Court File No. 40839

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

BETWEEN:

HIS MAJESTY THE KING

Appellant/
Respondent by Cross-Appeal
(Respondent)

– and –

JENNIFER PAN, DAVID MYLVAGANAM,
DANIEL CHI-KWONG WONG and LENFORD CRAWFORD

Respondents/
Appellants by Cross-Appeal
(Appellants)

FACTUM OF THE APPELLANT/RESPONDENT BY CROSS-APPEAL, HIS MAJESTY THE KING

(Pursuant to Rules 35(1) and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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Table of Contents

Page

PART I – OVERVIEW AND STATEMENT OF POSITION 1

A. Overview 1

B. Statement of facts 3

i. June-July 2010: Pan tries to get her plan off the ground. 3

ii. August 2010: Pan solicits the help of Wong and Crawford. 5

iii. October-November 2010: Pan's plan moves forward. 5

iv. Wong's knowledge about Pan's plan to kill both parents. 8

v. The call with Montemayor the night of the shootings 9

vi. The shooting of Pan's parents. 9

vii. Pan's evidence about her involvement in the events of November 8. 12

PART II – STATEMENT OF ISSUES 13

A. The Court of Appeal for Ontario failed to apply the correct air of reality test to the alternative theory of liability of a plan to kill only Mr. Pan. 13

B. The Court of Appeal for Ontario failed to afford some deference to the trial judge's determination of the air of reality to the alternative route to liability 13

C. In the alternative, the Court of Appeal for Ontario failed to apply the *curative proviso* 13

PART III – STATEMENT OF ARGUMENT 14

A. The Court of Appeal for Ontario failed to apply the correct air of reality test to the alternative theory of liability of a plan to kill only Mr. Pan. 14

i. The governing legal principles. 14

1) The air of reality test is a qualitative assessment that permits a limited weighing of the evidence by the trial judge to protect against speculation. 14

2) The inconsistency in the decisions of the Court of Appeal for Ontario concerning the air of reality test. 19

ii. The Court of Appeal for Ontario erred in its treatment of the air of reality test. 22

1) The Court of Appeal failed to do a contextual assessment. 22

2) The Court of Appeal for Ontario conflated reasonable doubt and air of reality. 24

3) A third route to liability added complexity and risked jury confusion. 26

4) A plan to kill only Mr. Pan was not realistic. 27

B. The Court of Appeal for Ontario erred by giving no deference to the trial judge's determination of air of reality. 30

i. The conflicting decisions of the Supreme Court of Canada. 30
ii. The conflicting decisions of the Court of Appeal for Ontario. 34
iii. The Court of Appeal for Ontario failed to apply the correct standard of review. 35
C. In the alternative, the *curative proviso* should be applied. 35
i. The legal principles. 36
ii. The error by the Court of Appeal for Ontario 38
iii. The overwhelming evidence of a plan to kill both parents. 38
iv. The effect of the presumption the jury followed the instructions it was given. 38
PART IV – SUBMISSIONS ON COSTS 40
PART V – ORDER 40
PART VI – SUBMISSIONS ON PUBLICATION 40
PART VII – AUTHORITIES i
A. Caselaw i
B. Secondary Sources vi
C. Statutes, Regulations, Rules, etc. vi
PART VII – STATUTES, REGULATIONS, ETC. vii

PART I – OVERVIEW AND STATEMENT OF POSITION

A. Overview

1. At 10:14 p.m. on November 8, 2010, three men entered the Pan home in Markham, Ontario. In less than 20 minutes Jennifer Pan's parents were held at gunpoint together on the family couch before being marched down to their basement together, ordered to put blankets on their heads and shot in the head execution-style. Bich-Ha Pan ("Mrs. Pan") was shot three times, in the back of her head, the back of her neck, and her shoulder, and died of her injuries at the scene. Miraculously Hann Pan ("Mr. Pan") survived penetrating wounds to the inside of his right eye and through his shoulder, and puncture wounds on his temporal bone and forehead, 13 days in hospital where he was put into a medically induced coma, and surgery. Mr. Pan became the only eyewitness other than Jennifer Pan ("Pan") who was at home, upstairs, when her parents were shot. She was found by police tied to a banister with a shoelace but not harmed. She quickly became a suspect in the police investigation, was interviewed immediately, and was arrested in the middle of her third police statement on November 22, 2010.

2. The jury was instructed on the only two scenarios for which there was an air of reality: 1) a contract murder where Pan hired people to kill her parents; or 2) a home invasion that went horribly wrong which Pan was not a part of. All the Respondents were charged as parties as the Crown conceded it could not prove the identity of the shooter. Daniel Wong ("Wong") and Lenford Crawford ("Crawford" aka "Homeboy") were alleged to be planners and were not at the scene. David Mylvaganam ("Mylvaganam") had conceded he was at the scene but denied he went into the house or knew about a murder plan and conceded he was liable for manslaughter. Pan's counsel had asked that an alternative murder plan also be put: a plan to kill only Mr. Pan. The trial judge declined to do so as he found there was no air of reality to this plan.

3. Pan was the only accused who testified at trial. At the time of the offences, she was 24 years old and lived with her parents. She testified that she had no plan to have anyone killed that night and she expressly denied she planned to have her father killed. Pan portrayed herself as a victim that evening who had no control over the events and was unable to protect her parents. Her description of the events is fundamentally inconsistent with Pan being the directing mind of plan to have only her father killed and not her mother. On Pan's own evidence, Pan took no real steps to protect her mother, which one would have expected if killing only her father was her

original plan. Pan also said nothing about a plan to kill her father in her three prior police statements. The first time she mentioned a plan to kill her father was during her trial testimony when she said she had planned to kill him over the summer, but that plan ended and was never revived. She said she then planned to have herself killed which she then cancelled. She testified that no one was supposed to die on November 8. In contrast, there was extensive evidence of Pan telling two friends and Wong that she wanted both parents dead and describing exactly how it would happen.

4. Pan had a motive to kill both parents and far less motive kill only her father: 1) she wanted out from under what she perceived to be oppressive family rules and expectations imposed by both parents; 2) she wanted to be with her boyfriend Wong whom her parents did not approve of; and 3) she had no independent means of support and stood to gain a sizeable inheritance if both of her parents died. Wong's motive was to maintain his relationship with Pan and gain financially because Pan promised to take care of him. Crawford would help his friend Wong and make a little money. For Mylvaganam and Eric Carty ("Carty") this was a contract murder and they were hired guns.

5. The Crown is appealing the decision of the Court of Appeal for Ontario[1] overturning the trial judge's decision[2] that there was no air of reality to a third plan (a plan to kill only Mr. Pan) and declining to apply the *curative proviso* notwithstanding the overwhelming Crown case. The court sent back for a new trial the first-degree murder charge (for the death of Mrs. Pan) and upheld the attempt murder conviction (for the shooting of Mr. Pan.) It is the Crown's position that the Court of Appeal for Ontario erred by applying the wrong air of reality test, failing to show some deference to the trial judge's assessment on their review, and in the alternative erred by failing to apply the *curative proviso*.

6. This was a long and complicated eight-month jury trial that started with five accused (the

[1] ***Appeal Record, Part 1, Vol.1*** - Decision of the Ontario Court of Appeal, ¶46-76; *R. v. Pan*, 2023 ONCA 362, ¶46-76.
[2] ***Appeal Book, Vol. 13,*** Ex.AAA – email Nov 16, 2014, with ruling on air of reality.

four Respondents plus Carty) and ended with four accused after Carty was severed.[3] It took approximately four years to investigate, prepare and complete the trial and consumed significant judicial, Crown, defence and police resources. In addition to the trial proper, which involved voluminous and complex cell phone evidence, there were numerous pre-trial motions. The pre-charge conference took six days, while the jury charge took four days to deliver. The case was completed on January 23, 2015, with the sentencing of the four Respondents, who were all convicted of the first-degree murder of Mrs. Pan and the attempted murder of Mr. Pan.

B. Statement of facts

7. The Crown led a vast body of evidence to prove that the Respondents were involved in the events of November 8, much of which is summarised in the appeal decision. The summary that follows focuses solely on the evidence relevant to the Appellant's appeal: what murder plan on November 8 had an air of reality?

i. June-July 2010: Pan tries to get her plan off the ground.

8. It was the Crown's theory that the spring/summer of 2010 marked the starting point for Pan's plan to murder her parents. Pan reached out to her friend Andrew Montemayor for help. Montemayor put Pan in touch with his roommate, Ricardo Duncan, but Duncan refused to be involved in a murder plot.[4]

9. Montemayor testified that, in the summer of 2010, Pan was "complaining about her ***parents.***" She said her ***parents*** didn't approve of her having a Filipino boyfriend, her father wouldn't let her go out, she felt she was under "house arrest" and she felt "resented by her ***parents.***" Pan asked him to "help her get rid of the stress," which he interpreted as wanting "to ***kill her parents*** because that was the stress she was feeling." In cross-examination, Montemayor agreed that he understood "get rid of the stress" to mean that Pan wanted to kill her father and not her mother. However, he clarified in re-examination that he was not sure whether he ever heard Pan talk about only wanting one parent dead, stating: "I just remember the ***parents***-wise.

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[3] Carty was severed part way through the trial when his counsel became ill. In 2015 Carty pleaded guilty to conspiracy to commit murder and was sentenced to 18 years' incarceration and died in custody. *R. v. Carty*, 2015 ONSC 8144.

[4] ***Transcript, Vol.62****,* p.128-33.

I'm not sure if it's one or two." He put Pan in touch with Duncan, who he thought could help.[5]

10. Duncan testified that he met Pan through Montemayor in about June/July 2010. Pan told Duncan she was "having some problems with her ***parents***." She said that "***they*** piss[ed] her off" by not allowing her to talk to anyone, and "***they*** basically locked her in […] the house" and didn't allow her to go anywhere. When Duncan suggested that she move out, Pan said "she tried moving out already but her ***parents*** found her and brought her back." Once or twice, Pan told Duncan that she "wished her ***parents dead***," but he thought she was just venting. She also talked about killing herself because she was "going through a lot of stress with her ***parents***." About two months after they met, Pan called Duncan and said, "she wanted [Duncan] to like ***kill her parents.***" She was "fuming mad" and said something like "come and ***kill my parents.***" In cross-examination, Duncan said Pan had referred to wanting "Dad" killed, but later he disagreed with the suggestion that Pan had talked to him specifically about killing her father. He also said that Pan wanted him to "kill her parent or something like that, she never specify who." In re-examination, he confirmed the accuracy of his police statement where he said "[s]he wants me to ***take the life of her parents,***" "[s]he wants me to ***kill them***." Duncan was offended by Pan's request and cut off contact after that call. July 8, 2010 was the last contact between their phones.[6]

11. Pan testified and claimed, for the first time, that she made a plan in the summer of 2010 to have her father shot at work. She claimed she approached Duncan through Montemayor to have Duncan go to her father's workplace and shoot him in the parking lot when no one was around. She said the plan ended when Duncan ripped her off by taking her money and ignoring her calls. Pan maintained she never tried to revive that plan.[7]

12. Pan testified that during this time she had a better relationship with her mother than her father, but she also described failing to meet the expectations or the strict rules of both parents. In her three police statements Pan never said she ever planned to kill her father nor even focused on him as the source of her unhappiness. In her statements she spoke predominantly about the

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[5] ***Transcript, Vol.29****,* p.21, 27-30, 41-42, 106-07, 114-15, 224-25, 228, 242, 302-04, 352, 355-56.
[6]***Transcript, Vol.30****,* p.10-12, 17, 19-28, 31-34, 66-75, 83-84, 99-103, 123-29, 148-49, 157-64, 170-71, 173-74; ***Appeal Book, Vol.3****,* Ex.98B, p.1087-90.
[7] ***Transcript, Vol.48****,* p.15-16, 87-96; ***Vol.50***, p.11-13, 21-22, 129-34, 179, 226-28, 255-62, 314-17, 319-22; ***Vol.51****,* p.59.

expectations of her "parents" and the rules and restrictions "they" imposed. She agreed that her parents held the same views but stated that this was because her mother had to have the same views as her father for cultural reasons. Her brother Felix Pan testified about how his mom was the "boss" of the family although his father wanted to be seen as the head of the family. Both parents yelled at Pan when they got upset. Sometimes her mom would protect her from her dad and sometimes her dad would protect her from her mom. Others similarly described the Pans having a fairly unified position on matters of discipline and family expectations. Both parents didn't like Wong and thought Pan should stay away from him.[8]

ii. August 2010: Pan solicits the help of Wong and Crawford.

13. On August 18, 2010, Pan's phone was in contact with Crawford's phone for the first time.[9] She did not previously know Crawford. The Crown's theory was that Wong put Pan in touch with Crawford, who acted as a "middleman." (Neither Wong nor Crawford were alleged to have been at the Pan home on the night of the offences.) Crawford recruited his long-time friend Carty to execute the plan to kill Pan's parents. Carty, in turn, recruited Mylvaganam. Ultimately, Carty, Mylvaganam, and at least one other man attended the Pan home to carry out the plan.[10] Mylvaganam's counsel conceded his client was at the Pan home, but he denied going inside. [11]

14. Pan testified and denied being a part of a plan to kill either or both of her parents in the fall of 2010. She had formed a new plan in August: to have herself killed. She contacted someone she knew only as "Homeboy" to carry out the suicide plan. She communicated with Homeboy at Crawford's phone number. She said they agreed on a fee of $10,000.[12]

iii. October-November 2010: Pan's plan moves forward.

