SCC File Numbers: **40701** / 40709

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

**EMANUEL LOZADA**

APPELLANT
(Appellant)

-and-

**HIS MAJESTY THE KING**

RESPONDENT
(Respondent)

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SCC File Number: **40709**

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

**VICTOR RAMOS**

APPELLANT
(Appellant)

-and-

**HIS MAJESTY THE KING**

RESPONDENT
(Respondent)

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# JOINT FACTUM OF THE APPELLANTS EMANUEL LOZADA AND VICTOR RAMOS

(Rule 42 of the *Rules of Supreme Court of Canada*)

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**STOCKWOODS LLP**
77 King Street West, Suite 4130
Toronto-Dominion Centre, TD North Tower
Toronto, Ontario M5K 1H1

**Nader R. Hasan**
Email: naderh@stockwoods.ca
**Spencer Bass**
Email: spencerb@stockwoods.ca
Tel.: (416) 593-7200
Fax: (416) 593-9345

**Counsel for the Appellant,**
**Emanuel Lozada *(SCC 40701)***

**JURISTES POWER LAW**
50 O'Connor Street, Suite 1313
Ottawa, Ontario K1P 6L2

**Maxine Vincelette**
Email: mvincelette@juristespower.ca
Tel & Fax: 613-702-5573

**Agent for the Appellant,**
**Emanuel Lozada *(SCC 40701)***

**SMITH LITKOWSKI**
3035-3080 Yonge Street
Toronto, Ontario M4N 3N1

**Richard Litkowski**
Email: rlitkowski@slcriminallawyers.ca

Tel.: (416) 650-1845

**Counsel for the Appellant,**
**Victor Ramos *(SCC 40709)***

**SUPREME ADVOCACY LLP**
340 Gilmour Street, Suite 100
Ottawa, Ontario K2P 0R3

**Thomas Slade**
Email: tslade@supremeadvocacy.ca

Tel: (613) 695-8855
Fax: (613) 695-8560

**Agent for the Appellant,**
**Victor Ramos *(SCC 40709)***

**ORIGINAL TO:** **SUPREME COURT OF CANADA**
**The Registrar**
301 Wellington Street
Ottawa, ON K1A 0J1

**COPY TO:**

**MINISTRY OF THE ATTORNEY GENERAL**
Crown Law Office - Criminal
720 Bay Street, 10th Floor
Toronto, Ontario M7A 2S9

**Jennifer Trehearne**
Email: jennifer.trehearne@ontario.ca

**Jennifer Epstein**
Email: jennifer.epstein@ontario.ca

**Samuel Greene**
Email: samuel.greene2@ontario.ca

Tel: 416-326-4600

**Counsel for the Respondent, His Majesty the King**
***(SCC files 40701 & 40709)***

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### OVERVIEW

1. This case strikes directly at a core question in our criminal law: when should an individual be held morally and criminally culpable for the unforeseen and unforeseeable actions of another? Based on the erroneous jury instructions in this case, the Appellants, Emmanuel Lozada and Victor Ramos, were convicted of manslaughter and held legally responsible for someone else's unforeseeable criminal actions.

2. In October 2013, following a rave in downtown Toronto, a group including the Appellants became involved in a fight with another group. It is uncontested that the Appellants did not foresee — and indeed could not have reasonably foreseen — that one member of their group would draw a knife and stab another combatant to death.

3. Nevertheless, the Appellants were convicted by a jury of manslaughter for their role in this fight, either as co-principals with the stabber under s. 21(1)(a) of the *Criminal Code*, RSC, 1985, c. C-46, or as aiders to the stabber under s. 21(1)(b) of the *Criminal Code*.

4. The trial judge's instructions, however, were deficient. As the dissenting judge below stated, the fundamental flaw in the trial judge's instructions — which was repeated on two separate occasions — "is clear and easily explained".[1] The trial judge erred by not asking the jury to consider whether the stabber's use of a deadly weapon was an unforeseeable intervening act that broke the chain of causation between the Appellants' actions and the victim's death.

5. The trial judge expressly told the jury — *twice* — that it "may be enough" to convict the Appellants of manslaughter if they simply concluded that further non-trivial bodily harm was reasonably foreseeable. This direction collapsed the causation and *mens rea* elements of manslaughter and risked effectively removing causation — a central live issue at the trial — from the jury's deliberations.

6. In doing so, the trial judge's instructions ran directly contrary to this Court's clear directions in *Maybin* regarding the causation standard and the role that reasonable foreseeability

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[1] *R v Triolo*, 2023 ONCA 221 at para 134 [*Court of Appeal Decision*].

plays in the analysis.[2] Indeed, all three judges at the Court of Appeal accepted that certain portions of the trial judge's instructions on reasonable foreseeability "can be said to have misstated the law as laid down in *Maybin*".[3]

7. Nevertheless, the majority below allowed the Appellants' convictions to stand on the basis of a departure from the established principle that juries follow the explicit instructions given to them by trial judges.

8. The crucial question in this trial for the jury was whether the stabber's unforeseen use of a knife was an intervening act that broke the chain of causation, such that the Appellants could not be held legally or morally responsible for the unfortunate death that followed. The trial judge, however, deprived the jury of the appropriate tools to properly assess this question.

9. In this case, there was a serious risk that the trial judge's erroneous instructions on the law played "a material, and potentially even a decisive role" in the jury's findings of guilt.[4] As a result, the convictions cannot stand.

