SCC File No. 39301

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

BETWEEN:

JASON WILLIAM COWAN

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

FACTUM OF THE APPELLANT
JASON WILLIAM COWAN

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. Two men robbed a Subway restaurant in Regina, Saskatchewan, on July 7, 2016. The main perpetrator wore a bandana to cover his face and brandished a large knife at the restaurant's only employee. The other perpetrator stood watch at the restaurant door. Neither perpetrator was identified by the employee, although video surveillance showed the main perpetrator was wearing distinctive shoes. Several days after the robbery, and following an anonymous tip, the police investigation focused on the appellant, Jason Cowan. Mr. Cowan was arrested at a residence about ten blocks away from the Subway restaurant and was charged with armed robbery contrary to section 344 of the *Criminal Code* and having his faced masked with intent to commit robbery contrary to section 351(2) of the *Criminal Code*.

2. At a trial before a judge sitting alone, the Crown advanced two mutually exclusive theories of Mr. Cowan's liability. More specifically, under the first theory, the Crown asserted that Mr. Cowan was the masked perpetrator of the robbery [the principal theory]. The Crown tendered evidence from police surveillance that showed Mr. Cowan wearing distinctive shoes that were similar to the ones worn by the masked perpetrator, as well as a witness who testified that Mr. Cowan had admitted to her that he had committed the robbery. Further, the Crown tendered a statement Mr. Cowan had given to the police upon his arrest in which Mr. Cowan provided an alibi. The Crown then called a witness to demonstrate Mr. Cowan's alibi was fabricated.

3. Under the second theory, the Crown asserted that other individuals were the perpetrators, but that Mr. Cowan had abetted or counselled these other individuals and was therefore a guilty of the offence by virtue of s. 21(1)(c) and/or s. 22(1) of the *Criminal Code* [the party theory]. The Crown's evidence respecting the party theory arose from Mr. Cowan's same statement to the police, wherein he said that before he left his residence to his purported alibi, he encouraged others to commit the robbery and the others went on to commit the robbery as he had told them to. The party theory was also predicated on the trial judge accepting Mr. Cowan's alibi as true.

4. The trial judge, however, found Mr. Cowan's alibi to be false. Ultimately, the trial judge found that the Crown had failed to prove Mr. Cowan's guilt beyond a reasonable doubt on the basis of either theory, and entered an acquittal on both charges.

5. The Crown's appeal to the Court of Appeal was successful. While the Crown failed to convince the Court of Appeal that the trial judge had committed a reversable legal error respecting the principal theory analysis, a majority of the Court of Appeal determined, in written reasons by Kalmakoff J.A. with Ottenbreit J.A. in concurrence, that the trial judge had erred in law in his analysis of the party theory by restricting his consideration to whether the Crown had proven Mr. Cowan abetted/counselled the principals in the robbery, as opposed to properly considering whether Mr. Cowan had abetted/counselled any other person in the commission of the robbery. The majority of the Court of Appeal ordered new trial but limited the issue at the retrial to the Crown's party theory.

6. Jackson, J.A. dissented and would have dismissed the Crown's appeal in its entirety. In her view, the trial judge committed no legal error when assessing the party theory, but even if the trial judge had done so, Jackson J.A. was of the view that any error was immaterial to the verdict because of how the trial judge had analyzed, and fundamentally rejected, Mr. Cowan's statement to the police. Mr. Cowan appeals to this Court as of right on the basis of the dissent of Jackson J.A.

B. STATEMENT OF FACTS

The Evidence at Trial

7. Around 9:30 p.m. on July 7, 2016, two men entered a Subway restaurant on Victoria Avenue in Regina, Saskatchewan. One of the men had his face masked with a bandana. The masked man approached the counter and pulled out of large knife. The other man stood by the front door of the restaurant. The masked man jumped over the counter and instructed the only store employee to give him all the money. The employee complied. The two perpetrators fled the store, taking approximately $400.00 and a coin dispenser.

Feb. 20, 2018, Trial Transcript, Appellant's Record ("AR") Vol II Tab 10, at T7 line 30 – T18 line 41.

