COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Doxtator, 2022 ONCA 155
DATE: 20220222
DOCKET: C66291 & C66431

MacPherson, Roberts and Miller JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Jasmine Doxtator

Appellant

and

AND BETWEEN

Her Majesty the Queen

Respondent

and

Richard Doxtator

Appellant

Richard Litkowski, for the appellant, Jasmine Doxtator

Jessica Zita, for the appellant, Richard Doxtator

Andreea Baiasu, for the respondent

Heard: September 27 and October 20, 2021 by video conference

On appeal from the convictions entered by Justice James A. Ramsay of the Superior Court of Justice, sitting with a jury, on September 21, 2017.

L.B. Roberts J.A.:

A. OVERVIEW

[1] The appellants appeal their respective convictions for the first degree murder of Joseph Caputo, committed on June 19, 2015.

[2] The appellants request a new trial. Their principal submission is that the trial judge erred in failing to leave for the jury's consideration for Jasmine Doxtator the included offences of second degree murder and manslaughter. Since their cases are intertwined, the appellants argue, if a new trial is ordered for Ms. Doxtator, Richard Doxtator should also have a new trial.

[3] For the reasons that follow, I agree that the included offences of second degree murder and manslaughter should have been left with the jury for Ms. Doxtator and would order a new trial. As a result, I do not need to address Ms. Doxtator's grounds of appeal concerning the trial judge's instructions on party liability. I would also order a new trial for Mr. Doxtator.

B. FACTUAL BACKGROUND

(a) The death of Mr. Caputo

[4] Except as otherwise indicated, the following is a summary taken from Ms. Doxtator's testimony and concessions at trial, as well as the unchallenged forensic evidence. Mr. Doxtator did not testify at trial but relied on Ms. Doxtator's testimony. As I would order a new trial, I make no findings regarding the ultimate

credibility and reliability of this evidence. I take it at its most favourable for the appellants for the purposes of assessing whether, on the totality of the evidence, the jury could have had a reasonable doubt with respect to whether Mr. Caputo's murder was planned and deliberate or whether Ms. Doxtator had murderous intent: *R. v. Ronald*, 2019 ONCA 971, at paras. 46-48, 59; *R. v. Tenthorey*, 2021 ONCA 324, at paras. 70-71, 75.

[5] The appellants are cousins. They lived in Hamilton, Ontario. Mr. Caputo was Ms. Doxtator's former drug dealer and friend whom she had known for many years before his death. She was familiar with Mr. Caputo's apartment in Niagara Falls, where his death occurred, because she had visited him often. A day or two prior to Mr. Caputo's death, Ms. Doxtator told Mr. Doxtator that the last time she saw Mr. Caputo he had drugged and raped her and that he was stalking her teenaged daughter. Up until that point, Ms. Doxtator had kept this information from Mr. Doxtator because she was concerned it would make him upset.

[6] On June 18, 2015, the appellants borrowed Ms. Doxtator's cousin's Jeep and attended a drive-in movie theatre. There, Ms. Doxtator and Mr. Doxtator talked about the problems she was having with Mr. Caputo. Ms. Doxtator became very upset. The appellants left the theatre without seeing the movie. Ms. Doxtator called Mr. Caputo and arranged to meet him. The appellants then drove to Niagara Falls, Ontario, to confront Mr. Caputo about his behaviour and tell him to stay away from Ms. Doxtator's daughter. Mr. Doxtator was to lend support and protection.

Ms. Doxtator was concerned about going alone because of what had happened the last time she saw Mr. Caputo.

[7] In cross-examination, the Crown suggested to Ms. Doxtator that her description of events made it sound like the appellants were going to threaten Mr. Caputo. Ms. Doxtator disagreed that it sounded like she was going to threaten him.

[8] Once in Niagara Falls, Ms. Doxtator met up with Mr. Caputo at a McDonald's restaurant. They did not stay at the restaurant but went to Mr. Caputo's apartment. While Ms. Doxtator initially testified the restaurant was closed, the parties later agreed it was open. Ms. Doxtator's evidence was that Mr. Caputo drove back in his car and Mr. Doxtator and Ms. Doxtator drove in the borrowed Jeep. The Crown maintained Mr. Caputo drove Ms. Doxtator back to his apartment and Mr. Doxtator followed them, without Mr. Caputo's knowledge, in the borrowed Jeep. The apartment's security camera showed only Mr. Caputo and Ms. Doxtator passing together through the lobby at around 12:57 a.m. Mr. Caputo's apartment was on the first floor and had a back door to a patio. Mr. Doxtator waited outside by the back door. Mr. Doxtator ultimately gained entrance into Mr. Caputo's apartment through the back door. Ms. Doxtator maintained that Mr. Caputo opened the door when Mr. Doxtator knocked; the Crown contended that Mr. Doxtator hid on the patio and Ms. Doxtator unlocked the back door so Mr. Doxtator could enter.

[9] Ms. Doxtator and Mr. Caputo argued in his apartment. A neighbour testified hearing what he thought sounded like a domestic dispute between a husband and wife. Ms. Doxtator and Mr. Caputo became upset when she confronted Mr. Caputo about his raping her and his harassment of her daughter. Mr. Doxtator told Mr. Caputo to let her speak. Mr. Caputo became enraged. He grabbed a kitchen knife, told them both "to get the 'F' out of his house", and started moving toward Mr. Doxtator. Mr. Doxtator held Mr. Caputo off with his hand on Mr. Caputo's forehead but a struggle ensued. It was at this point that Ms. Doxtator left through the back door, closing her eyes and putting her hands over her ears. She did not see Mr. Doxtator stab Mr. Caputo but on re-entering the apartment, she saw blood everywhere and Mr. Doxtator cleaning his hands. Ms. Doxtator did not see or know if Mr. Doxtator brought a knife with him. The appellants conceded at trial that Mr. Doxtator caused Mr. Caputo's death.

