File Number: 38661

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

ASSMAR RYIAD SHLAH

Appellant (on appeal)
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

FACTUM OF THE RESPONDENT
ATTORNEY GENERAL OF ALBERTA

RULES 36 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE RESPONDENT

PART I – OVERVIEW AND FACTS

Overview

1. Lukas Strasser-Hird died in a group attack by multiple persons in an alley behind the Vinyl nightclub in Calgary, Alberta on November 23, 2013. In a trial held before a judge and jury, the Appellant Assmar Ryiad Shlah was found to have participated in that attack and was convicted of second degree murder. Prior to the attack, Lukas had been in an altercation with Shlah in front of the Vinyl. At that time, Shlah pushed Lukas and Lukas punched Shlah in the nose, causing it to bleed. A group of Shlah's friends then began assaulting Lukas. This ended when bouncers from the Vinyl intervened and escorted Lukas and a few friends into the club.

2. Unfortunately, within a few moments, Lukas and his friends were ushered out of the Vinyl's back door into the alley behind the club. Shortly thereafter, they came to the attention of the group from the front of the club and many from that group went into the alley. Lukas was cornered against a wall and savagely beaten with fists and feet by numerous people. Intervention attempts by his friends and Good Samaritans who happened upon the scene were unsuccessful in stopping the attack. Lukas was also stabbed not long after the attack began, which caused him to bleed profusely while the beating continued, leaving him in a pool of his own blood. His attackers eventually left and police and medical personnel arrived to help him. However, he succumbed to his injuries in hospital a short time later.

3. Shlah was arrested leaving the scene, primarily because attending police officers saw that the entire top of his right shoe appeared soaked in blood. Eventually, he and four others were charged with murder. They were to be tried together but in the end, only four were, because the fifth, Nathan Gervais (who had allegedly made admissions about stabbing Lukas), fled Canada prior to the start of the trial. Evidence of Shlah's involvement in Lukas's death consisted of video surveillance showing the initial altercation between him and Lukas in front of the club, eyewitness testimony identifying him as kicking and/or punching Lukas during the attack and evidence that it was Lukas's blood that covered the top of his right shoe. There were inconsistencies in the testimony of the five eyewitnesses identifying Shlah or someone matching his description as

having assaulted Lukas. Other eyewitnesses said they had not seen him do anything during the assault and Shlah testified on his own behalf and denied assaulting Lukas.

4. Shlah's counsel highlighted these potential deficiencies in the eyewitness evidence identifying Shlah as one of Lukas's attackers during final argument. Of the three other persons tried for murder with him: Jordan Liao was acquitted, Joch Pouk was convicted of manslaughter and Franz Cabrera was convicted of second degree murder. On appeal, Shlah argued that his conviction for second degree murder was in error for two major reasons. The first was that there was no reliable evidence that established he had assaulted Lukas. The second was that the trial judge erred in some of his jury instructions on party liability. However, his complaints about the party liability instructions did not allege that they incorrectly stated the law.

5. A majority of the Court of Appeal upheld Shlah's conviction concluding that the jury could reasonably have found that he had assaulted Lukas in a way that was a significant contributing cause to his death with the necessary intent to be guilty of murder. They also found his complaints about the jury instructions were without merit and that the dissenting justice erred in analyzing the reasonableness of the second degree murder verdict. Finally, they concluded the dissenting justice's finding that the trial judge misdirected the jury on the issue of joint principal liability arising out of a group assault raised a new issue without notice and should not have been addressed. They further stated they disagreed with her view that this area of Canadian law required clarification.

6. The dissenting justice held that the jury's finding that Shlah had assaulted Lukas was unreasonable and he should have been acquitted of murder. She reached this conclusion by finding that the eyewitnesses who said Shlah was involved in the assault were unreliable and the DNA evidence from the blood on his right shoe did not, in fact, demonstrate what it needed to show to support a conviction. She also said the question of the correctness of current Canadian law regarding joint principal liability arising from a group assault had been before the Court of Appeal so her decision on that issue did not violate the *R. v. Mian* procedure by which a Court of Appeal should raise a new issue.

7. The Respondent submits that the dissenting justice did not properly apply the law or follow the correct process in her assessment of the reasonableness of the jury's second degree murder

verdict. Instead, as correctly identified by the majority, she assessed the evidence of Shlah's involvement in a piecemeal way, never looked at the entirety of the identification evidence as a whole and concluded that the jury's view of the evidence was unreasonable simply because she disagreed with it.

8. On the issue of the law of joint principal liability arising out of a group assault, the Respondent submits this was a new issue; not one that properly flowed from the grounds of appeal the Appellant raised. The Respondent further submits that the dissenting justice's view of the law of joint principals is flawed and wrongly turns common factual elements between different cases involving group assaults into legal requirements. If her interpretation was adopted it would drastically limit and perhaps eliminate the concept that in group assaults "the blow of one is the blow of all." This appeal is without merit and should be dismissed.

Statement of Facts

Trial Evidence

9. The Respondent does not adopt the description of the facts the Appellant details in the body of his factum and its attached Appendix A. The witness evidence and video and physical evidence that the Respondent submits is relevant to this appeal is set out below.

Interactions Between Shlah and Lukas at the Front of the Vinyl

10. A number of eyewitnesses testified that Shlah was angry when he initially left the Vinyl and also after his altercation with Lukas. Gino Aiello (friend of Shlah's) said there was a problem with Shlah getting his jacket when the two of them were leaving the club. They both got irritated. Shlah got his jacket back and a bouncer said a few things to Shlah that Aiello did not hear. They were still mad at the bouncer when they were leaving the club and were yelling at him when Lukas said something to Shlah.[1]

11. Shlah was further described as angry and drunk (Kristina Toporkova - friend of Shlah's)[2], looking angry (Meagan Varga – friend of Shlah's) [3], screaming at the bouncer (Tyler Schaber –

[1] Excerpt of Trial Transcript ("Trial") 253/19 – 30 [Record of Appellant ("ROA"), TAB 39]
[2] Trial 299/3 – 19 [ROA, TAB 19]
[3] Trial 39/13 – 29 [ROA, TAB 21]

friend of Shlah's)[4], screaming at the bouncers and arguing (Nikko Marasigan – friend of Shlah's)[5] and freaking out and stuff (Joao Furtado – acquaintance of Shlah's).[6]

12. Troy Foster (acquaintance of Shlah's and friend of Lukas's) said he saw Shlah escorted from the Vinyl by security. He was calling the doormen racial slurs like "spic" and "nigger." Lukas told Shlah he had Hispanic friends and did not appreciate his choice of words. Shlah directed his anger at Lukas and Lukas remained mostly relaxed. Shlah said something along the line of they were going to fight. In cross-examination, Foster agreed the doormen were Caucasian and that the slurs Shlah called them did not make sense. He disagreed with the suggestion that Shlah did not call someone a "nigger". He was maybe 10 feet from him and heard it. He was also sure Shlah had not called the doorman a "prick".[7]

Physical Contact between Shlah and Lukas in Front of the Vinyl

13. Video from the front of the Vinyl showed Shlah and Lukas originally came together through Shlah approaching and pushing Lukas. Lukas then struck Shlah in the face. Club staff intervened and brought Lukas into the Vinyl.[8] After a short period of time inside, Lukas left through its back door with a number of his friends.[9]

14. Anthony Spadafora (friend of Shlah's) said he saw Lukas strike Shlah in the face. Everyone started trying to go after Lukas and there was a big bunch of people going. The bouncers saw that and brought Lukas back into the club. Everyone was still waiting outside yelling things like "Come back outside." Everyone was mad because Lukas got a shot off. After Lukas punched Shlah everyone that saw it started to jump at him. He kind of ran and it was a scramble between their (Shlah's) friends and his friends. Spadafora remembered Lukas getting cornered along the wall of the Vinyl and the bouncers came in and split it up.[10]

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[4] Trial 127/29 – 128/15 [ROA, TAB 25]
[5] Trial 210/38 – 212/34 [ROA, TAB27]
[6] Trial 18/36 – 19/2 [ROA, TAB 33]
[7] Trial 1535/25 – 1536/40 and 1561/20 – 1563/8 [Record of Respondent ("ROR"), TAB 1C]
[8] Exhibit 66, Video of Lukas Exiting Vinyl from 2:25 – 5:09 [ROR, TAB 2A]
[9] Exhibit 66, Video of Lukas Exiting Vinyl from 5:09 – 10:30 [ROR, TAB 2A]
[10] Trial 108/4 – 32 and 110/28 – 39 [ROA, TAB 24]

15. Jacob Hartley (friend of Lukas's) said Lukas was in the middle of the fight that broke out and took a lot of hits to the head. Ten or fifteen people were involved. He heard "get that white boy" but did not know who said it.[11] Ramsey Sharawi (friend of Lukas's) saw Lukas arguing with a man with brown hair and then saw Lukas react as if he had been pushed or hit. Lukas swung at a male that was around Sharawi's skin colour, giving the male a bloody nose. Shortly after that, the bouncers came out to try to stop it and one dragged Lukas into the club. There were probably ten people he didn't know trying to kick and punch at Lukas while he was being dragged away.[12]

16. Rafael Pimentel (bar staff) said there was a swarm of people randomly throwing punches and fighting. Lukas was in the middle of it all. Club staff recognized him from earlier in the night and tried to stop the altercation. He thought Lukas was in danger so his real goal was to get him out of harm's way and into the club. Before that, he saw Lukas get hit a few times by unknown people with what looked like bare fists. He didn't observe any injuries to Lukas that stood out.[13] Michael Asiedu (friend of Lukas's) identified Shlah in the dock. He said that when he came outside of the club Shlah and Lukas were exchanging fists and he tried to get in between. Shlah pushed him and Asiedu's friend Victor (Vicuna) came between them.[14]

