WARNING

This appeal is subject to a publication ban under s. 110(1) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1:

> 110(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.
>
> (2) Subsection (1) does not apply
>
> > (a) in a case where the information relates to a young person who has received an adult sentence; or
> >
> > (b) [Repealed, 2019, c. 25, s. 379]
> >
> > (c) in a case where the publication of the information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.
>
> (3) A young person referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either Act at the time of the publication.
>
> 138(1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published), 118(1) (no access to records unless authorized) or 128(3) (disposal of R.C.M.P. records) or section 129 (no subsequent disclosure) of this Act, or subsection 38(1) (identity not to be published), (1.12) (no subsequent disclosure), (1.14) (no subsequent disclosure by school) or (1.15) (information to be kept separate), 45(2) (destruction of records) or 46(1) (prohibition against disclosure) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985,
>
> > (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

Corrected decision: The text of the original judgment was corrected on April 5, 2023, and the description of the correction is appended.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Triolo, 2023 ONCA 221
DATE: 20230331
DOCKET: C67547, C65434 & C67982

Doherty, Hoy and Paciocco JJ.A.

DOCKET: C67547

BETWEEN

His Majesty the King

Respondent

and

Joseph Triolo

Appellant

DOCKET: C65434

AND BETWEEN

His Majesty the King

Respondent

and

Victor Ramos

Appellant

DOCKET: C67982

AND BETWEEN

His Majesty the King

Respondent

and

Emanuel Lozada

Appellant

James Lockyer and Jessica Zita, for the appellant Joseph Triolo

Richard Litkowski, for the appellant Victor Ramos

Nader R. Hasan and Spencer Bass, for the appellant Emanuel Lozada

Jennifer Trehearne, Jennifer Epstein and Samuel Greene, for the respondent

Heard: October 24-25, 2022

On appeal from the convictions entered on March 3, 2017 by Justice Michael R. Dambrot of the Superior Court of Justice, sitting with a jury (C67547, C65434, C67982), and from the sentence imposed on June 19, 2017, with reasons reported at 2017 ONSC 4726 (C67547).

Paciocco J.A. (dissenting in part):

OVERVIEW

[1] Early in the morning of October 6, 2013, Rameez Khalid was fatally stabbed through the heart during a melee on Richmond Street in the City of Toronto. The street was thick with pedestrian traffic at the time. It was the *Nuit Blanche* festival.

[2] The appellant, Joseph Triolo, was convicted of second-degree murder on the theory that he was the stabber. Mr. Triolo did not testify at the trial. In support of his position that the Crown had not proved he was the stabber beyond a reasonable doubt, Mr. Triolo advanced a third-party suspect defence, arguing that it was likely on the evidence that his fifteen-year-old friend, T.N., did the stabbing.

[3] The appellants, Emanuel Lozada and Victor Ramos, who participated along with Mr. Triolo in the fight in which Mr. Khalid died, were convicted of manslaughter. The trial judge directed jurors that they could be guilty of manslaughter either as co-perpetrators or for aiding in the attack.

[4] For the following reasons, I would dismiss Mr. Triolo's appeal of his second-degree murder conviction. However, I would allow Mr. Lozada's and Mr. Ramos's appeals, set aside their manslaughter convictions, and order new trials.

MATERIAL FACTS

Background

[5] Mr. Khalid and Mr. Triolo initially encountered each other in the early morning of October 6, 2013, at a street rave on University Avenue near Queen Street. For some unknown reason, they engaged in a fight in which Mr. Khalid had the upper hand. Mr. Triolo may have been struck with a bottle during the fight. Both young men were unhurt and angry and wanted to continue the fight after they were separated, but the fight ended.

[6] Mr. Khalid left and began to walk southbound with his friend, Travis Galliah. After going a short distance southbound on University Avenue, Mr. Khalid and Mr. Galliah turned left and went eastbound on Richmond Street.

[7] Mr. Triolo and his friends (the “Triolo group”) followed shortly after, taking the same route. The Triolo group included Mr. Lozada, who conspicuously was wearing a bear costume, as well as Mr. Ramos, T.N., Terelle Holder[1], Stavros Panagiotopoulos, and a seventh unknown man. A second group including Michelle Andrikopoulos and other females, who were with the Triolo group, followed behind. The Crown theory, for which there was both evidentiary support and contradictory

[1] Mr. Holder was charged with manslaughter and tried with the appellants. He was acquitted.

indications, was that the Triolo group was pursuing Mr. Khalid and Mr. Galliah to settle the score.

[8] Grainy footage from two security cameras on the south side of the Four Seasons Centre for the Performing Arts (the “security camera images”) captured the movements of Mr. Khalid, Mr. Galliah, and the Triolo group on Richmond Street. One of those cameras faced east, and the other west. The Crown case at trial depended heavily on the security camera images, which consisted of the security camera video footage, as well as slides extracted from that footage. The security camera video footage of the two cameras was admitted at trial as Exhibit 3, and the extracted, frame-by-frame PDF slides were admitted as Exhibit 4. There was an agreed statement of facts related to the admission of these exhibits which is the subject of one of the grounds of appeal.

Identification of Key Players on the Security Camera Images

[9] The security camera images captured members of the Triolo group walking eastbound on the north side of Richmond Street, towards the location where the melee and stabbing ultimately occurred. The faces of the heavily dressed individuals cannot be identified because of distance, camera angle and the poor definition of the security camera images.

[10] Six of the individuals from the Triolo group, excluding T.N. who lagged closely behind, can be seen in the security camera video footage commencing at

timestamp 2:01:18.93, and on slides 46-57. All six individuals are men. I will assign numbers to each man for ease of reference. The man in the lead heading eastbound is wearing a bear costume (person 1) and is obviously Mr. Lozada. Three men follow immediately behind, on the sidewalk. The man to the left in this three-man group, next to the building wall on the north side of Richmond, is wearing a blue hat and a dark-coloured top (person 2). The man next to him is wearing a red hat and a light-coloured top with a hood (person 3). To this man's right is another man wearing dark clothing (person 4). To the far right, walking just off the sidewalk on the street, is another man wearing a blue backpack and a light-coloured top (person 5). Between person 5 and the three-man group is a man in a dark-coloured top wearing a dark backpack (person 6). Later security camera video footage commencing at timestamp 2:01:20.23, and with slide 57, shows T.N. (person 7) trailing slightly behind these six men, wearing a distinctive camouflage jacket.

[11] Testimony was provided relating to the identification of all but one of these seven individuals. As indicated, it is agreed that T.N. is person 7, wearing the camouflage jacket, and Mr. Lozada's identity as person 1 is not in doubt. T.N. and Mr. Panagiotopoulos identified person 2, the person wearing the blue cap who is next to Mr. Lozada, as Mr. Ramos. Mr. Ramos did not contest this evidence. Mr. Panagiotopoulos identified himself as person 4, saying "That'd probably be

me", and he identified person 6 as Mr. Holder. He said that he could not identify person 5, the man in the light-coloured top on the road wearing the blue backpack.

[12] Notably, Mr. Panagiotopoulos gave testimony that the Crown relies upon to identify Mr. Triolo as person 3, the man in the red hat and light-coloured top. Although he disclaimed a present memory of what Mr. Triolo was wearing at the material time, Mr. Panagiotopoulos accepted as true the contents of an affidavit he executed in September 2015, after reviewing the security camera images. He testified that he was "pretty sure" that in that affidavit he said that Mr. Triolo was wearing a red hat and light-coloured hoodie.

[13] When he was asked if he could identify the person seen in security camera images to be wearing a red hat and light-coloured hooded top, Mr. Panagiotopoulos said, "That'd be Joey", and he confirmed that he was referring to Mr. Triolo. He explained, "Again, it's the description I gave and that's him". Using other slide images taken from the opposite angle he again identified the man in the red hat and light-coloured hooded top, saying, "Its, uh, Mr. Triolo", and "it's probably Mr. Triolo".

[14] In cross-examination Mr. Triolo's trial counsel suggested to Mr. Panagiotopoulos that he had based his identifications of Mr. Triolo on the red hat description he had provided in his affidavit. Mr. Panagiotopoulos responded, "No, that's not the only indicator". When it was suggested that he could not

remember if Mr. Triolo was wearing a red hat that day he agreed saying, “I can’t remember anything from that day”, but then commented that Mr. Triolo’s trial counsel was “fixating” on the red hat. He said, “He also has a body … And he’s next to other people who are clearly identifiable.” “I didn’t just grab a name out of a hat and attach it to a body, sir”. Mr. Panagiotopoulos then agreed with the suggestion that he “sort of pieced it together with what [he] could remember and what made sense to [him].”

[15] T.N. did not identify the person in the red hat as Mr. Triolo. He testified that this person “might’ve been” Mr. Panagiotopoulos, but said, “I don’t recall”. T.N. also said he thought the man on the road with the blue backpack, person 5, was Mr. Triolo because, like Mr. Triolo, he was “stockier”, and he thought Mr. Triolo had a blue backpack with him.

[16] Contrary to T.N.’s evidence that Mr. Panagiotopoulos might have been the person in the red hat, Mr. Panagiotopoulos testified that he was not wearing a hat that night.

The Fatal Encounter

[17] As the Triolo group moved eastbound on Richmond Street, the security camera images showed a man walking westbound towards the Triolo group waving what T.N. testified was a T-shirt or cloth over his head. It is not contested

that this man was Mr. Khalid. Mr. Galliah can be seen following closely behind Mr. Khalid.

[18] Upon meeting the Triolo group, at approximately 2:01:23.49 per the security camera timestamp, Mr. Khalid was immediately pushed up against the wall of the Four Seasons Centre for the Performing Arts. The Crown theory, supported by the identification evidence from the security videos, is that it was Mr. Ramos who initially pushed Mr. Khalid.

[19] T.N. testified that he heard a man yell, “Is this the guy?”, or “Is this the kid?”. He said it was Mr. Ramos who was yelling this. Mr. Galliah testified that he too heard someone from the Triolo group saying the same thing. Another member of the Triolo group – the Crown alleged it was Mr. Triolo himself – replied “Yeah”, and the melee ensued.

[20] T.N. testified that Mr. Lozada, Mr. Triolo, Mr. Ramos, Mr. Holder and Mr. Panagiotopoulos were all involved in the melee. In his testimony Mr. Panagiotopoulos, who had a medical condition that would have made it perilous for him to become involved in a fight, claimed he had stayed out of the fray.

[21] It is not contested that Mr. Lozada fought with Mr. Galliah, who was knocked to the ground and repeatedly punched by Mr. Lozada. The Crown makes no allegation that Mr. Lozada attacked Mr. Khalid directly. Nor is it contested that the

other participants in the fight engaged Mr. Khalid, who quickly went down. While on the ground he was punched and kicked by multiple attackers.

[22] T.N. acknowledged in his testimony that after a very brief delay during which he watched the fight, he joined in the altercation. He confirmed that security camara images show that immediately before joining in, he had his right hand in his pocket and took his hand out of his pocket before doing so. He denied he had anything in his pocket.

[23] The security camera images show that T.N. became involved in the altercation by 2:01:27.72. Although T.N. consistently denied that he stabbed anyone during the melee, he gave varied descriptions of his participation in the melee when questioned by the police, at the preliminary inquiry, and then at the trial. In the most extensive account that he gave about his role, he said that he punched the person now known to have been Mr. Khalid upward of 10 times with “jabs” using both hands and that he attempted to kick him before leaving the altercation while it was still underway.

[24] Security camera images appear to confirm T.N.’s account that he remained in the fight only a few seconds before jumping out. He can be identified through his camouflage jacket watching the melee after he stepped away.

[25] In describing the altercation that he said he watched, T.N., who referred to Mr. Khalid in his testimony as the “person” or the “kid”, said “everybody’s kind of

over top of the person, and they're, they're swinging. And I seen, like, like a stabbing motion, and then I pretty much just kinda, like, seen blood." He identified the stabbing motion he was describing on slide 158, having a timestamp of 2:01:36.50. He said everyone stopped fighting and "split up". He testified that he could see blood squirting out of the "kid's" chest, although Mr. Khalid cannot be seen to be bleeding on the grainy security footage. Mr. Galliah testified that when he approached Mr. Khalid after the fight, blood was "pourin' everywhere".

[26] Security video shows that the altercation involving Mr. Khalid began against a wall on the north side of the sidewalk and ended on the south edge of the sidewalk, near the road, at approximately 2:01:38.77. The security video images confirm that as the melee ended, members of the Triolo group immediately split up and ran away.

[27] Mr. Khalid can be seen getting to his feet, starting at approximately 2:01:38.33. He is clearly unsteady. He takes a few steps forward and then stumbles back onto the road, collapsing onto the roadway at approximately 2:01:43.54. He barely moved after he fell before all apparent movement ceased at 2:01:45.49.

[28] There is evidence that Mr. Khalid lost a significant amount of blood. His autopsy confirms that he sustained multiple injuries to many parts of his body during the attack, including two stab wounds. One of those stab wounds was

secondary, but the other was a fatal eight centimetre deep wound through one of the biggest chambers of his heart. This wound perforated both sides of his heart and punctured the upper lobe of his left lung. Blood was found on the ground at the scene, mostly on the part of the sidewalk close to the road, a few feet from where Mr. Khalid lay, as well as on Mr. Khalid's clothes, and on his body. There does not appear to have been blood on the part of the sidewalk where the melee began.

[29] The Crown invited the jury to trace the movements of the man wearing the red hat – "Mr. Triolo" – through slides 116 and forward. The Crown asked the jury to accept that in those slides this man can be identified making arm motions while stabbing Mr. Khalid. One of those arm motions is depicted on slides 151-153 between 2:01:35.3 and 2:01:35.85. The second motion is captured between 2:01:36.50 and 2:01:36.81. The Crown relied upon the abrupt end of the fight that immediately followed the second arm motion as circumstantial evidence that this is when the stabbing occurred.