[10] The appellants left the apartment and locked the front door with Mr. Caputo's keys. At about 1:22 a.m., the apartment's video footage showed Ms. Doxtator leaving the apartment building with Mr. Doxtator. The appellants began driving back to Hamilton. However, about an hour later they returned to Mr. Caputo's apartment to retrieve Ms. Doxtator's cup that she had left behind, as witnessed by a neighbour.

[11] The Crown suggested Mr. Caputo's apartment had been ransacked and that some money had been taken. Mr. Doxtator's bloodied footprints were found

throughout the apartment. Ms. Doxtator maintained they did not take any money or drugs from the apartment, although she testified that she knew where Mr. Caputo kept drugs. The police later found on the Niagara bound side of the highway items belonging to Mr. Caputo that may normally be kept in a wallet, including various pieces of Mr. Caputo's identification, insurance cards, and his vehicle ownership card. Mr. Caputo's cell phone was also found on the side of Valley Way Road in Niagara Falls.

[12] On their return to Hamilton, the appellants threw away the kitchen knife used in the stabbing and Ms. Doxtator's bloodied shoes into a grocery store garbage bin. The kitchen knife was never recovered. Video footage at Mr. Doxtator's father's apartment shows the appellants putting items into the dumpster at the rear of the building.

[13] The appellants returned the Jeep to Ms. Doxtator's cousin the following day and then spent the next several days moving around and living transiently until they were arrested by the police. One witness testified that prior to the appellants' arrest, Mr. Doxtator had asked if he knew anyone who could forge documents and indicated that he was trying to go to Awkesasne, which borders New York State. Mr. Doxtator sent text messages that read, "I'm in a jam and I needed a place to recoup, gather my thoughts and figure shit out"; "I fucked up"; and "[c]an we set up our tent in house your backyard for a week til I figure out the next move. Me and

my girl and her daughter need to leave Canada soon". Ms. Doxtator texted a friend that she was in "big trouble" and she was scared.

[14] According to the forensic evidence, Mr. Caputo's blood was found in the inside back door area of his apartment, which continued through the living room, along the corridor and into the hallway area where his body was found. Mr. Caputo had sustained 18 individual sharp force injuries, which were cutting and stabbing wounds, and had superficial defensive wounds on his hands and the back of his arms. Three of the stab wounds to his upper back area that punctured his lungs could have been fatal; one stab wound to the front of his chest pierced his heart and killed him. According to the expert forensic pathologist, Dr. John Fernandes, the stab wound to the heart required a good deal of force, as it cut a bone entirely in two. The defensive injuries that he found on Mr. Caputo were indicative of a struggle. He agreed that the injuries were caused in rapid succession and that Mr. Caputo could have continued to stagger for a very short period of time after the fatal wound was inflicted.

[15] Traces of Mr. Caputo's blood were found on and near the borrowed Jeep's gear lever and on a bag seized from the place where the appellants were staying on their arrest. The police seized from the borrowed Jeep a hunting knife belonging to Mr. Doxtator. Mr. Doxtator's DNA was found on the knife. There was blood on Mr. Doxtator's hunting knife that was in too small a quantity to analyze. According to Dr. Fernandes, the knife that killed Mr. Caputo would have had a cutting edge

with no serrations. He opined that the hunting knife could be of the type of knife responsible for Mr. Caputo's injuries or it could have been a larger knife, such as a chef's knife.

(b) Trial proceedings

(i) Parties' Trial Positions

[16] At trial, the Crown's primary theory was that the appellants carried out the planned and deliberated murder of Mr. Caputo in retaliation for his rape of Ms. Doxtator and to protect her daughter. The Crown argued that Ms. Doxtator planned and facilitated the murder with Mr. Doxtator who did not know Mr. Caputo or where he lived: she called Mr. Caputo to arrange a meeting, lured him back to his apartment, and then opened the door to Mr. Doxtator who immediately stabbed Mr. Caputo to death with the hunting knife he had brought for that purpose. The Crown argued that following the murder, the appellants stole Mr. Caputo's wallet and ransacked the apartment for anything of value.

[17] While not part of the Crown's final submissions, in his charge to the jury the trial judge also stated that another possible motive derived from the evidence was that the appellants planned to carry out a robbery of drugs and money that Ms. Doxtator knew Mr. Caputo kept at his apartment.

[18] The appellants' defence depended on Ms. Doxtator's evidence that although they intended to confront Mr. Caputo, the appellants never intended or planned to kill or physically hurt him. The appellants' position was that Mr. Doxtator stabbed

Mr. Caputo in self-defense in response to Mr. Caputo attacking him with a kitchen knife. Alternatively, it was argued that Mr. Doxtator acted instinctively and so lacked the intent for murder and should therefore be found guilty of the lesser included offence of manslaughter.

(ii) Pre-charge conference and rulings

[19] At the pre-charge conference, the trial judge initially ruled that manslaughter would be left to the jury for Ms. Doxtator but that there was no air of reality to self-defense for Mr. Doxtator. His ruling was very brief:

> I have decided that I do not think there is an air of reality to self-defence. I have also decided that I think there is an air of reality to manslaughter for Jasmine Doxtator. I have given you the bare bones of what I plan to tell the jury in law about these offences.