15. The Crown's case was based heavily on cell phone records, including phone calls, text

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[8] ***Transcript, Vol.6***, p.107-110, 135, 137-138, 146-149; ***Vol.7***, p.11-17, 28-29, 32-33, 35-39, 43, 56-59; ***Vol.8***, p. 56; ***Vol.16,*** p.154-158, 161-163, 184-187; 242-247, ***Vol.17***, p.21; ***Vol.18***, p.71, ***Vol.19***, p. 8-18, 46; ***Vol.50,*** p. 75-85, 90-91, 310-313; ***Appeal Bool, Vol.9***, Ex.H, p.4046-50, 4052, 4061-4068, 4083, 4090-93, 4096, 4214-15, 4253-54.
[9] ***Appeal Book, Vol.2,*** Ex.69B, p.427-28; ***Vol.3,*** p.964-65.
[10] ***Transcript, Vol.65,*** p.162-68.
[11] ***Transcript, Vol.65***, p.50.
[12] ***Transcript, Vol.48,*** p.16-18, 111-21, 137-39; ***Vol.50,*** p.136-41, 153-54, 185, 228, 276-77, 317-19, 326, 338-44; ***Vol.51,*** p.20, 23-25, 32-44.

messages, and cell tower location data. The following two text message exchanges from the fall of 2010 were particularly important in establishing who the alleged murder plan targeted:

a. On October 31, after a call with Crawford, Carty exchanged text messages with Mylvaganam. An expert in codified language and urban street language testified about their meaning. Notably, the expert opined that the conversation was not about a drug transaction. The jury could infer that Carty was talking about a contract murder worth $10,000: $5,000 for each murder. Mylvaganam would get all $10,000 if he killed both.

Sender	**Text Message**[13] *(emphasis added)*	**Expert Evidence**[14]
Carty	***Ten stacks***	$10,000
Mylvaganam	Ya	
Mylvaganam	Wen u ready k	When you are ready ok
Carty	Ya ***5each ting***	Yes 5000 each thing
Mylvaganam	*Me u*	Me and you
Carty	***Ya bt u all da way and all ten 4u***	Yes, but if it's you all the way then all ten for you
Mylvaganam	Easy thing	Easy job
Carty	Awo	Agree
Mylvaganam	De ya a bill link	There's a money connection/source

b. On November 2, Pan and Wong had a conversation that was consistent with a plan to kill both parents and inconsistent with a suicide plan or a plan to kill only Mr. Pan. The conversation started with Wong apologetically saying that he had feelings for another woman. Immediately after this revelation, Pan and Wong exchanged the following messages:

[13] ***Appeal Book, Vol.2,*** Ex.85B, p.684.
[14] ***Transcript, Vol.41,*** p.92-93, 335-38, 341-43; ***Vol.43,*** p.141-43, 153, 227-28, 234-41; ***Appeal Book, Vol.6,*** Ex.178, p.2732-33.

Sender	Message[15] *(emphasis added)*
Pan	So you feel for her what I feel for you. ***Then call it off with Homeboy***
Wong	I enjoy chilling with her she's one of my closest friends and now I can't even be that bcoz of the ppl
Wong	***What do u mean I thought u said u wanted this for u***
Pan	***I do. But if I have no where to go.***
Wong	***Call It off with Homeboy? U said u wanted this with or without me****.*

On the Crown's theory, part of Pan's motive for killing her parents was to be with Wong. Learning she had no future with Wong made her want to "call off" the murder plan. Killing both of her parents would have left Pan with "nowhere to go" if she no longer had a relationship with Wong, while killing only her father would have left her mother alive and somewhere for Pan to go. Pan gave two different explanations for the text conversation with Wong: (1) she was telling him to cancel the plan with Homeboy; and (2) she was telling him that she would no longer pass along his drug trade-related messages.[16]

16. Pan testified that she changed her mind about wanting to die in late September/early October. Her life was improving—she was accepted to college, she felt included in her family, she believed she could reconcile with her father, and she felt she was "regaining [her] trust with [her] parents." Pan claimed that all her communications with Homeboy in November of 2010 were about cancelling her suicide plan. Pan gave two different explanations for a text she received from Homeboy on the day of the shootings.

a. The cell records show a text sent at 10:05 a.m. from Crawford to Pan: "To after work ok will be game time." Immediately Pan called Crawford back and spoke for over four minutes. At trial, Pan said the text meant "Homeboy" wanted to pick up his cancellation fee that day. She testified that during their call, she told him she did not have the cancellation fee so that day could not be "game time."

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[15] ***Appeal Book, Vol.4****,* Ex.139B, p.1477-79.
[16] ***Transcript, Vol.48,*** p.163-64, 173-80; ***Vol.50,*** p.122-29; ***Vol.51,*** p.85-94.

b. In her November 22 statement, Pan said she got a text message that evening from Homeboy saying "game on" which meant to her that the attack on her was going to happen. She maintained it was to be an attack on her and not her parents. There is no record of a "game on" text.[17]

iv. Wong's knowledge about Pan's plan to kill both parents.

17. In his March 2011 police statement, Wong said that Pan had talked to him in the past about wanting to have her parents killed.[18] She told him that she had "evil thoughts" and asked if he knew anyone who could "***take care of them***," "***they*** have to be taken out of the picture." Wong never actually heard Pan say, "I want you to help me kill my parents"—it was something like: "can you ***off them*** or, or something like that, or do you know anyone who would ***off them.***" Initially Wong told the police that he refused to help Pan, but ultimately admitted he told Pan she should call Crawford.[19]

18. Pan testified and denied asking Wong to help her get rid of her parents.[20] She testified that she told Homeboy that, if Wong ever asked about her purported suicide plan, Wong should be told that it was a plan to kill her father so that Wong wouldn't try to intervene to save her. However, there was no evidence that Wong was ever told that the plan targeted only Mr. Pan. Pan said she never spoke to Wong directly about who was the target of the fall plan and she did

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[17] ***Transcript, Vol.48,*** p.17-18, 123-28, 135-37, 145-49, 158-64, 171, 195-200, 214-23, 229-30, 240-41; ***Vol.50,*** p.135-41, 162-77, 180-81, 234-41, 285-88; ***Vol.51,*** p.60-64, 72-73, 76-84, 95-99, 108, 117-125; ***Vol.64***, p.125-126; ***Appeal Book, Vol.2,*** Ex.69B, p.430; ***Vol.4,*** Ex.139B, p.1505; ***Vol.9,*** Ex.H, p.4225-27, 4242-43.

[18] This evidence was directly admissible against Wong and relevant to the first step of the co-conspirators' exception/*Carter* analysis (or common unlawful design) for all the accused: was there a joint plan and what was its object? *R. v. Cargioli*, 2023 ONCA 612, ¶71-79; *R. v. Puddicombe*, 2013 ONCA 506, ¶105-114; leave to appeal refused, [2013] S.C.C.A. No. 496; *R. v. Carter*, [1982] 1 S.C.R. 938, p. 947-948; *R. v. Barrow*, [1987] 2 SCR 694, ¶73-77; *R. v. Dawkins*, 2021 ONCA 113, ¶40; *R. v. Bogiatzis*, 2010 ONCA 902, ¶25; *R. v Yumnu*, 2010 ONCA 637, ¶338; aff'd 2012 SCC 73.

[19] ***Appeal Book, Vol.10,*** Ex.Q, p.4319-20, 4325, 4346-47, 4351-56, 4363-64, 4367, 4586-4591, 4598, 4601, 4653, 4661-65, 4671-78, 4682-4701, 4754-55, 4758, 4780-83, 4787-88, 4815, 4826-43, 4852-57, 4862-64, 4921-22, 4928-31, 4935-36, 4966-70, 4986-96, 5008.

[20] ***Transcript, Vol.51***, p.5.

not know whether Homeboy ever spoke to Wong about the plan.[21] In his police statements, Wong denied knowing that Pan and Crawford had been in contact and denied knowing the details of any plan.[22] In his police statements, Crawford denied any involvement and did not say he told Wong anything about a plan.[23]

v. The call with Montemayor the night of the shootings.

19. Less than an hour before her parents were shot, Pan had a 20-minute phone call with Montemayor. He testified that Pan told him that she was going ahead with her plan to have her parents killed. She was complaining about the "house arrest" and "about her ***parents***;" "she was just mad at ***them*** and really pissed off at ***them.***" She said that she was going to execute her plan that night. Two or three of "her people" or "her friends" were going to come in through the front door, make it look like a robbery, "and ***shoot her parents.***" Pan would be tied up to make it look like she didn't do anything.[24]

20. In her November 22 police statement, Pan claimed that the call with Montemayor was just casual conversation.[25] At trial, Pan testified that she called Montemayor that night to try to get her money back from Duncan so that she could pay the cancellation fee to Homeboy for the suicide plan. She denied telling Montemayor that she was going to carry out her plan that night because, in her words: "[t]here was no plan to tell him about."[26]

vi. The shooting of Pan's parents.

21. The manner of the shootings was consistent with a plan to murder both of Pan's parents and inconsistent with a plan to kill only Mr. Pan. They were shot in the same way, in the same place, at the same time. The shootings took place at a time when Pan knew both of her parents would be home. Mr. Pan's regular shift at work was 7 a.m. to 3:30 p.m., and he usually went to

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[21] ***Transcript, Vol.48****,* p.17, 119, 136, 177-80, 196, 240-41; ***Vol.50,*** p.123-26, 194-95; ***Vol.51,*** p.36-37, 42, 49-50, 58-64, 70-71, 84, 90-91.
[22] ***Appeal Book, Vol.10****,* Ex.Q, p.4723, 4773-4783, 4791-93, 4808-10, 4814, 4818, 4825, 4839-40, 4844-59, 4864, 4869-73, 4876, 4940-43, 4954-65, 4983-84, 4996-99, 5004-05, 5010.
[23] ***Appeal Book, Vol.11****,* Ex.AA, p.5123-5588.
[24] ***Transcript, Vol.29****,* p.31-33, 38-47, 54-55, 60-61, 228-32, 237, 256, 262, 301, 305, 307, 326-28, 342-45, 351, 353-55.
[25] ***Appeal Book, Vol.9****,* Ex.H, p.4134-36.
[26] ***Transcript, Vol.50***, p.11, 296; ***Vol.51***, p.148-50.

sleep around 8:30 p.m.[27] On November 8, as on other Monday nights, Mrs. Pan was out of the house between 7-9:30 p.m. for her regular line dancing class.[28] The intruders entered the Pan home at 10:14 p.m. after she had returned home, changed into pyjamas and was watching t.v.

22. There was evidence that, on November 8, Mylvaganam and Carty were keeping Pan informed about their estimated time of arrival and confirming the details of what was about to happen. Cell tower data established that Mylvaganam's phone traveled from Rexdale to the area of the Pans' home in Markham then back again at times that lined up with the shootings.[29] The cell phone data also placed Carty in the car with Mylvaganam en route to Markham.[30] At 9:35 p.m.—five minutes after Pan would have expected her mother to come home—Mylvaganam's phone contacted Pan's phone for nearly two minutes using cell towers en route from Rexdale to Markham.[31] At 10:05 p.m., Mylvaganam's phone contacted Pan's phone for nearly three-and-a-half minutes using cell towers close to the Pan home.[32] Pan denied that in those calls Mylvaganam told her they were en route, asked if her mother was home yet, and confirmed that everything was ready to go ahead.[33] She said the calls were from an unknown person who was asking whether Homeboy's cancellation fee was ready.[34]

23. There was evidence that Pan unlocked the front door so that the assailants could get inside. Surveillance footage from a neighbour's house showed the intruders entering the Pan home through the front door.[35] The Pans typically kept their front door locked, but there were no signs of forced entry.[36] In her November 22 police statement, Pan admitted she made sure the

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[27] ***Transcript, Vol.8***, p.63-64; ***Vol.14***, p.21.
[28] ***Transcript, Vol.8****,* p.63, 78; ***Vol.51****,* p.193-94; ***Appeal Book, Vol.9****,* Ex.H, p.3723, 3730-31, 3786, 3824-25, 3951.
[29] ***Appeal Book, Vol.2,*** Ex.85B, p.635-36; ***Transcript, Vol.23,*** p.184-87.
[30] ***Appeal Book, Vol.2,*** Ex.85B, p.635-36; ***Transcript, Vol.64,*** p.118-19; ***Vol.65,*** p.57-61.
[31] ***Appeal Book, Vol.2,*** Ex.85B, p.619-620; ***Transcript, Vol.23,*** p.61-65,166-67.
[32] ***Appeal Book, Vol.2,*** Ex.85B, p.619-20; ***Transcript, Vol.23,*** p.61-65, 186-87.
[33] ***Transcript, Vol.51***, p.193-194.
[34] ***Transcript, Vol.48,*** p.241-42; ***Vol.51****,* p.184-88.
[35] ***Supplementary Appeal Book, Vol.1****,* Ex.38, p.33.
[36] ***Transcript, Vol.6****,* p.127-28; ***Vol.8****,* p.66; ***Vol.51,*** p.190; ***Vol.15****,* p.73-74; ***Appeal Book, Vol.9****,* Ex.H, p.3908, 4149-52.

