CITATION: R v. Hutley, 2022 ONSC 6540
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SUPERIOR COURT OF JUSTICE – ONTARIO

RE: R v. SHANE HUTLEY & AMANDA ROJAS-SILVA

BEFORE: S.F. Dunphy J.

COUNSEL: *Patricia Garcia*, for the Respondent/Crown

Maurizio Stellato, for the Applicant/Defendant Shane Hutley

Leah Shafran for the Applicant/Defendant Amanda Rojas-Silva

HEARD at Toronto: November 7, 2022

REASONS FOR DECISION

[1] This is a *certiorari* application brought by both accused seeking to quash the order of committal granted by Khawly J. on May 30, 2022 upon a two count indictment. The charges are manslaughter (s. 236 *Criminal Code*) and criminal negligence by unlawful confinement/restraint causing death (s. 220 *Criminal Code*). For the reasons that follow, I am granting the application and quashing the order of committal on both counts.

[2] The reasons of the learned Justice provide no indication that he considered and assessed the sufficiency of the evidence applicable to each of the essential elements of the two charges before him in forming the opinion that the test for committal had been met. Upon reviewing the record that was before the learned Justice, I conclude that there was no admissible evidence to support the findings necessary to issue an order of committal on either charge. In ordering committal in the absence of evidence sufficient to conclude that the test for committal had been met, the learned Justice exceeded his statutory jurisdiction and the committal orders must be quashed.

[3] In the case of the charge of unlawful act manslaughter, there is no evidence establishing the objectively reasonable foreseeability of bodily harm of a non-trivial or non-transitory nature arising from actions of either accused person for which there is any admissible evidence. The accused were not medical experts and there is evidence of only limited knowledge of the condition of the deceased patient at the time of their interactions with her. While there is some evidence from which the Crown may urge an inference of unlawful conduct on the part of the accused in the way of assault and/or

confinement, the actions attributed to the accused for which there is evidence amounted to restraining the deceased with minimal violence, the foreseeable consequences of which would be either trivial or transitory in terms of the potential for bodily harm. After the deceased and one of the accused fell to the floor in an unplanned accident, there is no evidence that either accused could have safely brought the deceased out of the prone position sooner than they in fact did which was as soon as they had assisted their colleague in handcuffing her. While it may have been foreseeable that the continuing strenuous resistance of the deceased to efforts of the accused security guards to restrain her might have exacerbated whatever state of shortness of breath the accused may have witnessed or surmised, there is no evidence that the chain of causation described by the Crown's expert that led from an essentially transitory state of a shortness of breath to a critical state of cardiorespiratory arrest was itself reasonably foreseeable to a lay person in the situation of the accused.

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[4] In the case of the criminal negligence causing death charge, there is no evidence that the actions of either accused were objectively capable of being found to be wanton or reckless in the sense of displaying a marked and substantial departure from the actions of a reasonable person in the situation of the accused. While there was some evidence from which the Crown could seek findings that the accused unlawfully restrained the deceased and that certain of their actions in doing so were a substantial contributing cause of death, the actions undertaken to restrain the deceased for which there is any evidence were forceful but not violent and consistent with their training in restraining someone. There is no evidence from which it could be concluded that such actions were objectively wanton or reckless in light of the dynamic circumstances in which the actions were taken and the circumstances then known to them. They attempted to immobilize the deceased against the wall by holding her hands or arms. After the deceased continued to struggle and fell, taking one of the accused security guards to the ground with her, they attempted to restrain the arms, hands and legs of the deceased to assist a colleague in placing handcuffs on her wrists. There is no evidence that the accused acted outside of their training in so doing or that their training standards themselves were objectively unreasonable. Further, none of the actions undertaken by either accused carried an objectively reasonable risk of producing bodily harm beyond a trivial or transitory nature.

[5] An order shall issue quashing the committal of the accused on both counts.

Background facts

[6] In describing the facts, I must consider those facts favourable to the theory of the Crown's case for which there is some admissible evidence that a properly instructed jury could accept. My task is to sort out the facts upon which the Crown may rely for which there is some evidence, whatever weight the evidence may ultimately bear in the hands of the trier of fact. This means that I must disregard – for these purposes at least – those alternative facts for which the defence submits there is better evidence or which may raise a reasonable doubt as to an essential element. The Crown is entitled to the most

favourable inferences that the evidence adduced can reasonably bear without regard to weight.

[7] As this is an application to quash a committal for trial and not a re-run of the preliminary inquiry, my task as reviewing judge is confined to reviewing the reasons for committal and the evidence adduced to determine if there was any evidence upon which the preliminary inquiry judge could form the opinion that the test for committal had been met.

[8] On May 11, 2020 an altercation occurred between security guards at Toronto General Hospital during the course of which a patient in the hospital, Ms. Warriner, suffered a cardiorespiratory arrest that caused her brain to be starved of oxygen. Despite being revived after a time at the scene, the duration of the state of oxygen deprivation caused sufficient damage to her brain that she was later diagnosed as being brain dead and, upon being removed from life support sixteen days later, passed away.

[9] Following a police investigation, two of the four security guards present on the scene were charged with unlawful act manslaughter and criminal negligence through unlawful confinement/restraint causing death. On May 30, 2022, Khawly J. committed the accused to trial on both counts.

[10] The actions that the Crown alleges form the *actus reus* of these two offences occurred within a comparatively brief time frame – well under three minutes – beginning at 6:38 am during the shift change-over at the hospital. They took place in the relatively early days of the pandemic and involved a patient who left the Covid ward of the hospital unobserved and without permission and walked to the screening area at the entrance to the hospital in her hospital gown with her mask pulled down and resting around her neck, refusing all requests that she put her mask back in place. Security was called to the scene.

[11] Before describing the events that form part of the *actus reus* of the offences alleged by the Crown, I shall review what evidence there is of the relevant information in relation to the patient in question that was known to one, the other or both accused.