Attack on Lukas in the Alley

17. Ty Javos Paike (friend of Lukas's) said the group from the front of the Vinyl met up with Lukas's group about two minutes after the group from the front had left the back of the club. As soon as they saw Lukas's group they were on them. The people with Lukas were shoved out of the way to get to him. The attack lasted for five to ten minutes with five to seven people all around Lukas. Kicks and punches were landing on his face, abdomen and legs. It took one or two minutes for Lukas to go to the ground.[15] Paike agreed that not all of the people attacking Lukas were involved throughout. It was possible there were at least 20 people by the dumpster (where the attack occurred). He had never met any of them except Nathan Gervais.[16]

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[11] Trial 897/41 – 899/5 and 899/34-38 [ROR, TAB 1B]
[12] Trial 321/20 – 322/26 [ROA, TAB 40]
[13] Trial 2/26 – 3/20 and 5/2 – 3 [ROA, TAB 41]
[14] Trial 160/3 – 6 [ROA, TAB 46]
[15] Trial 122/26 – 35 and 135/5 – 22 [ROA, TAB 11]
[16] Trial 173/16 – 30 [ROA, TAB 11]

18. Meagan Varga said the fight moved to the alley after it broke up (in front). Lukas was by the dumpster. She did not remember who was kicking him. She saw Marasigan, Franz Cabrera, Shlah, Joch Pouk and Gervais there but didn't hear them say anything. Lukas was just covering himself and she thought he was saying. "Please stop." He was just getting kicked. She saw Marasigan kick Lukas in the legs.[17]

19. Tyler Schaber said he and Furtado followed a big group around back. Lukas was down when he got there. He was lying by the dumpster and screaming "Stop, stop." Five or six people were beating on him but Schaber did not really remember anyone. He did not remember people saying anything.[18] He saw Shlah in the group and saw him go in for one punch when Lukas was on the floor. Schaber was pulling Shlah away at that time because he noticed Shlah had some blood on his nose. Shlah did not say anything when he did this and they pulled him to the end of the alley. Police showed up and put him into custody.[19] He would say Shlah's punch landed towards the chest up and thought he was there punching and kicking before but didn't really remember how many times he did that. Schaber said he was back there maybe five minutes. [20]

20. In cross-examination, Schaber agreed there were still people beating on Lukas when he walked away with Shlah. He also agreed that the liquor he drank had some effect on his memory, perception, all types of things. His group pretty much ran from the front of Vinyl to the alley. It was suggested Shlah was never involved in the fight and Schaber said he believed he was. It was just too long ago and he did not recall. He then agreed the person in the crowd could have been someone he thought was Shlah. He also agreed he kicked Lukas in the shins but had not been charged. [21] In re-examination he said his current best recollection was that he really didn't remember but guessed Shlah did participate.[22]

21. Joao Furtado said everyone started walking away when the police arrived (in front of the Vinyl). When they went towards 1st Avenue they saw a bunch of people rushing into the alley. People he recognized running to the back were Shlah, Marasigan and Schaber. He saw Lukas

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[17] Trial 39/31 – 40/39; 41/13 – 39 and 59/35 – 60/4 [ROA, TAB 21]
[18] Trial 129/39 – 130/28 and 131/19 – 132/38 [ROA, TAB 25]
[19] Trial 133/41 – 135/7 [ROA, TAB 25]
[20] Trial 137/15 – 37 [ROA, TAB 25]
[21] Trial 144/33 – 40; 149/26 – 30; 151/13 – 16; 154/27 – 41 and 158/25 – 40 [ROA, TAB 25]
[22] Trial 164/21 – 35 [ROA, TAB 25]

being kicked and punched. There were quite a lot of people and he didn't know if some were jumping on Lukas or protecting him. He got within a couple of feet and kicked Lukas once in the back area. At a certain point Lukas was all curled up on the ground. Schaber and Marasigan also kicked Lukas once each and Shlah kicked and punched him. He did not recall seeing where Shlah's punches and kicks landed. He estimated 10 to 20 blows (from Shlah) but was not too sure. He did not recall Shlah saying anything. This went on for 5 to 15 minutes. He would say around ten people were assaulting Lukas but there were too many people all around so he was not sure if they were helping or harming.[23]

22. In cross-examination he said they started running to the alley when they were just about at the corner of 10th and 1st. It was suggested he didn't know if Shlah was in the alley and he said Shlah was, because the police grabbed him there. He saw him around the whole group. It was suggested this could mean he was just standing around. Furtado said he highly doubted that but agreed he could not be specific on whether Shlah was doing anything to Lukas. It was suggested when he said Shlah kicked and punched him 10 to 20 times he did not know that to be the truth. Furtado replied "Yes." He agreed he was not above lying to get himself out of trouble and lied to police about never having struck Lukas. In re-examination he said the only thing he lied to police about was not kicking Lukas.[24]

23. William Sprague said he was with Samantha Willick, Sierra Ryan and Joey Arnold leaving another bar when they heard people talking about a kid getting jumped. They looked into the alley and saw a group of people near the dumpster. He believed Ryan and Arnold said they should go over so they did.[25] He saw a circle of five or ten men around the dumpster before he walked up. He did not know what all of them looked like; he mostly saw the backs of their heads before they walked over. He recognized one as taller, kind of Middle Eastern and another as a Filipino with a round face and pierced ears. The first person had a bloody nose.[26] It looked like they were punching, kicking and stomping someone who was on the floor in a pool of blood. He did not hear

[23] Trial 20/17 – 22/31 [ROA, TAB 33]
[24] Trial 32/27 – 33/15; 34/18 – 35/19 and 45/9 – 15 [ROA, TAB 33]
[25] Trial 113/15 – 31 [ROA, TAB 37]
[26] Trial 113/33 – 114/31 [ROA, TAB 37]

the person with the bloody nose say anything but saw him punch and stomp the person on the ground in the face and midsection. The other person was doing the same thing.[27]

24. When Sprague's group got closer a good percentage of the other group left, leaving the two people attacking him and a Caucasian person who was about five foot six with red hair who was trying to get the others to move on. He was saying "Franz, let's go".[28] The two people he described eventually left about two minutes from the time he first saw them as he was coming out of the bar. The people went west down the alley, away from 1st Street.[29]

25. In cross-examination Sprague agreed his initial police statement described the three persons as Asian but said to his thinking Asia would include the Middle East.[30] He saw the person with the bloody nose stomp the person on the ground around the beltline. The person with the bloody nose was reaching around Sprague and the people with him to do this. Both attackers were trying to get shots in whenever they could.[31] He did not identify Shlah's photograph in a photo array that included it.[32] Sprague agreed he was facing the person with the bloody nose and away from Lukas when this person was trying to get at Lukas. He did not see this person connect with Lukas. He just felt that from where this person was if he did connect it would have been to the waist area.[33]

26. Bryce Sunberg (friend of Lukas's) said his group, including Lukas, left the Vinyl via the back door and circled around the block to try to avoid people. The other group was waiting for them and once his group was out on the street they circled Lukas and started attacking him. He and Lukas's other friends were kind of isolated out. The only person in the crowd he knew was Nathan Gervais. He was trying to calm Gervais down. There were probably a dozen people in the attacking group. They were punching and kicking Lukas and chased him into the alley pinning him against the dumpster.[34] Sunberg saw Gervais run up to Cabrera and then run into the group

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[27] Trial 114/37 – 115/24 [ROA, TAB 37]
[28] Trial 116/1 – 30 [ROA, TAB 37]
[29] Trial 118/1 – 14 [ROA, TAB 37]
[30] Trial 127/28 – 128/27 [ROA, TAB 37]
[31] Trial 128/29 – 129/9 [ROA, TAB 37]
[32] Trial 129/37 – 131/8 [ROA, TAB 37]
[33] Trial 131/41 – 132/27 [ROA, TAB 37]
[34] Trial 139/6 – 140/39 [ROA, TAB 38]

attacking Lukas. Sunberg then saw multiple people kicking and punching Lukas as he was on the ground. He went to defend Lukas's face and saw Pouk kicking him in the face.[35]

27. Sunberg saw Pouk (whom he later picked out of a photo array) kicking Lukas in the face repeatedly and saying "you shouldn't have messed with my friend" and "you made your own choice." Lukas was on the ground barely conscious, screaming for his life and begging them to stop. Sunberg called 911 and was on the phone when about five of them came back including Gervais and a person he dock identified as Cabrera, and attacked Lukas again. The attackers said they needed to get his ID and wallet and get him again. Bystanders got them away.[36]

28. Gino Aiello said he was with Shlah, Marasigan and Meza heading west down 10th Avenue towards their car. They would have gone south down 1st Street and he then heard someone say, "There he is." He did not recall who said that or if they were in his group. He looked ahead and saw Lukas at the mouth of the alley. A bunch of people went towards the alleyway and he and the people with him went into the alley. He saw Shlah slip and fall. People ran after Lukas and he saw Lukas fall; that was all he could recall.[37]

29. Sierra Ryan said when she saw Lukas there were at least 20 people there. He was covered in blood and the cement around him was covered in blood. She couldn't say what he looked like because he was beaten so badly. He was telling her he was going to die over and over again. Blood was just sort of flowing out of the right side of his chest.[38]

30. Joey Arnold said Lukas was in a pool of blood saying "I'm dying". As he and Ryan were trying to help him, a group of between six and nine men came into the alley and tried to attack him. It would have been within a minute of when they arrived. The men were saying he (Lukas) had punched someone in the face and they were going to get him. He and Ryan tried to get in front of them so they didn't attack Lukas. He yelled "Stop" because he was worried they would attack Ryan and they stopped. He then tried to get between Ryan and Willick. Ryan started to help Lukas and Arnold tried to block as many as he could from attacking.[39] Two people from the group

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[35] Trial 141/25 – 30 [ROA, TAB 38]
[36] Trial 142/34 – 143/12; 144/38 – 145/8 and 145/32 – 146/2 [ROA, TAB 38]
[37] Trial 257/24 – 260/30 and 307/8 – 308/30 [ROA, TAB 39]
[38] Trial 17/6 – 19/18 [ROA, TAB 42]
[39] Trial 240/32 – 241/40 [ROA, TAB 48]

were particularly aggressive. Person 2 was more Middle Eastern, maybe Arab with a little blood on his face, just under the nose. He was maybe a little taller than Person 1, five seven and thinner. He didn't get to look at him much other than that. Person 2 was trying to punch and kick Lukas. Arnold didn't know what Person 2 said.[40]

