



SUPREME COURT OF CANADA

CITATION: R. v. Goforth, 2022
SCC 25

**APPEAL HEARD AND
JUDGMENT RENDERED:**
December 7, 2021
REASONS FOR JUDGMENT:
June 10, 2022
DOCKET: 39568

BETWEEN:

Her Majesty The Queen
Appellant

and

Kevin Eric Goforth
Respondent

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

**REASONS FOR
JUDGMENT:** Côté J. (Wagner C.J. and Moldaver, Karakatsanis, Rowe and
(paras. 1 to 60) Kasirer JJ. concurring)

**CONCURRING
REASONS:** Brown J. (Martin and Jamal JJ. concurring)
(paras. 61 to 68)

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Her Majesty The Queen

Appellant

v.

Kevin Eric Goforth

Respondent

Indexed as: R. v. Goforth

2022 SCC 25

File No.: 39568.

Hearing and judgment: December 7, 2021.

Reasons delivered: June 10, 2022.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law — Charge to jury — Accused charged with second degree murder and unlawfully causing bodily harm in relation to two foster children — Charges predicated on accused's failure to provide necessities of life to children — Accused convicted by jury of manslaughter and unlawfully causing bodily harm — Court of Appeal setting aside convictions on basis that errors in jury charge may have misled jury — Whether jury properly instructed.

On November 8, 2011, two girls aged three and two years old were placed in foster care with the accused and his wife. On the night of July 31, 2012, the accused and his wife took the older child to the hospital. She was in cardiac arrest and was not breathing. She was severely emaciated and dehydrated, her weight was significantly below the third percentile for children of her age and gender, and she had multiple bruises and abrasions on her body. She was placed on a life support machine but died on August 2, 2012. The younger child, who was also admitted to hospital, was severely ill due to malnutrition and dehydration, but she survived. She had pneumonia, a urinary tract infection, and a large ulcer on her lower left leg with signs of infection. She also had bruises on her face, open sores and abrasions on the lower spine, and wrap-around lesions on her wrists and ankles.

The accused and his wife were both charged with, and jointly tried for, second degree murder in relation to the death of the older child and unlawfully causing bodily harm in relation to the younger child. All of these charges were predicated on the alleged failure to provide the children concerned with necessities of life, contrary to s. 215 of the *Criminal Code*. The jury convicted the accused's wife of second degree murder and unlawfully causing bodily harm. As for the accused, the jury acquitted him of second degree murder but convicted him of the lesser and included offence of unlawful act manslaughter, and of unlawfully causing bodily harm. The accused appealed his convictions. The majority of the Court of Appeal set aside his convictions and ordered a new trial. It held that the trial judge had erred in describing the *mens rea* requirement for the predicate offence of failing to provide necessities of life and in

failing to review and to instruct the jury on the evidence of the accused's parenting circumstances as a secondary caregiver.

Held: The appeal should be allowed and the convictions restored.

Per Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.:

The jury was properly instructed. The jury charge functionally conveyed the *mens rea* requirements such that there is no reasonable possibility that the jury would have been confused. The charge also sufficiently recited the evidence about the circumstances that the accused argued prevented him from foreseeing the risk of harm to the children. As well, the jury was well-equipped to make a common sense assessment of whether failing to provide food or fluids to young children constituted a marked departure from the conduct of a reasonably prudent person.

An accused is entitled to a jury that is properly — and not necessarily perfectly — instructed. Trial judges must be afforded some flexibility in crafting the language of jury instructions, as their role requires them to decant and simplify the law and evidence for the jury. An appellate court must take a functional approach when reviewing a jury charge by examining the alleged errors in the context of the evidence, the entire charge, and the trial as a whole.

In the instant case, the jury charge was not perfect. With respect to the *mens rea* requirement for failure to provide necessities of life, the trial judge did not make a clear distinction in her instructions to the jury between the required foreseeability

standard for failing to provide necessities of life and the required foreseeability standard for manslaughter or unlawfully causing bodily harm. She routinely juxtaposed the two different foreseeability requirements without clearly alerting the jury to how the respective foresight standards corresponded to the respective offences. However, when read as a whole, the trial judge's instructions functionally conveyed the necessary legal principles. There is no reasonable possibility that the jury was confused about the required *mens rea* for failing to provide necessities of life or misled about what the Crown had to prove in order for the jury to find the accused guilty of either manslaughter or unlawfully causing bodily harm.

The trial judge clearly and correctly summarized the required *mens rea* for failing to provide necessities of life in one portion of the charge. She invited the jury to consider two straightforward questions to assess whether that requirement had been met. These questions told the jurors exactly what to ask themselves in the circumstances of this case. There is simply no reasonable possibility that any juror would have disregarded these straightforward questions and would have instead chosen to apply the lower foresight standard. Additionally, since the impugned instruction was routinely introduced with the word "further", the jury would have concluded that both foresight standards had to be satisfied. Finally, defence counsel did not object to the charge at trial and appellate counsel before the Court of Appeal did not initially identify the juxtaposition of the two foreseeability standards as an issue of concern. Although not determinative, defence counsel's failure to object at trial and appellate counsel's

failure to identify the issue initially on appeal undermine the argument that the jury may have been misled or confused about the appropriate standard.

As to the charge on the accused's alleged circumstances as a secondary caregiver, the law is clear that personal characteristics of an accused, short of incapacity, are irrelevant. Consideration of personal characteristics injects subjectivity into the objective test, which undermines the purpose of having a single and uniform minimum legal standard of care. While the legal duty of the accused is not particularized by his or her personal characteristics short of incapacity, it is particularized in application by the nature of the activity and the circumstances surrounding the accused's failure to take the requisite care. The reasonable person is therefore placed in the relevant circumstances of the accused. These circumstances do not personalize the objective standard; they contextualize it.

In the instant case, the accused's alleged lack of involvement in providing necessities for the children cannot be characterized as a circumstance. Rather, it constitutes an essential element of the *actus reus*. The accused had a duty to provide necessities of life to the children. His utter neglect of them is not a circumstance that can ground his failure to foresee the risk of harm. Moreover, given the evidence of emaciation and neglect of the children, the accused's alleged reliance on his wife, his alleged limited interaction with the girls, and the girls' alleged history of being picky eaters and suffering from illness regularly were not circumstances material to the jury's consideration of whether the accused had the requisite foresight to be criminally liable.