[12] There is evidence that the training of both accused included: (i) training that where a guard has to take a subject to ground to get them off that position as soon as it is safe to do so; (ii) training that, where handcuffing someone behind their back, to move the person into the recovery position as soon as it is safe to do so; (iii) training to avoid applying any upper force or body weight to the shoulders or neck area or any area that might put pressure and cause the person in question not to be able to breathe; and (iv) training as to the importance generally of bringing someone out of the prone position as soon as it is safe to do so. There is also evidence that using nearby objects such as a wall or other solid object is a common tactic employed by security guards to gain control of the situation when facing someone who is confrontational and uncooperative.

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[13] There is some evidence that Ms. Warriner was in a medically fragile state in fact at the time the incident began by reason of (i) a pre-existing diagnosis of chronic COPD for which she was receiving treatment including oxygen at home; (ii) a positive Covid test within the prior two weeks; (iii) a display of Covid-like symptoms upon admission to the hospital the evening of the May 10th; (iv) self-reported shortness of breath and productive coughing.

[14] There is no evidence that Ms. Rojas-Silva was aware of any of the foregoing medical information or of its potential significance to the events that occurred in the minutes following 6:38 am on May 11, 2020 beyond knowing that Ms. Warriner had left the Covid ward without permission and was being directed to return there and beyond any manifestation of shortness of breath of Ms. Warriner that she may have observed with her own eyes while on the scene.

[15] In the case of Mr. Hutley, there is some evidence that Mr. Hutley may have witnessed Ms. Warriner's verbally abusive interactions with Nurse Ng several hours before and may have witnessed some manifestations of the shortness of breath condition that had brought her to the hospital. There is also some evidence that Mr. Hutley was aware that Ms. Warriner had been the object of multiple "Code White" calls by reason of difficult interactions with medical and security personnel in the recent past. There is no evidence that Mr. Hutley was aware of any other aspects of her medical history or had any particular degree of expertise to appreciate the potential significance of those aspects of Ms. Warriner's medical history that he had been exposed to as the events dynamically unfolded.

[16] There is no evidence that Mr. Hutley and Ms. Rojas-Silva planned any of their actions during the incident or that they shared with the other the benefit of any information learned or prior observations made regarding Ms. Warriner.

[17] Ms. Warriner left the Covid floor where she had been admitted the previous evening complaining of shortness of breath some time prior to 6:33 am. At this time, security cameras captured her image on the main floor near the elevators. Security images followed her progress on the main floor until she approached the entrance to the Eaton Wing just before 6:35 am. In all of the security images captured in this phase of the events, Ms. Warriner had a mask under her chin covering only her neck. By this time, a radio call had gone out to security advising them of this missing patient who was to be found and returned to the Covid floor.

[18] Upon arrival in the area, Ms. Warriner took a seat near the screening area. She did not follow the request of a screener (Mr. Allen) to put her mask back on. A security guard who was present, Ms. Rojas-Silva, saw Ms. Warriner shortly after her arrival in the Covid screening area just inside the entrance area and advised the dispatcher. She also put in a call for back-up and for personal protective equipment or PPE to be brought to her at that time.

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[19] For approximately the next three minutes (per the police chronology in Exhibit 3) Ms. Rojas-Silva engaged with Ms. Warriner from a distance pending the arrival of the requested PPE and back-up. During this time, Ms. Warriner remained seated in the chair near the screening area. During the course of this phase of their interaction, Ms. Warriner became loud, verbally abusive and agitated in her dealings with Ms. Rojas-Silva such that she could be heard from some distance down the hallway. She continued to refuse to put her mask back on despite repeated requests that she do so.

[20] The “charge officer” or shift security supervisor, Mr. Li, arrived in the area bearing three PPE gowns. He began assisting Ms. Rojas-Silva in putting her gown on while the latter continued to engage with Ms. Warriner from a distance demanding that she put her mask back upon her nose and mouth. Mr. Li described Ms. Warriner as pointing at Ms. Rojas-Silva, demanding to be allowed to leave and threatening to sue the hospital and get her fired. Mr. Li observed that Ms. Warriner was agitated and refusing to cooperate or go back to the Covid unit as Ms. Rojas-Silva directed. At some point during this interaction, he formed the impression that Ms. Warriner seemed to be breathing rather heavily. There is thus some evidence that Ms Rojas-Silva may have been aware of the same circumstance.

[21] Mr. Li handed the other two PPE gowns he brought with him to two other security officers who arrived shortly after he did: the accused Mr. Hutley and Mr. Rouse. The beginning of the events that form part of the *actus reus* of the crimes alleged occurred moments after Ms. Rojas-Silva had donned her PPE with Mr. Li’s assistance and while Mr. Hutley and Mr. Rouse were in the process of putting theirs on.

[22] There is *some* evidence of the following events relied upon by the Crown as part of the *actus reus* occurring during the following approximately two and one-half minutes beginning with the time Ms. Rojas-Silva, having donned the PPE gown with her supervisor’s assistance approached the seated Ms. Warriner and, in the Crown’s description, got in her space:

a. Immediately after Mr. Li finished attaching the PPE gown to Ms. Rojas-Silva, she stepped towards Ms. Warriner and ordered the latter to put her mask back on. Ms. Warriner’s level of agitation was observed to rise by one eye-witness (the screener, Mr. Allen) who quoted her as threatening to urinate herself and described her as “getting more belligerent”.

b. Ms. Rojas-Silva pulled Ms. Warriner’s mask up over her nose and mouth. No eye-witness saw this occur but the video evidence is open to this interpretation of the events. There is an available inference that Ms. Rojas-Silva’s action was an assault in the sense of being a knowingly non-consensual application of force to Ms. Warriner by Ms. Rojas-Silva. No consideration of possible defences to such a charge can be given at this juncture.

