FILE NO. 36793

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF SASKATCHEWAN)

BETWEEN:

TASIA M. NATEWAYES

APPELLANT
(RESPONDENT IN THE COURT OF APPEAL)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(APPELLANT IN THE COURT OF APPEAL)

FACTUM OF THE RESPONDENT
(PURSUANT TO RULE 36(2) OF THE *RULES OF THE SUPREME COURT OF CANADA*)

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PART I

STATEMENT OF FACTS

Overview

1. The appellant drove her boyfriend and four other men to a home in Prince Albert knowing the men were armed and knowing they intended to assault another man. She waited for them as the men forcibly entered the home and assaulted the occupants. One of the intruders stabbed a young man to death inside the house. The victim was not the intended target. He died simply because he was in the wrong place at the wrong time.

2. The appellant was charged with two crimes: a) breaking and entering a dwelling house with intent to commit an indictable offence; and b) manslaughter. There was only one material fact in dispute at trial and that concerned whether the appellant knew her companions intended to break into the house. The trial judge found as a fact the appellant either knew or was wilfully blind about the intentions of her companions to forcibly enter the house. Accordingly, she found the appellant guilty on the break and enter offence.

3. The trial judge entered an acquittal on the manslaughter charge, reasoning that the appellant could not be a party to the offence unless a reasonable person could have foreseen a risk of bodily harm to the person who was killed. Considering the fact the appellant did not know the victim was in the house, a reasonable person could not have foreseen the victim was at risk of harm.

4. The Court of Appeal found legal error in that reasoning and entered a verdict of guilty on the manslaughter offence. The Court also concluded that the finding the appellant knew the men were going to forcibly enter the home was an "unassailable" finding of fact.

5. The appellant has filed a Notice of Appeal claiming a right to appeal the convictions on both offences pursuant to paragraph 691(2)(b) of the *Criminal Code*. With respect, in the

circumstances of this case, that paragraph only confers a right to appeal the manslaughter conviction.

Notice of Appeal, Appellant's Record, at p 21

6. The appellant purports to appeal the convictions primarily on the ground that the verdicts are unreasonable and cannot be supported by the evidence. The appeal should be dismissed. The trial judge's finding that the appellant knew there was going to a forcible entry was amply supported by the evidence. Even if that were not so, the appellant was still liable as a party to manslaughter. She was a party to the offence because she knowingly aided several armed men to commit an unlawful act of violence and, in the course of committing that unlawful act, one or more of those men stabbed the victim to death.

Background Circumstances

7. The appellant was with her boyfriend at a local mall in Prince Albert when she encountered a man named Cory Vandall. Mr. Vandall threatened her boyfriend. Shortly after the confrontation at the mall, the appellant used her car to drive by Mr. Vandall's house to see if he was at home. Then she used her car to transport her boyfriend and four other men to Mr. Vandall's home for the purpose of assaulting him. She believed Mr. Vandall was at home when she scouted it out with her boyfriend beforehand. She knew Mr. Vandall was with several other people at the mall and, as a consequence, had good reason to believe he was not at home alone. She knew that one of the men in her car was armed with a baseball bat and she saw some of the men in her car taking steps to mask their faces as she transported them to Mr. Vandall's house. She parked the car some distance away from the house and waited as the men forcibly entered the house and began to assault the occupants.

Trial judgment, Appellant's Record, at pp 2-3

8. There were several people in the house when the culprits broke in. Mr. Vandall, his girlfriend and his child were in an upstairs bedroom. There were four other people on the main floor, including Mr. Vandall's mother, his brother and his nineteen year old cousin,

Dakota Nayneecassum. Mr. Vandall's mother saw one of the intruders was armed with a machete and "bear mace". As soon as the intruders broke in, the occupants on the main floor tried to run out the back door. Mr. Nayneecassum did not make it. He fell to the floor and was stabbed to death.

Ibid., at pp 3-4

9. Mr. Vandall came downstairs to find out what was going on. He was attacked by two masked men but managed to get away and run upstairs to retrieve a weapon to defend himself. By the time he went back downstairs, the intruders were gone and his cousin was laying mortally wounded in a fetal position on the floor. There was bear mace sprayed all over the house and blood all over the kitchen.