front door was unlocked for the assailants (although she resiled from this admission at trial).[37]

24. Mr. Pan described how he was awoken by a man with a gun demanding money. He was told to go downstairs, where he saw his wife being held at gunpoint by another male. At one point, Mr. Pan saw his daughter being led around downstairs, unrestrained, with a third male. After demanding money again, one of the assailants pistol-whipped Mr. Pan. Pan's parents were then marched down to the basement together and each were shot in the head.[38] Mrs. Pan was pronounced dead at the scene.[39] Miraculously, despite being shot in the face, Mr. Pan survived.[40] When police arrived, Pan was tied to the upstairs banister with a shoelace. She was unharmed.[41]

25. Pan claimed in her statement to police and in her testimony that she was yelling and calling out to her mother, and that she begged the intruder she was with to be with her mother. Mr. Pan testified that he did not hear any sounds from upstairs or hear his daughter call out as he and his wife were taken down to the basement together.[42] Before he and his wife were taken to the basement, he observed Pan standing with one of the intruders on the main floor and talking "softly," "like a friend."[43] When Mrs. Pan begged the assailants not to hurt their daughter, one of the men responded "[d]on't worry. Your daughter is very nice so I don't hurt her."[44]

26. The intruders failed to fully cover their faces, suggesting that the plan was to leave no (uninvolved) witnesses behind. Mr. Pan testified that none of the three men wore coverings on their faces, though one did, at times, attempt to cover his face with a cloth he held in his hand.[45] Pan said that one of the intruders was wearing a bandana on his face.[46]

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[37] ***Appeal Book, Vol.9,*** Ex.H, p.4236-41; ***Transcript, Vol.48,*** p.303; ***Vol.50,*** p.27-29; ***Vol.51,*** p.191-92.
[38] ***Transcript, Vol.8,*** p.67-68, 72-83; ***Vol.9,*** p.2-11; ***Vol.18,*** p.45-56; ***Vol.15,*** p.10-19.
[39] ***Transcript, Vol.16***, p.22.
[40] ***Transcript, Vol.18***, p.45-56.
[41] ***Transcript, Vol.15***, p.72-73; ***Vol. 16,*** p.55; ***Supplementary Appeal Book, Vol.1***, Ex. 40A, p.142-45.
[42] ***Appeal Book, Vol.9,*** Ex.H, p.3894, 3898; ***Transcript, Vol.48,*** p.252; ***Vol.9***, p.7.
[43] ***Transcript, Vol.8***, p.73; ***Vol.9,*** p.13-14.
[44] ***Transcript, Vol.9***, p.6-7.
[45] ***Transcript, Vol.9***, p.23-25, 30; ***Vol 12***, pp.72-73.
[46] ***Appeal Book, Vol.9,*** Ex.H, p.3725-26, 3748-49, 4155; ***Transcript, Vol.48,*** p.280-81.

27. Valuable items in the home—including two luxury vehicles, a purse containing $240 cash, a wallet containing $60 cash, and various electronics—were not taken.[47]

vii. Pan's evidence about her involvement in the events of November 8.

28. Pan gave three statements to the police. In her first and second statements, Pan denied involvement in the events of November 8.[48] In her third and final statement, Pan admitted she was involved in what happened on November 8 but maintained that her parents were not supposed to be harmed; she claimed that she herself was supposed to be killed. She told the police that she set up a staged home invasion with someone she knew as "Homeboy." She knew the assailants would be coming in through the front door and she made sure it was unlocked for them.[49]

29. At trial, Pan testified that she was not involved at all in what happened on November 8, and she did not make a plan to kill either or both of her parents that night. She testified that she had initiated a plan to have herself killed, but she had taken steps to cancel that plan. Her position at trial was that no one was supposed to be killed on November 8.[50] She said that it was "ridiculous" to suggest a text message she sent to "Homeboy" on November 3, in response to his message asking "when is the best time for me to take care of my stuff?" and to which she replied "today is a no go dinner plans out so won't be home in time," was about a plan to kill her dad. She assumed it was referring to her going out to pick up some money to pay a cancellation fee.[51]

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[47] ***Transcript, Vol.64,*** p.344-45.
[48] ***Appeal Book, Vol.9****,* Ex.H, p.3987, 3991-92.
[49] ***Appeal Book, Vol.9****,* Ex.H, p.4194-4266.
[50] ***Transcript, Vol.48****,* p.15-18, 241-42; ***Vol.50****,* p.24-25, 27-28, 32-33, 42-43, 156, 184-86, 194, 275; ***Vol.51****,* p.124, 142, 148-50.
[51] ***Transcript, Vol.48***, p.209-212.

PART II – STATEMENT OF ISSUES

A. The Court of Appeal for Ontario failed to apply the correct air of reality test to the alternative theory of liability of a plan to kill only Mr. Pan.

The Court of Appeal for Ontario erred by failing to do a contextual assessment of all the evidence in the case when it determined an alternative murder plan to kill only Mr. Pan had an air of reality and by holding that the trial judged erred by not putting it to the jury. The court only considered whether there was "some" evidence in isolation, rather than whether there was "sufficient" evidence of a plausible alternate plan in the context of the entire case. An "air of reality" or "realistic possibility" is something more than a mere possibility. In this case there was no air of reality to an alternate murder plan.

B. The Court of Appeal for Ontario failed to afford some deference to the trial judge's determination of the air of reality to the alternative route to liability.

The Court of Appeal for Ontario erred by affording no deference to the trial judge's air of reality assessment. While the question of whether there is an air of reality to a route to liability is a question of law that is reviewed on a standard of correctness, there can and should be some deference to the trial judge's assessment of the evidence and the circumstances of the case, and the judge's decision whether to provide a contingent jury instruction on an alternative route to liability. Deference recognizes the trial judge's advantages in doing a contextual analysis of the evidence and in assessing the available reasonable inferences, the nuances of a case, the parties' positions, and whether an alternative theory of liability is realistic. This is consistent with this Court's direction to trial judges to focus their jury instructions, educate and not complicate.

C. In the alternative, the Court of Appeal for Ontario failed to apply the *curative proviso*.

In the alternative, if the Court of Appeal for Ontario was correct that there is no weighing of the evidence to determine the air of reality of an alternate route to liability, because a trial judge must put any theory of liability "no matter how incredible or unreliable," then the court erred by holding that the *curative proviso* is not available as a matter of principle when a realistic route has not been put to the jury. If there is no limited weighing in the "air of reality" test, then there can be weighing in applying the *curative proviso* to determine what verdicts are reasonably possible. It is not incompatible to have overwhelming evidence of one theory of liability and "some" evidence of another theory that is marginal at best.

PART III – STATEMENT OF ARGUMENT

A. The Court of Appeal for Ontario failed to apply the correct air of reality test to the alternative theory of liability of a plan to kill only Mr. Pan.

30. The Court of Appeal for Ontario erred by failing to do a contextual assessment of all the evidence in the case when it determined an alternative murder plan to kill only Mr. Pan had an air of reality and by holding that the trial judge erred by not putting it to the jury. The court only considered whether there was "some" evidence in isolation, rather than whether there was "sufficient" evidence of a plausible alternate plan in the context of the entire case. An "air of reality" or "realistic possibility" is something more than a mere possibility. In this case there was no air of reality to an alternate murder plan.

i. The governing legal principles.

1) The air of reality test is a qualitative assessment that permits a limited weighing of the evidence by the trial judge to protect against speculation.

31. The history of the development of the air of reality test can be traced back to 1912 and the *Eberts*[52] decision, which dealt with whether to leave manslaughter as an alternative verdict in a murder case, and in which the court rejected "mere surmise and conjecture" as a basis. The test continued to evolve from being a "sense of reality" to the now familiar "air of reality," or the "realistic possibility" standard as the Court of Appeal for Ontario has described it. In 1993 in *Aalders* and *Osolin*, and in 1995 in *Park,* this Court considered the question of the "air of reality" (or the French term: "vraisemblance") of an included offence (*Aalders*) and a defence (*Osolin* and *Park*), and revisited the question in 2002 for a defence in *Cinous.* [53]

32. *Cinous* explained that the "whole edifice" of the air of reality test is to prevent speculation and confusion and ensure the jury is not diverted from its task by asking the jury to consider defences that the evidence cannot reasonably support. The trial judge acts as a gatekeeper to ensure a jury renders a verdict founded on admissible evidence and theories of liability that are "realistic" rather than speculative.

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[52] *R. v. Eberts*, (1912), 47 S.C.R. 1.

[53] Silver, Lisa A., "Poof into a Puff of Air — Where Have all the Defences Gone? The Air of Reality Test and the Defences of Justifications and Excuses," 2014 61 C.L.Q. 531; *R. v. Aalders* [1993] 2 S.C.R. 482; *R. v. Osolin,* [1993] SCR 595; *R. v. Park*, [1995] 2 SCR 836; *R. v. Cinous,* 2002 SCC 29; *R. v. Ronald*, 2019 ONCA 971.

> The whole edifice of air of reality analysis is built upon the premise that putting outlandish defences to the jury would be confusing and would invite unreasonable verdicts. This is the practical basis for the trial judge's duty to keep from the jury defences that are fanciful or far-fetched in relation to the evidence adduced at trial. As L'Heureux-Dubé J. stated for the Court in *Park*, *supra*, at para. 11:
>
> > The common law has long recognized that a trial judge need not put to the jury defences for which there is no real factual basis or evidentiary foundation. Courts must filter out irrelevant or specious defences, since their primary effect would not be to advance the quest for truth in the trial, but rather to confuse finders of fact and divert their attention from factual determinations that are pertinent to the issue of innocence or guilt.
>
> The role of the jury is of paramount importance in the common law tradition. It is in keeping with the solemnity of the jury's task that frivolous questions are not put to it. Inviting the jury to solemnly consider that which is plainly unworthy of solemn consideration would in effect be to mislead the jury. The jury must not be diverted from the real issues in a case by defences that the evidence cannot reasonably support.[54]

33. What is "realistic" necessarily connotes a qualitative assessment. "Vraisemblable" can be translated as "plausible, likely or probable."[55] *Villaroman*, held that "the line between a plausible theory and speculation is not always easy to draw." "Inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense." Reasonable inferences are not "every conjecture, no matter how irrational or fanciful." "'Other plausible theories' or 'other reasonable possibilities' must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation."[56]

34. In *Cinous,*[57] this Court split on whether the air of reality of self-defence was "some evidence" (the dissent) or ***"some evidence, any evidence, upon which a properly instructed jury acting judicially could acquit"*** (the majority). The majority held that the trial judge must take a two-pronged approach: 1) determine if there is any evidence of self-defence and then 2) determine whether a properly instructed trier of fact acting judicially could use that evidence to acquit. Simply determining if there is "any evidence" was incomplete; the evidence must be ***reasonably capable of supporting the necessary inferences***.

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[54] *R. v. Cinous*, 2002 SCC 29, ¶84; *R. v. Park*, [1995] 2 SCR 836 , ¶11.
[55] The Collins French-English Dictionary.
[56] *R. v. Villaroman*, 2016 SCC 33, ¶36-43
[57] *R. v. Cinous,* 2002 SCC 29, ¶2, 54-73, 88-91.

35. The majority in *Cinous* also expressly approved of the trial judge engaging in a "limited weighing" where the evidence of self defence is indirect or circumstantial; the trial judge must examine the "field of factual inferences" that reasonably can be inferred from the evidence to decide whether there was an air of reality to a defence and "whether the evidence, if believed, could ***reasonably*** support an inference of guilt." This is the same test applied to applications for directed verdicts and for committal after a preliminary hearing. This limited weighing does not involve conclusions of guilt, making factual findings or assessing credibility.[58]

36. In the first-degree murder case of *Aalders*[59] this Court engaged in a contextual analysis and limited weighing of the entire case to determine if there was an air of reality to the included offence of manslaughter based on the accused's bare assertion in his testimony that he did not intend to kill. Despite the accused's testimony which, if accepted by the jury, would lead to a manslaughter conviction, this Court assessed the testimony in the context of the trial evidence as a whole and found no air of reality to manslaughter because the accused's assertion conflicted with the rest of the evidence. *Aalders* assessed the accused's evidence as against the other uncontested evidence and in the context of the entire case to determine what was realistic.

37. A similar approach was taken by this Court in *Osolin,* released the same year as *Aalders*, for the air of reality of the defence of honest but mistaken belief in consent to a charge of sexual assault. As in *Aalders*, the Court required the trial judge to "review all the evidence and decide if it is sufficient to warrant putting the defence to the jury." There must be a "real factual basis". The question is not "whether there is some evidence, but rather, whether there is some evidence capable of supporting the particular defence alleged by the accused," based on the "totality of the evidence" and the "relevant circumstances."[60]

38. *Park* proposed a method of categorizing the evidence to determine the air of reality of the defence of honest but mistaken belief in consent, which is instructive. *Park* observed that "the air

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[58] *R. v. Cinous,* 2002 SCC 29, ¶53, 90-91; *R. v. Kruk*, 2024 SCC 7, ¶147-148; See also: *R. v. Pappas,* 2013 SCC 56, ¶22, 25-27; *R. v. Charemski*, [1998] 1 S.C.R. 679, ¶2-4, 28-30; *R. v. Kirkpatrick*, 2022 SCC 33, ¶16-17; *R. v. Arcuri*, 2001 SCC 54, ¶1, 21-28; *R. v. Monteleone*, [1987] 2 S.C.R. 154, at p. 160.