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c. Ms. Warriner rose to her feet with her mask on and swatted at the arm of Ms. Rojas-Silva with her right arm while turning to walk away from her.

d. Ms. Rojas-Silva reacted to this by making contact with Ms. Warriner a second time and pushing or marching Ms. Warriner towards/against the nearby wall a few steps away. This aspect of the interaction took only four seconds. There is an available inference that Ms. Rojas-Silva had one hand on Ms. Warriner's upper back or shoulder area and her other hand on Ms. Warriner's right arm for some or all of this phase of the interaction. There is *no* evidence that Mr. Hutley touched Ms. Warriner in any way or played any part in directing the actions of Ms. Rojas-Silva up to and including this point in the interaction (ending with the time Ms. Warriner was upright and against the wall).

e. With Ms. Rojas-Silva on one side of Ms. Warriner and Mr. Hutley on the other, a struggle ensued during which both security guards sought to gain and maintain control of Ms. Warriner's arms and hold her against the wall. There is an available inference that their actions amounted to forcible confinement in that the force applied by both of them to Ms. Warriner was knowingly applied without Ms. Warriner's consent and was applied for the purpose of overcoming her resistance and preventing her from departing from their control. There is evidence that Ms. Warriner resisted their efforts strenuously and verbally. She flailed her arms and lashed out, attempting to scratch either or both accused and generally to evade their attempts to bring her arms and hands under control. There is evidence that when Ms. Warriner's hands and arms were under control of the accused, she used her feet to lash out with kicks, striking Mr. Rouse in the left shin at one point. There is evidence that Ms. Warriner expended considerable energy in physically and vocally resisting efforts of the two security guards to obtain control of her limbs. There is <u>no</u> evidence of any actions by either security guard that restricted Ms. Warriner's airways – there is no suggestion in the evidence of any chokeholds, punches or similar violent actions being applied. The only evidence is that the efforts of the accused were directed at controlling the upper body of Ms. Warriner against the wall by gaining control of both of her arms.

f. Ms. Warriner was considerably smaller and slighter than Mr. Hutley and, while of a roughly similar height as Ms. Rojas-Silva, she was visibly slighter. There is an available inference that the accused – who had one other guard (Mr. Rouse) standing directly behind and able to assist if needed – collectively had an overwhelming advantage in strength over Ms. Warriner and had gained control of Ms. Warriner's upper body at least for some period of time during this phase of the altercation. The duration of this aspect of the altercation cannot be fixed with precision and the Crown is entitled to all available inferences that would support its theory.

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g. After a time, Ms. Rojas-Silva and Ms. Warriner both lost their balance and fell to the ground while Mr. Hutley's legs became somewhat tangled in those of Ms. Warriner causing him to lose balance but not to fall. The fall of the two women caused the grip of both guards upon Ms. Warriner's arms to be temporarily lost. There is no evidence that any action of either accused was designed to bring Ms. Warriner to the ground or into a prone position. There is no evidence that Ms. Warriner's fall to the ground and ending up in a chest-down position was the result of any intentional act by either accused.

h. While chest-down on the floor, Ms. Warriner continued to resist efforts made by the three security guards (the accused plus Mr. Rouse) to bring her under control. Her resistance was strenuous and was both vocal (shouting and threatening) and physical (flailing limbs, scratching, kicking, spitting etc.). There is no evidence that either accused applied any weight to the upper body of the accused beyond that associated with gaining control of and holding her hands or arms while handcuffs were being applied.

i. There is evidence that both accused assisted Mr. Rouse in attaching his handcuffs to the wrists of Ms. Warriner and that they did so by acquiring control of the arms of a still chest-down Ms. Warriner while she struggled by seeking and obtaining control of both of her hands or arms behind her back. There is no evidence that either accused directed Mr. Rouse to use his handcuffs.

j. There is thus an available inference that both accused assisted Mr. Rouse in handcuffing Ms. Warriner's arms behind her back.

k. There is medical evidence from which it can be inferred that being in the prone position can interfere with the ability to breathe normally and that the added factor of having arms behind the back being handcuffed and/or being face down for a period of time could further interfere with the ability to breathe normally.

l. As soon as the handcuffs were applied, Ms. Warriner's physical resistance ended in whole or in substantial part but her vocal resistance did not. Mr. Rouse brought Ms. Warriner up off the ground at this point. There is some evidence that he did so with the assistance of Mr. Hutley. There is contradictory evidence as to what position Ms. Warriner was brought to, but it was at all events out of the prone or chest-down position.

m. Three is no precise evidence of how long Ms. Warriner spent in the prone position. It may have been for less than a minute or it may have been some other portion of the approximately 2.5 minute time frame during which all of the described events above occurred. The Crown is entitled to all available inferences and not merely those that are likely or probable.

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n. The now-handcuffed Ms. Warriner was placed in a wheelchair. She did not cooperate in any way in this process. There is conflicting evidence as to whether Ms. Warriner was vocal and alert at this point. The Crown is entitled to the inference that she was not and may have already suffered the cardiorespiratory arrest described by Dr. Von Both.

o. Within a few moments of being placed in the wheelchair and pulled (backwards) towards the elevator lobby, Mr. Rojas-Silva noticed that Ms. Warriner was non-responsive and appeared to have no pulse. A Code Blue was called.

p. While Ms. Warriner was able to be revived, she did not recover consciousness. She was taken off life-support and died sixteen days later.

[23] The Crown has presented the evidence of Dr. Von Both who performed the autopsy that, if accepted by a jury, would establish that the *immediate* cause of death of Ms. Warriner was hypoxic ischemic encephalopathy or, in lay terms, a brain injury resulting from lack of oxygen.

[24] The cause of that condition was attributed by Dr. Von Both to a cardiorespiratory arrest whose cause was a matter of some considerable debate between the parties. While Dr. Von Both's evidence regarding how that injury occurred suffers from a myriad of weaknesses which might offer trial counsel rich grounds for impugning its weight or credibility, such an assessment is beyond the scope of the task before Khawly J. or me.

