File Number: 37479

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

SPENCER LEE JORDAN

Applicant (on application for leave)
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL AND APPLICATION FOR EXTENSION OF TIME TO FILE ATTORNEY GENERAL OF ALBERTA, RESPONDENT

PURSUANT TO RULE 27 OF THE *RULES OF THE SUPREME COURT OF CANADA*

Publication Ban pursuant to s. 486.5 of the *Criminal Code*

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MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND FACTS

Overview

1. Spencer Lee Jordan ("the Applicant") was convicted of murdering his six-year-old daughter Meika Jordan. He and his common law spouse Marie Eve Magoon ("Magoon") killed Meika by assaulting her repeatedly throughout the day on November 13, 2011. The Trial Judge found that both the Applicant and Magoon directly participated in the assaults that caused Meika's death, and therefore both were guilty of murder as parties under section 21(1) of the *Criminal Code*.[1]

2. Based on the evidence before her, the Trial Judge found that the Applicant and Magoon were co-participants in the murder. She relied on the "common sense inference" to conclude that both had the requisite *mens rea* for murder. She found that the Applicant's act of punching Meika in the abdomen caused injuries to her pancreas and liver, which constituted a contributing cause of death. Although the Trial Judge could not say which blow or combination of blows caused the cerebral edema which was the primary cause of death, she found that the Applicant and Magoon had the necessary *mens rea* for murder, and both directly participated in the assaults that led to Meika's death. Accordingly, causation was made out both in law and in fact.

3. The application at bar is, in essence, an attempt to re-litigate the facts found by the Trial Judge. All of the Applicant's purported questions of law invite this Court to see the facts differently than the Trial Judge did. The proposed questions either do not arise on the record, or are not extricable from the Trial Judge's findings of fact. Nor has the Applicant pointed to a single erroneous sentence in the Alberta Court of Appeal decision from which he seeks leave to appeal. Finally, none of the questions raises any national importance that merits permitting a further appeal to this Court. The application for leave to appeal should be dismissed.

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[1] *Criminal Code*, RSC 1985, c C-46, s 21(1)

Facts

4. Six year-old Meika Jordan died in the hospital on November 14, 2011, shortly before 2:00 pm.[2] She first received medical attention when an ambulance arrived at her home at around 7:20 pm one day earlier.[3] By the time the ambulance arrived, Meika had lost consciousness and would never regain it.

5. Meika was in dire physical condition. Her hair was matted, broken or missing. A mixed-depth burn caused by an open flame covered nearly the entire palm of her left hand. In the centre of her palm, the burn was full-thickness third-degree. She had a bilateral subdural hematoma, a torn liver, and an injury to her duodenum and pancreas.[4] There were at least five significant impacts to Meika's head – front, left, right and back. Because of the head injuries, Meika's brain had swelled and was pressing on her brain stem. The swelling had led to cardiac arrest and cessation of breathing.[5] The cerebral swelling arose from at least one of the five impacts, though the doctors could not determine which one. The brain swelling would have commenced between one and eight hours before paramedics arrived.[6]

6. Meika had injuries all over her body. One doctor was so alarmed by the extent of the bruising and injuries that she had them documented by the hospital photographer. She said she had never seen anything like it before: "Certainly this was the worst case of inflicted injury I have ever seen."[7] Another pediatric specialist said she had "never seen a child with so many bruises in my career … and they were over parts of her body that are not typical for bruises for children."[8] A pathologist with 25 years' experience described Meika's injuries as on the most severe end of child abuse cases he had seen.[9] An attending paramedic and one of her treating specialists wept on the stand while testifying about Meika's presentation.[10]

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[2] Dr. Mahoney's testimony [Joint Record of the Respondent ("RR"), Vol I, Tab 2H at 70/31-34]
[3] Paramedic Krenz' testimony [RR, Vol I, Tab 2B at 8/6-36] and Paramedic Robertson's testimony [RR, Vol I, Tab 2C at 9/25-39]
[4] Trial Judge's Reasons for Judgment ("Reasons") at paras 4(8), 4(11) [Jordan's Leave Application ("LA") at Tab 3]
[5] Reasons at para 4(10) [LA at Tab 3]
[6] Reasons at paras 4(11)-(12) [LA at Tab 3]
[7] Reasons at para 4(8) [LA at Tab 3]; Dr. Mahoney's testimony [RR, Vol I, Tab 2H at 69/2-4]
[8] Dr. Gilfoyle's testimony [RR, Vol I, Tab 2E at 17/19-26]
[9] Dr. Milroy's testimony [RR, Vol I, Tab 2F at 60/24-34]
[10] Reasons at para 77 [LA at Tab 3]

7. The Applicant and Magoon were the only adults who had been with Meika in the days leading up to her death.[11] Police believed that one or both of them had caused all her injuries. After a lengthy police investigation which included intercepted communications and a Mr. Big operation, the Applicant and Magoon were charged jointly with first degree murder.