The accused was well positioned to observe the children's condition, yet he did nothing. In any event, the trial judge sufficiently recited the evidence about the accused's alleged circumstances. The trial judge instructed the jury multiple times on the accused's evidence relating to his busy schedule and his purported status as a secondary caregiver. Although the more detailed description of the evidence was given in portions of the charge that discussed the *actus reus*, there is no basis to conclude that the trial judge's comparably brief recitation of the evidence when discussing *mens rea* would have caused the jury any confusion. The trial judge also instructed the jury on the accused's alleged circumstances a final time when outlining the defence theory of the case at the end of her charge.

With respect to the term "marked departure", a new trial is not warranted simply because the trial judge did not explain its meaning. The alleged marked departure in the instant case relates to whether a reasonable person would have foreseen that failing to provide food or fluids to young children would result in a risk of danger to life or of permanent endangerment to health. Given this context, the jury was easily able to assess whether the failure to provide food or fluids to young children constituted a marked departure from the standard of care of a reasonably prudent person in the circumstances. As well, the accused chose not to request an instruction on the meaning of the term as it was not in his interest to do so and it was inconsistent with his defence at trial that neither he nor his wife ever denied food or fluids to the children and that medical attention was not required up until the time they took the older child to the hospital. The charge was thus adequate because, based on the evidence and the trial as

a whole, there was no issue as to whether the failure to provide food or fluids to young children constituted a marked departure — it was not a difficult concept to understand or apply in the circumstances.

Per Brown, Martin and Jamal JJ.: The jury charge, when viewed from the functional perspective required by the jurisprudence, did not properly equip the jury to decide the case according to law. However, as no substantial wrong or miscarriage of justice flowed from the deficient instructions, the curative proviso should be applied. There is therefore agreement with the majority that the appeal should be allowed and the convictions restored.

The functional approach requires the charge to be read as a whole and asks whether an appellate court can be satisfied that the jury would have adequately understood the issues involved, the law relating to the charge the accused was facing, and the evidence to be considered in resolving the issues. The jury must not be left to, in effect, cobble together its own charge by guessing correctly about which part of the charge to follow and which part to disregard.

In the instant case, at many points, the jury charge misstated an essential element of the offence that comprised the central issue, being whether the Crown had established the *mens rea* for the offence of failing to provide the necessaries of life. This charge may have been functionally adequate from the standpoint of a reviewing court searching for a correct instruction. But that is not the same thing as a charge that is functionally adequate for the purposes of a jury knowing the law that it must apply

to the evidence. By commingling, confusing and routinely and with frequency substituting the differing standards of foreseeability of harm (as between manslaughter and failing to provide the necessities of life), the trial judge left the jury equipped with a charge that, in critical sections, is not comprehensible to a legally trained reader, let alone to a layperson juror. Compounding the confusion, the jury charge addressed the *mens rea* under a heading relating to the *actus reus*. It cannot plausibly be maintained that this charge left the jury equipped to do its job.

Cases Cited

By Côté J.

Distinguished: *R. v. Stephan*, 2017 ABCA 380, 423 D.L.R. (4th) 56, rev'd 2018 SCC 21, [2018] 1 S.C.R. 633; **referred to:** *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301; *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. Luciano*, 2011 ONCA 89, 273 O.A.C. 273; *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760; *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581; *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Naglik*, [1993] 3 S.C.R. 122; *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49; *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215; *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60; *Thériault v. The Queen*, [1981] 1 S.C.R. 336; *R. v. Javanmardi*, 2019 SCC 54, [2019] 4 S.C.R. 3; *R. v. Royz*, 2009 SCC 13, [2009] 1 S.C.R. 423; *R. v. Corbett*, [1988] 1 S.C.R. 670.

By Brown J.

Referred to: *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Cooper*, [1993] 1 S.C.R. 146; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301; *R. v. Arcangioli*, [1994] 1 S.C.R. 129; *Thériault v. The Queen*, [1981] 1 S.C.R. 336; *Cullen v. The King*, [1949] S.C.R. 658; *R. v. Stephan*, 2018 SCC 21, [2018] 1 S.C.R. 633, rev’g 2017 ABCA 380, 423 D.L.R. (4th) 56.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 215, 222(5)(a), 229(a), 235, 269(a).

Authors Cited

Paciocco, David M. “Subjective and Objective Standards of Fault for Offences and Defences” (1995), 59 *Sask. L. Rev.* 271.

APPEAL from a judgment of the Saskatchewan Court of Appeal (Caldwell, Leurer and Barrington-Foote JJ.A.), 2021 SKCA 20, 400 C.C.C. (3d) 1, [2021] S.J. No. 40 (QL), 2021 CarswellSask 47 (WL), setting aside the convictions of the accused for manslaughter and unlawfully causing bodily harm and ordering a new trial. Appeal allowed.

Pouria Tabrizi-Reardigan, for the appellant.

Aleida M. Oberholzer and Zachary Carter, for the respondent.

The reasons for judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ. were delivered by

CÔTÉ J. —

I. Overview

[1] The circumstances giving rise to this appeal are tragic and abhorrent. The respondent, Kevin Eric Goforth, was convicted by a jury of unlawful act manslaughter and unlawfully causing bodily harm. The convictions were in relation to Mr. Goforth's two young foster children. The older child died as a result of a brain injury that developed following a cardiac arrest caused by malnutrition and dehydration. The younger child was severely ill due to malnutrition and dehydration, but she survived. Both children had bruises, abrasions, and lesions on their bodies. The main issue in this appeal is whether the jury was properly instructed such that it was able to find that Mr. Goforth had the requisite *mens rea*.

[2] A majority of the Court of Appeal for Saskatchewan allowed Mr. Goforth's appeal, set aside his convictions, and ordered a new trial. The majority found that the trial judge had erred in two principal ways. First, the trial judge erred in describing the *mens rea* requirement for failing to provide necessities of life, which was the predicate

offence for both manslaughter and unlawfully causing bodily harm. Second, she erred in failing to review and to instruct the jury on the evidence of Mr. Goforth's parenting circumstances as a secondary caregiver.