[30] The person who made the two arm motions that the Crown alleges caused Mr. Khalid's stab wounds can be seen running away from the altercation eastbound on Richmond Street. The Crown suggested to jurors that he can be seen to be wearing a red hat. He is followed by another man in a grey hoodie, who the Crown contended is wearing a backpack, and a third man wearing a blue hat.

[31] The Crown also relied upon testimony from T.N. to buttress its theory. T.N. testified that at the same point in the altercation that the Crown claims the stabbing occurred, he recalled seeing stabbing motions and a “shiny” and “silver” object in the hand of a man be believed to be Mr. Triolo. He testified that he could situate the timing of the stabbing he witnessed because in the relevant security image, slide 158, he himself is captured looking at the person in the grey hoodie, who he said was the stabber. T.N. testified that he believes the stabber to have been Mr. Triolo – “Um, I think it was Joey. Like … it was blurry. I couldn’t really tell”. He said he based this conclusion on the grey hoodie, and his belief that Mr. Triolo might have a grudge. He also described the stabber as “kind of, like, stocky, or, like, chubby-ish”.

[32] However, in his testimony, T.N. agreed that he thought the stabber was the man wearing the blue backpack whom he had earlier identified as Mr. Triolo. The Crown position is that T.N. was mistaken in suggesting that the person making those stabbing motions was the man wearing the blue backpack. The Crown argued that by tracing the movements of individuals in the security images, the person T.N. identifies as the person who inflicted the stab wounds can be identified as the man in the red hat, the person Mr. Panagiotopoulos identified as Mr. Triolo.

Evidence Pointing to T.N. as the Stabber

[33] As indicated, Mr. Triolo presented a third-party suspect defence at the trial, claiming that based on the evidence the jury should have a reasonable doubt about his guilt, arising from evidence that T.N. likely did the stabbing.

[34] I have already described the placement of T.N.'s hand in his pocket before the fight. The jab-like punching motions he described directing at Mr. Khalid are consistent with stabbing motions.

[35] It is not contested that after everyone split-up, T.N. walked back to the rave with Ms. Andrikopoulos, and then went to a party at her house where a number of people gathered. Ms. Andrikopoulos provided evidence indicative of T.N.'s role as the stabber.

[36] She testified that when T.N. approached her shortly after the fight, he had a terrified look on his face, showed her an eight-inch pocketknife which was closed, and asked her, "What do I do with it?". She testified that she could not remember seeing blood on the pocketknife. In his testimony, T.N. denied having a knife at the rave, or showing a knife to Ms. Andrikopoulos.

[37] Ms. Andrikopoulos also testified that at the subsequent get-together at her house the conversation was about T.N. being the stabber, and she confronted him about this while she was high on ketamine. Although she told the police that she was "pretty sure" in that conversation T.N. was "trying to admit that he did it" she

also testified that she was “not too sure” of this. She said she was being truthful in her police statement when she elaborated, “Because, like, he had first said he did it, but then he said he didn’t do it, so I was kind of confused”.

[38] In his testimony, T.N. disclaimed any memory of having any discussion with Ms. Andrikopoulos about the events that lead to Mr. Khalid’s death and denied confessing that he was the stabber to her or to anyone else.

[39] No forensic evidence linked T.N. to the stabbing. A camouflage jacket that had been seized from T.N. was tested for blood, but Mr. Khalid’s blood was not detected. No knife was recovered. Mr. Khalid’s blood was found on a pair of running shoes at Ms. Andrikopoulos’s apartment, which obviously would have been worn by someone proximate to Mr. Khalid at or after the time he was stabbed. But those shoes could not be linked to anyone, and T.N. was not the sole member of the Triolo group to be at Ms. Andrikopoulos’s apartment after the stabbing.

[40] Evidence was also presented at the trial about T.N.’s violent disposition, including an outstanding charge of assaulting his 80-year-old grandmother, which he denied. However, he admitted that he had had other altercations with her.

[41] Evidence was also led that at one point T.N. had been charged with second-degree murder in Mr. Khalid’s death. In October 2014, shortly after he agreed to provide police with a statement that ultimately formed the heart of his testimony, the murder charge against T.N. was reduced to aggravated assault and he was

released from closed custody where he had been detained. After pleading guilty to aggravated assault T.N. was credited with his time served and placed on probation.

The Crown's Reliance on Dr. Guenther's Testimony

[42] Dr. Guenther, an anatomical and forensic pathologist, testified that Mr. Khalid's "capacity to move around and do things" would be "very limited" after the wound to his heart was sustained. She said, "I cannot exclude some, uh, volitional activity, but it's very unlikely that this would be, um, extensive." She said that she "could probably go so far as saying it would be, um, a few seconds to several seconds" but that his heart failure would be "very fast".

[43] Mr. Triolo did not confront Dr. Guenther on the evidence she gave about the length of time Mr. Khalid could maintain volitional movement after having been stabbed, but Mr. Ramos's trial lawyer did, in the following exchange:

> Mr. Sarantis: And that stab wound would cause fairly quick internal bleeding, right?
>
> Dr. Guenther: Yes.
>
> Mr. Sarantis: The person would go into heart failure pretty quickly?
>
> Dr. Guenther: Very fast, yes.
>
> Mr. Sarantis: You said a few seconds, right?
>
> Dr. Guenther: Yes.

> Mr. Sarantis: And it could be up to several seconds, I think you said.
>
> Dr. Guenther: Yes.
>
> Mr. Sarantis: Up to 10 seconds?
>
> Dr. Guenther: I, I couldn't say that.
>
> Mr. Sarantis: Okay. You confidently say, though, you wouldn't expect mobility for very long after this, though, stab wound.
>
> Dr. Guenther: That is right.
>
> Mr. Sarantis: But you can't rule some mobility out after the stab wound.
>
> Dr. Guenther: Yes. However, it's highly unlikely that this mobility or vi-tion-al(ph) [*sic*], volitional activity would be extensive.
>
> Mr. Sarantis: Right. But it's really impossible to say with any certainty, isn't it?
>
> Dr. Guenther: That is correct.

[44] In its closing submissions the Crown relied, in part, on Dr. Guenther's testimony to challenge Mr. Triolo's theory that T.N. was the stabber. The Crown told jurors that Dr. Guenther "did not agree in cross-examination that volitional activity in his case could last as long as 10 seconds". Based on this, the Crown argued that it "defies common sense" that T.N., whose involvement occurred early in the altercation, could have been the stabber. The Crown did not attempt to quantify, for the jury, the time that had passed between T.N. leaving the altercation and the end of Mr. Khalid's attempt at volitional movement, but it is common ground that approximately 13 seconds passed between those two events.

[45] Mr. Ramos's counsel objected to the Crown's submission. He challenged the Crown's representation to the jury about Dr. Guenther's testimony, arguing that contrary to what the Crown said, Dr. Guenther "didn't foreclose 10 seconds being a possibility".

[46] In his closing submission to the jury, Mr. Triolo's trial counsel took the same position. He argued that there was no expert evidence that it was not possible for Mr. Khalid to have maintained volitional movement for 10 or more seconds. He submitted to jurors that Dr. Guenther "might not have agreed that it was 10 seconds, but she didn't preclude that, either."

[47] The trial judge addressed this issue in the jury charge after Mr. Triolo's counsel raised it during the pre-charge conference. The trial judge described the conflict between the Crown and defence counsel over the meaning of Dr. Guenther's evidence, and after providing the jury with a transcript of her testimony said: "In the end it is up to you to determine what Dr. Guenther was trying to convey on this point, not me, and not counsel."

THE ISSUES

[48] The appellants raise numerous grounds of appeal. Some of those grounds apply to all of the appellants, but others do not. I will organize and analyze the grounds of appeal as follows:

Grounds Applicable Only to Mr. Triolo's Conviction Appeal

A. Is fresh evidence offered by Mr. Triolo admissible?

B. Was Mr. Panagiotopoulos's evidence identifying Mr. Triolo inadmissible hearsay?

C. Was the verdict against Mr. Triolo unreasonable?

D. Did the trial judge err in failing to leave a provocation defence to the jury?

Common Grounds of Conviction Appeal

E. Did the trial judge err in the Vetrovec instruction relating to T.N.?

F. Did the trial judge err by overstepping the scope of the Agreed Statement of Facts?

G. Did the trial judge provide an unbalanced jury charge?

Grounds Applicable Only to Mr. Lozada and Mr. Ramos

H. Did the trial judge err in his instruction on the law of causation?

I. Did the trial judge err in his instruction on aiding and abetting by not addressing the element of consent?

Grounds Applicable only to Mr. Lozada

J. Did the trial judge err in failing to instruct the jury on the law of intoxication?

Mr. Triolo's Sentence Appeal

K. Was the period of parole ineligibility imposed on Mr. Triolo unreasonable?

ANALYSIS

(1) GROUNDS APPLICABLE ONLY TO MR. TRIOLO'S CONVICTION APPEAL

A. Is fresh evidence offered by Mr. Triolo admissible?

[49] Mr. Triolo sought to advance fresh expert evidence from a forensic pathologist, Dr. Shkrum, in support of his appeal, pursuant to s. 683(1)(b) of the *Criminal Code,* R.S.C. 1985, c. C-46. Dr. Shkrum's evidence purports to counter the Crown submission that based on Dr. Guenther's evidence, it "defies common sense" to suggest that T.N. could have been the stabber, given the time-lapse between T.N.'s exit from the fight and the loss by Mr. Khalid of the ability to engage in volitional movement. In Dr. Shkrum's opinion, "Mr. Khalid would have become unconscious and incapable of purposeful activity likely within 30 seconds of being stabbed" (emphasis added). Therefore, contrary to the Crown's submission, Mr. Khalid "could have still been conscious for a 13 second period after he had been stabbed during which he could have risen to stand before falling again."

[50] In my view, it is not in the interests of justice to grant leave to admit this fresh evidence, and I would not do so. This evidence lacks sufficient cogency to warrant admission, and there are due diligence concerns.

[51] The "*Palmer* test", articulated in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775, applies in determining whether the interests of justice require the

admission of fresh evidence. Analytical precision was added to the *Palmer* test when it was reformulated in *R. v. Truscott*, 2007 ONCA 575, 225 C.C.C. (3d) 321, at para. 92. The *Truscott* reformulation, which I prefer, poses three questions:

1. Is the evidence admissible under the operative rules of evidence?
2. Is the evidence sufficiently cogent that it could reasonably be expected to have affected the verdict?
3. What is the explanation offered for the failure to adduce the evidence at trial and should that explanation affect the admissibility of the evidence?

[52] I take no issue with the first of those questions. Dr. Shkrum's evidence would have been admissible as expert evidence, had it been called at the trial.

[53] My primary concern is with the second question, the "cogency requirement". *Truscott* identifies at para. 99 that this criterion is measured by asking three sub-questions:

1. Is the evidence relevant in that it bears upon a decisive or potentially decisive issue at trial?
2. Is the evidence credible in that it is reasonably capable of belief?
3. Is the evidence sufficiently probative that it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result?

[54] I have no problem with the first sub-question. Dr. Shkrum's evidence is relevant because it bears upon the potentially decisive issue at trial of whether there is a reasonable doubt that T.N. could have been the stabber.

[55] My cogency concerns begin with the second sub-question. I recognize Dr. Shkrum's expertise, but the reliability of his opinion was compromised during cross-examination on his fresh evidence affidavit when it became apparent that in coming to his opinion Dr. Shkrum had relied upon erroneous information about how long Mr. Khalid continued breathing, and he had cited nine academic articles as support for his opinion even though he did not read five of them because they were in German. These revelations weakened the foundation for his opinion, which was already limited. It also became clear during the cross-examination that the "30 second" period he identified was only an estimate and not a timeframe supported by science. In these circumstances, it is probable that jurors would have been guarded in accepting Dr. Shkrum's opinion.

[56] Moreover, I am not persuaded, as per sub-question 3, that Dr. Shkrum's evidence is sufficiently probative that it could reasonably be expected to have affected the result, even if it was credited. In my view the Crown's position that – based on Dr. Guenther's evidence – it "defies common sense" that T.N. could be the stabber was a transparently extravagant submission. It is probable that jurors would have recognized this and would not have accepted the Crown's invitation to reason in such a categorical way. As I have described, because of the

disagreement between counsel as to what Dr. Guenther meant, the trial judge provided them with a transcript of her material testimony and directed jurors to decide for themselves what she meant. Jurors can be taken to have followed that direction. What they would have observed on close examination is that Dr. Guenther's testimony on the 10 second ceiling was ambiguous. She either meant that she did not know whether Mr. Khalid could have maintained volitional movement for "up to 10 seconds", or she meant that she did not think he could maintain volitional movement for that long but that she could not say so with any certainty. Even taken at its highest for the Crown, Dr. Guenther's evidence was therefore qualified and cautious and incapable of offering a reasonable foundation for the Crown's strong submission that it "defies common sense" to suggest that T.N. could have been the stabber. If I am right about this, it reduces the importance and hence probative value of evidence offered to rebut the Crown's position that it "defies common sense" that T.N. could have been the stabber.

[57] To be clear I am not of the view that Dr. Guenther's evidence could make no contribution in evaluating the likelihood that T.N. could have stabbed Mr. Khalid. As I have indicated, Dr. Guenther testified that after the stab wound to his heart, Mr. Khalid's "capacity to move around and do things" would be "very limited", and that it's "very unlikely" his volitional movements would be "extensive", because heart failure would probably be very fast. Although this testimony is incapable of reasonably supporting the inference that it "defies common sense" that T.N. could

have been the stabber, it could, in my view, support the more restrained inference that Mr. Triolo is more likely to have been the stabber than T.N. This is because unlike the blows T.N. inflicted, which occurred sometime before Mr. Khalid ultimately lost volitional movement, the blows Mr. Triolo inflicted occurred immediately before Mr. Khalid tried and failed to gain his feet.