10. This Court ought to set aside the Appellants' convictions and order a new trial.

## FACTS

### *(i) The events of October 5-6, 2013*

11. On the night of October 5-6, 2013, as part of the Nuit Blanche art festival in Toronto, a rave was held in the median just south of the intersection of Queen Street West and University Avenue. Among the partygoers at this event were two groups. In one group was Rameez Khalid and his friend Travis Galliah. The other group of friends included the Appellants, as well as Joseph Triolo, T.N., and Terelle Holder.[5]

12. Around 2:00 a.m., a verbal and physical altercation broke out between members of these two groups. While it appears clear that Khalid and Triolo were the primary participants in this first altercation, there was much conflicting evidence regarding how this altercation started, who else

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[2] *R v Maybin*, 2012 SCC 24 [*Maybin*].
[3] *Court of Appeal Decision* at para 207.
[4] *Court of Appeal Decision* at para 157.
[5] *Court of Appeal Decision* at para 7.

actively participated in it, and what each participant did. There was also evidence that Khalid was actively fighting in this altercation and "had the upper hand".[6]

13. There was conflicting evidence about the Appellants' role in this first fight. Only one witness testified to seeing Lozada involved in it, and his involvement was limited to breaking it up. [7] By contrast, Lozada himself claimed to be passed out during the duration of the first fight as a result of consuming a large quantity of ketamine and only woke up towards the end of the first fight.[8] With respect to Ramos, the evidence suggests that his only involvement was to assist in pulling Triolo out of the fight.[9]

14. The first fight was broken up shortly after it began and none of the participants suffered significant injuries. There was some evidence that Triolo may have been struck with a bottle, but no weapons were used during this initial altercation.[10]

15. After the first fight, Khalid and Galliah moved south down University Avenue and then proceeded eastbound on Richmond Street. Khalid was very angry at this point and expressed his desire to go back and finish the fight.[11] Soon after, the Appellants' group of friends also left the rave and began walking down Richmond Street. The Crown argued at trial that this group was following Khalid and Galliah in order to "settle the score".[12] However, multiple group members confirmed that there was no discussion at that time about re-igniting the fight and that there was absolutely no mention of weapons, generally, or a knife in particular.[13]

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[6] *Court of Appeal Decision* at para 5.
[7] Testimony of T.N., Tr, Vol II at pp 666, 897, Appellants' Record ("AR"), Tabs 18A and 18B.
[8] Electronically Recorded Interview of Emanuel Lozada, Exhibit 26; Transcript of Electronically Recorded Interview of Emanuel Lozada at p 59, AR, Tab 7A.
[9] Testimony of Travis Galliah, Tr, Vol I at p 248, AR, Tab 17A; Testimony of T.N., Tr, Vol II at pp 670, 672, 761, 989, AR, Tabs 18A and 18B.
[10] *Court of Appeal Decision*, at para 5.
[11] Testimony of Travis Galliah, Tr, Vol I at p 250, AR, Tab 17A; Testimony of Akshay Jagtap, Tr, Vol II at pp 561-62, AR, Tab 18.
[12] Crown's Closing Address, Tr, Vol V at p 2225, AR, Tab 21.
[13] Testimony of T.N., Tr, Vol II at pp 778, 921, AR, Tabs 18A and 18B; Testimony of Michelle Andrikopoulos, Tr, Vol III at p 1429, AR, Tab 19B; Testimony of Stavros Panagiotopoulos, Tr, Vol III at p 1557, AR, Tab 19B.

16. The events that followed were recorded on "grainy footage" by security cameras attached to the Four Seasons Centre for the Performing Arts on Richmond Street.[14] The police obtained copies of this footage and the Crown invited the jurors at the trial to rely on this footage to identify the various participants and their actions in the events.

17. At some point, Khalid and Galliah turned around on Richmond Street and began heading back westbound, in the direction of the Appellants' group.[15] Khalid was described as "speed walking" towards the opposing group while swinging something in his hand.[16]

18. When the two groups met on Richmond Street, one member of the Appellants' group pushed Khalid up against the wall of the nearest building.[17] The Crown theory was that it was Ramos. There was some evidence that the man asked "is this the guy" or "is this the kid".[18] Someone (who the Crown alleged was Triolo) responded "yeah" and the second fight broke out.[19]

19. During this fight, Khalid and Galliah were punched repeatedly. There was also some evidence that both Khalid and Galliah were fighting back and throwing punches themselves.[20]

20. There is no dispute that Lozada did not interact with Khalid during this fight. Instead, he fought with Galliah.[21] The other participants, including Ramos, were fighting with Khalid.[22]

21. At some point during the altercation, one of the participants (whom the Crown alleged to be Triolo) pulled out a knife and stabbed Khalid in the chest. After the stabbing, the members of the Appellants' group split up and ran away.[23] Khalid can then be seen on the security footage

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[14] *Court of Appeal Decision* at para 8.
[15] Testimony of Travis Galliah, Tr, Vol I at p 208, AR, Tab 17; Testimony of T.N., Vol II at p 682, AR, Tab 18A.
[16] Testimony of T.N., Tr, Vol II at pp 771, 799-800, 908, 990, 992, AR, Tabs 18A and 18B.
[17] *Court of Appeal Decision* at para 18.
[18] *Court of Appeal Decision* at para 19.
[19] *Court of Appeal Decision* at para 19.
[20] Testimony of T.N., Tr, Vol II at pp 687, 776, 806, AR, Tabs 18A and 18B.
[21] *Court of Appeal Decision* at para 21.
[22] *Court of Appeal Decision* at para 21.
[23] *Court of Appeal Decision* at para 26.

getting to his feet, taking a few unsteady steps, and collapsing onto the road.[24] He died shortly afterwards.

22. After the fight, the Appellants' group broke up and went off in different directions. In total, the entire second fight lasted a matter of seconds.

23. Lozada was arrested a few days later and charged with second-degree murder. That charge was eventually reduced to manslaughter as the Crown realized that Lozada, who was wearing an unmistakable and obvious bear costume, could not have been the stabber. Ramos was originally charged with manslaughter and remained so throughout the process.

24. T.N. was also initially charged with murder for Khalid's death. However, after he agreed to provide a statement to the police, the charge was reduced to aggravated assault and he was released from closed custody.[25] T.N. was then called by the Crown as a witness at trial and provided testimony incriminating Triolo as the stabber. T.N. pleaded guilty to the aggravated assault charge and was sentenced to time served.[26]

### *(ii) The Trial*

25. The trial proceeded from January 19, 2017 until March 3, 2017 before Dambrot J. and a jury. Four co-accused were tried together: Triolo on the charge of second-degree murder, and the Appellants and Holder on the charge of manslaughter.

