

CANADA / JUDGMENT

## R. v. George

2026 ONCA 115

### COURT

Court of Appeal for Ontario

### DECIDED

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R. v. George

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Favreau, Lise G.; Copeland, Jill M.; Dawe, Jonathan

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. George, 2026 ONCA 115

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Favreau, Copeland and Dawe JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Melissa George

Appellant

James Lockyer and Jessica Zita, for the appellant

Andrew Cappell, for the respondent

### **Heard: December 2, 2025**

On appeal from the conviction entered by Justice Michael D. McArthur of the Superior Court of Justice, sitting with a jury, on September 23, 2020.

Dawe J.A.:

A. Overview [1] Melissa George appeals against her conviction for second degree murder in connection with the stabbing death of her uncle, Raymond Beaver.

- [2] On the night of October 2, 2017, Ms. George and her boyfriend Daniel Cavanagh – her co-accused at trial – went with several other relatives and family friends to the house where Mr. Beaver was living. The group broke in, and during the ensuing altercation someone fatally stabbed Mr. Beaver. The evidence pointed towards the stabber likely having been Mr. Cavanagh, which was the Crown’s theory at trial. The Crown also maintained that Ms. George had organized the home invasion intending for Mr. Beaver to be killed, and that she and Mr. Cavanagh were both guilty of first degree murder, Mr. Cavanagh as the principal and Ms. George as a secondary party.
- [3] The Crown adduced police statements by Ms. George in which she denied intending or anticipating Mr. Beaver’s death. She told the police that she had been expecting Mr. Cavanagh and Mr. Beaver only to have a fistfight, and that she had not known that Mr. Cavanagh had brought a knife with him. There was evidence that he had purchased a knife on the street earlier that evening, when Ms. George was not with him. Mr. Cavanagh did not testify, but took the position that Mr. Beaver could have been stabbed and killed by any one of the other people who broke into the house and went to the basement, including possibly by Ms. George.
- [4] The jury found both defendants not guilty of first degree murder, but guilty of second degree murder. The Crown is not appealing Ms. George’s acquittal on the first degree murder charge.

- [5] On appeal, Ms. George argues that the trial judge made a number of errors in his jury instructions. She also advances a claim that she received ineffective assistance from her trial counsel.
- [6] For the following reasons, I would allow the appeal on the strength of two of Ms. George's jury charge grounds.
- [7] First, in my view, the jurors were not adequately instructed about the limited probative value of the evidence of Ms. George's after-the-fact conduct: namely, her fleeing the scene after the stabbing, and her then making statements to the police that she later admitted were false denying or minimizing her involvement in the home invasion. Second, the jury was also not properly instructed that Ms. George's other statements to the police could contribute to a reasonable doubt about whether she was guilty of murder even if the jury did not affirmatively accept them as true.
- [8] For completeness, I will also briefly explain why I would not give effect to Ms. George's additional argument that the trial judge erred by leaving the possibility that Ms. George might have been the stabber as an issue for the jury to determine.
- [9] I would reject the Crown's submission that Ms. George's second degree murder conviction can be upheld by applying the curative proviso in s. 686(1)(b)(iii) of the Criminal Code, R.S.C. 1985, c. C-46, and would accordingly allow the appeal and order a new trial on a charge of second degree murder.
- [10] This makes it unnecessary for me to address Ms. George's ineffective assistance of counsel claim, except to the extent that it overlaps with her grounds relating to the jury charge.

B. Background 1. The death of Mr. Beaver [11] During the fall of 2017, Ms. George and Mr. Cavanagh were living in a bungalow on Lansdowne Avenue in London. The bungalow was rented by Donald Solomon, who Ms. George considered to be her grandfather. Several other people also lived there, including Mr. Solomon's stepson, Raymond Beaver, who lived in the basement. Mr. Beaver was also Ms. George's uncle. Mr. Solomon's brother, George Janes, lived upstairs with his partner, Connie Conway.

- [12] On Sunday, October 1, 2017, Mr. Cavanagh and Ms. George moved out of the bungalow, with police assistance, after they had a falling-out with Mr. Beaver and Mr. Janes. They went to stay at the nearby home of another relative. That evening, Mr. Beaver and Mr. Solomon had an argument about Mr. Beaver smoking crack cocaine at the residence, during which Mr. Beaver punched Mr. Solomon in the head. This led to Mr. Solomon also leaving the Lansdowne Avenue bungalow. The next day he told Ms. George and Mr. Cavanagh what had happened and asked if he could come stay with them. This gave her and Mr. Cavanagh a further reason to be upset with Mr. Beaver.
- [13] On Monday, October 2, 2017, Ms. George and Mr. Cavanagh both sent heated electronic messages to Mr. Beaver. Ms. George's messages outlined her reasons for being angry with Mr. Beaver, but she did not make any threats of violence against him. However, Mr.

Cavanagh's messages included threats that Mr. Beaver was "going down", and that Mr. Cavanagh would "make damn sure you face your maker". Mr. Beaver responded with a message that Mr. Cavanagh should "get [his] ass over here", adding "[we're] looming for the both of you just wait punk".