[3] In my view, the majority of the Court of Appeal erred by failing to take a functional approach in its assessment of the jury charge. This Court has long held that an accused is entitled to a jury that is properly — and not necessarily perfectly — instructed. The ultimate question in this appeal is whether the jury was properly instructed such that appellate intervention was unwarranted. In my view, while the charge was not perfect, the jury was nonetheless properly instructed. None of the issues raised in connection with the jury charge warranted appellate intervention.

[4] At the conclusion of the hearing, the Court allowed the appeal and restored the convictions, with reasons to follow. These are the reasons.

II. Facts

[5] On November 8, 2011, two young girls were placed in foster care with Mr. Goforth and his wife, Tammy Goforth, after having previously spent over a year and a half in temporary care with other foster parents. The Goforths had been identified as a possible permanent placement for the children. At the time they were placed in the care of the Goforths, the children were three and two years old. Neither child had any major health concerns prior to the placement. A child protection worker had described the girls as being “fairly pudgy”, “very full-faced”, and “full-cheeked” in appearance

(A.R., vol. III, at p. 141). She had also described the older child's disposition as "warm", "affectionate", and "very happy" (p. 154). A previous foster parent had described the younger child's disposition as "bubbly" and "happy" (A.R., vol. IV, at p. 232).

[6] On the night of July 31, 2012, approximately nine months after the girls entered their care, the Goforths took the older child to the hospital. The attending pediatrician in the intensive care unit testified at trial that the older child was very sick. She was in cardiac arrest and was not breathing. It took hospital staff 15 minutes to resuscitate her heart. She was severely emaciated and dehydrated. Her weight was significantly below the third percentile for children of her age and gender. She had multiple bruises and abrasions on her body. She was placed on a life support machine as she was not capable of breathing on her own. She was also in renal failure, likely due to severe dehydration.

[7] Despite continued treatment over the next day and a half, the older child's condition showed no signs of improvement and she was declared brain dead. She was taken off life support and died on August 2, 2012. The cause of her death, as set out in the Agreed Statement of Facts, was "diffuse hypoxic/ischemic brain injury that developed following a cardiac arrest on July 31, 2012, secondary to malnutrition and dehydration" (A.R., vol. II, at p. 171).

[8] Given the horrific state of the older child, the police were called shortly after her admission to the hospital. The police subsequently found the younger child

and she was admitted to hospital early in the morning on August 1, 2012. She was similarly emaciated, malnourished, and dehydrated. Her weight was also under the third percentile for children of her age and gender. She had increased body hair, which was a condition the attending pediatrician had previously seen in patients with anorexia nervosa and which, she explained in her testimony at trial, was a way the body could insulate itself after fat stores had been lost. In addition, the younger child had pneumonia, a urinary tract infection, and a large ulcer on her lower left leg with signs of infection. She also had bruises on her face, open sores and abrasions on the lower spine, and wrap-around lesions on her wrists and ankles.

[9] Mr. and Ms. Goforth were both ultimately charged with, and were jointly tried for, second degree murder (*Criminal Code*, R.S.C. 1985, c. C-46, s. 235) in relation to the death of the older child and unlawfully causing bodily harm (s. 269(a)) in relation to the younger child. Unlawful act manslaughter (s. 222(5)(a)) was a lesser and included offence in the second degree murder charges. All of the offences required the Crown to prove beyond a reasonable doubt that the two accused had committed an unlawful act. The unlawful act alleged by the Crown was failure to provide necessities of life as set out in s. 215(2) of the *Criminal Code*.

[10] Section 215 imposes a legal duty on certain persons to provide necessities of life to another person and sets out the corresponding offence for failure without lawful excuse to perform that duty. It states:

215 (1) Every one is under a legal duty

(a) as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years;

(b) to provide necessaries of life to their spouse or common-law partner; and

(c) to provide necessaries of life to a person under his charge if that person

(i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and

(ii) is unable to provide himself with necessaries of life.

(2) Every person commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse to perform that duty, if

(a) with respect to a duty imposed by paragraph (1)(a) or (b),

(i) the person to whom the duty is owed is in destitute or necessitous circumstances, or

(ii) the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or

(b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

[11] The jury convicted Ms. Goforth of second degree murder and unlawfully causing bodily harm. Because her subsequent appeal was unanimously dismissed by the Court of Appeal, there is no appeal in relation to Ms. Goforth before this Court.

[12] The jury acquitted Mr. Goforth of second degree murder but convicted him of the lesser and included offence of unlawful act manslaughter. He was also convicted of unlawfully causing bodily harm. Mr. Goforth appealed his convictions.

III. Decision Below

[13] The majority of the Court of Appeal for Saskatchewan allowed Mr. Goforth's appeal, set aside his convictions, and ordered a new trial (2021 SKCA 20, 400 C.C.C. (3d) 1). The majority held that the trial judge had erred in her explanation to the jury of the legal elements of s. 215 and in how she related the evidence to those elements.

[14] In the majority's view, the trial judge did not properly convey the *mens rea* requirement for the predicate offence under s. 215 — failing to provide necessities of life. When explaining the essential elements of s. 215, the trial judge confusingly introduced two different standards relating to the required foreseeability of harm. As a result, the jury may have concluded that, in order to find that Mr. Goforth committed the predicate offence under s. 215, the Crown only had to prove that a reasonable person in the circumstances would have foreseen the risk of bodily harm beyond the trivial or transitory. This is less stringent than the standard required for s. 215, which is that a reasonable person in the circumstances must have foreseen the risk of death or permanent health impairment. The error was compounded by the trial judge's failure to explain what is meant by a *marked departure* from the conduct of a reasonably prudent person in the circumstances.

[15] The majority also found that the trial judge had erred in relating the evidence to the *mens rea* requirement. Although personal characteristics of an accused short of incapacity are irrelevant in assessing the objective *mens rea* requirement for s. 215, the actual circumstances of an accused bear on whether their conduct is a marked departure from the standard of care expected of a reasonably prudent person. When reviewing the evidence relevant to *mens rea* for the jury, the trial judge referred only to a very limited subset of the evidence. Although a more complete summary of the evidence was provided at other times in the charge, the failure to refer to the evidence of Mr. Goforth's parenting and work circumstances when discussing *mens rea* created the real possibility that the jury would have been led to believe that evidence of Mr. Goforth's circumstances was irrelevant to assessing *mens rea*.

