



SUPREME COURT OF CANADA

CITATION: R. v. Lozada, 2024
SCC 18

APPEALS HEARD: February 13,
2024

JUDGMENT RENDERED: May 17,
2024

DOCKETS: 40701, 40709

BETWEEN:

Emanuel Lozada
Appellant

and

His Majesty The King
Respondent

AND BETWEEN:

Victor Ramos
Appellant

and

His Majesty The King
Respondent

CORAM: Karakatsanis, Rowe, Martin, Jamal and Moreau JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 31)

Moreau J. (Karakatsanis and Martin JJ. concurring)

**DISSENTING
REASONS:**
(paras. 32 to 51)

Jamal J. (Rowe J. concurring)

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Emanuel Lozada

Appellant

v.

His Majesty The King

Respondent

- and -

Victor Ramos

Appellant

v.

His Majesty The King

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Indexed as: R. v. Lozada

2024 SCC 18

File Nos.: 40701, 40709.

2024: February 13; 2024: May 17.

Present: Karakatsanis, Rowe, Martin, Jamal and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Charge to jury — Co-principal liability — Group assault — Manslaughter — Causation — Intervening act — Both accused part of group that attacked victim but fatal stab wound inflicted by other group member — Accused convicted of manslaughter by jury — Accused appealing convictions and claiming that trial judge erred in jury instructions on causation in context of co-principal liability — Whether jury properly instructed.

L and R were involved in a physical altercation between two groups of people. The victim was stabbed in the heart and died. L and R did not inflict the fatal stab wound and there was no evidence that they knew or foresaw that any person in their group had a knife or that the victim would be stabbed. At L and R's jury trial, the Crown advanced two theories of party liability for manslaughter: as co-principals under s. 21(1)(a) of the *Criminal Code* and as aiders under s. 21(1)(b). L and R were convicted of manslaughter. The majority of the Court of Appeal dismissed their appeals. The dissenting judge would have allowed the appeals and ordered a new trial, on the basis that the trial judge misdirected the jury in his instructions on causation in the context of co-principal liability.

Held (Rowe and Jamal JJ. dissenting): The appeals should be dismissed.

Per Karakatsanis, Martin and **Moreau** JJ.: On a reading of the jury instructions and the trial judge's answers to the jury's questions as a whole, the jury was accurately instructed on the issue of causation. The instructions conveyed the proper test for causation: whether L and R's conduct was a significant contributing

cause of the victim's death. Moreover, the trial judge properly equipped the jury with appropriate analytical tools to assist the jury in determining whether the stabbing could be considered to be an intervening act that would absolve L and R of legal responsibility for manslaughter.

Appellate courts take a functional approach in reviewing jury instructions by asking whether the jury was properly, not perfectly, instructed so as to equip the jury to decide the case according to the law and the evidence. The instructions must be read as a whole, and must be responsive to the evidence and set out the law in plain and understandable terms. Responses to questions from the jury require particular care because they carry influence exceeding the instructions given in the final charge. In cases involving causation, which is case-specific and fact-driven, trial judges must be accorded the flexibility to put issues of causation to the jury in an intelligible fashion that is relevant to the circumstances of the case.

The overall test for legal causation for manslaughter is whether the accused's unlawful acts were a significant contributing cause of death. In cases where an intervening act is said to have broken the chain of causation between the accused's acts and the victim's death, asking whether the intervening act was reasonably foreseeable or was an independent factor can be helpful analytical aids, but the overall significant contributing cause test is the legal standard. With respect to the reasonable foreseeability analytical aid, there is no requirement that the specific subsequent attack be reasonably foreseeable; it is sufficient if the general nature of the intervening act

and the risk of non-trivial harm are objectively foreseeable at the time of the dangerous and unlawful acts. The reasonable foreseeability inquiry asks whether the intervening acts and the harm that actually transpired flowed reasonably from the conduct of the accused. While some degree of specificity about the nature of the intervening act must have been reasonably foreseeable, there is no requirement for objective foreseeability of the precise future consequences of the accused's conduct.

The act of a co-participant in a group assault can trigger the application of the intervening act doctrine. There is no single test or measure for determining whether a particular act has broken the chain of causation. The issue in considering joint liability as co-principals under s. 21(1)(a) is whether the unlawful acts of the accused were a significant contributing cause of the victim's death. The Court in *R. v. Strathdee*, 2021 SCC 40, has left open the prospect of an instruction addressing a discrete or intervening event even in the case of co-participants in a group assault.