[20] After hearing further submissions, defence counsel persuaded the trial judge that only first degree murder or acquittal would be the verdicts left with the jury for Ms. Doxtator, and that for Mr. Doxator, self-defense, along with the potential verdicts of second degree murder and manslaughter, would be left with the jury. He stated: “Okay, it is all or nothing for Jasmine and I will leave self-defence for Richard. But do not spend too much time on that.”

(iii) Verdicts

[21] The jury returned in under six hours, rendering verdicts of first degree murder for both appellants. Both appellants were sentenced to life imprisonment without eligibility of parole for 25 years.

C. ISSUES AND THE PARTIES' POSITIONS ON APPEAL

[22] The appellants submit that the trial judge erred in his jury instructions by failing to leave with the jury the included offences of second degree murder and manslaughter as potential verdicts for Ms. Doxtator, notwithstanding the insistence of her trial counsel that only first degree murder should be left with the jury. They assert that it was open to the jury on the evidence to have a reasonable doubt as to whether Ms. Doxtator had the requisite intent for murder or whether the murder was planned and deliberate. As a result, they argue, the jury was pushed into the stark binary choice between a first degree murder verdict or an acquittal for Ms. Doxtator and, by extension, for Mr. Doxtator. According to the appellants, the failure to leave second degree murder and manslaughter for Ms. Doxtator undermined Mr. Doxtator's defence and tainted the verdict of first degree murder: having returned a first degree murder verdict for Ms. Doxtator, the jury would not have come to a verdict of less than first degree murder for Mr. Doxtator who stabbed Mr. Caputo.

[23] The Crown submits that the trial judge did not err in acceding to defence counsel's adamant request that only first degree murder should be left with the jury for Ms. Doxtator because there was no air of reality to the included offences. There is no reasonable view of the evidence, on the Crown's submission, on which a jury would have doubt of planning and deliberation but convict Ms. Doxtator of second degree murder or manslaughter. Moreover, the structure of the jury instructions

ensured that the jury would consider a separate verdict for each accused and reach a verdict for Mr. Doxtator before turning to consider the charge against Ms. Doxtator. There was no complaint about the charge that left first degree murder, second degree murder and manslaughter for Mr. Doxtator. As a result, the Crown argues, the appellants suffered no prejudice and received a fair trial. The Crown submits that given the appellants' plan to confront Mr. Caputo and the forensic evidence of the ferocity of the stabbings from the moment Mr. Doxtator was let into the apartment, a verdict of first degree murder was inevitable for both appellants. The Crown contends that if there was an error in the jury instructions, this court should apply the *curative proviso*.

D. ANALYSIS

(i) General principles

[24] There is no question that trial judges have a broad discretion in fashioning jury charges. Their decision about how much evidence to review, what structure to use and how to organize the charge falls within that discretion and, absent reversible error, is owed deference on appeal: *R. v. Newton*, 2017 ONCA 496, 349 C.C.C. (3d) 508, at para. 11.

[25] However, a failure to leave with the jury a possible verdict that arises on the evidence is an error of law to which no appellate deference is owed. It is well established that "a trial judge has a duty to instruct the jury on all bases of liability

that are available on the evidence": *R. v. Kostyk*, 2014 ONCA 447, 312 C.C.C. (3d) 101, at para. 40.

[26] In first degree murder cases, where there is any air of reality on the evidence, the included offences of manslaughter and second degree murder should be left with the jury: *Ronald*, at para. 41; *R. v. Romano*, 2017 ONCA 837, 41 C.R. (7th) 305, at paras. 13-14; *R. v. Babinski* (2005), 193 C.C.C. (3d) 172 (Ont. C.A.), at para. 45, leave to appeal refused, [2005] S.C.C.A. No. 201; *R. v. Aalders*, [1993] 2 S.C.R. 482, at p. 504; and *R. v. Luciano*, 2011 ONCA 89, 267 C.C.C. (3d) 16, at para. 75.

[27] In some cases, like here, the trial judge's instructions will not accord with the position advanced by counsel for the Crown or the defence; however, this is not dispositive of the issue because it is the trial judge's role to charge the jury on all relevant questions of law that arise from the evidence: *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, at para. 27. As this court instructed in *R. v. Polimac*, 2010 ONCA 346, 254 C.C.C. (3d) 359, at para. 97, leave to appeal refused, [2010] S.C.C.A. No. 263:

> Counsel's position at trial is of course not determinative when misdirection or non-direction is raised as a ground of appeal. A legal error remains a legal error even if counsel does not object or even supports the erroneous instruction. [Citations omitted.]

[28] By the same token, the law "is sensible": a trial judge should not leave verdict options that a reasonable jury, properly instructed, could not arrive at. This would

create “a breeding ground for confusion and compromise” and give the jury the option to make an unreasonable decision: *Romano*, at paras. 14-16; *R. v. Wong* (2006), 211 O.A.C. 201 (C.A.), at para. 12.

[29] As this court stated in *Ronald*, at para. 43, the purpose of the “air of reality” test is “to focus the jury’s attention on the live issues actually raised by the evidence.” This reduces the risks of unreasonable verdicts, juror confusion, or improper compromise by jurors.

[30] The overarching consideration for the trial judge in determining whether to leave included offences as verdict options for the jury is, as this court directed in *Ronald*, at para. 46, whether, on the totality of the evidence, the jury could reasonably be left in doubt with respect to an element of the main charge that distinguishes that charge from an included offence. This court reiterated in *Ronald*, at para. 42:

> There should be no instruction on potential liability for an included offence only when, on a consideration of the totality of the evidence and having due regard to the position of the parties and the proper application of the burden of proof, there is no realistic possibility of an acquittal on the main charge and a conviction on an included offence. [Citations omitted; emphasis added.]