[16] In dissent, Caldwell J.A. would have dismissed the appeal. With respect to the trial judge's instruction on the *mens rea* requirement for s. 215, Caldwell J.A. acknowledged that the foresight requirement for manslaughter was intermingled in the trial judge's discussion of the foresight requirement for the predicate offence under s. 215. However, he found that the trial judge had stated the law correctly — albeit somewhat confusingly. The lower foresight standard was routinely introduced as a “further” requirement that the Crown had to prove. When the trial judge's instructions were read as a whole, there was no reasonable possibility that they misled the jury or caused it to misunderstand what the Crown had to prove. Further, Caldwell J.A. found that “no reasonable juror could have concluded both that (a) Mr. [Goforth] ought to have foreseen the risk of bodily harm beyond the trivial or transitory, and yet (b) there

was no objectively foreseeable risk of death or permanent endangerment of health in the circumstances” (para. 102).

[17] Caldwell J.A. rejected the argument that the trial judge had failed to recount the evidence of Mr. Goforth’s circumstances to the jury. At trial, Mr. Goforth’s position was that neither he nor his wife had deprived the children of food or fluids. This position was inconsistent with Mr. Goforth’s position on appeal. On appeal, he argued that his wife’s primary role in the household constituted a circumstance that had rendered him unable to foresee the risks posed by his own failure to provide necessities of life to the children. In the view of Caldwell J.A., Mr. Goforth’s position on appeal “was patently precluded from being put to the jury by the position he took at trial and, regardless, would have been overwhelmed by the uncontroverted evidence of the children’s deplorable physical condition” (para. 75). The argument, in effect, was that a reasonable parent in the circumstances of his spousal relationship would not have been aware that the children had been neglected, were starving, and required medical attention. Caldwell J.A. found that Mr. Goforth’s spousal relationship was personal to him and was irrelevant to the objective *mens rea* requirement in s. 215.

[18] With regard to Ms. Goforth, the Court of Appeal was unanimous in dismissing her appeal. Ms. Goforth appealed only her conviction for second degree murder, arguing that there was an inconsistency between her conviction on that charge and Mr. Goforth’s acquittal. Although the impugned *mens rea* instruction was repeated in relation to the charges against Ms. Goforth, there were no concerns about whether

the jury was potentially confused about the required foreseeability standard. In the context of Ms. Goforth's conviction for second degree murder, the jury must have been satisfied either that Ms. Goforth meant to cause the older child's death or that she meant to cause the older child bodily harm that she knew was likely to cause death and she was reckless as to whether death ensued or not (*Criminal Code*, s. 229(a)). By necessary implication, the jury's conclusion amounted to a finding that Ms. Goforth met the requisite foresight standard for s. 215.

IV. Issues on Appeal

[19] The following issues must be considered in this appeal:

- (1) Did the trial judge err by improperly instructing the jury on the *mens rea* requirement for s. 215 (failure to provide necessities of life)? Specifically, did the trial judge err by intermingling the required foreseeability standard for s. 215 with the required foreseeability standard for manslaughter or unlawfully causing bodily harm?

- (2) Did the trial judge err by failing to instruct the jury on Mr. Goforth's circumstances as a secondary caregiver during the *mens rea* instruction for s. 215?

(3) Did the trial judge err by failing to explain what is meant by a *marked departure* from the conduct of a reasonably prudent person in the circumstances?

(4) If the trial judge erred, can the curative proviso be applied?

V. Analysis

A. *Standard of Review*

[20] The alleged errors in this case pertain to the trial judge's charge to the jury. As I stated above, this Court has long held that an accused is entitled to a jury that is properly — and not necessarily perfectly — instructed (*R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 31; *R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 2 and 32).

[21] Trial judges are not held to a standard of perfection in crafting jury instructions (*Daley*, at para. 31). Rather, an appellate court must take a functional approach when reviewing a jury charge by examining the alleged errors in the context of the evidence, the entire charge, and the trial as a whole (*R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 8; *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, at para. 10; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 32). It is the substance of the charge — and not adherence to or departure from a prescriptive formula — that is determinative (*R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 54; *R. v.*

Luciano, 2011 ONCA 89, 273 O.A.C. 273, at para. 69). As Bastarache J. instructed in *Daley*, at para. 30:

. . . it is important for appellate courts to keep in mind the following. The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case. [Emphasis added.]

[22] Indeed, trial judges must be afforded some flexibility in crafting the language of jury instructions, as their role requires them to “decant and simplify” the law and evidence for the jury (*Jacquard*, at para. 13; *R. v. Rodgeron*, 2015 SCC 38, [2015] 2 S.C.R. 760, at para. 50; see also *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581, at para. 39).

B. *Did the Trial Judge Err by Improperly Instructing the Jury on the Mens Rea Requirement for Section 215 (Failure to Provide Necessaries of Life)? Specifically, Did the Trial Judge Err by Intermingling the Required Foreseeability Standard for Section 215 With the Required Foreseeability Standard for Manslaughter or Unlawfully Causing Bodily Harm?*

[23] The Crown argues that the trial judge did not err in her charge regarding the *mens rea* requirement for s. 215. The jury charge addressed the objective foreseeability requirements for both manslaughter and the predicate offence. Although the charge juxtaposed these two foreseeability standards, there is no reasonable possibility that the jury would have thought the Crown only had to satisfy the lower foreseeability standard relating to manslaughter.

[24] Mr. Goforth, on the other hand, submits that the majority of the Court of Appeal was correct to find that the trial judge's instruction on the *mens rea* required for s. 215 was deficient. According to him, the majority functionally reviewed the jury charge and correctly concluded that the charge was inadequate because it confused the two foreseeability standards.

[25] For the reasons that follow, I would reject Mr. Goforth's submission. Although the jury charge was not perfect, a functional reading of it shows that the jury was properly instructed.

(1) The *Mens Rea* Requirements

[26] Mr. Goforth was charged with second degree murder and unlawfully causing bodily harm. Unlawful act manslaughter was a lesser and included offence in the second degree murder charge. All of these charges were predicated on the alleged failure to provide the children concerned with necessities of life contrary to s. 215. The *mens rea* requirement for both manslaughter and unlawfully causing bodily harm is the same. Both offences require the *mens rea* of the predicate offence, which in this case is the *mens rea* for s. 215, as well as objective foresight that the unlawful act could cause bodily harm beyond the trivial or transitory (*R. v. Creighton*, [1993] 3 S.C.R. 3, at p. 44; *R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 961).

