SCC File Nos. 40701 / 40709

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

BETWEEN:

HIS MAJESTY THE KING

Respondent
(Respondent)

-and-

EMANUEL LOZADA

Appellant
(Appellant)

AND BETWEEN:

HIS MAJESTY THE KING

Respondent
(Respondent)

-and-

VICTOR RAMOS

Appellant
(Appellant)

FACTUM OF THE RESPONDENT

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

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CONTENTS

PART I – OVERVIEW AND FACTS

A. Overview

1. The Appellants Emanuel Lozada and Victor Ramos, their friend Joseph Triolo, and others, were involved in what was at least a five-on-two attack on Rameez Khalid (the deceased) and his friend Travis Galliah. Ramos was one of the people who attacked the deceased, kicking and punching him and knocking him to the ground. Lozada attacked Galliah, repeatedly punching him and knocking him to the ground as well. Once the deceased was made vulnerable by the attack, Triolo stabbed the deceased in the heart. He died almost immediately. The Appellants, Triolo, and their friends fled the scene.

2. Triolo was tried for second-degree murder, and the Appellants' for manslaughter. The Crown conceded that there was "no evidence" the Appellants "knew or foresaw" that Triolo had a knife or would stab the deceased.[1] The Crown's position at trial was that the Appellants were guilty of manslaughter either as co-principals with Triolo under s.21(1)(a) of the *Criminal Code*, or as aiders under s.21(1)(b).[2] With respect to the co-principals route, the Crown argued that the Appellants rendered the deceased vulnerable to the stabbing, and were therefore a significant contributing cause of his death.[3] The Appellants argued that the stabbing was an intervening act which broke the chain of causation.[4] The Appellants and Triolo were convicted as charged following a jury trial before Justice Dambrot. A fourth co-accused, Holder, was tried for manslaughter but acquitted.

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[1] Crown's Closing Address, *Transcript* pp. 2251, pp. 2258 (*AR* at Vol. XIX, p. 112, p.119). As Justice Doherty observed in the court below, had there been evidence that the Appellants knew Triolo had a knife or believed he would use a knife in the course of their joint attack, the Appellants would no doubt have been charged with murder along with Triolo: *R. v. Triolo*, 2023 ONCA 221 at ¶180.

[2] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s.21.

[3] Crown's Closing Address, *Transcript* pp. 2252-2253 (*AR* at Vol. XIX, pp. 113-14).

[4] Lozada's Closing Address, *Transcript* pp. 2454-55, p. 2472, p. 2489 (*AR* at Vol. XX, pp. 114-115, p. 132, p. 149); Ramos's Closing Address, *Transcript* pp. 2516-2518 (*AR* at Vol. XX, pp. 176-178).

3. The Appellants and Triolo appealed their convictions to the Court of Appeal for Ontario on numerous grounds. Triolo's appeal was unanimously dismissed. The panel was also unanimous that the Appellants' grounds of appeal were without merit, except for one, relating to the jury instruction on the intervening act doctrine. The Appellants argued that the trial Judge erred by telling the jury that the stabber's actions would not break the chain of causation if the continuation of assaults on the deceased and the risk of non-trivial bodily harm to him was reasonably foreseeable; rather, the jury should have been instructed that the general nature of the intervening act had to have been reasonably foreseeable. The Crown argued that when read as a whole, the charge properly instructed the jury on the intervening act issue. Writing for himself and Justice Hoy, Justice Doherty concluded that there was no error in the intervening act instruction. In dissent, Justice Paciocco disagreed.[5]

4. As Justice Doherty observed, this trial was lengthy, and factually and legally complicated. There were four accused, several different potential bases for liability, various defences, and several different combinations of possible verdicts. The instructions to the jury were, of necessity, complex and lengthy. The charge consumed some 225 pages of transcript.[6] The issue before the Court of Appeal, and now before this Court, is whether the trial Judge erred in two short passages in an otherwise error-free charge.

5. The Respondent's position on the ground of appeal raised is as follows:

a. The intervening act doctrine does not apply where the person who causes the death is a co-participant in a group attack. Here, there was no air of reality that the stabber was someone other than a co-participant with the Appellants in this group attack. The Appellants were not entitled to the benefit of the intervening act instruction, and it therefore matters not whether that instruction contained an error;
b. In the alternative, the intervening act instruction, when read as a whole, properly equipped the jury to consider the intervening act issue; and,
c. In the further alternative, if there was an error, the curative proviso should be applied because there is no realistic possibility that a new trial would produce a different verdict.

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[5] *R. v. Triolo,* 2023 ONCA 221.
[6] *R. v. Triolo,* 2023 ONCA 221 at ¶175.

B. The Facts

6. Early in the morning of October 6, 2013, the deceased, his friend Travis Galliah, and others from their friend group attended a rave at the corner of Queen Street and University Avenue in downtown Toronto. The rave was part of the *Nuit Blanche* festival, a contemporary art event held annually.[7] The Appellants Emanuel Lozada and Victor Ramos, as well as their friends Joseph Triolo, Terelle Holder, T.N. (a young person), Steven Panagiotopoulos, Michelle Andrikopoulos, and others, attended the rave as well.[8] The two groups were previously unknown to one another.

7. At the rave, Triolo and the deceased, and possibly others, became involved in an altercation. The deceased bested Triolo in the fight. He punched Triolo, threw him to the ground, and kicked him.[9] There was also evidence from which the jury could infer that the deceased hit Triolo over the head with a glass bottle: Andrikopoulos testified that she heard Triolo scream something like "that nigga just hit me in the head" and that she heard a bottle breaking, and T.N. also testified that he heard glass breaking during the altercation.[10]

8. There was evidence that Galliah, Lozada, Ramos, and others broke up the altercation.[11] While the deceased was angry and wanted to continue the fight, he voluntarily walked away from the scene with Galliah. The two went southbound on University Avenue and then eastbound on Richmond Street.[12]

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[7] Evidence of T. Galliah, *Transcript* pp. 154-155 (*AR* at Vol. IX, pp. 164-65).
[8] Evidence of T.N., *Transcript* pp. 645, 671 (*AR* at Vol. XII, pp. 46, 72).
[9] *R. v. Triolo*, 2023 ONCA 221 at ¶5; Evidence of A. Jagtap, *Transcript* pp. 599-601 (*AR* at Vol. XI, p. 200, Vol. XII pp. 1-2); Evidence of T.N., *Transcript* pp. 663-670 (*AR* at Vol. XII, pp. 64-71).
[10] Evidence of M. Andrikopoulos, *Transcript* pp. 1218-1221, pp. 1284-1289, p. 1295 (*AR* at Vol. XV, pp. 17-20, 83-88, 94); Evidence of T. N., *Transcript* p. 664 (*AR* at Vol. XII, p. 65).
[11] Evidence of T. Galliah, *Transcript* p. 171 (*AR* at Vol. IX, p. 181); Evidence of T. N., *Transcript* pp. 666-667 (*AR* at Vol. XII, pp. 67-68).
[12] Evidence of T. Galliah, *Transcript* pp. 180-181, p. 183, pp. 248-251 (*AR* at Vol. IX, pp. 170-171, p. 173, Vol. X, pp. 48-51).