Ibid., at p 3

10. The appellant waited in the car for the culprits to return. She heard screams as she waited. The men ran back to the car and she drove them away from the scene of the crime. One of the men was carrying a can of bear mace and the smell of it inside the car was very unpleasant. She told the man to get rid of it. She dropped four of the men off. Then she took her boyfriend to her cousin's place where she washed the clothes they were wearing when the crime was committed.

Ibid., at pp. 4-5

11. The appellant and her boyfriend were arrested at the hotel they were staying at several hours later. The appellant was interviewed by the police and she repeatedly lied to the police about her knowledge of and involvement in the crimes.

12. She initially said she did not know anything about the crime and did not drive anyone to the victim's home.

First and second police interview of the appellant, Appellant's Record, at pp. 28-96

13. She became slightly more cooperative the next day after she was told the police had searched her car and hotel room. She admitted that shortly after the confrontation at the mall, she drove by Mr. Vandall's home at her boyfriend's direction to see if Mr. Vandall was at home. She said they saw Mr. Vandall's car parked outside. She said there were no people outside the house at the time. She said they returned to Mr. Vandall's house later but insisted that her boyfriend was the only person in the car with her at the time. She claimed the other men who were involved in the home invasion came in another car. She said she could hear screaming as she waited for her boyfriend to return and she said that she refused to let anyone other than her boyfriend back into the car when they fled from the house.

Third police interview of the appellant, Appellant's Record, at pp. 101-102, 107 and 110-111

14. The police decided that there was not enough evidence to charge her with an offence and she was released from custody. She was re-arrested in January 2013 and provided another statement. This time she admitted she drove all of the men to the house knowing they were going to "pick a fight" or "confront" Mr. Vandall.

Fourth police interview of the appellant, Appellant's Record, at p. 63

The Trial Judge's Findings

15. The appellant was charged with two offences: a) break and enter with intent to commit an indictable offence; and (b) manslaughter. Most of the Crown's case was tendered in the form of an agreed statement of facts.

Agreed Statement of Facts, Respondent's Record, Tab 4

16. The Crown also called Cory Vandall and his mother to testify about what they saw and heard when the culprits broke in. The Crown tendered all of the appellant's statements to the police. The defence called no evidence in reply.

17. The appellant's primary argument at trial was that the Crown failed to prove she knew her boyfriend and the other men were going to break into the house. According to her argument,

she could not be convicted of either offence unless she knew her companions intended to break into the house.

Trial judgment, Appellant's Record, at p. 5, lines 34-40

18. The trial judge found as a fact that the appellant either knew the men intended to forcibly enter the home or was wilfully blind to that outcome. Accordingly, she found the appellant guilty on the break and enter charge.

Ibid., at pp. 6-7

19. As for the manslaughter charge, the trial judge instructed herself that the *mens rea* for manslaughter requires foreseeability of a risk of a specific kind of bodily harm to a specific identifiable person. The appellant was not guilty of manslaughter in relation to Mr. Nayneecassum's death because she could not have reasonably foreseen that Mr. Nayneecassum was in the house or that he would be stabbed with a knife.

20. This is how the trial judge explained it:

> The Crown must prove beyond a reasonable doubt that a reasonable person, in all the circumstances, would have foreseen a risk of harm to Dakota and, if so, Natewayes would have the requisite *mens rea* to be guilty by operation of s.21(2) of the *Criminal Code*. I must conclude that a reasonable person in all the circumstances would not have foreseen a risk of harm to Dakota. Natewayes did not see any knife or sharp object with the five perpetrators when they exited her car at Cody Vandall's house. A reasonable person would certainly have foreseen the risk of harm to Cody Vandall, should Cody have been the person killed by the force of so many assailants, armed with a metal baseball bat. But the fact is that one of the perpetrators stabbed Dakota in the back, puncturing his lung and heart with a knife. Dakota was not the target of the assault. Natewayes did not even know about the stabbing until sometime later. The killing of Dakota was not an offence that a reasonable person, in the shoes of Natewayes, as a party, could have foreseen in all the circumstances of this case.