[59] *R. v. Aalders* [1993] 2 S.C.R. 482.

[60] *R. v. Osolin,* [1993] SCR 595, ¶53, 68, 136-140; *R. v. Reddick*, [1991] 1 S.C.R. 1086.

of reality standard cannot be evaluated in light of the 'totality of the evidence' without first breaking down that formless and undigested mass of evidence, distilling it, and finally analyzing it." *Park* suggested breaking down the evidence into "four rough and ready categories" and determining if the evidence supporting the accused, which is materially in dispute is, realistically viewed, clearly logically inconsistent with evidence which is not materially in dispute."

> 28….(1) testimonial evidence which is materially in dispute (i.e., addressing facts about which the case for the complainant and the accused disagree in important respects); (2) real evidence, the existence, significance or appreciation of which is materially in dispute; (3) testimonial evidence which is not materially in dispute (i.e., addressing facts about which the complainant and accused do not disagree in important respects), and (4) real evidence, the existence, significance and appreciation of which is not materially in dispute.
>
> 29. … real and testimonial evidence not materially in dispute (categories 3 and 4) are the "objective comparators" against which those aspects of the case for the accused which are materially in dispute (categories 1 and 2) may be measured. ***Where evidence supporting the accused which is materially in dispute is, realistically viewed, clearly logically inconsistent with evidence which is not materially in dispute, then it can be concluded as a matter of both law and logic that there can be no air of reality to the defence to which those logical inconsistencies relate.*** Whereas evaluations of the accused's case against evidence that is materially in dispute generally require assessments as to credibility or as to the appropriate weight to be given to that evidence, evaluations against evidence that is not materially in dispute does not call for such a process and is therefore more properly characterized as a question of law than as a question of fact.[61]
> [emphasis added]

39. *Park* found no air of reality on the totality of the evidence because there was "internal logical inconsistency" between material facts *not* in dispute and the accused's claim. Park held, "***It states the obvious to say that an accused cannot be said to dispute materially his own testimony***."

> 36…..If, then, an accused on one hand cross-examines the complainant and elicits some evidence which might support the conclusion that he believed she consented but, on the other hand, essentially tells a story that amounts to nothing less than wilful blindness as to her consent, then there would be a clear inconsistency within his claim to a mistaken belief in consent (principally advanced via cross-examination of the complainant). Thus, although the cross-examination, taken alone, could arguably constitute some evidence lending an "air of reality" to the defence of honest

[61] *R. v. Park*, [1995] 2 S.C.R. 836, ¶28-29, 36.

belief in consent, that defence should not be put to the jury because it suffers from a clear, internal logical inconsistency with facts that are not materially in dispute.

40. An air of reality "cannot spring from what amounts to little more than a bare, unsupported assertion by the accused"[62] and the unequivocal denial of a defence can deprive the defence of an air of reality, if there is no other evidence that realistically supports the assertion or the defence. [63] An air of reality depends on the entire factual context which includes the defence position.

41. This Court has addressed the issue of air of reality many times in relation to a variety of defences,[64] distinguishing between the evidentiary and persuasive burdens for defences. For all defences except those with a reverse onus, the defence bears an evidentiary burden of establishing an air of reality; the Crown bears the persuasive burden of disproving the defence beyond a reasonable doubt. This Court has held that to determine the air of reality of a defence, a trial judge is required to assess the whole case; the defence must have more than "a tenuous, trifling, insignificant or manifestly unsubstantive nature."[65] There may be cases where evidence is so "tenuous" the trial judge would be justified in refusing to charge on it, and yet the judge would not necessarily be in error if they did so charge.[66]

42. This Court has not revisited the question of air of reality in any detail in relation to included offences or alternate routes to liability since *Aalders*, apart from briefly addressing the

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[62] *R. v. Park*, [1995] 2 S.C.R. 836, ¶20, 35; *R. v. Cinous,* 2002 SCC 29, ¶88; *R. v. Bulmer*, [1987] 1 S.C.R. 120, ¶12-13.
[63] *R. v. Buzizi,* 2013 SCC 27, ¶11-13*; R. v. Olbey*, [1980] 1 S.C.R. 1008, p. 1022; *R. v. Faid*, [1983] 1 S.C.R. 265, p. 278, 280; *R. v. Gill*, 2009 ONCA 124, ¶19; *R. v. Gauthier*, 2013 SCC 32, ¶34.
[64] **Honest but mistaken belief in consent**: *R. v. Barton*, 2019 SCC 33, ¶120-123; R. *v. Park*, [1995] 2 S.C.R. 836; *R. v. Bulmer*, [1987] 1 S.C.R. 120; *R. v. Osolin***,** [1993] SCR 595; **Reasonable Steps**: *R. v. Morrison*, 2019 SCC 15, ¶118-122; Intoxication**:** *R. v. Robinson*, [1996] 1 S.C.R. 683; *R. v. Lemky*, [1996] 1 S.C.R. 757; **Necessity**: *R. v. Latimer*, 2001 SCC 1; **Self-Defence**: *R. v. Cinous* 2002 SCC 29; **Automatism**: *R. v. Fontaine*, 2004 SCC 27; **Provocation**: *R. v. Tran*, 2010 SCC 58; *R. v. Cairney*, 2013 SCC 55; *R. v. Buzizi*, 2013 SCC 27; *R. v. Pappas* 2013 SCC 56; *R. v. Mayuran*, 2012 SCC 31; **Third-party suspect**: *R. v. Grant* 2015 SCC 9; **Abandonment**: *R. v. Gauthier*, SCC 2013 SCC 32; **Reverse onus offences**: *R. v. Schwartz*, [1988] 2 S.C.R. 443; **Defence of property**: *R. v. Gunning*, 2005 SCC 27; **Mistake of fact**: *R. v. Finta*, [1994] 1 S.C.R. 701.
[65] *R. v. Fontaine*, 2004 SCC 27, ¶50-57.
[66] *R. v. Smith*, [1979] 1 S.C.R. 215, p. 216.

issue in the cases of *Wade, MacLeod, Kelsie* and *Pickton.*[67] *Wade* and *MacLeod* are brief endorsements. *Wade* simply confirmed that an air of reality for the included offence of manslaughter in a murder case must be based on an assessment of "totality" of the evidence and overturned the appeal court's decision that the trial judge had erred in their assessment and restored the conviction. *McLeod* simply upheld the appeal court's decision that it was an error of law not to leave manslaughter. *Kelsie* held that the evidence to support the lesser and included offence of manslaughter was "at best, tenuous and speculative, and did not meet the air of reality test" and overturned the lower appeal court's order for a new trial. *Pickton* did not describe the elements of the air of reality test nor indicate whether the standard of review was correctness or deference but did consider what the case "realistically" was about. The defence appeal was dismissed, even though the jury charge did not include direction to the jury on other available routes to liability (as a party), because the charge was "adequate" although "imperfect." *Pickton* held that, even though, "from a legalistic standpoint" the instructions did not reflect all potential modes of participation, the "instructions were unduly favourable to the defence" because they limited the grounds of liability to the accused having "actively participated."

2) The inconsistency in the decisions of the Court of Appeal for Ontario concerning the air of reality test.

43. The Court of Appeal for Ontario has taken an inconsistent approach to what it has termed the "realistic possibility" standard for defences, included offences and routes to liability. In most cases the court has held that to determine what is realistic a trial judge has the power to engage in limited weighing to determine if the evidence is "sufficient." But a trend has developed in Ontario more recently where the court has moved towards a "some evidence" standard with no weighing of any kind permitted.[68] The Court of Appeal for Ontario's decision in the within appeal falls on the far extreme end of the "no weighing" spectrum.

44. The Court of Appeal for Ontario has also held in *Ronald* and *Chacon-Perez* that the air of reality test cannot significantly differ as between modes of participation, essential elements of an offence, defences, justifications, excuses and included offences, although the court observed that

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[67] *R. v. Pickton,* 2010 SCC 32, ¶5, 10-11, 33; *R. v. Wade,* [1995] 2 S.C.R. 737, overturning [1994] O.J. No. 543 (CA); *R. v. MacLeod*, 2014 SCC 76; upholding 2014 NSCA 63; *R v. Kelsie*, 2019 SCC 17, ¶2; overturning 2017 NSCA 89.

[68] *R. v. Tenthorey*, 2021 ONCA 324, ¶69-71; cited in: *R. v. Doxtator*, 2022 ONCA 155, ¶4,

the approach to the evidence may differ.[69] This Court has not pronounced on this issue.

45. The different air of reality tests articulated by the Court of Appeal for Ontario contain similarities and important differences. The test is always articulated in terms of the "reasonableness" of inferences, but for defences and included offences the question is framed as "whether a reasonable doubt can be raised," while for a route to liability the question is whether the evidence can "reasonably support an inference of guilt."

a. **Defences:** Was there "something in the evidence that would reasonably allow the jury to draw the necessary inferences to at least raise a reasonable doubt as to whether the conduct of the victim amounted to provocation."[70]

b. **Included offences**: "On the totality of the evidence, [could] the jury reasonably be left in doubt with respect to an element of the main charge that distinguishes that charge from an included offence;" or, could a jury acquit on the main offence and convict on the included offence on a "reasonable view of the evidence taken as a whole" and on applying applicable legal principles?[71]

c. **Routes to liability**: "The question is whether there was evidence that, if believed, could 'reasonably support an inference of guilt' on the particular theory of liability." [72]

46. In many decisions the Court of Appeal for Ontario has applied *Aalders* and *Cinous* and recognized that a determination of air of reality requires a limited weighing and a qualitative assessment of reasonableness based on the totality of the evidence, an approach that has been followed in other provinces.[73] The following language is used by the court in expressing the test:

a. **Theories of liability:** "The trial judge must determine whether there is a sufficient evidentiary basis for a properly instructed jury, acting reasonably, to render a

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[69] *R. v. Chacon-Perez*, 2022 ONCA 3, ¶164; *R. v. Ronald*, 2019 ONCA 971, ¶43
[70] *R. v. Ronald*, 2019 ONCA 971, ¶45.
[71] *R. v. Ronald*, 2019 ONCA 971, ¶46; *R. v. Chacon-Perez*, 2022 ONCA 3, ¶166
[72] *R. v. Grandine,* 2022 ONCA 368, ¶35; *R. v. Al-Enzi*, 2021 ONCA 81, ¶150.
[73] *R v. Harkes*, 2021 ABCA 315, ¶39; *R. v. Barrett,* 2012 BCCA 241, ¶42; *R. v. Best*, 2016 NLCA 10, ¶11; *R. v.* Menard, 2014 QCCA 877; R. *v. Etienne*, 2015 QCCA 1390, ¶17; *R. v. MacKenzie,* 2012 NBCA 29, ¶14; *R. v. Turner*, 2023 MBCA 40, ¶76, 80-82; *R. v. Dejala*, 2021 QCCA 248, ¶87; lv. to appeal dismissed 2022 CanLII 12245; *R. v. Frank*, 2012 BCCA 2.

conviction based on that theory of liability."[74]

b. **Included offences:** The trial judge must determine if an included offence is "realistically possible" based on the "totality of the evidence."[75] "Isolated snippets of evidence" that "might skim over the bar of the air of reality test, if considered in isolation" are not sufficient to require an included offence be put, "given the generally unconvincing and unsupported nature of the facts relied on, the focus of the trial, and the way in which the case was put to the jury at the behest of the defence."[76]

c. **Defences:** "To assess whether the evidence is reasonably capable of supporting the inferences sought by an accused, the trial judge is entitled to engage in a limited weighing of the evidence."[77] The trial judge must consider whether the evidence of provocation "presents a coherent narrative."[78] The defence should not simply be based on a "cobbling together of isolated, unconnected answers from different witnesses ripped from the context in which those answers are given."[79] "It is not enough that a minute parsing of the evidence reveals bits and pieces of evidence that are consistent with some aspects of the provocation defence."[80]

d. **Where the accused contradicts or denies the defence:** While a defence that is incompatible with the accused's main narrative still must be put if it is realistically available on the totality of the evidence,[81] the position advanced in the accused's

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[74] *R. v. Figliola*, 2018 ONCA 578, ¶28-29; *R. v. Grandine,* 2022 ONCA 368, ¶35; *R. v. Al-Enzie*, 2021 ONCA 81, ¶149-151; *R. v. Largie*, 2010 ONCA 548, ¶141; lv. to appeal refused [2011] S.C.C.C. No. 119; *R. v. Ranger* [2003] OJ No 3479 (CA), ¶130-133; *R. v. Simon*, 2010 ONCA 754, ¶43; *R. v. Patel*, 2017 ONCA 702, ¶43; *R. v. Johnson*, 2022 ONCA 534, ¶69; upheld 2023 SCC 24.