9. Triolo was also still angry after the altercation.[13] T.N. testified that someone in their group said: "Just wait, we're gonna follow them" or "we're gonna get them", although neither Andrikopoulos nor Panagiotopoulos heard anyone say anything to this effect.[14] The Appellants' group began moving south on University Avenue and then east on Richmond Street, as the deceased and Galliah had done. The Appellants were in the lead, as the below slide taken from security video footage shows: Lozada was in the bear suit at the front, and Ramos was just behind and to the left of Lozada in the blue hat. There was evidence that Triolo was just behind and to the right of Ramos in the red hat and light hoodie, and their other friends followed thereafter.[15] The Crown urged the jury to find, and the trial Judge accepted on sentencing, that Triolo, the Appellants, and others followed the deceased and Galliah with the intention of "settling the score", and did not just happen to take the same route.[16]

[13] Evidence of T.N., *Transcript* pp. 670-71 (*AR* at Vol. XII, pp. 71-72); Evidence of M. Andrikopoulos, *Transcript* p. 1218, p. 1221, p. 1295 (*AR* at Vol. XV, p. 17, p. 20, p. 94).
[14] Evidence of T.N., *Transcript* pp. 760-61 (*AR* at Vol. XII, pp. 161-162); Evidence of M. Andrikopoulos, *Transcript* p. 1298 (*AR* at Vol. XV, p. 97); Evidence of S. Panagiotopoulos, *Transcript* p. 1541 (*AR* at Vol. XVI, p. 130).
[15] Slide 56, Exhibit 4: *RR* at Tab 2; *R. v. Triolo*, 2023 ONCA 221 at ¶¶10-11; Evidence of T.N., *Transcript* p. 673, pp. 677-678, pp. 707-710, pp. 764-765 (*AR* at Vol. XII, p. 74, pp. 78-79, pp. 108-111, pp. 165-66); Evidence of M. Andrikopoulos, *Transcript* pp. 1226-29 (*AR* at Vol. XV, pp. 25-28); Evidence of S. Panagiotopoulos, *Transcript* pp. 1525-29; pp. 1559-60 (*AR* at Vol. XVI, pp. 148-49).
[16] *R. v. Triolo*, 2017 ONSC 4726 at ¶10; Evidence of T.N., *Transcript* pp. 671-673, p. 677, pp. 760-761, p. 1056, p. 1088 (*AR* at Vol. XII, pp. 72-74, p. 78, pp. 161-162, Vol. XIV, p. 56, p. 89); Evidence of M. Andrikopoulos, *Transcript* p. 1220, pp. 1226-29, p. 1299 (*AR* at Vol. XV, p. 19, pp. 25-28, p. 98).

10. As the Appellants and their friends made their way eastbound along Richmond Street, the deceased and Galliah turned and began walking back westbound on Richmond. The deceased was swinging something in his hand.[17] When the two groups re-encountered each other on Richmond Street, Ramos pushed the deceased up against the wall of a building. Someone, whom T.N. testified was Ramos, said: "Is this the guy?", and someone else responded: "Yeah".[18]

11. The Appellants then engaged in what was at least a five-on-two assault on the deceased and Galliah. The five who attacked the deceased and Galliah were: Triolo, Lozada, Ramos, T.N., and a male whose identity was never established.[19] As to the Appellants' roles, Triolo and Ramos attacked the deceased, knocking him to the ground where he was punched and kicked by multiple attackers, while Lozada attacked Galliah, repeatedly punching him and knocking him to the ground as well.[20] Once the deceased was made vulnerable by the attack, Triolo stabbed the

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[17] Evidence of T.N., *Transcript* p. 682, p. 687, pp. 727-28, pp. 769-71 (*AR* at Vol. XII, p. 83, p. 88, pp. 128-129, pp. 170-172). At the pre-charge conference, counsel for Triolo argued that the deceased was swinging a t-shirt with what could have been a concealed weapon: *Transcript* Vol. 5b, p. 10 (*AR* at Vol. XXI, p. 124).

[18] Evidence of T.N., *Transcript* pp. 679-80, p. 710, pp. 774-75 (*AR* at Vol. XII, pp. 80-81, p. 111, pp. 175-176); Evidence of T. Galliah, *Transcript* pp. 186-187, p. 189, p. 194 (*AR* at Vol. IX, pp. 196-197, p. 199, p. 204); Slide 86 from Exhibit 4, *RR* Tab 2.

[19] *R. v. Triolo*, 2017 ONSC 4726 at ¶11; As noted above, the Crown alleged that Holder was also involved in the attack, but the jury was not satisfied of this beyond a reasonable doubt. Panagiotopoulos was also originally charged as a participant in the attack, but his charge was withdrawn. He testified at trial and denied having been involved in the attack; however, T.N. said that he saw Panagiotopoulos "throw some punches": Evidence of S. Panagiotopoulos, *Transcript* pp. 1465-1466, p. 1543 (*AR* at Vol. XVI, pp. 54-55, p. 132); Evidence of T.N., *Transcript* p. 683, p. 686, pp. 696-97, p. 918 (*AR* at Vol. XII, p. 84, p. 87, pp. 97-98, p. 118).

[20] *R. v. Triolo*, 2023 ONCA 221 at ¶21; Appellants' Factum, at ¶20; Evidence of M. Andrikopoulos, *Transcript* pp. 1233-1235, p. 1258 (*AR* at Vol. XV, pp. 32-35, p. 57); Evidence of T.N., *Transcript* pp. 997-998 (*AR* at Vol. XIII, pp. 197-198); Evidence of T. Galliah, *Transcript* pp. 190-192, p. 393 (*AR* at Vol. IX, pp. 200-202, Vol. X, p. 193).

deceased in the heart.[21] The Appellants and their friends fled the scene. The deceased stood up, took a few staggering steps, and then collapsed into the street.[22]

12. The pathologist who testified at trial described that the deceased suffered a stab wound to the heart approximately 8 cm deep, which would have caused heart failure very quickly.[23] The deceased also suffered a second, superficial stab wound to the right side of his belly.[24] The pathologist also observed 27 non-life-threatening blunt force injuries to the deceased's body, including ten to his head.[25] While the pathologist agreed that some of the deceased's injuries to his head could have been caused when he collapsed on the pavement after being stabbed, she did not think all of the injuries to the deceased's head would have been sustained in this way.[26] She also observed blunt force injuries to the deceased's hands and forearms, and explained that such injuries could be caused by a person defending themselves against punches or kicks.[27]

13. Galliah testified that he was repeatedly struck on his face. He suffered redness and abrasions to the right side of his head.[28]

C. The Trial

i. The Crown's Concession About the Knife

14. In the Crown's closing address, Crown counsel told the jury that there was "no evidence" that the Appellants "knew or foresaw that Joey Triolo, or any person in their group, had a knife

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[21] *R. v. Triolo*, 2023 ONCA 221 at ¶179; *R. v. Triolo*, 2017 ONSC 4726 at ¶12.
[22] *R. v. Triolo*, 2023 ONCA 221 at ¶¶25-27; Evidence of T.N., *Transcript* pp. 690-691 (*AR* at Vol. XII, pp. 91-92).
[23] Evidence of Dr. A. Guenther, *Transcript* p. 1716, p. 1719, pp. 1779-1780 (*AR* at Vol. XVII, p. 26, p. 29, pp. 89-90).
[24] Evidence of Dr. A. Guenther, *Transcript* pp. 1722-1723 (*AR* at Vol. XVII, pp. 32-33).
[25] Evidence of Dr. A. Guenther, *Transcript* pp. 1725-1754, p. 1767 (*AR* at Vol. XVII, pp. 35-64, p. 77).
[26] Evidence of Dr. A. Guenther, *Transcript* pp. 1755-1756 (*AR* at Vol. XVII, pp. 65-66).
[27] Evidence of Dr. A. Guenther, *Transcript* p. 1749 (*AR* at Vol. XVII, p. 59).
[28] Evidence of T. Galliah, *Transcript* pp. 190-191 (*AR* at Vol. IX, pp. 200-201); Photo of Galliah's injuries, Exhibit 9, *RR* Tab 3.

or would stab Mr. Khalid."[29] In a colloquy, the trial Judge agreed there was "no evidence that anybody anticipated a knife would appear in this case."[30]

15. The Crown did not concede that the Appellants "understood [the fight] would not involve weapons", as the Appellants suggest.[31] The Crown's concession was that there was no evidence the Appellants knew anyone in their group had a *knife*, or would stab – not that there was no evidence anyone would use any sort of weapon in the fight. And the concession was not that there was evidence the Appellants understood the fight *would not* involve a knife; it was only that there was *no evidence* they knew it *would* involve a knife.