In the instant case, the trial judge's legal causation instructions conveyed the correct overall test and focused the jury's attention on L and R's contribution to the victim's death. The trial judge's two statements that it "may be enough" to establish legal causation if the continuation of assaults on the victim was reasonably foreseeable should be understood in the context of the full instructions. The jury would not have found this factor to be adequate to establish legal causation without also accepting that the continuation of assaults was of the same general nature as the stabbing, or that the stabbing flowed reasonably from L and R's conduct. Accepting that L and R did not

know or foresee that anyone in their group had a knife would not force a conclusion on legal causation. The jury was broadly instructed to consider whether and how the conduct of L and R contributed to the victim's death or whether the fatal act flowed reasonably from that conduct. Read in context, the impugned statements would not have conveyed to the jury that it could have concluded that the stabbing did not break the chain of causation simply because the continuation of the assaults was reasonably foreseeable if it did not also accept that the continuation of the assaults was of the same general nature as the stabbing, or that the stabbing flowed reasonably from L and R's conduct.

Per Rowe and **Jamal JJ.** (dissenting): The appeals should be allowed, the manslaughter convictions set aside and a new trial ordered. There is agreement with the majority that L and R were entitled to have the jury properly instructed on how an intervening act may affect legal causation for unlawful act manslaughter. There is also agreement that an intervening act instruction is available in a case involving co-principal liability arising out of a group assault. There is, however, disagreement that the trial judge's intervening act instruction in the instant case properly instructed the jury on the issue of causation for unlawful act manslaughter.

The trial judge failed to properly instruct the jury by repeatedly instructing them that, even though the victim was stabbed by another member of the group involved in the group assault, it "may be enough" to make L and R's unlawful actions in participating in the group assault legal causes of the victim's death if it was

reasonably foreseeable that the assaults on the victim would continue and create a risk of non-trivial bodily harm to him. Even when read functionally and as a whole, the trial judge's instructions on the causation element of unlawful act manslaughter did not properly equip the jury to decide the case according to the law. A reasonably foreseeable intervening act will not usually break the chain of legal causation so as to relieve the offender of legal responsibility for an unintended result. However, what has to be reasonably foreseeable is the general nature of the intervening acts and the accompanying risk of harm. This standard requires greater specificity than the standard of reasonable foreseeability of the risk of further non-trivial bodily harm. An intervening act may break the chain of legal causation because the general nature of the intervening act and the accompanying risk of harm is not reasonably foreseeable, even though the risk of further non-trivial bodily harm is reasonably foreseeable.

To find that L and R's actions were legal causes of the victim's death even though he was stabbed by another member of the group, the jury had to find that the stabbing did not break the chain of legal causation from L and R's unlawful actions to the victim's death. Based on the trial judge's instructions, however, at least some members of the jury may have incorrectly found that the stabbing did not break the chain of legal causation simply because the continuation of the assaults on the victim and the resulting risk of non-trivial bodily harm to him was reasonably foreseeable. A single ambiguous or problematic statement in one part of a charge will not necessarily be an error of law where the charge as a whole equipped the jury with an accurate understanding of the relevant legal issue. In the instant case, however, other parts of

the trial judge's instructions did not prevent the jury from being inaccurately instructed on whether the stabbing broke the chain of legal causation.

Moreover, the trial judge's instructions did not make clear that the reasonable foreseeability of the continuing assaults "may be enough" to establish legal causation despite the stabbing of the victim, provided that the stabbing was of the same general nature as a continuation of the assaults. Simply repeating the test for legal causation, pointing to relevant evidence, and inviting the jury to consider whether the stabbing was extraordinary, unusual or overwhelming, or flowed naturally from or was directly related to L and R's unlawful conduct, would not have made this underlying premise clear to the jury.

Cases Cited

By Moreau J.

Applied: *R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30; **referred to:** *R. v. Abdullahi*, 2023 SCC 19; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Naglik*, [1993] 3 S.C.R. 122; *Smithers v. The Queen*, [1978] 1 S.C.R. 506; *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *R. v. Strathdee*, 2021 SCC 40.

By Jamal J. (dissenting)

R. v. Strathdee, 2021 SCC 40; *R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30; *R. v. Abdullahi*, 2023 SCC 19; *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Jackson*, [1993] 4 S.C.R. 573.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 21(1)(a), (b), 686(1)(b)(iii), 691(1)(a).

Authors Cited

Watt, David. *Helping Jurors Understand*, 2nd ed. Toronto: Thomson Reuters, 2023.

APPEALS from a judgment of the Ontario Court of Appeal (Doherty, Hoy and Paciocco JJ.A.), **2023 ONCA 221** (*sub nom. R. v. Triolo*), 166 O.R. (3d) 179, 424 C.C.C. (3d) 415, [2023] O.J. No. 1568 (Lexis), 2023 CarswellOnt 4742 (WL), affirming the convictions of the accused for manslaughter. Appeals dismissed, Rowe and Jamal JJ. dissenting.

Nader Hasan and *Spencer Bass*, for the appellant Emanuel Lozada.

Richard Litkowski, for the appellant Victor Ramos.