26. Throughout the trial, the Crown never alleged that the Appellants stabbed Khalid. Its theory was that Ramos fought with Khalid and punched and/or kicked him. By contrast, the Crown never even claimed that Lozada fought with or hit Khalid. The Crown was clear from its opening statement that it was alleging that Lozada fought with Galliah only.[27] The Crown argued that the Appellants' actions in fighting with Khalid and Galliah respectively left Khalid vulnerable to the

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[24] *Court of Appeal Decision* at para 27.
[25] *Court of Appeal Decision* at para 41.
[26] *Court of Appeal Decision* at para 41.
[27] Crown's Opening Address, Tr, Vol I at p 53, AR, Tab 17A.

stabbing by Triolo, foreclosed the possibility of escape or aid, and assisted Triolo by providing the opportunity to inflict the fatal blow.[28]

27. On this basis, the Crown advanced two theories of the Appellants' liability for manslaughter. First, it submitted that they were guilty as co-principals with Triolo under s. 21(1)(a) of the *Criminal Code*. On this route to liability, the Crown claimed that the Appellants committed a joint unlawful act of assault alongside Triolo, where the risk of bodily harm was reasonably foreseeable and that the Appellants' unlawful acts were significant contributing causes of Khalid's death.

28. Secondly, and in the alternative, the Crown submitted that the Appellants were guilty for aiding the stabber under s. 21(1)(b) of the *Criminal Code*. On this theory, the Crown alleged that, through fighting with Khalid and Galliah, the Appellants intended to, and did in fact, aid the stabber in unlawfully assaulting Khalid, where non-trivial bodily harm was reasonably foreseeable.

29. In advancing its theory of the case, the Crown conceded that there was no evidence that the Appellants knew or foresaw that any person in the group had a knife or knew or believed that Khalid would be stabbed; during discussions with counsel, the trial judge made the same observation.[29]

30. The Appellants advanced a number of defences. Lozada claimed that there was not enough evidence to conclude, beyond a reasonable doubt, that he actually hit and assaulted Galliah and that, even if he did, Galliah had consented to the fight. The Appellants also submitted that they could not be a significant contributing cause of Khalid's death because the stabbing was an unforeseeable intervening act that broke the chain of causation. They also argued that their actions did not enable the stabbing, nor did they intend to do so.[30]

31. In short, the Appellants argued that Khalid's stabbing was not a reasonably foreseeable consequence of their decision to join in a fight that they understood would not involve weapons.[31]

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[28] Charge to the Jury, Tr, Vol VI at p 2836, AR, Tab 27A.
[29] *Court of Appeal Decision* at para 125.
[30] Charge to the Jury, Tr, Vol VI at pp 2842-47, AR, Tab 27A.
[31] *Court of Appeal Decision* at para 147.

Thus, they could not be held legally or morally responsible for the unforeseeable actions of the stabber in using a knife.

### *(iii) The jury charge*

32. The trial judge delivered "complex and lengthy" instructions to the jury that attempted to cover all of the different alleged theories of liability and defences for four different accused.[32]

33. For the purposes of this appeal, it is not necessary to review the entirety of the jury charge, or even the judge's mistaken recitations of some of the evidence, as the Court of Appeal identified.[33] However, it is important to highlight a few sections that are relevant to the appeal.

34. In his charge, the trial judge identified that one of the essential questions to determine the guilt of the Appellants as co-principals was whether their unlawful acts were a significant contributing cause of Khalid's death. He explained that this question went beyond whether the Appellants' actions caused the death in a "medical, mechanical, or physical sense".[34]

35. The trial judge then went on to address how "reasonable foreseeability" impacted the causation analysis. He stated:

> First, bear in mind that the fact that none of the accused knew that anyone in their group had a weapon, or expected that anyone in their group would use a weapon, does not necessarily mean that their conduct was not a significant contributing cause of death. The specific act of stabbing does not need to be reasonably foreseeable at the time of the particular accused dangerous unlawful act for that dangerous unlawful act to be a significant contributing cause of death. If the continuation of assaults on Khalid and the risk of nontrivial 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.
>
> And my second point, I just told you the fact that a particular accused at the time he allegedly committed an assault, did not know that anyone else in the group would commit an assault with a weapon, does not necessarily mean that the

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[32] *Court of Appeal Decision* at para 175.
[33] See, *Court of Appeal Decision* at para 125.
[34] Charge to the Jury, Tr, Vol VI at pp 2817, AR, Tab 27A.

> conduct of the particular accused was not a significant contributing cause of death.[35]

36. In the course of their deliberations, the jury returned with a question, asking the trial judge to define a "break in the chain of causation". In response to the question, defence counsel asked the trial judge to specifically instruct the jury that something more than merely a continuing assault had to be reasonably foreseeable.[36] The trial judge refused.

37. Instead, the trial judge's answer to the question stated:

> 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, 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' unlawful act is not, in law, a cause of the 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 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 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; or C … that an act is an intentional act of a third party acting independently from the accused.[37]

38. The jury returned its verdict on March 3, 2017. It found Triolo guilty of second-degree murder, convicted the Appellants of manslaughter, and acquitted Holder.

39. Due to the nature of the jury's verdict, it is unclear which theory of liability (co-principal or aider) they relied on to convict the Appellants (or whether they all relied on a single theory).

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[35] Charge to the Jury, Tr, Vol VI at pp 2817-18 (emphasis added), AR, Tab 27A.
[36] *Court of Appeal Decision* at para 151.
[37] Proceedings During Superior Court Jury Deliberations, Tr, Vol VI at pp 2932-33 (emphasis added), AR, Tab 27A.