Ibid., at p. 9

The Court of Appeal's Reasons for Judgment

21. The Crown appealed the acquittal on the manslaughter charge, submitting that the trial judge erred in her appreciation of the *mens rea* necessary for manslaughter. The Crown submitted proof of foreseeability of risk of harm of a specific type or in relation to a specific identifiable person was not required. The Court of Appeal unanimously agreed with the Crown's submissions.

Court of Appeal's Reasons for Judgment, Appellant's Record, at para. 21

22. The appellant agreed with the Crown's submissions too. She acknowledged that her culpability for manslaughter did not turn on whether she knew or ought to have known Dakota Nayneecassum was in the house. She agreed that a conviction on the manslaughter offence was appropriate if she knew or was wilfully blind that her companions intended to break into the house.

Ibid., at para. 22

23. The appellant appealed from the conviction on the break and enter offence and argued she should have been acquitted on both charges because the Crown failed to prove she knew her companions meant to forcibly enter the house. The Court of Appeal was not persuaded. The Court unanimously concluded the finding of knowledge was "unassailable" and observed that it was difficult to see how any other conclusion would have been possible on the admitted and undisputed facts of the case.

Ibid., at paras. 26-27

24. Having held the disputed finding was reasonable, the Court allowed the Crown's appeal on the manslaughter acquittal and dismissed the appellant's appeal on the break and enter conviction. The Court directed the verdict on the break and enter offence be "set aside", entered a verdict of guilty on the manslaughter charge and remitted that charge back to the trial judge for sentencing.

Ibid., at paras. 33-34

The Application for Leave and the Notice of Appeal

25. On or about December 29, 2015, the appellant filed a Notice of Application for Leave to Appeal. The Attorney General filed a response a few weeks later. On April 29, 2016, the Supreme Court Registry Branch sent email correspondence to the parties asking the appellant whether she wanted to exercise her right to appeal. The appellant responded the same day, advising the Court she did.

Notice of Application for Leave to Appeal, Respondent's Record, Tab 1
Email correspondence dated April 29, 2016, Respondent's Record, at Tab 2

26. On May 6, 2016, the appellant filed a Notice of Appeal and a Notice of Motion for an Extension of Time to file an appeal. On May 9, 2016, the Attorney General advised the Court that the motion for an order extending time was not opposed.

27. The Notice of Appeal states the appellant is appealing as of right pursuant to paragraph 691(2)(b) of the *Criminal Code* and s. 40 of the *Supreme Court Act* from the Court of Appeal's decision to reverse the acquittal on the manslaughter charge and dismiss the appeal from conviction on the break and enter charge. The Notice requests the Court to quash both convictions.

Notice of Appeal, Appellant's record, at p. 21

28. On or about June 23, 2016, the appellant filed a Notice of Discontinuance with the Court, stating that she wholly discontinued the application for leave to appeal.

Notice of Discontinuance, Respondent's Record, at Tab 3

PART II

POINTS IN ISSUE

29. The Attorney General does not agree with the appellant's statement of the points in issue. The Attorney General respectfully submits the real issues at stake in this appeal may be stated as follows.

30. Does the appellant have a right to appeal the Court of Appeal's judgment affirming the conviction on the break and enter charge? No.

31. Did the Court of Appeal misapprehend the law concerning party liability for manslaughter? No.

32. Did the Court of Appeal err by entering a conviction instead of ordering a new trial? No.

PART III

ARGUMENT

Overview

33. The appellant claims a right to appeal the verdicts on both the manslaughter and the break and enter charges. The essence of the appellant's argument is that she could not be guilty of either offence unless she knew her companions intended to break into the house and she asserts there was insufficient evidence to prove that fact.

34. The appellant's arguments are based on a misapprehension of the law. The validity of the manslaughter conviction did not depend on a finding she knew her companions intended to break into the house. Even if it did, the finding of knowledge was reasonable and amply supported by the evidence.