Jennifer A. Y. Trehearne, Jennifer Epstein and Samuel Greene, for the respondent.

The judgment of Karakatsanis, Martin and Moreau JJ. was delivered by

MOREAU J. —

I. Overview

[1] The appellants, Emanuel Lozada and Victor Ramos, appeal as of right to this Court under s. 691(1)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46. The majority of the Court of Appeal for Ontario dismissed their appeals from jury convictions for unlawful act manslaughter. The dissenting judge would have allowed their appeals and ordered a new trial.

[2] The charges against the appellants arose from physical altercations between two groups of people who had been attending a rave in downtown Toronto. The first altercation was a fight between Rameez Khalid and Joseph Triolo in which Mr. Khalid had the upper hand. A glass bottle may have been used. However, the first altercation did not result in significant physical injuries. Both men were angry after the fight, but Mr. Khalid and his friend, Travis Galliah, walked away from the scene.

[3] The other group, which included Mr. Triolo and the appellants, followed shortly after. The Crown's theory at trial was that the group pursued Mr. Khalid and

Mr. Galliah to “settle the score” (2023 ONCA 221, 166 O.R. (3d) 179, at para. 7). When the two groups met, someone (whom the Crown argued was Mr. Ramos) pushed Mr. Khalid up against a wall and yelled, “[i]s this the guy?” (paras. 19 and 177). After someone else responded, “[y]eah”, another fight broke out (para. 19). Mr. Triolo, Mr. Ramos and others from the group attacked Mr. Khalid, who fell to the ground and was punched and kicked by multiple persons. Mr. Lozada fought Mr. Galliah, knocking him to the ground and repeatedly punching him. Approximately 15 seconds after this second altercation began, Mr. Khalid was stabbed twice, in the abdomen and fatally through the heart. He collapsed into the street and died several seconds later. The appellants did not inflict the fatal stab wound and the Crown conceded at trial that there was no evidence that the appellants knew or foresaw that any person in their group had a knife or that Mr. Khalid would be stabbed.

[4] The jury was satisfied that Mr. Triolo was the stabber, and so he was convicted of second degree murder. The appellants were convicted of manslaughter. At trial, the Crown advanced two theories of party liability for manslaughter: as co-principals under s. 21(1)(a) of the *Criminal Code* and as aiders under s. 21(1)(b). The Crown maintained that the appellants’ actions under either theory supported their convictions. These appeals are concerned only with the Crown’s theory of liability under s. 21(1)(a). The appellants submit that the trial judge misdirected the jury in his instructions on causation in the context of co-principal liability and in his response to a question from the jury seeking further clarification on causation.

[5] I am essentially in agreement with the majority of the Court of Appeal that, on a reading of the jury instructions and the trial judge's answers to the jury's questions as a whole, the jury was accurately instructed on the issue of causation. The instructions conveyed the proper test for causation: whether the particular appellant's conduct was a significant contributing cause of death. Moreover, on the particular facts of this case, the trial judge properly equipped the jury with appropriate analytical tools described in *R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30, to assist the jury in determining whether the stabbing could be considered to be an intervening act that would absolve the appellants of legal responsibility for manslaughter.

[6] Therefore, I would dismiss the appeals.

II. The Trial Judge's Instructions on Causation

[7] The trial judge began the causation instructions by setting out the proper test for legal causation: whether the particular appellant's unlawful act was a significant contributing cause of death. In other words, was each appellant's conduct "sufficiently connected with the death that it remained a significant contributing cause that continued until [Mr.] Khalid's death without interruption" (A.R., vol. XXIV, at pp. 105-6)? The trial judge clarified that this inquiry does not simply amount to determining the medical cause of Mr. Khalid's death but also concerned "the contribution of the [appellants] to that result" (p. 106).

[8] The trial judge then discussed the reasonable foreseeability concept in relation to the facts of the case. He noted that “the fact that none of the [appellants] knew that anyone in their group had a weapon, or expected that anyone in their group would use a weapon, d[id] not necessarily mean that their conduct was not a significant contributing cause of death” (p. 106). He continued:

The specific act of stabbing does not need to be reasonably foreseeable at the time of the particular [appellant’s] dangerous unlawful act for that dangerous unlawful act to be a significant contributing cause of death. If the continuation of assaults on [Mr.] Khalid and the risk of nontrivial bodily harm to [Mr.] Khalid from those continuing assaults was reasonably foreseeable at the time of the particular [appellant’s] dangerous unlawful act, that may be enough for an [appellant’s] conduct to be a significant contributing cause of death. It is up to you. [pp. 106-7]

[9] Next, the trial judge posed several additional questions about the effect of each appellant’s conduct in relation to the fatal stabbing. The jury was told to consider: (1) whether those assaulting Mr. Khalid and Mr. Galliah significantly contributed to Mr. Khalid’s death by preventing the possibility of aid or escape, or otherwise rendering Mr. Khalid more vulnerable to a fatal knife attack; (2) if Mr. Khalid was the aggressor and determined to fight despite being outnumbered, whether fighting with him before the stabbing “really made him more vulnerable” to a knife attack; (3) whether there “really was any possibility that [Mr.] Galliah would have aided [Mr.] Khalid or helped him escape if he had not been kept busy by those who were fighting with him”; and (4) whether the stabber could have inflicted the wounds if others were or were not attacking Mr. Khalid (pp. 108-9).