[75] *R. v. Ronald*, 2019 ONCA 971, ¶42, 48https://canlii.ca/t/j3w2f; *R. v. Berto*, 2021 ONCA 839, ¶45; *R. v. Wong*, [2006] O.J. No. 2209 (CA), ¶11-12; *R. v. Grewal,* 2019 ONCA 630, ¶36*; R. v. Romano,* 2017 ONCA 837, ¶13-16; *R. v. Luciano*, 2011 ONCA 89, ¶74-77.

[76] *R. v. Chalmers*, 2009 ONCA 268, ¶51-52, 58

[77] *R. v. Suthakaran*, 2024 ONCA 50, ¶18; *R. v. Nagy*, 2023 ONCA 184, ¶35.

[78] *R. v. Land*, 2019 ONCA 39, ¶80; *R. v. LeBlanc*, 2023 ONCA 718, ¶3; *R. v. Ariaratnam,* 2018 ONCA 1027, ¶11; *R. v. Wade*, [1994] O.J. No. 543 (CA),

[79] *R. v. Ariaratnam,* 2018 ONCA 1027, ¶11.

[80] *R. v. Dupe*, 2016 ONCA 653, ¶78.

[81] *R. v. Suthakaran*, 2024 ONCA 50, ¶16; *R. v. Ariaratnam,* 2018 ONCA 1027, ¶12

testimony "is part of the context in which the 'air of reality' test should be applied to the totality of the trial evidence."[82] An unequivocal denial of a defence by an accused, coupled with the absence of evidence that can realistically support the defence, will deprive the defence of an air of reality.[83]

e. On appeal: "When an appellant asserts error because of a failure to instruct on an included offence, …the [appeal court's] assessment also considers the strength of the evidence relied upon in connection with the included offence as well as the concessions made and position taken by trial counsel."[84]

47. The Court of Appeal for Ontario recently held in *Tenthorey*, in a statement at the extreme end of a "no weighing" or "some evidence" standard, that a trial judge must put an included offence, "no matter how incredible or unreliable the evidence may be."[85] *Tenthorey* was relied on by the court in the within case and cited at ¶68 and 69 of the appeal decision. But evidence cannot be realistic or plausible when it is incredible. Circumstantial evidence that "yields logical inferences in light of human experience and common sense" is not, by definition, incredible. The statement above from *Tenthorey* is at odds with *Aalders* and the long line of precedent that followed *Aalders* because it implicitly allows for no weighing or contextual assessment of the case as a whole to determine what is a "realistic possibility" and not merely a "possibility."

ii. The Court of Appeal for Ontario erred in its treatment of the air of reality test.

1) The Court of Appeal failed to do a contextual assessment.

48. The Court of Appeal for Ontario erred by failing to do a contextual assessment of all the evidence in the case when it determined there was an air of reality to an alternative plan to kill only Mr. Pan. The court only considered whether there was "some" evidence in isolation, rather than whether there was "sufficient" evidence of the alternate plan in the context of the entire case. The court failed to engage in a limited weighing of the evidence to assess its "sufficiency" in the context of the entire case, including the extent to which it might have been "inconsistent with the accused's principal narrative," as mandated by *Aalders*. The court erred by adopting the

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[82] *R. v. Dupe*, 2016 ONCA 653, ¶76; *R. v. Ariaratnam,* 2018 ONCA 1027, ¶12.
[83] *R. v. Gill*, 2009 ONCA 124, ¶19; *R. v. Angelis*, 2013 ONCA 70, ¶33.
[84] *R. v. Chacon-Perez*, 2022 ONCA 3, ¶167.
[85] *R. v. Tenthorey*, 2021 ONCA 324, ¶69-71; *R. v. Chacon-Perez*, 2022 ONCA 3, ¶165.

ratio of its earlier decision in *Tenthorey*, that an included offence must be left with the jury "regardless of how incredible or unreliable the evidence may be, or how unlikely it is that the trier-of-fact will ultimately draw the relevant inferences." There was no air of reality to an alternate murder plan in this case.[86]

49. In the passages below, the court considered the evidence relied on by Pan to support an alternative plan to kill only her father in isolation, with only a passing reference to the evidence relied on by the Crown of a plan to kill both Mr. and Mrs. Pan and without describing it in any detail and thereby failed to do the necessary contextual analysis. The court failed to appreciate that the Crown was not arguing that its list of evidence "outweighed," was longer than, or more important than Pan's list, but instead that Pan's list of evidence had to be considered together with the rest of the evidence. The court considered only what was "possible" rather than what was "realistically possible."

> [56] Pan points to this evidence in support of her submission that the two counts were not inseparable. Specifically, Pan refers to the following evidence:
>
> - Pan's evidence that she never planned to kill her mother and that the last plan was just for Pan to be killed – a plan that she says she abandoned.
> - Pan's evidence about the home invasion.
> - Pan's evidence about her strained relationship with her father and the rules and directives he laid down for her, including severing all ties with Wong, evidence that was confirmed by Pan's father.
> - Pan's evidence, confirmed by her brother, her cousin, and a friend, that she had a better relationship with her mother.
> - Pan's evidence that her mother only supported her father's dictates because of cultural expectations.
> - Pan's evidence that, in the Spring of 2010, she planned with Montemayor and Duncan to have her father killed.
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> ***The prosecution responds to this submission by pointing to the evidence that supported that the plan was to kill both parents.***

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[86] ***Appeal Record, Vol.1*** - Decision of the Court of Appeal for Ontario, ¶55-74; *R. v. Pan*, 2023 ONCA 362, ¶55-74.

> [57] ***The difficulty with the prosecution's position is that the question is not whether the evidence on the one side outweighed the evidence on the other. The question is whether there was some evidence that might have led the jury to rationally and logically have a reasonable doubt with respect to the elements of the first-degree murder count on the facts with respect to Pan's mother but not have that same doubt on the facts as it related to Pan's father. In this case there was that possibility.*** Indeed, that ***possibility*** might have been potentially increased if the jury had known that they had the right to consider included offences, but they were told that they did not. I now turn to that issue. [Emphasis added.]

50. Then, while recognizing in ¶71 of the judgment that the ultimate question was whether there was an air of reality to a third scenario based on a plan to only kill Mr. Pan, the court did not then go on to do any analysis of the air of reality of a third scenario in the context of the entire case. The court's reasons are conclusory and simply accepted that there was.

> [71] The fact remains that there was some evidence that might have caused the jury to have a reasonable doubt as to whether the plan was to deliberately kill Pan's mother (as opposed to her father). The issue was then whether there was an air of reality to an included offence.
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> [72] In this case, the jury might have had a doubt about the planned and deliberate murder of Pan's mother but be satisfied that the appellants knew that the murder of Pan's mother was a probable consequence of a plan to kill her father. This could give rise to a conviction for second-degree murder. It was also possible for the jury to have had a doubt about the planned and deliberate murder of Pan's mother but to have been satisfied that there was a reasonably foreseeable risk of non-trivial bodily harm to Pan's mother through the implementation of the plan to kill Pan's father, such that a conviction for manslaughter would arise.

2) The Court of Appeal for Ontario conflated reasonable doubt and air of reality.

51. The court also appears to conflate the following two important but discrete questions in ¶67 and 70 to 72 of their decision:

a. Was there evidence which could raise a reasonable doubt that Mrs. Pan's murder was planned and deliberate?

b. Was there an air of reality to a plan to kill only Mr. Pan?

52. Evidence which satisfies the first question will not necessarily satisfy the second. For example, an absence of evidence can raise a reasonable doubt,[87] but it is incapable of providing a foundation for a theory of liability. As this Court said in *J.M.H.*:

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[87] *R. v. J.M.H.*, 2011 SCC 45, ¶25, 26 and 30; *R. v. Villaroman,* 2016 SCC 3, ¶36.

> 30 …except in the rare cases in which a statutory provision places an onus upon the accused, it can sometimes be said as a matter of law that there is no evidence on which the Court can convict, but never that there is no evidence on which it can acquit as there is always the rebuttable presumption of innocence. ……"[88]

53. Despite correctly stating in ¶64 and 65 that "the route to an included offence does not necessarily arise as soon as there is a reasonable doubt on planning and deliberation" and that to instruct on an included offence in such circumstances would be a "breeding ground of confusion and compromise," in its final analysis, the court appears to have collapsed the two concepts, concluding in ¶70 that the question was: ***was there an air of reality that the jury might have a reasonable doubt*** about a plan to kill Mrs. Pan?

> [67] The trial judge relied on his view that there were only two plausible scenarios: a plan to kill both Mr. and Mrs. Pan, and a robbery/home invasion. This issue draws us back into a consideration of the evidence that was before the jury. I have set out the evidence, to which the appellants point, that might have allowed the jury to conclude that Pan's plan to kill related only to her father and not to her mother. ***In other words, there was evidence that might have raised a reasonable doubt as to whether the murder of Pan's mother was the result of a planned and deliberate murder, as opposed to being an unfortunate consequence of the planned and deliberate murder of Pan's father. That evidence does not have to rise to the level of showing that it would, in fact, have raised a reasonable doubt on first-degree murder but supported a conviction for an included offence, only that it might realistically have done so.***
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> [70] ***It cannot be said that, in this case, there was no realistic possibility (or air of reality) that a jury might have a reasonable doubt whether there was a deliberate plan to murder Pan's mother***. On that point, it is worth repeating what was said on the subject of the air of reality test in *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 54. [Emphasis added.]

54. There was no issue that the jury was instructed correctly on the principle of reasonable doubt nor that the jury was instructed it had to be satisfied beyond a reasonable doubt that Mrs. Pan's murder was planned and deliberate before the jury could convict the Respondents of first-degree murder. Furthermore, the evidence that could raise a reasonable doubt about such a plan was carefully reviewed by the trial judge in the jury charge and by counsel for Pan in his closing.[89]

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[88] *R. v. J.M.H.*, 2011 SCC 45, ¶30.
[89] ***Transcript, Vol.64***, p.321-355; ***Vol.65***, p.15-22, 169-174; ***Vol.61***, p.2-95, ***Vol.62***, p.13-28.

55. It also bears repeating that a concern about the risk of the jury convicting of first-degree murder, because the jury found it unpalatable to acquit outright if the jury had a reasonable doubt about a plan to kill Mrs. Pan, but disliked the conduct of any Respondent, does not make a plan to kill only Mr. Pan realistic. We do not routinely instruct juries trying a first-degree murder charge on the included offences of second-degree murder and manslaughter. There has to be an air of reality to the included offences. In some cases, an all or nothing instruction on first-degree murder is the only correct instruction.[90] This is one of those cases, particularly in relation to Pan, Wong and Crawford, whose roles were planners. Mylvaganam conceded he was at the scene that night with the intruders, and so was liable for at least manslaughter as an included offence.

3) A third route to liability added complexity and risked jury confusion.

56. In this case the trial judge endeavoured to help the jury understand the contours of this sprawling case that took 8-months to try, by reducing the theories of liability to what he found were the only two realistic scenarios: 1) a plan to kill both Pan parents, involving all accused, which Mr. Pan survived (first-degree murder and attempt murder) or 2) a home invasion that went wrong, with Pan excluded from liability, and Wong, Crawford and Mylvaganam liable for second degree murder, manslaughter and attempt murder through s. 21(2) common purpose party liability.[91]

57. An illustration of the complexity of the instructions based on these two scenarios can be found in the jury charge and the decision trees.[92] But the charge could have been even more complicated. The Crown elected not to have a charge on constructive first-degree murder based

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[90] *R. v. Ronald*, 2019 ONCA 971, ¶41; *R. v. Chenier* (2006), 205 C.C.C. (3d) 333 (Ont. C.A.), at p. 367; *R. v. Wong* (2006), 211 OAC 211, ¶11.

[91] ***Transcript, Vol.64***, p. 292-293; The Court of Appeal for Ontario erred in ¶51 by stating that the same instructions were given for Wong's liability as for Pan, (that it was an all or nothing conviction for first degree murder for the death of Mrs. Pan and a conviction for attempt murder for the shooting of Mr. Pan.) Unlike Pan, Wong was also liable in the home invasion scenario, which gave him a route to the lesser and included offences of second-degree murder and manslaughter.

[92] ***Appeal Book, Vol.14,*** Ex.EEE, p.6811-6816; ***Transcript, Vol.65,*** p.1-3; ***Criminal Code,*** R.S.C. 1985, c. C-46, s. 21 [common purpose party liability].

on confinement even though there was an evidentiary foundation. There was no defence objection to this omission.[93]

58. Against that backdrop, the complexity of adding a third scenario (a plan to kill only Mr. Pan) is significant, as it would add yet another decision tree and another scenario that depended on the complex principle of common purpose party liability under s. 21(2). A third scenario, based on an alternative murder plan, would have introduced a further quagmire of decision-making as illustrated by the draft decision trees prepared by counsel for Pan.[94] This third scenario would require the jury to determine whether each accused, having planned to kill Mr. Pan, knew that the death of Mrs. Pan, or a risk of harm to her, was a probable consequence, which would provide a route to second-degree murder or manslaughter. This would have added significant complexity to an already long and complicated jury instruction and would have increased the risk of juror confusion and improper compromise. The trial judge was trying to achieve just the opposite, as reflected in the careful organization of the charge to the jury and the colloquy in the six days of pre-charge conference.[95]

4) A plan to kill only Mr. Pan was not realistic.

