SCC File No.: 38677

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

B E T W E E N :

FRANZ EMIR CABRERA

APPELLANT
(Appellant)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

APPELLANT'S FACTUM
(Franz Emir Cabrera, Appellant)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

WOLCH WATTS WILSON & JUGNAUTH
1500, 633 6 Avenue SW
Calgary, AB T2P 2Y5

Gavin Wolch
Agathon Fric

Tel: (403) 265-6500
Fax: (403) 263-1111
Email: gavin@wolch.com
agathon@wolch.com

Counsel for the Appellant

SUPREME ADVOCACY LLP
100, 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Eugene Meehan, QC

Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca
emeehan@supremeadvocacy.ca

Ottawa Agents for the Appellant

ALBERTA JUSTICE
300, 332 6 Avenue SW
Calgary, AB T2P 0B2

Iwona Kuklicz

Tel: (403) 297-6005
Fax: (403) 297-3453
Email: iwona.kuklicz@gov.ab.ca

Counsel for the Respondent

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agents for the Respondent

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PART I: Overview & Statement of Facts

Overview

1. Lukas Strasser-Hird died by four stab wounds in the back alley of a downtown Calgary nightclub. A jury convicted the Appellant, Franz Cabrera, of second degree murder in Lukas' death. Despite their verdict, no properly instructed jury, acting judicially, could reasonably conclude that Cabrera caused the death of Lukas Strasser-Hird. Because his actions were not a significant contributing cause of death, Cabrera could only be liable for murder as an aider or abettor to the person(s) who actually committed the offence, or as someone who formed a common intention to carry out an unlawful purpose with the person who actually committed the offence. However, those alternate modes of liability were not supported by the evidence.[1] Therefore, while Cabrera might have been guilty of aggravated assault (given that he delivered at least two blows to Lukas' head), Cabrera could not be reasonably convicted of murder or manslaughter, which require proof of factual causation beyond a reasonable doubt.

Statement of Facts

2. November 22, 2013 was a Friday night like any other. Dozens of young adults, many of whom were in their late teens and looking to unwind after another long week at school, descended upon the Vinyl Nightclub in Calgary's downtown neighbourhood. Drink and dance were abundant.[2] People were having a good time.[3]

3. By 2:00 a.m. Saturday morning, last call had arrived and patrons started to leave. Among them was 20-year-old Assmar Shlah. Before exiting the nightclub, Assmar attempted to retrieve his jacket from the coat check counter. A dispute ensued as to which jacket belonged to him and

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1 *R v Cabrera*, 2019 ABCA 184 at paras 300–305.

2 Appellant's Record [AR] Vol II at 59/21-31, 62/24-27, 123/12-13, 173/41 – 174/8, 256/12-25; AR Vol III at 3/5-12, 7/33-40, 17/28 – 18/9, 26/36 – 27/4, 77/11-31, 89/30 – 90/12, 99/40 – 100/18, 114/10-20, 120/28 – 121/24, 255/36-37, 272/15-21, 284/18-32, 295/26-40, 296/41 – 297/4, 304/6-13, 317/15-25; AR Vol IV at 16/5-26, 61/36, 62/3-4, 109/29-41, 130/35 – 131/1, 175/8, 201/1-11, 239/8-24, 249/28 – 250/18, 269/20-28, 296/14-16; AR Vol V at 3/2-12, 33/3-10, 211/3-39, 216/10-25, 231/17-27, 265/8-12; AR Vol VI at 176/36-37; AR Vol VII at 104/31 – 105/5, 190/26-34, 192/22-36, 196/39, 212/34 – 213/8, 221/3-11, 257/10-26.

3 AR Vol III at 82/36, 296/20-21, 304/15-18; AR Vol IV at 269/7; AR Vol V at 58/9, 232/6, 263/28-32; AR Vol VII at 192/23.

staff at first refused to return his coat.[4] The staff relented, handing Assmar his coat, but bouncers then promptly pushed him out of the club's north entrance.[5]

4. Assmar shouted insults and obscenities back at his ejectors from the sidewalk, where people stood scattered in front of the club's north entrance.[6] One of those people, 18-year-old Lukas Strasser-Hird, thought he heard Assmar use a racial slur to describe one of the bouncers.[7] This prompted an argument between the two young men.[8]

5. Assmar shoved Lukas.[9] Then, Lukas punched Assmar in the face.[10]

6. When others saw what was happening, the fight escalated and others appeared to join the skirmish.[11] Police were called and the Vinyl's bouncers pulled Lukas back inside the club, giving him cover.[12] A heavily intoxicated[13] 19-year-old named Franz Cabrera was exiting the club just as Lukas was being pulled back inside.[14] Franz had not seen what transpired outside the club. He confronted one of Lukas' friends, Michael Asiedu, to determine what had happened, but Michael refused to say. The pair shook hands and parted ways.[15]

7. The police arrived and people began to disperse.[16]

8. While he did not engage with Lukas directly, one of the people involved in this fight was Assmar's friend, Nathan Gervais.[17] At some point after the argument broke out but before the

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[4] AR Vol III at 40/27-38, 199/26-39; AR Vol IV at 61/35-39; AR Vol V at 165/20-26.
[5] AR Vol IV at 17/4-39, 63/16-22; AR Vol VII at 258/13-18.
[6] AR Vol III at 199/33 – 200/10.
[7] AR Vol IV at 18/27-40.
[8] AR Vol IV at 19/14-40.
[9] AR Vol VIII at 109. *Cabrera*, *supra* note 1 at para 7.
[10] AR Vol III at 287/28-29; AR Vol IV at 20/10-11; AR Vol VIII at 109.
[11] AR Vol IV at 20/13-26.
[12] AR Vol II at 168/39-41; AR Vol IV at 285/5-25; AR Vol V at 286/1-17.
[13] AR Vol III at 120/28 – 121/24; AR Vol VII at 213/17-38.
[14] AR Vol VIII at 109.
[15] AR Vol VI at 169/6-14, 174/34 – 175/5.
[16] AR Vol II at 144/3-7, 170/16-32; AR Vol VI at 240/1-9.
[17] AR Vol III at 202/31-39; for context see also 91/17-40, 111/22-39.

bouncers intervened, Nathan ran north across the street to his parked car,[18] where he had kept a folding knife.[19] By the time Nathan had returned to the Vinyl, Lukas was gone. Nathan peered into the front door through which Lukas had just escaped.[20] Then, Nathan ran west to the end of the block, turned south at the corner, and entered the Vinyl's back alley.[21] He stood there, alone in the darkness, staring down the alley.[22]

9. Back inside, Vinyl staff shepherded Lukas and his friends toward the club's rear door. From there, they exited into the night, descending a set of stairs into the alleyway below.[23]

10. Lukas' group started eastward.[24] Several people were walking south past the alley's east end when they saw Lukas coming toward them. One of these individuals, Joch Pouk, recognized Lukas from the fight at the front of the club and began to hit him.[25] To escape Joch's advances, Lukas retreated westward into the alley.

11. Soon, Lukas was forced to the ground near a garbage dumpster and others, including Nathan Gervais, joined in punching and kicking him.[26] When the violence stopped after a few minutes, it was apparent that Lukas had sustained more than just blows in the melee: he had been stabbed.[27]

12. Franz was still standing outside the front, north entrance to Vinyl at the time witnesses were calling 911 to report Lukas' wounds.[28] Franz stumbled to the western corner of the block

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[18] AR Vol III at 104/28 – 105/34, 111/30-39, 127/10-20; AR Vol IV at 289/32 – 290/28; AR Vol VIII at 102, 109; *Cabrera*, *supra* note 1 at para 9.

[19] AR Vol III at 111/41 – 112/4, 115/6–17, 116/20–24, 122/19 – 124/12.

[20] AR Vol VIII at 109.

[21] AR Vol III at 29/13-41; AR Vol IV at 145/38 – 146/23, 147/23 – 150/14.

[22] AR Vol III at 27/22-29, 30/14-15, 39/14-32.

[23] AR Vol II at 61/35-36; AR Vol IV at 286/17-21.

[24] AR Vol II at 105/15-18, 130/17-18; AR Vol V at 89/25-28.

[25] AR Vol IV at 67/1-41; AR Vol VII at 177/7 – 179/24; *Cabrera*, *supra* note 1 at para 11.

[26] Exactly how many individuals were involved is unclear: see e.g. AR Vol IV at 67/4-5, 158/27-29; AR Vol V at 214/38 – 215/15.