- [14] That evening, Ms. George helped arrange for a group of relatives and family friends to meet outside the Lansdowne Avenue bungalow. At some point during the evening Mr. Cavanagh bought a knife with a distinctive circular handle from an acquaintance he met on the street. Ms. George was not present when he made this purchase.
- [15] Shortly before midnight, the group assembled outside the bungalow. It consisted of seven people, including Ms. George and Mr. Cavanagh, and two of Ms. George's sons. One of her sons, Nicholas George, was the only member of the group who testified at trial. His evidence was that Mr. Cavanagh had a knife and Ms. George was carrying a wooden stick, while a second woman in the group also had a knife and one of the other men in the group had a baton.
- [16] On Nicholas's account, Ms. George outlined for the group her plan for breaking into the house. She and Mr. Cavanagh were to go to the basement and "take care of Raymond [Beaver]", while the other woman in the group would "take care of any girls" in the house. Nicholas and another man were to go upstairs and "deal with George [Janes]". The last two members of the group were to remain on the stairs. Nicholas testified that he believed that the group was only there to "scare" Mr. Beaver, and he was not aware of any plan to kill him.
- [17] Shortly before midnight, one of the men in the group kicked in the door and various members of the group entered the house. At least one of the male intruders went upstairs and became involved in an altercation with Mr. Janes, although there was conflicting evidence about who this person was and how many intruders went upstairs. Ms. Conway, who had been upstairs with Mr. Janes, left the bungalow and ran to a neighbour's house to call the police. According to Nicholas, he was the last person to enter the bungalow, and he remained on the stairs while the remaining intruders went to the basement. Nicholas testified that he then went back outside after Mr. Janes threw something from upstairs that hit him in the face. As he was leaving the house he looked to see what was happening in the basement, and saw someone who he thought was Mr. Cavanagh pressed against the basement wall with someone else in front of him.
- [18] On Nicholas's account, after he left the house "everybody else was running out". Mr. Cavanagh then emerged in a frantic state and said: "I just fucking killed him". Nicholas asked what had happened, and Mr. Cavanagh replied that he had "stabbed him a couple of times", and gestured towards his neck area. It is unclear from Nicholas's testimony whether Mr. Cavanagh was holding a knife when he made this gesture. By that time Ms. George had also come out of the house. She told Mr. Cavanagh to "shut the fuck up, we don't need to talk about this." Nicholas ran away from the house. His girlfriend, Valerie Gavin, was parked in an industrial lot behind the bungalow. She testified that Ms. George came over, "hysterical,

and scared”, and screamed at Ms. Gavin to “get the fuck out of here”. Ms. Gavin drove away and moments later got a call from Nicholas telling her to meet him at a nearby Tim Hortons.

- [19] Mr. Janes testified that after the home invaders left, he went down to the basement and found Mr. Beaver “lying there with blood.” He went outside and asked neighbours to call the police. First responders found Mr. Beaver dead in the basement. He had been stabbed six times. The fatal stab wound had entered his chest cavity above his collarbone, causing significant injury to two large blood vessels and penetrating his lung. The knife that Mr. Cavanagh had purchased earlier that evening was found in a nearby flowerbed. It was an agreed fact that the deceased’s blood was on the knife.
- [20] Nicholas surrendered to the police on October 4, 2017, and was arrested for break and enter and assault with a weapon. He was put in a cell with Mr. Cavanagh, who had also been arrested. According to Nicholas, Mr. Cavanagh repeated that he had stabbed Mr. Beaver a couple of times, while gesturing towards his chest and neck areas.
- [21] Nicholas was later charged with first degree murder, but pleaded guilty to manslaughter and had received a sentence of time served and probation before he testified at Ms. George and Mr. Cavanagh’s trial. The Crown also accepted a plea of guilty to manslaughter from the other woman who had been part of the home invasion group.
2. Ms. George’s three police statements [22] Ms. George made three video-recorded police statements, the first two on October 3, 2017, the day after the night that Mr. Beaver was killed, and the third a week later, on October 10, 2017. All three statements were put in evidence by the Crown.
- a. Ms. George’s first police statement
- [23] In her first police statement on the morning of October 3, Ms. George described her and Mr. Cavanagh’s dispute with Mr. Beaver. She described saying to an acquaintance on the street that if the acquaintance saw Mr. Beaver, to tell him he was “dead meat”. However, Ms. George denied any knowledge of how Mr. Beaver had died, maintaining that she and Mr. Cavanagh were asleep at their new residence when she heard from a relative that Mr. Beaver was dead.
- [24] Ms. George was arrested for uttering a death threat, based on her account of what she had said to her acquaintance, and was detained in custody.
- b. Ms. George’s second police statement
- [25] Later that evening, Ms. George was interviewed a second time, and cautioned that she was under investigation for murder. In her second statement, Ms. George explained that Mr. Cavanagh had received a confrontational message from Mr. Beaver, and that when they went to the house that night she was expecting that “they were just gonna scrap it out”. She explained further that some members of the group had gone upstairs to stop Mr. Janes from interfering, “to make sure that Dan and Ray could do what they had to do”. However, Ms.

George denied that there was any plan to kill Mr. Beaver, or that she wanted him to die.

- [26] Ms. George initially said that she did not go into the bungalow, but later admitted to going downstairs. She explained that she heard Mr. Cavanagh shouting: “So you want me, eh? You want me, do you? Well, here I fucking am.” She saw Mr. Beaver “fly off the couch”, but told the officer that “after I seen the first punch, like I’m out.” She went outside, and a short while later Mr. Cavanagh also came out. Ms. George saw blood on his sweater, which she assumed was his own, and heard him say “I think I fucking killed him.” She maintained that she was unaware at the time that Mr. Cavanagh had a knife.

c. Ms. George’s third police statement

- [27] A week later, on October 10, 2017, Ms. George was rearrested for murder. She made a third police statement in which she gave a substantially similar account to that in her second statement. She explained that Mr. Cavanagh had wanted to fight Mr. Beaver and “that’s it”, adding:

Dan was just gonna go and just fucking feed it to him. I left after I seen the first hit. So I don’t, I don’t know what happened after that.