59. A plan to kill only Mr. Pan was not a realistic possibility having regard to all the evidence. To instruct the jury on that scenario would invite the jury to speculate and cobble together isolated, unconnected answers from the cross-examination of the witnesses Duncan and Montemayor about prior statements made by Pan, that were ripped from the context in which those answers were given and that were equivocal and internally inconsistent. That evidence conflicted with Pan's prior police statements, her own testimony denying she planned to kill anyone that night let alone her father and is inconsistent with her primary defence that there was no plan at all. A plan to kill only her father also fundamentally conflicts with and undermines her testimony and description of the events that night which portrayed her as a victim with no control and no ability to protect her parents.[96] A plan to kill her father also was inconsistent with the testimony of other witnesses and the bulk of the other circumstantial and direct evidence. The

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[93] ***Transcript, Vol.59,*** p.194.
[94] ***Appeal Book, Vol.12 -*** Ex. YY, p.6180-83.
[95] ***Transcript, Vol.59,*** p.1-409, ***Vol.60,*** p.1-285.
[96] ***Transcript, Vol.48***, p. 244-282, ***Vol.51***, p. 228-231.

evidence overwhelmingly pointed to a plan to kill both parents. To instruct on a third scenario would take the principle that the jury could consider some, all, or none of a witness's evidence to an absurdity, creating a version of events that would not reasonably be available, as a matter of logic, human experience and common sense.

60. From a contextual analysis of the totality of the evidence, including a consideration of the defence position, the only reasonable conclusion is that a plan to kill only Mr. Pan, when realistically viewed, is clearly and logically inconsistent with the evidence. As this Court said in *Park,* "as a matter of law and logic there can be no air of reality" to this alternative theory of liability.

a. Pan's evidence at trial was that she had no plan for anyone to die on November 8, 2010 and she expressly denied she had planned to have her father killed. While she said she had had a plan to kill her father in the summer, she also said that plan ended and was never revived in the fall.

b. In her three police statements Pan never said anything about a plan to kill her father nor even focused on him as the source of her unhappiness. She spoke predominantly about the expectations of her "parents" and the rules and restrictions "they" imposed.

c. Pan told two friends and her boyfriend Wong that she wanted to kill *both* parents. Any evidence of a plan to kill only her father in November, if it exists at all, can be found at most in isolated snippets from the cross-examinations of Montemayor and Duncan taken out of context. Both of these witnesses were unsure and equivocated, before ultimately rejecting the suggestion in re-examination that Pan had talked about a plan to kill only her father.

d. A week before the shootings Mylvaganam and Carty discussed a plan for *two* murders in text messages. Carty said it was to be "Ten stacks", or "5each ting," meaning $10,000 for the job or $5,000 for each murder. Mylvaganam could have all the money if he went "all da way" himself;

e. 20 minutes before the murder Pan told Montemayor over the phone exactly what

would happen: this was a fake home invasion by three of her friends or people where she would be tied up and unharmed and both parents would be shot;

f. The night of the murders Pan was at home the whole time and received cell phone calls from the co-accused while they were en route. There was a 2½ hour period when Pan's mother was out at line dancing, but the shooters only came late in the evening after Mrs. Pan had returned home. It can be inferred that Pan controlled the timing of arrival of the intruders to ensure both her parents were home;

g. Mr. and Mrs. Pan were not treated any differently during the entire evening. They were held at gunpoint on the couch together, taken downstairs to the basement together, and each shot in the head, at the same time, in the same way with blankets over their heads;

h. The timing and way the shootings took place, and Pan's description of the events, contradict Pan's claim that she did not want to harm her mother, and are fundamentally inconsistent with a plan to kill only Mr. Pan, for which Pan would be the directing mind. Pan portrayed herself as a victim with no control over the events. She claimed she heard her mother calling out for her, that she called back, and she asked if she could be with her mother but was denied. But if Pan was the directing mind in this plan to kill her father, then she was in control. She could have protected her mother. Instead, she let the intruders in as her mother sat on the couch watching t.v. and did not intervene as Mrs. Pan was held at gunpoint on the couch and then taken downstairs to the basement with Mr. Pan to be shot.

i. The intruders failed to fully cover their faces, suggesting that the plan was to leave no (uninvolved) witnesses behind;

j. Pan had motive for both parents to die rather than just one parent. She had no independent means of support and knew the terms of her parents' wills. She knew she would inherit nothing if only one parent died; and

k. Pan had a text exchange with Wong where she told him she wanted to cancel the plan once she realised they had no future, because she would have "nowhere to go" if she

went through with it. A reasonable interpretation of this text exchange is that Pan would have nowhere to go if both her parents were killed and she had no relationship with Wong. If her mother was alive, she had somewhere to go.

61. Counsel for Pan had told the jury in his closing that the jury must acquit if the jury found there was a plan to kill her father only, although the evidence for a plan to kill only her father "is not there."[97]

B. The Court of Appeal for Ontario erred by giving no deference to the trial judge's determination of air of reality.

62. A standard of review of correctness for jury instructions generally, and specifically in relation to trial decisions about air of reality, can and should include some deference. Whether there is an air of reality to a route to liability or an included offence, and therefore whether the trial judge must give a "contingent" instruction about it, depends on an assessment of "the circumstances of the case" and the trial evidence in its entirety.[98] This assessment is not simply a legal question such as whether an offence is included in a charged offence "in law," or what the legal elements of a defence are, but necessarily requires a contextual factual assessment for which the trial judge is uniquely well suited. The Appellant advocates for the approach taken in the *Buzizi* dissent (and reflected in *Thibert*, *Cairney*, and *Suthakaran*), that would afford some deference to the trial judge's assessment of air of reality and whether a "contingent instruction" is required. This recognizes the "privileged position of the trial judge…who saw and heard the witnesses, [and] is in the best position to determine whether the evidence that is capable of supporting the necessary inferences is credible."[99]

63. An inconsistency has developed concerning whether the standard of review of the air of reality, is correctness or deference, and needs clarification, as further reviewed below.

i. The conflicting decisions of the Supreme Court of Canada.

64. In *Aalders*[100] this Court did not address the standard of review of the trial judge's

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[97] ***Transcript, Vol.61***, p.27.
[98] *R. v. Abdullahi*, 2023 SCC 19 ¶47-49.
[99] *R. v. Buzizi*, 2013 SCC 27, ¶65; *R. v. Thibert*, [1996] 1 S.C.R. 37, ¶5-7, 33; *R. v. Cairney*, 2013 SCC 55, ¶63; *R. v. Suthakaran*, 2024 ONCA 50, ¶15.
[100] *R. v. Aalders* [1993] 2 S.C.R. 482.

decision whether there is an air of reality to an included offence, although it can be inferred that the Court applied a correctness standard. In various decisions since *Aalders* this Court has held that the standard of review of the air of reality is both correctness and deference. This issue has been the subject of controversy in academic writing.[101]

a. ***Deference:*** Three years after *Aalders*, *Thibert*[102] recognized the "tremendous advantage" of the trial judge in seeing and hearing all the evidence and held that "unless there is an absence of any evidence as to the objective and subjective elements of the defence such a decision of a trial judge should not be lightly interfered with by an appellate court." Justice Wagner, as he then was, wrote in dissent in *Buzizi* in favour of affording some deference to the trial judge's assessment of the air of reality of provocation, even if the standard is correctness, also recognizing the advantages of the trial judge.[103] *Cairney* (released in the same year as *Buzizi*) appears to endorse some deference to the trial judge's assessment of the air of reality of provocation, "if the trial judge applies the correct legal test."[104]

b. ***Correctness***: In 2002 *Cinous*[105] described this as a question of law but did not squarely address the earlier decision of *Thibert* which applied a standard of deference. *Tran* and *Buzizi* [106] held that the standard of review was correctness but also did not address *Thibert*. In *Alas*[107] this Court cited *Cinous*[108] and held that the standard of review of the defence of provocation was correctness, but provided no analysis and did not address its contradictory earlier decisions.

65. In 2023 this Court released a comprehensive review of the principles governing appellate review of jury charges in *Abdullahi* but did not address the standard of review beyond stating that whether a particular jury instruction is required is a question of law. At the same time, this

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[101] Rankin, Micah B., "R. c. Buzizi: A More Generous Air of Reality Test for the Subjective Dimension of the Provocation Defence", 2 CR-ART 261.
[102] *R. v. Thibert*, [1996] 1 S.C.R. 37, ¶5-7, 33.
[103] *R. v. Buzizi*, 2013 SCC 27, ¶62-65.
[104] *R. v. Cairney*, 2013 SCC 55, ¶63.
[105] *R. v. Cinous,* 2002 SCC 29.
[106] *R. v. Tran*, 2010 SCC 58, ¶40; *R. v. Buzizi*, 2013 SCC 27, ¶15.
[107] *R. v. Alas*, 2022 SCC 14, ¶3.
[108] *R. v. Cinous* 2002 SCC 29, ¶55.

Court held that an instruction on an included offence was "contingent" and may be required based on the "circumstances of the case." *Abdullahi* reiterated that appellate courts must take a functional approach in reviewing a jury charge and described the review of jury instructions as a question of law, but also distinguished between "mandatory" and "contingent" instructions. Instructions on included offences were considered "contingent" based on "the circumstances of the case." In other words, to determine if a contingent instruction is required, a trial judge must assess the facts in the context of the entire trial, which of course is the same process required to determine the air of reality of an included offence, defence or route to liability.[109]

66. *Housen v. Nikolaisen* remains authoritative on standards of review and has been applied in the criminal context, most recently in this Court's decision in *Kruk.*[110] *Housen* contains a comprehensive analysis of standards of review for questions of law alone, mixed fact and law, and fact, and describes the advantageous position of the trial judge in assessing and weighing vast quantities of evidence and in drawing inferences from it. *Housen* and *Kruk* support taking a broader perspective of the privileged position and advantages of the trial judge and recognize that these advantages are not limited to the opportunity to observe witnesses first-hand but include: the "relative expertise of trial judges in weighing and assessing evidence," their "inimitable familiarity with often-vast quantities of evidence," and their "extensive exposure to the entire factual nexus of a case."[111] The dissent in *Buzizi* similarly recognized these advantages in the contextual assessment of air of reality, which supports affording some deference to the trial judge's assessment of air of reality.[112]

67. There are many examples where a standard of review of correctness applies to a trial judge's decision whether a particular legal principle applies but accommodates deference for how the principle is applied to the particular facts. The application of a legal standard to the facts of the case is a question of law and reviewed on a standard of correctness whereas an error in the assessment of the evidence and the facts is reviewed on a standard of palpable and overriding

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[109] *R. v. Abdullahi*, 2023 SCC 19 ¶47-49.
[110] *Housen v. Nikolaisen* 2002 SCC 33, ¶25; *R. v. Kruk*, 2024 SCC 7, ¶83, 199.
[111] *Housen v. Nikolaisen* 2002 SCC 33, ¶25.
[112] *R. v. Buzizi,* 2013 SCC 27, ¶58, 62-65 (dissent).

error.[113] For example, the admissibility of evidence is a question of law,[114] although deference is given to the trial judge's weighing of the probative value and prejudicial effect of the evidence. The trial judge applies legal principles and exercises discretion when they act as gate keeper and determine the admissibility of similar fact evidence,[115] expert evidence,[116] defence evidence,[117] third party suspects,[118] and hearsay.[119] The application of the rule in *Browne v. Dunn* incorporates both a standard of correctness for whether the principle is engaged, and a standard of deference for the remedy fashioned by the trial judge. [120] Testimonial assessments may be reviewed on a correctness standard where an error in law is alleged, such as for reasonable apprehension of bias, making a finding of fact for which there is no evidence, and improperly taking judicial notice. Otherwise, a trial judge's assessment of credibility and reliability is reviewed on a standard of palpable and overriding error. [121] Lastly, the standard of "reasonableness" can entail a question of law.[122]

68. A standard of review for determining air of reality that includes some deference to the trial judge is consistent with the trial judge's recognized unique position and advantages in the role as the "gatekeeper" of fair trial interests. *Handy* described the "difficulty" of the gatekeeper task in determining the admissibility of similar fact evidence and assessing the "objective improbability of coincidence," which is a question of law alone, and observed that "the amount of discretion entrusted to [the trial judge] is great."[123] Similarly, *Pappas* recognized that the trial judge acts in a "gatekeeper" role by ensuring that defences with no evidential foundation are not

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[113] *R. v. Kruk*, 2024 SCC 7, ¶96-98; *R. v. Shepherd*, 2009 SCC 35, ¶20; *R. v. Araujo*, 2000 SCC 65, ¶18; *R. v. Biniaris*, 2000 SCC 15, ¶23.
[114] *R. v. Samaniego*, 2022 SCC 9, ¶25.
[115] *R. v. Handy*, 2002 SCC 56, ¶105-106; *R. v. Arp*, [1998] SCJ no. 82 (SCC), ¶47-48; *R. v. B.(C.R.)*, [1990] 1 S.C.R. 717.
[116] *R. v. Abbey*, 2009 ONCA 624,¶76-79, 84-95; leave to appeal refused 2010 CanLII 37826; *R. v. Gager*, 2020 ONCA 274, ¶28-29; lv. to appeal refused 2021 CanLII 32437.
[117] *R. v. Seaboyer*, [1991] 2 S.C.R. 577, ¶44-49.
[118] *R. v. Rudder*, 2023 ONCA 864, ¶58-60; *R. v. Grant* 2015 SCC 9, ¶37, 43-54.
[119] *R. v. Couture*, 2007 SCC 28, ¶57, 81; *R. v. Pasqualino*, 2008 ONCA 554, ¶22-28.
[120] *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.); *R. v. Willis,* 2019 NSCA 64, ¶9-10; *R. v. Drydgen* 2013 BCCA 253, ¶22; *R. v. Lyttle* 2004 SCC 5, ¶65-67; *R v. R.J.M.*, 2023 MBCA 28, ¶23.
[121] *R. v. Kruk*, 2024 SCC 7, ¶96, 197.
[122] *R. v. Kruk*, 2024 SCC 7, ¶184.
[123] *R. v. Handy*, 2002 SCC 56, ¶104-106.

put to the jury.[124] *Rodgerson* and *Abdullahi* recognized the difficulties a trial judge faces in achieving a "crucial balance" by structuring a charge that is "comprehensive and comprehensible." Jury charges are reviewed on a standard of correctness, using a functional approach that recognizes trial judges have discretion as to how the jury charges are structured.[125]

ii. The conflicting decisions of the Court of Appeal for Ontario.