8. The restaurant employee could not identify either of the perpetrators. The police responded to the employee's call to 911 and viewed the restaurant's video surveillance system. The masked perpetrator could be seen on the video surveillance system wearing gloves and distinctive running shoes. Efforts by the police to track the perpetrators with a canine unit were unsuccessful.

Feb. 20, 2018, Trial Transcript, AR Vol II Tab 10, at T22 line 9 – T24 line 17.

9. Six days later, the police received an anonymous tip that implicated Mr. Cowan in the robbery. To investigate the tip, the police surveilled Mr. Cowan and took photographs of him. The police photographed Mr. Cowan wearing running shoes that closely resembled the distinctive shoes worn by the masked robber.

Feb. 20, 2018, Trial Transcript, AR Vol II Tab 10, at T48 line 23 – T49 line 36.

10. On August 11, 2016, the police executed a search warrant at a residence on McDonald Street – which was a little more than ten blocks from the Subway restaurant. The police arrested an occupant of the house named Matthew Tone on an outstanding warrant. Mr. Tone was also detained as part of the robbery investigation. Mr. Tone provided a warned statement to the police about the Subway robbery, but he was subsequently released without being charged for the robbery. Mr. Tone was on the Crown's witness list for Mr. Cowan's trial, but he did not respond to the Crown's subpoena. When Mr. Tone failed to appear, the Crown tried to have his evidence from Mr. Cowan's preliminary inquiry admitted under the principled exception to the hearsay rule, but the trial judge ruled Mr. Tone's evidence to be inadmissible as not being sufficiently reliable.

Feb. 22, 2018, Trial Transcript, AR Vol III Tab 10, at T179.
Voir Dire Judgment, AR Vol 1 Tab 3.

11. Later in the day they executed the search warrant, the police happened to come upon Mr. Cowan. He was arrested and gave a recorded statement to the police. The video and the transcript of Mr. Cowan's statement to the police were entered into evidence at his trial.

Feb. 21, 2018, Trial Transcript, AR Vol III Tab 10, at T104 line 17 – T105 line 39.

12. In his statement, Mr. Cowan denied committing the robbery. He said he had an alibi. He told the police that he had been at the McDonald Street residence with Mr. Tone and a man named Dustin Fiddler until about 5:00 p.m. on July 6, 2016. He said he then left to go to the house of a friend named Jenna Tiszauer, where he stayed until about 11:00 p.m. He said he walked back to the McDonald Street residence and arrived around midnight. He told police that when he left, Mr. Tone and Mr. Fiddler complained about having no money, but by the time Mr. Cowan got back to the McDonald Street residence, Mr. Tone and Mr. Fiddler had come up with some money to purchased drugs and alcohol.

Interview Transcript, AR Vol III Tab 12, at pp 6-7, 10-11, and 20.

13. Mr. Cowan went on to tell the police that the men at the McDonald Street residence were talking about how they needed money so he told them "how to do a robbery, what to say, how to do it, how long to be in there". While Mr. Cowan initially told the police that he was with Mr. Tone and Mr. Fiddler at the McDonald Street residence, he later said that he was speaking to Mr. Fiddler, Mr. Tone, a man known as "Little Man" and a man named Bradley Robinson. Mr. Cowan would later say that Little Man and Mr. Robinson did the robbery because after Mr. Cowan returned from Ms. Tiszauer's house, the others told him that Mr. Robinson and Little Man did the robbery how Mr. Cowan had told them to.

Interview Transcript, AR Vol III Tab 12, at pp 25, 32; 35-37.

14. When shown still photographs from the Subway surveillance video, Mr. Cowan identified Little Man as the person standing at the door, and Mr. Robinson as the man with the knife. He later told the police that Mr. Tone and Mr. Fiddler drove Mr. Robinson and Little Man to the restaurant and that Mr. Tone and Mr. Fiddler waited in the vehicle during the robbery.

Interview Transcript, AR Vol III Tab 12, at pp 26 and 41.