[27] AR Vol IV at 164/2; AR Vol V at 134/6-8; AR Vol VII at 161/37-41.

[28] AR Vol III at 4/25 – 5/5; AR Vol VIII at 109. *Cabrera*, *supra* note 1 at para 12.

and turned into the alley, where he found Lukas already on the ground, bleeding. A couple of bystanders were attempting to give aid. Although at least one bystander tried to hold him back,[29] Franz successfully landed at least one kick and a punch to Lukas' head.[30] Again, others started to beat Lukas, but this time they were fewer in number.[31]

13. Numerous people surrounded Lukas and watched what had happened. Still, no one who saw Franz in the alley saw him holding a knife or any weapon.[32]

14. Within minutes, paramedics arrived and took Lukas to hospital, where he died. Alberta's Chief Medical Examiner, Dr. Jeffrey Gofton, later performed an autopsy on Lukas' body. His examination determined that four stab wounds to Lukas' torso—the *only* stab wounds on his body—caused his death.[33] Three were approximately 13 cm deep. The fourth could not be measured precisely.[34]

15. Franz hid from the police who arrived in the back alley. Some hours later, he attended Meagan and Lisa Varga's house, where several people who were at the Vinyl earlier in the night had gathered for an after-party. At the house, Franz made a number of statements, suggesting that he had "almost just killed somebody with [his] car keys"[35] and expressing disbelief that he might have "stabbed a kid over a jacket."[36] Nathan immediately corrected him, saying it was he who had stabbed Lukas.[37] Privately, Nathan told Nikko Marasigan that he would let Franz "take

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[29] AR Vol V at 176/8-32.

[30] AR Vol V at 212/10-38; AR Vol VI at 6/20-24, 30/31 – 31/17.

[31] Sierra Ryan described first group as of at least 20 and the second group as four to six: AR Vol VI at 3/25, 23/13-14, 23/35-36. Bryce Sunberg described the first group as about a dozen and the second as more than two, or four to five: AR Vol V at 60/21-26, 66/9-10, 66/26-27, 134/30-33, 135/24.

[32] See e.g. AR Vol IV at 168/14-19; AR Vol VI at 28/31-37.

[33] AR Vol VIII at 115, 120.

[34] AR Vol VII at 166/34 – 167/13.

[35] AR Vol III at 72/6.

[36] AR Vol III at 113/14-25; AR Vol IV at 73/9-13; AR Vol V at 179/24-36.

[37] AR Vol III at 84/14 – 85/5, 240/32-38.

the fall" for Lukas' death, even as Nathan admitted to waiting for Lukas in the alley, stabbing him, and ditching the knife he used.[38]

16. Franz's keys were recovered from the alley. They tested positive for Lukas' DNA.[39]

17. The Crown jointly indicted Nathan, Franz, Joch, Assmar, and a fifth young man named Jordan Liao in Lukas' death. All were charged with second degree murder, except Nathan, who was charged with first degree murder. Nathan fled to Vietnam to escape prosecution before trial.

18. Although Nathan remained on the Indictment, the trial proceeded against the other four young men in his absence. At trial, the Crown agreed there was "no doubt that Nathan Gervais stabbed Lukas."[40] However, the Crown argued that Nathan and Franz were both stabbers and that each had actually caused Lukas' death as co-principals.[41] The Crown characterized the events as a "group assault" and emphasized each accused's "participation" in the attack.[42]

19. The jury found Franz guilty of second degree murder.

20. Franz appealed his conviction on the basis that the jury's verdict was unreasonable. A majority of the Court of Appeal affirmed Franz's conviction. Chief Justice Fraser, writing for herself and Justice Schutz, held that the charge to the jury adequately addressed issue of co-principal liability and it was open to the jury to conclude that Franz caused Lukas' death, either because his punch and kick were a significant contributing cause of death, or because he was a participant in a group assault and, as such, was criminally responsible for the stab wounds attributed to Nathan.[43]

21. Justice Veldhuis disagreed. In her view, it would have been unreasonable for the jury to conclude Lukas' death was caused by anything other than the four stab wounds identified by Dr. Gofton. Furthermore, she thought it would have been unreasonable to conclude on the whole of

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[38] AR Vol IV at 73/1-7, 85/4-17.
[39] *Cabrera*, *supra* note 1 at para 55.
[40] AR Vol I at 194/14.
[41] AR Vol I at 180/38-39.
[42] AR Vol I at 186/39.
[43] *Cabrera*, *supra* note 1 at para 3.

the evidence—where the only evidence of a weapon capable of slicing through vital, internal organs was linked to Nathan—that Franz inflicted those deep wounds, with a car key or at all. As such, Franz could not be liable for murder except as a mere participant in a group assault—the law on which she argued was unclear and required closer attention from the trial judge and the jury. She would have ordered a new trial limited to Franz's liability as a co-principal on the Crown's group assault theory.

22. Nathan returned to Canada in 2018 and was tried earlier this year. In a prosecution conducted by the same Crown counsellors who in 2016 had argued that Franz had stabbed Lukas, Nathan was convicted of first degree murder by a judge sitting alone.[44] In his Reasons for Judgment, the judge concluded on substantially the same record[45] that is before this Court, that Nathan did, in fact, retrieve a knife from his car when he crossed the street toward the parking lot. This inference was supported, in part, by video footage, which showed the Accused "actively monitoring the movements of [Lukas] in a stalking or predatory fashion as he peers in the front door of the Vinyl" at the same time that he "repeatedly [puts] his hand in and out of his right front pocket and seemingly appear[s] to clutch something…."[46] That Nathan was hiding in the back alley, waiting for Lukas, was also corroborated by the evidence of Aaron Rogers and Brady Johnson, whom the judge found to be credible.[47] Both had also testified in these proceedings.[48]

23. After reviewing the entirety of the evidence,[49] including Franz's statements suggesting he might have stabbed Lukas, Justice Tilleman concluded: "[Lukas] died because of the multiple stab wounds. It was [Nathan] alone who stabbed [Lukas]. As a consequence, and as the 'but for' cause of the death of [Lukas], there is no question that [Nathan] significantly contributed to that

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[44] *R v Gervais*, 2019 ABQB 344.

[45] Entire transcripts of testimony from Cabrera's trial, including that of the first responders and medical examiner, were entered into evidence at Nathan's trial, as were many of the same exhibits, including photographs, videos, and expert reports: *ibid* at para 9.

[46] *Ibid* at para 352.

[47] *Ibid* at paras 355-356.

[48] *Cabrera*, *supra* note 1 at para 13.

[49] *Gervais*, *supra* note 44 at para 371.

death."[50] To reach that conclusion, Justice Tilleman considered the range of reasonable inferences that arose from the evidence and then found:

> It is not reasonable to infer that Cabrera inflicted the stab wounds. Admittedly, there was evidence from various witnesses, Aiello, Marasigan, and others, that Cabrera said he stabbed [Lukas]. However, the suggestion that Cabrera stabbed [Lukas] is inconsistent with the totality of the evidence that I accept, including [Nathan]'s admissions to several including his girlfriend, with whom he drove that night and lived, that he inflicted the fatal injuries. It was [Nathan] who retrieved a knife from his car and kept in his front pocket, before running off into the back alley to corner [Lukas]. Additionally, I find that the suggestion made by Cabrera to Marasigan that he stabbed [Lukas] with his "keys" is simply implausible as the catastrophic stab wounds suffered by [Lukas] are forensically inconsistent with being stabbed by keys as opposed to a sharp-edged knife.
>
> Further, while witnesses at the after party testified that they knew at that time that the Deceased had suffered stab wounds, there was no evidence indicating that it was common knowledge *how many* stab wounds were inflicted or where on the Deceased's body he was stabbed. Therefore, statements from Cabrera to the effect of, "I stabbed the [Deceased]" cannot automatically be equated with him saying, "I alone inflicted 4 stab wounds". The Accused said he stabbed the Deceased 3 times in the side, while the evidence is that the Deceased suffered 4 stab wounds (but three on the side). To be clear, I do not believe Cabrera stabbed the victim. I find his statement to be braggadocio amongst the group and friends and still belies the fact the Accused stabbed him 3 times in the side. And this is exactly what Dr. Gofton found. I am not left with a reasonable doubt by this evidence. There is no truthfulness or reliability or veracity to what I am told Cabrera said because Cabrera clearly did not know the nature of the fatal injuries or how they were inflicted. Incredibly, he claims to have stabbed the Deceased with "keys".[51]

24. Justice Tilleman convicted Nathan of first degree murder on May 8, 2019. The Court of Appeal released its decision in Franz's appeal, suggesting it was reasonable to find that Franz caused Lukas' death by his punch, kick, or keys, six days later.