69. The Court of Appeal for Ontario has taken conflicting positions on the question of the standard of review of the air of reality for provocation and self-defence. *Dupe*[126] held that the standard of review of the air of reality of provocation was deference. *Land*[127] reviewed the competing authorities and noted there was "some complexity in the standard of review of air of reality in provocation cases," observing that the Supreme Court of Canada has found both correctness (*Tran*[128]) and deference (*Thibert*[129]). *Paul*[130] adverted to this complexity when considering self-defence, noting the competing binding authorities in *Budhoo*[131](correctness) and *Dupe* (deference). Both *Land* and *Paul* determined this conflict need not be resolved given the finding of legal errors.

70. In *Doxtator*[132] the Court of Appeal for Ontario held that the standard of review of the air of reality of included offences in a homicide case was correctness, and no deference was owed to the trial judge, but *Doxtator* made no reference to the earlier decisions of *Dupe*, *Land*, or *Paul* (which had noted that some courts had applied a standard of deference.) *Doxtator* also recognized there was no question that trial judges have a broad discretion in fashioning jury charges, including how much evidence to review, what structure to use and how to organize the charge, and that absent reversible error, they are owed deference on appeal.

71. Most recently in *Suthakaran* the Court of Appeal for Ontario applied a standard of

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[124] *R. v. Pappas,* 2013 SCC 56, ¶26.
[125] *R. v. Abdullahi*, 2023 SCC 19, ¶34-37 (majority), 102-103 (dissent); *R. v. Goforth*, 2022 SCC 25, ¶20-22; *R. v. Rodgerson,* 2015 SCC 38, ¶50.
[126] *R. v. Dupe*, 2016 ONCA 653, ¶78, 79.
[127] *R. v. Land*, 2019 ONCA 39, ¶71-80.
[128] *R. v. Tran*, 2010 SCC 58, ¶39-41.
[129] *R. v. Thibert*, [1996] 1 S.C.R. 37, ¶5-7, 33
[130] *R. v. Paul*, 2020 ONCA 259, ¶26-31.
[131] *R. v. Budhoo*, 2015 ONCA 912, ¶40.
[132] *R. v. Doxtator*, 2022 ONCA 155, ¶25.

correctness ***with*** some deference to an assessment of the air of reality of a defence (despite this Court's decision almost two years earlier in *Alas* that the standard was correctness). *Suthakaran* also referred to the observations in *Land* and *Paul* that the standard of review is a complex question.[133]

72. The few decisions from other provincial appellate courts that have explicitly addressed the issue appear to uniformly apply a correctness standard.[134]

iii. The Court of Appeal for Ontario failed to apply the correct standard of review.

73. The Court of Appeal for Ontario did not expressly advert to the standard of review it was applying but implicitly did not afford any deference to the trial judge's assessment. The court simply cited the decisions of *Ronald* and *Chacon-Perez*, which also do not expressly state the standard of review.[135] It is the Appellant's position that in the absence of identified errors, some deference is owed to the trial judge's decision and the convictions for first degree murder should be reinstated.

74. The Court of Appeal for Ontario did not identify any specific error in the trial judge's assessment of the evidence, nor any legal error in the test he applied, and simply substituted its own view for the trial judge's. The trial record discloses no error in the trial judge's articulation of the test. While the trial judge's decision was brief, it correctly articulated the test as one of "air of reality" and "plausibility," and a review of the transcript reveals extensive submissions and *colloquy* about the correct test to be applied and the reasonable inferences available on the evidence.[136]

C. In the alternative, the *curative proviso* should be applied.

75. In the alternative, if the Court of Appeal for Ontario applied the correct test and found that there was an air of reality to the alternative route to liability (a plan to kill only Mr. Pan) which should have been put to the jury, the court erred by not applying the *curative proviso*. The

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[133] *R. v. Suthakaran*, 2024 ONCA 50, ¶15.
[134] *R v. Harkes*, 2021 ABCA 315, ¶20-21; *R. v. MacKenzie,* 2012 NBCA 29, ¶14.
[135] ***Appeal Record, Vol.1*** - Decision of the Court of Appeal for Ontario, ¶58, 59; *R. v. Pan*, 2023 ONCA 362, ¶58, 59; *R. v. Ronald*, 2019 ONCA 971; *R. v. Chacon-Perez*, 2022 ONCA 3.
[136] ***Appeal Book, Vol.13,*** Ex.AAA – email Nov 16, 2014, with ruling on air of reality; ***Transcript, Vol.59,*** p.14-57, 95, 137-140, 160-169, ***Vol.60,*** p. 2-20, 231-235.

evidence of a plan to kill both parents was overwhelming; any evidence of a plan to kill only Mr. Pan was tenuous and marginal at best.[137] If there is no weighing permitted in the air of reality test then there is scope for weighing in the application of the *proviso*.

i. The legal principles.

76. The Crown bears the burden of satisfying the court that any legal error is so minor as to be harmless, or that the evidence was so overwhelming that there is no "***reasonable possibility*** that the verdict would have been different had the error . . . not been made." The test is also expressed as whether "a reasonable and properly instructed jury would inevitably have convicted."[138] Appellate review for unreasonable verdict and for the application of the *curative proviso* are really two sides of the same coin. Both reviews contemplate weighing evidence to determine more than simply whether there is "some evidence" because both reviews require the reviewing court to assess the ***reasonableness*** of the verdict. Appellate review for unreasonable verdict, acts as "powerful safeguard against wrongful convictions because an appellate court can "review, analyse and, within the limits of appellate disadvantage, weigh the evidence" to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at. As part of a review for unreasonable verdict the court may review credibility where the "testimony which the jury must have believed to render its verdict is so ***incredible*** that a verdict founded upon it must be unreasonable.[139] Similarly, the *curative proviso* ensures that cases are not sent back to be retried, if there is error, if it is "***reasonably possible***" that the verdict would be the same, and therefore that there has been no miscarriage of justice. A retrial of any case is a significant burden for the participants, the community and the criminal justice system and often retraumatizing for witnesses and victims; even more so with a case of this size and of this nature.

77. The authorities on whether the *curative proviso* can be applied when an included offence has not been put are confusing and inconsistent. Authorities have held that the *curative proviso* is "generally not available" or may be "seldom" applied when there has been a failure to put to the

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[137] ***Appeal Record, Vol.1,*** Decision of the Court of Appeal for Ontario, ¶142-143.
[138] Section 686(1)(b)(iii) of the *Criminal Code*; *R. v. Abdullahi*, 2023 SCC 19, ¶33; *R. v. R.V.*, 2021 SCC 10, ¶37; *R. v. Sarrazin*, 2011 SCC 54, ¶30-31; *R. v. Van* 2009 SCC 22, ¶36; *R. v. Khan*, 2001 SCC 86, ¶26-31.
[139] *R. v. H.(W.)*, 2013 SCC 22, ¶25-34; *R. v. Biniaris*, 2000 SCC 15, ¶36; *R. v Yebes*, [1987] 2 SCR 168, ¶20-26.

jury an included offence, but not that it can never be applied.[140] The *proviso* has been applied to the failure to leave a possible verdict on an included offence where findings of fact are implicit in the verdict or verdicts returned by the jury, so long as those verdicts were not tainted by the legal error and the findings are "unambiguously revealed by the verdict."[141] In *Pickton* LeBel J., writing in dissent, would have applied the *proviso* when a mode of participation was not put to the jury, because the Crown's case was "compelling" and "overwhelming" and it would "surpass belief" that the jury would not have convicted him, and in fact would "likely" have convicted him of first degree rather than second degree murder.[142] On the other hand, in *Robinson* this Court declined to apply the *proviso* "as a matter of fairness and logic" when a defence of intoxication that had an air of reality had not been put to the jury.[143]

78. The Court of Appeal for Ontario in *Chalmers* held that the argument that the trial judge made a reversible error on whether there is an air of reality to a defence "is only as strong as the air of reality relating to the defence sought to be raised" and applied the *proviso*, finding that the failure to instruct on manslaughter in that murder case was harmless in all the circumstances because the air of reality to manslaughter was "marginal at best" or "might skim over the bar of air of reality, if considered in isolation." (The defence had conceded intent).[144] Ten years later *Ronald* held that the two conclusions (that evidence of one theory of liability was overwhelming while evidence of another theory was marginal albeit realistic) were "incompatible" and could not permit the application of the *proviso.*[145] *Doxtator,* in a somewhat contradictory fashion, repeated the "incompatibility" principle from *Ronald,* before citing *Chalmers* as an example where the *proviso* could be applied in that case because the evidence of the included offence that

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[140] *R. v. Ronald*, 2019 ONCA 971, ¶66; *R. v. Haughton* [1994] 3 SCR 516; aff'g [1992] OJ No 2690 (CA); *R. v. Doxtator*, 2022 ONCA 155, ¶52-53.
[141] *R. v. Ronald*, 2019 ONCA 971, ¶65-69; *R. v. Haughton*, [1994] 3 SCR 516; aff'g [1992] OJ No 2690 (CA); *R. v. Elkins* [1995] O.J. No. 3228 (CA); leave to appeal refused, [1996] S.C.C.A. No. 62; *R. v. Mulligan* 2011 O.A.C. 116, ¶60; *R. v. Sarrazin* 2010 ONCA 577, ¶70-72; 2011 SCC 54, ¶30-31; *R. v. Pilon*, 2009 ONCA 248, ¶76-80; *R. v. Humaid* [2006] O.J. No. 1507 (CA), ¶88-90, leave to appeal refused, [2006] S.C.C.A. No. 232; *R. v. Abdullahi*, 2023 SCC 19, ¶33; *R. v. Johnson*, 2023 SCC 24, ¶3.
[142] *R. v. Pickton,* 2010 SCC 32, ¶86.
[143] *R. v. Robinson*, [1996] 1 S.C.R. 683, ¶71
[144] *R. v. Chalmers*, 2009 ONCA 268, ¶58 and 64-67
[145] *R. v. Ronald*, 2019 ONCA 971, ¶66.

was not put to the jury was "marginal," and having regard to the defence position on intent.[146]

ii. The error by the Court of Appeal for Ontario

79. In this case, the Court of Appeal erred in ¶142 of its decision by finding the *proviso* had "no application" as a matter of principle and, by relying on *Ronald* and holding that, "the fact an included offence should have been left is inconsistent with any finding that the evidence on the main offence was so overwhelming that the verdict would have been the same."[147] The Appellant respectfully submits that if there is no weighing in the air of reality test, because a trial judge must put a route to liability to the jury no matter how incredible or unreliable, then an appellate court on review must be able to assess the "reasonable possibility" of a different verdict and be able apply the *proviso.* Just as in *Chalmers*, evidence of one scenario can "skim the bar of the air of reality" or be "marginal" at best, while the evidence of the other scenario is overwhelming; the two can co-exist and are not "incompatible," as *Ronald* held.[148]

iii. The overwhelming evidence of a plan to kill both parents.

80. The evidence of a plan to kill both parents was overwhelming, as summarised at paragraph 60 *supra*. A plan to kill only Mr. Pan, if it existed at all, was tenuous and marginal at its highest and contradicted and undermined Pan's own description of the events and her evidence that she had no plan to kill anyone in November 2010. The alternative plan is otherwise not supported by the bulk of the evidence.

iv. The effect of the presumption the jury followed the instructions it was given.

81. We must presume that the jury followed the instruction that it was given. [149] The first question the jury was directed to answer was whether there was a plan to kill Mrs. Pan as part of a plan to kill both Pans, and if the jury found there was no such plan the jury was to acquit of first-degree murder. If the jury was satisfied beyond a reasonable doubt there was a plan to kill

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[146] *R. v. Doxtator*, 2022 ONCA 155, ¶52-53.
[147] ***Appeal Record, Vol.1*** - Decision of the Court of Appeal for Ontario, ¶142; *R. v. Pan*, 2023 ONCA 362, ¶142.
[148] *R. v. Ronald*, 2019 ONCA 971, ¶66; *R. v. Chalmers*, 2009 ONCA 268, ¶58 and 64-67; *R. v. Doxtator*, 2022 ONCA 155, ¶48.
[149] ***Transcript, Vol.64***, p. 320; *R. v. Doxtator*, 2022 ONCA 155, ¶81 (dissent); 2022 SCC 40; *R. v. Corbett*, [1988] 1 S.C.R. 670, ¶39-40; *R. v. Suzack*, 128 OAC 140, ¶128; leave dismissed [2000] S.C.C.A. No. 583.