- [28] Ms. George insisted that there had never been any talk about killing Mr. Beaver; that she had never meant for him to die; and that everyone who went to the house that night believed that the plan was simply for Mr. Cavanagh to beat up Mr. Beaver. She again denied knowing that Mr. Cavanagh had a knife. Ms. George did admit to having seen the other woman in the group holding a knife earlier in the evening, when they had been together at the woman’s residence, but said she did not know if the woman had brought the knife to the Lansdowne Avenue bungalow.

3. Ms. George’s ineffective assistance of counsel claim [29] Ms. George has raised ineffective assistance of her trial counsel as a ground of appeal. In summary, her main complaints about her trial counsel’s performance are that: (i) he conducted only minimal cross-examinations of the Crown’s witnesses; (ii) he did not meaningfully participate in the pre-charge conference; and (iii) his closing address to the jury “was thoroughly unsatisfactory and devoid of advocacy.” Ms. George’s trial counsel passed away in 2024, four years after Ms. George’s trial, without having provided a responding affidavit.

C. Analysis [30] The concerns Ms. George raises about the adequacy of the jury instructions in this case must be assessed in light of the jury’s verdict.

- [31] The Crown’s theory at trial was that Mr. Cavanagh and Ms. George had jointly carried out a plan to kill Mr. Beaver. It was common ground that Mr. Beaver was stabbed by a single assailant, who caused his death. The Crown maintained that the stabber was Mr. Cavanagh, and that he was guilty of first degree murder as the principal. On the Crown’s theory, Ms. George was liable for first degree murder as an aider or abettor under s. 21(1)(b) or (c) of the Criminal Code.[1]

- [32] Mr. Cavanagh's defence at trial was that the stabber might have been one of the other intruders in the basement, a group that included Ms. George. The jury was accordingly instructed to consider the possibility that Ms. George herself might have been the "primary offender" – that is, the person who stabbed and killed Mr. Beaver. However, the evidence strongly pointed towards Mr. Cavanagh as having been the stabber.
- [33] If the jury had fully accepted the Crown's theory of the case, it would have found both defendants guilty of first degree murder. There was also a clear path by which the jury could be left with a reasonable doubt about whether Mr. Beaver's killing was planned and deliberate, but find that the person who actually stabbed him was guilty of second degree murder, having intentionally inflicted bodily harm on Mr. Beaver that the stabber knew was likely to cause death.
- [34] Crown counsel at trial (not Mr. Cappell) initially took the position during the pre-charge conference that if the jury did not find that Mr. Beaver's killing was a planned and deliberate murder, and also did not find that it was Ms. George who had stabbed him, the evidence would not support the conclusion that she was guilty of second degree murder as a party. Crown counsel explained that in this scenario, Ms. George would likely "be facing manslaughter or nothing", and told the trial judge:

I think that there's also room for the jury to find that there was no plan when Daniel Cavanagh went into the home and on impulse he decided to kill Raymond Beaver with the requisite intent for murder and is therefore guilty of a second, but I think if they find him guilty of a second they can't find Melissa George guilty as a party to that. It would be speculative to suggest that she was aware that he had changed his intentions from a fistfight essentially to a murder.

- [35] Crown counsel also initially suggested that second degree murder should not be left as an available verdict in relation to Ms. George, but later retreated from this position. He appears to have done so in part because Mr. Cavanagh's defence was that someone else in the basement, including possibly Ms. George, could have been the stabber. If the jury had found that Ms. George was the stabber, there would have been a clear route by which the jurors could have found her guilty of second degree murder as the principal. However, Crown counsel also retreated from his original position that there was no basis on which the jury could find Ms. George guilty of second degree murder as a secondary party, telling the trial judge that while it would be "difficult ... for the secondary to be convicted of a second-degree murder based on these facts", he agreed with the trial judge's suggestion that this verdict "could be available on the evidence as unlikely as it might be".
- [36] The jury found both defendants guilty of second degree murder. Crown counsel on appeal emphasized what he said was the strength of the Crown's case that Ms. George had planned Mr. Beaver's death, and suggested that the jury might have acquitted her and Mr. Cavanagh of first degree murder only because they had a reasonable doubt about the additional element of deliberation. I agree that this was a path that a reasonable jury, properly instructed, could perhaps have followed. However, Ms. George contends that the jury in this

case was not properly instructed. Her counsel forcefully argues that the evidence that Ms. George had planned Mr. Beaver's death was tenuous, and that the errors in the jury charge might well have led the jurors to reach a verdict that was not properly supported by the evidence.

1. The jury instructions on after-the-fact conduct [37] Ms. George's first challenge to the jury charge takes issue with the instructions the jury received about the inferences that could be drawn from the evidence of her after-the-fact conduct.
  - a. The governing legal principles [38] In *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, Martin J. dissented in the result, but wrote for the court about the principles that govern the admission of after-the fact conduct evidence. She emphasized at para. 113 that when dealing with this type of evidence:

[I]t is important for counsel and trial judges to specifically define the issue, purpose, and use for which such evidence is tendered and to articulate the reasonable and rational inferences which might be drawn from it. This often requires counsel and the court to expressly set out the chain of reasoning that supports the relevance and materiality of such evidence for its intended use. Evidence is to be used only for the particular purpose for which it was admitted. When evidence is admissible for one purpose, but not for another, the finder of fact, whether judge or jury, needs to be mindful of and respectful of its permissible and impermissible uses. In such cases, a specific instruction to a jury that certain evidence has a limited use or is of no probative value on a particular issue is required. [Emphasis added.]