[31] Importantly, unlike positive defences, there is no evidentiary burden placed on the defence or Crown “to put the possibility of a conviction for the included offence … “in play””: *Ronald*, at para. 47. In other words, the appellants do not need point to evidence that supports inferences inconsistent with first degree

murder. Rather, the trial judge must consider whether the jury could draw inferences, or not draw inferences from certain evidence, that could "open the door to a doubt" on an element such as planning and deliberation or murderous intent: *Ronald*, at para. 48.

(ii) Did the trial judge err by not leaving the included offences of second degree murder and manslaughter to the jury?

[32] In assessing whether the included offence of second degree murder should have been left to the jury, the question is whether "on the totality of the evidence, a reasonable jury could be left unconvinced, beyond a reasonable doubt, that the murder was planned and deliberate": *Ronald*, at para. 47. Similarly, in assessing whether the included offence of manslaughter should have been left to the jury, the question is "if on all of the evidence there is an air of reality to a finding that the Crown had not proved beyond a reasonable doubt that the killer had either of the requisite intents required for murder": *Babinski*, at paras. 45.

[33] In my view, on the totality of the evidence, a reasonable jury could have been left in doubt on whether Mr. Caputo's murder was planned and deliberate or whether Ms. Doxtator had the requisite intent required for murder.

[34] In his charge to the jury, the trial judge set out the possible verdicts for Ms. Doxtator: guilty of first degree murder or not guilty of first degree murder. He reviewed the elements of the offence of first degree murder that the Crown was obliged to establish beyond a reasonable doubt. He related in detail circumstantial

evidence that he instructed the jury might be relevant to planning and deliberation, as follows:

> - Jasmine and Richard Doxtator were in Joe Caputo's apartment for twenty-five minutes, during which time blood was let from one end of the apartment to the other.
>
> - Jasmine had Joe pick her up at McDonald's instead of going straight to his apartment.
>
> - Jasmine wanted to speak to Joe at his apartment instead of in a public place like McDonald's. She testified that McDonald's was closed, but it was not.
>
> - Richard did not enter the apartment with Jasmine.
>
> - Richard entered through the back door rather than the front.
>
> - After Joe was dead or dying, Richard and Jasmine stayed in the apartment for a few minutes to remove some items, and they locked the front door behind them.
>
> - They took some items that one might find in a wallet and returned for Jasmine's cup and Joe's cell phone.
>
> - They threw away the items from Joe's apartment.
>
> - Richard Doxtator did not know Joe Caputo.
>
> - They drove from Hamilton, not staying to watch the movie they told [Ms. Doxtator's cousin] about, and drove to Niagara Falls at a time when Jasmine had a beef with Joe Caputo, which Richard knew about. Jasmine says that they left the movie because it turned out not to be the one they expected.

> - Jasmine seems to be talking to Joe in a normal manner as they enter the apartment, if that is what you think it looks like – it is up to you of course.

[35] The trial judge further instructed that another piece of circumstantial evidence related to planning and deliberation was the knife found in the borrowed Jeep and stated that "if Richard brought a knife with him to Joe's, that is a factor that could be used when deciding whether planning and deliberation took place." He went on to compare the size of the wound in Mr. Caputo's heart to the width of the hunting knife found in the Jeep with Mr. Doxtator's DNA on the handle. He referenced Dr. Fernandes's testimony that "it is not likely that a knife of this width would cause such an injury, but he could not rule it out. The chest is compressible." He noted that while the blood on the blade could not be profiled for DNA "Joe Caputo's blood was not far away, in the same vehicle near the gearshift."

[36] The trial judge's summary of the evidence contrary to planning and deliberation appears in the following short paragraph of the charge:

> The evidence contrary to planning and deliberation is found in Jasmine's testimony. She said that she and [Richard] went to Joe's so that she could tell Joe to stay away from her daughter. There was no plan for [Richard] to come in and kill Joe. There was no plan for [Richard] even to come in. He just knocked at the gate after she had been in the apartment for 15 or 20 minutes and Joe let him in.

[37] The jury was not obliged to accept the Crown's theory or the trial judge's suggestions about the use that they could make of the circumstantial evidence to assess the elements of planning and deliberation. However, the jury was not

instructed that it could also reasonably take the view that this evidence, considered with the rest of the evidence, in particular, Ms. Doxtator's evidence, did not support the assertion that the murder was the product of a careful and considered scheme of the sort required to establish planning and deliberation. As this court reiterated in *Ronald*, at para. 50, "Not every act indicative of some preparation prior to the murder, or some degree of planning, points only to a finding that the murder was planned and deliberate, as that phrase is defined in the case law." And there was the reasonable possibility that the jury would not draw any inference from some of the evidence that the trial judge suggested may be relevant to planning and deliberation: *Ronald*, at para. 46.

[38] Similarly, with respect to the included offence of manslaughter, a properly instructed jury could have reasonable doubt whether Ms. Doxtator had the requisite intent for murder. A person may be convicted of manslaughter who lacks the requisite *mens rea* for murder but "aids and abets another person in the offence of murder, where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken": *R. v. Jackson*, [1993] 4 S.C.R. 573, at pp. 583. A reasonable view of the evidence could have led to the inference that while the appellants may have planned a violent physical encounter with Mr. Caputo, the appellants lacked murderous intent, and instead planned to assault or rob him.