15. A police witness provided an opinion that Mr. Cowan's height, weight, and stature were the same as the robber who was armed with the knife. When the police interviewed Mr. Cowan, Mr. Cowan acknowledged that the man with the knife could not have been Mr. Tone because Mr. Tone was taller. He also acknowledged that it could not have been Mr. Fiddler because Mr. Fiddler was a much larger person.

Dec. 13, 2017, Trial Transcript, AR Vol II Tab 9, at T7 lines 24-28.
Interview Transcript, AR Vol III Tab 12, at pp 20, 21, and 46.

16. Ms. Tiszauer testified at trial and said that Mr. Cowan approached her near the end of July, 2016. She testified that Mr. Cowan asked if she would provide him with an alibi, even though she had not been with him on the evening of July 7, 2016.

Dec. 14, 2017, Trial Transcript, AR Vol II Tab 9, at T96-97, 102-103.

17. The Crown also called a woman named Tara Regan. She testified that on some unspecified date in the summer of 2016, she went to the McDonald Street residence for a drink. She said that Mr. Cowan, Mr. Tone, and Mr. Fiddler were there drinking, when Mr. Cowan told them to look up Crime Stopper's information about the Subway robbery. Ms. Regan said that Mr. Cowan then told her that he had done the robbery.

Feb. 21, 2018 Trial Transcript, AR Vol III Tab 10, at T118 line 14 – T120 line 17.

18. Mr. Cowan did not testify at trial. The defence called Nicole Miller, who said that Mr. Tone told her that he, "Little Man", and another person committed the robbery.

Feb. 23, 2018, Trial Transcript, AR Vol II Tab 11, at T4-6 and 11.

The Trial Judge's Reasons for Judgment

19. In closing submissions, the Crown advanced two alternative theories of the case. Its primary theory was that Mr. Cowan was the masked robber in the Subway restaurant and, as such, he was guilty as a principal offender. The Crown emphasized the strength of the circumstantial evidence, including the fabricated alibi, along with the evidence of Ms. Regan to suggest that Mr. Cowan was the person who entered the Subway armed with the knife. The Crown further argued that Mr. Cowan demonstrated knowledge in his statement to the police that only the main perpetrator should have known.

Feb. 26, 2018, Trial Transcript, AR Vol III Tab 11, at T38 line 40 – T39 line 11.

20. The Crown also argued, in the alternative, that Mr. Cowan was guilty as a party to the offence by virtue of s. 21(1)(c) and/or s. 22(1) of the *Criminal Code* because, by providing instruction to the men he named in his warned statement on how to commit a robbery in order to solve their financial problems, he encouraged and/or counselled them to commit that offence.

Feb. 26, 2018, Trial Transcript, AR Vol III Tab 11, at T39 line 13 – T40 line 23.

21. The party theory was advanced by the Crown as a subsidiary argument that was dependent on the trial judge making certain findings, as was explained by Crown Counsel in argument:

> I want to speak, My Lord, about the Crown's subsidiary argument that if the Court – if the Court has a reasonable doubt about the identity of the accused and if the Court accept Mr. – Mr. Cowan's evidence that he had intimate knowledge of the details of the robbery, because he was told by his friend when he got back from Jenna Tiszauer, then the Court should also take into consideration the conversation that Mr. Cowan has admit that he had with his roommates priors.
>
> [Emphasis added]

Feb. 26, 2018, Trial Transcript, AR Vol III Tab 11, at T39 lines 13-18.

22. The Crown further added that its subsidiary argument was contingent on the trial judge determining that Mr. Cowan was "truthful" about the advice he gave.

Feb. 26, 2018, Trial Transcript, AR Vol III Tab 11, at T40 line 41.

23. In his reasons for judgment, the trial judge found that the Crown had failed to prove Mr. Cowan's guilt beyond a reasonable doubt, on the basis of either theory, and entered an acquittal.