[58] Dr. Shkrum's proposed fresh evidence does not counter this more restrained inference because the evidence he gives does not meaningfully challenge Dr. Guenther's position that the capacity to move and do things with an injury of the kind sustained by Mr. Khalid is likely be very limited because of the onset of heart failure. This is because Dr. Shkrum does not offer an opinion on what should usually be expected. Instead, as I read Dr. Shkrum's evidence it is directed at rebutting the proposition that there is a 10 second ceiling on possible voluntary movement. Since Dr. Shkrum's proposed testimony does not undermine the evidence provided by Dr. Guenther that jurors would be apt to rely upon, I am of the view that it cannot reasonably be expected to have affected the result.

[59] I would also find that the third *Truscott* question (the "due diligence" question) does not work in Mr. Triolo's favour. In my view, it should have been evident that the Crown stood to be assisted by Dr. Guenther's testimony that the loss of volitional movement would probably be very fast after Mr. Khalid sustained the stab wound through his heart. Certainly, this should have become clear when Mr. Ramos's counsel engaged in his cautious cross-examination of the reach of

Dr. Guenther's opinions. With due diligence, efforts could have been made at trial by Mr. Triolo's counsel to cross-examine Dr. Guenther further if that was considered to be tactically wise, or measures could have been taken to call Dr. Shkrum in reply, particularly given that he was already on retainer on behalf of Mr. Triolo. I appreciate that due diligence is not a prerequisite to the admission of fresh evidence on a criminal appeal: *R. v. Manasseri*, 2016 ONCA 703, 344 C.C.C. (3d) 281, at para. 219, leave to appeal refused, [2016] S.C.C.A. No. 513. However, I cannot find on the record before us that Mr. Triolo exercised due diligence in attempting to secure at trial the kind of evidence he now seeks to admit on appeal. Although a failure to take due diligence can, depending on the circumstances, be overcome where the fresh evidence is cogent enough that it could have affected the outcome of the trial, for the reasons I have expressed, Dr. Shkrum's evidence lacks the cogency to do so.

[60] I would therefore deny leave to admit the proposed fresh evidence and dismiss this ground of appeal.

B. Was Mr. Panagiotopoulos's evidence identifying Mr. Triolo inadmissible hearsay?

[61] Mr. Triolo argues that Mr. Panagiotopoulos based his testimony identifying Mr. Triolo on inadmissible hearsay, thereby making the identification itself inadmissible hearsay. He emphasizes that Mr. Panagiotopoulos testified that he

had no recollection of what Mr. Triolo was wearing. He submits that Mr. Panagiotopoulos relied on the description contained in an affidavit he had provided to the police to identify Mr. Triolo and to provide testimony about Mr. Triolo's clothing, including the red hat and light-coloured top. He contends that since this affidavit was prepared out of court, its contents would be hearsay at trial unless Mr. Panagiotopoulos adopted those contents as his testimony at trial. He argues that the contents of the affidavit remained hearsay at trial because Mr. Panagiotopoulos cannot be taken to have "adopted" those contents, given that he had no memory of the facts and events the affidavit described.

[62] I do not agree. First, as I describe in para. 13 above, Mr. Panagiotopoulos provided direct in-court testimony identifying person 3 in the video as Mr. Triolo, saying, "[t]hat'd be Joey" (clarifying that he was referring to Mr. Triolo), and "that's him". When it was suggested to Mr. Panagiotopoulos during cross-examination that his identification was based solely on the red hat he described in his affidavit, Mr. Panagiotopoulos disagreed, referring to his familiarity with the Triolo group and Mr. Triolo's body type. Although Mr. Panagiotopoulos no doubt relied, in part, on the consistency of the person on the security camera images with the description of Mr. Triolo's clothing that he had provided in his affidavit, Mr. Panagiotopoulos was providing first-hand in court identification evidence that was materially based on his personal familiarity with Mr. Triolo. Put simply, he looked at the security

camera images and recognized a person who he not only knew, but who he knew at the material time was with others he could recognize.

[63] Nor was it inadmissible hearsay for Mr. Panagiotopoulos to provide testimony about the description he had provided in his affidavit about what Mr. Triolo was wearing. I reject Mr. Triolo's submission that this evidence was hearsay because Mr. Panagiotopoulos could not, as a matter of law, "adopt" this description, absent a memory at the time of his testimony as to what Mr. Triolo was wearing. In advancing this submission Mr. Triolo relies on the decisions in *R. v. Toten*, (1993) 14 O.R. (3d) 225, at p. 23 (C.A.) and *R. v. McCarroll*, 2008 ONCA 715, 238 C.C.C. (3d) 404, at para. 40. However, neither of these cases apply.

[64] *Toten* dealt with the meaning of "adopts" in s. 715.1 of the *Criminal Code*, a statutory provision that determines when a video-recorded statement from a witness who is a minor can be admitted in court as that minor witness's testimony. Section 715.1, including the statutory meaning of the term "adopts", has nothing to do with this case. In any event, the interpretation of "adopts" from *Toten* that Mr. Triolo relies upon has been overtaken by the decision in *R. v. F. (C.C.)*, [1997] 3 S.C.R. 1183, at paras. 36-44, which holds that a witness "adopts" a statement within the meaning of s. 715.1 by affirming that they recall making the statement and were being honest and truthful at the time, even if they have no memory of the facts asserted in the statement at the time of trial.

[65] Meanwhile, *McCarroll* describes the rule in *R. v. Deacon*, [1947] 1 S.C.R. 531, which is used to determine whether a prior inconsistent statement made by a witness has been adopted by that witness as their trial evidence after they have been confronted with that prior inconsistent statement by an opposing party during cross-examination. That is not the issue in this case.

[66] As I have indicated, Mr. Panagiotopoulos identified Mr. Triolo in direct evidence he gave in court. That being so, the rule affirmed by this court in *R. v. Langille* (1990), 75 O.R. (2d) 65 (C.A.), applies. This rule holds that "prior statements identifying or describing the accused are admissible where the identifying witness identifies the accused at trial": *R. v. Tat* (1997), O.R. (3d) 631 (C.A.), at p. 497-98; *R. v. Starr*, [2000] 2 S.C.R. 144, at para. 221. This rule operates as an exception to the rule against prior consistent statements and permits the "probative force of [the] identification evidence [to be] measured by a consideration of the entire identification process which culminates with an in-court identification": *Tat*, at p. 498. Evidence that Mr. Panagiotopoulos had previously described Mr. Triolo as wearing a red hat and light-coloured coat at the time of the incident was therefore properly admitted and left to the jury as information probative of the identification that Mr. Panagiotopoulos provided. It was not inadmissible hearsay.

[67] I would also note that Mr. Triolo did not object to the previous description evidence when it was presented at trial, and he relied on this same evidence to

challenge the integrity of Mr. Panagiotopoulos's in-court identification. He cannot fairly raise an objection now, for the first time on appeal.

[68] I would therefore dismiss this ground of appeal.

C. Was the verdict against Mr. Triolo unreasonable?

[69] A verdict is unreasonable if it is not one that "a properly instructed jury acting judicially could reasonably have rendered". This is determined by asking whether there is evidence on the record to support the verdict, and whether the jury's conclusion conflicts with the bulk of judicial experience: *R. v. H. (W.)*, 2013 SCC 22, [2013] 2 S.C.R. 180, at paras. 27-29.

[70] I would dismiss this ground of appeal. There was clearly evidence on the record that supported the verdict, and I am not persuaded that Mr. Triolo's conviction conflicts with the bulk of judicial experience.

[71] Evidence supporting Mr. Triolo's guilt included:

- Mr. Triolo had a distinct motive to cause Mr. Khalid bodily harm due to the earlier altercation with Mr. Khalid in which he alone was personally involved and bested.
- Mr. Triolo was involved in the melee in which the stabbing occurred.

- Mr. Panagiotopoulos provided evidence that Mr. Triolo was the man in the security videos wearing a red hat and a light-coloured top, which jurors were entitled to accept.
- Notwithstanding the grainy footage, it would be reasonable for jurors to accept the Crown's invitation to follow the movements of the man in the red hat and light-coloured top and find that this is the man who can be seen to be striking two blows at Mr. Khalid near the end of the fight, which blows are consistent with stabbing motions.
- It was open to the jurors to accept T.N.'s evidence that at the same point in the events where the security video images captured those two blows, he saw a shiny sliver object in the hand of the man who was administering those blows, whom he believed to be Mr. Triolo. It was also open to the jury to accept T.N.'s testimony that he saw blood spurting out, even though the grainy security video images do not appear to capture this. There was circumstantial support for T.N.'s testimony about the stabbing, including:
    - The person T.N. identified on the security camera images as the stabber administered two blows in what could fairly be described as a stabbing motion, and those blows coincided in number with the two stab wounds Mr. Khalid sustained;

- The existence and location of the blood on the edge of the sidewalk close to the curb is consistent with the stabbing occurring where T.N. describes, which is not the location where T.N. can earlier be seen to be involved in the melee; and
- The fact that the fight ended abruptly, and everyone scattered immediately after those two blows were administered is consistent with the stabbing having just occurred.

[72] I am therefore persuaded that there is a reasonable view of the evidence that could sustain a finding of guilt.

[73] Mr. Triolo's submission that, on the whole of the evidence, his conviction would nonetheless conflict with the bulk of judicial experience is premised on a range of factors, including the poor quality of the security camera images, the confusing nature and brevity of the melee, the inability to distinguish punching motions from stabbing motions, T.N.'s lack of credibility, and the incriminating evidence implicating T.N.

[74] I am not persuaded that the poor quality of the security camera images impedes a reasonable conviction. Although faces cannot be identified on the security footage, body type and the general description of clothing can be discerned, enabling the movement of the man in the red hat to be followed. And notably, the arm motions relied upon by the Crown can be seen. Based on T.N.'s

testimony about the shiny silver object and the aftermath, jurors were provided with a reasonable basis for distinguishing these arm motions from other blows that others no doubt administered during the attack on Mr. Khalid. In substance, the challenges that Mr. Triolo brings ultimately coalesce into the central submission that it was unreasonable for jurors to accept T.N.'s testimony, and to conclude that they were not left in reasonable doubt by the evidence implicating him in the stabbing.

[75] In considering this proposition it is important to bear in mind the admonition that Watt J.A. provided in *R. v. Bains*, 2015 ONCA 677, 127 O.R. (3d) 545, at para.163, about unreasonable verdict challenges in jury trials. Verdicts in jury trials are meant to be rendered by juries and not by appellate judges. Watt J.A. makes clear that where the verdict is supportable on any reasonable view of the evidence, as I would find this verdict to have been, we are to take a guarded approach in asking whether the jury verdict conflicts with the bulk of judicial experience. Specifically, we are to ask "whether proper judicial fact-finding, applied to the evidence as a whole, *precludes* the conclusion reached by the jury" (emphasis in the original). He explained:

> On review of a jury verdict for unreasonableness, we are to treat the verdict rendered with great deference, according due weight to the jury who were ear and eyewitnesses to the evidence as it unspooled at trial. We are *not* to act as a "thirteenth juror". Nor are we simply to give effect to vague unease or lurking doubt based on our own review of a sterile printed record. Nor are we to label

> a verdict “unreasonable” just because three of us at one remove would have a reasonable doubt on our own review of the printed record. [Emphasis original; citations omitted.]

[76] I accept that jurors would have to grapple with significant credibility concerns with T.N.’s testimony. I recognize that as an alterative suspect he could have reason to cast blame elsewhere. I am aware that he clearly benefited from co-operating with the police by avoiding both a homicide prosecution and the risk of a much longer sentence. I am alert to the problems with his testimony, including that he fell back at times on a lack of memory. And I am mindful that he had provided varying descriptions about how many blows he directed at Mr. Khalid. However, jurors had the benefit of seeing T.N. testify, and as I have described in para. 71 above, there was circumstantial evidence consistent with his account of the stabbing that jurors may have relied upon to overcome these concerns. It is also crucial that the jurors had the benefit of examining this testimony, and the balance of the evidence in the case, in the light of what they themselves could see on the security camera images.

[77] I have also given close consideration to the evidence Ms. Andrikopoulos provided implicating T.N. as an alternative suspect, but there were significant problems with her reliability. She was high on ketamine when making the observations she offered at the trial and provided inconsistent and confusing

accounts of the admission T.N. allegedly made to her. The jury, who had the advantage of seeing her testify was entitled to reject this testimony.

[78] Moreover, even if jurors were to accept Ms. Andrikopoulos's testimony that T.N. was apprehensive immediately after the altercation about having a knife in his possession, this finding would not preclude the conclusion reached by the jury, in light of the other evidence in the case. If jurors were to conclude based on their examination of the security camera images and the supporting circumstantial evidence that the blows identified by the Crown constitute the stabbing, T.N. could not have been the stabber even if he had a knife of his own and then lied to the jury about it.

[79] The jurors were also entitled to discount the significance they would give to T.N.'s disposition for violence as a basis for finding that he could be the stabber. Mr. Triolo's own violent disposition was exposed by the uncontested evidence that he fought twice with Mr. Khalid, in short succession. In this context, evidence of T.N.'s general disposition for violence does little, in my view, to advance the proposition that Mr. Triolo's conviction conflicts with the bulk of judicial experience.

[80] In sum, I do not see this as a case where proper judicial fact-finding applied to the evidence as a whole *precludes* the conclusion reached by the jury. The verdict was not unreasonable. I would therefore deny this ground of appeal.