[27] Section 215 creates a penal negligence offence. It is "aimed at establishing a uniform minimum level of care to be provided for those to whom it applies, and this

can only be achieved if those under the duty are held to a societal, rather than a personal, standard of conduct” (*R. v. Naglik*, [1993] 3 S.C.R. 122, at p. 141 (emphasis deleted)). Liability is premised on what a reasonable person in the accused’s position would have known or foreseen, so “fault lies in the absence of the requisite mental state of care” (*R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, at para. 8). The provision punishes conduct that is a marked departure from an objectively reasonable standard of care. More specifically, the *mens rea* requirement for s. 215 is established when the Crown proves that the accused’s conduct constitutes “a marked departure from the conduct of a reasonably prudent parent in circumstances where it was objectively foreseeable that the failure to provide the necessities of life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health, of the child” (*Naglik*, at p. 143; see also *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, at para. 8).

[28] In *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60, at para. 36, Cromwell J. provided a useful analytical framework for assessing whether objective *mens rea* has been made out:

It is helpful to approach the issue by asking two questions. The first is whether, in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible. If so, the second question is whether the accused’s failure to foresee the risk and take steps to avoid it, if possible, was a *marked departure* from the standard of care expected of a reasonable person in the accused’s circumstances. [Emphasis in original.]

[29] In this case, the Crown needed to prove beyond a reasonable doubt that Mr. Goforth had the requisite *mens rea* for the predicate offence under s. 215 as well

as the requisite *mens rea* for the offences of manslaughter and unlawfully causing bodily harm.

[30] In order to satisfy the *mens rea* requirement for s. 215, the Crown needed to prove that (a) it was objectively foreseeable, to a reasonable person in the circumstances of the accused, that the failure to provide food, fluids, or medical care would lead to a risk of danger to the life, or a risk of permanent endangerment to the health, of the children; and that (b) the accused's conduct represented a marked departure from the conduct expected of a reasonably prudent parent, foster parent, guardian, or head of a family in the circumstances.

[31] In order to satisfy the *mens rea* requirement for either manslaughter or unlawfully causing bodily harm, the Crown needed to prove—in addition to establishing the *mens rea* for s. 215—that it was objectively foreseeable, to a reasonable person in the circumstances of the accused, that the failure to provide necessities of life to the children would lead to a risk of bodily harm which was neither trivial nor transitory (*Creighton*, at pp. 44-45). This is a lower foreseeability standard than what is required for s. 215, as the foreseeability of death or of permanent endangerment to health is not required. Therefore, when the offence under s. 215 is the predicate offence for either manslaughter or unlawfully causing bodily harm, if the Crown proves the requisite *mens rea* requirement for s. 215, then, by necessary implication, the additional *mens rea* requirement for manslaughter or unlawfully causing bodily harm will be satisfied.

(2) The Charge Functionally Conveyed the *Mens Rea* Requirements

[32] The majority of the Court of Appeal concluded that the following instruction could have confused the jury about the appropriate standard for *mens rea*:

The Crown must establish beyond a reasonable doubt the essential elements of an offence under section 215(2), its external circumstances and the mental or fault element. The accused's conduct must also constitute a marked departure from that of a reasonable person in the same circumstances. Further, the Crown must establish beyond a reasonable doubt that a reasonable person would foresee the risk of bodily harm, beyond the trivial or transitory, in the context of dangerous conduct. [Emphasis added.]

(A.R., vol. I, at p. 154)

This instruction was repeated numerous times in the jury charge, in relation to both counts of the indictment, with slight variations (see, e.g., A.R., vol. I, at pp. 173-74, 175, 252 and 254-55).

[33] In the assessment of whether the jury would have been confused about the appropriate foreseeability standard, it is important to note that the trial judge also clearly and correctly summarized the required *mens rea* for s. 215 in a different portion of the charge. When specifically discussing whether Mr. Goforth had the requisite *mens rea* for s. 215 in relation to the older child, the trial judge instructed the jury as follows:

Did Kevin Goforth's failure to provide the necessities of life to [the older child] represent a marked departure from the standard of conduct of a reasonably prudent person in the circumstances where it is objectively foreseeable that the failure to provide food or fluids or the failure to seek

medical attention would lead to a risk of danger to life or a risk of permanent endangerment to the child's health?

These further considerations can be transformed into questions for you to consider.

A) Was it objectively foreseeable that the failure to provide [the older child] with food or fluids or the failure to seek medical attention for [the older child] would lead to a risk of danger to life or a risk of permanent endangerment to [the older child's] health?

B) If so, did Kevin's failure to provide [the older child] with food or fluids or to seek medical attention represent a marked departure from the standard of conduct of a reasonably prudent person in the circumstances?

(A.R., vol. I, at p. 172)

A similar instruction — albeit more abridged — was provided about whether Mr. Goforth had the requisite *mens rea* for s. 215 in relation to the younger child.

[34] The questions posed by the trial judge in the above passage adhere to the two-step inquiry discussed by Cromwell J. in *Roy*, at para. 36 (see also *Naglik*, at pp. 143-44).

[35] Ultimately, when read as a whole, the trial judge's instructions functionally conveyed the necessary legal principles. The jury charge was not perfect. The trial judge did not make a clear distinction between the required foreseeability standard for s. 215 and the required foreseeability standard for manslaughter or unlawfully causing bodily harm. She routinely juxtaposed the two different foreseeability requirements without clearly alerting the jury to how the respective foresight standards corresponded to the respective offences.

[36] The imprecise juxtaposition of different *mens rea* requirements should be avoided. It *could* potentially confuse the jury and *could* potentially necessitate a new trial in a different set of circumstances. However, in the circumstances of this case, there is no reasonable possibility that the jury was confused about the required *mens rea* for s. 215 or misled about what the Crown had to prove in order for the jury to find Mr. Goforth guilty of either manslaughter or unlawfully causing bodily harm. With respect, the Court of Appeal erred in holding otherwise, for three reasons.