[39] Referring to the court's previous decision in *R. v. Rodgeron*, 2015 SCC 38, [2015] 2 S.C.R. 760, Martin J. added, at para. 115:

While the focus should be on the intended use of the evidence when determining admissibility and crafting jury instructions, it is also important to expressly state the inferences available to the jury. In *Rodgeron*, this Court made clear that judicial expertise may be required in order to "present the evidence and the available inferences to the jury in a comprehensible form": para. 31.

- b. The parties' positions at trial [40] Crown counsel at trial asked the trial judge to instruct the jurors that they could draw inculpatory inferences from two aspects of Ms. George's after-the-fact conduct: (i) her having fled the scene after Mr. Beaver was stabbed, rather than staying and aiding him; and (ii) her making initial statements to the police that she later admitted were false. Importantly, Crown counsel explained that he was relying on this evidence to support his position that Mr. Beaver's death had been planned:

[I]f this had not been a planned and deliberate homicide, if, if this had only been meant to be some sort of fair fight and things had taken a bad turn, it would have made some sense that Melissa George might have taken some steps to try and assist her, her uncle as he lay dying.

[41] Ms. George's trial counsel made no submissions regarding the proposed after-the-fact conduct instructions.

[42] In his closing address, Crown counsel at trial invited the jury to view Ms. George's statements to the police as her wanting "to take control of the story", but said nothing further about the specific inferences that the jury might draw from her having initially said things to the police that she later admitted were false, such as denying having been at the bungalow when Mr. Beaver was killed, or later denying that she had gone inside before admitting that she had done so. Crown counsel went on to urge the jury to treat Ms. George's failure to stay and help Mr. Beaver as supporting the prosecution's theory that she had planned his death, submitting:

Her plan having been executed, Melissa George fled the scene. She did nothing to try and help her uncle, because this outcome, this murderous act was exactly what Melissa George had wanted.

[43] For his part, Ms. George's trial counsel said nothing to the jury about the inferences that the jury could or should draw from either aspect of Ms. George's after-the-fact conduct, nor did he suggest that the jury consider any alternative explanations.

c. The trial judge's instructions [44] The trial judge began his after-the-fact conduct instructions by telling the jury:

In this case, it is alleged that Melissa George fled the scene of the offence, made false or misleading statements and failed to render assistance to Raymond Beaver when he was assaulted and injured.

[45] He then reviewed some of Ms. George's false statements, as well as the evidence from Nicholas George and Valerie Gavin about her conduct after Mr. Beaver was stabbed, and told the jury:

If you find that this conduct occurred, you may use this evidence with respect to the mental element or intention in relation to the incident involving Raymond Beaver.

After-the-fact conduct is a type of circumstantial evidence. And as with all circumstantial evidence, you must come to what inference, if any, may be drawn from it.

[46] The trial judge then reviewed the evidence of Mr. Cavanagh's after-the-fact conduct, before instructing the jury:

After-the-fact conduct is a type of circumstantial evidence, as I mentioned before. And as with all circumstantial evidence, you must consider what inference, if any, may be drawn from it.

In summary overall, you may use this after-the-fact evidence involving the offence against each of Melissa George and Daniel Cavanagh along with all of the other evidence in this case, in deciding whether the Crown has proved Melissa George and/or Daniel Cavanagh's guilt beyond a reasonable doubt. However, you must not infer Melissa George's and/or Daniel Cavanagh's guilt

from this evidence unless, when you consider it along with all of the other evidence, you are satisfied that it is consistent with his or her guilt and is inconsistent with any other reasonable conclusion.

You must be careful about inferring either Melissa George's or Daniel Cavanagh's guilt from this evidence because there might be other explanations for it. You may use the evidence of after-the-fact conduct to support an inference of guilt only if you have rejected any other explanation for this conduct of either of them.

[47] The trial judge then turned to the evidence that Ms. George and Mr. Cavanagh had both fled the scene without rendering aid to Mr. Beaver, and told the jury:

Evidence that a person did not render aid to someone who has been fatally stabbed is more consistent with intending or being reckless regarding the death of the person than not. Consequently, this post-offence conduct may be a relevant consideration on the issue of the mental element for murder.

In this case, it will be for you to determine the state of mind of Daniel Cavanagh and Melissa George and whether one, both or neither of them meant to kill Raymond Beaver or meant to cause Raymond Beaver bodily harm that they knew was likely to kill Raymond Beaver and were reckless whether Raymond Beaver died or not. It is for you to determine whether Daniel Cavanagh and Melissa George took steps to prevent Raymond Beaver from dying and to put what, if any, weight on this in your analysis of the evidence.

When considering what inference, if any, to draw from this evidence, keep in mind that people, sometimes for entirely innocent reasons, may panic, they may freeze for fear, and have other situations and conditions that prevent or compromise a response. Even if Daniel Cavanagh or Melissa George did not render aid to Raymond Beaver, either of their actions may be based on a number of things, including a lack of knowledge of what happened, or on a feeling that might be attributed to something other than involvement in the offence for which they are now charged.