[25] Dr. Von Both's expertise in the matter of restraint asphyxia was not accepted by Khawly J. However, his more general expertise as a forensic pathologist was. Warts and all, Dr. Von Both's evidence provides *some* evidence from which a jury might infer that the cause of the anoxic brain injury that resulted in the death of Ms. Warriner was a state of cardiorespiratory arrest that in turn was produced by a combination of (i) her pre-existing medical conditions including chronic COPD and the impaired lung function associated with that condition, (ii) the stress upon her respiratory system resulting from her agitated state including coughing and "huffing and puffing" while sitting in the chair before any physical contact was made with her by Ms. Rojas-Silva; (iii) the additional oxygen consumption and stress on her respiratory functions resulting from her exertions during the period of time where she was flailing, scratching and generally resisting being immobilized against the wall, (iv) the additional respiratory stresses consequent upon her struggles while being restrained after she fell to the ground and landed in the prone position; and (v) the physical restrictions to her breathing consequent upon having handcuffs applied to her while still lying in a prone position. He opined that these factors in combination resulted in the cardiorespiratory arrest that led to her death with emphasis on the last two that he described as the "icing on the cake" or effectively as a kind of tipping point.

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[26] The foregoing does not in any way imply that this description of the cause of death is the only or even most probable construction of the events or the chain of causation leading to her death. The defence pointed to a myriad of factors not examined by the doctor. That is beyond the scope of this review. A jury's job would ultimately be to weigh the evidence and decide what, if anything, has been proved beyond a reasonable doubt. Taking the Crown's case at its highest, and notwithstanding Dr. Von Both's lack of expertise in the field of restraint asphyxiation, there is some evidence from which a jury could reach the foregoing conclusions regarding the cause of death. There is evidence that death could have been the culmination of the factors he described.

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Issues to be decided

[27] The following are the issues to be decided on this application:

a. Was there any evidence upon which the preliminary inquiry judge could form the opinion that the test for committal was met in respect of either or both charges?

b. Was there some evidence adduced during the preliminary inquiry which, if accepted by a properly instructed jury, might support a finding of guilt beyond a reasonable doubt as to each of the essential elements of manslaughter in the case of each accused?

c. Was there some evidence adduced during the preliminary inquiry which, if accepted by a properly instructed jury, might support a finding of guilt as to each of the essential elements of Criminal Negligence Causing Death in the case of each accused?

Discussion and analysis

(a) Was there any evidence upon which the preliminary inquiry judge could form the opinion that the test for committal was met in respect of either or both charges?

[28] The scope of review by this court of a decision committing an accused person to trial is indeed a narrow one. It is not sufficient that this court disagrees with a decision made or would have assessed the evidence differently. The only ground raised to justify my intervention by the applicants is that there was no evidence from which the learned Justice could have formed the opinion that the evidence was sufficient to justify a committal for trial.

[29] I am somewhat handicapped in conducting this review by the relative brevity of the reasons of the learned Justice as regards the key issues. The reasons devoted considerable time in considering matters such as whether the accused ought to have been charged or whether others ought also to have been charged (i.e. the manner of exercise of prosecutorial discretion). Those comments, while perhaps of assistance to

the Crown in considering its position on this matter, are of no assistance to me in tracking his assessment of the evidence in relation to the essential elements of each charge.

[30] Justice Khawly's reasons treated as the "lynchpin" of the case the characterization of the manner in which Ms. Rojas-Silva initially approached Ms. Warriner. While that question may well form part of the context of the matters that followed, there is no suggestion that the *manner* of Ms. Rojas-Silva's initial approach was a significant cause of death and it is certainly no part of the *actus reus* of either charge.

[31] The reasons of the learned Justice considered whether Mr. Hutley could have foreseen whether the death of Ms. Warriner was a potential consequence of his decision to assist Ms. Rojas-Silva without concluding that he should have foreseen it and despite the fact that the foreseeability of death is not the applicable legal test at all events.

[32] Committal was ordered on both charges without having broken down for analysis any of the essential elements of either charge. There is simply no basis to conclude that the learned Justice reached any conclusions as to the sufficiency of the evidence as to any of the essential elements of either charge. The reasons simply do not address the issue.

[33] The insufficiency of the reasons alone does not justify quashing the committal and neither applicant has asked me to do so on that basis. I must review each charge and each essential element of each charge to determine whether the record before me contains evidence capable of supporting a committal. In undertaking that review, I am not bound by any opinions on the sufficiency of the evidence expressed by the learned Justice because he expressed none in sufficient detail to identify them.

[34] My answer to this first issue is that the insufficiency of the reasons before me requires me to examine each count in the indictment separately and to assess whether the Crown adduced any evidence at the preliminary inquiry capable of satisfying the test for committal for each charge.

(b) <u>Was there some evidence adduced during the preliminary inquiry which, if accepted by a properly instructed jury, might support a finding of guilt as to each of the essential elements of manslaughter in the case of each accused?</u>

[35] The first count in the indictment charges that both accused did "unlawfully cause the death of [Ms. Warriner] and thereby commit manslaughter contrary to section 236 of the *Criminal Code*".

[36] Section 234 of the *Criminal Code* defines manslaughter as culpable homicide that is not murder or infanticide. Culpable homicide is defined by s. 222(5) of the Criminal Code as occurring when a person "causes the death of a human being, (a) by means of an unlawful act".

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[37] The Supreme Court of Canada described the thre essential elements of the crime of unlawful act manslaughter pursuant to s. 222(5) and s 236 of the *Criminal Code* in the case of *R. v. Javanmardi*, 2019 SCC 54 (CanLII), [2019] 4 SCR 3 as follows:

a. The accused committed an unlawful act;

b. The act caused the death of the victim; and

c. The objective foreseeability of the risk of bodily harm of the act was neither trivial nor transitory.