24. As to the principal theory, the trial judge rejected the evidence given by Ms. Regan. He found her to be an unsavoury witness whose testimony needed to be assessed in accordance with the principles set out in *R v Vetrovec*, [1982] 1 SCR 811. The trial judge determined that he was not prepared to accept Ms. Regan's testimony as either reliable or trustworthy, finding that although there were "some circumstances which might well be confirmatory of the fact that Mr. Cowan was the principal robber", that evidence did "not support the evidence given by Ms. Regan that the accused admitted to her that he did it":

Trial Judgment, AR Vol I Tab 4, at para 37.

25. Having rejected Ms. Regan's testimony, the trial judge went on to review the remainder of the evidence. He determined that without Ms. Regan's evidence the case against Mr. Cowan as a principal offender was circumstantial. He instructed himself in accordance with the approach to

circumstantial evidence set out in *R v Villaroman*, 2016 SCC 33, [2016] 1 SCR 1000 [*Villaroman*], then went on to say:

> I cannot and do not accept the testimony of Ms. Regan as reliable or trustworthy. Nor do I find that the remaining circumstantial evidence respecting the identity of the accused as a principal committing this robbery satisfies me, beyond a reasonable doubt, that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty. There are "other reasonable possibilities" that arise from the whole of the circumstances testified to by the witnesses or as reflected in the exhibits presented at the trial respecting the identity of the principal committers of this robbery. The evidence given establishes that there were at least three persons resident at [the McDonald Street house] at the time this robbery was committed. Additionally, a number of other individuals were visiting and drinking, using drugs and partying on, and according to the statement of the accused, some days before, the robbery date including the individual known as "littleman". These circumstances, together with the statements made by Mr. Cowan during his police interview and the confirmation that is found in Ms. Regan's testimony that some of the persons named by Mr. Cowan were present at [the McDonald Street house], all support the possibility that others, and not the accused, might well have been the principal committers of this robbery. The robbers may or may not have been the accused and/or any of the other persons including Mr. Tone and "littleman" who were present at [the McDonald Street house] the day of the robbery. I therefore find the accused not guilty as having committed this robbery as a principal.
>
> *Trial Judgment*, AR Vol I Tab 4, at para 42.

26. The trial judge then turned to consider the party theory. He found that Mr. Cowan's guilt had not been proven on that basis either. His reason respecting the party theory were as follows:

> The position of the Crown relies, in the alternative, upon the contention that Mr. Cowan, if not guilty as a principal robber, is guilty as a party for aiding, abetting or counselling the commission of the offence by others.
>
> In his interview statement and those passages of it quoted in this judgment, Mr. Cowan clearly admits that he told the persons, which he claimed committed this robbery, namely "Matthew" (taken to be Matthew Tone) and "littleman" how to do it. The evidence of [the Subway employee] and the Subway video confirms that the counselling and instructions that the accused gave respecting how this robbery should be done compares very closely with how it was committed. The language used by the principal robber and the statements he made are virtually identical to the advice Mr. Cowan says he gave to those he claims committed it.

The problem with this position of the Crown, that is that the accused should be found guilty, if not as a principal who committed the robbery, as a party to it pursuant to ss. 21 andhttps://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html - sec22_smooth 22 of the *Criminal Code*, is that there is not sufficient evidence implicating or proving, beyond a reasonable doubt, that Matthew Tone and "littleman" were the persons involved in committing this robbery.

Some evidence in this respect is given by Ms. Nicole Miller, the sole witness called by the defence, as well as the statements made by the accused during his interview with the police. As I noted at paras. 31 and 32 of this judgment, Ms. Miller was dating Matthew Tone at the time of the robbery. She testified that, in the presence of Tara Regan and Dustin Fiddler, Matthew Tone told her that he did the robbery with "littleman". She testified, however, that she thought Mr. Tone was joking when he said he was involved in the robbery. This, as defence counsel acknowledged, was hearsay evidence not tendered for the truth of the statement but simply that it was made. The Crown had subpoenaed Mr. Tone to give evidence at the trial and during the trial made an application which I granted pursuant to ss. 698(2)(b) authorizing a warrant for his arrest. These efforts remained unsuccessful and he did not appear to give evidence at the trial. Therefore, we are left only with his hearsay statement and the statement of the accused implicating him as a principal in this robbery. On this latter point, the accused himself appeared confused. At para. 27 of this judgment (and p. 29 of the transcript) Mr. Cowan refers to "Bradley" being "the other guy" committing the robbery. No evidence exists respecting such an individual.