16. This erroneous statement of the Crown's concession was incorporated into the dissenting judgment at the Court of Appeal:

> [The Appellants'] position was that they should not be held responsible in law for a stabbing death that was not a reasonably foreseeable consequence of their decision to join in a group attack that *they had understood would not involve weapons*. Once the stabber made an unexpected decision *to use a weapon* to inflict an obviously mortal injury on Mr. Khalid, it could no longer be said that their own contribution to Mr. Khalid's death was a significant enough contributing cause to justify holding them morally and legally responsible for Mr. Khalid's death.[32]

17. The Crown also did not concede that the Appellants "could not reasonably have foreseen" that a member of their group had a knife and would stab, as the Appellants assert.[33] The Crown's concession was simply that there was no evidence the Appellants actually foresaw the knife or the stabbing.

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[29] Crown's Closing Address, *Transcript* p. 2251, p. 2258 (*AR* at Vol. XIX, p. 112, p. 119).
[30] Colloquy, *Transcript* p. 2070 (*AR* at Vol. XVIII, p. 180).
[31] Appellants' Factum, at ¶31.
[32] *R. v. Triolo*, 2023 ONCA 221 at ¶147.
[33] Appellants' Factum, at ¶2.

ii. The Closing Addresses

18. The Crown urged the jury to find that Lozada and Ramos had rendered the deceased vulnerable to the stabbing by virtue of their actions in the altercation on Richmond Street, and they were therefore a significant contributing cause of the deceased's death.[34]

19. In his closing, Lozada's counsel said there "must not be anything that somebody else does later than Manny Lozada's act that would make it not a contributing cause of the death". He later reminded the jury the Crown agreed the knife was not reasonably foreseeable. At the end, he returned to the theme, telling the jury anything Lozada did was "without a clue" that anyone would "spring out" with a knife and cause bodily harm. As for Ramos, in his closing, counsel argued whoever killed the deceased "acted on their own with a knife when no weapon was ever discussed by anyone in that group, undisputed". He asked rhetorically: "You're not responsible for every action of your friend if you're out somewhere, are you?" He said that due to the stab wound, Ramos' actions would "no longer be a significant contributing cause" of the deceased's death, and urged the jury to find the stabber "broke the chain of causation". Counsel stated: "In law, and in life, it would be unfair to hold [Ramos] accountable for a death he did not cause".[35]

iii. The Charge to the Jury

20. The trial Judge instructed the jury on causation and intervening act as follows:

> …Conduct that causes death does not have to be the sole cause of death. Death can be caused by the conduct of more than one person. Whether or not death in this case was caused by more than just the stabber is for you to decide. Let me explain.
>
> To prove that an accused's conduct caused Khalid's death, Crown counsel must prove beyond a reasonable doubt that the particular accused's conduct *contributed significantly to the death*. An accused's conduct may have contributed significantly to Khalid's death even though the main cause of death was the stabbing, and not the particular accused's conduct.

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[34] Crown's Closing Address, *Transcript* pp. 2252-2253, p. 2258, p. 2271, p. 2279 (*AR* at Vol. XIX, pp. 113-114, p. 119, p. 132, p. 140).

[35] Lozada's Closing Address, *Transcript* pp. 2454-2455, p. 2472, p. 2489 (*AR* at Vol. XX, pp. 114-115, p. 132, p. 149); Ramos' Closing Address, *Transcript* pp. 2516-2518 (*AR* at Vol. XX, pp. 176-178).

On the other hand…[i]f you conclude that the *stabbing resulted in what a particular accused did no longer being a significant contributing cause of death*, then the particular accused did not cause Khalid's death.

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

To decide whether a particular accused's conduct was a significant contributing cause of Khalid's death, *you must consider all of the evidence*. Do not limit your consideration only to the opinion of Dr. Guenther about what caused Khalid's death. … The question for you is a broader one. You are concerned not only with how Khalid came to death in a medical, mechanical, or physical sense, but also … with the *contribution of the accused to that result*. …

Two additional points. 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.

…

I said that in deciding this issue you must take into account the evidence of Dr. Guenther, the video recordings and the testimony of any witnesses who describe the events that took place around the time that Khalid was killed. I will not describe the evidence about the fight on Richmond Street and the acts of the various accused again. *But consider whether those who assaulted Galliah or Khalid, particularly if Khalid was on the ground, significantly contributed to the cause of Khalid's death by either preventing the possibility of aid or escape for Khalid, or otherwise rendering him more vulnerable to a fatal knife attack.*

On the other hand, if you find that Khalid was the aggressor in the fight, and was determined to fight despite being outnumbered, *consider whether fighting with him before the stabbing really made him more vulnerable to being assaulted with a knife*. And consider whether there really was any possibility that Galliah would have aided Khalid or helped him escape if he had not been kept busy by those who were fighting with him. Further, consider whether the stabber would have been able to inflict the

> wound whether or not others were striking Khalid. I offer no opinion, I am merely posing questions. [emphasis added][36]

21. The issue of causation was reiterated in the portion of the charge that set out the parties' positions. The Crown's position was that:

> In joining the six on two assault, the acts of each man - punching Mr. Khalid, surrounding Mr. Khalid, punching Mr. Galliah, surrounding Mr. Galliah, knocking Mr. Khalid to the ground, continuing the assault while he was on the ground - *these acts were significant contributing causes to the death of Mr. Khalid. They left Mr. Khalid vulnerable to the stabbing. They foreclosed any chance of escape or aid. They aided the stabber in providing the opportunity to inflict the lethal blow*. [emphasis added] [37]

22. Lozada's position was that the jury "cannot reasonably infer that his actions intentionally encouraged or enabled the stabbing and death of the deceased, or that he was thinking anything like that" and that he should not be held responsible for a "consequence that could not have been foreseen and took place in a matter of seconds."[38]

23. Ramos' position was that he did not cause Khalid's death because: "The stabber acted alone. No one else in the group had any knowledge of an impending stab. There was no forewarning. The stabbing was an intervening act. … The surprise stabbing intervened that night. The surprise stab broke the chain of causation."[39]

iv. The Jury's Question

24. During deliberations, the jury sent a question to the trial Judge: "can we get a definition for a break in the chain of causation?"[40] In answering the jury's question, the trial Judge stated:

> I didn't use that phrase in my part of the charge, but it is in there, because it's part of the position of Mr. Ramos. But, although I didn't use the phrase, I covered the same concept in the charge, … under question three, "Was the particular accused's unlawful act a significantly, significantly contributing cause of the death of Khalid?" And that is one of the questions I posed under the heading, "Is a particular accused

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[36] Charge to the Jury, *Transcript* pp. 2816-2820 (*AR* at Vol. XXIV, pp. 105-109).
[37] Charge to the Jury, *Transcript* pp. 2835-2836 (*AR* at Vol. XXIV, pp. 124-125).
[38] Charge to the Jury, *Transcript* pp. 2845-2846 (*AR* at Vol. XXIV, pp. 134-135).
[39] Charge to the Jury, *Transcript* p. 2853 (*AR* at Vol. XXIV, p. 142).
[40] Question From the Jury, *Transcript* p. 2889 (*AR* at Vol. XXIV, p. 178).

guilty of manslaughter as a co-principal?". So, uh, I understand that's how it came, that's how it arises, and I will give you my answer.