[48] Finally, the trial judge returned to Ms. George's false police statements. Earlier in his instructions, he had reminded the jury that in her first police statement on October 3, 2017, Ms. George had denied being at the house when Mr. Beaver was killed, but in her second statement later that same day had admitted to being at the house. The trial judge told the jury:

You have also heard evidence of false or misleading statements made after the alleged offence.

For example, I have already referred to some statements by Melissa George in relation to her first and second interviews with the police officer. In her third statement, Melissa George admits that she left out mention to the police of some people so they did not get involved and some others went into the house but she did not want to be labelled as, she explained, as a rat. She then stated that it was Nicholas and [one of the other men] that went into the house to stop George Janes from assisting Ray while Dan Cavanagh went downstairs to confront Raymond Beaver.

Keep in mind, however, that not every false statement is a lie. For example, any false statement can result from confusion or poor memory. A lie is an intentional falsehood. And you may disbelieve a person's statement without concluding that the statement was a deliberate lie.

A finding that Daniel Cavanagh or Melissa George lied or participated in a lie is not enough to support a finding of guilt. There must be other evidence showing that the purpose of the lie was to conceal Daniel Cavanagh's or Melissa George's involvement in the offence charged.

It is for you to find that the false statement was fabricated by either or both Daniel Cavanagh or Melissa George, however, unless you find that the false statement at issue was a lie that was told by Daniel Cavanagh or Melissa George or with the other person's participation in order to conceal their own involvement in the offence charged, you must not rely on such a statement to infer guilt against the other person that has been charged.

- d. Analysis [49] In my opinion, the trial judge's jury instructions did not adequately equip the jurors to understand the specific reasoning paths they could properly follow to infer Ms. George's guilt from her after-the-fact conduct. Most critically, the jurors were not told how the available inferences would change if they rejected the Crown's theory that Ms. George had planned Mr. Beaver's death.
- [50] Importantly, the Crown was only relying on the after-the-fact conduct evidence to support the inference that Ms. George had helped arrange the home invasion in furtherance of a plan to kill Mr. Beaver. The Crown did not suggest that this evidence could be used to infer that she had aided or abetted an unplanned murder that had been committed spontaneously by Mr. Cavanagh. Rather, as I have already noted, Crown counsel at trial initially acknowledged during the pre-charge conference that on this scenario Ms. George would "be facing manslaughter or nothing". Although he later retreated from this position, Crown counsel never suggested that there was a reasoning path by which the jury could use Ms. George's after-the-fact conduct to infer that she was guilty of second degree murder as a secondary party, if the jury did not find that she had stabbed and killed Mr. Beaver herself, and also was not satisfied that she had planned for Mr. Cavanagh to kill him.
- [51] None of this was explained to the jury. The jury was never told that the Crown was only relying on Ms. George's after-the-fact conduct to support the inference that she had planned Mr. Beaver's death. Instead, the trial judge repeatedly instructed the jurors that they could use Ms. George's after-the-fact conduct evidence to draw inferences about her intent, without telling them that the available inferences would change if they were not satisfied on the evidence as a whole that Mr. Beaver's death had been planned or that Ms. George was the stabber.

[52] The question of whether a particular inference can properly be drawn from after-the-fact conduct “is measured against what is reasonable and rational according to logic, human experience, and common sense”: Calnen, at para. 145, per Martin J. Answering this question requires “an evaluative assessment” that must be conducted on a “fact specific” basis: Calnen, at paras. 145-46, per Martin J. At para. 146 of her reasons for the court on this issue, Martin J. explained:

[T]he strength of the inferential link between the evidence in question and the fact to be established is often assessed based on factors such as what was done, when it occurred, and the risks associated with such conduct.

[53] The inferences that are reasonably available must also be assessed in the context of the evidence as a whole. As Rothstein J. noted in *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 42 (“*White* (2011)”), “[w]hether or not a given instance of post-offence conduct has probative value with respect to the accused’s level of culpability depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial”.

[54] In light of the jury’s verdict, it is unnecessary for me to decide whether the after-the-fact conduct evidence in this case was capable of reasonably and rationally supporting the inference that Ms. George had planned Mr. Beaver’s death, as the Crown contended. It is sufficient that I am satisfied that this evidence, viewed contextually, could not reasonably and rationally support the inference that Ms. George had purposely aided or abetted Mr. Cavanagh to commit an unplanned murder.

[55] Ms. George’s flight after Mr. Beaver was stabbed, like that of the accused in *R. v. Arcangioli*, [1994] 1 S.C.R. 129, was “singular, relatively simple, and occurred over a short period of time”: Calnen, at para. 125, per Martin J. Unlike the situations in *R. v. Campbell*, 2018 ONCA 837, 366 C.C.C. (3d) 346 and *R. v. Angelis*, 2013 ONCA 70, 296 C.C.C. (3d) 143, there was no evidence that Ms. George had any first-aid training that she might have used to try to save Mr. Beaver’s life. Her flight did not delay his receiving emergency medical care, since other people remained at the scene and summoned help quickly.

[56] Likewise, Ms. George’s initial lies to the police were not complicated and she did not maintain them for very long. In her second statement on October 3, 2017, she acknowledged that she had been untruthful when she told the police that morning that she had not been at the house when Mr. Beaver was killed. She also eventually admitted during her second statement that her initial claim not to have gone inside the house was false.