8. The trial was held over a period of five weeks in March and April of 2015. Evidence called included extensive wiretap recordings, Mr. Big statements by both the Applicant and Magoon, and evidence from four medical doctors who gave opinion evidence about Meika's injuries. The Trial Judge carefully weighed all the evidence and made specific findings of fact about what each accused had done to Meika. With regard to the Applicant's acts on November 13, 2011, she found that he had punched Meika in the abdomen, causing the injury to her pancreas.[12] He had then ordered her to "run the stairs" as a punishment for bad behaviour. When she refused or resisted, he got frustrated and picked her up by her ankles and dragged her up and down the stairs, causing her to hit her head repeatedly. At another time, as a result of her refusal to run stairs, he tried to push her, to make her go, and then threw her upstairs to the kitchen. In the kitchen, he threw her down on the floor a number of times.[13] The Trial Judge inferred from the whole of the evidence that both accused, in their assaults on the victim, intended to cause her bodily harm which each knew was likely to kill her, and both were reckless as to whether death ensued.[14] This elevated the Applicant's culpability to murder.

9. The Trial Judge went on to consider whether the Crown had proved that the Applicant was guilty of first degree murder. She found that the Crown had failed to prove unlawful confinement.[15] Accordingly, both the Applicant and Magoon were acquitted of first degree murder but convicted of second degree murder.

10. Both the Applicant and Magoon appealed their convictions for second degree murder. The Applicant argued that the Trial Judge erred by: (1) finding a common purpose; (2) failing to recognize that he abandoned any intent to continue assaulting Meika; (3) failing to see Magoon's actions as an intervening act; (4) finding that he caused the abdominal injury; (5) finding that he

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[11] Reasons at para 78 [LA at Tab 3]
[12] Reasons at paras 102, 124-125 [LA at Tab 3]
[13] Reasons para 129 [LA at Tab 3]
[14] Reasons para 173 [LA at Tab 3]
[15] Reasons para 202 [LA at Tab 3]

knew that Magoon was causing bodily harm to Meika; and (6) relating the evidence to the concept of recklessness.[16] The Crown also appealed the two acquittals for first degree murder, arguing that the Trial Judge applied the wrong test in assessing whether Meika was unlawfully confined. The Court of Appeal dismissed the Applicant's appeal and allowed the Crown's appeal; in the result, the Court entered convictions for first degree murder.

11. The Applicant now seeks leave to appeal his convictions for murder. His largely factual arguments are, seemingly, similar to the ones that were argued and unanimously dismissed in the Court of Appeal. He asserts that the Trial Judge erred in: (1) inferring intent; (2) finding causation; (3) finding that he and Magoon were acting in concert; and (4) finding that he was a participant in the murder. The Applicant maintains that he does not require leave and that he is entitled to advance these grounds as of right. The Crown position is that leave is required, and the Crown has filed a motion to strike out these grounds.

PART II – QUESTIONS IN ISSUE

Question in Issue 1 Can a "common sense inference" be utilized to find an accused had the requisite *mens rea* for murder under section 229(a)(ii) when the trier of fact made specific findings of fact and rules [sic] based on those facts that the requisite intent under s 229(a)(i) did not exist?

Respondent's Position with regard to Question in Issue 1 **The Trial Judge inferred that the Applicant had the requisite mental element for murder. She applied the correct test. The Court of Appeal properly declined to interfere with this finding of fact. The Applicant has not demonstrated any extricable error of law.**

Question in Issue 2 Once a Trial Judge determines there is no factual causation, can: (a) that judge jettison the causation analysis of co-accuseds individually, and (b) proceed directly to considering parties of the offence under section 21 of the *Code*?

Respondent's Position with regard to Question in Issue 2 **The Trial Judge explicitly found that the Applicant's acts were a cause of the victim's death beyond *de minimis*. Further, she found that the Applicant was a co-participant in the murder. She**

[16] Alberta Court of Appeal Memorandum of Judgment ("MOJ") at para 64 [LA at Tab 2]

applied the correct test. These factual findings were amply supported by the evidentiary record.

Question in Issue 3 When the evidence does not factually support the inference that two (2) parents acted in concert resulting in the death of a child in their home by way of assault, what is [the] degree and scope of knowledge that must be proven by the Crown, to impose criminal liability for first or second degree murder?

Respondent's Position with regard to Question in Issue 3 **The Trial Judge applied the correct test, and found as fact that the Applicant was a co-participant in the murder. This finding was amply supported by the trial evidence. This is not a question of law.**

Question in Issue 4 What is the proper legal test to be a party to an offence under s 21(1)(a)?

Respondent's Position with regard to Question in Issue 4 **The test for liability under section 21 is settled.**

PART III – ARGUMENT

12. A person convicted of an indictable offence whose conviction is affirmed by a court of appeal may appeal to this Court on any question of law if leave is granted.[17] The test for leave to appeal requires a significant question of law which raises issues of national importance. This can include situations where a particular question of law is the subject of competing decisions nationally. It can also occur in cases where a potential miscarriage of justice is raised.

13. All of the Applicant's questions implicitly assert that the findings of fact the Trial Judge made were wrong. None of the questions in issue is a question of law that can be extricated from the facts found in the trial court. In the Court of Appeal, the Applicant mounted a concerted attack on the reasonableness of the facts found by the Trial Judge. The Court of Appeal reviewed the fact finding and found that it was amply supported by the evidence. Applying an appropriately deferential standard of review, the Court of Appeal did not interfere with the Trial Judge's fact finding. This Court should not do so either.

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[17] *Criminal Code*, RSC 1985, c C-46, s 691(1)(b)

Question in Issue 1 – Can a "common sense inference" be utilized to find an accused had the requisite *mens rea* for murder under s 229(a)(ii) when the trier of fact made specific findings of fact and rules [sic] based on those facts that the requisite intent under s 229(a)(i) did not exist?