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[50] *Ibid* at para 372.

[51] *Ibid* at paras 380-381 [emphasis added].

PART II: Questions in Issue

25. Franz Cabrera appeals to this Court on two questions:

i. first, did the trial judge misdirect the jury on the law of co-principal liability, particularly with respect to the law on group assaults; and

ii. second, was the jury's verdict unreasonable?[52]

PART III: Argument

ISSUE 1: THE TRIAL JUDGE MISDIRECTED THE JURY ON THE LAW OF CO-PRINCIPAL LIABILITY, PARTICULARLY WITH RESPECT TO THE LAW ON GROUP ASSAULTS

A. Cabrera was entitled to a properly instructed jury

26. Trial judges have the unenviable challenge of instructing jurors on the law. Mistakes happen, and while it might be possible to have explained a legal concept more artfully, the words a trial judge used will not normally, by themselves, constitute reversible error.[53] What matters "is the overall effect of the charge" in the context of the trial as a whole.[54] The question is whether the jury was properly, not perfectly, instructed.[55] What is proper will vary according to the circumstances of each case.

27. Admittedly, counsel did not object to the trial judge's instructions on co-principal liability or the so-called "group assault" pathway to conviction at trial. However, this does not mean the error was harmless or insignificant.[56] The majority below argued this was because "no one thought on the evidentiary record here that a jury would give any credence to the theory of

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[52] AR Vol I at 9.

[53] *R v Daley*, 2007 SCC 53 at para 30, [2007] 3 SCR 523.

[54] *Ibid* at para 31; *R v Jaw*, 2009 SCC 42, [2009] 3 SCR 26.

[55] *R v Jacquard*, [1997] 1 SCR 314 at para 62, 113 CCC (3d) 1; *Daley*, *supra* note 53 at para 31.

[56] *Jacquard*, *supra* note 55 at para 37.

two separate assaults."[57] In fact, this case was nuanced and the importance of the definition was not apparent to counsel at the time the jury was charged, as Veldhuis JA recognized.[58]

B. The jury was not properly instructed on Cabrera's liability as a co-principal to murder

28. At trial, the Crown argued that Cabrera participated in a "group assault" or "group attack" such that the sequence of events in the back alley as a whole could be said to be a single unlawful act that caused Lukas' death. This is what is meant by the "group assault" theory, mode, or pathway of liability. According to this line of jurisprudence, an individual may be convicted as a co-principal to murder even if the Crown cannot prove that his own actions factually caused the victim's death. In such circumstances, the blow of one is said to be the blow of all and mere participation in the "group assault" will be sufficient to ground liability.[59]

29. That the group assault theory of liability was a live issue at trial is evidenced by the disagreement at the court below as to whether the trial judge adequately addressed it in his charge. Cabrera admits that the trial judge did not explicitly err in his instructions on co-principal liability[60] and he never characterized the events as a "group" assault, except when he was quoting the Crown's position or speaking in the jury's absence.[61] Instead, the problem arises from the lack of guidance on what "common participation" requires to ground co-principal liability for murder.

i) The law on group assault requires clarification

30. According to section 21(1) of the *Criminal Code*, "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; or (c) abets any person in committing it." One who "actually commits" an offence is called a principal to the offence. The effect of section 21(1) is to hold those who aid or abet the commission of a crime equally liable as the person or persons who actually committed the

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[57] *Cabrera*, *supra* note 1 at para 86.
[58] *Ibid* at para 277.
[59] *Ibid* at paras 78, 269.
[60] AR Vol I at 225/10-27. *Cabrera*, *supra* note 1 at paras 276-277.
[61] AR Vol I at 175/23-25, 254/1-3.

offence, although they themselves did not actually commit the offence.[62] Still, though the result may be the same, the distinction between principals, aiders, and abettors is not just some academic curiosity without practical import: each carries distinct external and mental elements that the Crown must prove beyond a reasonable doubt.[63]

31. More than one person can "actually commit" an offence. For instance, in the most straightforward case, if the Crown proves that two people each individually committed all of the essential elements of an offence, then it does not matter that another person could also be convicted of the same offence. Each is severally liable for his actions as a principal and they may be described as co-principals[64] vis-à-vis one another.[65] In this scenario, "co-principal" liability means only that more than one person committed the same offence. Each person's liability is legally irrelevant to the other's.

32. Somewhat confusingly, courts have also used this terminology—"co-principal" liability—to describe cases in which two or more people "form an intention to commit an offence, are present at the commission of the crime, and contribute to it," *even though no one person personally committed all of the external elements of the offence*.[66] In this type of case, it is the cumulative actions of multiple individuals that complete the *actus reus*. The offence would not be complete without the contribution of each. This rule plays out differently for different offences. As LeBel J. explained in *R v Pickton*:

> offences without causal requirements would lend themselves more clearly to a "co-principal" type situation, as they are offences which are often committed by more than one person, such as robbery, kidnapping, or breaking and entering. In those cases, the *actus reus* or acts that make up the offence can extend over minutes or hours or days, and different elements or portions of the offence can be completed by different persons (if one person breaks the window of a premises, and both persons enter it, they are both still actually committing the same break and enter). In

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[62] *R v Pickton*, 2010 SCC 32 at para 33, [2010] 2 SCR 198, citing *R v Thatcher*, [1987] 1 SCR 652 at 689, 32 CCC (3d) 481.

[63] *R v Briscoe*, 2010 SCC 13 at para 13, [2010] 1 SCR 411.

[64] They may also be described as "joint principals."

[65] *Pickton*, *supra* note 62 at para 53.

[66] *Ibid* at para 63.

> this way, co-principal liability can arise whether the acts of each accused are committed sequentially (one acts first, the other acts second, and the *actus reus* of the offence is only complete after the second act), or whether the acts are concurrent (both accused persons act at the same time, each committing the entire *actus reus*).[67]

33. By contrast, murder is an offence with a causal requirement built into the *actus reus*. This does not mean co-principal liability has no relevance to murder, but it is different in its application:

> the classic scenario in which the potential for co-principal liability arises is when two or more persons assault the victim at the same time, by beating him or her to death: see, for example, *R. v. McMaster*, [1996] 1 S.C.R. 740. In a joint beating case, since each accused commits each element of the offence of murder (the entire *actus reus* and *mens rea* of the offence), and only factual causation may be uncertain (which person delivered the "fatal" blow), legal causation will allow for uncertainty as to the actual act which caused the death.[68]

34. Justice Veldhuis held in her dissent that what will count as a group assault or joint beating in law is unclear.[69] Cabrera submits that whether a sequence of events qualify as a single group assault or discrete events is a question of mixed fact and law, which warranted closer attention by the trial judge, given the evidence in this case and given the risk "that those whose moral culpability is diminished may find themselves brandished as murder[ers] under the sweeping legal gloss of 'the blow of one is the blow of all'."[70]

ii) The suggestion that the 'blow of one is the blow of all' has been taken out of its proper context

35. In *R v McMaster*, this Court held that "[i]t is a well-established principle that where a trier of fact is satisfied that multiple accused acted in concert, there is no requirement that the trier of fact decide which accused actually struck the fatal blow,"[71] citing a 1987 decision of this

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[67] *Ibid* at para 65, LeBel J (dissenting, but not on this point) [emphasis added].

[68] *Ibid* at para 64.

[69] *Cabrera*, *supra* note 1 at paras 272, 277.

[70] *Ibid* at para 285.

[71] *R v McMaster*, [1996] 1 SCR 740 at 753, 105 CCC (3d) 193.