D. Did the trial judge err in failing to leave a provocation defence to the jury?

[81] I would also reject Mr. Triolo's argument that the trial judge erred by failing to direct the jury on the defence of provocation. A provocation defence direction is required only if the provocation defence has an air of reality: *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162, at paras. 20-22. For a defence to have an air of reality, there must be evidence "upon which a properly instructed jury acting reasonably could acquit [on the basis of the defence] if it believed the evidence to be true": *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 65. This requires there to be direct or circumstantial evidence reasonably capable of supporting the inferences necessary to make out each element of the relevant defence: *Cinous*, at paras. 65, 82. In this case there is no air of reality to the provocation defence, which has two elements, one objective and the other subjective; each element has two components. The objective components are as follows: (1) there must have been a wrongful act or insult; and (2) the wrongful act or insult must have been sufficient to deprive an ordinary person of self-control: *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350, at para. 25. The subjective components are: (1) the accused must have acted in response to the provocation; and (2) the accused must have lost self-control and must have acted on the sudden before there was time for their passion to cool: *Tran,* at para. 36.

[82] Mr. Triolo points to two wrongful acts as provocation, the earlier fight, and Mr. Khalid approaching the Triolo group waving a shirt, which may have appeared threatening. In my view, neither wrongful act can reasonably support the defence of provocation.

[83] With respect to the earlier fight, in his submissions to the jury Mr. Triolo sought to challenge evidence suggesting that he was interested in continuing the fight. He challenged the reliability of the evidence that he was hit by a bottle and dissuaded the jury from accepting the suggestion that he was “pissed”. He also argued forcibly that the evidence did not support an inference that he or his group followed Mr. Khalid to “settle a score”. It is obvious that his position at trial is not consistent with his current suggestion that there is an air of reality to the possibility that he lost control after the first fight.

[84] Moreover, the initial fight ended some time before the stabbing, which occurred after the parties had walked almost one-third of a kilometre from the location of the first fight. Even if Mr. Triolo had been angry, this left him with ample opportunity for his passions to cool before the stabbing occurred.

[85] The attempt to treat Mr. Khalid’s aggressive approach towards the Triolo group fares no better as a wrongful act capable of causing Mr. Triolo to lose control. Even in the context of the earlier fight, Mr. Khalid’s act of waving a shirt while approaching the Triolo group is not sufficient to deprive an ordinary person

of the power of self-control. I agree with the Crown submission that "[t]o hold otherwise would set the societal standards of what is expected of an ordinary person far too low".

[86] That is enough to reject this ground of appeal, but its lack of merit is further punctuated by a complete absence of evidence that Mr. Triolo was deprived of self-control or acted on the sudden.

[87] I would therefore dismiss this ground of appeal.

(2) COMMON GROUNDS OF CONVICTION APPEAL

E. Did the trial judge err in the *Vetrovec* instruction relating to T.N.?

[88] There was never any doubt that T.N. was a "*Vetrovec* witness"[2] whose evidence required special scrutiny. His evidence played a major role in the prosecution, yet he was an alternate suspect who had benefited by providing a statement that the police would find favour with, he had an unsavoury character, and he had provided false information relevant to the prosecution. Appropriately, the trial judge provided the jury with a *Vetrovec* warning relating to T.N.'s evidence.

[89] The appellants contend that the warning was inadequate and erroneous. I disagree. When the direction is examined in the context of the case as a whole, I

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[2] After the decision in *R. v. Vetrovec*, [1982] 1 S.C.R. 811.

am satisfied that the jurors had a functional understanding both of the dangers in relying on T.N.'s evidence, and of how to proceed with its evaluation.

[90] The appellants do not challenge the general *Vetrovec* instruction that the trial judge gave. In his charge, the trial judge included all of the components of a typical *Vetrovec* warning described by Fish J. in *R v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 37. Specifically, he: (1) alerted jurors that T.N.'s evidence required special scrutiny; (2) explained why it required special scrutiny; (3) cautioned jurors that it would be dangerous to convict on unconfirmed evidence from T.N.; and (4) directed the jury that they should look for evidence from another source confirming the veracity of what T.N. was saying. The appellants' concern is confined to the sufficiency and accuracy of the trial judge's jury charge relating to confirmatory evidence. Before identifying those challenges, it is helpful to describe the governing principles.

The Governing Principles

[91] To confirm the veracity of a *Vetrovec* witness, evidence need not implicate the accused in the commission of the offence. Evidence will be confirmatory if it is capable of restoring the jury's faith in the relevant aspects of the *Vetrovec* witness's account: *R. v. Mohamad*, 2018 ONCA 966, 369 C.C.C. (3d) 211, at para. 153. In a jury trial, it is up to the trial judge to determine how extensively they will illustrate confirmatory evidence in the jury charge: *Mohamad*, at para. 152.

[92] There are limits to what can serve as confirmatory evidence. Evidence that is tainted because it is not independent of the *Vetrovec* witness cannot do so: *Khela*, at para. 39; *R. v. Drabinsky*, 2011 ONCA 582, 274 C.C.C. (3d) 289, at paras. 138-39. If there is no reasonable basis for viewing apparently confirmatory evidence as independent, the trial judge must direct jurors not to rely on that evidence as confirmatory: *R. v. Magno*, 2015 ONCA 11, 321 C.C.C. (3d) 554, at paras. 41-43, leave to appeal refused, [2015] S.C.C.A. No. 145. But if there is any reasonable basis for finding the apparently confirmatory evidence to be independent, it must be left to the trier of fact to decide whether that evidence is confirmatory or tainted: *Magno*, at para. 41; *R. v. Spence*, 2018 ONCA 427, 360 C.C.C. (3d) 425, at paras. 48-50. This holds true where the evidence of one *Vetrovec* witness appears to support the evidence of another *Vetrovec* witness, since mutual corroboration is permissible: *R. v. Winmill* (1999), 42 O.R. (3d) 582 (C.A.), at paras. 115-117, 120.

[93] Moreover, a trial judge's decision to leave evidence to the jury to decide whether it is confirmatory or tainted is entitled to considerable deference: *Magno*, at para. 43. However, where there is a risk that evidence may be tainted, the trial judge should communicate to jurors that confirmatory evidence must be independent: *Khela*, at paras. 52-54. And jurors should also be alerted to circumstances that suggest a lack of independence, such as collaboration among the *Vetrovec* witnesses: *Winmill*, at para. 115.

Analysis of the Charge on Confirmatory Evidence

[94] In his charge the trial judge chose to illustrate some of the evidence the jury could choose to treat as confirmatory. He directed jurors that "[p]erhaps the most significant piece of potential confirmation" comes from Mr. Galliah, given that both T.N. and Mr. Galliah described someone saying words to the effect of, "Is this the guy?". The trial judge referred, as well, to other potential confirmatory evidence including the security video, unspecified aspects of Ms. Andrikopoulos's evidence, and unspecified aspects of Mr. Panagiotopoulos's evidence. The appellants argue that the trial judge erred in three ways in choosing and describing these "illustrations" of confirmatory evidence.

(1) "Is this the guy?"

[95] First, they argue that the trial judge erred in advising the jury that they could find the security video and Mr. Galliah's testimony that someone said, "Is this the guy?" to be confirmatory, without also advising jurors that T.N.'s testimony was "severely tainted" by his pretrial exposure to this information, through disclosure and the bail hearings that were held. I do not agree.

[96] This is not a case where there is no reasonable basis on which the jury could find the apparently confirmatory evidence to be independent. T.N. was present during the events he described. Therefore, he may have had personal knowledge of the details confirmed in the security camara images and in Mr. Galliah's

testimony before being exposed to this evidence at the bail hearings or through disclosure. The trial judge was therefore entitled to invite jurors to decide whether to accept this evidence as confirmatory. Having done so, he would have erred had he directed jurors that this evidence *is* "severely tainted". It is for jurors, not the judge, to decide whether evidence that could reasonably be found to be independent is in fact tainted.

[97] I also take the appellants to be arguing that the trial judge erred by not providing jurors with a specific instruction to consider whether T.N.'s testimony was independent of the security camera images and of Mr. Galliah's testimony before treating this evidence as confirming his testimony. I would not give effect to this argument either. Considering the charge as a whole and in context, I am confident jurors would have considered the independence of the confirmatory evidence.

[98] As I have described, the trial judge provided jurors with a clear, sharp warning to be careful before accepting the evidence of T.N. and Mr. Galliah. He also told jurors to look for confirmatory evidence, he told them that to be confirmatory, evidence must be independent, and he instructed them to decide whether this evidence was confirmatory. The jury therefore knew that they should consider the independence of any confirmatory evidence.

[99] Significantly, there was no realistic risk in the circumstances of this case that the jurors would not have considered whether T.N.'s testimony was tainted by

his pretrial exposure to the security videos and to disclosure. T.N. was questioned extensively about his pretrial exposure to the security camera images and Mr. Galliah's statement. Mr. Triolo's counsel argued in his closing submissions that T.N. used his exposure to other features of the disclosure to concoct a false story. And in his charge to the jury the trial judge reminded jurors of the defence submission that T.N.'s evidence was self-serving and motivated by a plea deal, and he had earlier given a mid-trial instruction to jurors to the same effect.

[100] To be sure, a perfect charge would have been explicit in directing jurors to consider whether T.N.'s testimony was independent of the security camera images and of Mr. Galliah's testimony before treating that evidence as confirmatory, but perfection is not needed. Jurors had the functional understanding that they required to assess the independence of the confirmatory evidence.

(2) Mutual Confirmation by *Vetrovec* Witnesses

[101] Second, the appellants argue that given that both T.N. and Mr. Galliah were *Vetrovec* witnesses, the trial judge was obliged to caution the jury about unreliable evidence being used to confirm unreliable evidence. In my view, there was no need to direct the jury in this regard. Jurors had been duly cautioned about the special scrutiny that each witness's testimony required. If jurors accepted, as they were entitled to, that T.N. and Mr. Galliah were offering independent evidence that someone said, "Is this the guy?", this overlap in a key detail of the narrative would

reasonably be capable of helping to restore the faith of jurors in the relevant aspects of their accounts, notwithstanding that they were each *Vetrovec* witnesses.

(3) Mr. Panagiotopoulos's Evidence

[102] Finally, the appellants submit that it was inaccurate to describe Mr. Panagiotopoulos's evidence as confirmatory because there was "no commonality" between his evidence and T.N.'s testimony. Certainly, T.N. testified on matters that Mr. Panagiotopoulos did not, and there were material differences in the identification evidence they gave relating to Mr. Triolo and to which of the persons on the security video images was Mr. Panagiotopoulos. But it overstates things to say that there was "no commonality" in their evidence. There were coincidental details in their narratives relating to the unfolding of events that could be taken as supportive, such as their overlapping testimony about the pace of the Triolo group when taking the same path that Mr. Khalid and Mr. Galliah had taken. Although I accept that the confirmatory potential of Mr. Panagiotopoulos's evidence was limited, it is not non-existent and substantial deference is owed to the decision of the trial judge to offer aspects of Mr. Panagiotopoulos's evidence by way of illustration.

[103] Nor was the trial judge required to specify the aspects of Mr. Panagiotopoulos's testimony that could be confirmatory. As I have indicated,

trial judges are not typically required to give illustrations of confirmatory evidence. It follows that when they choose to do so, they are not obliged to be specific. Jurors knew what they were to be looking for, and it was for them to decide, based on their evaluation, whether they would find confirmation of T.N.'s testimony in aspects of what Mr. Panagiotopoulos said.

[104] I would therefore dismiss this ground of appeal.

F. Did the trial judge err by overstepping the scope of the Agreed Statement of Facts ("ASF")?

[105] The appellants argue that the trial judge overstepped the ASF which had been filed relating to Exhibits 3 and 4. Exhibit 3 is the video footage captured by the two Four Seasons Centre for Performing Arts security cameras and Exhibit 4 is the extracted, PDF document containing frame-by-frame images. I see no merit in this ground of appeal.

[106] The ASF stated:

> 3. Security footage from the Four Seasons Centre for the Performing Arts is admitted on consent and accurately depicts the location therein at times noted on Oct. 6, 2013;
>
> 4. It is admitted that the PDF document Opera House Camera Views is a frame-by-frame true copy of the security footage from the Four Seasons Centre for the Performing Arts and depicts the locations therein at the times noted on Oct. 6, 2013[.]

[107] Not surprisingly, given that Exhibits 3 and 4 were admitted on consent pursuant to this ASF, the Crown did not lead evidence authenticating these exhibits. However, in his closing addresses, Mr. Triolo's trial counsel attempted to neutralize the Crown's reliance on Exhibits 3 and 4 by addressing the technical frailties of the videos, arguing that there was no evidence presented as to the reliability of the exhibits, and no evidence establishing that "there weren't errors when the slides were put together that could lead to misinterpretation". He also purported to explain to the jury that the ASF had limited scope: "All that's saying is that it's accurate with respect to the location". He submitted on this basis that the Crown's invitation to use the slides to draw conclusions should be rejected.

[108] Mr. Holder's counsel made more restrained submissions about the shortcomings of the videos, cautioning jurors that the security cameras did not capture the entirety of the events because they omit one-third of a second between each image.

[109] After confronting Mr. Triolo's counsel about the submissions he made and receiving a response, the trial judge expressed disagreement with Mr. Triolo's interpretation of the ASF. He directed the jury that, "It is admitted that the videos record the events on that part of Richmond Street where the killing took place and at the time it took place."

[110] The appellants argue that in giving this direction the trial judge "overstated the concession", which they say was only that the video evidence "accurately depicts *locations* at particular times", with no concession being made that the videos accurately depict the *events* in question. The appellants argue that the trial judge's direction unfairly undercut defence attempts to discredit the reliability of the videos by bestowing the videos with "an elevated air of reliability". They also argue that his comments to the jury "precluded the jury from critically examining the Video and the Slides" and created the impression that defence counsel had attempted to circumvent their agreement.

[111] In my view, the submission that the ASF admitted no more than that the locations and times captured by security camera images were accurate but did not also acknowledge the accuracy of what the captured images depict, is untenable.