[10] The trial judge concluded this portion of his instructions by reiterating the overall “significant contributing cause” standard for legal causation (p. 109).

[11] During deliberations, the jury asked for “a definition for ‘a break in the chain of causation’” (A.R., vol. VIII, at p. 7).

[12] In response, the trial judge first repeated the overall “significant contributing cause” standard and explained that this standard relates to whether “it is still morally just and fair to hold the [appellants] legally responsible for the death” (A.R., vol. XXIV, at p. 220). The jury could ask itself whether the stabbing was “so overwhelming as to make the effect of the unlawful acts of the [appellants] merely part of the background” (p. 220). The jury could also ask itself whether the stabbing was “directly related to the unlawful acts of the [appellants]” (p. 220). The trial judge then twice stated that the jury might consider whether the stabbing was “extraordinary or unusual in the sense that an ordinary person would not reasonably foresee it” (pp. 220-21).

[13] The trial judge concluded his answer by listing three scenarios in which the fatal act would break the chain of causation:

- If the fatal act was “an extraordinary and highly unusual occurrence, as opposed to being an event that could ordinarily, or naturally flow from the circumstances of this case” (p. 221);

- If the fatal act was “a reasonably unforeseeable act, remembering that the act of stabbing does not need to be reasonably foreseeable at the time of the particular [appellant’s] dangerous, unlawful act. If the continuation of assaults on [Mr.] Khalid and the risk of non-trivial bodily harm to [Mr.] Khalid from these continuing assaults was reasonably foreseeable at the time of the particular [appellant’s] dangerous, unlawful act, and flowed naturally from that dangerous, unlawful act, that may be enough” (pp. 221-22); or
- If the fatal act was “an intentional act of a third party acting independently from the [appellants]” (p. 222).

III. The Accuracy of the Jury Instructions

A. *Relevant Legal Principles*

[14] Appellate courts take a functional approach in reviewing jury instructions by asking whether a jury was properly, not perfectly, instructed so as to equip the jury to decide the case according to the law and the evidence (*R. v. Abdullahi*, 2023 SCC 19, at paras. 4 and 35-37; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at paras. 8-9; *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 62). Importantly, the instructions must be read as a whole (*Abdullahi*, at para. 35). Jury instructions must be responsive to the evidence and set out the law in plain and understandable terms (*R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at paras. 29-32). Responses to questions from the jury require

particular care because they carry influence exceeding the instructions given in the final charge (*R. v. Naglik*, [1993] 3 S.C.R. 122, at p. 139; *Abdullahi*, at para. 42).

[15] In *Maybin*, at para. 28, this Court held that the overall test for legal causation for manslaughter remains the same as the earlier statements from *Smithers v. The Queen*, [1978] 1 S.C.R. 506, and *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488: were the accused's unlawful acts a significant contributing cause of death? In cases where an intervening act is said to have broken the chain of causation between the accused's acts and the victim's death, asking whether the intervening act was reasonably foreseeable or was an independent factor can be helpful analytical aids, but the overall significant contributing cause test is the legal standard (paras. 26-29 and 44).

[16] With respect to the reasonable foreseeability analytical aid, there is no requirement that the specific subsequent attack be reasonably foreseeable. Instead, "it is sufficient if the general nature of the intervening act and the risk of non-trivial harm are objectively foreseeable at the time of the dangerous and unlawful acts" (*Maybin*, at para. 34). Karakatsanis J. also described the reasonable foreseeability inquiry as asking whether "the [intervening] acts and the harm that actually transpired flowed reasonably from the conduct" of the accused (para. 38). Conversely, *Maybin* does require that "[s]ome degree of specificity about the nature of the intervening act . . . be foreseeable" (para. 37). It does not "assist in addressing moral culpability to require merely that the risk of some non-trivial bodily harm is reasonably foreseeable" (para. 38).

[17] The circumstances of *Maybin* illustrate the type of specificity that is required when relying on the reasonable foreseeability analytical aid. Karakatsanis J. rejected the defence's submission that it was pertinent that the bouncer's assault of the unconscious victim was not reasonably foreseeable. It was sufficient for the trial judge to conclude that "in the context of an escalating bar fight, it was reasonably foreseeable that further non-trivial harm would be caused by the interventions of other patrons and bar staff" (para. 41). The relevant question was, more broadly, whether there was a risk of harm from third party interventions flowing from the accused's conduct.