[37] First, despite the frequency with which the more confusing instruction was repeated, the clearest explanation of the *mens rea* requirement was provided when the trial judge invited the jury to consider two straightforward questions to assess whether that requirement had been met. These questions told the jurors exactly what to ask themselves in the circumstances of this case. There is simply no reasonable possibility that any juror would have disregarded these straightforward questions and would have instead chosen to apply the lower foresight standard.

[38] Second, the fact that the impugned instruction was routinely introduced with the word “further” also supports the argument that the jury would have simply concluded that both foresight standards had to be satisfied.

[39] Finally, I note that defence counsel did not object to the charge at trial and that appellate counsel before the Court of Appeal did not initially identify the juxtaposition of the two foreseeability standards as an issue of concern (C.A. reasons, at paras. 93-94). Although not determinative, defence counsel’s failure to object at trial

and appellate counsel's failure to identify the issue initially on appeal undermine the argument that the jury may have been misled or confused about the appropriate standard. Indeed, contrary to the opinion of my colleague (at para. 65), this provides a strong reason to conclude that the jury would not have been misled or confused. As Bastarache J. explained in *Daley*, at para. 58:

. . . it is expected of counsel that they will assist the trial judge and identify what in their opinion is problematic with the judge's instructions to the jury. While not decisive, failure of counsel to object is a factor in appellate review. The failure to register a complaint about the aspect of the charge that later becomes the ground for the appeal may be indicative of the seriousness of the alleged violation. See *Jacquard*, at para. 38: "In my opinion, defence counsel's failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection."

(See also *Calnen*, at paras. 38-39; *Thériault v. The Queen*, [1981] 1 S.C.R. 336, at pp. 343-44.)

[40] In sum, when the jury charge is read functionally and as a whole, I have no trouble concluding that the jury was properly instructed on the law and able to draw the necessary legal conclusions.

C. *Did the Trial Judge Err by Failing to Instruct the Jury on Mr. Goforth's Circumstances as a Secondary Caregiver During the Mens Rea Instruction for Section 215?*

[41] The law is clear that personal characteristics of an accused, short of incapacity, are irrelevant in assessing objective *mens rea* (*Creighton*, at p. 61). In *Creighton*, the majority of this Court rejected the view that "individual excusing

conditions” (p. 63) such as educational, experiential, and “habitual” characteristics of an accused may be taken into account (p. 61). Consideration of personal characteristics, short of incapacity, injects subjectivity into the objective test, which undermines the purpose of having a single and uniform minimum legal standard of care (pp. 61 and 70). This is not to say that the reasonable person is placed in a factual vacuum. “While the legal duty of the accused is not particularized by his or her personal characteristics short of incapacity, it is particularized in application by the nature of the activity and the circumstances surrounding the accused’s failure to take the requisite care” (p. 71; see also *R. v. Javanmardi*, 2019 SCC 54, [2019] 4 S.C.R. 3, at paras. 36-38). The reasonable person is therefore placed in the relevant circumstances of the accused. These circumstances “do not personalize the objective standard; they contextualize it” (D. M. Paciocco, “Subjective and Objective Standards of Fault for Offences and Defences” (1995), 59 *Sask. L. Rev.* 271, at p. 285).

[42] The issue that arises in this appeal is whether Mr. Goforth’s alleged status as a secondary caregiver is a relevant circumstance or an irrelevant personal characteristic. The Crown argues that Mr. Goforth’s role in the household, his belief that his wife had everything well in hand, and his work schedule were irrelevant to the assessment of the objective *mens rea* for s. 215. Mr. Goforth argues that the trial judge failed to adequately instruct the jury on his circumstances as the less involved parent, which deprived the jury of critical information about whether he had the capacity to foresee the risk of harm to the girls.

[43] The majority of the Court of Appeal highlighted evidence relating to five circumstances that it believed were “critical to the question as to whether Mr. [Goforth] had the necessary moral culpability”: (a) his alleged lack of involvement in providing necessities for the girls; (b) his alleged reliance on Ms. Goforth as the person who would feed and clothe the girls and see to their needs; (c) the girls’ history of recurring illness and recovery under the care of Ms. Goforth; (d) his alleged limited interactions with the girls, including that he never saw them unclothed; and (e) his evidence that the girls were picky eaters but that he observed them eating and drinking and they were never refused either food or drink (para. 199).

[44] In contrast to the majority, Caldwell J.A., in dissent, held that “the nature or characteristics of Mr. [Goforth]’s relationship with his spouse are ‘individualized excusing conditions’” and that, as a result, “Mr. [Goforth]’s spousal relationship is personal to him and . . . is not relevant in an objective *mens rea* inquiry” (paras. 108-9).

[45] With respect, neither the majority nor the dissent in the Court of Appeal accurately characterized the relevant circumstances in this case. The dissent, on the one hand, described the relevant circumstances too narrowly. The existence or nature of a spousal relationship *can* be considered a relevant circumstance — the circumstances of a single parent may be significantly different than the circumstances of a parent in a two-parent home. Similarly, the work schedule and physical absence of one parent may be a relevant circumstance, depending on the particular factual matrix.

[46] The majority, on the other hand, adopted an overly broad conceptualization of circumstances. Contrary to the majority's conclusion, Mr. Goforth's "alleged lack of involvement in providing necessities for the girls" is not a circumstance in which the reasonable person needed to be placed (C.A. reasons, at para. 199). Indeed, given that Mr. Goforth was physically in the children's presence on a daily basis, his alleged lack of involvement in providing necessities for them cannot be characterized as a circumstance. Rather, it constitutes an essential element of the *actus reus*. Mr. Goforth had a duty to provide necessities of life to the children. His utter neglect of them is not a circumstance that can ground his failure to foresee the risk of harm.

[47] I acknowledge that the other four purported circumstances (listed in (b) to (e) at para. 43, above) *could* be legally relevant. However, contrary to the conclusion of the majority of the Court of Appeal, none of these circumstances were "critical" to the jury's assessment of Mr. Goforth's "moral culpability". Indeed, none of these circumstances were material to the jury's consideration of whether Mr. Goforth had the requisite foresight to be criminally liable under s. 215. In light of the evidence relating to the children's deplorable and heart-wrenching condition, none of these alleged circumstances could have possibly prevented Mr. Goforth from foreseeing the risk of harm to them. According to his own evidence, Mr. Goforth ate dinner with all of the children — the Goforths' own children and their foster children — almost every evening. He testified that the girls got sick about twice a month but that at no point did he think he or Ms. Goforth should call the doctor or the free health line. He was well positioned to observe their condition, yet he did nothing. The uncontroverted medical

evidence presented at trial indicated that both girls suffered from malnutrition over a prolonged period.