In this case, death was caused by the stabbing of Khalid in the chest, however, that does not necessarily mean that an unlawful act committed by an accused who is not the stabber, is not also a legal cause of death, since there can be more than one cause for an event. The question for you remains the same, namely, despite the fact the death was caused by the stabbing, *were the acts of the accused, or any of them still a significant contributing cause of the death to the extent that it is still morally just and fair to hold the accused legally responsible for the death?* In answering the question, you can ask yourself this question, *"Is the stabbing so overwhelming as to make the effect of the unlawful acts of the accused merely part of the background or setting for that stabbing to occur, so, that it can be said that these unlawful acts of the accused were no longer a significant contributing cause of the death?".* In answering that question, you can also ask yourself whether the stabbing was *directly related to the unlawful acts of the accused*. If it was, then the unlawful acts will normally still be a significant contributing cause of the death. You may also wanna ask yourself *whether the intervening act, that is, the stabbing, is extraordinary or unusual in the sense that an ordinary person would not reasonably foresee it*. …

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 unlawful 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 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][41]

[41] Instructions on Jury Question, *Transcript*, pp. 2930-2933 (*AR* at Vol. XXIV, pp. 219-222).

D. The Court of Appeal for Ontario

25. At the Court of Appeal for Ontario, the Appellants argued that the trial Judge erred in his causation instruction to the jury by understating the standard of "reasonable foreseeability" that the jury could use as an analytical tool in determining whether the Appellants' unlawful acts amounted to a "significant contributing cause" of death. The Appellants conceded that the specific act of stabbing did not need to be reasonably foreseeable. However, they submitted that the trial Judge erred when he told the jury that causation may be established if the continuation of assaults on the deceased and the risk of non-trivial bodily harm to him from those continuing assaults was reasonably foreseeable. They submitted that the decision of this Court in *R. v. Maybin* requires that the general nature of the intervening act and the risk of non-trivial harm must be objectively foreseeable.[42]

26. The Respondent Crown conceded that that the trial Judge put the question of reasonable foreseeability too low in two short passages in the otherwise correct 225-page charge. However, the Respondent Crown submitted that viewed as a whole, the charge fully equipped the jury to deal with causation. Reasonable foreseeability was just an analytical tool by which the jury could assess causation, not a dispositive test on that question. The trial Judge also put the question of reasonable foreseeability too high (to the Appellants' advantage) when he told the jury to consider whether the stabbing itself was reasonably foreseeable. At the end of the day, the trial Judge correctly instructed the jury on the fundamental question of whether the actions of the Appellant were a significant contributing cause of death. The trial Judge's instructions, together with counsels' closing addresses, would have ensured that the jury asked themselves whether the Appellants were moral innocents in the stabbing.[43]

27. Writing for himself and Justice Hoy, Justice Doherty began by observing that the trial Judge correctly instructed the jury that the test for causation is whether the Appellants' actions were a significant contributing cause of death. As this Court established in *R. v. Maybin*, reasonable foreseeability is not a test for legal causation, and the trial Judge did not tell the jury that a reasonably foreseeable risk of bodily harm was a standalone test which could, if satisfied,

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[42] *R. v. Maybin*, 2012 SCC 24 at ¶34; *R. v. Triolo*, 2023 ONCA 221 at ¶133.
[43] *R. v. Triolo*, 2023 ONCA 221 at ¶135, ¶¶156-159; *R. v. Maybin*, 2012 SCC 24 at ¶¶28-29.

justify a causation finding. Rather, when read as a whole, the charge made clear that the jury had to be satisfied that the stabbing, or some similar escalation in violence during the attack, was a natural and ordinary, or reasonably predictable, occurrence in the course of the attack. A reasonably intelligent juror would not have understood from the charge that he or she could ignore the rest of the causation instructions if satisfied that the risk of non-trivial bodily harm was foreseeable at the time of the actions of the Appellants. To the contrary, the trial judge dealt at some length with the other considerations relevant to causation, by referencing some of the specific evidence in the case, and putting forward the different interpretations of that evidence available to the jury.[44]

28. In dissent, Justice Paciocco disagreed that the jury was properly instructed on the causation issue. He held that the trial Judge provided the jury with an incorrect pathway to conviction by directing them 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. Although the issue of reasonable foreseeability is only an analytical tool and not a self-standing legal requirement, there was a prospect that some or all of the jurors would have relied upon this tool and used it improperly, thereby arriving at a "significant contributing cause" finding that was not supported by law. The fact that the trial Judge also put the question of reasonable foreseeability too high did not cancel out his error in putting it too low. Because the question of "reasonable foreseeability" is a tool for assessing moral fault, the trial Judge's misdirection on that tool had the potential to distort the jurors' decisions on the application of the other analytical tools the trial Judge offered.[45]

PART II – STATEMENT OF POSITION

29. The Respondent's position on the ground of appeal raised is as follows:

a. The Appellants were not entitled to the benefit of the "intervening act" instruction given at trial because they were co-participants with the stabber in a group attack;

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[44] *R. v. Triolo*, 2023 ONCA 221 at ¶186, ¶¶195-208.
[45] *R. v. Triolo*, 2023 ONCA 221 at ¶¶134-135, ¶¶146-160.

b. In the alternative, the intervening act instruction, when read as a whole, properly equipped the jury to consider the "intervening act" issue; and,
c. In the further alternative, if the trial Judge erred in his causation instruction to the jury, no substantial wrong or miscarriage of justice occurred and the proviso under s.686(1)(b)(iii)[46] should be applied and the appeal dismissed.

PART III – STATEMENT OF ARGUMENT

A. The Applicable Legal Principles

30. The elements of the offence of unlawful act manslaughter are:

a. an unlawful act which caused death (the *actus reus*); and,
b. the objective foreseeability of the risk of bodily harm that is neither trivial nor transitory, coupled with the fault element of the predicate offence (the *mens rea*).[47]

31. In *R. v. Maybin,* this Court established that in homicide cases, an accused's unlawful actions need not be the only cause of death, or even the direct cause of death; a court must determine if the accused's actions are a significant contributing cause of death. Causation has two aspects: factual and legal. Factual causation is about how the victim came to die, in a medical, mechanical, or physical sense. The question is whether the deceased would have died "but for" the accused's acts, and is inclusive in scope. Legal causation narrows a wider range of factual causes into those sufficiently connected to the death to warrant assignment of criminal responsibility. Legal causation is based on concepts of moral responsibility and is not a mechanical or mathematical exercise.[48]

32. This Court has offered two analytical approaches to the intervening act issue: the "reasonable foreseeability" and "intentional, independent act" approaches. However, neither an unforeseeable intervening act nor an independent intervening act is automatically sufficient to