31. Arnold's notes on the instructions for the lineup that contained Shlah's photograph were that he hadn't seen photographs other than on the news and had spoken to Ryan and Willick about who was caught. He selected Shlah's photo and described that he believed Shlah got punched in the face and was the friend of the aggressors. He said this person kept going at Lukas, yelling at him and swearing, attacking his head while he was lying in a pool of blood. He said he had not seen Shlah's photograph on the news or Facebook. He dock identified Shlah as the second of the two aggressors, the gentleman with the bloody nose. He identified Cabrera as the main aggressor.[41]

32. In cross-examination, Arnold agreed he had not mentioned Middle Eastern or Arab in his police statement but denied other persons had put thoughts into his head about who the second attacker was. He did not think much about the second aggressor because he was off to Arnold's right. He agreed he said the second attacker was no taller than he was. He was asked to stand in front of Shlah and confirmed Shlah was taller than him but noted Shlah's build was as he described. He agreed he began to talk about a second aggressor when he viewed Shlah's photo lineup.[42]

33. Constantin Bogdan Matei said he saw Lukas come back into the club with a bouncer. He had a bruised cheek. Lukas and his friends were told by the bouncers that they were going to be kept inside. However, within two minutes the bouncers kicked Lukas's group out the back. The group then walked from the alley into the street and saw maybe 15 people running towards them. Lukas tried to run back into the club but was caught before the door and cornered between a dumpster and the wall. Matei could hear people saying "What's up now?" and "Why you running?" He saw people kick and punch Lukas and drag him to the ground. Matei was trying to pull people off but people were pushing him off. He could see Pouk kicking Lukas in the face

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[40] Trial 242/37 – 243/14 [ROA, TAB 48]
[41] Trial 254/40 – 257/24 and 258/9 – 259/22 [ROA, TAB 48]
[42] Trial 276/30 – 278/16; 278/32 – 279/22; 280/11 – 37 281/16 – 41 and 292/7 – 13 [ROA, TAB 48]

about ten times and people laying down and punching him. Pouk was holding the wall with his left hand and kicking Lukas in the face with his right foot.[43]

34. About six to eight people were taking turns at Lukas, punching and kicking him in the stomach and the face. He was full of blood and missing teeth with his whole upper body covered in blood. Matei could not recognize him. He noticed the blood maybe 30 seconds into the fight. Before that Lukas was on the ground, getting pushed down, beaten up and punched and kicked.[44] Matei saw more people kicking and punching Lukas as well but from where he was standing there were people in his way blocking him from seeing the rest of the attackers. He could not describe them. There were about 20 people around at the time. There were about six to eight guys assaulting him at the same time but they were taking turns. One person would leave and another would come in. Matei was crying and trying to get in but people were telling him to stay away. He was crying because he knew Lukas was messed up and he couldn't do anything about it. The fight went on for about three minutes.[45]

Post-Attack Involvement of Police and Emergency Medical Personnel

35. Emergency medical personnel and police officers were dispatched to the alley. Natasha Rogers (Emergency Medical Technician) testified that Lukas was in very critical condition with an obvious stab wound to his abdominal area. It was bleeding through his shirt where an officer was holding pressure. Lukas was conscious but wasn't answering questions. They could not identify him because while they had his ID he was so badly beaten that he was unrecognizable. His face was completely swollen and he was missing teeth.[46]

36. Cst. Joe Shorkey from the Calgary Police Service testified he took note of Shlah in the alley as he had a bloody nose, some blood on his clothing and a large amount of blood covering the kind of toe portion of the shoe. Shlah's story was that he was sucker-punched. He denied having anything to do with the altercation in the rear of the club and said the blood on his shoe came from his nose. Shorkey did not believe this.[47] Cst. Marc Strong of CPS testified he was looking for

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[43] Trial 2/21 – 36 and 6/24 – 37 [ROA, TAB 50]
[44] Trial 8/19 – 9/1 [ROA, TAB 50]
[45] Trial 10/11 – 11/30 [ROA, TAB 50]
[46] Trial 2235/24 – 2236/15 [ROR, TAB 1D]
[47] Trial 113/19 – 37 and 114/25 – 30 [ROA, TAB 44]

anyone that stuck out, that had a lot of blood on them. Shlah had blood on his face, and coming from his nose. What really stood out was that his right shoe had blood all over it.[48]

Relevant DNA Findings

37. Jason Solinski provided expert testimony on the DNA analysis of substances located on Shlah's shoes (Exhibit 5 in the trial and depicted in Exhibit 2, TAB 2 at photos 044, 099 and 100)[49]. Areas identified for examination on the shoes were: AA (blood identified on the front instep side of the sole from the right shoe), AB (blood identified on the outstep side underneath the upper lace from the right shoe) and AC (blood identified on the instep side of the left shoe near the lace openings). His opinion was that AA and AC matched Lukas with the possibility of a random match being one in 13 trillion. AB matched Shlah. Area AA was measured as being 17.5 cm by 14.5 cm.[50] A report detailing these findings was entered in the trial.[51]

Lukas's Cause of Death

38. Dr. Andre Ferland, Lukas's emergency department physician said the cause of his death was irreversible shock. His blood pressure was too low to provide enough cardiac output to feed his organs and his body was in a state of total shutdown. Medical intervention could not produce the normal state of his blood and could not keep his vital signs and he passed away.[52]

39. Dr. Jeffrey Jason Gofton, the medical examiner, said the short answer on cause of death was multiple stab wounds to the torso: one at the right front upper chest, two in the right upper abdomen region and one at the right back side of the abdomen. Lukas also had multiple blunt force injuries on his head (at least 11), hands, right elbow, right ankle and back. Four teeth were also missing. Internal and external bleeding were part of the mechanism of his injuries. There are a number of risks with blunt force trauma to the head. There can be a concussive brain injury, skull fractures, brain bruising and brain bleeding, all the way to the end of the spectrum being death.[53]

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[48] Trial 135/13 – 136/32 [ROA, TAB 50]
[49] Exhibit 2, Book of Photographs at 29, 56 and 57 [ROA, TAB 58]
[50] Trial 319/30 0 320/37 and 348/28 – 349/35 [ROA, TAB 49]
[51] Exhibit 13, Forensic Science and Identification Services Laboratory Report dated 2014-01-30 at 105 – 109 [ROA, TAB 59]
[52] Trial 325/11-21 [ROR, TAB 1A]
[53] Trial 70/32 – 71/9; 71/122 – 72/5 and 73/13 – 74/13 [ROA, TAB 51]

40. The first stab wound was at the right anterior chest. It was 11 cm in length and showed signs of underlying surgical intervention. He could not give an estimation of the depth of the first stab wound because tissue had been surgically removed. It had caused injuries to the heart and both lungs and repairs to the same were attempted. There was also damage to one of the major arteries feeding inside the rib cage. There was associated internal bleeding with this injury and it was definitely potentially fatal. There was a chance of survival with immediate intervention. The second and third wounds were a cluster at the right upper abdomen. They were sutured surgically. Both wounds were approximately 13 cm deep and extended into the right side of the liver.[54]

41. The fourth stab wound was approximately 13 centimetres deep but did not have internal organ injury. The second and third wounds could also have been potentially fatal. They involved an internal organ and were also associated with internal bleeding. The fourth wound would be less likely to be lethal but a stab wound itself carries implications of serious injury. After these wounds it would have been possible to save Lukas if medical intervention had been immediate. The actual likelihood of survival was beyond his scope of practice.[55]

42. Lukas had a substantial amount of blood loss that would have starved his heart muscle for blood and oxygen and led to damage because of lack of blood supply to it. Eventually those little pieces of the heart would die from lack of blood flow. The liver appeared depleted of red blood cells which spoke to the fact that there were stab wounds and loss of blood. His findings (reported in the Autopsy Report[56]) were that the cause of death was multiple stab wounds to the chest and blunt force injuries as well.[57]

Decision of the Court of Appeal

Majority

43. The majority of the Court of Appeal gave extensive reasons for dismissing Shlah's appeal.

44. They said a jury verdict is reasonable if it is one a properly instructed jury, acting judicially, could reasonably have rendered. There must be some evidence to support the verdict

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[54] Trial 74/15 – 76/4 [ROA, TAB 51]
[55] Trial 74/6 – 34 [ROA, TAB 51]
[56] Exhibit 82, Autopsy Report dated April 10, 2014 at 120 [ROA, TAB 61]
[57] Trial 76/13 – 32 and 76/37 – 77/20 [ROA, TAB 61]

and it must not conflict with or be precluded by judicial experience. In reviewing a verdict for unreasonableness, an appellate court reweighs the evidence in a limited way. It is not permitted to retry the case or to find that a verdict is unreasonable simply because it decides, based on its own review of the evidence, that it has a reasonable doubt about an appellant's guilt.[58]

45. "The lens of judicial experience" and "the bulk of judicial experience" are not code words invoked to justify the reversal of jury verdicts. They do not allow appellate justices to assess witness credibility differently than the finder of fact or substitute their preferred inferences over what the finder of fact found to be reasonable. They also do not allow piece-mealing of the evidence or grant the power to fill in evidentiary gaps with speculative assessments of what further evidence might have revealed.[59]

46. They noted Lukas's injuries involved four stab wounds to his torso and substantial blunt force trauma including at least 11 injuries to his head. This included the loss of four upper frontal incisors. He was beaten so badly he could not be recognized from his driver's licence. The jury could also find that these attacks interfered with the attempts of the Good Samaritans to render medical assistance, as they testified there were continued attempts to attack Lukas while they were trying to help him. Finally, the jury could have found that the continued attacks exacerbated Lukas's blood loss and contributed to the subsequent lactic acidosis and irreversible shock that ultimately caused his death.[60]

47. There was no basis for concluding this jury was unreasonable in its implicit finding of a single group attack on Lukas. They were instructed to consider whether the stabbing was a possible intervening act for which other assailants would not be liable as joint principals. The evidence made it clear many of the assailants formed an intention to assault Lukas arising out of the incident in front of the Vinyl well before the alley attack.[61]