[112] First, this interpretation is not supported by the plain language of the ASF. The ASF concedes admissibility expressly. An agreement that the security video images are admissible necessarily entails a concession that they satisfy the threshold authenticity requirement that there is a basis on which a reasonable jury could find that the security camera video footage and the slides are what the party tendering them purports them to be, namely, images of the relevant events. So understood, the express admission about time and place contained in the ASF is not a limitation on the admissions made, but rather an acknowledgement that the images on the authentic exhibits were captured at the time and place indicated.

[113] Even had the language of the ASF been unclear, the interpretation advanced by the appellants could not be accepted. It would be unreasonable to give an agreed statement of facts an illogical interpretation or an interpretation that deprives the agreed statements of fact of meaning. An admission that these exhibits captured directions and times but not images of the events they depict would be pointless, depriving the ASF of its utility. The trial judge was correct in rejecting the appellants' position and interpreting the ASF as he did.

[114] Nor do I accept that the trial judge's direction to jurors that the videos "record the events on that part of Richmond Street where the killing took place and at the time it took place" precluded the jury from critically examining the security camera video footage and slides. The direction that the security camera images recorded the events where the killing took place left it entirely open to the appellants to argue that the recorded images of those events, although genuine, are too grainy or confusing or incomplete to be relied upon to draw the conclusions the Crown was advancing.

[115] In my view, there is nothing to be done about the risk that the trial judge's direction could have caused jurors to think that Mr. Triolo's trial counsel may have been trying to renege on the ASF. Mr. Triolo's trial counsel made an untenable submission about the reach of the ASF, one that the trial judge had an obligation to confront.

[116] I would dismiss this ground of appeal.

G. Did the trial judge provide an unbalanced jury charge?

[117] The appellants argue that the jury charge was not even-handed and balanced. They identify several examples from the summary of the evidence that they contend favoured the Crown unfairly. I would not allow this ground of appeal. In my view, the charge, when read as a whole, did not unfairly steer the jury in the Crown's direction, or unduly promote the case for the Crown, as is required for this ground of appeal to succeed: *R. v. Panovksi*, 2021 ONCA 905, at para. 103.

The Red Hat

[118] First, the appellants submit that the trial judge gave an imbalanced summary of Mr. Panagiotopoulos's evidence about the identification of the person in the red hat. They submit that the trial judge did so by inaccurately telling jurors that, "[Mr. Panagiotopoulos] testified that the man in the red hat on the stage door camera was Joseph Triolo". In my view, this direction was not inaccurate. Mr. Panagiotopoulos identified person 3, who was depicted in the security camara images to be wearing a red hat, as Mr. Triolo. It was therefore accurate for the trial judge to tell jurors that Mr. Panagiotopoulos testified that the man in the red hat was Mr. Triolo. The fact that Mr. Panagiotopoulos did not use those exact words is not a basis for concern.

The Treatment of Mr. Panagiotopoulos's Evidence

[119] Relatedly, the appellants argue that the trial judge failed to give a balanced account of Mr. Panagiotopoulos's identification evidence by failing to remind jurors when describing his identification evidence that Mr. Panagiotopoulos had a strong motive to tell the police what they wanted to hear and had provided problematic testimony. In my view, Mr. Lozada and Mr. Ramos are in no position to raise this ground of appeal. At trial, Mr. Lozada's and Mr. Ramos's counsel spoke in favour of Mr. Panagiotopoulos's credibility because his evidence assisted their cases. Mr. Lozado's trial counsel called Mr. Panagiotopoulos's evidence "unimpeached" and Mr. Ramos's counsel said Mr. Panagiotopoulos was "forthright, honest and direct". Mr. Triolo did challenge Mr. Panagiotopoulos's credibility by raising his motive to strike a favourable deal, however, the trial judge was required to provide a balanced charge that accounted for the interests of all parties. Given the divergent interests of the appellants relating to Mr. Panagiotopoulos's credibility, the trial judge cannot be faulted for leaving the credibility issue to the appellants' submissions rather than featuring this issue in the jury charge.

[120] Moreover, Mr. Triolo's submission relating to Mr. Panagiotopoulos's credibility was not difficult to follow. A recitation by the trial judge of that submission was not needed to ensure that jurors would consider it.

Ms. Andrikopoulos's Testimony about the Admission

[121] The appellants submit that the trial judge's summary of Ms. Andrikopoulos's testimony about T.N.'s admission that he had stabbed Mr. Khalid was also imbalanced. Mr. Triolo took the lead in arguing this issue. His primary submission, as expressed in his factum is that the trial judge mistakenly told jurors that "the last thing that [Ms.] Andrikopoulos said was that she did not remember [T.N.] making the admission", when in fact the last thing she said was to express agreement with Mr. Lozada's counsel's that she had a clear recollection of T.N. saying at one point, "I did it".

[122] The problem I have with this submission is that the trial judge never told the jury that "the last thing" Ms. Andrikopoulos said was that she did not remember T.N. saying he did it. The actual wording of the material passage from the trial judge's direction is: "Finally, she said that there was a lot of commotion in the house but she did not remember [T.N.] ever saying he killed the guy" (emphasis added). It is important to appreciate that the trial judge made this statement after describing a number of the various things that Ms. Andrikopoulos had said on the subject. In context, it is apparent that the trial judge used the word "finally" not to suggest that this was the last thing she said, but to alert jurors that he had come to the end of his list of the various things Ms. Andrikopoulos had said.

[123] Nor do I find the trial judge's summary of Ms. Andrikopoulos's evidence to have been unfair. Her evidence was anything but clear. During cross-examination by Mr. Triolo's counsel Ms. Andrikopoulos acknowledged trying to be truthful at the preliminary inquiry when she said, "I'm pretty sure he was trying to admit that he did it, but I'm not too sure", and "he had first said he did it, but then he said he didn't do it, so I was kind of confused". In her testimony she said she was high at the time of her conversation with T.N., and that is why she was not too sure, adding that there was "commotion that kinda went on in the house…everybody [was] kinda talking about what's going on, and what happened, and that [T.N.] did it". She then added, "but I don't remember [T.N.] ever really saying "I did it", 100 percent, "I, I killed a guy", it was [*sic*] accident, or, whatever happened. He never said 100 percent that he did it." She then agreed to the suggestion that he said both "I did it" but then "I didn't do it". Put simply, there would have been an imbalance had the trial judge presented her as a witness to a clear admission of guilt by T.N. She was not. The trial judge's charge fairly captured the confusing testimony she gave.

T.N.'s Motive

[124] The appellants also take issue with the trial judge's treatment of T.N.'s motive, relative to his treatment of the motive of the others. When he referred to T.N. as a potential third party suspect he commented that unlike Mr. Triolo, T.N. was not involved in the initial fight with Mr. Khalid, and therefore T.N. "had no apparent motive to kill [Mr.] Khalid". Later, he described that earlier fight as

providing the Triolo group with “reason to follow [Mr.] Khalid, intending to do harm to him”. Mr. Triolo says that these directions are inconsistent and imbalanced. I do not agree. In the first instance the trial judge was speaking of a motive to kill, which T.N. did not share, and in the second instance, a motive to harm, which T.N. did share. I see no contradiction.

Ms. Andrikopoulos’s Memory and Blood on the Knife

[125] Lastly, the appellants take issue with the trial judge telling jurors that Ms. Andrikopoulos said that she remembers seeing no blood on the knife that T.N. showed her when she in fact testified that she could not remember whether she saw blood on the knife. I do agree that the trial judge made this error, and that it does relate to a potentially important issue. However, this lone misstep does not render the charge imbalanced, nor does this misapprehension of the evidence, shared by the trial judge with the jury, raise concerns about a miscarriage of justice. This misstatement of the evidence by the trial judge occurred in a jury direction in which the trial judge told jurors that they were to rely on their recollection of facts, not his.

[126] I would dismiss this ground of appeal.

(3) GROUNDS OF APPEAL APPLICABLE ONLY TO MR. LOZADA AND MR. RAMOS

[127] There was no suggestion that Mr. Lozada or Mr. Ramos stabbed Mr. Khalid. As explained, the evidence against Mr. Lozada was that he repeatedly struck Mr. Galliah while other participants from the Triolo group were involved in the attack on Mr. Khalid. The evidence against Mr. Ramos was that he slammed Mr. Khalid against the wall and assaulted him by punching and/or kicking him during the group assault. The Crown argued that both men were nonetheless liable on the homicide charge of manslaughter, either as co-principals with Mr. Triolo in the fatal attack on Mr. Khalid under s. 21(1)(a) of the *Criminal Code*, or as aiders and abetters of Mr. Triolo, under s. 21(1)(b) of the *Criminal Code*.

[128] The appellants claim the trial judge erred in the jury directions he gave relating to both paths to convictions. Since it is possible that the jury may have convicted based on only one path to conviction, a legal error in the jury charge on either path to conviction must lead to a successful appeal. I find no error in the aiding and abetting charge. However, I agree with Mr. Lozada and Mr. Ramos that the trial judge did err in his charge on co-principal liability. I will explain this error before turning briefly to Mr. Lozada's and Mr. Ramos's remaining grounds of appeal.

H. Did the trial judge err in his instruction on the law of causation?

Overview

[129] Section 21(1)(a) of the *Criminal Code*, the provision that applies to principal offenders, states that everyone is a party to an offence who "actually commits it". In this case, the Crown was alleging that Mr. Lozada and Mr. Ramos were principal offenders because they committed the offence of unlawful act manslaughter contrary to s. 222(5) of the *Criminal Code*.

[130] In *R. v. Creighton* [1993] 3 S.C.R. 3, at p. 25, Lamer C.J.C. described the elements of the offence of unlawful act manslaughter that the Crown is required to prove beyond a reasonable doubt, as follows:

> (a) that the accused has committed an unlawful act which caused the death of the deceased; (b) that the unlawful act must be one that is objectively dangerous (i.e., in the sense that a reasonable person would realize that it gives rise to a risk of harm); (c) that the fault requirement of the predicate offence, which cannot extend to offences of absolute liability, was in existence and (d) that a reasonable person in the circumstances of the accused would foresee the unlawful act giving rise to the risk of death.

[131] A majority of the court in *Creighton* disagreed with Lamer C.J.C.'s description of element (d), holding that reasonable foreseeability of death is not required, and that a reasonable foreseeability of bodily harm is sufficient: *Creighton*, at p. 57 (per McLachlin J.) and pp. 38,39 (per La Forest J.). With that

important modification noted, Lamer C.J.C.'s recitation of the elements of unlawful act manslaughter remains helpful.

[132] There is no suggestion on the facts of this case that the jury was inadequately directed on elements (b), (c) and (d). Given that the jury returned verdicts of guilty of manslaughter against Mr. Lozada and Mr. Ramos this ground of appeal can proceed on the basis that the jury accepted that these men intentionally engaged in unlawful and objectively dangerous acts of assault that a reasonable person would have foreseen could give rise to the risk of bodily harm, thereby satisfying elements (b), (c) and (d) of the offence. This ground of appeal turns on the trial judge's instruction on element (a), the "causation" element of unlawful act manslaughter.

[133] To satisfy the causation requirement, the Crown is required to prove that the accused person's unlawful act was a "significant contributing cause" of the victim's death. I am persuaded that the trial judge misdirected jurors by understating the standard of "reasonable foreseeability" they could use in determining whether Mr. Lozada's and Mr. Ramos's unlawful acts amounted to a "significant contributing cause". This error mattered. Mr. Lozada and Mr. Ramos argued at trial that their unlawful acts of assault were not a significant contributing cause of Mr. Khalid's death because their unlawful acts were overwhelmed in significance by the reasonably unforeseeable intervening acts of the stabber, which were the

mechanical cause of Mr. Khalid's death. The jury misdirection occurred when the trial judge was instructing jurors on how to determine that issue.

[134] The error, which is found in two separate passages of the charge, is clear and easily explained. As a matter of law, "reasonable foreseeability" could only support a finding of causation against Mr. Lozada and Mr. Ramos if jurors concluded that it was reasonably foreseeable that, as a result of Mr. Lozada's and Mr. Ramos's acts, someone could engage in an act of the same general nature as the act the stabber engaged in, presenting the accompanying risk of harm. Yet the trial judge twice directed the jury that they could use a lower, more easily achieved standard of "reasonable foreseeability" in finding the causation element to be satisfied. He twice directed jurors that they could find the stabber's act to be reasonably foreseeable by asking whether the risk of further bodily harm was a reasonably foreseeable result of the continuation of the assault. In doing so the trial judge provided jurors with an incorrect and inadequate pathway to conviction.

[135] The Crown concedes that the trial judge put the standard of what needs to be foreseen too low but argues that when the charge is read as a whole in light of the submissions of counsel the charge was sufficient. I disagree. As I will explain below, although "reasonable foreseeability" is only an analytical tool and not a self-standing legal requirement, there is a realistic if not likely prospect that some if not all of the jurors would have relied upon this analytical tool and used it improperly, thereby arriving at a "significant contributing cause" finding that is not

supported by law. Not only did the trial judge explicitly invite jurors to use "reasonable foreseeability" as a tool in resolving whether Mr. Ramos' and Mr. Lozada's unlawful acts were significant contributing causes of Mr. Khalid's death, he instructed jurors that a finding of "reasonable foreseeability", based on the inadequate standard he described, "may be enough for an accused's conduct to be a significant contributing cause". It is not safe in these circumstances to treat the misdirection as an error on an incidental point, or to assume that the balance of the charge would overcome the erroneous and prejudicial jury direction that was provided.

[136] I will begin by undertaking a close examination of the law before looking at the trial judge's charge and explaining why I am persuaded that the error I identify is not overcome by the balance of the jury charge.

The Legal Principles

[137] In *R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30, at para. 28, Karakatsanis J. gave definition to the causation element by posing the following question: "Were the dangerous, unlawful acts of the accused a significant contributing cause of the victim's death?" (emphasis added). The requirement of a "significant contributing cause" reflects the fact that in criminal law causation has both a factual and a normative element, generally described as "factual causation" and "legal causation".