[57] Importantly, there was considerable evidence that Ms. George had helped organize a violent confrontation between Mr. Cavanagh and Mr. Beaver, in circumstances where the jury might have little difficulty concluding that a reasonable person would have foreseen the likelihood that Mr. Beaver might suffer bodily harm that was neither trivial nor transitory. This evidence strongly supported a finding that Ms. George was liable for at least manslaughter: see e.g., *R. v. DeSousa*, [1992] 2 S.C.R. 944, at pp. 961-68; *R. v. Creighton*, [1993] 3 S.C.R. 3, at

pp. 41-45. Even though she had not formally admitted her culpability for this lesser offence, this is not an essential precondition for a “no probative value” instruction: Calnen, at paras. 121-23, per Martin J.

- [58] In my view, on the evidence as a whole, it would not have been reasonable or rational for the jury to rely on the evidence of Ms. George’s after-the-fact conduct to infer that she had purposely aided or abetted an unplanned murder that Mr. Cavanagh committed spontaneously. The jurors should have been told that the Crown was only relying on the after-the-fact conduct evidence to support its theory that Mr. Beaver’s killing was planned, and that if they were not satisfied of this beyond a reasonable doubt they could not use Ms. George’s after-the-fact conduct to infer that she was guilty of second degree murder, rather than guilty of manslaughter or not guilty.
- [59] The trial judge did not give these instructions. Moreover, he went further and suggested that the jurors should use the evidence of Ms. George’s failure to stay at the scene and aid Mr. Beaver to infer that she had intended his death. As I have discussed, he instructed the jury that:

Evidence that a person did not render aid to someone who has been fatally stabbed is more consistent with intending or being reckless regarding the death of the person than not.

[Emphasis added.]

- [60] The trial judge was evidently paraphrasing an observation this court made in Campbell, at para. 12, which was one of the cases the Crown had provided to him. However, “there is no general rule applying to post-offence conduct: relevance must be assessed on a case-by-case basis”: White (2011), at para. 38. Whether an accused’s failure to render aid to a victim supports the inference that they intended the victim’s death in a particular case requires consideration of “[t]he overall conduct and context”: Calnen, at para. 124, per Martin J. Moreover, even in situations where the inference is properly left with the jury, Campbell does not suggest that it is ever appropriate for trial judges to suggest that the inference is one that the jury should draw. Rather, as Martin J. noted in Calnen, at para. 124, quoting from R. v. White, [1998] 2 S.C.R. 72 (“White (1998)”):

[I]t is normally the function of the trier of fact to determine what inference is accepted and the weight to be given to it, and “[f]or the trial judge to interfere in that process will in most cases constitute a usurpation of the jury’s exclusive fact-finding role”: White (1998), at para. 27.

- [61] In summary, I would conclude that the trial judge erred by not instructing the jury that the Crown was only relying on the evidence of Ms. George’s after-the-fact conduct to support the inference that she had planned Mr. Beaver’s death, and that this evidence otherwise had no probative value. In particular, the jurors should have been told that if they did not accept the Crown’s theory on planning, they could not use Ms. George’s after-the-fact conduct evidence to infer that she was guilty of second degree murder rather than manslaughter.

- [62] Regrettably, the trial judge did not receive any assistance on this challenging legal issue from Ms. George's trial counsel. His failure to make any submissions on this point, either during the pre-charge conference or during his closing address to the jury, forms part of Ms. George's ineffective assistance of counsel claim, which alleges a broader failure by her trial counsel to engage with the issues at trial or raise any real defence for his client. For present purposes it is unnecessary for me to examine trial counsel's overall trial performance in detail. I will simply say that I am satisfied from the trial record that his silence on the after-the-fact conduct issue was not a deliberate tactical choice, and that Ms. George gained no advantage from it.
2. The failure to give a proper W.(D.) instruction [63] During the pre-charge conference, Crown counsel raised with the trial judge whether the charge should include a W.(D.) instruction in relation to Ms. George's partially exculpatory police statements: *R. v. W.(D.)*, [1991] 1 S.C.R. 742. However, the trial judge questioned whether giving a W.(D.) instruction specifically in relation to Ms. George would "skew the case", since the Crown had not adduced any similarly exculpatory statements by her co-accused, Mr. Cavanagh. The Crown and Mr. Cavanagh's counsel both agreed that this was a legitimate concern. Ms. George's trial counsel made no submissions on this issue.
- [64] The Crown and Mr. Cavanagh's counsel ultimately both expressed their agreement with the trial judge's proposed instruction, after suggesting some modifications. Once more, Ms. George's trial counsel remained silent.
- [65] When charging the jury, the trial judge reminded the jurors that they had "heard the testimony of witnesses in this case who claimed to have heard Melissa George say something." He then instructed the jury:

Some or all of the statements may help Melissa George in her defence. You must consider those remarks that may help Melissa George, along with all of the other evidence, unless you conclude that she did not make them. In other words, you must consider all the remarks that might help Melissa George even if you are not sure whether she said them.

In relation to these statements of Melissa George, if what you accept or do not reject of Melissa George's evidence may lead to a finding that she is not guilty of the offence [sic]. As I have mentioned, the burden of proof of the offence otherwise at all times remains on the Crown Attorney to prove the case against her beyond a reasonable doubt, and there is no burden upon Melissa George to prove anything. Any finding by you that accepts or does not reject Melissa George's evidence ought not to reflect in any manner negatively or otherwise on Melissa George. You must consider and assess the evidence separately involving each person.