35. Further, this appeal concerns the validity of the manslaughter verdict, not the validity of the break and enter verdict. Therefore, the appellant's submissions that the break and enter verdict should be quashed as being unreasonable and not supported by the evidence should be dismissed.

Clarifying what this appeal is about

36. The appellant purports to appeal both the manslaughter and break and enter convictions but the manslaughter conviction is the only conviction at issue in this proceeding. There are two reasons for that.

37. First, this is an appeal as of right pursuant to paragraph 691(2)(b) of the *Criminal Code*. That paragraph states:

> **691(2)** A person who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal may appeal to the Supreme Court of Canada
>
> **(b)** on any question of law, if the Court of Appeal enters a verdict of

guilty against the person.

38. Paragraph 691(2)(b) confers a right to appeal the manslaughter conviction. It does not confer a right to appeal the break and enter offence.

39. In any event, the Court of Appeal "set aside" the verdict on the break and enter even though the appeal from conviction was dismissed. It is most likely the Court had *R v Kienapple* in mind when it did so. The point is, at this stage of the proceedings, there is no break and enter conviction left to appeal.

R v Kienapple, [1975] 1 SCR 729

40. Accordingly, the appellant errs by inviting this Court to consider the reasonableness of the break and enter verdict and to quash that verdict if reasonableness is found to be wanting. The reasonableness of that verdict is not an issue that is properly before the Court.

41. Appreciating this appeal is solely about the lawfulness of the manslaughter verdict serves to clarify the issues at stake and the standard of review to be applied to those issues. For example, contrary to the appellant's submissions, it is not the reasonableness of the break and enter verdict that is at stake here, it is the reasonableness of the trial judge's factual finding the appellant knew her companions intended to break into Mr. Vandall's home. The reasonableness of that finding must be assessed on the standard of palpable and overriding error.

Housen v Nikolaisen, 2002 SCC 33, at para 10, 2 SCR 235

42. Secondly, by focussing on the lawfulness of the manslaughter verdict, we can focus on the validity the appellant's argument that she could not be convicted of manslaughter unless she knew her companions intended to break into Mr. Vandall's house. For reasons that will be provided later, that argument is contrary to law.

Defining party liability for manslaughter

43. The offence of manslaughter covers a wide variety of circumstances. There are two constant requirements: (a) there must be conduct which causes the death of another person; and (b) there must be fault short of an intention to kill. The fault requirement is usually supplied by the commission of an unlawful act which causes death. In some cases, it may be supplied by a criminally negligent act or omission which causes death.

R v Creighton, [1993] 3 SCR 3, at p 42, [*Creighton*]

44. In unlawful act manslaughter cases the Crown must prove the unlawful act was dangerous in the sense that a reasonable person in the circumstances of the offender would foresee it as posing a likelihood of risk of bodily harm to another person. A subjective awareness of the risk is not necessary. In other words, the fact an accused person does not foresee a risk of harm flowing from the unlawful act is irrelevant if a reasonable person in those circumstances would have. The Crown need not prove there was foreseeability of a risk of death either.

Creighton, at pp 42-45
R v DeSousa, [1992] 2 SCR 944, at pp 961-962 and 967, [*DeSousa*]

45. Pursuant to s. 21(1) of the *Criminal Code*, a person may be a party to the offence of manslaughter if he or she knowingly aids or abets the commission of an unlawful act which causes death. Thus, an aider or abettor may be convicted of manslaughter if a reasonable person in all the circumstances would have appreciated that bodily harm was a foreseeable consequence of the unlawful act the party assisted or encouraged others to commit.

R v Jackson, [1993] 4 SCR 573, at p 583, [*Jackson*]

46. The motives of an aider are not relevant so long as the aid was provided for the purpose of assisting the principal to commit the unlawful act. Put another way, an aider does not have to desire the unlawful act be successfully committed.

