, “it still must be answered in a complete and careful manner”. And, again: “The jury must be given a full and proper response to their question. The jury is entitled to no less.” That is the law.
2. Here, as we have seen, the judge well understood the significance of the jury’s question. The jurors needed and sought further instructions as to the distinction between manslaughter and second degree murder. To better understand that distinction, upon which their verdict entirely depended, the jury requested a definition of manslaughter. Their request could have been easily satisfied by a simple instruction as to its essential elements and how they related to the main items of evidence. Instead, the jury received an unhelpful response.
3. As O’Brien J.A. states (at paras. 84 and 88):

The answer provided by the trial judge to the jury did little to explain the distinction. It starts with the reiteration that it was proven that there was an “unlawful taking of life”. This, of course, is applicable both to murder and manslaughter. The judge then read selected portions of the charge, which the jury already had in its possession in written form.

. . .

It is not, of course, incumbent on the appellant to identify the reason why the jury was having difficulty distinguishing between the two offences. Here, it comes down simply to this. The jury was being asked to convict the appellant either of murder or manslaughter. For whatever reason, the jury wanted to be informed as to what, as a matter of law, constituted manslaughter. The question was directed at a relevant and live issue and I can think of no good reason for depriving the jury of that instruction.

1. It appears from the record that the trial judge opted not to outline the elements of manslaughter for two reasons: first, because to do so might increase the jury’s confusion (for lay people, he explained, the concept “is not something that is necessarily easy to grasp”); and second, because the jury might as a result of his instruction acquit the accused of manslaughter, contrary to his express direction that it was not open to them to do so.
2. With respect, I agree with O’Brien J.A. that these rationales for withholding the requested assistance “denigrat[e] the role of the jury” (para. 89), whose “collective wisdom and intelligence” the law should and does presume (*R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 139). I reject the proposition that jurors can be confused, and deterred from doing their duty, by a clear explanation of the very law they are duty-bound to apply.
3. Moreover, the trial judge could easily have satisfied the jury’s request by adopting the model instructions for unlawful act manslaughter set out, for example, in D. Watt, *Watt’s* *Manual of Criminal Jury Instructions* (2005), at pp. 472-73, upon which the judge had relied in preparing other elements of his charge.
4. Instead, the jury was left to reject the manslaughter alternative urged upon them by defence counsel without any instruction in law as to its constituent elements. Unwilling and unable to do so in good conscience, the jurors requested ― but never received ― the assistance of the trial judge to which they were by law entitled.
5. The submissions and concessions by counsel did not displace the judge’s obligation to explain the essential elements of every offence left open to the jury, to relate the main items of evidence to each of those elements ― and to answer the jury’s questions, if any, clearly and responsively. That was not done here.
6. As O’Brien J.A. concluded (at paras. 89-90):

The jury had to determine if the facts in evidence established murder or manslaughter ― one or the other. The responsibility lay with the trial judge to instruct on relevant matters of law. It cannot be said in circumstances such as these that knowledge of what constitutes manslaughter is not material. . . .

. . . The jury was entitled to make an informed decision through knowing beforehand what constituted each of the offences, so as to better distinguish between them.

# III

1. This appeal is before us as of right on the strength of O’Brien J.A.’s dissent in the Court of Appeal. For the reasons already mentioned, I agree with O’Brien J.A. that the trial judge’s failure to define the elements of manslaughter amounted in itself to reversible error. I agree as well that the jury “should have been informed that the mental element of the offence, in this instance, required both the intentional application of force (which was admitted) and the objective foreseeability of the risk of bodily harm, which is neither trivial nor transitory, in the context of the dangerous act” (para. 92).
2. In this light, two aspects of the judge’s charge are of particular concern.
3. First, the judge blurred the lines between murder and manslaughter by defining the bodily harm required for murder under s. 229(*a*)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46, as “any hurt or injury that interferes with health or comfort, and it has to be more than something that is just brief or fleeting or minor in nature”. As O’Brien J.A. explains (at para. 86):

This quality of bodily harm relates to the offence of manslaughter, not murder, and may have caused some confusion for the jury and caused the jury members to diminish the intent required to establish murder. This is especially so as this erroneous part was repeated to the jury in response to its question.

1. Second, in summarizing the position of the defence, the trial judge failed to draw the jury’s attention to its most important component: that the appellant, because of his extensive consumption of alcohol and drugs during the hours preceding the incident, lacked the subjective foresight that distinguishes murder from manslaughter, as a matter of law. And yet, as the Crown quite properly acknowledges in its factum, one of the main issues in the case was “whether intoxication raised a doubt about the intent for murder” (R.F., at para. 1); and accordingly, in pre-charge discussions with the trial judge, “defence counsel agreed with the trial judge’s suggestio[n] that . . . the jury instruction should focus the jury on the real issues, intent and intoxication” (R.F., at para. 9). It is undisputed that a proper evidentiary basis for this submission had been adduced at trial.

# IV

1. Finally, I derive no comfort from the trial judge’s invitation to the jury to formulate a further question if his response to the questions they had already asked did not assist them (paras. 94-95).
2. The jury had already formulated their sole concern ― the distinction between the two offences left open to them by the judge ― in three different ways. The judge indicated to the jury that he had responded to their questions to the best of his ability “as constrained by the law”. However well intentioned, the judge’s invitation could not reasonably have encouraged the jury to formulate further questions on the same subject.
3. The jurors can hardly be expected to have later asked, once again, for a definition of manslaughter, or for its essential elements. And even if they had, they would presumably have received the response already given which, in my respectful view, was plainly inadequate.

# V

1. For all these reasons, and with great respect, I would allow the appeal, quash the conviction, and order a new trial.

*Appeal dismissed,* McLachlin C.J. *and* Deschamps *and* Fish JJ. *dissenting.*

Solicitors for the appellant:  O’Brien Devlin MacLeod, Calgary.

Solicitor for the respondent:  Attorney General of Alberta, Calgary.