Court called *R v Thatcher*. In *Thatcher*, Dickson CJ, writing for the majority, famously said that "[t]he whole point of s. 21(1) is to put an aider or abettor on the same footing as the principal."[72] To help illustrate this point, he cited a passage from this Court in *Chow Bew v R*, quoting the 10th edition of *Russell on Crime*. It stated:

> Thus where several persons are together for the purpose of committing a breach of the peace, assaulting persons who pass, and while acting together in that common object, a fatal blow is given, it is immaterial which struck the blow, for the blow given under such circumstances is in point of law the blow of all, and it is unnecessary to prove which struck the blow.[73]

36. Leaving aside the troublesome fact that this description of the law originated from an English law text long after Canada had adopted a *Criminal Code*, it is significant that the passage was lifted from the section of Russell's book dealing with "Principals in the Second Degree." By this he meant aiders and abettors[74]—not "actual committers," whom he called principals in the first degree. In other words, saying "the blow of one is the blow of all" was never meant to suggest that one could be liable for murder as a principal or co-principal on the basis of mere participation, or that evidence of common purpose was not required. Rather, as Dickson CJ makes clear, that maxim was simply meant to summarize the upshot of party liability codified in section 21, which is that it did not matter that the aider or abettor did not actually commit the offence;[75] he would be held liable as a principal all the same.

iii) The group assault pathway to conviction manipulates factual causation to avoid proving the specific and difficult **mens rea** *for aiding and abetting*

37. Group assault cases tend to fall into one of two categories.

38. The first is cases in which it is impossible to discern who among a group of individuals factually caused the victim's death.[76] For example, in *R v Miazga*, multiple people hit the victim at the same time over the course of approximately one minute. At some point, one of the

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[72] *Thatcher*, *supra* note 62 at 689.

[73] *Ibid* at para 81; *Chow Bew v R*, [1956] SCR 124, 113 CCC 337.

[74] Appellant's Book of Authorities, *Russell on Crime*, 10th ed, at 1845.

[75] *Thatcher*, *supra* note 62 at 693.

[76] See e.g. *R v Miazga*, 2014 BCCA 312, 315 CCC (3d) 182; *R v Magoon*, 2016 ABCA 412 at paras 84-85, aff'd 2018 SCC 14; *H(LI)*, 2003 MBCA 97 at paras 54-55, 176 CCC (3d) 526.

aggressors had introduced a knife and stabbed the victim, causing his death. The court could not be sure who stabbed the victim, but it did not doubt that one of the co-accused had inflicted the fatal wounds. All who participated in the attack were convicted of manslaughter for causing the death, notwithstanding the uncertainty as to the identity of the precise killer. In this way, the characterization of the blows as part of a single group assault that collectively caused the death may be understood as a policy-driven decision, designed to avoid the uncertainty that would otherwise lead to the acquittal of the actual killer. This concern arises whether the blows are concurrent or successive.[77]

39. The second category includes cases in which it is clear the accused did not inflict the fatal blow, but he is held liable for causing the death anyway.[78] This class of cases is exemplified by the British Columbia Court of Appeal's decision in *R v Ball*. In that case, two brothers got into a physical altercation with a group of five other men outside a bar. Bradley was injured in the course of the fight and later died. At trial, the judge convicted Adam Ball for the manslaughter death of Bradley, despite the fact that he never touched him: Ball's only assault was against the surviving brother, Ian.[79] In affirming Ball's conviction on appeal, the court held that Ball caused Bradley's death by participating in a single group assault. It did not matter that Ball had not personally hit Bradley because his actions disabled Ian from rescuing his brother and, in that sense, had factually caused the other's death.

40. In both types of group assault, the result is the same: the accused is found to have factually caused the victim's death, even when there is good reason to doubt that he did. Cabrera submits that these cases are wrongly decided because they play fast and loose with the issue of factual causation to avoid having to confront the comparatively high mental requirements associated with aiders, abettors, and persons who form a common intention to carry out an unlawful purpose.[80] For instance, in the present case there is no indication that Cabrera, by his actions, which came late in the sequence of events, did anything for the purpose of aiding or abetting Nathan to commit the offence of murder. There is no evidence that Cabrera and Nathan

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[77] E.g. *Magoon*, *supra* note 76.

[78] See e.g. *R v Ball*, 2011 BCCA 11, 267 CCC (3d) 532; *McMaster*, *supra* note 71.

[79] *Ball*, *supra* note 78 at para 14.

[80] *Briscoe*, *supra* note 63.

spoke in front of the nightclub before Lukas is assaulted in the alley or that Cabrera knew Nathan was going to fetch his knife. The Crown and the majority below sought to get around that hurdle by invoking the group assault jurisprudence, which would imply that Cabrera factually caused Lukas' death by his participation in a single assault. If that were true, the dilemma of proving what Cabrera did or did not know about Nathan's intention would not matter.

41. The difficulty, of course, is that this case is not like the others where courts have found that a single group assault factually caused the death for reasons of policy and conceptual convenience. The danger of finding the existence of a group assault too readily is that it circumvents the distinct and essential elements of principal, aider, abettor, and common unlawful purpose liability. Certainly, the mental elements that the Crown must prove to convict someone of aiding or abetting a murder are high, but this is rightfully so. That section 21(1)(b) and (c) place aiders and abettors on equal footing with one who actually commits the offence represents a significant extension of criminal liability by Parliament. Creating a test for co-principal liability on the basis of mere participation in a group assault, without regard to circumstances such as the timing,[81] knowledge,[82] and nature of one's participation in the assault, casts too wide a net, which renders the party liability provisions in section 21 nugatory. This is what LeBel J. meant when he observed that section 21 "often bridges the gap which might otherwise exist between factual and legal causation."[83]

iv) The fact of a group assault does not change the nature of the causation inquiry

42. Even assuming Cabrera could be found to have participated in a single group assault, that conclusion does not, by itself, change the elements required to convict him as someone who actually committed the offence. Speaking in the context of an accused's liability as co-principal to murder, LeBel J. said: "The only requirement for 'causation of death' is that related to murder/manslaughter generally. It must be established that each accused's assault of the victim was a 'significant contributing cause'…."[84] Put differently, "common participation" is not and should not be treated as a legally distinct ground of liability absent proof of factual causation.

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[81] *Cabrera*, *supra* note 1 at para 279.

[82] *Ibid* at para 280.

[83] *Pickton*, *supra* note 62 at para 61.

[84] *Ibid* at para 64.

Cabrera submits that what is meant by "common participation" is that the actions of two or more members of the group are each severally "significant contributing causes" of the death. In other words, not all group assaults are created equal and the unique circumstances of each case matter. The trier of fact must be instructed to consider the particular contribution of each participant in the group assault to the impugned consequence. Hence, a finding that an individual participated in a "group assault" does not presage the conclusion that he caused or contributed to the death.

43. The correctness of this interpretation is supported by LeBel J.'s observation in *Pickton* that "phrases such as 'concerted action', 'acted in concert', 'common design', 'participation in a common scheme', and 'joint participation' are phrases which properly capture the entire gamut of principal liability, co-principal liability and liability as an aider or abettor. They cover the entire range of party liability set out in s. 21(1) and are not limited to s. 21(1)(a)."[85]

v) In any event, the group assault jurisprudence is distinguishable from Cabrera's case

44. This Court need not craft a definitive test for all cases as to what will or will not qualify as a group assault sufficient to establish that the actions of the collective may be held to factually and legally cause the death. To resolve this appeal, it is sufficient that the Court hold that Cabrera's situation is qualitatively different than those in *Miazga* and *Ball*. Cabrera's is not a case in which it is impossible to determine whose individual actions inflicted the fatal blow as in cases like *Miazga*. There, the brawl lasted one minute, each accused's blows were concurrent, and the court could not determine who stabbed the victim with a knife. By contrast, the attacks on Lukas lasted approximately 10 minutes, they were separated by at least one minute in which the violence ceased, the blows were successive, and the evidence disclosed the stabber's identity. It is nearly universal in cases of trauma or violence that witnesses to the events feel as if time slowed or stood still. So, although one minute might not sound like a long break, it would have been profound to those experiencing the events first-hand and is legally significant to the group assault analysis. Unlike *Miazga*, Cabrera's case is one that is capable of reasonably precise causal fact-finding.

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[85] *Ibid* at para 69, LeBel J (dissenting, but not on this point).

45. It is a principle of fundamental justice that "a law that deprives a person of life, liberty, or security of the person must not do so in a way that is overbroad"[86] and that the morally innocent should not be punished.[87] As a function of these two principles, one who "engages in a separate assault on the victim after fatal injuries have been inflicted [is] not…in the same legal position, and therefore not as culpable for the murder, as the accused who inflicted the fatal injuries or the accused who assaulted the victim at the same time as the fatal injuries were administered."[88]

46. Nor, for reasons that are developed more fully below,[89] could it be said that Cabrera's actions disabled others from coming to Lukas' aid in any significant way as in *Ball*, where the group's blows against the brothers were concurrent and rendered the victim vulnerable to the force that killed him. By contrast, Cabrera's actions did nothing to facilitate Lukas' stabbing by Nathan, which occurred before Cabrera ever set foot in the alley. Again, Cabrera's case is materially different. Juries should be slow to attribute one victim's death to the broad actions of an entire group. Restraint is essential to the group assault analysis, lest we over-criminalize young men who are predominantly members of visible minority groups, as were four of the five men jointly indicted in Lukas' death.[90] Juries should be instructed to attempt to discriminate between blows where the evidence reasonably permits them to do so.