B. *Application to This Case*

[18] The appellants submit that the jury was improperly instructed when the trial judge twice stated that it "may be enough" to establish legal causation if the continuation of assaults on Mr. Khalid, and accompanying risk of non-trivial bodily harm, was reasonably foreseeable (see A.F., at paras. 4-5 and 91-96). They argue that "the trial judge should have told the jury that a stabbing could break the chain of causation unless the use of some weapon — or, at the very least, the heightened escalation of the assault — was reasonably foreseeable" (para. 93).

[19] In my view, the trial judge's statements that it "may be enough" to establish legal causation if the continuation of assaults was reasonably foreseeable could be characterized as ambiguous in isolation, but accurate when read in the context of the instructions as a whole. Applying the directions from *Maybin*, at para. 38, it was correct to tell the jury that the reasonable foreseeability of continuing assaults "may be enough"

to establish causation, provided that the jury accepted the premise that the continuation of assaults was of the same “general nature” as the fatal act (the stabbing) or that the stabbing flowed reasonably from the appellants’ conduct.

[20] The remainder of the instructions made that underlying premise clear. The trial judge accurately stated the overall test for legal causation — whether the appellants’ conduct was a “significant contributing cause” of Mr. Khalid’s death — more than ten times in the course of his instructions and response to the jury’s question (see A.R., vol. XXIV, at pp. 104-9 and 220-21). The repetition of this standard would have underscored to the jury that its assessment broadly concerned the contribution of the appellants to Mr. Khalid’s death. Moreover, the trial judge told the jury to consider whether the fatal stabbing would “naturally flow” from each appellant’s conduct, whether it was “extraordinary and highly unusual”, whether it was “directly related” to each appellant’s unlawful act, and whether it was so overwhelming as to make the conduct of the appellants “merely part of the background or setting” (pp. 220-21).

[21] The further references to the evidence would have also centered the jury’s attention on each appellant’s contribution to Mr. Khalid’s death. These include the trial judge’s prompts that the jury consider whether the appellants’ conduct rendered Mr. Khalid more vulnerable to the stabbing and whether Mr. Galliah could have aided Mr. Khalid if he was not being attacked (pp. 108-9).

[22] The functional approach to appellate review of jury instructions requires that the charge be read as a whole (*Abdullahi*, at para. 35). As the trial judge explained,

accepting that the appellants did not know or foresee that anyone in their group had a knife would not force a conclusion on legal causation. The jury was broadly instructed to consider whether and how the conduct of the appellants contributed to Mr. Khalid's death or whether the fatal act flowed reasonably from that conduct — which is one way that *Maybin* defines what it means for the general nature of an intervening act to be reasonably foreseeable (para. 38). Read in context, the impugned statements would not have conveyed to the jury that it could have concluded that the stabbing did not break the chain of causation simply because the continuation of the assaults was reasonably foreseeable if it did not also accept that the continuation of the assaults was of the same general nature as the stabbing, or that the stabbing flowed reasonably from the appellants' conduct. As Doherty J.A. reasoned for the majority of the Court of Appeal, it should not be assumed that “a reasonably intelligent juror would . . . ignore the rest of the causation instructions if satisfied that the risk of non-trivial bodily harm was foreseeable at the time of the actions of [the appellants]” (para. 196).

[23] Causation is “case-specific and fact-driven” (*Maybin*, at para. 17). Trial judges must be accorded “the flexibility to put issues of causation to the jury in an intelligible fashion that is relevant to the circumstances of the case” (*Nette*, at para. 72). In this case, there was evidence that would have supported the conclusion that the fatal stabbing was of the same general nature as the violent assaults that were underway. “Mr. Khalid sustained multiple lacerations, abrasions and blunt force injuries to multiple parts of his body from the blows he received” after being attacked by several people (C.A. reasons, at para. 163, per Paciocco J.A.). There was evidence that a glass

bottle was used in the course of the earlier altercation (C.A. reasons, at para. 5). As the jury could have reasoned that the reasonable foreseeability of continuing assaults, and the accompanying non-trivial bodily harm, was a factor proving legal causation, the trial judge did not inaccurately instruct the jury by telling it that reliance on this factor “may be enough”.