[138] In a homicide case “factual causation” is “an inquiry about how the victim came to his or her death in a medical, mechanical, or physical sense, and with the contribution of the accused to that result”: *Maybin*, at para. 15, quoting *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488, at para. 44. “Legal causation” is the normative inquiry, dedicated to determining whether the factual contribution by the accused to the death of the victim is sufficient to warrant the moral and legal responsibility that a finding of guilt of manslaughter entails: *Maybin*, at para. 16.

[139] In applying the “significant contributing cause” standard, “the doctrine of intervening act is used, when relevant, for the purpose of reducing the scope of the acts which generate legal liability”: *Maybin*, at para. 23. The intervening act inquiry is relevant if there is a factual chain of causation between the act of the accused and death, but where some new event has occurred that may be so significant that the act of the accused loses its significance as a contributing cause. In effect, where the intervening act is significant enough, it overtakes the act of the accused and “breaks the chain of causation” between the accused and the death of the victim: *Maybin*, paras. 23-24.

[140] In *Maybin*, at paras. 25-28, Karakatsanis J. recognized that there are two analytical aids that, while not necessarily determinative, can assist in deciding whether an intervening act sufficient to break the chain of causation has occurred, “reasonable foreseeability” and “independent act”. Only the former, “reasonable

foreseeability", also referred to as "objective foreseeability" is relevant to this appeal, so I will say no more about "independent act" inquiries.

[141] Using "reasonable foreseeability" to assist in determining legal responsibility "accords with our notions of moral accountability": *Maybin*, at para. 30. Generally speaking, "an accused who undertakes a dangerous act, and in doing so contributes to death, should bear the risk that other foreseeable acts may intervene and contribute to that death": *Maybin*, at para. 30. By implication, unforeseeable acts that intervene and contribute to death may break the chain of causation.

[142] In *Maybin*, Karakatsanis J. addressed the problem that inconsistent outcomes can be arrived at in applying this analytical tool, depending upon one's view of the "scope of what has to be reasonably foreseeable". She posed three options as to what must be reasonably foreseeable. I will assign numbers to each of these standards, for clarity: "[1] Is it the specific assault by the intervening actor [that must be reasonably foreseeable]? [2] Is it simply the risk of further bodily harm? Or [3] is it the general nature of intervening acts and the accompanying risk of harm?": *Maybin*, at para. 32.

[143] She rejected standard 1 as too restrictive to reflect the reach of moral responsibility: *Maybin*, at para. 34.

[144] She also rejected standard 2, because it would add nothing meaningful to the analysis, given that reasonable foreseeability of the risk of bodily harm is already one of the other elements of *mens rea* for unlawful act manslaughter: *Maybin*, at paras. 37-38. She added that, without "[s]ome degree of specificity", this formulation is too broad to answer the material "question of whether the nature of the intervening act is such that the accused should not be held legally responsible for the death": *Maybin*, at para. 37.

[145] She then made clear that standard 3 expresses the correct scope of what needs to be reasonably foreseen, and that this is the standard that is to be applied when conducting intervening act inquiries: *Maybin*, at para. 38:

> For these reasons, I conclude that it is the general nature of the intervening acts and accompanying risk of harm that needs to be reasonably foreseeable. Legal causation does not require that the accused must objectively foresee the precise future consequences of their conduct. Nor does it assist in addressing moral culpability to require merely that the risk of some non-trivial bodily harm is reasonably foreseeable. Rather, the intervening acts and the ensuing non-trivial harm must be reasonably foreseeable in the sense that the acts and harm that actually transpired flowed reasonably from the conduct of the appellants. If so, then the accused's actions may remain a significant contributing cause of death. [Emphasis added].

Analysis of the Jury Direction on Causation

(1) Intervening Act as a Live Issue

[146] At trial the Crown took the position that the intentional assaultive acts by Mr. Lozada and Mr. Ramos were a significant contributing cause of Mr. Khalid's death on the theory that Mr. Lozada's and Mr. Ramos's participation in the group assault rendered Mr. Khalid vulnerable to the stabbing.

[147] Mr. Lozada and Mr. Ramos disagreed. The Crown conceded that there was no evidence that any of the alleged co-participants in the group attack knew or foresaw that any person in the group had a knife or knew or believed that Mr. Khalid would be stabbed, and during a colloquy the trial judge made the same observation. As indicated, Mr. Lozada and Mr. Ramos argued that the stabber's use of the knife to inflict the injuries that were the mechanical cause of Mr. Khalid's death was an intervening cause that severed the chain of causation and rendered it inappropriate to hold them legally or morally responsible for Mr. Khalid's death. In substance, their position was that they should not be held responsible in law for a stabbing death that was not a reasonably foreseeable consequence of their decision to join in a group attack that they had understood would not involve weapons. Once the stabber made an unexpected decision to use a weapon to inflict an obviously mortal injury on Mr. Khalid, it could no longer be said that their

own contribution to Mr. Khalid's death was a significant enough contributing cause to justify holding them morally and legally responsible for Mr. Khalid's death.

[148] In my view, these submissions had an air of reality, making "intervening act" a live issue, and "reasonable foreseeability" an important tool in its evaluation.

(2) The Errors in the Charge

[149] During the pre-charge conference defence counsel asked the trial judge to instruct the jury on standard 3, that as noted at para. 38 of *Maybin*, "the general nature of the intervening act and the accompanying risk need to be reasonably foreseeable". The trial judge did not do so. When he instructed jurors on the use of the "reasonable foreseeability" tool in assessing whether an intervening act broke the chain of causation he said:

> The specific act of stabbing does not need to be reasonably foreseeable at the time of the particular accused dangerous unlawful act for the dangerous unlawful act to be a significant contributing cause of death. <u>If the continuation of the assaults on [Mr.] Khalid and the risk of nontrivial bodily harm to [Mr.] Khalid from those continuing assaults was reasonably foreseeable at the time of the particular accused's dangerous unlawful act, that may be enough for an accused's conduct to be a significant contributing cause. It is up to you.</u> [Emphasis added.]

[150] I underscore that the trial judge not only provided an incorrect standard of reasonable foreseeability. He directed jurors that if that standard is met "that may be enough for an accused's conduct to be a significant contributing cause".

[151] During deliberations the jury sent a question to the trial judge: “Can we get a definition for a break in the chain of causation?” In the colloquy that followed defence counsel asked the trial judge to instruct the jury that something more than merely a continuing assault had to be reasonably foreseeable, but he again declined. In answering the jury question, he repeated his correct instruction on the significant contributing cause standard, including by making it clear that the general intervening cause inquiry in this case was concerned with whether “despite the fact the death was caused by the stabbing, were the acts of the accused, or any of them still a significant contributing cause of the death to the extent that it is still morally just and fair to hold the accused legally responsible for the death?” However, with respect to the reasonable foreseeability inquiry he said:

> You may also wanna [*sic*] ask yourself whether the stabbing was extraordinary, or unusual in the sense that it would not have been reasonably foreseeable to an ordinary person, in similar circumstances, and it is so strong and powerful that it virtually overwhelms the acts of an accused. If so, then you’re entitled to conclude that the unlawful acts of the accused are no longer a significant contributing cause of the death, and, therefore, he is not legally liable for causing that death. The chain of causation would be broken.
>
> The fatal act, in this case, will only break the chain of causation, so, that the accuseds’ [*sic*] unlawful act is not, in law, a cause of the death if: … B, that act is a reasonably unforeseeable act, remembering that the act of stabbing does not need to be reasonably foreseeable at the time of the particular accuseds’ [*sic*] dangerous, unlawful act. <u>If the continuation of assaults on [Mr.] Khalid and the risk of non-trivial bodily harm to</u>

> [Mr.] Khalid from these continuing assaults was reasonably foreseeable at the time of the particular accuseds' [*sic*] dangerous, unlawful act, and flowed naturally from that dangerous, unlawful act, that may be enough… [Emphasis added].

[152] As the underscored passages show, the trial judge incorrectly directed jurors that they could find sufficient objective foreseeability to sustain a causation finding if they find that it was foreseeable that the continuation of the assault would cause non-trivial bodily harm to Mr. Khalid. I do not see any other reasonable way of interpreting the invitation to jurors that this "may be enough".

[153] At the risk of repetition, it is important to reinforce why these directions were in error. As I have explained, this standard 2 measure was rejected in *Maybin* as inadequate, in part, because reasonable foreseeability of non-trivial bodily harm is already a separate element of the unlawful act manslaughter offence. If this same standard can operate as a basis for rejecting intervening acts, then the intervening act requirement would lose its significance. Moreover, as Karakatsanis J. explained, standard 2 also sets the threshold for reasonable foreseeability too low to identify adequate moral responsibility, which of course is the point of having a "significant contributing cause" requirement.

(3) The Inadequacy of the Balance of the Charge

[154] I do not accept the Crown's submissions that despite these errors the charge was adequate.

[155] First, in my view, the fact that “reasonable foreseeability” is not an independent causation requirement but rather an analytical tool in evaluating whether an intervening cause has broken the chain of causation does not reduce the significance of the errors. This case raised a realistic intervening act issue, the parties argued their causation case by focusing on reasonable foreseeability considerations, and the trial judge appropriately chose to provide the jury with the analytical tool of “reasonable foreseeability” to assist them. The fact that “reasonable foreseeability” is not a self-standing legal test does not alter the fact that it was an important analytical tool in this case, and that its erroneous application could lead to error.

[156] Second, I do not accept the Crown’s submission that the fact that the trial judge also put the foreseeability standard too high at one point when answering the jury question assists in negating the fact that he put the standard too low in other passages. In making this submission the Crown relies on the following excerpt from the trial judge’s answer: “You may also wanna ask yourself whether the stabbing was extraordinary, or unusual in the sense that it would not have been reasonably foreseeable to an ordinary person, in similar circumstances…” (emphasis added). In this passage the trial judge does appear to be instructing jurors to use standard 1, which was rejected by Karakatsanis J. in *Maybin* as an incorrect measure of moral fault. However, even leaving aside the dubious premise that one erroneous charge can negate another erroneous charge, the trial judge

repeatedly directed jurors, including a few lines after this passage, that “the act of stabbing does not need to be reasonably foreseeable at the time of the particular accuseds’ [*sic*] dangerous, unlawful act”. These explicit instructions that the stabbing need not be reasonably foreseeable likely neutralized the erroneous standard 1 charge, but as I will now explain, there is nothing in the charge to redress the erroneous standard 2 charge.

[157] The Crown’s primary position is to the contrary. It argues that when viewed as a whole in light of the submissions made by defence counsel, the charge was adequate. I disagree. I emphasize again that the trial judge elevated the importance of the “reasonable foreseeability” charge by instructing jurors, including in response to a jury question, that a finding of reasonable foreseeability may be enough for an accused’s conduct to be a significant contributing cause. In doing so, he offered jurors a direct and simple path to finding that the “significant contributing cause” element was satisfied. There is every risk, in these circumstances, that the erroneous charge would play a material, and potentially even a decisive role, in the decision-making process.

[158] Moreover, “reasonable foreseeability” is an analytical tool for measuring the significance of the connection between the act of the accused and the consequence of death, or for assessing moral fault. As such, the trial judge’s misdirection on the “reasonable foreseeability” analysis had the potential to distort the jurors’ decisions on the application of the other analytical tools the trial judge

offered in the noncontroversial parts of his charge. For example, the fact that the trial judge correctly linked the “significant contributing cause” element to the need for morally just and fair accountability does not redress the fact that he gave jurors an incorrect “reasonable foreseeability” measure for assessing morally just and fair accountability. Similarly, the fact that the trial judge told jurors to consider whether the stabbing was so overwhelming that it made the act of the accused merely part of the background does not assist, given that the determination of whether the assaults merely became part of the background would be informed by whether this intervening act was reasonably foreseeable. The same holds true with respect to the trial judge’s directions to jurors to inquire whether the stabbing was directly related to the assaults, or whether it overwhelmed the assaults, or whether it flowed naturally from the circumstances of the case. The answer to each of these questions can be influenced materially by considerations of whether the stabber’s conduct was reasonably foreseeable, and the jury charge misdirected jurors on how “reasonable foreseeability” should be measured.

[159] This is also true of the Crown submission that the jury would have had the benefit of defence counsel’s submission that Mr. Lozada and Mr. Ramos were morally innocent of the stabbing. In my view, the fact that the appellants’ submissions would have alerted jurors to consider their moral innocence cannot ameliorate the misdirection because, by directing jurors to use a lower standard of

"reasonable foreseeability" than the law required, the trial judge mislead jurors on how to measure their moral innocence.

[160] Ultimately, it was for the jury to determine whether the stabbing was an intervening act that broke the chain of causation. I am persuaded that even though the legal errors I have identified occurred in only two sentences of a complex and lengthy jury charge, they played an important and potentially critical role in the jury's determination of an essential element of the offence of unlawful act manslaughter. In my view, the errors, reinforced twice by the trial judge including in response to a jury question, were errors of substance that presented a material risk that reasonably intelligent, responsible jurors may have used a legally inadequate measure to find that Mr. Lozada's and Mr. Ramos's unlawful acts were a significant contributing cause of Mr. Khalid's death. I would allow this ground of appeal.