40. Following the trial, the judge sentenced both of the Appellants to three years of imprisonment, less credit for pre-trial custody.[38] Given that Lozada came to Canada on his own as a teenager, this sentence makes him eligible for deportation.[39]

### *(iv) The Court of Appeal for Ontario*

41. The Appellants and Triolo each appealed their convictions. The appeals were heard together by the Court of Appeal for Ontario.

42. The Court unanimously dismissed Triolo's appeal.

43. A majority of the Court also dismissed the Appellants' appeals. However, Paciocco J.A. dissented. He would have allowed the appeals of the Appellants and ordered a new trial.

44. All judges of the Court of Appeal agreed that, because it cannot be known which route to liability the jury took, an error in either the instruction on aiding and abetting or co-principal liability would be fatal to the convictions.[40] They all found that there was no error in the trial judge's instructions on aiding and abetting. They unanimously dismissed various grounds of appeal advanced by the Appellants, including whether the trial judge erred in his *Vetrovec* instructions regarding T.N., whether he erred by not addressing the consent element in his instructions on aiding and abetting, and whether he delivered an imbalanced charge.[41] However, they split on the question of whether the trial judge erred in his instruction on the law of causation for co-principals.

45. All of the judges at the Court of Appeal accepted, as a starting point for their analysis, that there was no evidence that the Appellants knew or believed that Triolo had a knife or that he would use it during the fight.[42]

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[38] *R v Triolo*, 2017 ONSC 4726 at para 28. [*Sentencing Decision*]
[39] *Sentencing Decision* at para 16. Lozada also has a young son who was only two years old at the time of the offence: Electronically Recorded Interview of Emanuel Lozada, Exhibit 26; Transcript of Electronically Recorded Interview of Emanuel Lozada at pp 41-42, AR, Tab 7A.
[40] *Court of Appeal Decision* at para 181.
[41] *Court of Appeal Decision* at para 174.
[42] *Court of Appeal Decision* at para 180.

46. The Court of Appeal's analysis focussed on the trial judge's directions that:

> 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.

47. At the Court of Appeal, the Crown conceded that the trial judge inaccurately stated the standard for reasonable foreseeability as part of the causation analysis and set the standard of what needs to be foreseen too low.[43] Nevertheless, the Crown argued that the charge, when read as a whole, was sufficient.

48. Doherty J.A. (with Hoy J.A. concurring) held that this statement was not sufficiently erroneous to warrant a new trial. He accepted that "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".[44] Further, he noted that "[w]hen read in isolation", the impugned passage of the charge "can be said to have misstated the law as laid down in *Maybin*".[45]

49. Nevertheless, Doherty J.A. stated that, in his view, the trial judge's instructions would not have caused the jury to treat reasonable foreseeability of bodily harm as a standalone test of causation.[46] Rather, according to him, the instructions would have simply been interpreted by the jury that reasonable foreseeability of non-trivial bodily harm "could be enough to establish causation" depending on other factors.[47]

50. Paciocco J.A. dissented. He held that the trial judge misdirected the jury on the use of reasonable foreseeability in assessing whether the Appellants' actions were a significant contributing cause of Khalid's death. As a result, the convictions could not stand and a new trial was required.

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[43] *Court of Appeal Decision* at para 135.
[44] *Court of Appeal Decision* at para 194.
[45] *Court of Appeal Decision* at para 207.
[46] *Court of Appeal Decision* at para 195.
[47] *Court of Appeal Decision* at para 196.

51. In his dissenting reasons, Paciocco J.A. succinctly summarized the error in the trial judge's jury instructions:

> [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.[48]

52. Regarding this reasonable foreseeability inquiry, he went on to explain that "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".[49]

53. Paciocco J.A. rejected the Crown's arguments that the charge as a whole somehow made up for these clear and significant errors. Instead, he found that there was a real risk that the erroneous instructions played "a material, and potentially even a decisive role" in the jury's deliberations.[50] He therefore would have ordered a new trial for the Appellants.

## PART II - QUESTIONS IN ISSUE

54. The Appellants appeal as of right on the following ground of appeal, based on the dissent in the Court of Appeal:

(a) Whether the trial judge erred by misdirecting the jury with respect to the "causation" element of unlawful act manslaughter.

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[48] *Court of Appeal Decision* at para 134.
[49] *Court of Appeal Decision* at para 135.
[50] *Court of Appeal Decision* at para 157.

55. The Appellants submit that the trial judge erred in instructing the jury on the law of causation as it related to their liability as co-principals by understating the standard of "reasonable foreseeability" that could be used to determine whether the Appellants' unlawful acts amounted to a "significant contributing cause" of death.

## PART III - STATEMENT OF ARGUMENT

56. The trial judge erred by inappropriately narrowing the intervening act doctrine in the context of manslaughter.

57. In the jury instructions, and in response to a question from the jury, the trial judge unduly restricted the law of intervening act as it applied to the Appellants' liability as co-principals. The jury was therefore misdirected on the key question of whether the admittedly unforeseeable action of the stabber was an intervening act that broke the chain of causation between the Appellants' actions and Khalid's death.

58. As noted above, the Crown argued that the Appellants were guilty of manslaughter either under s. 21(1)(b) of the *Criminal Code* (as aiders), or under s. 21(1)(a) (as a co-principal). Under the co-principal theory of liability, the Crown was required to prove that the Appellants were joint participants in an unlawful assault and that their unlawful actions were a significant contributing case of Khalid's death.

59. As a result, a live issue for the jury was whether the unforeseeable actions of the stabber in unexpectedly using a knife in the middle of a fist fight was an intervening act that broke any possible causal link between the Appellants' actions and Khalid's death.

60. While the fundamental question remains whether the unlawful acts of an accused were a significant contributing cause of death, an intervening act may sever the chain of causation and render it inappropriate to hold an accused legally or morally responsible for the ensuing death.[51] An intervening act that is reasonably foreseeable will generally not relieve an accused from liability for an unintended result. However, a crucial question remains *what* exactly must be

[51] *Maybin* at paras 28-30.

reasonably foreseeable such that the Appellants could still be held legally responsible for Khalid's death from an unexpected stabbing by someone else.