[39] Ms. Doxtator's evidence, together with the forensic evidence, permitted the reasonable inferences that although the appellants previously did not plan and deliberate on killing Mr. Caputo, once in the apartment and embroiled in a conflict with him, Mr. Doxtator developed the intent to kill Mr. Caputo, which was shared by Ms. Doxtator, or that the planned physical confrontation escalated and led to his death.

[40] Ms. Doxtator's evidence was that she wanted to confront Mr. Caputo and tell him to stop stalking her daughter and that their friendship was over. She brought Mr. Doxtator along for security and support. A witness testified hearing a man raise his voice and something that reminded him of an argument between a husband and a wife. This is consistent with Ms. Doxtator's evidence that she and Mr. Caputo became involved in a heated argument prior to the beginning of the physical altercation between Mr. Doxtator and Mr. Caputo. Ms. Doxtator said she left the apartment once the physical confrontation between Mr. Caputo and Mr. Doxtator began. There is no suggestion that she stabbed Mr. Caputo or that she provided the murder weapon. She testified she did not see Mr. Doxtator with the hunting knife. She said she ran out of the apartment with her hands over her ears and shutting her eyes.

[41] The jury was entitled to accept some, none, or all of Ms. Doxtator's evidence. The jury could have accepted Ms. Doxtator's testimony that the appellants did not plan or deliberate on the murder of Mr. Caputo, while still rejecting Ms. Doxtator's

version of events of what happened once the appellants were at Mr. Caputo's apartment or her claims that they were not planning to threaten him. As this court stated in *Tenthorey*, at para. 96: "The air of reality test does not include consideration of the reasonableness of a jury's choices about what evidence to believe."

[42] Furthermore, the following evidence, some of which was referenced by the trial judge as supportive of planning and deliberation, is equally consistent with a panicked and desperate reaction to an unexpected killing:

i. The apparent ransacking and bloodied footsteps all over the apartment.
ii. The appellants leaving behind Ms. Doxtator's cup and then returning to Mr. Caputo's apartment.
iii. The clumsy disposition of clothing in dumpsters close to premises where the appellants had recently stayed.
iv. Mr. Doxtator's increasingly desperate text messages that suggested he was looking for places to hide and to eventually leave the country. In particular, his text to Matt that, "I fucked up," and his text to Harvey, "I'm in a jam and I needed a place to recoup, gather my thoughts and figure shit out….". may be suggestive of someone who unintentionally committed a killing and are not suggestive only of someone who had committed a planned and deliberate killing.

[43] The evidence related to the knife was also equivocal. While Dr. Fernandes did agree that the hunting knife could not be ruled out as the murder weapon, he recommended checking for other knives and agreed that the murder weapon could have been a larger kitchen knife, like a chef's knife. He only ruled out a serrated knife. I also note that the trial judge appears to have misstated Dr. Fernandes's evidence about the dimensions of the murder weapon. The trial judge stated: "According to Dr. Fernandes, it is not likely that a knife of this width would cause such an injury, but he could not rule it out. The chest is compressible." While the compression of the chest was relevant to the length of the knife, such that Dr. Fernandes could not rule out a knife of the length of the hunting knife, it was not relevant to its width. As the trial judge correctly stated, Dr. Fernandes was of the view that because of its width, it was unlikely the hunting knife caused the fatal injury.

[44] As in *Ronald*, at para. 58, the nature, speed and ferocity of the attack on the victim could equally suggest that the killer acted in a frenzied rage consistent with second degree murder.

[45] The evidence outlined above does not exclude the reasonable inference that Mr. Caputo's murder was planned and deliberate. That inference was available on the evidence. However, the question is not whether the evidence points more strongly to second degree murder or manslaughter than planning and deliberation. As I have stated, the correct question is whether a reasonable jury, properly

instructed, could have a doubt as to whether Ms. Doxtator had planned and deliberated the murder of Mr. Caputo or had the requisite murderous intent: *Ronald*, at para. 59.

[46] If the jury had a reasonable doubt about planning and deliberation for Mr. Caputo's murder and even the presence of a murderous intent for Ms. Doxtator, but had no doubt about her participation in an unlawful act – assault or robbery – they were faced with only one option: an outright acquittal. This left the jury with a stark choice. Given the defence concession that Mr. Doxtator stabbed Mr. Caputo, as the Nova Scotia Court of Appeal suggested in *R. v. MacLeod*, 2014 NSCA 63, 346 N.S.R. (2d) 222, at para. 89, aff'd 2014 SCC 76, [2014] 3 S.C.R. 619, the jury "may have considered an outright acquittal not only quite unpalatable in the circumstances, but contrary to a considerable body of evidence suggesting that [the appellants knew they] had engaged in a blameworthy act".

[47] To be fair to the trial judge, his initial instinct that there was an air of reality to manslaughter for Ms. Doxtator was correct. Ms. Doxtator's defence counsel was adamant that the evidence did not support the verdicts of second degree murder or manslaughter. However, the insistence of defence counsel was not determinative in the circumstances of this case where the evidence gave rise to other reasonable inferences than planning and deliberation or murderous intent. As this court reiterated in *R. v. Chambers*, 2016 ONCA 684, 342 C.C.C. (3d) 285,

at para. 70, citing *Polimac*, at para. 97: “A legal error remains a legal error irrespective of trial counsel’s position”. See also *Kostyk*, at paras. 40 and 42.