I. Did the trial judge err in his instruction on aiding and abetting by not addressing the consent element?

[161] Mr. Lozada and Mr. Ramos argue that the trial judge erred in failing to direct the jury on the issue of consent relating to their liability for manslaughter as aiders, pursuant to s. 21(1)(b) of the *Criminal Code*. The argument in favour of the need for a direction on the law of consent has subtlety. To be guilty as an aider, the accused must intend to assist in an act which the law deems to be unlawful:

R. v. Briscoe, 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 16; *R. v. Roach*, 192 C.C.C. (3d) 557 (Ont. C.A.), at para. 27. Consensual fights, where the force is applied with the consent of the person assaulted, are not unlawful: *R. v. Paice*, 2005 SCC 22, [2005] 1 S.C.R. 339, at paras. 18-19; *R. v. Modeste*, 2015 ONCA 398, 326 C.C.C. (3d) 93, at para. 50. Therefore, a person cannot be guilty as an aider for intentionally assisting in a consent fight. Mr. Lozada and Mr. Ramos argue that even if they intended to aid in a fight, there is an air of reality on the evidence that their intention was to join a consensual, and therefore legal fight. They argue that given this air of reality, the trial judge had to leave this issue with the jury for its consideration in determining whether Mr. Lozada and Mr. Ramos committed the offence of assault, which was required to ground their manslaughter convictions as aiders.

[162] I do not agree. It is irrelevant that at one juncture during the trial the trial judge appeared to accept that there was an air of reality to the prospect that the fight involving Mr. Khalid and Mr. Galliah may have begun as consensual. Whatever Mr. Lozada or Mr. Ramos may have believed at the outset as to whether Mr. Khalid and Mr. Galliah were consenting to a fight, any pretense to consent disappeared long before the fight ended, yet Mr. Lozada and Mr. Ramos continued their engagement. As soon as Mr. Khalid arrived, he was pushed against the wall by Mr. Ramos, and his identity as the man involved in the earlier fight was confirmed, this became a group swarming involving multiple attackers against two

individuals who continued to be attacked after they fell to the ground. This was no longer a consensual fight, even if it started that way. It became an attack.

[163] Moreover, it is obvious that from the outset of the melee, members of the Triolo group were intending to cause serious bodily harm. As a matter of sound policy, an intention by the accused to cause bodily harm retroactively vitiates any consent that may have been given if serious bodily harm later occurs: *Paice*, at para. 12. Even in the chaos of the event, Mr. Lozada and Mr. Ramos would certainly have recognized that members of the group they were fighting with intended to cause bodily harm. Nor can there be any doubt that serious bodily harm was caused to Mr. Khalid from the group assault. Mr. Khalid sustained multiple lacerations, abrasions, and blunt force injuries to multiple parts of his body from the blows he received.[3]

[164] Put simply, before their participation in the assault ended, Mr. Lozada and Mr. Ramos must have known of the facts that legally undermine any belief they may have had that they were assisting in a consensual fight. In these circumstances there is no air of reality to the suggestion that throughout the attack that they were engaged in, Mr. Lozada and Mr. Ramos could have believed they were in a consensual fight. No direction on the law of consent was required.

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[3] I have not relied on the obvious serious bodily harm caused by the stabbing because, on the authority of *Modeste*, at para. 53, it would be improper to do so. In order to vitiate consent to an otherwise consensual fight, the relevant serious bodily harm must result from the consensual fight and not from some other act.

(4) GROUNDS OF APPEAL APPLICABLE ONLY TO MR. LOZADA

J. Did the trial judge err in failing to instruct the jury on the law of intoxication?

[165] I do not accept Mr. Lozada's submission that the trial judge erred by failing to instruct the jury to consider whether he could benefit from the defence of intoxication. The defence of intoxication can apply to unlawful act manslaughter as an aider, since a conviction of the underlying offence of aiding an assault requires the aider to have the specific intent to assist: *R. v. Charlie*, 2020 BCCA 24, at para. 57-58. But in Mr. Lozada's case, the defence of intoxication has no air of reality. For an air of reality to exist there must be evidence that the accused was in an advanced state of intoxication at the time of the alleged offence, with the degree of advanced intoxication required varying depending upon the type of offence: *R. v. Wobbes*, 2008 ONCA 567, 235 C.C.C. (3d) 561 at para. 32; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at paras. 41-43. In his case, the requisite evidence was lacking.

[166] In order to gauge the degree of intoxication needed to give Mr. Lozada's defence of intoxication an air of reality it is helpful to begin by examining the complexity of the specific intent that Mr. Lozada was required to have to be guilty of manslaughter as an aider. Mr. Lozada argues that the Crown's theory that he assisted the stabber by rendering Mr. Khalid more vulnerable to the stabbing by

engaging Mr. Galliah, “involved a convoluted chain of reasoning”, thereby enabling the requisite specific intent to be defeated by a lower degree of intoxication. I disagree. The Crown’s theory of the aid that Mr. Lozada provided was a description of the contribution he made, not a description of what he allegedly set out to accomplish. To be convicted as an aider, Mr. Lozada merely had to have the intention to assist in an assault against Mr. Khalid when he joined the group attack. Although I recognize that this calls for a more complex state of intention than a base and simple intention to assault that a principal offender must have, I would not characterize the formation of an intention to assist in a group assault as an advanced intellectual exercise. In my view, a relatively advanced state of intoxication is required for intoxication to have an air of reality as a defence to aiding in an assault, and there was no evidence that at the time of the melee, Mr. Lozada was in a sufficiently advanced state of intoxication.

[167] To be sure, there was evidence, that if believed, would establish that Mr. Lozada was significantly intoxicated by ketamine while at the rave, including during the first fight. But there was a paucity of evidence that his ketamine use had a continued effect on him during the relevant events. Mr. Lozada himself gave a description of how ketamine affected him, explaining that “it’s like heroin. You can’t get up when… or do anything. Like you could barely walk.” It is clear from the security camera images of him walking down Richmond Street immediately before the confrontation that led to his manslaughter conviction that any such effect had

passed. Although expert evidence of the effect of an intoxicant is not always required, there was no expert evidence called in this case to link the effects of Mr. Lozada's earlier ketamine high to the time of the fatal encounter and the experiential lay evidence about ketamine did not fill the breach.

[168] What the evidence did include was testimony provided by Mr. Lozada explaining why the group took the Richmond Street route before the fight, as well as Mr. Panagiotopoulos's evidence that Mr. Lozada was not having difficulty running, walking or speaking after they fled the scene together.

[169] In my view, this evidentiary record does not support a conclusion that Mr. Lozada was in an advanced state of intoxication at the time of the events that led to his manslaughter conviction. To the contrary, the evidence supports the conclusion that Mr. Lozada was capable of purposeful conduct during the melee, despite his use of ketamine at an earlier point in time.

[170] Given the absence of evidence of advanced intoxication at the time of the alleged act this is not a case where there was evidence that, if believed, would enable a properly instructed jury, acting reasonably, to acquit Mr. Lozada of aiding in the assault based on the defence of intoxication. In my view, the trial judge was not obliged to take the initiative not sought by Mr. Lozada by putting the defence of intoxication to the jury. I would dismiss this ground of appeal.

(5) Mr. Triolo's Sentence Appeal

K. Was the period of parole ineligibility imposed on Mr. Triolo unreasonable?

[171] I would reject this ground of appeal. Considerable deference is owed to the trial judge's discretionary determination to impose a period of 12 years without parole eligibility. The trial judge explained this decision based on his reasonable finding that Mr. Triolo pursued Mr. Khalid to settle the score and chose to engage in a brazen and brutal stabbing in a busy downtown area. In these circumstances, the sentence imposed by the trial judge is not demonstrably unfit notwithstanding Mr. Triolo's youth, lack of criminal record, and character references. There is no basis to interfere.

CONCLUSION

[172] I would dismiss Mr. Triolo's conviction appeal and his sentence appeal.

[173] I would allow Mr. Lozada's and Mr. Ramos's conviction appeals, set aside their manslaughter convictions, and order a new trial.

"David M. Paciocco J.A."

Doherty J.A.:

[174] I have had the benefit of reading the detailed and clear reasons of my colleague, Paciocco J.A. I would dismiss the appeal brought by the appellant, Mr. Triolo, for the reasons given by my colleague. I also agree with his analysis of the grounds of appeal pertaining to the appellants, Mr. Ramos and Mr. Lozada, with one exception. Paciocco J.A. is satisfied that the causation instruction as applied to the liability of Mr. Ramos and Mr. Lozada for manslaughter as co-principles under s. 21(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, was wrong in law. He concludes that the convictions of Mr. Ramos and Mr. Lozada for manslaughter must be quashed and a new trial ordered. I see no error in the causation instruction and would dismiss the appeals brought by Mr. Ramos and Mr. Lozada.

[175] My colleague has fully reviewed the evidence and the various arguments advanced by the appellants. I will address only the causation issue on which he would order a new trial. Before doing so, however, it is worth noting that this was a lengthy, factually and legally complicated trial. There were four accused, several different potential bases for liability, various defences, and several different combinations of possible verdicts. The instructions to the jury were, of necessity, complex and lengthy. The charge consumes some 225 pages of transcript, not counting a detailed answer to a question posed by the jury. The trial judge also provided a written copy of his instructions to the jury. The outcome of the appeals

brought by Mr. Ramos and Mr. Lozada come down to the meaning to be taken from two short passages in a lengthy jury instruction.

THE RELEVANT FACTS

[176] I need only summarize some of the salient facts relevant to the causation issue. Mr. Triolo, Mr. Ramos and Mr. Lozada were part of a group of young men (the “Triolo group”) that attacked a second group of young men on a street in downtown Toronto shortly after 2:00 a.m. during the *Nuit Blanche* festival. The second group included the victim, Rameez Khalid, and some friends. There had been an earlier encounter between some members of the two groups during which Mr. Khalid had apparently got the better of Mr. Triolo.

[177] When the Triolo group first approached the other group, someone whom the Crown argued was Mr. Ramos allegedly pushed Mr. Khalid and yelled “Is this the guy?” A battle ensued. Mr. Khalid and at least one friend were punched, knocked to the ground, and kicked.

[178] About 15 seconds after the attack began, and while it was still ongoing, Mr. Khalid was stabbed in the heart. He managed to get to his feet, but almost immediately collapsed and died on the roadway a few seconds later. The autopsy revealed that Mr. Khalid had suffered two stab wounds, one through the heart, and multiple injuries to other parts of his body, presumably from the beating administered immediately prior to the stabbing.

[179] The jury was satisfied Mr. Triolo stabbed and killed Mr. Khalid with the intention necessary for murder under s. 229(a) of the *Criminal Code*. Mr. Ramos and Mr. Lozada were charged only with manslaughter, either as co-perpetrators of the assault on Mr. Khalid, or as aiders and abetters to Mr. Triolo's homicide. In light of the court's disposition of Mr. Triolo's appeal, it is appropriate to consider the appeals of Mr. Ramos and Mr. Lozada on the basis that Mr. Triolo stabbed and killed Mr. Khalid and was properly convicted of murder.

[180] There was no evidence that Mr. Ramos or Mr. Lozada knew that Mr. Triolo was armed with a knife, or believed that he would use a knife in the course of their joint attack on Mr. Khalid and his friends. Had the Crown presented such evidence, Mr. Ramos and Mr. Lozada would no doubt have been charged with murder.

THE ALLEGED ERROR IN THE JURY INSTRUCTION

[181] The trial judge instructed the jury that Mr. Ramos and Mr. Lozada were potentially liable for manslaughter, either as co-perpetrators of the assault on Mr. Khalid that led to his death, or as aiders and abetters in the homicide committed by Mr. Triolo. Paciocco J.A. concludes that the aiding and abetting instruction is correct. I agree. He also points out, however, that, as there is no way of knowing which of the two routes the jury took to convicting Mr. Ramos and Mr. Lozada of manslaughter, an error in either instruction would be fatal to the convictions. Again, I agree.

[182] The trial judge correctly identified the essential elements of unlawful act manslaughter, including the requirement that the actions of Mr. Ramos and Mr. Lozada constitute a "significant contributing cause" of Mr. Khalid's death. Paciocco J.A. accepts, as do I, that there was ample evidence upon which a jury could conclude that, even though Mr. Ramos and Mr. Lozada did not administer the fatal stab wound, they could be held to have caused Mr. Khalid's death in that their actions amounted to a significant contributing cause of that death.

[183] Paciocco J.A. does take issue with the trial judge's causation instruction. He concludes that on two occasions the trial judge wrongly told the jury that reasonable foreseeability of further bodily harm against Mr. Khalid in the course of the assault could suffice to establish that the actions of Mr. Ramos and Mr. Lozada were a significant contributing cause in Mr. Khalid's death. My colleague concludes that the trial judge twice misstated the foreseeability requirement applicable to the determination of causation as against the non-stabbers, Mr. Ramos and Mr. Lozada. He writes, at para. 134:

> As a matter of law, "reasonable foreseeability" could only support a finding of causation against Mr. Lozada and Mr. Ramos if jurors concluded that it was reasonably foreseeable that, as a result of Mr. Lozada's and Mr. Ramos's acts, someone could engage in an act of the same general nature as the act the stabber engaged in, presenting the accompanying risk of harm.

REVIEWING JURY INSTRUCTIONS

[184] Jury instructions must be read bearing in mind the intended audience, and the ultimate purpose of the jury instructions. Jurors are 12 reasonably intelligent people. They are not lawyers trained in the language of the law, or conversant with the most recent jurisprudential explanations of legal principles. Jury instructions must be delivered using plain language in a down-to-earth manner. The aim is to arm the jury with an understanding of the necessary legal principles, so that the jury can apply those principles to the facts as found by the jury. The question for an appellate court must be what would a reasonably intelligent, responsible juror take from the instruction: see *R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 163. That question is not necessarily answered by a side-by-side comparison, between the language of the instruction and the language of settled case law. Those cases speak to a different audience and serve a different purpose.