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[46] *Criminal Code of Canada*, R.S.C. 1985, c. C-46.
[47] *R. v. Javanmardi*, 2019 SCC 54 at ¶¶25-31; *R. v. Yumnu*, 2010 ONCA 637 at ¶232; aff'd on other grounds 2012 SCC 73.
[48] *R. v. Maybin*, 2012 SCC 24 at ¶1, ¶¶14-16; *R. v. Nette*, 2001 SCC 78 at ¶¶44-45; *R. v. Manasseri*, 2016 ONCA 703, at ¶¶185-187, leave to appeal refused [2016] S.C.C.A. No. 513.

break the chain of legal causation. Similarly, the fact that the intervening act was reasonably foreseeable, or was not an independent act, is not automatically sufficient to establish legal causation. The test remains whether the accused's acts were a significant contributing cause of death.[49]

33. Under the "reasonable foreseeability" approach, 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 accused's conduct. The specific subsequent attack need not be reasonably foreseeable, nor its precise details. 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 act.[50]

34. Under the "intentional, independent act" approach, the question is whether the accused's acts merely set the scene, allowing other circumstances to (coincidentally) intervene, or whether the accused's act triggered or provoked the intervening party's action. In other words, the issue is whether the intervening act was so connected to the accused's actions that it is not independent. If the intervening act is a direct response or is directly linked to the accused's actions, and does not overwhelm the original actions, the accused cannot be said to be morally innocent of the death. Factors for consideration are whether the intervening actor acted in direct and virtually immediate reaction to what the accused did; whether the intervening actor's actions were responsive and not coincidental conduct; whether the intervening actor's actions were closely connected in time, place, circumstance, nature, and effect with the accused's acts; and, whether the effects of the accused's actions were still subsisting and not spent when the intervening actor acted.[51]

35. In *Maybin*, the accused brothers struck the deceased at a bar. One brother rendered the deceased unconscious, and he lay on a pool table. A bouncer came; when he asked who started the fight, a patron pointed at the pool table. The bouncer immediately struck the unconscious victim forcefully in the head. The victim later died of brain bleeding. Medical evidence could not

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[49] *R. v. Maybin*, 2012 SCC 24 at ¶¶4-5, ¶23, ¶¶28-29; *R. v. H.C.*, 2022 ONCA 409 at ¶41.
[50] *R. v. Maybin*, 2012 SCC 24 at ¶26, ¶30, ¶¶34-38; *R. v. H.C.*, 2022 ONCA 409 at ¶43.
[51] *R. v. Maybin*, 2012 SCC 24 at ¶49, ¶57, ¶59; *R. v. H.C.*, 2022 ONCA 409 at ¶44.

establish whether the death was caused by the blows of the Maybin brothers, the bouncer, or both. The brothers argued the bouncer's conduct was an intervening act that was not reasonably foreseeable. This Court rejected that argument. It noted the brothers initiated a late night assault in a crowded bar, with drinking patrons and security staff nearby. It was open to the trial judge to find it was reasonably foreseeable the fight would escalate and other patrons would join or seek to end the fight, or bouncers would use force to gain control of the situation.[52]

36. Joint or co-principal liability flows whenever two or more individuals come together with an intention to commit an offence, are present during the commission of the offence, and contribute to its commission.[53] The intervening act doctrine does not apply, and the chain of causation is not severed, where the fatal blow is struck by a co-participant in a group attack. As this Court held in *R. v. Maybin*:

> …[T]he 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 s.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 actions of the individuals and the effect of those actions, not on the connection between the actors. [emphasis added][54]

Similarly, this Court recently endorsed the reasons of Chief Justice Fraser of the Alberta Court of Appeal in *R. v. Cabrera,* in which she wrote:

> Common participation is distinct from the question of intervening act. The latter issue only arises on a finding that accused were acting independently of one another: *Magoon, supra* at para 90; *Maybin, supra* at para 55. Where two accused are found to have been acting independently, causation must be determined on the basis of each accused's own actions, which can include rendering the victim vulnerable to the assault of others: *Maybin, supra,* at para 20. By contrast, where the accused are acting together as joint principles within s21(1)(a) of the *Code,* it is unnecessary to determine factual causation for each joint principal: *Magoon, supra* at para. 90.[55]

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[52] *R. v. Maybin*, 2012 SCC 24 at ¶¶8-9, ¶41.
[53] *R. v. Strathdee*, 2021 SCC 40 at ¶4, affirming 2020 ABCA 443.
[54] *R. v. Maybin,* 2012 SCC 24 at ¶55.
[55] *R. v. Cabrera,* 2019 ABCA 184 at ¶¶78-101, aff'd 2019 SCC 56 at ¶1. See also *R. v. Strathdee*, 2020 ABCA 443 at ¶44, aff'd 2021 SCC 40 at ¶4; *R. v. Pickton*, 2010 SCC 32 at ¶61 *per* LeBel J.

Numerous appellate courts across the country have also concluded that the intervening act doctrine does not apply in the context of a group attack.[56]

37. In *Cabrera,* Chief Justice Fraser explained that the intervening act doctrine does not apply to a group attack because when a person participates in an assault on a victim along with others, that person must accept the consequences which flow from this group action. Each assailant is not permitted to offer his or her individual involvement alone, ignoring for liability purposes the effect of their collective actions. Party liability under s.21 of the *Criminal Code* provides that all parties in a group attack are equally morally blameworthy, even if only one of them in the end factually caused the death.[57]

38. Juries are not instructed to engage in a two-part analysis of factual and legal causation. They adjudicate the single issue of whether the accused's acts were a "significant contributing cause". This standard is the same even where it is alleged an intervening act has fractured the chain of causation. Causation issues are case-specific and fact driven. The choice of terminology to put to a jury is discretionary. Different approaches may be helpful in assessing legal causation, depending upon the specific factual context.[58]

39. The law requires properly, not perfectly, instructed juries. Thus, a jury charge is not subjected to minute scrutiny or held to a standard of perfection. In accordance with the functional and contextual approach, alleged errors must be examined in the context of the entire charge and the trial as a whole. Trial judges must be afforded some flexibility in crafting the

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[56] *R. v. Cribbin*, [1994] O.J. No. 477 (C.A.) at ¶35; *R. v. K.K.P.*, 2006 ABCA 299 at ¶¶16-23; *R. v. J.S.R.,* [2008] O.J. No. 5505 (C.A.) at ¶32; *R. v. Miazga*, 2014 BCCA 312 at ¶¶15-25, leave to appeal refused [2014] S.C.C.A. No. 439; *R. v. McRae*, 2016 BCCA 19 at ¶69; *R. v. Magoon*, 2016 ABCA 412 at ¶90, aff'd on other grounds 2018 SCC 14. *Cribbin* was cited with approval in *R. v. Maybin*, 2012 SCC 24 at FN3 on a different issue. *Contra R. v. Modeste*, 2016 ONSC 3955 at ¶16.

[57] *R. v. Cabrera*, 2019 ABCA 184 at ¶¶78-101, aff'd 2019 SCC 56 at ¶1.