[24] Moreover, *Maybin* does not structure the jury’s reasonable foreseeability analysis by first requiring it to characterize the intervening act and then ask whether that type of act was reasonably foreseeable. Such an approach risks undermining *Maybin*’s holding that the specific intervening act need not be reasonably foreseeable (see paras. 34-35). While “[s]ome degree of specificity” about the nature of the intervening act must have been reasonably foreseeable, there is no requirement for objective foreseeability of the “precise future consequences” of the accused’s conduct (paras. 37-38). It is useful to recall that in *Maybin*, the Court concluded that it would be too specific to examine the foreseeability of the “bouncer’s assault of the unconscious victim” (paras. 39-40). Rather, the inquiry more broadly concerned the reasonable foreseeability of “interventions of other patrons and bar staff” (para. 41). Similarly, Jamal J.’s suggestion that jurors could have characterized the general nature of the intervening act as “assault with a weapon” is in my view too narrow a formulation, and inviting the jury to first characterize the intervening act could generate confusion (see para. 48). With respect to the reasonable foreseeability analytical aid, *Maybin* only requires that the jury consider whether the general nature of the intervening acts and accompanying risk of harm was reasonably foreseeable at the time

of the accused's unlawful acts, or whether the intervening acts flowed reasonably from the accused's conduct.

[25] In sum, the trial judge's legal causation instructions conveyed the correct overall test and focused the jury's attention on each appellant's contribution to Mr. Khalid's death. The trial judge's two statements that it "may be enough" to establish legal causation if the continuation of assaults on Mr. Khalid was reasonably foreseeable should be understood in the context of the full instructions. The jury would not have found this factor to be adequate to establish legal causation without also accepting that the continuation of assaults was of the same general nature as the stabbing, or that the stabbing flowed reasonably from the appellants' conduct.

IV. Intervening Acts and Group Assaults

[26] The issue of whether it is legally possible, in the context of a group assault, for an intervening act to be committed by a member of the attacking group requires additional comment, having been raised by the Crown as a new issue before this Court.

[27] As this Court held, "[g]enuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties . . . and cannot reasonably be said to stem from the issues as framed by the parties" (*R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 30; see also *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39). However, the applicability of the doctrine of intervening acts in the context of co-principal liability under s. 21(1)(a) of the *Criminal Code* arises naturally from the

issues in these appeals as framed by the appellants, in particular, whether the trial judge erred by inaccurately instructing the jury with respect to the “causation” element of unlawful act manslaughter. Further, the appellants had the opportunity to respond to the Crown’s new argument in their joint reply factum and at the oral hearing.

[28] The possibility of an intervening act occurring in the context of a group assault was contemplated by this Court in *R. v. Strathdee*, 2021 SCC 40, at para. 4:

Joint/co-principal liability flows whenever two or more individuals come together with an intention to commit an offence, are present during the commission of the offence, and contribute to its commission. In the context of manslaughter, triers of fact should focus on whether an accused’s actions were a significant contributing cause of death, rather than focusing on which perpetrator inflicted which wound or whether all of the wounds were caused by a single individual. In the context of group assaults, absent a discrete or intervening event, the actions of all assailants can constitute a significant contributing cause to all injuries sustained. [Emphasis added.]

[29] The causation inquiry is case-specific and fact-driven. There is no single test or measure for determining whether a particular act has broken the chain of causation. The issue in considering joint liability as co-principals under s. 21(1)(a) is whether the unlawful acts of the accused were a significant contributing cause of the victim’s death (*Maybin*, at paras. 18-29). *Strathdee* leaves open the prospect of an instruction addressing “a discrete or intervening event” even in the case of co-participants in a group assault.

[30] Accordingly, I reject the Crown's argument before this Court that in no case can the act of a co-participant in a group assault trigger the application of the intervening act doctrine.

V. Conclusion

[31] I would dismiss the appeals.

The reasons of Rowe and Jamal JJ. were delivered by

JAMAL J. —

[32] I agree with my colleague Moreau J. that the appellants were entitled to have the jury properly instructed on how an intervening act may affect legal causation for unlawful act manslaughter. As my colleague explains, an intervening act instruction is available in a case involving co-principal liability arising out of a group assault (see *R. v. Strathdee*, 2021 SCC 40, at para. 4).

[33] I respectfully disagree, however, with my colleague's conclusion, and that of the majority of the Court of Appeal for Ontario, that the trial judge's intervening act instruction properly instructed the jury on the issue of causation for unlawful act manslaughter. I substantially agree with the reasoning and conclusion of the dissenting justice in the Court of Appeal.

I. The Trial Judge's Intervening Act Instruction Did Not Properly Instruct the Jury on Legal Causation

[34] In my view, the trial judge failed to properly instruct the jury by repeatedly instructing them that, even though Rameez Khalid was stabbed by another member of the group involved in the group assault, it “may be enough” to make the appellants’ unlawful actions in participating in the group assault legal causes of Mr. Khalid’s death if it was reasonably foreseeable that the assaults on Mr. Khalid would continue and create a risk of non-trivial bodily harm to him (A.R., vol. XXIV, at pp. 106-7 and 221-22).