The accused, too, I find to be of unsavoury character. By his own admissions in his statement, he is a twice convicted robber. He clearly has a motive to fabricate and his statement given to the police has many inconsistencies and contradictions. These include his statements regarding who was present at 2234 McDonald Street the day of the robbery, his conflicting statements regarding the change dispenser stolen from the Subway Restaurant and, most significantly, his lie to the police about being with his friend "Jen" on the date and during the time that this robbery was committed, a clearly fabricated alibi as Ms. Tiszauer testified at the trial.

I cannot be satisfied that the Crown has proven, beyond a reasonable doubt, based upon the hearsay evidence of Ms. Miller and the police statement given by the accused to the police, but not testified to at the trial, that Matthew Tone and "littleman" were involved as principals in the commission of this robbery. Indeed, Cst. Lawrence testified that after Tone was arrested and interviewed, he came to the conclusion that there was insufficient evidence connecting him to the robbery with the result he was released and not charged. The identity of "littleman", other than he was thought to be a cousin to Dustin Fiddler, was not determined, nor does there appear to have been any follow-up investigation of him.

> In the circumstances, before the accused can be convicted of aiding, abetting or counselling the commission of this Subway robbery by Matthew Tone and "littleman" as the accused at some point in his statement says they did, I must be satisfied, beyond a reasonable doubt, that it was Matthew Tone and "littleman" who participated as principals in the commission of this crime. The evidence that I have reviewed does not satisfy me, beyond a reasonable doubt, that they did so and accordingly that the accused aided, abetted or counselled the persons who did commit this crime within the meaning of ss. 21 and 22 of the Criminal Code.

Trial Judgment, AR Vol I Tab 4, at paras 43-49.

The Court of Appeal for Saskatchewan's Reasons for Judgment

27. The Crown's appeal to the Saskatchewan Court of Appeal was successful. In written reasons by Kalmakoff J.A., with which Ottenbreit JJ.A. concurred, the majority of the Court of Appeal determined that that criminal liability on the basis of s. 21(1)(c) and s. 22(1) of the *Criminal Code* should not be limited to cases where the accused person abets or counsels the principal offender, and therefore the trial judge misdirected himself in law by finding that Mr. Cowan could not be convicted of robbery on the basis of abetting/counselling the commission of the Subway robbery unless the Crown proved "beyond a reasonable doubt, that it was Matthew Tone and 'littleman' who participated as principals".

Court of Appeal Reasons for Judgment, AR Vol I Tab 5, at paras 36-37.

28. The majority of the Court of Appeal determined that the trial judge's error was sufficiently material to his verdict because it appeared to the majority that the alleged error caused the trial judge to overlook "important evidence that supported the Crown's party theory" from Mr. Cowan's statement to the police.

Court of Appeal Reasons for Judgment, AR Vol 1 Tab 2, at para 39.

29. Jackson J.A. dissented and would have dismissed the Crown's appeal in its entirety. In her view, the trial judge made no legal error because the trial judge was responding to the evidence and the submissions, which narrowed the case to a consideration of who had committed the crime, and the trial judge named the most obvious candidates. Jackson J.A. was further of the opinion that if the trial judge did commit an error of law, it did not warrant overturning Mr. Cowan's acquittal.

Court of Appeal Reasons for Judgment, AR Vol 1 Tab 2, at para 53.

PART II: QUESTIONS IN ISSUE

ISSUE 1: Did the majority of the Court of Appeal err in determining the trial judge committed an error in law by limiting himself to considering two named individuals only, apart from Mr. Cowan, as being principals only to the offence? Yes.

ISSUE 2: Did the majority of the Court of Appeal err in determining that if the trial judge had so erred, the Crown had discharged the burden upon it to demonstrate that the error might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal? Yes.