[38] I shall consider each of these essential elements in turn.

(i) The unlawful act

[39] The *actus reus* element of unlawful act manslaughter is satisfied by proof beyond a reasonable doubt that the accused committed an unlawful act if the unlawful act caused the death in question (the causation aspect being the second essential element listed above): *Javanmardi* at para. 30.

[40] The Crown's position is that the actions of Ms. Rojas-Silva in instigating physical contact with Ms. Warriner constituted an unlawful assault and that she thereafter used excessive and illegal force to subdue Ms. Warriner in pushing Ms. Warriner to the wall and again when she held down Ms. Warriner's upper body after Ms. Warriner went to the ground.

[41] Ms. Rojas-Silva was directly involved in each of the aspects of the incident the Crown alleges amounted to an unlawful act. There is evidence from which it might be inferred that she made first physical contact with Ms. Warriner in pulling her mask up. There is an available inference from the video evidence that first contact was made by Ms. Rojas-Silva in this fashion and that Ms. Warriner did not consent to that contact to the knowledge of Ms. Rojas-Silva. Defences to that assault allegation are not relevant at this juncture nor is the weight to be attributed to the evidence relied upon by the Crown.

[42] There is also an available inference that after Ms. Warriner rose from her chair and "swatted" at Ms. Rojas-Silva's hand while turning to walk away, Ms. Rojas-Silva put her arms on the back, arm and shoulder of Ms. Warriner and guided or pushed her up against the wall and held her there against her will despite her struggling to free herself. These actions are capable of being construed as supporting a finding of the unlawful act of confinement, of assault or both. Once again, neither the defences that might be offered nor the weight to be attached to the evidence in support of the allegation or the defences are to be considered at this juncture.

[43] There is no evidence to support significant aspects of the Crown's *characterization* of certain aspects of these events. For example, Ms. Rojas-Silva certainly did not wrench

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Ms. Warriner's hand behind her back while pushing her towards the wall as the Crown alleged. Both of Ms. Warriner's hands are continuously visible in front of her in the surveillance video evidence for all but a brief moment and no eye-witness made any such allegation. However, the Crown's mischaracterization of what the evidence shows, while unhelpful, has no impact on the availability of the inferences from the evidence necessary to satisfy this aspect of the *actus reus* alleged. There is evidence that Ms. Warriner was prevented from going where she wished to go by the physical actions of Ms. Rojas-Silva that, if accepted by a jury, is capable of supplying the unlawful act necessary to support this charge.

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[44] In the case of Mr. Hutley, there is no evidence that he touched or restrained Ms. Warriner in any manner, shape or form prior to the point where Ms. Rojas-Silva finished pushing Ms. Warriner against the wall. The video evidence conclusively shows that he was in the process of donning his PPE gown and was several feet away from Ms. Warriner while the latter was being pushed to and then against the wall by Ms. Rojas-Silva.

[45] He *did* assist her thereafter. Once Ms. Warriner was against the wall there is evidence that Mr. Hutley assisted Ms. Rojas-Silva in confining the still-struggling Ms. Warriner by holding her hands or arms thereby preventing her from going where she wished to go and doing so without her consent.

[46] There is evidence that after Ms. Warriner fell to the ground that Ms Rojas-Silva and Mr. Hutley both participated together in attempting to gain and maintain some degree of control of Ms. Warriner's arms and upper body at least and that they both did so for the purpose of assisting Mr. Rouse to apply his handcuffs to Ms. Warriner while her arms were behind her back and she was chest-down on the ground. There is thus evidence to supply the unlawful act necessary to support this charge as against Mr. Hutley from the point where he began to assist Ms. Rojas-Silva to detain Ms. Warriner.

[47] However, that evidence of one or more arguably unlawful acts by both accused does not include evidence to sustain what the Crown submitted as additional available inferences.

[48] There is no evidence that either Ms. Rojas-Silva or Mr. Hutley intentionally "put" Ms. Warriner on the ground or that either intentionally put her in the prone or chest-down position after she fell either. Dr. Von Both's assumption that the accused put Ms. Warriner in the prone position is not evidence that it did in fact occur. There is in fact no such evidence.

[49] Once Ms. Warriner was on the ground, there is no evidence that either Ms. Rojas-Silva or Mr. Hutley applied any additional pressure to Ms. Warriner's chest beyond whatever restrictions flow from bringing her hands behind her back long enough to attach handcuffs to her wrists. Dr. Von Both's assumption that this is what occurred is also not evidence that it did in fact occur.

[50] If and to the extent there is evidence that any of the actions described above in fact caused the death of Ms. Warriner, then the *actus reus* of the charge would be made out for the accused who was involved in that or those actions.

(ii) Is there evidence that those actions caused the death of Ms Warriner?

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[51] There is some evidence from which a jury might conclude that the actions attributed to each of the accused *contributed* in some fashion to the death of Ms. Warriner. Dr. Von Both's description of the chain of events he found led to the death of Ms. Warriner includes references to the growing and continuing expenditure of energy and thus oxygen by Ms. Warriner in her excited and agitated state placing strains upon her COPD-compromised lungs. He described those strains as reaching the crisis point when Ms. Warriner's ability to breath freely was impaired by lying in the prone position for a time and having her arms held behind her back while being handcuffed. Each step that inched Ms. Warriner closer to the point of crisis was logically a contributing factor. Each of the described unlawful acts is capable of being so described. However, mere contribution is not sufficient to satisfy the legal requirement of causation. The causal link must rise to the point of a "*significant* contributing cause of death": *R. v. Maybin*, 2012 SCC 24 at para. 1 (CanLII).

[52] Bearing the *Maybin* test in mind, it is simply not possible to construe Ms. Rojas-Silva's first alleged action – forcefully putting the mask on – as constituting a significant contributing cause of death. I do not read the reasons of the Khawly J. as so finding.