48. Given all the circumstances, nothing was unreasonable about the jury finding that the assault on Lukas was one interrelated and interconnected chain of events, causally and temporally. It involved the same group of people and occurred over a very short period of time. The jury's

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[58] *R v Cabrera,* 2019 ABCA 184 (*"Cabrera")* at paras 16 – 17, 20 – 22 [ROA, TAB 2]
[59] *Cabrera,* at paras 29 – 30 [ROA, TAB 2]
[60] *Cabrera,* at paras 73 – 75 and 114 [ROA, TAB 2]
[61] *Cabrera,* at paras 92 – 93 [ROA, TAB 2]

implicit finding that the actions of the assailants were part of a single group attack was entirely reasonable. There was one assault that caused death, not two.[62] They disagreed with the dissenting justice that on the evidence before the jury, the lens of judicial experience precluded any liability for Shlah. The jury's finding that Shlah participated in the group assault on Lukas was reasonable and understandable on this record. In particular, it was open to the jury to find he had participated as a principal or joint principal.[63]

49. The case against Shlah was not only circumstantial. There was eyewitness evidence, physical evidence (blood and DNA on his shoes) and video evidence of the altercation in front of the Vinyl that showed his demeanour and time of departure (to the alley). Identity was an issue but only on whether he was an active participant in Lukas's assault.[64]

50. The dissenting justice's conclusion that it was unreasonable for the jury to find that Shlah participated in the alley attack on Lukas was the product of her having gone through the evidence in a piecemeal fashion, considering the eyewitness and circumstantial evidence individually and essentially discounting the probative value of each. She also concluded that the DNA testing of Shlah's shoe did not sample enough different areas and disputed the inferences that could be drawn from the testing that did occur. She then found the verdict was unreasonable because a reasonable jury could not have convicted Shlah on the basis of either eyewitness or circumstantial evidence alone.[65]

51. The majority held that this approach was not proper. The review of a verdict's reasonableness must consider the evidence in its totality. Here, when the evidence was considered as a whole, it was entirely reasonable for the jury to conclude beyond a reasonable doubt that Shlah kicked and hit Lukas in the alley as part of the group attack. Although there were frailties in both the eyewitness and DNA evidence, when that evidence was considered in conjunction with the videotape evidence, the jury was entitled to conclude that the only reasonable inference from all the evidence was that Shlah participated in the attack on Lukas.[66]

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[62] *Cabrera*, at paras 97 – 98 [ROA, TAB 2]
[63] *Cabrera*, at paras 113 – 114 [ROA, TAB 2]
[64] *Cabrera*, at paras 118 – 120 [ROA, TAB 2]
[65] *Cabrera*, at para 121 [ROA, TAB 2]
[66] *Cabrera*, at paras 122 and 124 [ROA, TAB 2]

52. The real question on the DNA evidence was whether the jury (in implicitly finding Lukas's blood covered the entire front of Shlah's right shoe) reached an unreasonable opinion. The Appellant relied on the rule from *Hodge's Case* to argue that the jury had to be satisfied that the only reasonable inference from the evidence was consistent with guilt. He argued there was a reasonable inference from the DNA evidence consistent with his innocence – that the large bloodstain was from his bloody nose and Lukas's blood came from him stepping in a pool of blood in the alley. This meant the DNA evidence was not properly on the identification scale and the remaining eyewitness evidence did not support his involvement.[67]

53. The majority held that this argument had three problems. Firstly, the eyewitness evidence on identity made it difficult to say the evidence was primarily or largely circumstantial. Secondly, this argument depended on eliminating the eyewitness evidence and then saying another inference was available from the only circumstantial evidence remaining. However, reasonable doubt is not tested piece by piece. The circumstantial and eyewitness evidence cannot be separated.[68] Thirdly, on appeal, the phrase "the only reasonable inference" does not mean the only conceivable inference. An appellate court cannot set aside findings necessarily implicit in the jury's verdict in assessing the availability of another reasonable inference unless those fact findings are demonstrably unreasonable.[69]

54. The jury's decision to reject Shlah's alternative inference (that the majority of the blood on his shoe was his own and the blood identified as Lukas' came from stepping in the same and not from kicking him) was reasonable for a number of reasons. They included that there was no evidence to indicate the blood in the large stain on Shlah's shoe belonged to anyone else (the video evidence offered little indication that his nose had been bleeding sufficiently to cover his shoe), that the jury may have found the version of events he testified to difficult to reconcile with other evidence that indicated he was in the alley longer than claimed, that he was with other persons in the group attack and that his version of the progress he made going to the alley was different from the person that testified to being with him.[70]

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[67] *Cabrera,* at para 163 [ROA, TAB 2]
[68] *Cabrera,* at paras 164 – 166 [ROA, TAB 2]
[69] *Cabrera,* at paras 165 – 167 [ROA, TAB 2]
[70] *Cabrera,* at paras 173 – 184 [ROA, TAB 2]

55. A trier of fact should not give credence to an unreasonable alternative inference simply because it was possible. On this record, it was the jury's right to reject Shlah's evidence and find it did not raise a reasonable doubt. This jury could conclude beyond a reasonable doubt that Shlah participated in Lukas's assault.[71]

56. The majority disagreed with the dissenting justice's opinion that the existing jurisprudence on joint principal liability arising from a group assault required clarification. Also, because this concern was not raised by any party at trial or on appeal it was a new issue raised without the notice necessary to allow it to be adequately addressed. It would be wrong to now entertain the invitation to revisit Canadian law without the benefit of counsel argument.[72]

57. Further, they also disagreed that the law on group assaults did not apply to a situation where the victim may have been stabbed early in an assault with other participants joining in later. Guilt as a joint principal under Canadian law does not require proof of a prior agreement to act in concert or a common purpose amongst everyone. Common participation is sufficient. The fact some persons begin an assault before others or end their involvement before others does not preclude the existence of a single group attack.[73]

Dissent

58. The dissenting justice gave extensive reasons for acquitting Shlah or alternatively, ordering a new trial on second degree murder.

59. She noted Shlah submitted that the evidence suggesting he had assaulted Lukas was not reliable. He testified he was in the alley but did not assault Lukas or know who the man on the ground was. He said the identification witnesses who said they saw him or someone that looked like him punching or kicking Lukas were mistaken and/or unreliable. He also argued the probative value of the DNA test of his shoe was limited for reasons including that Lukas's DNA was found only on the outside edge of the sole, which was consistent with his evidence that he might have stepped in the blood in the alley.[74]

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[71] *Cabrera,* at paras 185 – 186 [ROA, TAB 2]
[72] *Cabrera,* at para 88 [ROA, TAB 2]
[73] *Cabrera,* at paras 89 – 91 [ROA, TAB 2]
[74] *Cabrera,* at paras 314 – 315 [ROA, TAB 2]

60. The dissenting justice began with a review of the individual testimony of the persons who testified to being in the alley while the attack on Lukas was ongoing.[75] She said that in deciding to accept some, all or none of a witness's evidence a reasonable jury could not be blind to the significant concessions witnesses made during cross-examination about assumptions they made, alcohol they consumed and inconsistencies in descriptions of the perpetrators. Paike and Varga said they saw Shlah in the alley but did not see him do anything to Lukas. Sprague and Arnold testified a Middle Eastern man was the second aggressive member in the second wave of attackers but neither could say they saw him strike Lukas. They did describe threatening behaviour that could constitute an assault. Their identification evidence of the second attacker was inconsistent between their police statements and testimony. Their evidence was not corroborated by circumstantial evidence or direct evidence from other witnesses.[76]

61. This left the evidence of Schaber and Furtado. Both said they knew Shlah and saw him strike Lukas. Schaber said he saw at least one punch at Lukas's upper chest and Furtado said Shlah struck Lukas 10 to 20 times either by kicking or punching, although he then admitted he was not certain how many blows were levelled or landed. Cross-examination called the reliability of their evidence into question. Schaber admitted he was no longer sure Shlah was even involved in the assault because of the passage of time but confirmed in re-examination that his best recollection was that Shlah did participate. Furtado admitted he was so intoxicated he was not really sure he saw Shlah do anything to Lukas.[77]

62. The most important piece of physical evidence against Shlah was his right shoe, which had a large bloodstain covering most of its top. The Crown argued this stain was Lukas's blood. The actual evidence made it difficult to draw that inference as he was not the only possible source of that blood. This was because it appeared there were errors in describing the DNA evidence that may have impacted the jury's deliberations on the inferences available to it.[78]

63. The errors involved the area designated as AA on Shlah's right shoe, which was found to contain Lukas's blood. The descriptions of this area in the Forensic Report, expert testimony and

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[75] *Cabrera,* at paras 319 – 336 [ROA, TAB 2]
[76] *Cabrera,* at paras 337 – 338 [ROA, TAB 2]
[77] *Cabrera,* at para 339 [ROA, TAB 2]
[78] *Cabrera,* at paras 340 – 341 [ROA, TAB 2]

on the shoe were inconsistent and raised the question of whether AA referred only to the tested site on the shoe or the entire bloodstain covering the top of the shoe. The Forensic Report described AA as being: right shoe; front instep, side of sole. The right shoe appeared to have blood on its front instep. However, the site from which the sample that was tested for DNA was obtained entirely from the side of the sole.[79]

64. The record indicated the process followed in the DNA testing of an exhibit involved three different units in the forensic laboratory. The involvement of different people at different stages might explain the inconsistencies in the description of area AA. The person that testified at trial (Solinski) never handled any exhibits. He interpreted the findings in the raw DNA typing data.[80]

65. When he testified about the staining and location of the sample sent for DNA analysis he relied on the description in the Forensic Report (written by a retired analyst) and the working papers of the search technologist (who identified biological material, extracted the same and developed a profile). It did not appear Solinski was shown the shoe or asked to explain the discrepancy between the location noted on the shoe and the other documents. His misunderstanding about AA and reliance upon third party reports impacted his understanding about the relationship between area AA and the large bloodstain. His testimony that area AA was 17.5 by 14.5 cm with a 2.5 by .7 cm area swabbed and sent for analysis relied on the notes of the search technologist which assumed AA included the tested area and the large bloodstain.[81]