Mrs. Pan, then the jury was to go on and decide if any accused was part of that plan.[150] We must presume the jury followed that instruction and was satisfied beyond a reasonable doubt that there was a plan to murder Mrs. Pan. If so, the jury necessarily rejected a plan to murder only Mr. Pan.

82. While the trial judge did not give an instruction on the alternative scenario of a plan to murder only Mr. Pan because it was not realistic, in his *W.D.* instruction he expressly referred to the evidence relied on by Pan (that she never wanted to harm her mother and her claim she had an earlier plan to kill her father that she abandoned), telling the jury it must consider it when determining whether it was satisfied beyond a reasonable doubt that the murder of her mother was planned and deliberate.[151]

83. Instructing the jury on an alternative scenario based on a plan to kill only Mr. Pan would have expanded Jennifer Pan's liability, by making her liable for second-degree murder or manslaughter through common purpose liability.[152]

84. Lastly, and in respect of the Respondents Wong, Crawford and Mylvaganam, the jury was not left with a stark and binary choice of acquitting or convicting them of first-degree murder. If this Court remains concerned that the jury might not have followed the instructions it received and may have convicted because the jury disliked the Respondents' conduct but was unwilling to acquit even though the jury had a reasonable doubt there was a plan to kill Mrs. Pan, the jury had a route to lesser and included offences for three Respondents. The jury was instructed it could find Wong, Mylvaganam and Crawford guilty of second-degree murder or manslaughter for the death of Mrs. Pan, and attempted murder for shooting Mr. Pan, on the home invasion theory. The jury rejected those options and therefore implicitly was satisfied beyond a reasonable doubt that there was a plan to kill Mrs. Pan.

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[150] ***Appeal Book***, ***Vol.14***, Ex. III, p.6874-6885; ***Transcript, Vol.64***, p.291-356; ***Vol.65***, p.1-12-158.
[151] ***Transcript, Vol.64***, p.321-352; ***Vol.65***, p.15-48, 169-170.
[152] ***Appeal Book, Vol.14***, Ex.III, p.6874-6885.

PART IV – SUBMISSIONS ON COSTS

85. The Appellant submits there should be no order as to costs in this criminal matter.

PART V – ORDER

86. The Appellant requests that the appeal of the decision of the Court of Appeal for Ontario, to overturn the first-degree murder convictions and send that charge back for a retrial for all four Respondents, be allowed and the convictions for first-degree murder be reinstated.

PART VI – SUBMISSIONS ON PUBLICATION

87. There is a publication ban for the autopsy photo of Mrs. Bich Ha Pan in Ex. 45.

88. There are sealing orders restricting public access to the following exhibits:

a. ***Stinchcombe Voir Dire:*** Ex. A – Sealed Telus Emails; Ex. B– Sealed Bell records

b. ***Severance and Mistrial Application:*** Ex. A –Sealed Medical discharge statement; Ex. B –Sealed Doctor's report of September 2nd, 2014

c. ***Subpoena***: Ex. NN – Sealed Package of Documents received from the Toronto Police Service pursuant to a Subpoena to Witness issued at the request of the Defence

d. ***Sealed Jury Letters:*** Exs. HHH and NNN.[153]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of March 2024 by:





Susan L. Reid | Jeremy Streeter | Stephanie A. Lewis

Counsel for the Appellant,
His Majesty the King

[153] ***Transcript, Vol.41,*** p.247, ***Vol.15,*** p.123, ***Vol.49,*** p.41; ***Appeal Book, Vol.8,*** Trial Lettered Exhibit List, p.3443.

PART VII – AUTHORITIES

A. Caselaw

	Paragraphs
Browne v. Dunn (1893), 6 R. 67 (U.K. H.L.)	66
Housen v. Nikolaisen 2002 SCC 33	65
R. v. Rudder, 2023 ONCA 864	66
R. v. Aalders [1993] 2 S.C.R. 482	31, 36, 37, 42, 46, 47, 48, 63
R. v. Abbey, 2009 ONCA 624; leave to appeal refused 2010 CanLII 37826	66
R. v. Abdullahi, 2023 SCC 19	61, 64, 67, 76
R. v. Alas, 2022 SCC 14	63, 70
R. v. Al-Enzie, 2021 ONCA 81	46
R. v. Angelis, 2013 ONCA 70	46
R. v. Araujo, 2000 SCC 65	66
R. v. Arcuri, 2001 SCC 54	35
R. v. Ariaratnam, 2018 ONCA 1027	46
R. v. Arp, [1998] SCJ no. 82 (SCC)	66
R. v. B.(C.R.), [1990] 1 S.C.R. 717	66
R. v. Barrett, 2012 BCCA 241	46
R. v. Barrow, [1987] 2 SCR 694	17
R. v. Barton, 2019 SCC 33	41
R. v. Berto, 2021 ONCA 839	46
R. v. Best, 2016 NLCA 10	46
R. v. Biniaris, 2000 SCC 15	66, 75

R. v. Bogiatzis, 2010 ONCA 902 17

R. v. Budhoo, 2015 ONCA 912 68

R. v. Bulmer, [1987] 1 S.C.R. 120 40, 41

R. v. Buzizi, 2013 SCC 27 40, 61, 63, 65

R. v. Cairney, 2013 SCC 5563 41, 61, 63

R. v. Cargioli, 2023 ONCA 612 17

R. v. Carter, [1982] 1 S.C.R. 938 17

*R. v. Carty***,** 2015 ONSC 8144 6

R. v. Chacon-Perez, 2022 ONCA 3 44, 72

R. v. Chalmers, 2009 ONCA 268 46, 77, 78

R. v. Charemski, [1998] 1 S.C.R. 679 35

R. v. Chenier (2006), 205 C.C.C. (3d) 333 (Ont. C.A.) 55

R. v. Cinous, 2002 SCC 29 31, 32, 34, 35, 46, 53, 63, 40, 41

R. v. Corbett, [1988] 1 S.C.R. 670 80

R. v. Couture, 2007 SCC 28 66

R. v. Dawkins, 2021 ONCA 113 17

R. v. Dejala, 2021 QCCA 248; lv. to appeal dismissed 2022 CanLII 12245 46

R. v. Doxtator, 2022 ONCA 155; 2022 SCC 40 43, 69, 76, 77, 78, 80

R. v. Drydgen 2013 BCCA 253 66

R. v. Dupe, 2016 ONCA 653 46, 68, 69

R. v. Eberts, (1912), 47 S.C.R. 1 31

R. v. Elkins [1995] O.J. No. 3228 leave to appeal refused, [1996] S.C.C.A. No. 62 76

R. v. Etienne, 2015 QCCA 1390 46

R. v. Faid, [1983] 1 S.C.R. 265 40

R. v. Figliola, 2018 ONCA 578 46

R. v. Finta, [1994] 1 S.C.R. 701 41

R. v. Fontaine, 2004 SCC 27 41

R. v. Frank, 2012 BCCA 2 46

R. v. Gager, 2020 ONCA 274; lv. to appeal refused 2021 CanLII 32437 66

R. v. Gauthier, 2013 SCC 32, 40, 41

R. v. Gill, 2009 ONCA 124 40, 46

R. v. Goforth, 2022 SCC 25 67

R. v. Grandine, 2022 ONCA 368 45, 46

R. v. Grant 2015 SCC 9 41, 66

R. v. Grewal, 2019 ONCA 630 46

R. v. Gunning, 2005 SCC 27 41

R. v. H.(W.), 2013 SCC 22 75

R. v. Handy, 2002 SCC 56 66, 67

R. v. Harkes, 2021 ABCA 315 46, 71

R. v. Haughton, [1994] 3 SCR 516; aff'g [1992] OJ No 2690 (CA) 76

R. v. Humaid [2006] O.J. No. 1507 (CA), leave to appeal refused, [2006] S.C.C.A. No. 232 76

R. v. J.M.H., 2011 SCC 45 52

R. v. Johnson, 2022 ONCA 534; upheld 2023 SCC 24 46, 76

R. v. Kelsie, 2019 SCC 17; overturning 2017 NSCA 89 42

R. v. Khan, 2001 SCC 86 — 75

R. v. Kirkpatrick, 2022 SCC 33 — 35

R. v. Kruk, 2024 SCC 7 — 35, 65, 66, 67

R. v. Land, 2019 ONCA 39 — 46, 68, 69, 70

R. v. Largie, 2010 ONCA 548; lv. to appeal refused [2011] S.C.C.C. No. 119 — 46

R. v. Latimer, 2001 SCC 1 — 41

R. v. LeBlanc, 2023 ONCA 718 — 46

R. v. Lemky, [1996] 1 S.C.R. 757 — 41

R. v. Luciano, 2011 ONCA 89 — 46

R. v. Lyttle 2004 SCC 5 — 66

R. v. MacKenzie, 2012 NBCA 29 — 46, 71

R. v. MacLeod, 2014 SCC 76; aff'g 2014 NSCA 63 — 42

R. v. Mayuran, 2012 SCC 31 — 41

R. v. Menard, 2014 QCCA 877 — 46

R. v. Monteleone, [1987] 2 S.C.R. 154 — 35

R. v. Morrison, 2019 SCC 15 — 41

R. v. Mulligan 2011 O.A.C. 116 — 76

R. v. Nagy, 2023 ONCA 184 — 46

R. v. Olbey, [1980] 1 S.C.R. 1008 — 40

R. v. Osolin, [1993] 4 SCR 595 — 31, 37, 41

R. v. Pan, 2023 ONCA 362 — 5, 48, 74, 79

R. v. Pappas, 2013 SCC 56 — 35, 41, 67

R. v. Park, [1995] 2 S.C.R. 836 — 31, 32, 38, 39, 40, 41, 60

R. v. Pasqualino, 2008 ONCA 554 — 66

R. v. Patel, 2017 ONCA 702 — 46

R. v. Paul, 2020 ONCA 259 — 68, 69, 70

R. v. Pickton, 2010 SCC 32, — 42, 76

R. v. Pilon, 2009 ONCA 248 — 76

R. v. Puddicombe, 2013 ONCA 506; leave to appeal refused, [2013] S.C.C.A. No. 496 — 17

R. v. R.J.M., 2023 MBCA 28 — 66

R. v. R.V., 2021 SCC 10 — 75

R. v. Ranger [2003] OJ No 3479 (CA) — 46

R. v. Reddick, [1991] 1 S.C.R. 1086 — 37

R. v. Robinson, [1996] 1 S.C.R. 683 — 41, 76

R. v. Rodgerson, 2015 SCC 38 — 67

R. v. Romano, 2017 ONCA 837 — 46

R. v. Ronald, 2019 ONCA 971 — 31, 44, 46, 55, 72, 76, 77, 78

R. v. Samaniego, 2022 SCC 9 — 66

R. v. Sarrazin 2010 ONCA 577; 2011 SCC 54 — 76

R. v. Schwartz, [1988] 2 S.C.R. 443 — 41

R. v. Seaboyer, [1991] 2 S.C.R. 577 — 66

R. v. Shepherd, 2009 SCC 35 — 66

R. v. Simon, 2010 ONCA 754 — 46

R. v. Smith, [1979] 1 S.C.R. 215 — 41

R. v. Suthakaran, 2024 ONCA 50 — 46, 61, 62, 70

R. v. Suzack, 128 OAC 140, leave to appeal refused [2000] S.C.C.A. No. 583 — 80

R. v. Tenthorey, 2021 ONCA 324 — 43, 47, 48

R. v. Thibert, [1996] 1 S.C.R. 37 — 61, 63, 68

R. v. Tran, 2010 SCC 58 — 41, 63, 68

R. v. Turner, 2023 MBCA 40 — 46

R. v. Van 2009 SCC 22 — 75

R. v. Villaroman, 2016 SCC 33 — 33, 52

R. v. Wade, [1995] 2 S.C.R. 737, overturning [1994] O.J. No. 543 — 42, 46

R. v. Willis, 2019 NSCA 64 — 66

R. v. Wong (2006), 211 OAC 211 — 55

R. v Yebes, [1987] 2 SCR 168 — 75

R. v. Yumnu, 2010 ONCA 637; aff'd 2012 SCC 73 — 17

B. Secondary Sources

Rankin, Micah B., "R. c. Buzizi: A More Generous Air of Reality Test for the Subjective Dimension of the Provocation Defence", 2 CR-ART 261 — 63

Silver, Lisa A., "Poof into a Puff of Air — Where Have all the Defences Gone? The Air of Reality Test and the Defences of Justifications and Excuses," 2014 61 C.L.Q. 531 — 31

Collins French-English Dictionary — 33

C. Statutes, Regulations, Rules, etc.

Section 686(1)(b)(iii) of the *Criminal Code* — 75

PART VII – STATUTES, REGULATIONS, ETC.

N/A