PART III: ARGUMENT

A. The trial judge did not err in law in his analysis of the party theory.

30. Mr. Cowan respectfully adopts and recommends to this Honourable Court the reasons of, and conclusions reach by, Jackson J.A. in her dissenting reasons. The arguments offered here are intended to supplement, rather than replace, those reasons.

31. The approach to be employed in reviewing a trial judge's reasons for error was expressed by this Court in *Villaroman*, at para 15:

> [A] trial judge's reasons for judgment should not be "read or analyzed as if they were an instruction to a jury": *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (C.A.), at p. 525. Rather, the reasons must be "read as a whole, in the context of the evidence, the issues and the arguments at trial, together with 'an appreciation of the purposes or functions for which they are delivered'": *R. v. Laboucan*, 2010 SCC 12 (CanLII), [2010] 1 S.C.R. 397, at para. 16, citing *R. v. R.E.M.*, 2008 SCC 51 (CanLII), [2008] 3 S.C.R. 3, at para. 16; see also *R. v. C.L.Y.*, 2008 SCC 2 (CanLII), [2008] 1 S.C.R. 5, at para. 11.

32. This approach to the interpretation of trial judge's reasons was more recently reviewed in *R v Chung*, 2020 SCC 8 at para 13, 443 DLR (4th) 393:

> When interpreting a trial judge's reasons, appellate courts should not parse the reasons of the trial judge in a line by line search for errors. Instead, the reasons are to be "read as a whole, in the context of the evidence, the issues and the arguments at trial, together with 'an appreciation of the purposes or functions for which they are delivered'" (*R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at para. 16, quoting *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 16). Appellate courts must attempt to understand the reasoning of the trial judge. However, even if the trial judge articulates the right test, appellate courts may find an error of law if the judge's reasoning and application demonstrate a failure to properly apprehend the law (*George*, at para. 16).

33. The majority of the Court of Appeal in this case determined that that criminal liability on the basis of s. 21(1)(c) and s. 22(1) of the *Criminal Code* should not be limited to cases where the accused person abets or counsels the principal offender, and therefore the trial judge misdirected himself in law by finding that Mr. Cowan could not be convicted of robbery on the basis of abetting/counselling the commission of the Subway robbery unless the Crown proved "beyond a reasonable doubt, that it was Matthew Tone and 'littleman' who participated as principals". In the majority's view, with which Jackson J.A. ultimately agreed, party liability as an abettor or counsellor may extend to a person who abets/counsels any other person to commit an offence, whether that other person is themselves a principal or a party to the offence.

34. Sections 21 and 22 of the *Criminal Code* describe certain ways in which a person may be a party to an offence. They read:

> **Parties to offence**
> 21(1) Every one is a party to an offence who
>
> (a) actually commits it;
>
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> (c) abets any person in committing it.

> **Common intention**
> (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.
>
> **Person counselling offence**
> 22(1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
>
> **Idem**
> (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
>
> **Definition of counsel**
> (3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

35. Mr. Cowan agrees that nothing in the language of the statute limits party liability to abetting or counselling the principal offenders. Despite this, it is common in submissions and judgments to refer to the person who "actually commits" an offence, as those words are used in s. 21(1)(a), as a "principal" and to a person who aids or abets any person committing the offence as a "party". For example, in *R v J.F.*, 2013 SCC 12 at para 39, [2013] 1 SCR 565, this Court described party liability as follows:

> [T]o be a party to an offence, a person must aid or abet the principals "in the commission of the offence": (citations omitted).
>
> [Emphasis added]

36. Mr. Cowan submits that the majority of the Court of Appeal therefore erred by seizing onto specific words in the trial judge's reasons instead of reviewing the reasons as a whole and in the context of the evidence and arguments in the case. The trial judge's analytical approach in this case demonstrated that, while there were portions of his reasons that sought proof of Mr. Tone and Little Man as principals, when read as a whole the trial judge was not limiting his consideration of the "principals" but overall to "persons involved" in committing this robbery, given the trial

judge's reference to the same at paragraph 45 of the trial judgment. The trial judge's focus throughout his decision was on the identity of the perpetrators – and, relatedly, Mr. Cowan's connection to the perpetrators.