R v Briscoe, 2010 SCC 13, at para 16, 1 SCR 411, [*Briscoe*]
R v Hibbert, [1995] 2 SCR 973, at para 36

47. The aider must know the principal intends to commit the unlawful act but it is not necessary for an aider to know precisely how the unlawful act will be committed or who the ultimate victim might be. It is sufficient if the unlawful act knowingly aided is the same type of unlawful act which is actually committed.

> *Briscoe*, at para 17; *R v Dunlop*, [1979] 2 SCR 881, at p 896; *R v Kirkness*, [1990] 3 SCR 74, at pp 100-101, per Wilson J.; *D.P.P. for Northern Ireland v Maxwell*, [1978] 3 ALL ER 1140 (HL), [*Maxwell*]; *R v Yanover (No 1)*, (1985), 20 CCC (3d) 300 (Ont CA), at para 76, [*Yanover*]; and *R v Stevenson* (1984), 11 CCC (3d) 443 (NSCA), at para 28

48. An accused person may also be a party to manslaughter pursuant to s. 21(2) of the *Criminal Code*. For liability to attach under s. 21(2), the Crown must prove:

> a) the accused formed an intention in common with at least one other person to carry out an unlawful purpose and to assist each other therein;
>
> b) the other person committed a culpable homicide in the course of carrying out the common unlawful purpose; and
>
> c) a reasonable person in all the circumstances would have foreseen a risk of harm to another person was a probable consequence of carrying out the common intention.
>
> *Jackson*, at p 587

Foreseeability of risk of specific harm to a specific person is not required

49. In this case, the trial judge found as a fact that the appellant knowingly aided her companions to commit the unlawful act of breaking and entering with an intent to assault Mr. Vandall. However, because Mr. Vandall was the target of the intended assault and because the appellant had no reason to think Mr. Nayneecassum was in the house, the judge held the appellant was not criminally responsible for Mr. Nayneecassum's death.

50. For the reasons given by the Court of Appeal, the trial judge clearly erred. The appellant's culpability for manslaughter did not depend on whether she knew or ought to have known Mr. Nayneecassum was in the house or was at risk of harm. Neither did it depend on a finding that she knew or ought to have known her companions were armed with a knife or

other sharp instruments rather than a baseball bat.

51. The law is settled. Party liability attaches if the unlawful act causing death was the *same type* of unlawful act the party knowingly aided. An aider does not have to know the identity of the actual victim to be liable as a party. In *Yanover*, Martin J.A. made that point clear when he stated:

> [76] For liability to attach under s.21(1)(b) or 21(1)© it is unnecessary that the person supplying the instrument for the commission of the intended crime know the precise details of the crime intended to be committed such as the particular premises intended to be blown up or the precise time when the offence is intended to be committed, provided that he is aware of the type of crime intended to be committed.

52. Justice Martin relied on the decision in *D.P.P. for Northern Ireland v Maxwell* as support for that proposition. The facts of the *Maxwell* case are instructive. Mr. Maxwell was a member of an organization responsible for numerous acts of sectarian violence. He was directed by a member of the organization to guide a car to a country inn. The accused did as he was instructed, knowing the men he was leading were likely going to commit a serious violent crime. The accused did not know what form that violence might take and he did not know who the intended target was. As matters turned out, the principals planted a bomb at the inn which, fortunately, was disarmed before it exploded. The accused was charged with doing an act with intent to cause an explosion and with possession of an explosive. The issue was whether he was a party to those crimes.

53. The accused argued that he could not be liable as a party because he did not know the men possessed explosives or intended to plant a bomb. The House of Lords disagreed, holding an aider is liable for assisting in the commission of an unlawful act even if he does not have knowledge of the actual crime the principal intends to commit. It is sufficient if the aider knows the unlawful act is the same type of unlawful act actually committed.

Maxwell, at p 1145

54. The same principle was applied in *R v Bainbridge*. In *Bainbridge*, the accused gave another man some equipment knowing it would be used for the purposes of breaking into premises. He did not know it would be used to break into a bank and he argued that lack of knowledge barred a finding he was a party to the offence. The Court of Appeal upheld the conviction, holding that a party is liable for knowingly assisting the same type of unlawful act as the one actually committed. Further, a party need not know the identity of the actual victim to be liable.