61. In this case, the trial judge erred by substantially departing from this Court's clear direction on this precise question. The result of this misdirection was that the jury was not equipped with the proper tools to appropriately consider whether the Appellants were a legal cause of the death that ensued. Instead, they may have found the Appellants guilty simply because they concluded that a risk of bodily harm was an objectively foreseeable consequence of their actions. This conclusion is precisely what this Court warned against when legal causation is a live issue on a manslaughter charge.

62. The trial judge's error was significant and irremediably tainted his instructions on causation, an essential element of the offence. Accordingly, this Court should allow the appeal and order a new trial.

## A. LEGAL CAUSATION AND REASONABLE FORESEEABILITY

63. This Court has already established the principle that something more than objective foreseeability of non-trivial bodily harm is required for an accused's actions to be a legal cause of death.

64. In *Maybin*, this Court addressed the question of when intervening acts by another party will "sever[] the causal connection between the accused's act and the victim's death, thereby absolving the accused of legal responsibility for manslaughter".[52]

65. Justice Karakatsanis, writing for a unanimous Court explained that causation is a "case-specific and fact-driven" question.[53]

66. She reaffirmed that the central question concerning causation on a charge of manslaughter is whether the unlawful actions of the accused were a "significant contributing cause of death".[54] However, she identified a number of useful tools to assist juries in answering this question when

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[52] *Maybin* at paras 2, 28, 60.
[53] *Maybin* at para 17.
[54] *Maybin* at para 5. See also: *R v Nette*, 2001 SCC 78; *R v Smithers* (1977), [1978] 1 SCR 506.

it is alleged that an intervening act of a third party is the proximate cause of a person's death: whether the intervening act was reasonably foreseeable and whether the intervening act was an intentional, independent act.

67. These questions can assist the jury in answering the ultimate question of whether the accused should be held legally responsible for the death or whether he or she is morally innocent.[55] While they should not be conflated with a rule for causation, they are useful analytical tools that incorporate the core question of blameworthiness.[56] Thus, they can be important questions for juries to consider in order to grapple with the more complicated inquiry of whether the actions of an accused are a "significant contributing cause" of death.

68. Justice Karakatsanis then went on to consider the analytical tools of "reasonable foreseeability" and "independent act" in depth.

69. Concerning reasonable foreseeability, this Court explained that, where an intervening act is reasonably foreseeable, it "will usually not break or rupture the chain of causation so as to relieve the offender of legal responsibility for the unintended result".[57]

70. This, however, raises the question of the precise scope of the foreseeability analysis: what needs to be objectively foreseeable for the chain of causation to remain intact?

71. In *Maybin*, this Court addressed this question, stating that the "specific act" that caused death need not be reasonably foreseeable; it is "too restrictive to require that the precise details of the event be objectively foreseeable".[58] In some cases, the specific nature of the intervening act may be unpredictable but the accused's acts will remain a significant contributing cause. Thus, "it is sufficient if the general nature of the intervening act and the risk of non-trivial harm are objectively foreseeable at the time of the dangerous and unlawful acts".[59]

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[55] *Maybin* at para 29.
[56] *Maybin* at para 44.
[57] *Maybin* at para 30.
[58] *Maybin* at para 34.
[59] *Maybin* at para 34 (emphasis added).

72. However, Karakatsanis J. warned that the analysis cannot be framed too generally. It is not enough to merely find that the risk of further bodily harm is foreseeable, as that would add nothing to the legal causation analysis. She explained:

> [37] That said, if it is only the risk of further bodily harm that is to be reasonably foreseeable, then the reasonable foreseeability test adds little concrete assistance in determining whether the intervening cause should legally sever the chain of causation. Such a broad formulation of reasonable foreseeability diminishes its effectiveness as any limitation of the scope of criminal liability. It does little to assist in answering the question of whether the nature of the intervening act is such that the accused should not be held legally responsible for the death. Some degree of specificity about the nature of the intervening act must be foreseeable in order to invoke a moral response.
>
> [38] For these reasons, I conclude that it is the general nature of the intervening acts and the 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 the 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.[60]

73. Objective foreseeability of non-trivial bodily harm is already an essential element of the *mens rea* for manslaughter. Therefore, if this was also the requirement to dismiss an intervening act, the result of the legal causation inquiry would be automatic in every manslaughter case: as long as the *mens rea* element is satisfied, the accused's actions would necessarily be a legal cause of the death. As a result, for the legal causation analysis to have any meaning, it must answer a different question. Accordingly, under the reasonable foreseeability inquiry, if the "general nature of the intervening acts and the accompanying risk of harm" are a reasonably foreseeable consequence of the accused's unlawful actions, the law will comfortably assign legal culpability for the ensuing death.

74. *Maybin* itself involved a bar fight where the two accused rendered the victim unconscious before a bouncer intervened and struck the unconscious victim in the head. It was unclear which

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[60] *Maybin* at paras 37-38 (emphasis added).

blow actually resulted in the victim's death, the accused's or the bouncer's. Nevertheless, this Court concluded that it was open to the judge to find the actions of the accused to be a significant contributing cause of death. It was reasonably foreseeable that, as a result of the accused's actions, the bar fight would escalate and other patrons or bar staff would intervene to gain control of the situation, even if the precise details of the bouncer hitting the unconscious victim forcefully in the back of the head were not. Thus, the "general nature" of the intervening act — bar staff intervening to end the fight — was reasonably foreseeable, even if the precise event — a bouncer striking an unconscious person in the back of the head — was not.