37. Mr. Cowan submits that the trial judge did not lose focus on the issue of the identity of the perpetrators, particularly in light of the Crown's primary theory that Mr. Cowan himself was the main perpetrator. The Crown therefore took pains to negate that anyone other than Mr. Cowan had committed the robbery, and the Crown indicated that the Court should only consider its subsidiary argument if the Court accepted that Mr. Cowan's intimate knowledge of the details of the robbery came from being told by his roommates after he "got back from Jenna Tiszauer".

38. As stated by Jackson J.A., here, at most, with his references to "principals" rather than "perpetrators", the trial judge did not re-state the complete law regarding how an accused can be found guilty as a party when he indicated his conclusion, but Mr. Cowan's submits that the trial judge was responding to the evidence and the submissions made to him. The trial judge mentioned Mr. Tone and littleman because they were the obvious parties other than Mr. Cowan himself and their role, such as it was described by the Crown, was as principals in the commission of the offence. Mr. Cowan therefore submits that the majority of the Court of Appeal therefore erred in determining that the trial judge committed an error of law in his analysis respecting the Crown's party theory.

B. If there was an error, it was immaterial to the verdict.

39. Mr. Cowan further submits that even if the trial judge made an error of law in his analysis of the Crown's party theory, any error was immaterial to the ultimate verdict. To overturn an acquittal, the Crown must show an error about which there is a "reasonable degree of certainty" of its materiality: *R v George*, 2017 SCC 38 at para 27, [2017] 1 SCR 1021. Fish J., writing for the majority in *R v Graveline*, 2006 SCC 16 at para 14, 2006 1 SCR 609, put the burden on the Crown in this way:

> It has been long established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused

> would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.

40. An appeal Court's focus should be on an objective basis, looking at the seriousness of the error's potential impact and the effect that the error could have had on the trial of fact's reasoning process: *R v S.B.*, 2016 NLCA 20 at para 96, 377 Nfld & PEIR 84, per Green C.J.N.L.

41. Mr. Cowan submits that if the trial judge committed any errors of law in his analysis on the party theory, any errors were immaterial to the trial judge's verdict because the trial judge clearly did not accept the premise on which the Crown's party theory was based.

42. Under the Crown's main theory of liability, the Crown chose to confine itself to proving that Mr. Cowan was the principal offender. The Crown attempted to use Mr. Cowan's statement to the police in order to prove as much, by showing the Mr. Cowan was lying about his alibi. But under its second theory of liability, the Crown submitted that Mr. Cowan abetted or counselled one or more other persons as parties in the commission of the robbery, but this theory was only advanced if Mr. Cowan's obvious lie about his alibi turned out to be true.

43. The trial judge in this case had to find a clear connection between Mr. Cowan's alleged act of abetting or counselling, and the actual commission of the robbery: *R v Dooley*, 2009 ONCA 910 at para 120, 249 CCC (3d) 449; *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 60, [2005] 2 SCR 100. This connection required the trial judge to accept Mr. Cowan's statement that he counselled/abetted others who went on to commit the robbery as true.

44. Mr. Cowan submits that the trial judge did not accept the Crown's party theory because the trial judge could not safely accept as fact anything from Mr. Cowan's statement to the police. The trial judge made specific findings about Mr. Cowan's credibility, stating (at para 46 and 47):

> Therefore, we are left only with his hearsay statement and the statement of the accused implicating him as a principal in this robbery. On this latter point, the accused himself appeared confused. At para. 27 of this judgment (and p. 29 of the transcript) Mr. Cowan refers to "Bradley" being "the other guy" committing the robbery. No evidence exists respecting such an individual.
>
> The accused, too, I find to be of unsavoury character. By his own admissions in his statement, he is a twice convicted robber. He clearly has a motive to fabricate and his statement given to the police has many inconsistencies and contradictions. These include his statements regarding who was present at 2234 McDonald Street the day of the robbery, his conflicting statements regarding the change dispenser stolen from the Subway Restaurant and, most significantly, his lie to the police about being with his friend "Jen" on the date and during the time that this robbery was committed, a clearly fabricated alibi as Ms. Tiszauer testified at the trial.
>
> [Emphasis added]