R v Bainbridge, [1960] 1 QB 129 (CA), at p 134

55. This principle is well established in Canada too. In addition to Justice Martin's observations in *Yanover* as noted above, *Maxwell* was cited with approval by the majority judges in *R v Dunlop* who stated:

> A person cannot properly be convicted of aiding or abetting in the commission of acts which he does not know may be or are intended: per Viscount Dilhorne in *D.P.P. for Northern Ireland v. Maxwell*, [citation omitted]. One must be able to infer that the accused had prior knowledge that *an offence of the type committed was planned* ... [Emphasis added]
>
> *Dunlop*, at p 896

56. In *Kirkness*, Wilson J. expressed support for the same principle:

> To be convicted as an aider or abettor one must also possess the necessary state of mind. Dickson J. addressed this issue also in *Dunlop*. He found that there must be evidence supporting an inference that the accused had prior knowledge that an offence of the type committed was planned.
>
> How similar must the anticipated crime and the actual crime be before the requisite mental element is satisfied? The case law on this issue seems to indicate that the two crimes must be substantially similar.
>
> *Kirkness*, at pp 100-101

57. Therefore, in unlawful act manslaughter cases, it is not necessary to prove an aider or abetter knew or ought to have known there was a risk of bodily harm to the person who was actually killed. The appellant knowingly aided others to commit an assault. The trial judge found

a reasonable person would have foreseen a risk of bodily harm from the unlawful act she knowingly aided. Nothing more was required to make the appellant criminally liable for the death of Mr. Nayneecassum, a death that was occasioned in the commission of the unlawful act she knowingly aided.

58. It is the same for principal offenders. In *R v Droste*, the Court considered a case involving a man who planned and deliberated the murder of his wife. In the course of executing that plan, he committed an unlawful act which caused the unintended deaths of his children. He was charged with two counts of first degree murder. The Ontario Court of Appeal upheld the convictions and one of the reasons the court gave for doing so involved the concept of "transferred intent".

R v Droste (1981), 63 CCC (2d) 418 (Ont CA), at para 21

59. The Supreme Court affirmed the decision and in *obiter* comments expressed agreement with the principle that victim identity is not an essential element of the *mens rea* for unlawful act homicide. The Court stated:

> Even if s. 214(2) did create a separate substantive offence of first degree murder — which it does not — I would incline to Professors Smith and Hogan's analysis and to the conclusion of Martin J.A. in the Ontario Court of Appeal that the identity of the victim would not be an essential element of such an offence.
>
> *R v Droste*, [1984] 1 SCR 208, at p 218

60. The decision in *R v DeSousa* makes it clear that a principal offender will be liable for harm or death caused to an unintended target if the offender committed an unlawful act that caused harm or death and if he knew or ought to have known the act created a risk of bodily harm to another person.

61. In *DeSousa*, the accused, who was involved in a physical altercation with others, threw a bottle. The bottle broke and caused serious injury to an innocent bystander. The accused did not intend to harm the actual victim and argued he did not foresee bodily harm to her. He

was charged with unlawfully causing bodily harm contrary to what is now s. 269 of the *Criminal Code*. The Court held the accused would be liable for unlawfully causing bodily harm to the victim on proof he committed an unlawful act that a reasonable person would foresee as being likely to risk bodily harm to another person. He did not have to know or be aware there was a risk of harm to a specific person and did not have to intend the actual consequences flowing from the unlawful act.

DeSousa, at pp 961-962 and 967

62. More recently, a manslaughter conviction was upheld in *R v Woodcock*, another case where an innocent bystander was killed by people engaged in an unlawful conduct. The accused and several other persons engaged in a mutual gunfight on a busy Toronto street. In the course of that gunfight, several people were shot and a teenage girl was killed. Mr. Woodcock's manslaughter conviction was upheld even though he did not fire the bullet that killed the victim, did not know who she was and did not intend to harm her. His liability for manslaughter flowed from the fact that he committed an unlawful act which was a legal cause of the victim's death and which a reasonable person would have foreseen was likely to cause bodily injury to another person. Nothing more was required.