66. Solinski's evidence about the size of the swabbed area was consistent with the appearance of the right shoe. However, the search technologist's assumption that area AA was 17.5 by 14.5 cm had not been established. Its dimensions were established before testing had been done so no one knew if it contained blood from one or more people. Whether the finding at the tested site could be extrapolated to cover the entire bloodstain would be the basis of an inference for the jury and would depend on all of the relevant evidence. Solinski's evidence on this point went beyond his area of expertise which was the interpretation of the DNA evidence.[82]

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[79] *Cabrera,* at paras 342 – 346 [ROA, TAB 2]
[80] *Cabrera,* at paras 349 – 350 [ROA, TAB 2]
[81] *Cabrera,* at paras 351 – 352 [ROA, TAB 2]
[82] *Cabrera,* at para 353 [ROA, TAB 2]

67. The dissenting justice stated that the reasonableness of the verdict against Shlah had to be considered in light of all of the evidence, with an assessment of its cumulative effect. The case against him was based on eyewitness identification, physical evidence and circumstantial evidence of the initial altercation in front of the Vinyl. She said that while eyewitness evidence placed him at the scene of the assault it was without any reliable evidence of what, if anything, he did to Lukas. Viewing that evidence through the lens of judicial experience, it would be unsafe for a properly instructed jury acting judicially to conclude that identity and the assault were established on that evidence alone.[83]

68. The bloodstain evidence appeared to be strong evidence in favour of guilt and, absent an explanation from Shlah, it might have been tempting to infer that it came from a kick. However, it was circumstantial evidence and its weight and cogency depended on the circumstances. The right shoe did not provide much assistance in establishing participation in the assault. Only three small parts of the shoes were tested so the jury was required to infer that Lukas's blood made up the entire large stain described as AA. That might have been the only reasonable inference if Lukas was the only possible source of blood on the shoe. However, Shlah's blood was found on the same shoe and there was evidence Shlah had bled from his nose after Lukas punched him in front of the Vinyl. As a result, there was another reasonable explanation that did not involve Lukas's blood for the existence of the large bloodstain at AA.[84]

69. Since it was not open to the jury from the DNA testing alone to infer that the blood covering the front of the shoe was entirely from Lukas, they could not use this inference to conclude that Shlah had kicked him in a particularly violent fashion. Without this, the DNA evidence and equivocal eyewitness evidence together did not establish identity or participation in the assault beyond a reasonable doubt. The jury could only infer guilt by impermissibly filling in the blanks and too quickly overlooking reasonable alternative inferences. There was no reliable evidence demonstrating Shlah committed an unlawful act upon Lukas on which the jury could base its conclusion that he was guilty of murder. A properly instructed jury, acting judicially, could not

[83] *Cabrera*, at para 354 and 355 [ROA, TAB 2]
[84] *Cabrera*, at paras 356 [ROA, TAB 2]

find he committed an unlawful act. He could not have been found guilty of murder as a principal or co-principal.[85]

70. If there was evidence from which a properly instructed jury, acting judicially, could find Shlah committed some form of unlawful act or acts, the lack of direction regarding group assault set out in Cabrera's appeal requires a new trial for Shlah for the same reasons.[86] There is very little guidance and some uncertainty in the case law on what makes up a group assault. The majority said it was an error to discuss this because it was not raised or argued at trial or on appeal. The dissenting justice disagreed because group assault was the main pathway to conviction for all accused. Its framework was directly at issue at trial and on appeal.[87]

71. In her reasons for decision on the Franz Cabrera appeal the dissenting justice stated that group assault had become a legal term of art used to describe a particular instance of co-principal liability. However, she found that it lacked definition. Canadian appellate courts use different language to describe what is required to constitute a "group assault" and make parties co principals for murder or manslaughter.[88]

72. *Spackman* (ONCA) at para. 181 held s. 21(1)(a) applied where two or more persons together form an intention to commit an offence, are present at its commission, and contribute to it, although each does not personally commit all the essential elements of the offence. *Ball* (BCCA) at paras. 25 and 28 held that the elements are met when several persons act together toward a common criminal object, with the requisite intent and any of them jointly or severally achieve the common object and all are present at the commission of the crime. The court would look for common participation or multiple accused acting in concert. *H(LI)* (MBCA) at para. 20 held that the elements are met where each person participates and assists each other in an assault intended to cause death or which they know will likely cause death and the death of the victim is achieved.[89]

73. The dissenting justice noted that the trial judge instructed the jury that if A and B attacked C together, intending to kill him, and their combined blows did kill him, both would be guilty of

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[85] *Cabrera*, at paras 361 – 364 and 366 [ROA, TAB 2]
[86] *Cabrera*, at para 365 [ROA, TAB 2]
[87] *Cabrera*, at paras 272 – 273 [ROA, TAB 2]
[88] *Cabrera*, at para 275 [ROA, TAB 2]
[89] *Cabrera*, at para 275 [ROA, TAB 2]

murder because each contributed to C's death. She was concerned that while this instruction was consistent with current law, it provided very little guidance on what "common participation", "acting in concert" or "acting together" meant. She further held that this lack of direction on what constituted a group assault may have left the jury with the impression that mere presence could ground a conviction. A common theme in the group assault cases is a substantive link among the assaults committed by the accuseds and the death of the victim when looking at the timing of the events and the participant's knowledge.[90]

74. There must be a temporal connection between the actions of two or more people to conclude they are acting together. This is obvious in many of the cases as members of the group are usually present throughout the assault or present at the outset and leave after the assault is underway. Knowledge is an essential component of other party offences such as aiding and abetting. It follows that an accused who has not committed the entire *actus reus* must know about the unlawful actions of the other principals to warrant a conviction as a co-principal to murder. Knowledge is rarely an issue in group assault cases because the parties are typically assaulting the victim at the same time and would necessarily see or hear what the others were doing.[91]

75. Based on those distinguishing characteristics, the Crown could not simply assert that this was a group assault, because everyone participated in the assault at various times. Only *Maybin* involved an accused coming along after the assault was underway or fatal wounds were administered so it could not be a foregone conclusion that what occurred in the alley was a single transaction. In *Maybin* the bouncer assaulted the victim after he had been left unconscious by the assaults of the Maybin brothers. His acquittal was upheld on appeal because factual causation was not proven.[92]

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[90] *Cabrera*, at paras 276 – 278 [ROA, TAB 2]
[91] *Cabrera*, at paras 279 – 280 [ROA, TAB 2]
[92] *Cabrera*, at para 281 [ROA, TAB 2]

PART II – ISSUES

Question in Issue 1 Whether the jury's finding of guilt for Assmar Shlah was unreasonable?

Respondent's Position with regard to Question in Issue 1 **The jury's finding that Assmar Shlah had assaulted Lukas Strasser-Hird was reasonable on the evidence before them.**

Question in Issue 2 If there was some evidence on which a properly instructed jury, acting judicially, could find that Assmar Shlah had committed some form of unlawful act or acts, whether the trial judge misdirected the jury on the law of co-principal liability and, in particular, with respect to the law on group assaults.

Respondent's Position with regard to Question in Issue 2 **The trial judge correctly instructed the jury on the law of co-principal liability with respect to the law on group assaults. This area of the law does not require revision or clarification.**

PART III – ARGUMENT

Question in Issue 1: Unreasonable Verdict

Overview

76. The dissenting justice found it was unreasonable for the jury to conclude that Shlah committed any assaultive act against Lukas. She reached this conclusion by reviewing the evidence of the witnesses who provided the evidence the jury would have had to rely on to find that Shlah had assaulted Lukas along with the DNA evidence of the blood found on Shlah's right shoe. She also noted that a number of witnesses (including Shlah) testified that he had not become physically involved with Lukas. Given the fact the jury convicted Shlah of second degree murder they had to have rejected the evidence of Shlah's non-participation. However, the dissenting justice did not indicate that she found the implicit rejection of that evidence by the jury to be unreasonable. The Respondent's response will proceed on that understanding.

Applicable Principles

Unreasonable Verdict

77. The Respondent adopts Shlah's statements on the law relating to unreasonable verdict set out in Paragraphs 24 – 26 of his factum. However, his review is incomplete, as it does not include the comments this Court made in *H(W)*[93] about the very limited ability an appellate court has to interfere with a jury's credibility findings. *H(W)* summarized a number of points on the issue this Court previously made in *R. v. Francois*:[94]

a. It is for the jury to decide, regardless of difficulties with a witness's evidence, how much, if any, of their testimony it accepts.

b. Credibility assessment does not depend solely on objective considerations such as inconsistencies or motives for concoction and the jury is entitled to decide the weight given to such factors. Particularly where the witness offers an explanation for inconsistencies the jury may conclude that they lose their power to raise a reasonable doubt.

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[93] *R v H(W),* 2013 SCC 22 at paras 31, 32
[94] *R v Francois,* [1994] 2 S.C.R. 827 [Not Reproduced]

c. The reviewing court must be deferential to the collective good judgment and common sense of the jury. A jury may bring special qualities to the difficulties of finding where the truth lies that may not be shared by appellate courts.

78. The Respondent agrees that some of the questions the jury had to resolve in their assessment of eyewitness testimony identifying Shlah as assaulting Lukas involved *reliability*. This Court has stated that various aspects of the frailty of eyewitness identification evidence have formed a recurring basis for guilty verdicts being found to be unreasonable.[95] These determinations have been seen as particularly suitable for appellate review because such cases turn primarily on the reliability of eyewitness evidence and not their credibility.[96]

79. However, the testimony of two of the eyewitnesses who were familiar with Shlah, Schaber and Furtado, did raise significant *credibility* issues for the jury to resolve, particularly on the question of how much of their respective testimony the jury might accept. This was because a major feature of their testimony were concessions made during cross-examination about their observations of Shlah. The discrepancies between their testimony in chief and cross-examination were in large measure a question of credibility, meaning the jury findings on that evidence were findings of fact and subject to a deferential standard of appellate review.