47. The legal parameters of group assaults matter because the group assault theory of liability was the only reasonable pathway to conviction on the evidentiary record. In Justice Veldhuis' words:

> This issue becomes vital to the analysis for Cabrera <u>once the trier of fact concludes that he was not the stabber, and he came along after the fatal stab wounds were administered</u>. This case was nuanced and the importance of the definition may not have been apparent to the trial judge or the parties at the time the jury was charged.[91]

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[86] *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 50, [2016] 1 SCR 180.
[87] *R v Nette*, 2001 SCC 78 at para 45, [2001] 3 SCR 488.
[88] *Cabrera*, *supra* note 1 at para 282.
[89] See Appellant's Factum at paras 83-85, below.
[90] See e.g. *Cabrera*, *supra* note 1 at para 286.
[91] *Cabrera*, *supra* note 1 at para 277 [emphasis added].

48. In other words, it is because the jury, acting judicially, could not have reasonably convicted Cabrera on any other basis that the gravity of the trial judge's misdirection (or non-direction) on group assaults is laid bare. If instructions to a jury are to be assessed functionally, and they are,[92] then the significance of the trial judge's failure to focus on the law of group assaults can only be appreciated after assessing the reasonableness of the jury's possible verdicts.

ISSUE 2: THE JURY'S VERDICT WAS UNREASONABLE

A. The verdict is not one that a properly instructed jury, acting judicially, could reasonably have rendered

49. Even as Parliament has created a presumption in favour of trial by jury,[93] section 686(1)(a)(i) of the *Criminal Code* acknowledges that juries, like trial judges, are fallible. That provision empowers an appeal court to reverse a conviction "where it is of the opinion that the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence."[94]

50. A jury's verdict is unreasonable or cannot be supported by the evidence if it is not "one that a properly instructed jury, acting judicially, could reasonably have rendered."[95] The question is not whether the jury could have *possibly* reached the verdict that it did; it is whether the verdict it reached was reasonable.[96] Therefore, it is not enough that there was some evidence on the record which, if believed, was capable of supporting a conviction.[97] In determining whether the jury's verdict was reasonable, the court must "review, analyse and, within the limits of

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[92] *Jacquard*, *supra* note 55 at para 32 per Lamer CJ.

[93] *Criminal Code*, RSC 1985, c C-46, s 471.

[94] *Ibid*, s 686(1)(a)(i).

[95] *R v Yebes*, [1987] 2 SCR 168 at 185, 36 CCC (3d) 417; *R v Biniaris*, 2000 SCC 15 at para 36, [2000] 1 SCR 381.

[96] *Yebes*, *supra* note 95 at 185.

[97] This is the test on a motion for a directed verdict. It is distinct from the test for an unreasonable verdict. The former does not ask the judge to weigh the evidence; the latter does: *R v Arcuri*, 2001 SCC 54 at para 21, [2001] 2 SCR 828.

appellate disadvantage, weigh the evidence" and consider through the lens of judicial experience whether "judicial fact-finding precludes the conclusion reached by the jury."[98]

51. A majority at the court below concluded that the jury's verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered because it was reasonable to find Cabrera's actions were a significant contributing cause of Lukas' death. That court's holding on this point is an original decision: "The review by the Supreme Court of a decision by a court of appeal that a verdict is unreasonable or cannot be supported by the evidence is in reality the first level of appellate review of that conclusion." Thus, there is no bar to reviewing this "important" decision.[99]

B. Cabrera's liability as an actual committer under section 21(1)(a) was the central issue at trial

52. Although the trial judge in Cabrera's case instructed the jury on his potential liability as a principal, aider, abettor, or someone who formed a common intention to carry out an unlawful purpose, it is apparent from the record that the central issue at trial was whether he was liable as a principal or co-principal—that is, whether he *actually committed* murder. This was the Crown's main argument at trial;[100] it was the focus of Cabrera's closing address;[101] it was the trial judge's opinion in his decision on defence counsel's application for a directed verdict;[102] it was the conclusion Justice Veldhuis reached in her reasons for dissent,[103] which specifically ruled out Cabrera's liability under sections 21(1)(b), (c), and 21(2) as unreasonable;[104] and it is evidenced by the majority below's failure to address whether it would have been reasonable for any one or more jurors to find Cabrera guilty on the basis that he aided or abetted Lukas' murder, even if he did not cause the death. Chief Justice Fraser's reasons speak only of the reasonableness of convicting Cabrera under section 21(1)(a), presumably because, as everyone

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[98] *Biniaris*, *supra* note 95 at para 36.
[99] *Ibid* at para 34.
[100] AR Vol I at 194/14. *Cabrera*, *supra* note 1 at para 254.
[101] AR Vol I at 205/31 – 206/6.
[102] AR Vol I at 175/32.
[103] *Cabrera*, *supra* note 1 at para 273.
[104] *Ibid* at paras 302, 305.

else seems to have concluded, it would have been unreasonable to convict Cabrera on any other basis.

C. No properly instructed jury, acting judicially, could conclude that Cabrera actually committed murder by his own acts

i) Causation is an essential element of the actus reus *for principals to murder*

53. To convict an accused person, the Crown must prove each essential element of the offence beyond a reasonable doubt. The *Code* defines murder in a series of cascading provisions, each building upon the content of the previous. Consistent throughout them is a requirement that the accused cause the victim's death. For instance, sections 222 and 229 state in relevant part:

> **222** (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
>
> (2) Homicide is culpable or not culpable.
>
> […]
>
> (5) A person commits culpable homicide when he causes the death of a human being…
>
> […]
>
> **229** Culpable homicide is murder
>
> (a) where the person who causes the death of a human being
>
> (i) means to cause his death, or
>
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not…[105]

54. A person "causes the death" of a human being within the meaning of section 229 if his actions are a "significant contributing cause" of the death.[106] The accused's actions need not be the *only* cause, the *primary* cause, or even the most *immediate* cause of death.[107] One's actions may qualify as a significant contributing cause of death so long as they are at least *a* contributing cause of death, outside the *de minimis* range.[108] It follows that more than one person can cause

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[105] *Criminal Code*, *supra* note 93, ss 222, 229.

[106] *Nette*, *supra* note 87 at para 72.

[107] *R v Maybin*, 2012 SCC 24 at para 20, [2012] 2 SCR 30; *Nette*, *supra* note 87 at para 71.

[108] *Nette*, *supra* note 87 at para 72.

the death of a human being if the actions of each were by themselves a significant contributing cause of death.

ii) Factual causation is an insufficient but necessary condition to find that Cabrera's actions were a significant contributing cause of death

55. The "significant contributing cause" test encompasses two distinct but related aspects of causation: factual causation and legal causation.[109]

56. Factual causation "is concerned with an inquiry about how the victim came to his or her death, in a medical, mechanical, or physical sense, and with the contribution of the accused to that result."[110] To determine factual causation, the fact finder must ask: "but for" the accused's actions, would the death have occurred? If the answer is *no*, then the accused caused the death in a factual sense.

57. By contrast, legal causation "is concerned with the question of whether the accused person *should* be held responsible in law for the death that occurred."[111] In other words, factual causation is an empirical question, while legal causation involves a normative judgment. Because murder is among the most serious offences known to the criminal law, the latter is meant to act as a filter, narrowing the number and nature of "but for" causes that will attract criminal liability.[112]

58. Although the way judges explain causation to juries has changed over time, the necessity of establishing factual causation as a prerequisite to conviction has been constant.[113] For instance, in *R v Nette*, the majority held that "[i]n determining whether a person can be held responsible for causing a particular result, in this case death, it must be determined whether the

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[109] *Nette*, *supra* note 87 at para 44.
[110] *Ibid*.
[111] *Ibid* at para 45 [emphasis added].
[112] *Maybin*, *supra* note 107 at para 15.
[113] *Cabrera*, *supra* note 1 at para 67: "Factual causation must always be met." See also Veldhuis JA's concurrence on this point at para 258; *Smithers v R*, [1978] 1 SCR 506 at 518, 34 CCC (2d) 427.

person caused that result both in fact and in law."[114] Arbour J., writing for the majority, quotes Professor Glanville Williams to describe the nature of the causation inquiry:

> When one has settled the question of but-for causation, the further test to be applied to the but-for cause in order to qualify it for legal recognition is not a test of causation but a moral reaction.[115]

Factual causation is therefore a primary threshold test—*primary* because it is the first question to consider in the analysis, and *threshold* because only when one has settled the factual question is there a need to answer the question of legal causation.