14. The Trial Judge found that although she could not infer actual intent to kill (as required by section 229(a)(i)), she was able to infer that both the Applicant and Magoon intended to cause bodily harm which each knew was likely to cause death, and were reckless as to whether death ensued, satisfying the *mens rea* requirement for murder under section 229(a)(ii).[18] The "common sense inference" was available to the Trial Judge. There was no error in her analysis, or in the analysis by the Court of Appeal.

15. The Applicant' claim that the Trial Judge made certain findings of fact at the first stage of the intent analysis, but then "disregarded" them at the second stage,[19] is not borne out on the record. She expressly considered all the evidence before her in deciding what if any inferences she could draw.[20] In this case, despite trial counsel's arguments, she drew an inference that the Applicant had the requisite intent for murder. The Court of Appeal determined that there was no error in her analysis.[21] Leave should not be granted to allow the Applicant a third venue to argue this question of fact.

The "Common Sense Inference" was Available

16. In assessing whether the Crown had proved that the Applicant and Magoon had the necessary intent for murder, the Trial Judge first considered whether the Crown had proved intent under section 229(a)(i). This section requires a specific intent to cause death. She noted that neither of the accused set out with an intention to kill Meika; that each was frustrated with their situation, and the inability of each to deal with that anger or frustration ultimately lead to each assaulting Meika; that each accused seemingly had little understanding of the limits on punishment to inflict on a six year old child; and that they did not seem to recognize her

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[18] Reasons at paras 165-175 [LA at Tab 3]; *Criminal Code*, RSC 1985, c C-46, s 229
[19] Applicant's Memorandum of Argument at paras 14, 21, 23, 30 and 33 [LA at Tab 3]
[20] Reasons at para 167 [LA at Tab 3]
[21] MOJ at para 95 [LA at Tab 2]

complaints or her lethargy to be a manifestation of underlying injuries.[22] The Trial Judge found that she could not infer a specific intent to kill in these circumstances.

17. Having made this finding, the Trial Judge went on to consider the second form of murderous intent under section 229(a)(ii). She noted that there was no real question that each accused knew their actions would cause bodily harm, and intended to do so. The main issue was whether each knew that the bodily harm was likely to cause death and was reckless whether death ensued.[23] She noted that a trier of fact may draw a "common sense inference" that a sane and sober person intends the predictable consequences of their actions. Here there was no indication of alcohol or drug use by either the Applicant or Magoon.[24] The Trial Judge noted that intention has to be determined considering all the evidence. In this case the evidence included that the Applicant had hit Meika in the stomach, injuring her pancreas.[25] It also indicated that the Applicant had grabbed her and dragged her up the stairs by her ankles, and also thrown her repeatedly down on the tile floor. Both of these actions caused her to hit her head repeatedly.[26]

18. The Trial Judge found that when she considered the progression of assaultive behaviour that both the Applicant and Magoon inflicted on Meika, within a period of a few hours, it was a logical consequence that each meant to cause bodily harm which they both knew was likely to cause death. She noted that it would have been difficult to draw that inference if one or the other had only struck a single blow; but the repetitive nature of the blows to the head by both offenders led her to conclude that the common sense inference was available.[27]

19. The Trial Judge further noted that Meika was crying and screaming at various points during the assaults. Her level of function progressively diminished throughout the day, starting with the abdominal injury in the morning and culminating in the eventual total loss of consciousness. One could not fail to notice this. Even after her physical condition was compromised, both the Applicant and Magoon continued to assault her. Continuing to inflict

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[22] Reasons at para 164 [LA at Tab 3]
[23] Reasons at para 168 [LA at Tab 3]
[24] Reasons at para 166 [LA at Tab 3] (this was in line with this authorities from this Court, including *R v Daley*, 2007 SCC 53 at paras 50-53 and *R v Walle*, 2012 SCC 41 at paras 55-62)
[25] Reasons at paras 124-125 [LA at Tab 3]
[26] Reasons at para 167 [LA at Tab 3]
[27] Reasons at para 170 [LA at Tab 3]

repetitive head injuries – in the face of Meika's gradual diminution of function – had predictable consequences. The common sense inference was compelling in these circumstances.[28]

20. The Applicant argues that the Trial Judge "disregarded" her findings of fact in reaching this conclusion. However, he does not point to anything in the record where she did so explicitly; in fact, the Trial Judge plainly said that "intent has to be determined considering all the evidence".[29] Although some of her found facts might support the Applicant's argument, other findings supported an inference that the murderous intent was present. A Trial Judge is not required to specifically advert to every item of evidence considered, or to detail the way each item of evidence was assessed.[30] A trier of fact must consider all the evidence together, including evidence that might tend to raise doubt about the applicability of the common sense inference, and a failure to do so is an error of law. However, there is no obligation to record all or any specific part of the process of deliberation on the facts. Unless the reasons demonstrate that a consideration of all evidence was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was error in law in this respect.[31]

21. The Applicant relies on *R v Walle* to support his argument that the Trial Judge failed to consider (or "disregarded") certain facts. In *Walle*, the appellant argued that the Trial Judge had erred by failing to take into account certain pieces of evidence that arguably suggested that the common sense inference should not be drawn. In particular, Mr. Walle argued that evidence about his developmental delays, his hospitalization on a mental health warrant, his "blank" affect when he entered the bar, his hand gestures while testifying, and his alcohol consumption should have led the Trial Judge to have a reasonable doubt about whether to infer intent.[32] This Court rejected those submissions and upheld the murder conviction.[33]