Appellate Assessment of Unreasonable Verdict

80. Appellate courts have described the deferential process to be employed in assessing a jury's verdict for unreasonableness in a number of ways:

a. A review necessarily involves a limited reweighing of the evidence but does not amount to a retrying of the case.[97]

b. "It is not the function of an appellate court to reassess the credibility of the witnesses, make new findings of fact, reweigh the evidence, draw different inferences from it, and render the decision that the appeal judges might have rendered if they had been the trial judge."[98]

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[95] *R v Biniaris*, 2000 SCC 15 at para 41
[96] *R v Tat*, (1997) 117 CCC (3d) 481 at para 99
[97] *R v Tetrault*, 2018 ABCA 397 at para 30; *R v Warring*, 2017 ABCA 128 at para 6
[98] *R v Bourgeois*, 2017 ABCA 32 at para 11 aff'd by 2017 SCC 49

c. "The issue is not whether the reviewing court would have convicted the appellant but whether the evidence, viewed through the lens of judicial experience, was reasonably capable of supporting a finding of guilt."[99]

d. "Appellate courts should be very cautious about declaring a jury verdict unreasonable. The issue can only be considered if the trial has been fair throughout and the jury charge is without error. It is not a light thing to conclude that a unanimous verdict of 12 jurors is not "supportable on any reasonable view of the evidence."[100]

e. The test for unreasonable verdict requires an assessment of the cumulative effect of all the evidence. It is not a piecemeal evaluation.[101] There must be contemporaneous consideration of its totality.[102]

f. The "lens of judicial experience" refers to an appellate court's examination of the cogency of the evidence adduced at trial with the benefit of the knowledge of the risks of wrongful convictions associated with certain kinds of cases, evidence and the witnesses that provide it. Judges have an appreciation of the risks of a wrongful conviction that an individual jury deciding a single case cannot have.[103]

Identification Evidence

81. As noted, eyewitness identification evidence is a type of evidence particularly suited to analysis for unreasonable verdict. However, appellate courts have recognized that identification evidence insufficient to establish the guilt of the accused standing alone may be sufficient to do so in combination with other evidence such as circumstantial evidence.[104]

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[99] *R v McCracken,* 2016 ONCA 228 at para 24
[100] *R v George-Nurse,* 2018 ONCA 515 at para 37 aff'd by 2019 SCC 12
[101] *R v Robinson,* 2003 BCCA 353 at para. 40. See also *R v Montague-Mitchell* 2018 SKCA 78 at para 60
[102] *R v Yeo* 2016 PECA 3 at para. 45
[103] *R v Pannu,* 2015 ONCA 677 at para. 176
[104] *R v McCracken, supra* at paras 26 – 28 and *R v Hay,* 2013 SCC 61 at para 39

Reasonable Inferences

82. The applicable law on reasonable inferences the Crown may need to negative with regard to circumstantial evidence of guilt is:

a. The Crown may need to negative reasonable possibilities but not every possible conjecture no matter how fanciful that might be consistent with the accused's innocence. Plausible theories and reasonable possibilities must be based on logic and experience applied to the evidence or absence of evidence, not on speculation.[105]

b. The line between plausible theory and speculation is not always easy to draw but the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than the accused's guilt.[106]

c. Circumstantial evidence does not have to totally exclude other conceivable inferences. A trier of fact should not act on alternative interpretations of the circumstances it considers to be unreasonable. Alternative inferences must be reasonable, not just possible.[107]

d. "[i]t is fundamentally for the trier of fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt."[108]

Analysis

The Majority Correctly Concluded the Verdict was Not Unreasonable

83. In its extensive reasons for decision, the majority correctly concluded that the dissenting justice erred in failing to consider the evidence in its totality, in examining it piecemeal and in applying reasonable doubt to individual items of evidence. They also correctly set out that appellate intervention that overturns a jury verdict must identify an error that makes it unreasonable.

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[105] *R v Villaroman,* 2016 SCC 33 at para 37
[106] *R v Villaroman, supra,* at para 38
[107] *R v Villaroman, supra* at para 42 citing *R v Dipnarine* 2014 ABCA 328 at paras 22 and 24 – 25
[108] *R v Dipnarine,* 2014 ABCA 328 at para 22. See also *R v Villaroman, supra* at paras 56 and 71

84. *R. v. Biniaris* states it is very important for a reviewing appellate court to articulate its reasons for finding that a guilty verdict is unreasonable as explicitly and precisely as possible.[109] An unreasonable verdict is an error of law. As such, an appellate court must be able to clearly articulate what that error was. Any inability to clearly articulate the error is a strong indication the complained of verdict is not unreasonable. While it is correct that an appellate court calls upon its judicial experience to assess a verdict for unreasonableness it is also then correct that, if a defect is found, the court must be able to explain what that defect is.

85. The Appellant contends that *Biniaris* does not require an appellate court to find an error before concluding that a guilty verdict is unsafe. This is incorrect. The Appellant's conclusion cannot be drawn simply from the fact that in *Biniaris,* this Court does not use the word "error" to explain what will make a guilty verdict unreasonable. The concerns expressed in *Biniaris* involved, among others, that some difficulties in the assessment of specific trial issues might be recurring ones such as eyewitness identification evidence or treatment of what might be viewed as a technical defence such as not criminally responsible by reason of mental disorder. There was a worry these recurring issues might exist because the problems associated with them had not been properly highlighted in jury instructions in the trials where they arose. This was seen as producing situations where an unreasonable verdict might in some ways be the product of deficient instruction.[110]. In other words, the product of an error.

86. Here, deficient instruction does not seem to have been an issue. The Appellant did not complain about the trial judge's instruction on eyewitness observations or the assessment of witness testimony. The concerns that led the dissenting justice to find an unreasonable verdict and the dissenting justice also did not say she found fault with the jury instructions on those topics. The Respondent submits the suggestion that an appellate court could overturn the verdict of a properly instructed jury without identifying an error is contrary to what *R. v. Biniaris* holds. This is particularly the case because one of the reasons this Court stressed the importance of precise reasons for an unreasonable verdict conclusion was the fact the same might become the basis for a further appeal, as has occurred here.[111]

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[109] *R v Biniaris* 2000 SCC 15 at paras. 38, 41 and 42
[110] *R v Biniaris, supra* at para 41
[111] *R v Biniaris, supra* at para 42

87. The Appellant is also incorrect in his assertion that the majority committed an egregious error by concluding that despite the frailties in the eyewitness and DNA evidence, the evidence was sufficient, when combined with the video evidence, to allow the jury to properly conclude that the only reasonable inference was that Shlah participated in the attack on Lukas. The majority's assertion that two pieces of evidence that might be insufficient to provide proof beyond a reasonable doubt when viewed separately, might do so in combination with other evidence, correctly states the law.[112] Further, the Appellant's assertion that the addition of the video evidence could not justify a murder conviction demonstrates a recurring error in his unreasonable verdict argument and the reasoning of the dissenting justice - the failure to acknowledge that each individual item of evidence must be considered in connection with all related evidence.

88. The video showed Shlah was visibly upset after the altercation with Lukas and that he proceeded in the direction of the alley. Eyewitnesses said they saw someone the jury could conclude was Shlah or that some eyewitnesses knew was Shlah, violently assaulting Lukas, while in an agitated state. The video was relevant to accepting that testimony and supported the conclusion that the jury's verdict was reasonable. Again, it is not an appellate court's function to parse individual items of evidence to determine if the verdict was reasonable. An item of evidence must be assessed in conjunction with all of the other evidence. The majority was correct in finding that the dissenting justice did not do this and that when considered together, the evidence supported the reasonableness of Shlah's second degree murder conviction.

89. The majority also did not downplay the importance of cross-examination in the assessment of a witness's testimony. The comments they made accurately reflect the reality of witnesses being imperfect and the special position a jury occupies in determining credibility. Again, this jury was properly instructed on the assessment of witness testimony and had the advantage of watching the witnesses testify. Finally, the issue of what to accept from the testimony of Schaber and Furtado had a significant element of credibility assessment involved. That placed the jury at a great advantage over the Court of Appeal as the impression the jury gained from watching their entire testimony may have been different from what might be gathered from the written record.

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[112] *R v Hay*, *supra* at para 39 and *R v Currie*, 2008 ABCA 374 at para 20

90. All of this meant the majority did not err in concluding that the jury could have accepted some, all or none of Furtado's evidence. Shlah's complaint about their treatment of that testimony is really a complaint that they did not accept his characterization of how they should have viewed it. It is the same argument made at trial and on appeal and advances the incorrect suggestion that there is only ever one way specific evidence can reasonably be viewed. It also does not address the fact that it is the assessment of the evidence in its entirety that must be reasonable. Shlah's complaint mistakenly approaches each item of evidence, such as Furtado's testimony, in isolation. This is never the way a jury assesses evidence in determining if guilt has been proven beyond a reasonable doubt or the way an appellate court conducts its limited review of that same evidence in assessing whether a guilty verdict is reasonable.

91. Finally, contrary to Shlah's complaint, the fact Furtado was an admitted liar (on another issue) did not have to be fatal to his credibility. This was another specific credibility concern falling directly into the comments this Court made in *R. v. H(W).*[113] The jury was in the best position to make that decision. It also did not fall under one of the specific types of evidence that has been most closely associated with juries falling into error in the past (i.e. eyewitness identification evidence or the not criminally responsible due to mental disorder defence.) The majority's assessment of the reasonableness of the jury's verdict (as detailed in their reasons for decision) is correct and none of the complaints the Appellant has raised have any merit. However, the majority correctly concluded that the dissenting justice committed a number of errors in determining that the jury's finding that Shlah assaulted Lukas was unreasonable.