[35] Even when read functionally and as a whole, the trial judge’s instructions on the causation element of unlawful act manslaughter did not properly equip the jury to decide the case according to the law. The trial judge correctly instructed the jury that the test for legal causation is whether the appellants’ actions were significant contributing causes of Mr. Khalid’s death. But he also twice incorrectly instructed the jury — once in response to a question from the jury asking for a definition of a “break in the chain of causation” (A.R., vol. XXIV, at pp. 178 and 218) — that the stabbing may not break the chain of legal causation from the appellants’ unlawful actions to Mr. Khalid’s death if it was reasonably foreseeable that the assaults on Mr. Khalid would continue and create a risk of non-trivial bodily harm to him (pp. 106-7 and 221-22).

[36] In my view, this instruction was erroneous. As this Court has recognized, a reasonably foreseeable intervening act will not usually break the chain of legal

causation so as to relieve the offender of legal responsibility for an unintended result (*R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30, at para. 30). However, in order for legal causation to function as “a narrowing concept” that “funnels a wider range of factual causes into those which are sufficiently connected to a harm to warrant legal responsibility” (para. 16), what has to be reasonably foreseeable is the “general nature of the intervening acts and the accompanying risk of harm” (para. 38). This standard requires greater specificity than the standard of reasonable foreseeability of the risk of further non-trivial bodily harm. An intervening act may break the chain of legal causation because the general nature of the intervening act and the accompanying risk of harm is *not* reasonably foreseeable, even though the risk of further non-trivial bodily harm *is* reasonably foreseeable (paras. 37-38). Failing to appreciate this distinction would diminish the intervening act doctrine’s “effectiveness as any limitation of the scope of criminal liability” (para. 37).

[37] In sum, to find that the appellants’ actions were legal causes of Mr. Khalid’s death even though he was stabbed by another member of the group, the jury had to find that the stabbing did not break the chain of legal causation from the appellants’ unlawful actions to Mr. Khalid’s death. Based on the trial judge’s instructions, however, at least some members of the jury may have incorrectly found that the stabbing did not break the chain of legal causation simply because the continuation of the assaults on Mr. Khalid and the resulting risk of non-trivial bodily harm to him was reasonably foreseeable.

[38] I accept that “[a] single ambiguous or problematic statement in one part of a charge will not necessarily be an error of law where the charge as a whole equipped the jury with an accurate understanding of the relevant legal issue” (*R. v. Abdullahi*, 2023 SCC 19, at para. 41). Here, however, other parts of the trial judge’s instructions did not prevent the jury from being inaccurately instructed on whether the stabbing broke the chain of legal causation.

[39] Although the trial judge explained the approach to legal causation by referring to other evidence and inviting the jury to consider whether the appellants’ unlawful actions made Mr. Khalid more vulnerable to being attacked with a knife, this line of inquiry would not have helped the jury to assess whether the stabbing was an intervening act that broke the chain of legal causation. For example, even though the appellants’ unlawful actions made Mr. Khalid more vulnerable to being stabbed, the general nature of the stabbing and the accompanying risk of harm may not have been reasonably foreseeable to the appellants. As a result, this aspect of the trial judge’s instruction did not adequately mitigate the risk that the jury may have applied the wrong reasonable foreseeability standard to find that the stabbing did not break the chain of legal causation.

[40] In addition, in response to the jury’s question asking for a definition of a “break in the chain of causation”, the trial judge told the jury that they *may* consider: (1) whether holding the appellants responsible for Mr. Khalid’s death is morally just and fair; (2) whether the stabbing of Mr. Khalid by another member of the group was

so overwhelming as to make the appellants' actions merely part of the background; (3) whether the stabbing was directly related to the assaults; and (4) whether the stabbing was extraordinary or unusual or whether it flowed naturally from the circumstances in this case (A.R., vol. XXIV, at pp. 220-21). Again, despite this further guidance, at least some members of the jury may have reasonably relied on the trial judge's incorrect instruction and found that the stabbing of Mr. Khalid did not break the chain of legal causation simply because the appellants could have reasonably foreseen the continuation of assaults on Mr. Khalid and the resulting risk of non-trivial bodily harm.

[41] My colleague Moreau J. concludes that the trial judge "was correct to tell the jury that the reasonable foreseeability of continuing assaults 'may be enough' to establish causation, provided that the jury accepted the premise that the continuation of assaults was of the same 'general nature' as the fatal act (the stabbing) or that the stabbing flowed reasonably from the appellants' conduct" (para. 19). She also concludes that the remainder of the trial judge's instructions made this underlying premise clear by repeating the test for legal causation, pointing to relevant evidence, and inviting the jury to consider whether the stabbing was extraordinary, unusual or overwhelming, or was directly related to or would naturally flow from the appellants' unlawful conduct (paras. 20-21).