59. The principle that the Crown must prove factual causation beyond a reasonable doubt was affirmed in *Smithers v R*[116] and is further consistent with the way lay jurors would understand what it means for something to be a "significant contributing cause" of death.

iii) The evidence establishes that Lukas' death was factually caused by four, 13 cm-deep stab wounds only

60. Alberta's Chief Medical Examiner, Dr. Jeffrey Gofton, performed the autopsy on Lukas' body. The Crown produced Dr. Gofton as its own expert at trial, leaving his testimony to the very end of its case. He was the only medical professional qualified as an expert in these proceedings.[117] He alone was qualified to give expert opinion in the field of forensic pathology. Forensic pathology is that branch of science concerned with determining the cause and manner of death.[118]

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[114] *Nette*, *supra* note 86 at para 44 [emphasis added].

[115] *Ibid* at para 45.

[116] *Smithers*, *supra* note 113 at 518.

[117] The majority at the court below incorrectly observed that two medical experts testified at trial: see *Cabrera*, *supra* note 1 at para 61. In fact, Dr. Andre Ferland was not qualified as an expert in determining cause of death or in any other subject matter: AR Vol II at 135/12-23.

[118] Appellant's Book of Authorities, Royal College of Physicians and Surgeons of Canada, *Forensic Pathology Competencies*, online: <http://www.royalcollege.ca/rcsite/documents/ibd/forensic-pathology-competencies-e.pdf>.

61. During his testimony, Dr. Gofton swore that Lukas' death was caused by four stab wounds to his torso, at least three of which were 13 cm deep.[119] At the end of his Autopsy Report, he states:

> Cause of death is due to multiple stab wounds to the torso:
>
> a) Reportedly involved in an altercation and found stabbed, subsequently taken to a hospital and died despite medical and surgical intervention.
>
> b) Stab wound to the right chest with associated thoracic organ injury and internal hemorrhage.
>
> c) Stab wounds (2 total) to the right upper abdomen with associated injury to the liver and internal hemorrhage.
>
> d) Stab wound to the right back with skeletal muscle injury.[120]

62. Notwithstanding this uncontroverted evidence that 13 cm-deep stab wounds caused Lukas' death, the Crown argued and the majority below accepted that it would have been reasonable to conclude that kicking and punching Lukas' head or stabbing him with car keys contributed to Lukas' death in a medical sense.[121] To support this argument, they pointed to Dr. Gofton's testimony that blunt force trauma could cause a "vast spectrum of injuries" up to and including death.[122] However, the fact that death *could* result from blunt force trauma does not mean that it did in this case. As Justice Veldhuis correctly observes: "*there was no evidence that Lukas actually suffered from these conditions.*"[123]

63. The majority below took an unreasonably restrictive view of Dr. Gofton's testimony when it said, "Dr. Gofton did not opine, nor was he asked in his oral evidence, whether the blunt force injuries contributed to Strasser-Hird's death."[124] Although he was not directly asked to

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[119] AR Vol VII at 166/39 – 167/17.
[120] AR Vol VIII at 120.
[121] *Cabrera*, *supra* note 1 at paras 72-73.
[122] AR Vol VII at 165/9-13.
[123] *Cabrera*, *supra* note 1 at para 262 [emphasis in original].
[124] *Ibid* at para 62.

clarify whether the blunt force injuries he observed on Lukas' body contributed to the death, he did not have to be asked. His Autopsy Report Form, tendered by the Crown as an exhibit at trial,[125] listed "Multiple Stab Wounds to the Torso" as the "immediate cause" of Lukas' death. The form also included a space to list "[o]ther *significant* conditions *contributing* to the death but not causally related to the immediate cause."[126] This is no accident. As a forensic pathologist, Dr. Gofton's expertise is in examining cadavers and following biological clues to determine how an individual died. He is not a lawyer, but that he had a general understanding of (a) the law on causation in homicide cases, and (b) the use to which his Autopsy Report was likely to be put—that is, as evidence in a court of law—is revealed by the standard form he and the Medical Examiner's Office use to report autopsy results. This form averts the examiner's mind to the possibility of multiple contributing causes of death. In other words, there is no reason to believe Dr. Gofton was anything but careful and complete in his analysis. Indeed, a second pathologist, Dr. Elizabeth Brooks-Lim, reviewed Dr. Gofton's report for errors before it was published as part of the Medical Examiner's quality assurance process.[127] She concurred in Dr. Gofton's conclusions.[128]

64. The fact that Dr. Gofton left the section of the form about other contributing causes blank, having thoroughly examined the blunt force injuries in Lukas' specific case, knowing that blunt force injuries can sometimes cause a range of complications, up to and including death,[129] and after Dr. Brooks-Lim reviewed his work, only bolsters the conclusion that blunt force injuries did not significantly contribute to Lukas' death in a medical sense. Dr. Gofton's express reference to "[t]he combination of these stab wounds"[130] further demonstrates that he was alive to the possibility that the combined effect of multiple injuries could lead to death. Still, he did not conclude that Lukas' death was caused by a combination of stab wounds to the torso *and* blunt force head injuries, however substantial they might have been.

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[125] AR Vol VIII at 115.
[126] *Ibid* [emphasis added].
[127] AR Vol VII at 170/40 – 171/3.
[128] AR Vol VIII at 123.
[129] AR Vol VII at 165/6-13.
[130] AR Vol VIII at 115.

65. There was no suggestion by any of the parties, at trial or on appeal, that Dr. Gofton's opinion was in any way mistaken, negligent, deceitful, or incomplete. On the contrary, the Crown sought to produce him as an expert and he was qualified as such without objection.

66. Chief Justice Fraser, writing for the majority below, also relied upon the evidence of Dr. Andre Ferland, an intensive care physician, to support her conclusion that the jury could have reasonably concluded blunt force injuries significantly contributed to Lukas' death. In her view:

> Dr Ferland…concluded…that Strasser-Hird ultimately died from irreversible shock. In light of this evidence, the jury could reasonably have found that the additional blood loss from the blunt force injuries caused by Cabrera's actions as one of the aggressors in the second wave of violence contributed to the lactic acidosis and irreversible shock that ultimately caused Strasser-Hird's death.[131]

This is an unreasonable conclusion, as it ignores Dr. Ferland's own evidence as to why Lukas needed "massive" blood transfusions in the first place. In his words, "we had transfused many times his blood volume…because of the bleeding he had incurred <u>from the penetrating injuries</u>. So he…passed away of irreversible shock."[132] The stab wounds were the only penetrating injuries on Lukas' body.

67. In his testimony, Dr. Ferland never mentioned any injuries to Lukas' head and he was not able to describe Lukas' injuries when he was asked to do so.[133] He assumed care of Lukas only after Lukas had been bandaged up, without having had an opportunity to evaluate the extent of Lukas' injuries.[134] Combined with the fact Dr. Ferland expressly attributed Lukas' bleeding and shock to "the penetrating injuries," judicial fact-finding precluded the conclusion endorsed by the majority below. The majority erroneously assumed that "[t]wo medical experts testified at trial on the cause of death," referring to Dr. Gofton and Dr. Ferland.[135] In fact, only Dr. Gofton

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[131] *Cabrera*, *supra* note 1 at para 75.
[132] AR Vol II at 139/3-9 [emphasis added].
[133] AR Vol II at 139/30-37.
[134] AR Vol II at 141/38 – 142/8.
[135] *Cabrera*, *supra* note 1 at para 61.

was qualified as an expert at trial. Dr. Ferland was not qualified to give an expert opinion on the cause of Lukas' death or on any other subject.[136]

68. To be clear, the jury was not obliged to accept Dr. Gofton's evidence simply because he was an expert on determining causes of death. As the trier of fact, a jury must consider *all* evidence, both expert and lay, and come to its own determination as to the factual cause of death.[137] However, that does not give the jury free rein. In charging the jury on causation, the trial judge hastened to point out:

> There is no medical evidence…that blunt force injuries to Mr. Strasser-Hird caused his death. […] It is for you to decide, but having regard to the medical evidence, I suggest it will be difficult for you to conclude that blunt force injuries were a significant contributing cause of death to Mr. Strasser-Hird. Rather, I suggest that you will conclude the cause of death was stab wounds, although it may be less clear which ones and how many.[138]

Yes, it was an issue for the jury to decide, but that did not give the jury the right to be unreasonable about the factual cause of death or to convict Cabrera regardless of what the evidence showed.