[185] Jury instructions must be read as a whole with a view to the ultimate purpose of those instructions. The Supreme Court of Canada and this court have repeatedly cautioned appellate courts against an overly legalistic and microscopic review of jury instructions: *R. v. Evans*, [1993] 2 S.C.R. 629, at p. 640; *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581, at para. 52; *R. v. Mariani*, 2007 ONCA 329, 220 C.C.C. (3d) 74, at para. 64; and *R. v. Archer* (2005), 202 C.C.C. (3d) 60 (Ont. C.A.), at para. 46. In trials like this one, where the legal and factual issues in play and the respective theories of the Crown and the defence require literally hundreds

of pages of explanation, it can be expected that a scrutinizing reader will find passages in the instructions which can be construed as unclear, misleading or, even when considered on a standalone basis, wrong in law. As observed by the majority in *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at paras. 30-31:

> The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case.
>
> In determining the general sense which the words used have likely conveyed to the jury, the appellate tribunal will consider the charge as a whole. The standard that a trial judge's instructions are to be held is not perfection. The accused is entitled to a properly instructed, not a perfectly instructed jury. [Citation omitted.] It is the overall effect of the charge that matters.

See also *R. v. Goforth*, 2022 SCC 25, 415 C.C.C. (3d) 1, at paras. 20-22; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at paras. 8-9; and *R. v. N'Kansah*, 2019 ONCA 290, at para. 35.

THE LEGAL PRINCIPLES

[186] The trial judge must, of course, get the law right in his jury instructions. In respect of causation as applied to unlawful act manslaughter, *R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30, sets out the relevant principles:

- Legal or imputable causation is determined by asking whether the Crown has proved beyond a reasonable doubt that the actions of an accused were a significant contributing cause of the victim's death: *Maybin*, at para. 5;
- The causation inquiry is a normative one. The trier of fact looks for a connection between the actions of the accused and the victim's death sufficient to morally justify the imposition of legal liability for the homicide: *Maybin*, at paras. 16, 60;
- The causation inquiry is of necessity, case-specific, and fact-driven. The terminology to be used in describing the causation requirement to a jury is discretionary and will have regard to the circumstances of the case and the particular nature of the causation issue: *Maybin*, at para. 17;
- The law recognizes that the actions of another person can break the chain of causation between the actions of an accused and the victim's death: *Maybin*, at para. 23;
- There is no single test or measure for determining whether a particular act has broken the chain of causation. The question remains whether the unlawful acts of the accused were a significant contributing cause in the victim's death: *Maybin*, at paras. 23-29;
- A determination of whether the alleged intervening act was reasonably foreseeable can assist in determining whether the causation chain is broken

by the intervening act. Reasonable foreseeability is not, however, a test for legal causation, but only a tool to be used, if appropriate in assessing whether, despite the alleged intervening act, legal responsibility for the death should still be imputed to the accused: *Maybin*, at paras. 30-44; and

- An independent act committed by another may break the chain of causation. An act is independent for this purpose if it is not directly linked to the actions of the accused, and by its nature overwhelms the actions of the accused so that the accused can properly be said to be morally innocent in the death. The independent act inquiry is also not a test for causation. It is a lens through which the trier of fact may, when the trier considers it appropriate, conduct the significant contributing cause inquiry: *Maybin*, at paras. 45-56.

[187] For present purposes, paras. 28 and 29 of the majority in *Maybin* are particularly germane. After referring to the reasonable foreseeability inquiry and the independent act inquiry, Karakatsanis J., for the majority, said:

> In my view, both these approaches are analytical aides – not new standards of legal causation. I agree with the intervener, the Attorney General of Ontario, that while such approaches may be helpful, they do not create new tests that are dispositive. Neither an unforeseeable intervening act, nor an independent intervening act is necessarily a sufficient condition to *break* the chain of legal causation. Similarly, the fact that the intervening act was reasonably foreseeable, or was not an independent act, is not necessarily a sufficient condition to *establish* legal causation. Even in cases where it is alleged that an intervening act has interrupted the chain of legal

> causation, the causation test articulated in *Smithers* and confirmed in *Nette* remains the same: Were the dangerous, unlawful acts of the accused a significant contributing cause of the victim's death?
>
> Depending on the circumstances, assessments of foreseeability or independence may be more or less helpful in determining whether an accused's unlawful acts were still a *significant contributing* cause at the time of death. Any assessment of legal causation should maintain focus on whether the accused should be held legally responsible for the consequences of his actions, or whether holding the accused responsible for the death would amount to punishing a morally innocent. [Italics in original; underlining added.]

THE CHARGE TO THE JURY

[188] I come now to the charge to the jury. In the first paragraph of the instructions, the trial judge accurately described the test for causation:

> Crown counsel must prove beyond a reasonable doubt that the particular accused's conduct contributed significantly to the death. An accused's conduct may have contributed significantly to Khalid's death even though the main cause of death was the stabbing, and not the particular accused's conduct.

[189] The trial judge followed this clear and accurate statement of the test for causation by alerting the jury to the key causation related issue as applied to Mr. Ramos and Mr. Lozada. He told the jury that the stabbing by Mr. Triolo could negate any claim by the Crown that the non-stabbers, Mr. Ramos and Mr. Lozada, had caused Mr. Khalid's death. The trial judge said:

> If you conclude that the stabbing resulted in what a particular accused did no longer being a significant

> contributing cause of death, then the particular accused did not cause Khalid's death.

[190] Having alerted the jury to the test for causation, and placed that test in the factual context of the case to be decided by the jury, the trial judge immediately restated the test for causation as applied to the non-stabbers, Mr. Ramos and Mr. Lozada:

> For the particular accused to cause Khalid's death despite the fact that somebody else stabbed Khalid, you must conclude that what the accused did was sufficiently connected with the death that it remained a significant contributing cause that continued until Khalid's death without interruption.

[191] The trial judge proceeded to tell the jury that in determining whether the actions of the accused were a significant contributing cause of death, the jury must consider all of the evidence, not just the medical evidence of the cause of death. He stressed that the jury's ultimate concern was the contribution of the accuseds to the death of Mr. Khalid.

[192] The trial judge next turned to the foreseeability of Mr. Khalid's death as a consideration for causation as applied to Mr. Ramos and Mr. Lozada. He reminded the jury that the fact the non-stabbers did not know that one of their group members had a weapon or would use a weapon was not determinative of the causation issue. Nor was reasonable foreseeability of the actual mechanism of death, i.e. the stabbing, a prerequisite to a finding of causation. Both instructions are correct in law.

[193] The trial judge next told the jury:

> If the continuation of assaults on Khalid and the risk of non-trivial bodily harm to Khalid from those continuing assaults was reasonably foreseeable at the time of the particular accused's dangerous unlawful act, that may be enough for an accused's conduct to be a significant contributing cause of death. It is up to you.

[194] My colleague describes this passage as a fatal misdirection. I agree that in cases in which an intervening act occurs, an accused cannot be fixed with causal responsibility for the victim's death based solely on finding that the risk of non-trivial bodily harm was reasonably foreseeable: *Maybin*, at para. 38. To the extent that a finding of legal causation in the face of an intervening act rests on reasonable foreseeability, the accused must foresee "the general nature of the intervening acts and the accompanying risk of harm": *Maybin*, at para. 38.

[195] I do not agree, however, that reasonable foreseeability of the general nature of the intervening acts and the accompanying risk of harm is a test for causation. Nor do I read the trial judge as instructing the jury that a reasonably foreseeable risk of bodily harm was a standalone test for causation which could, if satisfied, justify a causation finding.

[196] The trial judge's instructions must be considered in their entirety. I read the impugned passage cited in the preceding paragraph as an indication that reasonable foreseeability of non-trivial bodily harm could be enough to establish causation, depending on the jury's assessment of other factors relevant to legal

causation on these facts. The trial judge did not tell the jury that it could, or should, stop its causation analysis after the reasonable foreseeability inquiry. I do not think a reasonably intelligent juror would understand from the trial judge's instructions that he or she could ignore the rest of the causation instructions if satisfied that the risk of non-trivial bodily harm was foreseeable at the time of the actions of Mr. Ramos and Mr. Lozada. To the contrary, the trial judge dealt at some length with the other considerations relevant to causation. He did so by referencing some of the specific evidence in the case, and putting forward the different interpretations of that evidence available to the jury. In doing so, the trial judge transformed the causation inquiry from an abstract one into a practical exercise, rooted in the evidence of the case and directed at whether the actions of Mr. Ramos and Mr. Lozada were a significant contributing cause of Mr. Khalid's death.

[197] In referencing the evidence, the trial judge said:

> But consider whether those who assaulted Galliah [Khalid's friend] or Khalid, particularly if Khalid was on the ground, significantly contributed to the cause of Khalid's death by either preventing the possibility of aid or escape for Khalid, or otherwise rendering him more vulnerable to a fatal knife attack.
>
> On the other hand, if you find that Khalid was the aggressor in the fight, and was determined to fight despite being outnumbered, consider whether fighting with him before the stabbing really made him more vulnerable to being assaulted with a knife. And consider whether there was really any possibility that Galliah would have aided Khalid or helped him escape if he had not been kept busy by those who were fighting with him.

> Further, consider whether the stabber would have been able to inflict the wound whether or not others were striking Khalid. I offer no opinion, I am merely posing questions.

[198] The trial judge completed this part of his causation instruction by stressing the burden of proof carried by the Crown on the issue of causation.

[199] As I read the trial judge's initial instructions on causation, there could be no realistic possibility that the jury would find causation based simply on a determination that it was reasonably foreseeable that Mr. Khalid would suffer bodily harm of a non-trivial nature during the continuing assaults. The jury was told to look for a clear connection between the acts of the non-stabbers and Mr. Khalid's death. They were provided with helpful examples based on the evidence in which the actions of the non-stabbers, Mr. Ramos and Mr. Lozada, could have significantly contributed to the eventual death of Mr. Khalid. This approach gave the jury a practical case-specific instruction on the meaning of causation. The jury knew they could convict Mr. Ramos and Mr. Lozada of manslaughter as co-perpetrators only if satisfied beyond a reasonable doubt that their actions were a significant contributing cause in Mr. Khalid's death.

THE ANSWER TO THE JURY'S QUESTION

[200] In the course of their deliberations, the jury asked the following question:

> Can we get a definition for a break in the chain of causation?

[201] The trial judge began his answer by pointing out to the jury that, although the stabbing of Mr. Khalid was the direct and physical cause of his death, it was not necessarily the only legal or imputable cause of death. He told the jury it must decide:

> [W]ere the acts of the accused, or any of them still a significant contributing cause of the death to the extent that it is still morally just and fair to hold the accused legally responsible for the death?

[202] The trial judge told the jury to consider whether the stabbing was "so overwhelming as to make the effects of the unlawful acts of the accused merely part of the background or setting for that stabbing to occur, so, that it can be said that these unlawful acts of the accused were no longer a significant contributing cause of death?". He went on to tell the jury that, in making that determination, it should consider whether the stabbing was "extraordinary or unusual in the sense that an ordinary person would not reasonably foresee it."

[203] I pause to emphasize that I do not understand the trial judge to have told the jury that a reasonable foreseeability of the stabbing was the test for causation. Had the trial judge so instructed the jury, the instruction would have been unduly favourable to the appellants and contrary to *Maybin*, at para. 38. Putting that sentence in the context of the rest of the charge, however, the trial judge was merely telling the jury that should they find that the stabbing was reasonably foreseeable, that such a finding would play a role in their determination of whether

the acts of the non-stabbers remained "a significant contributing cause" of Mr. Khalid's death.

[204] The trial judge next reminded the jury that the stabbing could be viewed as a sufficiently significant event so as to render the non-stabbers not legally liable for Mr. Khalid's death. The trial judge went on:

> The fatal act, in this case, will only break the chain of causation, so, that the accuseds' unlawful act is not, in law, a cause of death if: A, that act is an, is an extraordinary and highly unusual occurrence, as opposed to being an event that could ordinarily, or naturally flow from the circumstances of this case; B, that act [the stabbing] is a reasonably unforeseeable act, remembering that the act of stabbing does not need to be reasonably foreseeable at the time of the particular accuseds' dangerous, unlawful act. If the continuation of the assaults on Khalid and the risk of non-trivial bodily harm to Khalid from these continuing assaults was reasonably foreseeable at the time of the particular accuseds' dangerous, unlawful act, and flowed naturally from that dangerous, unlawful act, that may be enough.

[205] The trial judge added that if the stabbing was an intentional act, independent of the acts of the non-stabbers, that too would break the chain of causation.

[206] In my view, this instruction told the jury that it must consider whether the act of stabbing was, in any meaningful sense, independent of the ongoing violent attack, in which all of the appellants were fully participating, as opposed to a natural and ordinary part of that ongoing joint attack. The instructions, read as a whole, adequately gave the jury the information it needed to decide whether the stabbing was part and parcel of the ongoing attack which culminated in Mr. Khalid's death,

and whether the non-stabbers, who fully participated in that ongoing attack, could be said to have significantly contributed to Mr. Khalid's death, and therefore properly held morally responsible for that death.

CONCLUSION

[207] When read in isolation, the two passages from the trial judge's instructions highlighted by Paciocco J.A. can be said to have misstated the law as laid down in *Maybin*. Perfection is not the standard. Read as a whole, the instruction accurately put the law of causation as it applied to Mr. Ramos and Mr. Lozada.

[208] The trial judge's causation instructions encompassed much more than the two passages highlighted by my colleague. In plain language, and by reference to the evidence, the trial judge made it clear that to find causation as against Mr. Ramos and Mr. Lozada as co-perpetrators in the death, the jury had to be satisfied that the stabbing, or some similar escalation in violence during the attack, was a natural and ordinary, or I would say reasonably predictable, occurrence in the course of the attack. In short, the jury was left with the proper test for causation, and a clear instruction that it must decide whether the stabbing was, in any realistic sense, an independent or intervening act.

[209] I would dismiss the appeal.

Released: March 31, 2023 "D.D."

"Doherty J.A."
"I agree. Alexandra Hoy J.A."

Erratum

Correction made April 5, 2023: A publication ban warning was placed at the beginning of these reasons, and the name of the young person referred to in these reasons was replaced with the young person's initials so as to comply with s. 110(1) of the *Youth Criminal Justice Act*.