75. Several cases have considered this question in the context of unforeseen stabbings during group assaults, similar to the facts of this case. In *Miazga*, the British Columbia Court of Appeal held that the accused were guilty of manslaughter as co-principals because they took part in an attack where non-trivial bodily harm was reasonably foreseeable. Therefore, "they bear legal responsibility for [the deceased's] death at the hands of one of the other attackers, even though they did not intend for [the deceased] to die or foresee that one of the attackers would use a knife".[61]

76. The Court then rejected that a *Maybin* causation inquiry was necessary on the facts because "the knife blows that killed [the deceased] were not struck by an independent intervening actor, but by a co-participant in the group-attack on him".[62] Essentially, the Court held that an intervening act can never absolve an accused of liability for the unforeseeable intervening act of a co-perpetrator.

77. *Miazga*, and the cases that follow it, however, are directly at odds with Karakatsanis J.'s holding in *Maybin*:

> I agree with the respondent that the inquiry as to whether an intervening act is independent is distinct from the inquiry of whether the accused and the intervening actor are parties acting in concert or with common purpose pursuant to 21 of the *Criminal Code*. If they are parties, each is responsible for the acts of the other. In the legal causation analysis, their respective acts remain separate. Legal causation focusses on the connection (or independence) between the

[61] *R v Miazga*, 2014 BCCA 312 [*Miazga*] at para 15 (emphasis added).
[62] *Miazga* at para 25.

> actions of the individuals and the effect of those actions, not on the connection between the actors.[63]

78. The Court in *Miazga* conflated the legal causation inquiry with the question of whether the accused were parties to the offence. Each is designed to ask a different question and addresses different aspects of culpability.

79. As a result, Nordheimer J. (as he then was), in another case involving very similar facts, expressed in *obiter* "serious doubts" that the principle from para. 15 of *Miazga* is a correct statement of the law.[64] Ultimately, in *Modeste,* Nordheimer J. acquitted the accused because he found that the stabber's actions were an intervening act that could not be reasonably foreseen. He stated: "There is simply no evidence that Mr. Modeste knew that [the stabber] had a knife or that he knew, or should have foreseen, that [the stabber] would use a knife during this struggle".[65] Thus, *Modeste* seems to go so far as to conclude that, on facts such as those in this case, where *the stabbing itself* — or the use of a knife — is unforeseeable, the chain of causation will be broken.

80. In any event, *Modeste* recognized the principle from *Maybin* that the mere foreseeability of further bodily harm is insufficient.

## B. THE TRIAL JUDGE IMPROPERLY INSTRUCTED THE JURY ON REASONABLE FORESEEABILITY

81. Despite the clear direction from this Court on the scope of reasonable foreseeability, the trial judge improperly instructed the jury that objective foreseeability of continuing harm was sufficient to reject the argument of intervening act and convict the Appellants.

82. The question of an intervening act breaking the chain of causation was particularly important in this case because all parties agreed that the use of a knife was not foreseeable or contemplated by the Appellants. The Crown specifically conceded that there was no evidence that the participants in the fight, including the Appellants, "knew or foresaw" that any person in their group had a knife, nor was there evidence that they "knew or believed that Mr. Khalid would be

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[63] *Maybin* at para 55.
[64] *R v Modeste*, 2016 ONSC 3955 [*Modeste*] at para 16.
[65] *Modeste* at para 18.

stabbed".[66] During submissions, even the trial judge commented on the fact that there was "nothing in the evidence to suggest that anybody had any anticipation of a knife".[67]

83. As a result, a live issue at trial was whether the Appellants could be held legally and morally responsible for Khalid's death, or whether the unforeseen use of a knife was an intervening act that broke any chain of causation between their unlawful acts and the death.

84. As Karakatsanis J. explained in *Maybin*, one of the key tools to assist the jury in answering this question is the reasonable foreseeability inquiry.

85. The trial judge accepted that he needed to instruct the jury on reasonable foreseeability to assist them in determining the causation question (under the co-principal theory of liability).

86. In pre-charge conferences, the issue of the scope of the reasonable foreseeability inquiry arose. Defence counsel argued that something more than merely a further assault needed to be reasonably foreseeable in the circumstances of this case. Specifically, Ramos' counsel urged the trial judge to explain to the jury that:

> it's not simply additional assault, and a risk of non-trivial bodily harm to Khalid from that continuing assault, but something more than that, because that's what we have here. It's a stab that's not contemplated by anyone, and there's evidence to support that. How far you're gonna go, I, I made the submission at one point that, arguably some weapon needs to be even foreseen, maybe not a knife, but something more than hitting, because a hit doesn't kill him.[68]

87. In the end, the trial judge left the issue of intervening act with the jury but rejected that the stabbing itself — or even an assault with a weapon — needed to be reasonably foreseeable for the stabber's actions not to break the chain of causation. The jury charge framed the issue as follows:

> The specific act of stabbing does not need to be reasonably foreseeable at the time of the particular accused dangerous unlawful act for that dangerous unlawful act to be a significant contributing cause of death. <u>If the continuation of assaults on Khalid and the risk of nontrivial bodily harm to Khalid from those continuing assaults was reasonably foreseeable at the time of the particular</u>

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[66] Crown's Closing Address, Tr, Vol V at pp 2251, 2258, AR, Tab 21.
[67] Submissions, Tr, Vol IV at pp 2066, 2070, AR, Tab 20B.
[68] Submissions, Tr, Vol VI at pp 2915-16, Tab 27A.

> 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.
>
> … I just told you the fact that a particular accused at the time he allegedly committed an assault, did not know that anyone else in the group would commit an assault with a weapon, does not necessarily mean that the conduct of the particular accused was not a significant contributing cause of death.[69]

88. The trial judge then reiterated this instruction in response to a question from the jury asking him to define a "break in the chain of causation". His answer to the question stated:

> 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 the 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 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 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; or C … that an act is an intentional act of a third party acting independently from the accused. [Emphasis added.][70]

89. Essentially, the trial judge stated that if an accused reasonably foresaw the continuation of assaults on Khalid (with a risk of non-trivial bodily harm), including assaults by way of punches and/or kicks, "that may be enough" on its own for the jury to conclude that the stabbing could not amount to an intervening act and the Appellants were guilty of manslaughter (provided the jury concluded that the other essential elements were proven beyond a reasonable doubt).