[53] The next impugned action by Ms. Rojas-Silva must be viewed in the same light. Whether or not Ms. Rojas-Silva was justified in using force to control this patient in these circumstances, there is no objectively reasonable foundation in the evidence to characterize the four seconds during which Ms. Warriner was pushed towards and then against the wall as constituting a significant contributing cause of death and there is no direct finding of Khawly J. to the contrary.

[54] Both of these actions, assuming them to be unlawful as alleged, may have exacerbated to some speculative degree an existing state of shortness of breath but there is no reason to expect that without the intervention of further events – including the accidental fall of Ms. Warriner – any significant degree of harm would have ensued. Further, it was not the actions that exacerbated the shortness of breath condition but Ms. Warriner's reaction to them. As noted earlier, Mr. Hutley, although a witness to some extent, had no role in these first two events.

[55] The next phase of the incident – restraining the struggling Ms. Warriner against the wall – begins to acquire the complexion of an event with at least the potential to be characterized as a significant contributing cause of death. Dr. Von Both's evidence regarding the cause of death referred to the significant expenditure of energy and thus of oxygen by Ms. Warriner in struggling with the two guards and when she was in an excited or agitated state. He did not allege that the actions in and of themselves were a cause of

depriving Ms. Warriner of oxygen. Rather, he described Mr. Warriner's reaction to these events as using up her reserves of oxygen and placing her closer to the point of the crisis that occurred a short while later.

[56] The causal link to Ms. Warriner's death attributable to the last phase of the events described above - i.e. the physical constraints applied while Ms. Warriner was continuing to struggle in the prone position – is considerably stronger. Dr. Von Both did provide some evidence that the physical restrictions placed upon Ms. Warriner's ability to breathe while she was in the prone position with her arms held behind her back for a period of time played a significant and indeed (in his opinion) decisive role in the final crisis that resulted in the cardiorespiratory arrest that ultimately caused the death of Ms. Warriner.

[57] While the evidence does not support a conclusion that either accused "put" Ms. Warriner in that position or that either applied any additional weight or other pressure to her chest or neck area while gaining control of her arms and assisting Mr. Rouse to place handcuffs on her wrists, there is an available inference that the restraint imposed upon Ms. Warriner's arms and hands while both accused were attempting to control them and place them in handcuffs had an adverse effect upon Ms. Warriner's ability to breathe freely and that this did in fact play a significant contributing causal role in the cardiovascular arrest crisis that occurred shortly thereafter.

[58] I must therefore conclude that there is some evidence that the actions of the accused from and after the point where Ms. Warriner fell to the ground played a significant contributing causal role in the death of Ms. Warriner. The evidence adduced by the Crown is sufficient for purposes of committal as regards this second essential element of the charge of illegal act manslaughter.

(iii) Objective foreseeability of bodily harm of non-trivial or transitory nature

[59] There being no evidence from which it might be concluded that the actions of Ms. Rojas-Silva prior to the involvement of Mr. Hutley contributed significantly to the death of Ms. Warriner, I need not consider either action from the point of view of this third essential element beyond the context that they supply to the events which followed. At all events, the degree of force involved in both initial stages of the event entailed only a minimal degree of violence which could not reasonably be expected to have caused any bodily harm not of a trivial or transitory nature. Indeed, there is no evidence that any such harm was caused in fact. The most that can be said of these events is that they moved the cardiorespiratory crisis point described by Dr. Von Both closer to being reached – if only slightly closer.

[60] Once against the wall, the evidence supports inferences no more violent than that the two accused held Ms. Warriner's hands or arms in an effort to prevent her from using these to scratch or hit them and that once a degree of control of those limbs had been achieved, Ms Warriner used her legs to lash out and kicked at least one guard (Mr. Rouse). There is similarly no evidence from which an inference might be drawn that these

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actions can reasonably be characterized as creating an objectively foreseeable risk of bodily harm of a trivial or non-transitory nature. The medical evidence did not go so far as to suggest that these actions alone could be sufficient to trigger the cardiorespiratory crisis that later followed and there is no evidence that a reasonable person in the position of either accused person should reasonably foresee any material harm arising from these actions.

[61] The reasonable foreseeability required to constitute proof beyond a reasonable doubt must amount to more than mere speculation and none of the Crown's evidence or arguments on this point rises beyond that level.

[62] For similar reasons it cannot reasonably be said that the efforts of the accused to assist Mr. Rouse in applying his handcuffs to Ms. Warriner in the dynamic situation then unfolding after Ms. Warriner fell to the ground carried such an objectively foreseeable risk either. As noted earlier, there is no evidence that anyone "put" Ms. Warriner on the ground nor is there evidence that either accused person "kept" Ms. Warriner down for longer than it took to gain control of her hands to allow the handcuffs to be applied nor is there evidence that any downward force was deliberately applied (such as putting a knee or other weight on the back to add to the compression).

[63] The only evidence of the training of the accused regarding bringing a subject out of the prone position or into the recovery position was that this should be done as soon as it is "safe to do so". There is no evidence that it was "safe" to bring Ms. Warriner out of the prone position while she was kicking, attempting to scratch and spit and otherwise struggling before the guards had a sufficient degree of control over her movements to do so. There is no evidence that the accused *could* have brought her out of the prone position before achieving sufficient control over a struggling, resisting Ms. Warriner.

[64] For purposes of this analysis, the evidence of Dr. Von Both that the restrictions placed upon Ms. Warriner's ability to breath were sufficient in fact to trigger the cardiorespiratory arrest that he found occurred must be taken as capable of being accepted by a jury. That evidence relied in part upon the cumulative impact of other prior circumstances and their impact upon Ms. Warriner. The knowledge of only a fraction of those other circumstances is capable of being attributed to the accused on the most favourable but objective reading of the evidence for the Crown. None of the medical expertise necessary to translate that limited information into an assessment of the degree of risk that hindsight and a medical expert suggests was actually growing.