[58] *R. v. Maybin,* 2012 SCC 24 at ¶17; *R. v. Nette,* 2001 SCC 78 at ¶46; *R. v. Manasseri*, 2016 ONCA 703 at ¶190 leave to appeal refused [2016] S.C.C.A. No. 513; *R. v. H.C.*, 2022 ONCA 409 at ¶¶38-39.

language of jury instructions, as their role requires them to "decant and simplify" the law and evidence for the jury. The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. A single ambiguous or problematic statement in one part of a charge will not necessarily be an error of law where the charge as a whole equipped the jury with an accurate understanding of the relevant legal issue.[59]

B. The Appellants Were Not Entitled to the Benefit of an 'Intervening Act' Instruction

40. The Respondent submits that the Appellants were not entitled to the benefit of an 'intervening act' instruction. The Appellants did not argue before the jury that the stabber was not a joint participant in the group fight.[60] Triolo, whom the Crown alleged was the stabber, pointed at T.N. as the alternate suspect.[61] There was no air of reality to the suggestion that some unknown and unrelated third party stabbed the deceased. As such, the Appellants must accept the consequences which flowed from their group action.[62] The jury only needed to be told to focus on whether each Appellant's actions were a significant contributing cause of death, rather

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[59] *R. v. Cabrera,* 2019 ABCA 184 at ¶¶18-19, aff'd 2019 SCC 56 at ¶1; *R. v. Jacquard*, [1997] 1 S.C.R. 314 at ¶62; *R. v. Araya*, 2015 SCC 11 at ¶39; *R. v. Goforth*, 2022 SCC 25 at ¶¶20-22; *R. v. Calnen*, 2019 SCC 6 at ¶¶8-9; *R. v. Abdullahi*, 2023 SCC 19 at ¶¶30-43.

[60] Lozada's Closing Address, *Transcript* pp. 2451-2458, p. 2472, pp. 2487-2489 (*AR* at Vol. XX, pp. 111-118, p. 132, pp. 147-149); Ramos' Closing Address, *Transcript* pp. 2517-2518 (*AR* at Vol. XX, pp. 177-178). The Respondent acknowledges that counsel for Ramos submitted to the jury that: "[w]hoever killed [the deceased], acted outside of that group. They acted on their own with a knife when no weapon was ever discussed by anyone in that group, undisputed." However, it is clear from the context that counsel for Ramos's point was that the stabber, by virtue of his use of the knife, acted outside of the others, who were engaged in kicking and punching. Counsel does not appear to have been suggesting that someone unconnected from the Appellants' friend group involved themselves in the ongoing fight and stabbed the deceased. Indeed, it is difficult to imagine why a stranger to the fight would have done so.

[61] Triolo's Closing Address, *Transcript* p. 2305 (*AR* at Vol. XIX, p. 166).

[62] *R. v. Cabrera*, 2019 ABCA 184 at ¶¶78-101, aff'd 2019 SCC 56 at ¶1.

than focusing on which perpetrator inflicted which wound.[63] A significant contributing cause of death would be established by proof that: (1) two or more individuals came together with an intention to commit an offence; (2) they were present during the commission of the offence; and, (3) they contributed to its commission.[64] For liability purposes, it mattered not that "someone brought a knife to a fist fight".[65] Because the stabber was a joint participant in the group attack with the Appellants, there was no intervening act for the Appellants to foresee.

41. That the Appellants cannot escape liability for manslaughter merely because death was ultimately caused by a stab wound is consistent with the question of moral responsibility which underpins the concept of causation.[66] The Appellants punched or kicked Galliah and the deceased about the body, including their heads, knocking them to the ground where the attack continued, and rendering the deceased vulnerable to the stabbing. Manslaughter only requires the objective foreseeability of the risk of bodily harm that is neither trivial nor transitory[67], which was made out on the Appellants' own actions. Party liability therefore bridges any causation gap.[68] By contrast, where someone unconnected from a group attack, such as the bouncer in *Maybin*, becomes involved, then the accused can only be held morally responsible for the intervening party's actions where the general nature of the intervening act and the risk of non-trivial harm are objectively foreseeable; in other words, where those actions flowed reasonably from the conduct of the accused or were directly linked to the accused's actions.[69]

42. The Respondent acknowledges that this argument was not made in the courts below. However, this Court has the jurisdiction to hear any argument which supports the order of the court below, including those arguments not dealt with below.[70] There is no dispute about the

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[63] *R. v. Strathdee*, 2021 SCC 40 at ¶4.
[64] *R. v. Strathdee*, 2021 SCC 40 at ¶4.
[65] *R. v. Cabrera*, 2019 ABCA 184 at ¶¶99-100, aff'd 2019 SCC 56 at ¶1.
[66] *R. v. Maybin*, 2012 SCC 24 at ¶16.
[67] *R. v. Javanmardi*, 2019 SCC 54 at ¶¶25-31; *R. v. Yumnu*, 2010 ONCA 637 at ¶232; aff'd on other grounds 2012 SCC 73.
[68] *R. v. Pickton*, 2010 SCC 32 at ¶61 *per* LeBel J.
[69] *R. v. Maybin*, 2012 SCC 24 at ¶34, ¶38, ¶57.
[70] *R. v. Keegstra*, [1995] 2 S.C.R. 381 at ¶23; *R. v. Downes*, 2023 SCC 6 at ¶56.

evidentiary record on which this legal issue turns.[71] The Respondent is not asking this Court to make new law, but only to apply existing jurisprudence of this Court to the facts of this case.[72] To the extent that any question remains about the state of the law on this issue, this Court will have the benefit of the decisions of numerous appellate courts across the country.[73] Any prejudice to the Appellants can be ameliorated by the opportunity to file a reply factum on this issue. It is in the public interest that this Court's jurisprudence be consistently applied, and that this matter be resolved in accordance with that jurisprudence.[74]

C. The Jury Was Correctly Charged on the Intervening Act Issue

43. In the alternative, if the Appellants were entitled to the benefit of the 'intervening act' instruction, the Respondent submits that that instruction adequately conveyed the relevant law to the jury.

44. The Appellants do not dispute that the trial Judge correctly instructed the jury that the *test* for causation was whether the Appellants were a significant contributing cause of the death. In fact, the trial Judge used that phrase some *ten* times between his charge and his answer to the jury's question. Instead, the Appellants submit that the trial Judge misdirected the jury in two short passages in an otherwise correct 225-page charge when he instructed the jurors on the analytical tool of 'reasonable foreseeability' as set out by this Court in *Maybin*. In particular, the Appellants say that the trial Judge put the analytical tool of 'reasonable foreseeability' too low when he told the jury that what needed to be reasonably foreseeable was the continuation of assaults on the deceased and the risk of nontrivial bodily harm.[75] They contend that the jury would have taken this statement of the law as the test for causation, because the trial Judge told

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[71] *R. v. J.F.*, 2022 SCC 17 at ¶41.
[72] *R. v. Maybin,* 2012 SCC 24 at ¶55; *R. v. Cabrera,* 2019 ABCA 184 at ¶¶78-101, aff'd 2019 SCC 56 at ¶1; *R. v. Strathdee*, 2021 SCC 40 at ¶4.
[73] *R. v. Cribbin*, [1994] O.J. No. 477 (C.A.) at ¶35; *R. v. K.K.P.*, 2006 ABCA 299 at ¶¶16-23; *R. v. J.S.R.,* [2008] O.J. No. 5505 (C.A.) at ¶32; *R. v. Miazga*, 2014 BCCA 312 at ¶¶15-25, leave to appeal refused [2014] S.C.C.A. No. 439; *R. v. McRae*, 2016 BCCA 19 at ¶69; *R. v. Magoon*, 2016 ABCA 412 at ¶90, aff'd on other grounds 2018 SCC 14.
[74] *R. v. Jolivet*, 2000 SCC 29 at ¶46.
[75] Charge to the Jury, *Transcript* p. 2818 (*AR* at Vol. XXIV, p. 107); Instructions on Jury Question, *Transcript*, pp. 2932-2933 (*AR* at Vol. XXIV, pp. 221-222).

the jury that the reasonable foreseeability of the risk of the continuation of the assaults and nontrivial bodily harm "may be enough" to make out causation.