The Dissenting Justice Erred in Her Finding of Unreasonable Verdict

92. Firstly, the dissenting justice's assessment of the identification evidence of the various witnesses was hampered by the fact she failed to consider what the reasonable effect of all of the relevant evidence on identification was when viewed together. The majority correctly concluded that her assessment of that evidence was piecemeal. As an example, Furtado said he saw each of Schaber and Marasigan kick Lukas once. Schaber and Marasigan each testified to kicking Lukas once.[114] She did not mention this confirmation of Furtado's testimony when she assessed the same. While this was obviously not specific evidence of Shlah assaulting Lukas, it provided

[113] *R v H(W), supra* at para 32
[114] Trial 214/10 – 22 [ROA, TAB 27] (Marasigan) and 158/25-40 [ROA, TAB 25] (Schaber)

support for the conclusion that Furtado was reliably reporting what he had seen, despite some evidence that may have suggested otherwise.

93. Secondly, she erred by finding confusion in the DNA evidence concerning the blood on the top of Shlah's shoe on the basis that Area AA on Shlah's right shoe was described in different terms by different forensic personnel who had deal with it. This was not confusion. Rather, it was another situation where the jury did not adopt the interpretation of the evidence Shlah had argued for (that the blood came from his bleeding nose, from him incidentally stepping in Lukas's blood in the alley or that the DNA analysis could only be relied on to conclude that Lukas's blood was found on a small area on the outside of his right shoe and not covering its entire top). There was evidence that the blood covering the top of Shlah's shoe was Lukas's. As explained in detail by the majority, the jury did not err in coming to that conclusion instead of the one Shlah urged on them.

94. Thirdly, the dissenting justice's conclusion that the absence of blood on other parts of Shlah's clothing was relevant to whether he had kicked Lukas was no more than speculation. There was no evidence on that issue; only defence argument. Giving an accused the benefit of the doubt on the evidence before the trier of fact does not extend to giving them the benefit of the doubt on evidence that might have existed but did not, when there is no evidence to suggest it would be reasonable for that evidence to have existed. This is not what cases on circumstantial evidence speak of when they say reasonable doubt can be based on the absence of evidence.

95. Finally, the dissenting justice said she conducted an analysis of the cumulative effect of the relevant evidence on the question of whether Shlah committed an unlawful act against Lukas. However, she did not do that that. She may have considered all of the evidence separately but did not consider the potential effect of that evidence examined as a whole. She also never actually considered whether it could have been reasonable for the jury to convict Shlah on the same. Her evaluation assessed all of the evidence individually and at first instance. It appears she then found that the verdict was unreasonable because she would have acquitted Shlah. That was not a proper evaluation of a jury verdict for reasonableness**.**

96. The Appellant argues that the dissenting justice's approach to the identification evidence was not piecemeal because she correctly concluded that when cross-examination ended, judicial

experience warned against relying on the testimony of Furtado and the other eyewitnesses. However, his argument actually supports the Crown's concerns about the dissenting justice's approach. Where multiple witnesses and items of evidence make up the allegation against an accused the question is never whether the evidence of each unequivocally points to guilt. It is whether all of the evidence together can reasonably support a guilty verdict. In part, the Appellant argues that the dissenting justice was correct because the majority relied on flawed evidence in finding the guilty verdict was reasonable. *His implicit argument is that the flaws in Furtado's testimony (and by extension, that of other witnesses) meant it could not be considered at all*. This is an error because a trier of fact is entitled to accept some, all or none of a witness's evidence. The dissenting justice made this very error in reaching her decision.

97. Again, the majority was correct in the approach they took in assessing the evidence before the jury on whether Shlah had assaulted Lukas to determine if the second degree murder verdict was reasonable. In contrast, the dissenting justice did not follow the process the law requires to assess jury verdicts for reasonableness. This verdict was reasonable and should be upheld for the reasons of the majority. This ground of appeal should fail.

Question in Issue 2: Joint Principal Liability

Overview

98. This issue produced intense disagreement between the majority and the dissenting justice. The majority believed the dissenting justice's concern with the law of joint principal liability through participation in a group assault raised a new issue without notice and should not have been considered. As a result, they did not analyze it. The dissenting justice said the Appellant raised the issue through his challenge of the trial judge's instructions on parties to offences. The Respondent submits the majority was correct in concluding that this issue was raised in a manner that is contrary to *R. v. Mian.* However, the Respondent will offer argument on the same in response to the reasons for dissent. The Respondent submits that the dissent is in error and that current Canadian law on joint principals through participation in a group assault does not require clarification.

New Issue Raised Without Notice

99. The question of whether the current law of joint principal liability arising from a group assault is in need of clarification is a new issue raised without notice to the parties, contrary to the law set out in *R. v. Mian*.[115] As the Appellant has acknowledged, there were no arguments at trial or on appeal suggesting that the jury instruction on joint principals was incorrect or that Canadian law was incorrect. Trial arguments on this issue were about whether the evidence required the instruction to be given. This demonstrates that the issue raised by the dissenting justice is factually and legally distinct from those raised by the parties.

100. The Respondent agrees with the Appellant that his failure to object to the joint principal liability instruction provided by the trial judge does not mean he is prevented from contesting the same on appeal. However, that is not the basis of the Respondent's argument. The Respondent's argument is that the issue was never properly before the Court of Appeal and was never raised by the dissenting justice so that the parties could address it.

101. Further, in finding that the Canadian law of joint principals arising out of a group assault is deficient and in need of clarification the dissenting justice relied on non-Canadian law, primarily that of South Africa, as detailed in paras. 282 – 285 of her dissent. However, the concept of "common purpose" in South African criminal law she appears to rely on in concluding that Canadian law is deficient differs from the concept of joint principals participating in a group assault found in Canadian law. Particularly, it requires greater knowledge and common intention on the part of accused persons. As a result, her finding that the jury instruction on joint principals was deficient is based on different legal concepts and seeks to alter Canadian law on joint principals. This further supports the majority's conclusion that this was an entirely new issue raised without notice.

102. The argument that the basis for dissent was a new issue never argued by the parties is not neutralized by the Appellant's contention that his appeal addressed the timing and knowledge of the assault and the actions of other assaulters. His complaints on those points did not allege that the jury instruction was incorrect because Canadian law was incorrect. That contention arose for the first time in the dissenting justice's judgment. It was not an issue in the parties' written

[115] *R v Mian* 2014 SCC 54 at paras 29 – 35

argument and was not raised during the oral hearing of these appeals. It was not properly before the Court of Appeal and should not have formed part of the dissent.

Joint Principals

Applicable Principles

103. In the absence of some proven prior agreement to commit a criminal offence, multiple accuseds in a multiple participant assault might be found to be co-principals due to common participation as in *Ball*[116] or might be found to be independent actors as in *Maybin.*[117] It is impossible to determine whether the law of joint principals arising from a group assault applies in a particular prosecution with multiple accuseds until the facts have been found. Here, it seems clear the jury could have found that the persons who assaulted Lukas were all part of one assault. The dissenting justice has not stated that this finding would be unreasonable. However, her complaints about the deficiencies she identifies in the law of group assault suggest she saw what Cabrera and Shlah did (if Shlah did anything) to be part of a second attack separate from what occurred when Lukas was stabbed. This is an ongoing difficulty in the approach she has taken in finding fault with the current law of joint principals through participation in a group assault.

104. The law with respect to persons becoming joint principals through participation in a group assault engages the following principles:

a. If two people each individually assault the victim, it may be unclear which assault caused the victim's death as opposed to other injuries. The law does not require a determination of who struck the fatal blow for co-principal liability to flow to each participant. Whether one assault or some combination of the two caused the death is irrelevant for co-principal liability as long at both assaults are a significant contributing cause of death.[118]

b. "The decision in *Suzack*, however, also makes it clear that the phrases such as "concerted action", "acted in concert", "common design", "participation in a

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[116] *R v Ball*, 2011 BCCA 11
[117] *R v Maybin*, 2012 SCC 24
[118] *R v Pickton*, 2010 SCC 32 at paras 63 and 66. See also *R v Spackman*, 2012 ONCA 905 at paras 181 and 183.

common scheme", and "joint participation" are phrases which properly capture the entire gamut of principal liability, co-principal liability and liability as an aider or abettor. They cover the entire range of party liability set out in s. 21(1) and are not limited to s. 21(1)(*a*)."[119]

c. A finder of fact's conclusion that parties are common participants means that no party's actions can constitute an intervening act. Section 21 provides that all parties in this type of attack are equally morally blameworthy even if only one of them factually caused the death.[120]

d. "Two persons may both be actual committers for the purposes of s. 21(1)(a) (referred to in the case law variously as "co-principals", "joint-principals", "co-perpetrators" or "joint-perpetrators") even though each has not performed every act which makes up the *actus reus* of the offence."[121]

e. "It is a well-established principle that where a trier of fact is satisfied that multiple accused acted in concert, there is no requirement that the trier of fact decide which accused actually struck the fatal blow."[122] The blow of one is in law the blow of them all.[123]

f. Where multiple persons commit a crime as co-perpetrators they may have agreed to do so in advance but an agreement to carry out a common purpose is not necessary under s. 21(1)(a) of the *Criminal Code*. The question is whether there is indication of common participation, not common purpose. In such a case the Crown need only prove the individuals engaged in the action they took with the requisite intent.[124]

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[119] *R v Pickton, supra* at para 69
[120] *R v Magoon,* 2016 ABCA 412 at para 92. See also *R v Mercer,* 2005 BCCA 144 at para 52
[121] *R v Ball, supra* at para 23. See also *R v Pickton,* 2010 SCC 32 at para 66 and *R v Spackman, supra* at para 183
[122] *R v McMaster,* 1996 CanLII 234 (SCC) at para 33
[123] *R v Ball, supra* at para 28
[124] *R v Ball, supra* at paras 25-27

Analysis

105. The dissenting justice's conclusion that the law of joint principals arising from a group assault requires revision involves two errors in her assessment of the current state of the law: her conclusion at para. 275 of her judgment that "group assault" has become a term of art (a statement she does not elaborate on) and her assertion that Canadian courts lack uniformity when describing how persons can become joint principals by participating in a group assault.