69. The trial judge's opinion was no more determinative of Lukas' cause of death than Dr. Gofton's; however, Justice Poelman's caution to the jury was not merely passing fancy. In *R v Biniaris*, this Court observed that the rules that regulate the content of jury charges offer signals as to when judicial fact-finding will preclude a conclusion reached by the jury:

> These rules are sometimes expressed in terms of warnings, mandatory or discretionary sets of instructions by which a trial judge will convey the product of accumulated judicial experience to the jury, who, by definition, is new to the exercise. […] But these rules of caution cannot be exhaustive, they cannot capture every situation, and cannot be formulated in every case as a requirement of the charge. Rather, after the jury has been adequately charged as to the applicable law, and warned, if necessary, about drawing possibly unwarranted conclusions, it remains that in some cases, the totality of the evidence and the

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[136] AR Vol II at 135/12-18.

[137] *Smithers*, *supra* note 113 at 518.

[138] AR Vol I at 243/21-22, 27-31 [emphasis added].

> peculiar factual circumstances of a given case will lead an experienced jurist to conclude that the fact-finding exercise applied at trial was flawed in light of the unreasonable result that it produced.[139]

In other words, the fact that Justice Poelman felt compelled to caution the jury at all offers persuasive insight into what was and was not reasonable to conclude in this case from someone who is learned in the exercise of judicial fact-finding. Thus, Justice Veldhuis reasonably interpreted the trial judge's caution "as meaning it would have been unreasonable for the jury to conclude that the cause of death was anything other than the multiple stab wounds to Lukas' torso."[140] Justice Poelman's caution in this regard was not binding, but neither was it hollow.

70. Dr. Gofton's evidence was the only direct evidence on the cause of death. This did not make it inherently more reliable or accurate than circumstantial evidence, but it means Dr. Gofton's evidence did not carry the same risk as the circumstantial evidence on cause of death that the jury would "unconsciously 'fill in the blanks' or bridge gaps in the evidence to support the inference that the Crown invite[d] it to draw."[141] The jury could not conclude blunt force trauma caused the death on the basis of entirely circumstantial evidence, including the nature of the blunt force injuries to Lukas' head and the force with which they were delivered,[142] unless it was the only reasonable inference on the whole of the evidence.[143] However, judicial experience suggests it was equally if not more reasonable to conclude that Dr. Gofton was correct and complete when he said that Lukas' death was caused by the four stab wounds.

71. By definition, Dr. Gofton could not have been qualified as an expert on Lukas' cause of death unless his opinion on that topic was necessary "in the sense that it provide[d] information 'which [was] likely to be outside the experience and knowledge of a judge and jury.'"[144] A properly instructed jury, acting judicially, could not have reasonably concluded that blunt force injuries factually contributed to Lukas' death without also finding that Dr. Gofton was mistaken,

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[139] *Biniaris*, *supra* note 95 at para 39 [emphasis added].
[140] *Cabrera*, *supra* note 1 at para 267.
[141] *R v Villaroman*, 2016 SCC 33 at para 26, [2016] 1 SCR 1000.
[142] One witness described a "soccer-like kick" to the head: AR Vol IV at 1089/9-10.
[143] *Villaroman*, *supra* note 141.
[144] *R v Mohan*, [1994] 2 SCR 9 at para 22, 89 CCC (3d) 402.

negligent, deceitful, or incomplete in his analysis. To do so on this particular evidentiary record would have been unreasonable.

72. In *Nette*, Arbour J. held "the fact that the appellant's actions might not have caused death in a different person…does not transform this cause into one involving multiple causes."[145] No more does the fact that blunt force injuries *might* have caused death in a different person transform this case into one involving multiple causes.

73. But for the stab wounds attributable to Nathan Gervais, Lukas would have been badly beaten. He might have required reconstructive surgery on his face and mouth. But, according to the evidence, he would not have died. What happened to him was gruesome and we should all shudder at the thought of kicks to the head. However, the majority below has let the emotion and publicity of this case to cloud the medical evidence, as shown by its emphasis on Lukas' missing teeth.[146] Lukas did not die from missing teeth, nor from the blunt force trauma to his head that knocked them out.

iv) Cabrera did not inflict the four, 13 cm-deep stab wounds that factually caused Lukas' death

74. Cabrera does not dispute there is evidence on the record from which a jury could reasonably conclude that he punched and kicked Lukas.[147] However, if Cabrera's death was factually caused by stab wounds only, then it was unreasonable to conclude that Cabrera factually caused Lukas' death.

75. No one except the prosecutor at trial, who invited the jury to convict Cabrera on a gap in the evidence,[148] has seriously suggested that Cabrera inflicted the four stab wounds that caused Lukas' death. Even the majority below does not go so far as to suggest it would have been reasonable to attribute the four stab wounds to Cabrera's own hand. If Cabrera stabbed Lukas at all, the majority and minority agree it was with his car key.[149]

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[145] *Nette*, *supra* note 87 at para 81.
[146] *Cabrera*, *supra* note 1 at para 73.
[147] *Ibid* at para 248; AR Vol VI at 6/20-24.
[148] AR Vol I at 181/3-4.
[149] *Cabrera*, *supra* note 1 at paras 72, 75, 101, 252.

76. That it would have been unreasonable to conclude Cabrera inflicted the stab wounds that took Lukas' life inexorably flows from several pieces of evidence that no judicial fact-finder, not even the majority below, could deny. First, 911 received the first report that Lukas had been stabbed around 2:40 a.m. Video surveillance from the Vinyl shows Cabrera was still outside the front, north entrance of the club at that time.[150] In other words, "Cabrera's assault on Strasser-Hird in the alley was restricted to *after* the…stabbing…took place."[151]

77. Second, common sense and judicial experience dictate that Lukas had to have been stabbed with a long knife or similarly shaped weapon. The only weapon attributed to Cabrera, his car key,[152] would not have been capable of penetrating Lukas' body 13 cm deep and tearing through multiple vital organs.

78. Third, the only evidence of a knife was the folding knife that belonged to Nathan Gervais. Nathan's girlfriend, Kristina Toporkova, knew Nathan kept a knife in his car, saw Nathan run to his car that night, assumed he had gone to get his knife, and heard Nathan admit that he stabbed Lukas *with a knife*, which he said he discarded.[153]

79. The majority below says that introducing Nathan's statements at trial without objection was a "tactical" move that enabled Cabrera to blame Nathan for causing Lukas' death.[154] However, Nathan was not a scapegoat. He was a principal who actually caused Lukas' death. He remained on the indictment throughout the trial and was later found by a judge to have been the only person who stabbed Lukas in the alley beyond a reasonable doubt.[155] Now, not even the Crown maintains that Cabrera inflicted the stab wounds.

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[150] The parties agreed that the Vinyl video footage timestamp was 64 minutes behind the actual time: see e.g. *Cabrera*, *supra* note 1 at para 252, fn 20.

[151] *Ibid* at para 71. See also para 252. This is corroborated by evidence of Sierra Ryan, a sober bystander unconnected to the co-accused who swore Cabrera arrived after Lukas stabbed.

[152] AR Vol VIII at 67.

[153] AR Vol III at 115/13-14.

[154] *Cabrera*, *supra* note 1 at fn 6.

[155] *Gervais*, *supra* note 44 at para 381.

80. Fourth, no one ever saw Cabrera stab Lukas—with a knife or at all. After Cabrera punched and kicked Lukas, he told Sandy Tang that he "stabed [sic] him on the street [a]nd brought him to the alley";[156] yet, despite being surrounded by countless witnesses who watched the events in the alley, no one saw Cabrera bring Lukas to the alley.[157] The indisputable evidence, accepted by the entire court below, is that Lukas was already in the alley when Cabrera entered the picture. In other words, this is the type of case mentioned in *Biniaris* in which the jury "reject[ed] a defence [i.e. that Cabrera's admissions were some mix of drunken bravado and the confused ramblings of someone who was trying to make sense of what had happened] with respect to which there may be unjustified skepticism or even prejudice because those relying on such justifications or excuses may be viewed as simply trying to avoid responsibility for their actions."[158] The jury's skepticism was understandable (i.e. *why would anyone admit to something he did not do?*), but ultimately unjustified on the whole of the evidence.