22. The Applicant also relies on *Bottineau*, an Ontario Superior Court decision of Watt J. (as he then was) for the proposition that a trier of fact must consider all evidence in assessing

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[28] Reasons at para 171 [LA at Tab 3]
[29] Reasons at para 167 [LA at Tab 3]
[30] *R v H(JM)*, 2011 SCC 45 at para 32
[31] *R v Walle*, *supra* note 24 at para 46, citing *R v Morin* [1992] 3 SCR 286 at para 21; *R v H(JM)*, *supra* note 30
[32] *R v Walle*, *supra* note 24 at paras 47-51
[33] *Ibid* at para 91

intention.[34] Of course this is correct – the Trial Judge was obligated to consider all the evidence, and she did. The *Bottineau* case is actually a helpful illustration of the Crown's position. In the trial level decision, Watt J. provided a thorough review of the law and its application to the case before him.[35] The two accused put forward various reasons why the common sense inference should not be drawn – for example, Bottineau suffered from significant mental deficiencies. Watt J. concluded that the two accused parents were joint principals in the murder of their five year-old grandson, and that he could rely on the common sense inference to establish the requisite *mens rea* for murder.[36] Both accused were convicted of second degree murder. The Ontario Court of Appeal affirmed the convictions.[37]

23. Like in *Walle* and *Bottineau,* in the case at bar there were many facts that supported the common sense inference. The Trial Judge considered the progression of assaultive behavior that the Applicant and Magoon inflicted on Meika, and concluded that it was a logical consequence that each meant to cause bodily harm which each knew would likely cause death. This was a finding of fact that she reached only after considering a large body of evidence and applying the correct legal principles. The Court of Appeal found that the finding was reasonable and supported by the record. The Applicant has failed to show any error in the analysis of either court.

No Question of Law or Issue of National Importance

24. The Applicant's question pertaining to the inference of murderous intent does not raise a question of law. The law is not in doubt: a Trial Judge is required to consider all the evidence, but she is not required to record every step of her reasoning in a "watch me think" fashion.[38] The real argument the Applicant seeks to raise here is that the Trial Judge should have drawn different inferences than she did. There is no extricable error of law for this Court to consider.

25. The Applicant relies on *R v Nygaard* for the proposition that the distinction between the intents in ss. 229(a)(i) and 229)(a)(ii) is a slight one. It is true that Cory J. found that the

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[34] *R v Bottineau,* 2006 CarswellOnt 8510 (SCJ), aff'd 2011 ONCA 194, leave to appeal to the SCC refused 2012 CarswellOnt 272
[35] *Ibid* at paras 392-448
[36] *Ibid* at para 448
[37] *R v Bottineau* (2011), *supra* note 34
[38] *R v M(RE),* 2008 SCC 51 at para 17; also see, *R v Walle, supra* note 24 at para 46

difference in degree of culpability was too minute to merit a distinction – at least with regard to the degree of moral blameworthiness.[39] Both forms of intent require subjective foresight of death. However, the two forms of intent remain legally distinct, and it is not an error to find that one is established but the other is not. Juries are routinely instructed that either form of intent is sufficient for a conviction.

26. The Trial Judge did not make any palpable or overriding error in her factual findings. The Court of Appeal found that the findings were supported.[40] The majority observed that the common sense inference has been employed in many cases involving abuse or mistreatment of children.[41] It also found that there was ample evidence supporting an inference that the Applicant was aware of Meika's neurological deterioration, even if he was wilfully blind to it.[42] In short, the Court of Appeal recognized the factual nature of the Applicant's complaints, noted that there was substantial evidence supporting the Trial Judge's inferences, and declined to interfere. This Court should do the same.

Conclusion on Question in Issue 1

27. The issue raised by the Applicant is one of fact, not law. The Applicant asserts that the Trial Judge disregarded her own findings of fact in inferring the mental element for murder under section 229(a)(ii), but the record does not support this assertion. Trial judges are not required to spell out every step of their reasoning, or exhaustively catalogue every piece of evidence they consider. This Trial Judge said that she was considering "all the evidence", which is exactly what the law requires. The Court of Appeal affirmed this. The question in issue fails to raise any issue of national or public importance. Leave should not be granted.

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[39] *R v Nygaard*, [1989] 2 SCR 1074 at pp 1088-1089
[40] MOJ at paras 93-97 [LA at Tab 2]
[41] MOJ at at para 97 [LA at Tab 2]
[42] MOJ at para 98 [LA at Tab 2]

Question in Issue 2 – Once a Trial Judge determines there is no factual causation, can: (a) that judge jettison the causation analysis of co-accuseds individually, and (b) proceed directly to considering parties of the offence under s 21 of the *Code*?

28. The Applicant argues that he acted independently from Magoon in his assaults on Meika. He asserts that he did not know that Magoon was assaulting Meika, and, since he has not been shown to have struck the killing blow, he cannot be found to have factually caused the death.