R v Woodcock, 2015 ONCA 535, 22 CR (7th) 186

63. Two important conclusions follow from the decisions in these cases. First, the trial judge erred by reasoning as if the appellant could not be a party to the offence of manslaughter unless she knew or ought to have known Dakota Nayneecassum was at risk of bodily harm. Proof of foreseeability of harm to a specific identifiable person was not required. The appellant agreed with this point when she was in the Court of Appeal and she has not challenged it here.

64. Secondly, the appellant was liable as a party even if she did not know her companions intended to break into the house. Her knowledge the men intended to assault Mr. Vandall and her acts in aiding them in that endeavour coupled with the finding a reasonable person

would have foreseen a risk of bodily harm in those circumstances was all that was required to make her a party to manslaughter under s. 21(1) or s. 21(2) of the *Criminal Code*.

65. The appellant was liable under s. 21(1) because she knowingly aided the commission of the same type of unlawful act which ultimately caused Mr. Nayneecassum's death. Her willingness to transport several armed men to and away from the crime scene so they could assault Mr. Vandall made her a party to the offence of manslaughter whether she knew her companions intended to break into the house or not.

66. The appellant was liable under s. 21(1) because she knowingly aided several men to commit a criminal assault and in the course of that assault, the men caused bodily harm and death to another person. If Mr. Nayneecassum had survived his injuries she could have been prosecuted for being a party to the offence of aggravated assault under s. 268 or unlawfully causing bodily harm under s. 269. His death did not insulate the appellant from criminal responsibility.

67. The appellant was liable under s. 21(2) because in the course of carrying out a common intention to unlawfully assault one man, one or more of the principals assaulted and killed another man in circumstances where the appellant knew or ought to have known bodily harm would be a probable consequence of the common unlawful enterprise.

68. In summary, the identity of the actual victim and the appellant's knowledge of who the actual victim was likely to be was not an essential element of the offence of manslaughter and was not a necessary component in finding her liable as a party to the offence. The trial judge erred by reasoning otherwise and the Court of Appeal properly identified and corrected that mistake.

The appellant knew a break and enter was intended

69. Even if the appellant's liability as a party depended on a finding she knew or was wilfully

blind about her companions' intentions to break into Mr. Vandall's house, the finding she had that knowledge was reasonable and amply supported by the evidence. The appellant argues otherwise but, with respect, her arguments are unsustainable.

70. For example, the appellant asserts the trial judge's finding of knowledge was based on two or three subsidiary findings of fact which were not capable of supporting an inference of knowledge. The appellant describes these subsidiary findings as "foundational pillars supporting the conviction". It is evident the appellant misreads the reasons for judgment.

71. The trial judge's finding of knowledge was based on a consideration of the evidence as a whole, most of which was not in dispute or which was admitted to be true. This is clear in the judgment itself. After summarizing the evidence, the trial judge stated all of the subsidiary findings of fact, reviewed counsel's submissions and summarized the applicable law. Then, she found as a fact the appellant knew the men intended to break into the house.

Trial judgment, Appellant's Record, at pp 4-6

72. The trial judge's subsidiary findings of fact may be summarized as follows:

- the appellant was aware her boyfriend and Mr. Vandall did not like each other;
- after she saw Mr. Vandall at the mall and told her boyfriend that he was waiting to fight him, her boyfriend sent text messages for help and two men came to help him;
- the appellant used her car to drive all three men by Mr. Vandall's home to see if Mr. Vandall's car was parked outside;
- they saw Mr. Vandall's car parked outside the house and assumed he was at home;
- the appellant drove the men to Roy's house where two more men joined them;
- the appellant knew that one of the men in her car was armed with a baseball bat;
- she knew the men were going to pick a fight with Mr. Vandall;
- her boyfriend told her they had to use her car to drive to Mr. Vandall's house because the owner of the only other available car was too drunk to drive;
- as she drove the men back to Mr. Vandall's house she became aware they were taking