[65] The standard of reasonable foreseeability must be construed not from the perspective of a medical specialist studying the situation in hindsight but rather from the perspective of a reasonable person in the situation of the accused. That situation was an extremely swift-moving, dynamic one where only limited, non-expert observations can be attributed to the accused. Considering only the actions of the accused for which there is evidence, and shorn of all inaccurate characterizations of them for which there is no

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evidence, it cannot be said that there was an objectively reasonable risk of bodily harm beyond the trivial or transitory.

[66] The Crown's written and oral argument continued to stress the danger both guards were said to know of "putting" Ms. Warriner in the prone position despite the utter lack of any evidence that either accused person can reasonably be characterized as having done so. There is no evidence that Ms. Warriner was kept in the prone position for more than the time it took to bring her out of that position as soon as the handcuffs were applied.

[67] Taking the Crown's case at its highest, I cannot find that any of the evidence led would permit a jury, properly instructed, to conclude that this third essential element of the charge of manslaughter has been satisfied.

(iv) Conclusion re manslaughter

[68] Taking all available inferences in favour of the thesis of the Crown's case at their highest, the evidence led at the preliminary inquiry taken would not permit a properly instructed jury to conclude that all three essential elements of the charge of manslaughter can be proved beyond a reasonable doubt. There is no basis in the evidence to sustain the committal of either accused on the charge of manslaughter. The committal of the accused on that charge must accordingly be quashed.

(c) Was there some evidence adduced during the preliminary inquiry which, if accepted by a properly instructed jury, might support a finding of guilt as to each of the essential elements of Criminal Negligence Causing Death in the case of each accused?

[69] The second count in the indictment charges that both accused did "by criminal negligence, namely the unlawful confinement/restraint of [Ms. Warriner] cause the death of [Ms. Warriner], contrary to Section 220 of the Criminal Code.

[70] The essential elements of the crime of criminal negligence causing death are:

a. That the accused committed the act alleged;

b. The act caused the death of the victim; and

c. That the act showed wanton or reckless disregard for the lives or safety of others in that the act was a marked and substantial departure from that of a reasonable person in the situation of the accused,

(i) Which act of the accused?

[71] There is no evidence of any omission to do something which either accused had a duty imposed by law to perform but failed to do that in any way contributed to the chain of causation resulting in the death of Ms. Warriner. The Crown led evidence of the training

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both accused received from their employer but has neither alleged nor proved anything in the nature of a governing standard imposed by law. Both were licensed security guards but no professional obligations or regulations related to that qualification have been identified by the Crown.

[72] If the charge of manslaughter is to stand, it must stand on the basis of identifying one or more positive acts which the evidence permits to be attributed to each accused that satisfies the necessary criteria.

[73] I make no comment upon the submissions made to the effect that either or both accused had a positive duty to respond to the call made and to use force to return Ms. Warriner to her room. Such a duty, if proved, may or may not afford a defence but is of no assistance in assessing the Crown's burden of proof or the evidence available to discharge that burden

[74] The indictment specifies that the actions of the accused that are alleged to fulfill the first essential element of this charge were the "unlawful confinement/restraint" of Ms. Warriner.

[75] The actions of Ms. Rojas-Silva in (i) guiding/pushing Ms. Warriner to the wall; (ii) restraining her against the wall; and (iii) restraining her while assisting Mr. Rouse in applying the handcuffs to Ms. Warriner after she fell to the ground can each be characterized as unlawful actions of confinement or restraint as discussed in respect of the first count of the indictment. Mr. Hutley played no part in the first of these three actions but participated in the last two.

(ii) Did the actions cause the death of Ms. Warriner?

[76] For the reasons discussed in relation to the first count, I found that there was some evidence from with an inference that the second and third described actions listed in the preceding paragraph were a significant contributing cause of death.

(iii) Did the act show a wanton or reckless disregard for the lives of others based on the act being a "marked and substantial departure" from that of a reasonable person in the circumstances?

[77] The Supreme Court in *Javanmardi* found that "wanton or reckless disregard for the lives or safety of others" standard in the Code's definition of criminal negligence requires demonstrating a "marked and substantial departure" from the conduct of a reasonable person in the circumstances of the accused in the sense that a reasonable person in the circumstances would have foreseen that this conduct posed a serious risk to the lives or safety of others.

[78] I cannot find that there is any evidence that any of the actions of either accused is capable of being characterized as displaying the requisite degree of "wanton or reckless disregard" for the lives or safety of other persons in such a way as to be a "marked and

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substantial departure" from the conduct of a reasonable person in the circumstances of the accused. There is no evidence from which it might be concluded that a reasonable but non-expert security guard with the type of training described in the evidence and in the dynamic situation present should or would foresee that the described actions of the two accused in seeking to restrain and contain Ms. Warriner posed a serious risk to her life or safety. A jury properly instructed could not so conclude beyond a reasonable doubt on any objectively available construction of the evidence adduced.

[79] The issue in respect of this essential element is *not* whether there is evidence from which it might be considered that some or all of the actions attributable to either accused can be qualified as an assault or forcible confinement. As I have already indicated, I must consider that the actions of both accused can be so qualified since this review does not permit any weighing of the evidence or a consideration of the availability of defences. The conclusion that there is a basis to assert an unlawful act as against the two accused does not dispense the Crown from discharging the burden of proving that the actual actions undertaken – unlawful though they may have been – ought reasonably to have engendered a realization in the mind of a reasonable person in that situation of the risk of serious harm to Ms. Warriner that it took hindsight and several months of study to confer upon Dr. Von Both.

[80] The Crown suggested that Ms. Rojas-Silva bears blame for the events that followed even the initial comparatively trivial physical contact being made because she could have adopted other less confrontational approaches to de-escalate the situation including by calling for a "Code White" which would have brought medical personnel to the scene in addition to the security personnel and medical personnel might have been more adept at de-escalating. That critique misapplies the objective test of wanton or reckless in a fundamental way.