45. As it did at the Court of Appeal for Ontario, the Respondent concedes that when read in isolation, the trial Judge put the analytical tool of reasonable foreseeability too low in the two impugned passages when he told the jury that the continuation of assaults and the risk of nontrivial bodily harm "may be enough". In *Maybin*, this Court found that something more than the risk of further bodily harm must be reasonably foreseeable.[76]

46. On the other hand, the trial Judge also put the reasonable foreseeability question too *high* (to the Appellants' benefit) when, in answering the jury's question, he stated that the jury might ask "whether the *stabbing* was extraordinary, or unusual in the sense that *it* would not have been reasonably foreseeable to an ordinary person, in similar circumstances" (emphasis added).[77] As conceded at ¶90 of the Appellants' factum, and as established by this Court in *Maybin*, the specific act - the stabbing - did not have to be reasonably foreseeable for causation to be established.[78] Instead, the accused must only foresee "the *general* nature of the intervening acts and the accompanying risk of harm" (emphasis added).[79]

47. In the Respondent's submission, as Justice Doherty concluded at the Court of Appeal for Ontario, when read as a whole, the charge made clear to the jury that: (1) a reasonably foreseeable risk of bodily harm was not a standalone test for causation which could, if satisfied, justify a causation finding; and, (2) the stabbing, or some similar escalation in violence during the attack, had to have been reasonably foreseeable.[80]

i. The jury would have understood that a reasonably foreseeable risk of bodily harm was not a standalone test for causation

48. When read as a whole, the causation instruction would have conveyed to the jury that the reasonable foreseeability of bodily harm was not a standalone test for causation. Rather, as

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[76] *R. v. Maybin*, 2012 SCC 24 at ¶¶36-42.
[77] Instructions on Jury Question, *Transcript*, pp. 2931-2932 (*AR* at Vol. XXIV, pp. 220-221).
[78] *R. v. Maybin*, 2012 SCC 24 at ¶¶34-35.
[79] *R. v. Maybin*, 2012 SCC 24 at ¶38.
[80] *R. v. Triolo*, 2023 ONCA 221 at ¶195, ¶208.

Justice Doherty concluded, the trial Judge told the jury that the reasonable foreseeability of non-trivial bodily harm could be enough to establish causation *depending on their assessment of other factors* relevant to legal causation. The trial Judge did not tell the jury that it could or should stop its causation analysis after the reasonable foreseeability inquiry. To the contrary, the trial Judge dealt at some length with the other considerations relevant to causation. He did so by referencing some of the evidence, and putting forward the different interpretations of that evidence available to the jury. For example, he told the jury to consider whether the Appellants' actions significantly contributed to the death by preventing the possibility of aid or escape, or whether the deceased was determined to fight such that the fight did not make him more vulnerable to the stabbing. The trial Judge also told the jury to consider whether or not the stabber would have been able to inflict the fatal wound even absent the Appellants' actions. The trial Judge instructed the jury to look for a clear connection between the acts of the non-stabbers and the death. The jury would have understood that they could convict the Appellants only if satisfied beyond a reasonable doubt that their actions were a significant contributing cause of the death.[81] The trial Judge repeated the significant contributing cause test on no fewer than 10 occasions.[82]

49. Indeed, it does not make sense that the jury would have thought that the standalone test for causation was the reasonable foreseeability of bodily harm, as the trial Judge *also* told the jury to consider whether the specific act of *stabbing* was reasonably foreseeable. The jury's question reveals that it was carefully engaged on the issue of causation. If the jurors had understood that reasonable foreseeability was *the* test for causation, they would have asked the trial Judge *what* had to be reasonably foreseeable – further bodily harm, or the stabbing.

50. Because the jury would not have understood the reasonable foreseeability of bodily harm as the test for causation, Justice Paciocco's concerns expressed at ¶¶158-159 of his Judgment do not materialize. In particular, Justice Paciocco concluded that the trial Judge's "misdirection on the 'reasonable foreseeability' analysis had the potential to distort the jurors' decisions on the

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[81] *R. v. Triolo*, 2023 ONCA 221 at ¶¶195-199.
[82] Charge to the Jury, *Transcript* pp. 2816-2820 (*AR* at Vol. XXIV, pp. 105-109); Instructions on Jury Question, *Transcript*, pp. 2930-2933 (*AR* at Vol. XXIV, pp. 219-222).

application of the other analytical tools" provided to them for determining the causation question.[83] However, because the jurors would have understood that the reasonable foreseeability of bodily harm was only one factor in a panoply of considerations, there is no reason to think the jury would have elevated it to a guide by which to apply the other analytical tools the trial Judge provided.

ii. The jury would have understood that the stabbing, or some similar escalation in violence, had to have been reasonably foreseeable

51. In addition, the jury would also have understood that the stabbing, or some similar escalation in violence, had to have been reasonably foreseeable.[84] The trial Judge brought home to the jury that the question was the Appellants' moral culpability for the *stabbing*, by instructing the jurors to consider:

a. whether the Appellants were a "significant contributing cause to the death" (this phrase being repeated 10 times between the charge and the answer to the jury's question);
b. whether the stabbing was an "extraordinary and highly unusual occurrence, as opposed to being an event that could ordinarily, or naturally flow from the circumstances of this case";
c. whether the stabbing "flowed naturally" from the Appellants' continuing assaults on the deceased and Galliah;
d. whether the stabbing was "directly related to the unlawful acts" of the Appellants;
e. whether it was "morally just and fair to hold the [Appellants] legally responsible for the death;
f. whether the stabbing was "so strong and powerful that it virtually overwhelm[ed] the unlawful acts" of the Appellants; and,
g. whether the stabbing was the intentional act of a third party acting independently from the accused.[85]

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[83] *R. v. Triolo*, 2023 ONCA 221 at ¶¶184-185.
[84] *R. v. Triolo*, 2023 ONCA 221 at ¶¶204-208.
[85] Charge to the Jury, *Transcript* pp. 2816-2820 (*AR* at Vol. XXIV, pp. 105-109); Instructions on Jury Question, *Transcript*, pp. 2930-2933 (*AR* at Vol. XXIV, pp. 219-222).

Set particularly against the backdrop of counsel for Ramos's submission to the jury that "[y]ou're not responsible for every action of your friend if you're out somewhere, are you?"[86], the jury would have understood that the Appellants had to have done *something* to render the stabbing, or a similar escalation in violence, reasonably foreseeable.

D. The Proviso

52. In the further alternative, the Respondent submits that if the Appellants were entitled to the benefit of the 'intervening act' instruction, and if the trial Judge erred in that instruction, nonetheless the curative proviso under s.686(1)(b)(iii)[87] should be applied and the appeal dismissed. This is for two reasons.