[48] Accordingly, much of the evidence relating to Mr. Goforth's circumstances — including his alleged reliance on his wife, his alleged limited interaction with the girls, and the girls' alleged history of being picky eaters and suffering from illness regularly — was immaterial given the evidence of emaciation and neglect. Any reasonable parent in Mr. Goforth's circumstances would have foreseen the danger and would have taken action.

[49] In any event, the trial judge's charge sufficiently recited the evidence about Mr. Goforth's alleged circumstances. As mentioned above, trial judges have a duty to “decant and simplify”, and “there is no need to state evidence twice where once will do” (*Jacquard*, at paras. 13-14).

[50] The trial judge instructed the jury multiple times on Mr. Goforth's evidence relating to his busy schedule and his purported status as a secondary caregiver. Although the more detailed description of the evidence was given in portions of the charge that discussed the *actus reus*, there is no basis to conclude that the trial judge's comparably brief recitation of the evidence when discussing *mens rea* would have caused the jury any confusion. When discussing the relevant *mens rea* evidence in relation to the older child, the trial judge still instructed the jury to “consider the evidence of Tammy and Kevin Goforth” (A.R., vol. I, at p. 173), and then briefly mentioned some of the testimonial evidence. When discussing the relevant *mens rea*

evidence in relation to the younger child, the trial judge instructed the jury that “the evidence you have already considered on this issue is relevant here” (p. 255). The trial judge’s brevity would not have caused the jury to conclude that only the limited subset of evidence specifically mentioned was relevant.

[51] The trial judge also instructed the jury on Mr. Goforth’s alleged circumstances a final time when outlining the defence theory of the case at the end of her charge. She summarized Mr. Goforth’s position as follows:

Throughout the time in which the children resided with Kevin and Tammy, Kevin was continuously employed as a carpenter in Regina that required him to work six days per week at approximately 10-12 hours per day. Kevin was not the primary caregiver for the children. While he focussed on providing monetary support for the family, meals, bathing and clothing of the children was a responsibility of Tammy’s.

(A.R., vol. I, at p. 263)

[52] Again, defence counsel’s failure to object to the jury charge is significant. It belies the argument that the trial judge’s decision not to repeat evidence in an already lengthy jury charge constituted an error. As Binnie J. stated in *R. v. Royz*, 2009 SCC 13, [2009] 1 S.C.R. 423, at para. 3: “Lack of objection is not fatal, but it may be informative, because defence counsel would have understood that additional evidentiary matters reviewed at his request might result in the judge repeating additional portions of the evidence requested by the prosecution on the same point, which might in the end have been expected to be more prejudicial than helpful to the defence.”

[53] Overall, the jury was well aware of all the circumstances that Mr. Goforth argued prevented him from foreseeing the risk of harm to the children. Indeed, on any reasonable view of the case, this, more than anything else, would appear to explain why Ms. Goforth was convicted of second degree murder whereas Mr. Goforth was convicted of unlawful act manslaughter. I have no hesitation in concluding that the jury was properly instructed and that it rightly rejected Mr. Goforth's defence that his circumstances prevented him from foreseeing the risk of harm to the children.

D. *Did the Trial Judge Err by Failing to Explain What Is Meant by a Marked Departure From the Conduct of a Reasonably Prudent Person in the Circumstances?*

[54] On appeal to this Court, Mr. Goforth reiterates that the trial judge's failure to explain the meaning of the term "marked departure" also left the jury ill-equipped to apply the *mens rea* standard. Mr. Goforth argues that this case is analogous to *R. v. Stephan*, 2017 ABCA 380, 423 D.L.R. (4th) 56, rev'd 2018 SCC 21, [2018] 1 S.C.R. 633. In *Stephan*, this Court ordered a new trial because the trial judge, among other things, "did not sufficiently explain the concept of marked departure in a way that the jury could understand and apply it" (para. 2).

[55] I do not agree with this submission. In the circumstances of this case, a new trial is not warranted simply because the trial judge did not explain the meaning of the term "marked departure". This case is easily distinguishable from *Stephan*, in which this Court agreed with O'Ferrall J.A. that the trial judge had erred by failing to describe what is meant by this term. In *Stephan*, the alleged marked departure pertained to the

conduct of parents who relied on naturopathic and home remedies to treat their child's suspected meningitis. In that case, the trial judge was required to explain more thoroughly what a marked departure was due to the difficulty of assessing whether the parents' conduct in the circumstances constituted a marked departure — hindsight is not the same as foresight. Moreover, there was an additional concern in *Stephan* that the jury may have thought that a reasonable parent should react more like a medical professional since there was a large body of expert medical evidence.

[56] There are no such concerns with respect to Mr. Goforth. The alleged marked departure in this case relates to whether a reasonable person would have foreseen that failing to provide food or fluids to young children — one of whom ultimately died as a result of brain injury that developed following a cardiac arrest caused by malnutrition and dehydration — would result in a risk of danger to life or of permanent endangerment to health. Given this context, the jury was easily able to assess whether the failure to provide food or fluids to young children constituted a marked departure from the standard of care of a reasonably prudent person in the circumstances.

[57] Again, the fact that Mr. Goforth failed to object to the jury charge and request an instruction on the meaning of “marked departure” speaks volumes. It was simply not in his interest to do so and it was inconsistent with his defence at trial — namely, that neither he nor his wife ever denied food or fluids to the children

and that medical attention was not required up until the time they took the older child to the hospital.

[58] My colleague is incorrect to assert that I am, in substance, applying the curative proviso. It must be remembered that the “adequacy of the jury instructions must be assessed in the context of the evidence and the trial as a whole” (*Pickton*, at para. 10). Jury charges may therefore focus on what is “actually and realistically at issue in the case” (para. 10). The charge in this case was adequate because, based on the evidence and the trial as a whole, there was no issue as to whether the failure to provide food or fluids to young children constituted a marked departure — it was *not* a “difficult concept” to understand or apply in the circumstances. Furthermore, I would reiterate what Dickson C.J. stated in *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 693-94:

We should maintain our strong faith in juries which have, in the words of Sir William Holdsworth, “for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense” (Holdsworth, *A History of English Law* (7th ed. 1956), vol. I, at p. 349).