[48] This is not to say that defence counsel’s position at trial is irrelevant. As this court instructed in *R. v. Chalmers*, 2009 ONCA 268, 243 C.C.C. (3d) 338, at para. 52, the question of whether included offences should have been left with the jury “must be assessed in light of both the strength of the evidence relied on … and the concessions made and position taken by the defence” at trial (emphasis added). However, the present case is not like *Chalmers* (and other similar cases), where this court, at para. 66, found the air of reality of the verdict of manslaughter to be “marginal at best” and did not permit the appellant “to paddle downstream on appeal when one has paddled vigorously upstream at trial”: at para. 51. In *Chalmers*, the position of the appellant, who was convicted of the second degree murder of his wife, was that he did not cause his wife’s death but it was caused by accident or a third party. His counsel approved the charge that if the jury found Mr. Chalmers had caused his wife’s death, murderous intent was conceded. In the present case, for the reasons stated above, there was an air of reality to the potential verdicts of manslaughter and second degree murder. Further, the appellants only conceded that Mr. Doxtator stabbed Mr. Caputo, causing his death. Importantly, there was no concession that if Ms. Doxtator was somehow involved in the killing of Mr. Caputo, it was a planned and deliberate murder.

[49] In my view, on the totality of this evidence, a reasonable jury could have been left unconvinced, beyond a reasonable doubt, that the murder was planned and deliberate or that Ms. Doxtator had the requisite intent to kill Mr. Caputo. As a result of this potential uncertainty, in addition to an acquittal, the jury could have returned a verdict of not guilty of first degree murder, but guilty on the included offences of either manslaughter or second degree murder.

(iii) Does the *curative proviso* apply?

[50] The Crown submits that the *curative proviso* found in s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C., 1985, c. C-46, should be applied to correct any errors the trial judge made. I do not agree.

[51] This court in *Ronald*, at para. 65, recently explained the availability of the *proviso* in the context of an erroneous failure to leave with the jury a possible verdict that arises on the evidence:

> Section 686(1)(b)(iii) of the *Criminal Code* provides that this court may dismiss an appeal despite an error in law if satisfied that the error caused no substantial wrong or miscarriage of justice. The burden is on the Crown to show either that the legal error was so minor as to be "harmless", or the evidence was so overwhelming as to satisfy the court that the verdict would necessarily have been the same had the error not been committed. [Citations omitted.]

[52] The *curative proviso* will generally not be available in cases where included offences (in this case, lesser offences) are not left with the jury and the jury convicts of a more serious offence. This is because a failure to leave included offences that

have an air of reality can seldom be said to be harmless or to have caused no substantial wrong or miscarriage of justice. As this court in *Ronald* explained, a determination that the included offences should have been left with the jury because there was a realistic possibility of an acquittal on the full offence is incompatible with a determination that the evidence supporting the conviction on the full offence was “overwhelming”. Further, the verdict may have been different if the jury had been presented with “the full menu of legally available verdicts”: *Ronald*, at paras. 66-67. See also *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, at para. 31.

[53] That is not to say that courts never apply the *curative proviso* to the erroneous failure to leave a possible verdict on an included offence. For example, in *Chalmers*, this court found there was no substantial wrong or miscarriage of justice when the trial judge did not leave the included offence of manslaughter with the jury and the jury convicted Mr. Chalmers of second degree murder. However, as the court noted, the argument that the trial judge made a reversible error “is only as strong as the air of reality relating to the defence sought to be raised”: at para. 58. The omission in *Chalmers* was found to be harmless in the circumstances of that case because the air of reality to manslaughter was “marginal at best” and the defence had conceded the issue of intent: at paras. 64-66. Those are not the circumstances of the present case.

[54] I do not accept Crown counsel's submission that this is an appropriate case where the court can take into account findings of fact implicit in the jury's verdict of first degree murder to cure any error to leave with the jury the possible verdicts of the lesser and included offences. Specifically, the Crown argues that the jury's verdict of first degree murder for the appellants demonstrates that the jury rejected Ms. Doxtator's evidence that the appellants did not plan and deliberate to kill Mr. Caputo. As this court noted in *Ronald*, at para. 68, the court can account for "findings of fact implicit in the verdict or verdicts returned by the jury as long as those verdicts are not tainted by the legal error, and those findings are unambiguously revealed by the verdict" (emphasis added).The difficulty is that in this case the jury's verdict is tainted by the erroneous omission of the included offences for Ms. Doxtator. If the included offences had been left to the jury, the trial judge would have provided appropriate instructions about the evidence that could have given rise to reasonable doubt in the jury's minds about planning and deliberation.

[55] Nor am I persuaded by Crown counsel's submission that the structure of the charge made any difference. While the trial judge reviewed in his instructions the offences alleged against Mr. Doxtator first before turning to those charged against Ms. Doxtator, and the jury was properly instructed to consider and render separate verdicts for each appellant, the evidence in relation to the charges was the same for both of them. It would be artificial to suggest that the jury would not have

reviewed the evidence as a whole in considering the respective verdicts for each accused.

[56] In my view, the Crown cannot satisfy its burden in the circumstances of this case. The Crown's case on planning and deliberation and murderous intent was not overwhelming and, as I earlier explained, the supporting evidence was potentially equivocal. The failure to leave the other verdicts could not be said to be harmless. The jury instructions wrongly narrowed the proper scope of the jury's deliberations. Not all verdicts reasonably available on the evidence were left with the jury for its consideration.

[57] There is a real likelihood that the jury, left only with the choice of convicting Ms. Doxtator of first degree murder or declaring her not guilty, would opt for the verdict that attributed some responsibility to her for Mr. Caputo's death. It cannot be said that, had the jury been left with other possible verdicts that would have held her accountable, either manslaughter or second degree murder, the jury would necessarily have still convicted her of first degree murder: *Ronald*, at paras. 66-67; *R. v. Haughton*, [1994] 3 S.C.R. 516, at pp. 516-17; *Sarrazin*, at para. 31.