29. In order to succeed, this argument would require this Court to overturn two of the Trial Judge's central findings of fact. First, the Trial Judge found that when the Applicant punched Meika in the abdomen, he injured her pancreas. This injury accelerated Meika's death,[43] and was a contributing cause of death beyond *de minimis*.[44] This act alone was both a factual and legal cause of the death. Second, the Trial Judge explicitly found that the Applicant's additional assaults were not independent from Magoon's. The two were co-participants in one ongoing sequence of violence. They both repeatedly assaulted Meika, causing her bodily harm which each knew was likely to cause death. Therefore, the Applicant was a party to the killing under section 21(1) and was criminally liable for all blows struck by all participants, regardless of whether he struck the blow that caused the cerebral edema or not.

The Applicant's Punch was a Contributing Cause of Death Beyond *De Minimis*

30. The Trial Judge made a finding of fact that the Applicant's punch to Meika's stomach caused her internal injuries, including the pancreatic injury. She explained that this blow fit the medical evidence and was consistent with the pathologist's evidence about timing.[45] She went on to find that the Crown had proven that the abdominal injuries caused by the Applicant were a contributing cause of death. While recognizing that the abdominal injuries would likely not have caused death if treated, she found that the internal bleeding compromised Meika's cardiovascular system, making her less able to deal with the head injuries. She found that it was a contributing

[43] Reasons at para 147 [LA at Tab 3]
[44] Reasons at para 4(17) [LA at Tab 3]
[45] Reasons at para 125 [LA at Tab 3]

factor that accelerated Meika's death. Accordingly, it met the legal test for causation set out by this Court in *Smithers* and *Nette*.[46]

31. In the Court of Appeal, the Applicant challenged these findings of fact. He disputed that he had caused the pancreatic injury at all (suggesting that Magoon might have caused it by kicking or stepping on Meika); and he also disputed that the abdominal injury was actually a cause of death. The Court of Appeal addressed these arguments in some detail.[47] The Court noted that the Trial Judge accepted the opinion of Dr. Milroy, the Crown pathologist, who testified that Meika died of a combination of her abdominal and head injuries. It rejected the Applicant's argument that the punch did not cause the abdominal injuries because, essentially, it was a reasonable finding of fact which found support in the record.

32. The Court of Appeal also affirmed the finding that the abdominal injury was a contributing cause of death beyond *de minimis*. It found that the Trial Judge had applied the correct test, and her application of the law to the facts was reasonable. There was no basis to interfere.[48] The Applicant now seeks leave to revisit – again – the factual inferences drawn by the Trial Judge. This is not a question of law that should engage another layer of appellate review.

The Applicant Was Found Guilty as a Co-Participant

33. In addition to finding that the punch the Applicant delivered to Meika's abdomen was a cause of death, the Trial Judge also found that he was a co-participant in the subsequent assaults on Meika which led directly to her death. Since the two were parties to the offence, it was not necessary to determine whether the fatal blow or blows were struck by the Applicant, Magoon, or a combination of both. The Trial Judge found common participation.[49]

34. In reaching this conclusion, the Trial Judge drew on a large body of established law. The concept of parties to an offence is neither novel nor unsettled. The predecessor

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[46] Reasons at para 147 [LA at Tab 3], citing *Smithers v R*, [1978] 1 SCR 506 and *R v Nette*, 2001 SCC 78
[47] MOJ at paras 9, 68-76 [LA at Tab 2]
[48] MOJ at paras 74-76 [LA at Tab 2]
[49] Reasons at paras 151-159 [LA at Tab 3]

to section 21 was first adopted into Canadian law in 1886.[50] The current section 21 has been considered extensively by this Court. In *R v Isaac*, this Court explained that, in a case where two individuals participate in an assault which caused the victim's death, but there was no evidence as to which struck the killing blow or blows, it was mandatory to instruct the jury on section 21(1) of the *Code*. This was so even if only one of the offenders was named in the indictment before the Court.[51]

35. In *R v Thatcher*, this Court conducted a thorough review of the principles of party liability under section 21(1), and concluded that section 21 was designed to make the different modes of committing an offence legally irrelevant. A person who actually commits an offence and a person who merely aids or abets are both equally guilty of the offence.[52] The Court reviewed a number of cases and authorities dating back to the 1800s, and affirmed that section 21 was designed to alleviate the necessity for the Crown choosing between different forms of participation in a criminal offence.[53] Notably, in *Thatcher* there was no direct evidence as to what role the accused had played in the murder: the Crown could not prove whether he had committed the murder himself or whether he had arranged to have the killing done by an unindicted third party. The jury was charged that they need not resolve the issue, as long as they were unanimous on the question of guilt. The Court observed that if this were not the case, "it would otherwise be open to co-accused to escape conviction by imbuing members of a jury with doubt as to which of the co-accused physically performed the criminal act, even if the jurors entertained no doubt that any individual co-accused either personally committed the crime or else aided and abetted in its commission."[54]

36. The British Columbia Court of Appeal adopted *Thatcher* in *R v Ball*, a case relied on by the Trial Judge in the case at bar. Ryan J.A. wrote that "… where co-perpetrators engage in a deadly assault, the Crown need not prove which of the attackers struck the fatal blow or blows."[55] She cited *Ewaschuk* for the proposition that:

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[50] *R v Thatcher,* [1987] 1 SCR 652 at para 71, citing *R v Harder*, [1956] SCR 489
[51] *R v Isaac,* [1984] 1 SCR 74 at paras 9-0
[52] *R v Thatcher, supra* note 50 at para 68
[53] *Ibid* at para 73
[54] *Ibid* at para 70
[55] *R v Ball*, 2011 BCCA 11 at para 28, leave to appeal to SCC refused 2011 CarswellBC 3080