[42] Respectfully, I do not share this view. It was up to the jury, not the trial judge, to decide whether the intervening act (the stabbing) was of the same general nature as a continuation of the assaults. The trial judge's inaccurate instructions cannot

be salvaged by assuming that the jury would have characterized the general nature of the stabbing in this case as a “continuation of [the] assaults” (A.R., vol. XXIV, at p. 221). In any event, the trial judge’s instructions did not make clear that the reasonable foreseeability of the continuing assaults “may be enough” to establish legal causation despite the stabbing of Mr. Khalid, *provided that* the stabbing was of the same general nature as a continuation of the assaults. The trial judge never referred to the “general nature” of the stabbing. As a result, simply repeating the test for legal causation, pointing to relevant evidence, and inviting the jury to consider whether the stabbing was extraordinary, unusual or overwhelming, or flowed naturally from or was directly related to the appellants’ unlawful conduct, would not have made this underlying premise clear to the jury.

[43] The risk of an improper instruction was especially high here because the trial judge repeated his incorrect instruction when the jury asked him to define a “break in the chain of causation”. As this Court recently explained in *Abdullahi*, “[t]here is a greater risk that the jury has an inaccurate understanding of the law where an inaccurate statement is made in a recharge in response to a question from the jury . . . ; this may well compound and thereby make more serious such an error” (para. 42).

[44] I also agree with the following observations of former Justice David Watt on the importance of questions from the jury:

Appellate courts say that answers to questions from the jury are extremely important. Questions carry an influence far exceeding the instructions in the main charge. If a jury asks a question about a subject

covered in the main charge, it is clear that they did not understand or remember what was said about it in the main charge. Equally clear is that they must rely exclusively on the trial judge's response to resolve any confusion or debate on the issue that may have taken place in the jury room prior to their question. A question submitted by the jury provides the clearest possible indication that one, several, or all jurors have the problem reflected in the question on which they seek further instructions. [Footnotes omitted.]

(D. Watt, K.C., *Helping Jurors Understand* (2nd ed. 2023), at § 9:6)

[45] In this case, as reflected in the jury's question, the case against the appellants turned on the issue of what constitutes a break in the chain of legal causation. The jury could reasonably have been expected to focus on the trial judge's answer in particular. I note that even the majority of the Court of Appeal accepted that the trial judge's answer, "[w]hen read in isolation, . . . can be said to have misstated the law as laid down in *Maybin*", but it concluded that when "[r]ead as a whole, the instruction accurately put the law of causation as it applied to [the appellants]" (2023 ONCA 221, 166 O.R. (3d) 179, at para. 207).

II. The Curative Proviso Does Not Apply

[46] In the circumstances, I would not apply the curative proviso under s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[47] If an accused has shown that a jury instruction is improper, "the Crown, if it seeks to rely on the [curative] proviso, bears the burden to establish one of the requirements of the proviso: that (1) the error of law is 'harmless', or (2) despite a

potentially prejudicial error of law, there is an ‘overwhelming’ case against the accused”, such that the jury would inevitably have convicted the accused (*Abdullahi*, at para. 33, citing *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, at para. 25; see also *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 31; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 36).

[48] The Crown argues that the evidence against the appellants “was so overwhelming that there is no realistic possibility that a new trial would produce a different verdict” (R.F., at para. 53). I disagree. The evidence did not conclusively establish whether the appellants could have reasonably foreseen the general nature of the stabbing of Mr. Khalid by another member of the group and the accompanying risk of harm. For example, had the trial judge properly instructed the jury, at least some members of the jury may have characterized the general nature of the intervening act — the stabbing of Mr. Khalid — as an assault with a weapon and found that the appellants could not have reasonably foreseen an assault with a weapon because there was no evidence that the appellants knew or foresaw that anyone in their group had a knife or would stab Mr. Khalid.

[49] In the alternative, the Crown argues that the appellants would have been liable for manslaughter as aiders even if the jury had a reasonable doubt about the appellants’ liability as co-principals. I would not give effect to this submission. As all members of the Court of Appeal accepted, it cannot be known what route to liability the jury took in convicting the appellants (paras. 128 and 181). As the trial judge

accurately instructed the jury, to convict the appellants of manslaughter as aiders, the jury had to be satisfied beyond a reasonable doubt “[t]hat a reasonable person in all the circumstances of the [appellants] would have appreciated that bodily harm that is neither trivial nor transitory was a foreseeable consequence of [the] assault on [Mr.] Khalid” (A.R., vol. XXIV, at p. 112; see also *R. v. Jackson*, [1993] 4 S.C.R. 573, at p. 583). The jury could have had reasonable doubt about this issue because the appellants did not foresee that a knife would be used on Mr. Khalid, and because in an altercation earlier that evening between Mr. Khalid and the stabber both parties had been “unhurt” (C.A. reasons, at para. 5).

[50] Therefore, in the circumstances, I see no basis to apply the proviso.

III. Disposition

[51] I would allow the appeals, set aside the manslaughter convictions, and order a new trial.

Appeals dismissed, ROWE and JAMAL JJ. dissenting.

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