Jurors do not check their common sense at the door of the deliberation room. Given the evidence and the circumstances of the trial as a whole, I am confident that the jury in this case was well-equipped to make a common sense assessment of whether failing to provide food or fluids to young children constituted a marked departure from the conduct of a reasonably prudent person.

E. *If the Trial Judge Erred, Can the Curative Proviso Be Applied?*

[59] In light of my conclusion that the jury charge functionally conveyed the necessary law and evidence to the jury, it is not necessary to resort to the application of the curative proviso.

VI. Disposition

[60] The appeal is allowed, the convictions are restored, and the sentence appeal is remitted to the Court of Appeal.

The reasons of Brown, Martin and Jamal JJ. were delivered by

BROWN J. —

[61] I agree with my colleagues that the appeal should be allowed. But I do not accept that the jury charge, when viewed from the “functional perspective” required by the jurisprudence, “properly . . . equipped [the jury] to decide the case” according to law (*R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 54).

[62] At many points — *five*, by my colleagues’ count, which I accept — this jury charge misstated an essential element of the offence that comprised the central issue, being whether the Crown had established the *mens rea* for the offence of failing to provide the necessaries of life. Yet, in concluding that the charge was “functionally” adequate, my colleagues point to *a single instance*, in “a different portion of the

charge”, in which “the trial judge . . . clearly and correctly summarized the required *mens rea*” (para. 33). This, they say, was “the clearest explanation of the *mens rea* requirement” (para. 37).

[63] What my colleagues do not account for, however, is that, merely because *they* have the insight to distinguish the single correct instruction from the repeated incorrect instructions, it does not follow that *the jury* had that insight. This charge may have been “functionally” adequate from the standpoint of a reviewing court searching for a correct instruction. But that is not the same thing as a charge that is “functionally” adequate for the purposes *of a jury* knowing the law that it must apply to the evidence. There is no reason to suppose that this jury could possibly have known to single out that single correct instruction as the one to follow, and to ignore the five incorrect instructions as mere distractions. That my colleagues observe that the single correct instruction was “the clearest explanation” is of no significance, either, since that observation is informed by *their* proper understanding of the law — an understanding which *this jury* did not have, which is precisely the problem.

[64] In any event, focusing on one correct instruction interspersed with five incorrect instructions fails to take a functional approach to the charge. The functional approach requires the charge to be read *as a whole* and asks whether an appellate court can be satisfied that the jury would have adequately understood the issues involved, the law relating to the charge the accused was facing, and the evidence to be considered in resolving the issues (*R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 54; *R. v. Daley*, 2007

SCC 53, [2007] 3 S.C.R. 523, at para. 31; *R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 163; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 8). My colleagues claim to be applying *Daley*'s "cardinal rule" that "it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge" (*Daley*, at para. 30 (emphasis added)). Of course, the words used in the charge need not represent some formulaic statement of the applicable law. But they must be an accurate statement of the law, and the jury must not be left to, in effect, cobble together *its own* charge by guessing correctly about which part of the charge to follow and which part to disregard. Applying *that* standard, it is simply not possible to say that this charge passes muster.

[65] My colleagues also place great weight on the single use of the word "further", in a lengthy, convoluted charge (para. 38). The significance they ascribe to it is, with respect, hardly obvious. As for their stress upon counsel not having objected to the charge, and again with respect, this Court has *repeatedly* observed that trial counsel's failure to object, while a consideration, is not determinative (*Barton*, at para. 48; *Daley*, at para. 58; *Jacquard*, at para. 37; *R. v. Arcangioli*, [1994] 1 S.C.R. 129, at pp. 142-43; *Thériault v. The Queen*, [1981] 1 S.C.R. 336, at pp. 343-44; *Cullen v. The King*, [1949] S.C.R. 658, at p. 664). My colleagues concede this (at para. 39), but do not acknowledge the point that underlies *why* counsel's failure to object is not determinative: ultimately, it is *the trial judge* who is responsible for the charge.

[66] Remarkably, my colleagues maintain (at paras. 55-56) that this charge was adequate despite the trial judge not sufficiently explaining the concept of a marked departure for the *mens rea* of failing to provide the necessities of life, and despite this Court in *R. v. Stephan*, 2018 SCC 21, [2018] 1 S.C.R. 633, rev'g 2017 ABCA 380, 423 D.L.R. (4th) 56, having ordered a new trial on precisely the basis that the “difficult concept” of a marked departure had not been properly explained to the jury (*Stephan* (C.A.), at para. 247). They say, however, that there is no concern here because the jury, “[g]iven the evidence and the circumstances of the trial as a whole” (para. 58), was “easily able to assess whether the failure to provide food or fluids to young children constituted a marked departure from the standard of care of a reasonably prudent person in the circumstances” (para. 56). But this is not the same thing as saying that the charge was adequate. In substance, and their protestations to the contrary notwithstanding, my colleagues are applying the curative proviso.

[67] The matter comes down to this. By commingling, confusing and “routinely” and with “frequency” (to use my colleagues’ terms at paras. 35 and 37) substituting the differing standards of foreseeability of harm (as between manslaughter and failing to provide the necessities of life), the trial judge left the jury equipped with a charge that, in critical sections, is not comprehensible to a legally trained reader, let alone to a layperson juror. Compounding the confusion, the jury charge addressed the *mens rea* under a heading relating to the *actus reus*. It cannot plausibly be maintained that this charge left the jury equipped to do its job.

[68] On this record, however, I am persuaded of the Crown's submission that no substantial wrong or miscarriage of justice flowed from the deficient instructions. It is inconceivable, given the extreme form which the failure to provide the necessities of life took in this case, that the jury would not have found that the Crown had established the more stringent foreseeability requirement applicable to failing to provide the necessities of life. I would apply the curative proviso, allow the appeal and restore Goforth's convictions of manslaughter and unlawfully causing bodily harm.

Appeal allowed.

Solicitor for the appellant: Attorney General of Saskatchewan, Regina.

Solicitors for the respondent: Pfefferle Law Office, Saskatoon.