[58] As a result, I would not accede to Crown's counsel request that we apply the *curative proviso* found in s. 686(1)(b)(iii) of the *Criminal Code*. The trial judge's failure in this case to leave the potential verdicts of second degree murder and manslaughter with the jury for Ms. Doxtator led to "a substantial wrong or miscarriage of justice".

[59] I would therefore order a new trial for Ms. Doxtator.

(iv) Should Mr. Doxtator also be granted a new trial?

[60] In my view, Mr. Doxtator should also have a new trial.

[61] That there were no objections to, or errors identified in, the trial judge's instructions to the jury with respect to the offences against Mr. Doxtator is not dispositive of this issue. As Crown counsel frankly acknowledged during oral argument, if the included offences of second degree murder and manslaughter had been left to the jury for Ms. Doxtator, the trial judge's instructions would have been different with respect to Mr. Doxtator.

[62] The Crown's case against the appellants for first degree murder was structured and presented to the jury as a package. There was no theory put forward that Mr. Doxtator planned and deliberated on the murder of Mr. Caputo without Ms. Doxtator or *vice versa*. Mr. Doxtator's defence relied on Ms. Doxtator's evidence and her acquittal. If she were convicted of first degree murder, his conviction for first degree murder would inevitably follow. The jury was not left with instructions to consider the alternative possibility that Mr. Doxtator killed Mr. Caputo in the heat of the moment rather than in self-defence. If the jury rejected self-defence for Mr. Doxtator, given the way the charge was left for Ms. Doxtator, there was only a straight line to first degree murder for him and no other pathways to the lesser and included offences of second degree murder and manslaughter.

[63] If the trial judge had left to the jury the included offences of manslaughter and second degree murder for Ms. Doxtator, the charge for Mr. Doxtator would have been much broader than the focus on self-defence in terms of the possible routes to manslaughter or second degree murder. The charge could have included another view of the evidence that the appellants had planned a violent encounter with the purpose of assaulting or robbing Mr. Caputo that ended in his stabbing. With this broader instruction, at the very least, the jury could have had a reasonable doubt of Mr. Doxtator's planning and deliberation of Mr. Caputo's killing.

[64] This situation is similar to that in *Ronald*, where this court found that the failure to leave second degree murder with the jury for one appellant tainted the verdict of the other. In that case, by not leaving second degree murder for the principal, the trial judge effectively removed a basis upon which the appellant alleged of aiding and abetting was asking the jury to find that the principal acted alone: at paras. 73-74. While the present appeal deals with the inverse factual scenario because all routes of liability were left with Mr. Doxtator, the person who caused Mr. Caputo's death, the effect of the error in Ms. Doxtator's instruction was similar. The failure to leave second degree murder and manslaughter for Ms. Doxtator narrowed the instructions for Mr. Doxtator and weakened his position that he was not guilty of first degree murder.

[65] As a result, it cannot be said the verdict for Mr. Doxtator would have been the same. At the very least, a properly instructed jury could have reasonably

returned a verdict of second degree murder for Mr. Doxtator. The interests of justice therefore dictate that Mr. Doxtator have a new trial.

Disposition

[66] For these reasons, I would allow the appeals and order a new trial for both appellants.

"L.B. Roberts J.A."
"I agree. B.W. Miller J.A."

MacPherson J.A. (dissenting):

[67] I have had the opportunity to review the reasons prepared by my colleague in this appeal. She would allow the appeal and order a new trial for both Mr. Doxtator and Ms. Doxtator on the basis that the trial judge erred by not putting second degree murder and manslaughter to the jury for Ms. Doxtator and that this failure affected Mr. Doxtator's charge as well.

[68] I will consider Mr. Doxtator's appeal first and then will consider Ms. Doxtator's appeal. I would dismiss Mr. Doxtator's appeal and allow Ms. Doxtator's appeal.

Mr. Doxtator's appeal

[69] With respect, I do not agree with my colleague's conclusion that the trial judge's failure to put second degree murder and manslaughter to the jury for Ms. Doxtator negatively impacted Mr. Doxtator's charge. My colleague states her conclusion for Mr. Doxtator as follows:

> The failure to leave second degree murder and manslaughter for Ms. Doxtator narrowed the instructions for Mr. Doxtator and weakened his position that he was not guilty of first degree murder.

[70] For two reasons, I do not agree with this conclusion.

[71] First, the trial judge instructed the jury that Ms. Doxtator's culpability should be considered separately from Ms. Doxtator's and that the verdict for each need not be the same. He instructed that what Ms. Doxtator said to the police is evidence

for and against her and “is not evidence against Richard Doxtator”. He instructed that Ms. Doxtator’s statement was not to be considered when deciding Mr. Doxtator’s case. He laid out the available verdicts for Mr. Doxtator and then separately laid out the available verdicts for Ms. Doxtator.

[72] Second, and crucially, the charge in relation to Ms. Doxtator did not narrow the instructions for Mr. Doxtator or weaken his position because the trial judge instructed the jury to consider Mr. Doxtator’s charges of first degree murder, second degree murder and manslaughter before considering Ms. Doxtator’s charge of first degree murder.

[73] The trial judge in his charge told the jury that they “must consider each accused person separately” and that in the charge he would “deal with Richard and Jasmine Doxtator separately, starting with Richard”. The trial judge instructed the jury on the available verdicts for Mr. Doxtator first, before saying that “[i]f Jasmine Doxtator agreed with Richard Doxtator to go to Niagara Falls and kill Joe Caputo, and took time to deliberate on that plan and carried out her role … she, too, is guilty of first degree murder.”