- [66] The purpose of a W.(D.) instruction is to make clear to the jury the possibly counter-intuitive point that even if the jurors do not affirmatively believe exculpatory evidence, it can still contribute to a reasonable doubt. In this case, over the course of her three police statements Ms. George went from initially denying any involvement in Mr. Beaver's death to admitting that she had helped organize and had participated in the home invasion during which he

was stabbed and killed. While these latter admissions were in one sense inculpatory, her statements were also exculpatory insofar as she (i) denied that there was any plan to kill Mr. Beaver; (ii) denied wanting him to die; (iii) denied knowing that Mr. Cavanagh had a knife; and (iv) insisted that she had only been expecting Mr. Cavanagh and Mr. Beaver to fight.

- [67] The critical point the jurors had to understand was that even if they did not affirmatively believe any of the exculpatory aspects of Ms. George's police statements, this evidence could still contribute to a reasonable doubt about whether Ms. George had purposively aided or abetted Mr. Cavanagh to commit murder. Although her statements could have been treated by the jury as supporting her liability for manslaughter as a secondary party, her exculpatory denials, unless they were entirely rejected by the jury, also provided her with a defence to the more serious offences of first and second degree murder.
- [68] In my view, the trial judge's instructions failed to convey this essential point to the jury in clear and comprehensible terms.
- [69] First, to the extent that his instructions made the point that the evidence the jury did not entirely reject could still raise a reasonable doubt, he focused entirely on the possibility that the jury might be unsure about whether Ms. George had said the things being attributed to her. In the case of her police statements, this was simply not a live issue: all three of her statements had been video recorded, and there was no dispute at trial that the recordings accurately captured her words.
- [70] Second, while the trial judge's references to the burden of proof were correct as far as they went, they did not explain the implications of the criminal burden and standard of proof for the jury's assessment of credibility. The essential point – that the jury might not affirmatively believe Ms. George's exculpatory denials, yet still be left with a reasonable doubt by them – was compressed into a single statement that a reasonable doubt could arise from evidence that "you accept or do not reject". In my view, this did not do enough to unpack the key point and explain it for the jurors.
- [71] Third, the trial judge's instruction that statements by Ms. George that the jurors "accept or do not reject ... may lead to a finding that she is not guilty of the offence" (emphasis added), was potentially confusing since the jury was being asked to consider three different gradations of criminal liability: first degree murder, second degree murder, and manslaughter. Many of Ms. George's statements were capable of simultaneously helping the Crown establish that she was guilty of manslaughter while also contributing to a reasonable doubt about whether she was guilty of first or second degree murder.
- [72] Fourth, the jury might well have been left confused by the trial judge's concluding paragraph, in which he stated that "[a]ny finding by you that accepts or does not reject Melissa George's evidence ought not to reflect in any matter negatively or otherwise on Melissa George" (emphasis added). Having regard to the discussion that took place during the pre-charge conference, the trial judge almost certainly meant to say that the jury should not let their findings regarding Ms. George's statements affect their assessment of the case

against Mr. Cavanagh, against whom they were inadmissible. The trial judge's apparent slip of the tongue might not have been of much consequence if the instructions that preceded it had adequately conveyed the critical point that Ms. George's exculpatory statements could help raise a reasonable doubt about whether she was a party to murder, even if the jury did not positively believe them. However, the previous instructions failed to make this point clear.

- [73] I would add that the need to ensure trial fairness for Mr. Cavanagh did not justify giving the jury anything less than a full W.(D.) instruction in relation to Ms. George's exculpatory statements, with the modifications that would have been necessary in the context of this case. The jury was correctly instructed that they had to consider each defendant separately, and that the evidence against each was different, insofar as their out-of-court statements were not admissible evidence in relation to one another. In these circumstances it would not have "skewed" the trial to explain to the jury how Ms. George's statements could contribute to a reasonable doubt about her guilt on the charges of first and second degree murder, even if no similar instruction would be given in relation to Mr. Cavanagh. The jurors would have understood that they had to consider the cases against each defendant separately, and that Mr. Cavanagh's statements to Nicholas George were different from Ms. George's police statements in that her statements, unlike his, were partially exculpatory.
3. The trial judge did not err in leaving Ms. George's potential liability as a principal with the jury [74] Ms. George also argues that the trial judge erred by directing the jury to begin their deliberations by deciding if they were satisfied beyond a reasonable doubt that one or the other of Mr. Cavanagh or Ms. George was "the person who inflicted the fatal stab wound upon Mr. Beaver". It was common ground at trial that all of the stabbing injuries Mr. Beaver sustained, including the fatal wound, were inflicted by a single person. The jury was instructed that they should consider the person who inflicted the fatal stabbing injury to be the "primary offender". Ms. George argues that there was no air of reality to the possibility that she was the stabber, and that the jury should have been instructed accordingly.
- [75] It is a reversible error to instruct a jury on a theory of liability or mode of participation in an offence for which there is no air of reality: see e.g., *R. v. Ranger* (2003), 67 O.R. (3d) 1 (C.A.), at para. 132; *R. v. Mohamed*, 2025 ONCA 611, at para. 96. There will be an air of reality if "there is some evidence that, if believed, could reasonably support an inference of guilt on that theory of liability": *Mohamed*, at para. 96; see also *R. v. Grandine*, 2022 ONCA 368, 414 C.C.C. (3d) 207, at para. 35; *R. v. Al-Enzi*, 2021 ONCA 81, 401 C.C.C. (3d) 277, at para. 150, leave to appeal refused, [2023] S.C.C.A. No. 35. The standard of review is correctness: *Al-Enzi*, at para. 151.
- [76] I agree with Ms. George that the evidence pointing towards Mr. Cavanagh as the stabber was much stronger than the evidence supporting the alternative possibility that she had stabbed Mr. Beaver herself. However, it was not the trial judge's task to decide whether a jury would be more likely to find that Mr. Cavanagh was the stabber. Rather, the air of reality threshold would be met if there was some evidence that could allow a jury to reasonably infer that the

stabber was Ms. George, even if there was considerably more evidence pointing towards Mr. Cavanagh: see e.g., *R. v. Earhart*, 2010 ONCA 874, 272 C.C.C. (3d) 475, at paras. 152-56, leave to appeal refused, [2011] S.C.C.A. 397. If there was at least some evidence pointing in both directions, it was for the jury to decide what conclusions it would draw from the evidence as a whole: see e.g., *R. v. Jackson*, 2016 ONCA 736, 33 C.R. (7th) 130, at paras. 12-14.