90. The Appellants accept that the specific act itself — *i.e.* a stabbing — need not be reasonably foreseeable for it not to constitute an intervening act. In this sense, this Court need not go as far as *Modeste*. Accordingly, the Appellants do not impugn the first part of the trial judge's direction that "The specific act of stabbing does not need to be reasonably foreseeable at the time of the particular

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[69] Charge to the Jury, Tr, Vol VI at pp 2817-18 (emphasis added), AR, Tab 27A.
[70] Proceedings During Superior Court Jury Deliberations, Tr, Vol VI at pp 2932-33, AR, Tab 27A.

accused dangerous unlawful act for that dangerous unlawful act to be a significant contributing cause of death".

91. However, it is the second part of the instruction — that it "may be enough" if the "continuation of assaults" and the risk of non-trivial bodily harm was reasonably foreseeable — where the trial judge erred.

92. The judge's direction to the jury does not accord with the direction from *Maybin* that the "general nature" of the intervening acts must be reasonably foreseeable.

93. In this case, the "general nature" of the intervening act that caused Mr. Khalid's death was not merely the continuation of the same sort of assault that the accused were engaged in. Rather, it was an assault of a different nature — i.e., an assault with a weapon. Accordingly, the trial judge should have told the jury that a stabbing could break the chain of causation unless the use of some weapon — or, at the very least, the heightened escalation of the assault — was reasonably foreseeable to the accused.

94. As the dissenting judge below explained, the trial judge's instruction provided the jury with a "lower, more easily achieved standard" for reasonable foreseeability than the one that this Court set.[71] As noted above, the Crown conceded before the Court of Appeal that the trial judge set the standard of what needs to be foreseen too low.[72]

95. In effect, the trial judge's direction amounted to simply saying that, if a further risk of non-trivial bodily harm was foreseeable, there could be no break in the chain of causation — a position explicitly rejected by this Court in *Maybin*.[73] Even the majority below agreed that "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".[74]

96. The trial judge left the jury with the erroneous impression that, as long as one more punch was a foreseeable result of the Appellants' actions in the fight, they would be liable for an

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[71] *Court of Appeal Decision* at para 134.
[72] *Court of Appeal Decision* at para 135.
[73] *Maybin* at para 37.
[74] *Court of Appeal Decision* at para 194.

unforeseeable stabbing. This was erroneous and inconsistent with the proper analysis of a significant contributing cause. It commits the precise error that Karakatsanis J. warned against in *Maybin*. It conflates the legal causation analysis with the *mens rea* for manslaughter: as long as the mental element of objective foreseeability of non-trivial bodily harm is present, an intervening act can never break the chain of causation. Such an approach deprives the legal causation analysis – with its important analytical tool of reasonable foreseeability – from playing its significant role in ensuring that criminal liability does not attach to those free of moral blameworthiness.

## C. THE REAL RISK OF THE MISDIRECTION

97. In the circumstances of this case, there is a real risk that the jury followed the trial judge's directions and convicted the Appellants using an improperly low standard for reasonable foreseeability.

98. While the Crown submitted that the Appellants could be guilty of manslaughter as either parties to the offence or co-principals, we cannot know which route to conviction the jury landed on (or indeed if they all agreed on a single route). Thus, as the Court of Appeal unanimously recognized, "an error in either instruction would be fatal to the convictions".[75]

99. As noted above, causation — and especially intervening act — were live issues that the jury needed to grapple with in order to convict the Appellants of manslaughter as co-principals. As Paciocco J.A. explained below, the defence submissions on intervening act "had an air of reality, making 'intervening act' a live issue, and 'reasonable foreseeability' an important tool in its evaluation".[76] Neither the majority below nor the Crown disagreed that causation and intervening act were live issues at the trial.

100. In his instructions, the trial judge expressly directed the jurors to use the reasonable foreseeability analysis to help them resolve this question. He then told them — *twice* — that it "may be enough" for them to convict to find that the mere continuation of assaults were reasonably foreseeable.

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[75] *Court of Appeal Decision* at para 181.
[76] *Court of Appeal Decision* at para 148.

101. The majority below claimed that the judge "did not tell the jury that it could, or should, stop its causation analysis after the reasonable foreseeability inquiry".[77] However, that is the precise impression that he would have left them with by telling them that it "may be enough" for the Appellants' conduct to constitute a significant contributing cause of death.

102. This is not a minor or incidental error. Instead, the trial judge provided the jury with a potential direct route to a conviction that contradicted this Court's binding precedent. He "offered jurors a direct and simple path to finding that the 'significant contributing cause' element was satisfied" and there is therefore "every risk, in these circumstances, that the erroneous charge would play a material, and potentially even a decisive role, in the decision-making process".[78]

103. The fact that "reasonable foreseeability" is merely an analytical tool — and not a stand-alone test for conviction — does not diminish the impact of the erroneous instruction in this case. As Paciocco J.A. explained "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".[79] Reasonable foreseeability was one of the key tools that the trial judge gave to the jury in this case to help them resolve the difficult issues before them. However, the result of his instructions was to effectively tell them that they could find a shortcut through the legal causation inquiry by employing an improperly low threshold for reasonable foreseeability.

104. As a result, the trial judge's instructions in this case raise the very real possibility that the jury convicted the Appellants by using an improper standard to assess causation. The ensuing convictions therefore cannot stand.

## D. THE MAJORITY BELOW IMPROPERLY DIMINISHED THE EFFECT OF THE MISDIRECTION

105. The majority below dismissed the clear errors in the trial judge's instructions by concluding that the jury would have somehow conducted the proper causation analysis anyway, in spite of trial judge's instructions to the contrary.

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[77] *Court of Appeal Decision* at para 196.
[78] *Court of Appeal Decision* at para 157 (emphasis added).
[79] *Court of Appeal Decision* at para 155.