> Where several persons act together toward a common criminal object, with the "requisite intent", and any of them jointly or severally achieve the common object, all who are present at the commission of the crime commit the crime as *joint principal offenders*. This principle has been pithily stated in concrete terms that "the blow of one is, in law, the blow of all of them." [*R. v. Macklin Murphy* (1838), 2 Lewin 225; *R. v. Chow Bew*, [1956] S.C.R. 124 at pp. 126-7; *R. v. Thatcher*, [1987] 1 S.C.R. 652, at pp. 689-99.][56] (italics original)

37. The Supreme Court has affirmed the principles in *Thatcher* in several more recent decisions. In *R v McMaster* it wrote that "… 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."[57] This well established principle was confirmed again by this Court in *R v Maybin.* The two Maybin brothers jointly participated in an assault. Timothy Maybin struck the victim several times; Matthew Maybin helped, but was pulled away by bar staff. There was no possibility that Matthew Maybin could have caused the death.[58] Nonetheless, both brothers were parties to the assault. Where two actors are parties, each is responsible for the acts of the other.[59]

38. In *Nette*, the Court observed that causation issues tend to arise in homicides involving multiple parties. In these cases the law of parties provides that individuals may bear criminal responsibility for the acts of another.[60] Other recent cases from this Court include *R v Briscoe*,[61] *R v Pickton*,[62] and *R v Vu*.[63] The Trial Judge also relied on *R v Elder*, a recent Alberta Court of Appeal case which reviewed all these authorities as well as many others.[64]

39. On appeal, the Applicant asserted that he had a minimal role in the assaults on Meika and in fact had no knowledge of most of them. The Court of Appeal concluded that there was no basis to interfere with the Trial Judge's findings.[65] The Trial Judge had correctly held that there

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[56] *Ibid*, at para 28, citing E.G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, 2nd ed (Toronto: Canada Law Book 2010) at 15-81
[57] *R v McMaster*, [1996] 1 SCR 740 at para 33
[58] *R v Maybin*, 2012 SCC 24 at paras 8-9
[59] *Ibid*, at para 55
[60] *R v Nette*, *supra* note 46 at para 63
[61] *R v Briscoe*, 2010 SCC 13 at paras 17-18 and 21-25
[62] *R v Pickton*, 2010 SCC 32 at paras 64-66
[63] *R v Vu*, 2012 SCC 40 at para 58
[64] *R v Elder*, 2015 ABCA 126 at paras 14-18
[65] MOJ at paras 80-88 [LA at Tab 2]

was no need to determine the extent of participation for each participant. There was no requirement that the assaults be simultaneous.[66] The Applicant has not pointed to any error in the Court of Appeal's reasons.

The Trial Judge Properly Applied the Test for Causation

40. As a result of the finding that the two offenders were co-participants, it is not necessary to strictly parse questions about causation. There is no doubt that the assaults, in totality, caused Meika's death.[67] Still, since the Applicant suggests that the Trial Judge "jettisoned" the causation analysis, some brief response is called for.

41. In support of his argument that he and Magoon were not acting in concert, the Applicant relies on *R v Shilon* and *R v JSR*.[68] *Shilon* was a case where the accused drove a stolen truck at high speeds, attempting to escape from a person who was chasing him. The pursuer caused a fatal collision. The Ontario Court of Appeal found that the driver and the pursuer were not co-perpetrators because there was no "mutuality of intention" – the two drivers were in fact working at cross-purposes.[69] Similarly, *JSR* was a case where a gunfight broke out between JSR and a number of other individuals, and one of the others shot an innocent bystander. The Ontario Court of Appeal concluded that the shooters were not pursuing a "common unlawful object".[70] Rather, like in *Shilon,* they were each attempting to achieve opposite outcomes. These cases show that offenders will generally not be liable as parties when they are working against each other. But in the case at bar the Applicant and Magoon were acting together in their assaults on Meika. These two cases are not of assistance.

42. As explained in *Maybin,* causation is broken down into "factual causation" and "legal causation". Factual causation is not limited to the direct and immediate cause of death, nor is it limited to the most significant cause.[71] By contrast, legal causation incorporates a wider range of factual causes into those which are sufficiently connected to the death to warrant legal responsibility. Legal causation – also referred to as imputable causation – is based on moral

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[66] MOJ at para 87 [LA at Tab 2]
[67] Reasons at para 78 [LA at Tab 3]
[68] *R v Shilon,* 2006 CarswellOnt 9888 (CA) and *R v JSR*, 2008 ONCA 544
[69] *R v Shilon*, supra note 68 at para 53
[70] *R v JSR, supra* note 68 at paras 39-46
[71] *R v Maybin, supra* note 58 para 20

responsibility, and is concerned with the question of whether the accused person should be held responsible in law for the death that occurred.[72]

43. In *Nette*, this Court observed that where the intention to cause bodily harm that is likely to cause death is proven, and the offender committed an act that caused or contributed to the victim's death, it will be rare indeed for causation to be in doubt. In such a case, the *mens rea* requirement generally resolves any concerns about causation. It would be rare in a murder case where intention to kill is proven for an accused to be able to raise a doubt that, while he intended to kill, and struck life-threatening blows, he did not cause the death.[73] In the case at bar, the intention for murder was established. Factual causation was also established, both by the Applicant's punch to the victim's abdomen and by the finding that the two offenders were parties. In these circumstances, legal causation is not in doubt. Both the Trial Judge and the Court of Appeal dealt with causation properly.