- [77] On the evidential record in this case, I am not persuaded that the trial judge erred by leaving the question of who fatally stabbed Mr. Beaver to be decided by the jury. It was common ground that Mr. Beaver had been stabbed by a single assailant, who must have been one of the home invaders who had gone down to the basement. This group included both Mr. Cavanagh and Ms. George, and possibly others. There was also evidence that Mr. Cavanagh and Ms. George both had reason to be angry with the deceased. Although there was a substantial body of evidence pointing towards Mr. Cavanagh as the stabber, the jurors were instructed that they “must not consider anything Daniel Cavanagh said to a witness” – including his alleged admissions to Nicholas that he had stabbed and killed Mr. Beaver – “in reaching your verdict on Melissa George”. The evidence that linked Mr. Cavanagh to the knife with the deceased’s blood on it found outside the house was not conclusive, since it was conceivable that he could have given the knife to Ms. George.
- [78] In my view, there was enough circumstantial evidence supporting the inference that Ms. George could have been the stabber to clear the low “some evidence” threshold for leaving this possibility to be considered by the jury. I am also not persuaded that the trial judge’s instructions on this issue caused any prejudice to Ms. George. She argues that because the trial judge’s approach put her “on the same footing” as Mr. Cavanagh, this may have led the jury to improperly treat them interchangeably, to her detriment. However, the jury was clearly instructed that there was only one “primary offender” in this case – the person who actually stabbed and killed Mr. Beaver – and that their first task was to decide if they were satisfied beyond a reasonable doubt that this person could be identified as either Mr. Cavanagh or Ms. George. The jury would have understood that since there was only one stabber, they could not find that both defendants were “primary offenders”. The jurors were also clearly instructed that they had to consider the cases against each defendant – which involved substantially different bodies of admissible evidence – separately.
- [79] For these reasons, I would not give effect to this ground of appeal.
4. The curative proviso [80] The Crown argues that even if the trial judge made errors in his jury instructions, Ms. George’s conviction for second degree murder should nevertheless be upheld on the basis that “[t]he evidence against [her] was so overwhelming that a murder conviction was inevitable”: see e.g., *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 31.
- [81] I do not agree that the case against Ms. George on a charge of murder was as strong as the Crown contends. There was undoubtedly a substantial body of evidence establishing that she was angry with Mr. Beaver, and that she had helped organize and had participated in the home invasion. However, the evidence that Ms. George wanted her uncle dead was thin. Her

admission that she had made a threat against Mr. Beaver to an acquaintance was hardly conclusive, and might well have been discounted by the jury as not something she had meant seriously. On the evidence as a whole, it was open to the jury to accept, or at least not reject, Ms. George's statement to the police that she had only been expecting Mr. Cavanagh and Mr. Beaver to fight and had not planned or desired his death, particularly in light of Nicholas George's testimony that he was unaware of any plan to kill Mr. Beaver.

- [82] It was also open to the jury to be left with a reasonable doubt about whether Ms. George knew that Mr. Cavanagh had a knife. While Nicholas testified that he saw Mr. Cavanagh holding a knife while the group was assembling outside the bungalow, the jurors would not inevitably have accepted his evidence on this point or, if they did, concluded that Ms. George must also have made a similar observation.
- [83] Ultimately, the Crown's case that Ms. George had purposely aided or abetted Mr. Beaver's killing turned almost entirely on the jury accepting the Crown's theory that her purpose in helping organize the home invasion was to facilitate Mr. Beaver's murder. However, the jury found both Ms. George and Mr. Cavanagh not guilty of first degree murder. As I have already discussed, while it is possible that the jury arrived at this verdict by accepting the Crown's theory on planning but having a reasonable doubt about the additional element of deliberation, it is also entirely possible on this record that the jurors were simply not convinced that the Crown had proved that Mr. Beaver's death was planned.
- [84] In short, while the Crown had a strong case that Ms. George was a secondary party to manslaughter, I do not view the Crown's case against her on a charge of murder as overwhelming, particularly in light of the jury's verdict finding her not guilty of first degree murder. I am accordingly not satisfied that the Crown has met its burden of establishing that the errors in the jury charge could not have affected the verdict, and that "any other verdict but a conviction" on a charge of murder "would be impossible": Khan, at para. 31.

D. Disposition [85] In the result, I would allow Ms. George's appeal, quash her conviction for second degree murder, and order a new trial on this charge.

Released: February 19, 2026 "L.F."

*"J. Dawe J.A."*

I agree. L. Favreau J.A."

*"I agree. J. Copeland J.A."*

- [1] The Crown did not rely on s. 21(2) of the Criminal Code, and the jury was not instructed about this alternative route to liability as a secondary party.

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