45. Notably, the trial judge found as a fact that Mr. Cowan lied to the police about his alibi. Proceeding from that basis, it follows that the trial judge did not accept Mr. Cowan's statements as to the conversation that he had with the other men he identifies in his statement. As is evident from the trial judge's reasons, the trial judge was not prepared to find that Mr. Cowan was the masked robber. The trial judge was also not prepared to find either Mr. Tone or Little Man to be the masked robber. The trial judge's references to the lack of evidence respecting Mr. Robinson must in this context be taken as the trial judge's expression of an opinion that he would not have been prepared to find that Mr. Robinson was the masked robbery either. Who, then, does the Crown suggest was the masked robber?

46. Any misdirection in law in the trial judge's analysis of the party theory was accordingly inconsequential to the verdict. On an objective basis, it cannot reasonably be said that the trial judge's reasoning process would have changed had he made more specific reference to Mr. Fiddler as a perpetrator, or to the other men as parties to the offence. Nor, for that matter, would it have mattered if the trial judge had only sought to establish the identities of the perpetrators as subsidiary facts on a balance of probabilities. Although the trial judge may not have expressly stated that he rejected Mr. Cowan's inculpatory statements to the police, it is clear from the trial judge's reasons as a whole that the trial judge was not prepared to accept Mr. Cowan's inculpatory statements to the police as fact either. As put by Jackson J.A. at para 92 of her dissenting reasons:

> We are focussed on the materiality of the trial judge's error of referring to Mr. Tone and littleman as principals only. From this, the Crown asks the Court to conclude that the trial judge did not consider them or anyone else as parties. But, in assessing the materiality of this error, we cannot lose sight of the fact that the trial judge concluded that the Crown had not proven beyond a reasonable doubt that Mr. Tone or littleman were principals because the only evidence the trial judge had was Mr. Cowan's statement. If Mr. Cowan's statement was not sufficient to permit the trial judge to draw the inference that Mr. Tone or littleman were principals, it would not have supported the less obvious inferences that they played a different role in the offence or that anyone else was a party. This is so because the evidence establishing this aspect of the offence came from the exact same source, i.e., Mr. Cowan's statement.

47. In the words of *Graveline*, the Crown's appeal was based on the purely hypothetical possibility that the verdict would not necessarily have been the same, because the trial judge had rejected the premise upon which the Crown' advanced its party theory. The trial judge could not accept any of Mr. Cowan's statement as true, and therefore he could not find that Mr. Cowan had in fact said anything to any other person at the residence. At bottom, the trial judge could not be certain who robbed the Subway, and therefore he could not accept that Mr. Cowan had abetted or counselled someone in the commission of the robbery. Mr. Cowan submits that the majority of the Court of Appeal thus erred in concluding that if there was an error, it was material to the verdict.

PART VI: SUBMISSIONS ON COSTS

48. Mr. Cowan does not seek costs and asks that none be awarded against him.

PART V: ORDER SOUGHT

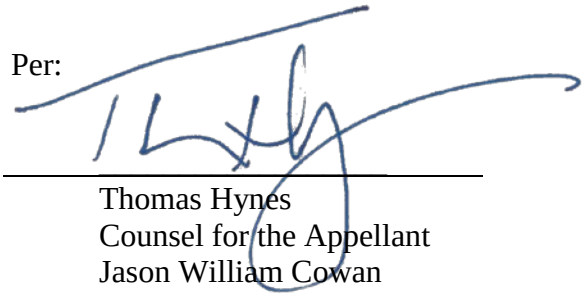
49. Mr. Cowan respectfully requests that the appeal be allowed and the acquittal entered by the trial judge restored.

PART VI: IMPACT OF ANY ORDER, RESTRICTION OR BAN

50. Not applicable. This matter is not subject to any sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation or restriction on public access to information in the file.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21 DAY OF OCTOBER 2020.

Per:



Thomas Hynes
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Jason William Cowan

PART VII: TABLE OF AUTHORITIES

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