[81] First, the available objective evidence of the standards to be expected of a reasonable security guard with the experience and training of the two accused is to quite the opposite effect. Three security guards were spectators during the initial phases of Ms. Rojas-Silva's interactions with Ms. Warriner and one of them – the supervisor Mr. Li – was not physically engaged throughout. He was in the ideal position throughout to have issued instructions to either accused to disengage or take some other action. A "Code White" – were it the magic bullet for dealing with the situation the Crown portrayed it as being – was an option for Mr. Li from start to finish that he never saw fit to exercise. These circumstances do not speak highly of the obviousness or adopting that course of action or the imprudence and foreseeability of risk in failing to do so. The inaction of the other security guards in warning of the alleged risk, counselling disengagement or calling a Code White is certainly no evidence that the actual conduct of the accused amounted to a marked and substantial departure pregnant with risk of serious harm to Ms. Warriner and the Crown led no other evidence to suggest that it is.

[82] It is important not to confuse the decision to use force with the risks associated with the *manner* in which the accused chose to use force. My earlier conclusion was that

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the Crown has led some evidence sufficient to satisfy the unlawful action element of this charge. For present purposes, it is presumed that force was applied unlawfully. That does not mean that the mere fact that the action was unlawful carries with it the conclusion that anything that follows is a marked and substantial departure carrying the requisite degree of risk of serious harm. The two issues are separate and distinct.

[83] Second, there is the matter of chronology. The Crown's characterization telescopes a variety of discrete actions taken in a progressive manner as a dynamic situation unfolded in real time and while one (and then the other) accused were actively involved in it. The failure to have called for a Code White when taking step 1 that carries with it no objective serious risk of harm cannot result in the conclusion that step 5 carries a risk of serious harm because of the failure to have acted in a certain way before step 1.

[84] Even assuming that the accused acted outside of their training in resorting to force to detain the patient when other options were available, there is no evidence to contradict the evidence that the *type* of force employed was within their training once the decision to restrain had been taken. Stated differently, the evidence permits an available inference that the use of force was not objectively called for, but there is no evidence that having decided – even unreasonably – to apply force, the *manner* in which the force was applied was not consistent with that training. The uncontradicted evidence of the training of the accused is to the effect that they restrained Ms. Warriner in a manner consistent with their training even if the initial decision to restrain her may be open to question.

[85] The conclusions reached in respect of the objective foreseeability of non-trivial or transitory bodily harm apply to this essential element as well. The force applied before Ms. Warriner fell was at the low end of the scale designed to restrain but not harm the subject. After she fell, the decision to apply handcuffs (taken by a non-accused person but nevertheless an action in which the accused participated/assisted) certainly involved a greater degree of restraint. However, there is no evidence that the manner in which this decision was executed carried with it a risk of serious harm. At its highest (from the perspective of the Crown) the training of the accused was not to apply weight to a subject in the prone position and to bring them to a recovery position as soon as it is safe to do so. There is no evidence that they departed from this as the only evidence is that as soon as control over the arms was gained the handcuffs were applied and as soon as the handcuffs were applied Ms. Warriner was brought out of the prone position.

[86] Once on the ground, the Crown suggests the evidence supports the conclusion that the two accused "restrained Ms. Warriner's chest down on the ground". That is a conclusion that the evidence does not support.

[87] There is no evidence that the accused *ever* had control of Ms. Warriner while she was lying on the ground before Mr. Rouse – on his own initiative – secured Ms. Warriner's wrists in his handcuffs with the assistance of the accused. Prior to control over Ms. Warriner's limbs being gained in this fashion, the only evidence is that Ms. Warriner was flailing, attempting to scratch and kick and loudly threatening the guards. She was, in a

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phrase, resisting their attempts to restrain her energetically and with a degree of violence. Once handcuffs were applied and control over her was successfully achieved, the only evidence is that Ms. Warriner was brought out of the prone position in which she found herself without any evidence of delay.

[88] Mr. Li's evidence did include the use of such phrases as "holding her down" on the ground, but he explained that Ms. Warriner was resisting, kicking and spitting in this time frame and that what he meant by "holding her down" was that the two accused were gaining control of Ms. Warriner's arms and (as far as he could see) applying handcuffs. His evidence was also that once the handcuffs were applied, Ms. Warriner was lifted up off the ground. Mr. Rouse's evidence differs as to details of who applied the handcuffs but not as to its fundamental gist. He said that it was he who decided to use his handcuffs without any discussion having regard to the degree of resistance being shown by Ms. Warriner and that the accused assisted him in securing her limbs for that purpose after which he brought her up off the ground. The evidence of these two is the effectively the only evidence of what took place after Ms. Warriner fell to the ground. No video camera filmed the events and the other witness who testified (Mr. Allen) had an obstructed view and was otherwise engaged.

[89] Applying the most favourable view to the Crown of the evidence adduced to the objective legal fault standard for manslaughter, it cannot be concluded that there was any evidence from which a jury, properly instructed, could conclude that the actions of either accused demonstrated a wonton or reckless disregard for the life or safety of Ms. Warriner. The Crown's evidence, taken at its highest, fails to cross the hurdle of this third essential element.

(iv) Conclusion regarding criminal negligence causing death

[90] Taking all available inferences in favour of the thesis of the Crown's case at their highest, the evidence led at the preliminary inquiry taken is not sufficient to permit a properly instructed jury to conclude that all three essential elements of the charge of criminal negligence causing death can be proved beyond a reasonable doubt. There is no basis in the evidence to sustain the committal of either accused on the charge of criminal negligence causing death.

Disposition

[91] In conclusion, the applications of the accused are granted and an order shall issue quashing the committal of Ms. Rojas-Silva and Mr. Hutley on the charges of manslaughter and criminal negligence causing death as requested.

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S.F. Dunphy J.

Date: November 22, 2022

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