106. Firstly, while she says "group assault" has become a term of art in Canadian law she offers no Canadian authority for that assertion and does not explain what this term of art would encompass. The Canadian cases she has pointed to simply indicate that whether an attack is a group assault is a question of fact. Secondly, the quotation she highlights from the Ontario Court of Appeal in *Spackman*[125] does not represent an inconsistency with other Canadian courts on how someone can become a joint principal. It merely repeats what this Court said in *Pickton*[126] - one can become a joint principal by committing the offence or by forming a common intention, being present at the offence's commission and contributing to it. In concluding that the law has been described inconsistently between different provinces, the dissenting justice highlighted the second mode of becoming a joint principal but ignored the first.

107. This error can be seen by looking at the cases she has cited (*Ball*[127], *Monk (Alexis)*[128] and *H(LI)*[129]*)* to show this lack of uniformity. They do not demonstrate a lack of uniformity. They simply involve fact situations where the respective accuseds were found to be joint principals because it was determined that they committed the entire offence – the first mode of becoming a joint principal as opposed to executing a prior plan. They are cases where different law applied to different facts. As a result, they do not demonstrate inconsistency between Canadian courts on modes of becoming a joint principal arising out of a group assault. There appears to be no basis for this concern of the dissenting justice.

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[125] *R v Spackman, supra* at para 181
[126] *R v Pickton, supra* at para 63
[127] *R v Ball, supra* at paras 25 – 28
[128] *R v Monk (Alexis),* 2002 BCCA 103 at para 33
[129] *R v H(LI),* 2013 SCC 22 at para 20

108. It is also unclear why she believed the jury instruction on common participation in this case (which she said conformed to current law) might have led the jury to believe that Cabrera or Shlah could have been responsible for murder simply by being present at the attack on Lukas. It discussed persons attacking the victim together. It did not suggest mere presence could make someone guilty of murder. The jury verdicts also showed they did not have this mistaken belief as they acquitted Jordan Liao despite evidence showing he was present at the attack.

109. The dissenting justice is further mistaken in her assertion that the legal test for whether persons are joint principals arising from a group assault incorporates a clearly defined level of commonality in timing and knowledge. While there may be a degree of commonality between various prosecutions, this has not created a clear-cut legal test. In the absence of a proven prior agreement, the question is whether the person involved committed the offence. In a case of simultaneous assaults the trier of fact must decide whether the actions of individual accuseds amounted to the commission of the crime they are being tried for because they were common participants in a group assault. Agreement between the parties is not required, nor is some form of wilful blindness such as in *Briscoe*.[130] The dissenting justice erred in her analysis of this issue by taking factual similarities from prior cases and elevating them to legal requirements.

110. Further, her suggestion at para. 280 of her dissent that an accused who has not committed the entire *actus reus* must know about the unlawful actions of the other participants to be liable for murder is also not correct. She says that shared knowledge is necessary to make persons joint principals. However, this belief and her belief that the facts of this case demonstrate a flaw in the law of joint principals in general seems based on the idea that Shlah and Cabrera were part of a separate second assault. This was an interpretation of the facts these accuseds urged upon the jury but, as the majority noted, was implicitly rejected. Her concern is based on something the jury did not find.

111. The conclusion by the dissenting justice that co-participants in an assault must know what their fellow assaulters had done to be jointly liable is contrary to Canadian law and would have a troubling outcome in this case and many others. It is not contested that the most serious injuries Lukas suffered were the stab wounds. However, no one saw them inflicted, with the presumable

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[130] *R v Briscoe,* 2010 SCC 13 [Not Reproduced]

exception of the actual stabber. Taking the dissenting justice's argument to its logical conclusion would mean the actual stabber would be the only person that could be guilty of murder because no one else knew of the stabbing. This is not a reasonable suggestion for revision of existing Canadian law.

112. Finally, at paras. 281 and 282 of her decision she expresses her belief that the Crown could not assert that this was a group assault because the persons involved in it did not all begin assaulting Lukas at the same time. This reinforces the conclusion that the overriding difficulty she had with the finding of joint principal liability being available in this case was not the current state of Canadian law but, rather, her belief that Shlah and Cabrera were part of a separate assault unconnected to Lukas's stabbing. However, again, this position relies on a view of the facts that had been put before the jury by Shlah and Cabrera that was not unreasonable for the jury to reject.

113. The jury was not instructed that persons could be guilty merely because they were present. It was possible for them to reasonably conclude that Cabrera and Shlah engaged in their actions as part of the larger group assault as retribution for what they felt Lukas had done to Shlah in front of the Vinyl. It was then also reasonable for the entire attack on Lukas to be found to be part of one assault with persons beginning and ceasing to participate at different times. The scenario of unrelated and unknowing attackers being found guilty for the actions of others that troubles the dissenting justice did not occur here. These were not the separate, independent actors of *Maybin.*[131] This was analogous to the group assault of *Miazga.*[132] The dissenting justice's concerns about the deficient state of the Canadian law of joint principals are simply not made out. This ground of appeal has also not been made out and should be dismissed.

114. Finally, on this ground of appeal, the Appellant has argued that any determination of whether there is a deficiency in the law concerning persons found to be joint principals due to their participation in a group assault requires a consideration of this matter's specific facts. This is not correct. Although the dissenting justice clearly seemed influenced by factual concerns that do not conform to the jury's implicit findings, her actual reason for this aspect of her dissent was that the

[131] *R v Maybin*, 2012 SCC 24 at para 8
[132] *R v Miazga*, 2014 BCCA 312 at para 5

law of joint principals is generally deficient and in need of clarification. An examination of the evidence in this matter does not assist in assessing that conclusion.

Conclusion

115. The Appellant argues that the majority of the Court of Appeal did not properly assess the reasonableness of the guilty verdict of second degree murder found against him. However, the errors in assessing that verdict were committed by the dissenting justice. As properly identified by the majority, she erroneously evaluated the trial evidence on a piece-meal basis, did not consider its cumulative effect and concluded the verdict was unreasonable because she disagreed with it. The majority was correct in finding that the guilty verdict was one that a properly instructed jury acting judicially could render and this ground of appeal should be dismissed.

116. The majority was also correct in concluding that the dissenting justice's second reason for overturning Shlah's conviction (deficiencies in the law of joint principals arising from a group assault) was a new issue decided without proper notice to the parties that should not have formed part of the reasons for dissent. In addition, there is no basis for the dissenting justice's conclusion that the law of joint principals arising from a group assault is deficient and in need of clarification. Her conclusion is based on the mistaken belief that "group assault" has become a term of art and that there is current inconsistency in the way that the courts of different provinces define how multiple accuseds become joint principals through participation in a group assault. Finally, her concern about lack of clarity in the law of joint principals appears largely founded on the idea that Shlah and Cabrera were, in fact, not part of the original assault on Lukas; an argument which the jury implicitly rejected and which the dissenting justice has not found to be in error. This ground of appeal is also without merit and should be dismissed.

PART IV – COSTS

117. The Respondent makes no submissions regarding costs.

PART V – ORDER SOUGHT

118. That this Appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 27th day of September, 2019.

BRIAN R. GRAFF
COUNSEL FOR THE RESPONDENT

BRG/cw

PART VI – SUBMISSIONS ON CASE SENSITIVITY

119. The Respondent confirms that there is no sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation, or restriction on public access to information in the file that could impact the Court's reasons in this appeal.

PART VII – TABLE OF AUTHORITIES AND LEGISLATION

Authorities	**Cited at Paragraph No.**
R v Ball 2011 BCCA 11 (CanLII) at paras 23, 25 - 28	72, 103, 104, 107, 121
R v Biniaris [2000] 1 SCR 381, 2000 SCC 15 (CanLII) at paras 38, 41, 42	78, 84, 85, 86
R v Bourgeois 2017 ABCA 32 (CanLII) at para 11 aff'd by [2017] 2 SCR 287, 2017 SCC 49 (CanLII)	80
R v Currie 2008 ABCA 374 (CanLII) at para 20	87
R v Dipnarine 2014 ABCA 328 (CanLII) at paras 22, 24 – 25	82
R v George-Nurse 2018 ONCA 515 (CanLII) at para 37 aff'd by 2019 SCC 12 (CanLII)	80
R v H(LI), 2003 MBCA 97 (CanLII) at para 20	72, 107
R v H(W), [2013] 2 SCR 180, 2013 SCC 22 (CanLII) at paras 31, 32	77, 91
R v Hay [2013] 3 SCR 694, 2013 SCC 61 (CanLII) at para 39	81, 87
R v Magoon 2016 ABCA 412 (CanLII) at para 92	104
R v Maybin 2012 SCC 24 (CanLII) at para 8	75, 103, 113
R v McCracken 2016 ONCA 228 (CanLII) at paras 24, 26 – 28	80, 81
R v McMaster, [1996] 1 SCR 740, 1996 CanLII 234 (SCC) at para 33	104
R v Mercer 2005 BCCA 144 (CanLII) at 52	104
R v Mian [2014] 2 SCR 689, 2014 SCC 54 (CanLII) at paras 29 – 35	6, 98, 99
R v Miazga 2014 BCCA 312 (CanLII) at para 5	113
R v Monk (Alexis) 2002 BCCA 103 (CanLII) at para 33	107
R v Montague-Mitchell 2018 SKCA 78 (CanLII) at para 60	80
R v Pannu 2015 ONCA 677 (CanLII) at para 176	80
R v Pickton, [2010] 2 SCR 198, 2010 SCC 32 (CanLII) at paras 63, 66, 69	104, 106

R v Robinson 2003 BCCA 353 (CanLII) at para 40	80
R v Spackman 2012 ONCA 905 (CanLII) at paras 181, 183	72, 104
R v Tat, (1997) 117 CCC (3d) 481, 1997 CanLII 2234 (ONCA) at para 99	78
R v Tetrault, 2018 ABCA 397 (CanLII) at para. 30;	80
R v Villaroman, [2016] 1 SCR 1000, 2016 SCC 33 (CanLII) at paras 37 – 38, 42, 56, 71	82
R v Warring, 2017 ABCA 128 (CanLII) at para 6	80
R v Yeo, 2016 PECA 3 (CanLII) at para 45	80
Legislation	**Cited at Paragraph No.**
Criminal Code, RSC 1985, c C-46, s 21 *Code criminal*, LRC (1985), ch C-46, s (21)	71, 103, 104