Conclusion on Question in Issue 2

44. Contrary to the premise of the Applicant's question, the Trial Judge did not find that there was "no factual causation" – she expressly found that the Applicant struck Meika in the abdomen, causing an injury that accelerated her death and was therefore a contributing cause beyond *de minimis*.[74] She also found that the Applicant was a co-participant in numerous further assaults throughout the day, at least one of which caused the cerebral edema which was the primary cause of Meika's death;[75] and she found that the Applicant actually intended to cause bodily harm to Meika which he knew was likely to cause death, and was reckless whether death ensued.[76] She recognized that when two assailants attack a victim it is not necessary to prove which one struck the fatal blow. In other words, she applied settled law to her findings of fact. There was ample evidence supporting her conclusions. The Applicant has failed to establish any legal error, or any question of public importance.

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[72] *Ibid* at para 16
[73] *R v Nette, supra* note 46 at para 47
[74] Reasons at paras 124-125 (regarding the Applicant punching Meika and causing the abdominal injuries); and 4(17) and 147 (that the abdominal injuries were a contributing cause of death beyond *de minimis*) [LA at Tab 3]
[75] Reasons at para 160 [LA at Tab 3]
[76] Reasons at para 174 [LA at Tab 3]

Question in Issue 3 – When the evidence does not factually support the inference that two (2) parents acted in concert resulting in the death of a child in their home by way of assault, what is [the] degree and scope of knowledge that must be proven by the Crown, to impose criminal liability for first or second degree murder?

45. Under this ground, the Applicant asserts that the Trial Judge erred in finding that he and Magoon were parties. This, too, was a finding of fact which was entitled to appellate deference. The Trial Judge found that the Applicant actually participated in murdering Meika; first by punching her in the morning and causing abdominal injuries which contributed to her death; and secondly by repeatedly assaulting her throughout the rest of the day. She found, on the evidence, that the Applicant and Magoon did act in concert.[77] The Court of Appeal found that the Trial Judge's findings of fact that the two were co-participants was amply supported by the evidence, and declined to interfere.[78] This Court should decline to do so as well.

The Trial Judge Found as Fact that the Applicant was a Co-Participant in the Murder

46. As set out above, the Trial Judge made a finding of fact that the Applicant was a co-participant in the murder. Many cases establish that there is no need for an explicit agreement to commit an assault in order to make two offenders co-participants. There is also no requirement to find that both offenders committed their assaults simultaneously. Accordingly, the first premise of the Applicant's question is invalid. The Trial Judge made a finding that the two were co-participants, which was amply supported by the evidence.

The Applicant was aware of Magoon's Assaults on Meika

47. The Applicant asserts that there was insufficient evidence to support the Trial Judge's finding that he had some knowledge of Magoon's assaults on Meika. This issue was argued in the Court of Appeal.[79] The Applicant does not point to any error in those reasons.

48. Whether the evidence justified this finding of joint participation was a question of fact for the Trial Judge, not a question of law. There was a significant body of evidence supporting the Trial Judge's conclusion. The Applicant demonstrated knowledge of what was happening in and near the kitchen around dinner time on Sunday, right up to five or ten minutes before Meika's

[77] Reasons at paras 146-162 [LA at Tab 3]
[78] MOJ at paras 87-88 [LA at Tab 2]
[79] MOJ at paras 77-79 [LA at Tab 2]

final fall. He said that while Ms. Magoon was in the kitchen, he threw Meika up the stairs.[80] He said that "when we were eating dinner" Meika was still supposed to be running the stairs, and was complaining that she was tired and her stomach hurt.[81] Dinner preparation began around 4:00 pm. In his description of the dinner hour, he said "we were having a roast" and dinner was prepared "when we actually wanted it, getting all their plates ready and bringing [the boys'] and mine downstairs." He said that Ms. Magoon was in the kitchen "putting cookies on a cookie tray … and maybe down there five, ten minutes maybe that long, wham, heard her fall down the stairs."[82] The Trial Judge observed that the floor design of the house was not large, and each level was connected by six or seven steps.[83] The kitchen and basement were separated by one short flight of stairs.[84]

49. In the Applicant's Mr. Big interview, he describes actually witnessing several of the assaults by Magoon against Meika.[85] Also of note is the following intercepted conversation between him and Magoon:

> MARIE MAGOON: Well Spence you were with me the whole entire time.
> SPENCER JORDAN: I know that.
> MARIE MAGOON: I was never alone with her. You were there.
> SPENCER JORDAN: I know.[86]

50. Further, by the time Meika arrived at the hospital she had injuries all over her body.[87] She had blood around her mouth.[88] She had clumps of hair missing from her head.[89] There is no reasonable way the Applicant could have failed to see these injuries. The Trial Judge found that Meika's medical condition would have deteriorated significantly either during the afternoon or at minimum in the hour before the 911 call. She also found that the repetitive hitting of Meika's head on the floor by Magoon would have had Meika crying, and screaming that she would comply. Her falls would have made sounds, and she would have cried out in association with