81. As Justice Veldhuis correctly noted:

> "These facts, combined with the considerable evidence pointing to Gervais as the actual stabber and the absence of any evidence regarding a second knife, compel the conclusion that it would have been unreasonable for a properly instructed jury, acting judicially, to have given credit to Cabrera's admissions and conclude that it was he who had delivered the fatal stab wounds."[159]

v) 'But for' Cabrera's actions, Lukas still would have died

82. To be sure, the technical or medical cause of death—in this case, stab wounds—is not dispositive of factual causation. Indeed, it is an error of law to stop with an assessment of the medical cause of death and not to ask the ultimate question: would the deceased have died "but for" the accused's actions.[160] One's actions may be a significant contributing cause of death even if they do not directly contribute to death in a biological sense. For instance, rendering the victim vulnerable to the lethal actions of another will usually suffice.[161]

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[156] AR Vol III at 235/22-27.

[157] See e.g. AR Vol III at 255/9-13; AR Vol IV at 167/17-18.

[158] *Biniaris*, *supra* note 95 at para 41.

[159] *Cabrera*, *supra* note 1 at para 253.

[160] *Maybin*, *supra* note 107 at para 21.

[161] *Ibid* at para 20.

a. Cabrera did not deprive Lukas of 'immediate' medical intervention

83. The majority below argued Cabrera's actions could have contributed to Lukas' death in a factual sense because "Dr. Gofton had made it clear in his evidence that had medical intervention occurred immediately, it would have been possible to save Strasser-Hird."[162] This mischaracterizes Dr. Gofton's evidence and assumes a level of certainty where there was none. What Dr. Gofton actually said is:

> Q After receiving those four stab wounds, would it have been possible to save him with immediate medical intervention?
>
> A It would be possible. It would have to be immediate.
>
> Q How likely would it be?
>
> A Well, that's probably a little bit beyond my scope of practice because I'm not an emergency physician.

84. Suggesting that Cabrera delayed "immediate medical intervention" in any significant, contributing way is not supported by the evidence. First, just because it might have been *possible* to save Lukas did not make it probable or reasonable to believe. Second, when Dr. Gofton said it would be possible to save Lukas with "immediate medical intervention," it is unreasonable to think he meant the first aid by a couple of bystanders, who were not medically trained. Given the size, placement, and severity of Lukas' stab wounds, it is unfathomable that any pressure a couple of Good Samaritans could have applied to Lukas' wounds would have made the difference between life and death, as the majority below seems to assume. What is clear is that Lukas required surgical—not superficial—intervention. He required "massive"—not minor—blood transfusions. And even "sophisticated breathing machines" could not deliver enough oxygen to inflate his severed lungs.[163] Third, by his own admission, Dr. Gofton was not qualified to opine on the possibility or likelihood that immediate medical intervention could have saved Lukas. According to his evidence, that was a question for an emergency room physician. The Crown called Dr. Ferland, an intensive care physician, yet they never asked him how likely it was that Lukas could be saved.

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[162] *Cabrera*, *supra* note 1 at para 74.
[163] AR Vol II at 139/19-21; AR Vol VII at 165/35.

85. As the court below unanimously accepted, 911 had already been called by the time Cabrera entered the alley.[164] Emergency medical responders would not have arrived any sooner than they did. Cabrera's actions, reprehensible though they were, had no influence on the timing of their intervention. Furthermore, there was no suggestion at trial or on appeal that Cabrera's actions accelerated Lukas' death.[165] As such, it is unreasonable *on this record* to think that Lukas would not have died but for Cabrera's interference with bystanders. One can imagine a different case in which the victim's wounds could have been staunched by untrained bystanders who did not have the tools available to a paramedic or medical doctor. This was not that case.

b. Cabrera did not render Lukas vulnerable to Nathan's stabbing

86. In *R v Maybin*, this Court held that an accused may factually cause another's death if his actions render the victim vulnerable to the assault of another. In that case, the Maybin brothers went to a bar. They got into a fight with a man, whom they hit in the head enough times to render him unconscious. A bouncer intervened and punched the victim in the head. The victim died from bleeding on the brain, but the medical evidence was inconclusive as to whose punch caused the death. This Court affirmed the brothers' convictions and the bouncer's acquittal because "the bouncer was not in the same position as the Maybin brothers: the bouncer's assault was at the end of the chain of events leading to the victim's death."[166] Even if the bouncer's punch was the fatal blow, the bouncer would not have punched the victim if the brothers had not initiated the fight. The bouncer's intervention was reasonably foreseeable in those circumstances, and the brothers' actions had rendered the man vulnerable to the bouncer's assault. Hence, the brothers' actions factually caused the death.

87. Cabrera's situation is distinct from that of the Maybin brothers. First, unlike *Maybin*, the medical evidence is conclusive that Lukas died from four stab wounds, which Cabrera did not inflict. Second, Cabrera's assault against Lukas came late in the sequence of events. So, while there is no doubt that the lethal stab wounds inflicted by Nathan rendered Lukas vulnerable to Cabrera's subsequent blows, it cannot be said that Cabrera's blows rendered Lukas vulnerable to

[164] *Cabrera*, *supra* note 1 at para 71.
[165] *Ibid* at fn 16.
[166] *Maybin*, *supra* note 107 at para 19.

Nathan's stabbing and thereby caused Lukas' death. By that time, Lukas had already been stabbed.

88. In this sense, Cabrera's situation is distinguishable from that of Joch Pouk, whom the evidence showed was first to run toward and attack Lukas in the alley.[167] It was reasonable for the jury to conclude that Joch factually caused Lukas' death because his advances and the concomitant attention he drew to Lukas' presence in the back alley started the melee that ended in Nathan stabbing Lukas. However, it would have been unreasonable for any of the jurors to find that Cabrera factually caused Lukas' death on the same basis.

D. No properly instructed jury, acting judicially, could conclude that Cabrera actually committed murder by participating in a group assault

89. The jury was not properly instructed on what factors it should consider before deciding that Cabrera participated in a single group assault in the back alley such that the group as a whole could be said to have factually caused Lukas' death, notwithstanding that Nathan delivered the fatal blows. Had it been properly instructed, in accordance with the law articulated under the first ground of appeal above, it could not have reasonably concluded that Cabrera's actions as a member in that group significantly contributed to Lukas' death. In this respect, it is factually and legally significant that:

i) Lukas died from stab wounds;
ii) the evidence clearly shows Nathan inflicted the stab wounds;
iii) the evidence clearly shows Cabrera did not inflict the fatal stab wounds;
iv) Cabrera was not present at the time Nathan inflicted the fatal stab wounds;
v) Cabrera did not participate at all in the first group assault involving Joch and Nathan;
vi) the assaults in the back alley spanned at least ten minutes;
vii) the assaults were separated by a discrete gap of at least one minute of non-violence;
viii) Cabrera did not delay immediate medical intervention or do anything to render Lukas vulnerable to Nathan's stabbing;

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[167] AR Vol IV at 67/1-41; AR Vol VII at 177/7 – 179/24; *Cabrera*, *supra* note 1 at para 11.

ix) there is no evidence Cabrera discussed an assault on Lukas with Nathan or anyone else who participated in the first round of assaults; and

x) there is no evidence Cabrera knew Nathan had retrieved or intended to use a knife.

90. Even assuming Cabrera and Nathan's assaults were motivated by the same perceived slight against their friend Assmar, as the majority below suggests,[168] that was insufficient to conclude that they were acting in concert, as part of a single group. As argued at paragraph 42 above, they did not "participate" in a group assault that caused Lukas' death unless their individual actions each significantly contributed to that result. Only then would they be liable as co-principals.

PART IV: Costs

91. The appellant makes no submissions concerning costs.

PART V: Order Sought

92. The appellant requests that this Honourable Court allow the appeal, enter an acquittal to second degree murder, and substitute a conviction for aggravated assault. In the alternative, the appellant requests that this Court allow the appeal and order a new trial limited to Mr. Cabrera's liability for second degree murder as a participant in a group assault.

PART VI: Submissions on Case Sensitivity

93. There is a publication ban on the name of one witness who testified at trial. The particulars are described in the certificates in Form 23A and B, filed with the Court September 9, 2019.

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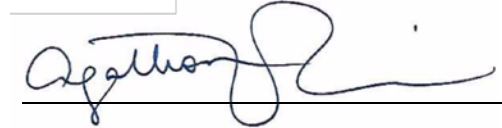
[168] *Cabrera*, *supra* note 1 at para 96.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Calgary, in the Province of Alberta, on this 9th day of September 2019.

Gavin Wolch
Counsel for the Appellant



Agathon Fric
Counsel for the Appellant

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