106. In their attempt to minimize the effect of the erroneous instruction, the majority below stated:

> 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.[80]

107. Respectfully, this was not an accurate description of what the trial judge told the jury, either explicitly or implicitly. The trial judge never told the jury that they had to be satisfied that the stabbing "or some similar escalation in violence" had to be reasonably foreseeable or predictable. There was nothing in the jury instructions that would have conveyed this message to them. Instead, he told them in unequivocal terms that it "may be enough" if "the continuation of assaults on Khalid and the risk of nontrivial bodily harm to Khalid from those continuing assaults was reasonably foreseeable at the time of the particular accused's dangerous unlawful act". [81] This is a far cry from the message that the majority claims was clear to the jury. In fact, the clear message that the jury received was directly at odds with this Court's precedent.

108. Moreover, the majority is incorrect to claim that the trial judge's correct instructions on other aspects — or other analytical tools — of the legal causation analysis can excuse the erroneous instructions. That is because these other aspects of the charge were likely infected by the improper instruction on reasonable foreseeability. As Paciocco J.A. succinctly explained:

> [T]he 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

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[80] *Court of Appeal Decision* at para 208 (emphasis added).
[81] Charge to the Jury, Tr, Vol VI at pp 2817-18 (emphasis added), AR, Tab 27A.

> 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.[82]

109. Ultimately, the attempt by the majority to dismiss the erroneous instruction as "two short passages in a lengthy jury instruction"[83] is unconvincing. The misdirection occurred on a central issue in the trial and provided the jury with a direct — but improper — route to a conviction.

110. A bedrock principle of appellate review is that the jury accepts and follows instructions given to it by a trial judge. Indeed, this Court has repeatedly asserted that one must assume that a jury will follow such explicit instructions, even when those instructions are difficult or complex.[84] Nothing in this case justifies deviating from that principle, and as such, there was a real risk that the jury convicted the Appellants based on an erroneous legal instruction.

## E. THE TRIAL JUDGE'S OTHER INSTRUCTIONS DO NOT CANCEL OUT THE ERROR

111. The Crown argued before the Court of Appeal that, while the trial judge may have set the standard for reasonable foreseeability too low in the impugned section of the charge, he also set the standard too high in another section. According to the Crown, this latter error was to the Appellants' advantage and would negate the impact of the trial judge's former error.

112. In making this submission, the Crown pointed to the section of the judge's response to the jury question, where he directed them to ask themselves "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".[85] The Crown argued that the trial judge in this passage told the jury that the specific intervening act itself had to be reasonably foreseeable — another proposition that Karakatsanis J. rejected in *Maybin.*

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[82] *Court of Appeal Decision* at para 158.
[83] *Court of Appeal Decision* at para 175.
[84] *R v Corbett*, [1988] 1 SCR 670 at pp 692-693; *R v Doxtator*, 2022 SCC 40 at para 1.
[85] *Court of Appeal Decision* at para 156; Proceedings During Superior Court Jury Deliberations, Tr, Vol VI at pp 2932-33, AR, Tab 27A.

113. This submission has no merit.

114. Firstly, the Appellants reject the proposition that one erroneous instruction could somehow cancel out a different one.[86] The Crown provided no authority for such a proposition.

115. Secondly, the trial judge twice explicitly instructed the jury — both in his original charge and his response to their question — that the specific act of the stabbing need not be reasonably foreseeable. Thus, the jury could not have been left with the impression that they needed to find that the stabbing itself was reasonably foreseeable in order to convict the Appellants.

116. Finally, this portion of the answer to the jury to which the Crown refers was followed almost immediately by the trial judge repeating his erroneous instruction that the reasonable foreseeability of continuing assaults "may be enough".

117. As a result, the message that the jury received repeatedly was that they could convict the Appellants so long as further non-trivial bodily harm was reasonably foreseeable. The trial judge never corrected this erroneous instruction before the jury. Nothing else in the charge negates the real and serious impact of this improper instruction.

## PART IV - SUBMISSIONS CONCERNING COSTS

118. The Appellants do not seek any costs of the appeal.

## PART V - ORDER OR ORDERS SOUGHT

119. The Appellants respectfully request an order allowing the appeal, quashing their convictions, and ordering a new trial.

## PART VI - SUBMISSIONS ON CASE SENSITIVITY

120. The identity of one of the witnesses at trial – T.N. – is subject to a publication ban under s. 110(1) of the *Youth Criminal Justice Act*, SC 2002, c 1. This factum does not make reference to the identity of T.N.

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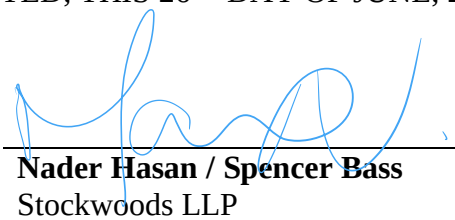
[86] *Court of Appeal Decision* at para 156.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 26TH DAY OF JUNE, 2023



For **Nader Hasan / Spencer Bass**
Stockwoods LLP

*Lawyers for the Appellant,*
*Emanuel Lozada*

For **Richard Litkowski**
Smith Litkowski

*Lawyers for the Appellant,*
*Victor Ramos*

## PART VII - TABLE OF AUTHORITIES

| CASES | Cited in paras. |
|---|---|
| *R v Corbett*, [1988] 1 SCR 670 | 110 |
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| LEGISLATION | Cited in paras. |
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| *Criminal Code*, RSC, 1985, c. C-46, s. 21(1)(a), 21(1)(b) | 3, 27, 28, 58 |

## LEGISLATION

*Criminal Code*, RSC, 1985, c. C-46

**Parties to offence**

**21 (1)** Every one is a party to an offence who

**(a)** actually commits it;

**(b)** does or omits to do anything for the purpose of aiding any person to commit it

**Participants à une infraction**

**21 (1)** Participent à une infraction :

**a)** quiconque la commet réellement;

**b)** quiconque accomplit ou omet d'accomplir quelque chose en vue d'aider quelqu'un à la commettre