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[80] Blackfoot Hotel ("BH") intercept dated October 6, 2012 at 1954 Hours, at [RR, Vol III, Tab 3J(3) at 60/20-62/22]
[81] BH intercept dated October 6, 2012 at 1954 Hours at [RR, Vol III, Tab 3J(3) at 63/1-7]
[82] Mr. Big confession [RR, Vol II, Tab 3I at 38/3-39/14, 167/5-168/23]
[83] Reasons at para 161 [LA at Tab 3]
[84] Scene Photograph marked exhibit 3 [RR, Vol 1, Tab 3B at 110]
[85] Mr. Big confession at [RR, Vol II, Tab 3I at 169/11-170/21, 185/10-187/22]
[86] Intercepted call dated October 3, 2012 [RR, Vol III, Tab 3J(1) at 5/17-20]
[87] Dr. Mahoney's testimony [RR, Vol I, Tab 2H at 68/38-39]
[88] Christopher Novak's testimony [RR, Vol I, Tab 2D at 12/17]
[89] Dr. Gilfoyle's testimony [RR, Vol I, Tab 2E at 16/26-31]

injuries of the extent seen.[90] The Court of Appeal concluded that "it was reasonable for the Trial Judge to find that the Applicant had knowledge of what was going on in the house".[91] As noted earlier, this was a finding of fact which is entitled to appellate deference. No issue of law arises.

Conclusion on Question in Issue 3

51. The Trial Judge reasonably concluded that the Applicant was generally aware of Magoon's assaults on Meika. She also found that the two offenders were acting in concert, contrary to the Applicant's premise. No error has been established in how this issue was dealt with either by the Trial Judge or the Court of Appeal.

Question in Issue 4 – What is the proper legal test to be a party to an offence under s 21(1)(a)?

The Legal Test is Settled

52. The legal test for party liability under section 21 has been largely settled since *Thatcher*. It was affirmed by this Court in *Isaac, McMaster, Briscoe, Pickton, and Vu,* as well as numerous provincial appellate authorities. As the Court of Appeal noted in addressing this argument:

> The real test under this section [21(1)(a)] is whether each principal directly participates in the offence. This can be made out by showing that each principal had direct physical contact with the victim. Where this is the case, the extent of participation does not need to be precisely determined. It is not necessary to prove who struck the final or fatal blow; the blow of one is the blow of all: *Elder*; *Ball* at paras 28 and 30; *R v Pickton*, 2010 SCC 32 at paras 64-66, [2010] 2 SCR 198.[92]

53. The Applicant has not pointed to any aspect of the Court of Appeal's reasons on this issue which is erroneous. The Court's reasons followed the extensive body of jurisprudence on this issue. No error has been demonstrated, either by the Court of Appeal or by the Trial Judge. The application of settled law to the facts of this case does not raise a question of national importance, and does not merit another layer of appellate review.

Conclusion

54. The Trial Judge conducted her fact-finding carefully and meticulously, and all her conclusions are amply supported by the evidentiary record. There is no legal basis to assail her

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[90] Reasons para 136 [LA at Tab 3]
[91] MOJ at para 79 [LA at Tab 2]
[92] MOJ at para 85 [LA at Tab 2]

finding that the Applicant and Magoon were co-participants in Meika's homicide. Nor is there a legal basis to attack her finding that both had the requisite intent for murder. The only questions of law that arise on these facts are ones that can be answered by reference to settled jurisprudence. The Applicant has failed to demonstrate any error by the Trial Judge. He has not even attempted to demonstrate any error in the Court of Appeal. The application for leave should be dismissed.

PART IV – COSTS

55. The Respondent makes no submissions regarding costs.

PART V – ORDER SOUGHT

56. The application for leave to appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 17th day of July, 2017.

CHRISTINE RIDEOUT
for **ANDREW BARG**
COUNSEL FOR THE RESPONDENT

PART VI - TABLE OF AUTHORITIES

	Cited at Paragraph No.	Tab No. (if applicable)
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R v Bottineau, 2006 CarswellOnt 8510 (SCJ) at paras 392-448, aff'd 2011 ONCA 194 (CanLII), leave to appeal to the SCC refused 2012 CarswellOnt 272	22, 23	Tab 4 Appellant's Authorities
R v Briscoe, 2010 SCC 13 at paras 17-18 and 21-25	38, 52	
R v Daley, 2007 SCC 53 at paras 50-53	17	
R v Elder, 2015 ABCA 126 (CanLII) at paras 14-18	38, 52	
R v H(JM), 2011 SCC 45 at paras 31, 32	20	
R v Isaac, [1984] 1 SCR 74 at pp 80-81, 1984 CarswellQue 97 at paras 9-10	34, 52	
R v JSR, 2008 ONCA 544 (CanLII) at paras 39-46	41	
R v M(RE), 2008 SCC 51 at para 17	24	
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R v Pickton, 2010 SCC 32 at paras 64-66	38, 52	
R v Shilon, 2006 CarswellOnt 9888 (CA) at para 53	41	Tab 22 Appellant's Authorities
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R v Vu, 2012 SCC 40 at para 58	38, 52	

	Cited at Paragraph No.	Tab No. (if applicable)
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Smithers v R, [1978] 1 SCR 506	30	

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Criminal Code, RSC 1985, c C-46, s 229 *Code criminal*, LRC (1985), ch C-46, s 229	14, 16, 17, 25, 27
Criminal Code, RSC 1985, c C-46, s 691(1)(b) *Code criminal*, LRC (1985), ch C-46, s 691(1)(b)	12