[74] This language clearly indicates that Mr. Doxtator’s conviction was to be decided before Ms. Doxtator’s. For Ms. Doxtator to be convicted of first degree murder, the jury must have accepted that the Crown proved beyond a reasonable doubt that Mr. Doxtator caused Mr. Caputo’s death and that the death was

unlawful. Only after making these determinations was the jury instructed to consider Ms. Doxtator's involvement.

[75] The factual scenario is similar to that in *R. v. Campbell*, 2020 ONCA 221, where this court found that a new trial need not be ordered because of errors in the jury charge because "the jury would only have reached consideration of whether the shooting was planned and deliberate after concluding that the appellants caused [the] death and had the requisite intent for murder": at para. 52. In the case at bar, the jury would have reached consideration of whether Ms. Doxtator was guilty of first degree murder only after concluding that Mr. Doxtator was guilty of first degree murder. We know this because that is what the jury charge instructed.

[76] Accordingly, my colleague's conclusion that if Ms. Doxtator was convicted of first degree murder, Mr. Doxtator's conviction for first degree murder would inevitably follow is, in a word, backwards. The fact that the instruction required the jury to decide on Mr. Doxtator's guilt before considering Ms. Doxtator's means that Mr. Doxtator's conviction could not have been influenced by Ms. Doxtator's conviction.

[77] The structure of my colleague's reasons is antithetical to the way the jury charge was structured at trial. Instead of considering Mr. Doxtator's case first, as the trial judge instructed the jury, my colleague devotes 59 paragraphs to considering Ms. Doxtator's case first. In very brief reasons (six paragraphs), she

then allows those reasons to influence her assessment of Mr. Doxtator's case. This is the inverse of how the trial judge instructed the jury.

[78] My colleague does not take issue with any wording in Mr. Doxtator's jury charge. While she says that Mr. Doxtator's charge could have been broader and could have included another view of the evidence, there is no error identified. Indeed, there is no such error in Mr. Doxtator's jury charge. Accused persons are entitled to a proper jury charge, not a perfect one: *R. v. Jacquard*, [1997] S.C.R. 134, at para. 2; *R. v. Alvarez*, 2021 ONCA 851, at para. 80. This court has also held that appellate courts "are not forensic pathologists dissecting the *corpus* of a charge in search of a disease process … [o]ur task is to administer justice, to deal with valid objections and to determine whether those claims have led to a miscarriage of justice": *R. v. Luciano*, 2011 ONCA 89, at para. 71. In this case, there was no miscarriage of justice. The jury was instructed to consider Mr. Doxtator's charges and Ms. Doxtator's charges separately. Ms. Doxtator's instructions were not to play a role in Mr. Doxtator's conviction. Mr. Doxtator's conviction for first degree murder would not inevitably follow Ms. Doxtator's conviction – and would not follow her conviction at all – because his conviction was to be considered before Ms. Doxtator's and because there was no error in his charge.

[79] Given the jury instruction was proper for Mr. Doxtator, it does not matter that Mr. Doxtator and Ms. Doxtator were tried as co-accused, even if the Crown

presented the case against the appellants to the jury as a package. This court has held that "[a]n accused's right to a fair trial does not … entitle that accused to exactly the same trial when tried jointly as the accused would have had had he been tried alone" so long as each joint accused is afforded "the constitutional protections inherent in the right to a fair trial": see *R. v. Suzack* (2000), 128 O.A.C. 140 (C.A.), at para. 111. The Crown presenting the case as a package did not affect the co-accused's fair trial rights, even if the case may have been presented differently were the co-accused tried separately. This is because the trial judge properly instructed the jury and did not present the co-accused's case to the jury as a package in his instructions.

[80] I do not agree that this situation is similar to that in *R. v. Ronald*, 2019 ONCA 971. As my colleague notes, the present appeal deals with the inverse factual scenario because all routes to liability were left with Mr. Doxtator. In cases where a party to a crime has received a new trial, it is when there was an error in the jury charge of the co-accused who caused the death (the "prime mover"): see *Ronald*; *R. v. Nygaard*, [1989] 2 S.C.R. 1074. In this case, Mr. Doxtator was the prime mover because he caused Mr. Caputo's death. In *Ronald* and *Nygaard*, courts were avoiding an incongruous result: that the non-moving party, absent a new trial, would risk receiving a greater conviction than the moving party who was entitled to a new trial. Here, there was no issue with the prime mover, Mr. Doxtator's, jury charge. There is no risk that Ms. Doxtator – even if she were to receive a new trial

– would receive a greater conviction than Mr. Doxtator. Therefore, the principles in *Ronald* do not apply.

[81] The assumption must be that the jury correctly followed the proper instruction absent evidence to the contrary. This court has instructed that "courts must proceed on the basis that juries accept and follow the instructions given to them by the trial judge": *Suzack*, at para. 128. Given that the instruction properly indicated to the jury that Mr. Doxtator's charge was to be considered before moving on to Ms. Doxtator's charge, it must be assumed that the jury correctly followed the instructions and considered Mr. Doxtator's charge first.

Ms. Doxtator's appeal

[82] I agree with my colleague that Ms. Doxtator deserves a new trial. As my colleague outlines, there is an air of reality that Ms. Doxtator committed second degree murder or manslaughter. The trial judge erred by failing to put this charge to the jury. I agree with my colleague's reasons on this issue.

Disposition

[83] I would dismiss Mr. Doxtator's appeal and allow Ms. Doxtator's appeal. I would order a new trial for Ms. Doxtator.

Released: February 22, 2022 "J.C.M."

"J.C. MacPherson J.A."