53. First, the Court of Appeal for Ontario was unanimous that there was "ample evidence" upon which a jury could have concluded that the Appellants' actions amounted to a significant contributing cause of death.[88] In fact, the evidence against the Appellants was so overwhelming that there is no realistic possibility that a new trial would produce a different verdict.[89] The general nature of the stabbing and the accompanying risk of harm was reasonably foreseeable because:

a. **It was reasonably foreseeable that the fight would escalate**: The Crown urged the jury to find, and the trial Judge accepted on sentencing[90], that Triolo, the Appellants, and their friends, followed the deceased and Galliah to 'settle the score' from the earlier altercation in which the deceased had used considerable force against Triolo, throwing him to the ground, kicking him, and possibly hitting him over the head with a glass bottle. This was not fisticuffs. This was a five-on-two, if not six- or seven-on-two, fight which resulted in 27 blunt force injuries to the deceased, including 10 to his head. In these circumstances, there was no reason for either of the Appellants to think

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[86] Ramos' Closing Address, *Transcript* pp. 2517-2518 (*AR* at Vol. XX, pp. 177-178).
[87] *Criminal Code of Canada*, R.S.C. 1985, c. C-46.
[88] *R. v. Triolo*, 2023 ONCA 221 at ¶182.
[89] *R. v. Trochym*, 2007 SCC 6 at ¶¶81-82; *R. v. Van*, 2009 SCC 22 at ¶¶34-36; *R. v. R.V.*, 2019 SCC 41 at ¶85.
[90] *R. v. Triolo*, 2017 ONSC 4726 at ¶10.

that their co-participants would restrain their use of force to some level they all thought reasonable. The Appellants and their friends were seeking revenge;

b. **It was reasonably foreseeable that someone would use force to end the fight:** The Appellants would have known that the deceased bested Triolo in the first fight. There was evidence that the deceased was angry after the first fight and wanted to continue. When the two groups re-encountered each other on Richmond Street, there was evidence that the deceased swung something in front of him as he walked toward the Appellants and their friends. The Appellants had no reason to think the deceased would simply surrender to their attack. It was therefore reasonably foreseeable that someone would use force to bring the deceased under control and to bring the fight to an end; and,

c. **It was reasonably foreseeable that someone would use a weapon:** There was evidence from which the jury could infer that the deceased hit Triolo over the head with a glass bottle during the first fight at the rave. When the deceased walked back towards the Appellants and their friends when they re-encountered each other on Richmond Street, he was swinging something in his hand. It was reasonably foreseeable that someone would use some kind of weapon during the fight, even if that simply meant picking something up from the street, such as another glass bottle. In this regard, it is worth noting that the trial Judge instructed the jury that the Appellants did not anticipate that anyone in their group "would use a weapon".[91] That instruction was overly favourable to the Appellants. The Crown only conceded that there was "no evidence" that the Appellants "knew or foresaw" that Triolo had a knife or would stab anyone. The Crown did not concede that it was not reasonably foresee*able* that someone would use a knife, or a weapon more generally, in the course of the attack.[92]

54. Second, even if the jury had a reasonable doubt about the Appellants' liability as co-principals, they would have had to go on to consider the Appellants' liability as aiders.[93] While the intervening act doctrine (assuming it applied here) required the Crown to prove that the

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[91] Charge to the Jury, *Transcript* p. 2817 (*AR* at Vol. XXIV, p. 106).
[92] Crown's Closing Address, *Transcript* p. 2251, p. 2258 (*AR* at Vol. XIX, p. 112, p. 119).
[93] Charge to the Jury, *Transcript* pp. 2820-21 (*AR* at Vol. XXIV, pp. 109-110).

general nature of the intervening act *and* the risk of non-trivial bodily harm was objectively foreseeable, liability as an aider flowed simply if a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act being undertaken.[94] The Appellants' actions in kicking and punching the deceased and Galliah and forcing them to the ground clearly carried the objective foreseeability of bodily harm.

PART IV – SUBMISSION ON COSTS

55. The Respondent does not seek any Order for costs.

PART V – ORDER REQUESTED

56. The Respondent requests that the within appeal be dismissed.

PART VI – SEALING ORDERS, PUBLICATION BANS, OR OTHER RESTRICTIONS ON PUBLIC ACCESS

57. 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*.[95] The Respondent has referred to T.N. by his initials in its materials for that reason.

All of which is respectfully submitted this 21st day of August, 2023.



Jennifer Trehearne	Jennifer Epstein	Samuel Greene
Counsel for the Respondent	*Counsel for the Respondent*	*Counsel for the Respondent*

[94] *R. v. Jackson*, [1993] 4 S.C.R. 573 at ¶21.
[95] *Youth Criminal Justice Act*, S.C. 2002, c. 1.

PART VII – TABLE OF AUTHORITIES

Case	**Paragraph Number**
R. v. Abdullahi, 2023 SCC 19	¶39
R. v. Araya, 2015 SCC 11	¶39
R. v. Cabrera, 2019 ABCA 184, affirmed 2019 SCC 56	¶36, ¶37, ¶39, ¶40, ¶42
R. v. Calnen, 2019 SCC 6	¶39
R. v. Cribbin, [1994] O.J. No. 477 (C.A.)	¶36, ¶42
R. v. Downes, 2023 SCC 6	¶42
R. v. Goforth, 2022 SCC 25	¶39
R. v. H.C., 2022 ONCA 409	¶32, ¶33, ¶34, ¶38
R. v. Jackson, [1993] 4 S.C.R. 573	¶54
R. v. Jacquard, [1997] 1 S.C.R. 314	¶39
R. v. Javanmardi, 2019 SCC 54	¶30, ¶41
R. v. J.F., 2022 SCC 17	¶42
R. v. Jolivet, 2000 SCC 29	¶42
R. v. J.S.R., [2008] O.J. No. 5505 (C.A.)	¶36, ¶42
R. v. Keegstra, [1995] 2 S.C.R. 381	¶42
R. v. K.K.P., 2006 ABCA 299	¶36, ¶42
R. v. Magoon, 2016 ABCA 412, affirmed on other grounds 2018 SCC 14	¶36, ¶42
R. v. Manasseri, 2016 ONCA 703, leave to appeal refused [2016] S.C.C.A. No. 513	¶31, ¶38
R. v. Maybin, 2012 SCC 24	¶25, ¶26, ¶31, ¶32, ¶33, ¶34, ¶35, ¶36, ¶38, ¶41, ¶42, ¶45, ¶46
R. v. McRae, 2016 BCCA 19	¶36, ¶42
R. v. Miazga, 2014 BCCA 312, leave to appeal refused [2014] S.C.C.A. No. 439	¶36, ¶42
R. v. Modeste, 2016 ONSC 3955	¶36
R. v. Nette, 2001 SCC 78	¶31, ¶38

R. v. Pickton, 2010 SCC 32	¶36, ¶41
R. v. R.V., 2019 SCC 41	¶53
R. v. Strathdee, 2021 SCC 40, affirming 2020 ABCA 443	¶36, ¶40, ¶42
R. v. Triolo, 2023 ONCA 221	¶3, ¶4, ¶7, ¶11, ¶16, ¶25, ¶26, ¶27, ¶28, ¶47, ¶48, ¶50, ¶51, ¶53
R. v. Triolo, 2017 ONSC 4726	¶9, ¶11, ¶53
R. v. Trochym, 2007 SCC 6	¶53
R. v. Van, 2009 SCC 22	¶53
R. v. Yumnu, 2010 ONCA 637, aff'd 2012 SCC 73	¶30, ¶41

Legislative Authority	**Paragraph Number**
Criminal Code of Canada, R.S.C. 1985, c. C-46, s.21(1) *Code Criminel*, L.R.C. (1985), ch. C-46, s.21(1)	¶2, ¶37
Criminal Code of Canada, R.S.C. 1985, c. C-46, s.686(1)(b)(iii) *Code Criminel*, L.R.C. (1985), ch. C-46, s.686(1)(b)(iii)	¶29, ¶52
Youth Criminal Justice Act, S.C. 2002, c. 1, s.110 *Loi sur le système de justice pénale pour les adolescents*, L.C. 2002, ch. 1, s.110	¶57