File No. 39301

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN)

BETWEEN:

JASON WILLIAM COWAN

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN **Respondent**
(Appellant)

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Appellant)

- and -

JASON WILLIAM COWAN **Respondent**
(Respondent)

FACTUM OF THE RESPONDENT/APPELLANT, HER MAJESTY THE QUEEN

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

OFFICE OF THE ATTORNEY GENERAL FOR SASKATCHEWAN
300 - 1874 Scarth Street
Regina, SK S4P 4B3

Pouria Tabrizi-Reardigan
Tel: (306) 787-5490
Fax: (306) 787-8878
Email: pouria.tabrizireardigan@gov.sk.ca

Counsel for the Respondent/Appellant, Her Majesty the Queen

GOWLING WLG (CANADA) LLP
Suite 2600, 160 Elgin Street
Ottawa ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Respondent/Appellant, Her Majesty the Queen

GERRAND RATH JOHNSON LLP
#700 – 1914 Hamilton Street
Regina, SK S4P 3N6

Thomas Hynes
Tel: (306) 522-3030
Fax: (306) 522-3555
Email: thynes@grj.ca

Counsel for the Appellant/Respondent, Jason William Cowan

GOLDBLATT PARTNERS LLP
500 – 30 Metcalfe Street
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: (613) 482-2463
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for Counsel for the Appellant/Respondent, Jason William Cowan

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PART I – OVERVIEW AND FACTS

Overview

1. The appellant[1] was acquitted of an armed robbery despite overwhelming evidence against him. In his statement to the police, the appellant showed intimate knowledge of the crime, admitted the masked robber was wearing his shoes, admitted to instructing his four friends how to commit a robbery and his instructions matched how the crime was committed. The Crown argued he was either guilty of committing the crime himself or guilty of counselling or abetting his friends.

2. The trial judge acquitted the appellant. He was not satisfied the appellant was the masked robber because his friends might have committed the crime instead. He was also not satisfied that the appellant had abetted or counselled the commission of the offence, because the identity of the masked robber could not be established with certainty. The Crown appealed.

3. According to the majority judges of the Saskatchewan Court of Appeal, the trial judge committed a legal error by requiring proof of the masked robber's identity as a precondition to finding the appellant guilty of being a party to the offence. The majority judges concluded the trial judge had focused on irrelevant criteria at the cost of overlooking evidence that supported conviction. The error and its effect on the acquittal called for a new trial. The majority judges did not inspect the lower court's principal liability analysis for errors. Instead they reasoned that the errors alleged by the Crown would not have materially affected the outcome. As a result, they limited the new trial to the issue of party liability. The Crown has appealed this limiting order because it is contrary to the interests of justice and violates principles of appellate review.

4. A dissenting judge of the Court of Appeal would have dismissed the Crown's appeal in its entirety. In her view, the trial judge's party liability analysis was not erroneous and the judge spoke in terms of proof of the principals' identity only because he was responding to the evidence and submissions. She also reasoned that the alleged error would not have affected the outcome

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[1] For ease of reference, we refer to Jason William Cowan as the appellant in sections covering Mr. Cowan's appeal as well as the Crown's appeal.

because the Crown's case relied on the appellant's statement, which the trial judge must be taken to have rejected. The dissenting opinion was a product of misapprehensions of the record and the law. The appellant's appeal as of right should be dismissed.

Summary of Facts

5. The dissenting opinion advanced a different interpretation of the trial judgment based on the evidence and the arguments at trial. Because of this, although we generally agree with the facts laid out by the appellant, a more comprehensive review of the trial record is necessary.

The Circumstances of the Crime

6. At trial the Crown called a number of police officers and Darshit Patel, a Subway restaurant employee, to describe the circumstances of the crime and the investigation that followed it. Security footage from the Subway and still photographs from the video were entered as exhibits.

7. Around 9:30 p.m. on July 7, 2016, two men entered a Subway restaurant. One man stayed by the door while the other went inside and robbed Mr. Patel who was the only person working at the restaurant.[2] The man who went inside wore a black jacket and a face mask that covered all but his eyes.[3] He also wore sport shoes but Mr. Patel did not see a brand name on them.[4] The man who had stayed by the door was not wearing a mask. Mr. Patel's attention was on the masked robber so he did not know what the man at the door looked like.[5]

8. The masked man held a knife and said "I'm here just to take the money."[6] Mr. Patel ran to the back of the restaurant but the armed intruder told Mr. Patel to stop or he would kill him.[7] The intruder led the employee to the front counter and instructed him to put the money in the bags

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[2] Feb 20, 2018 Transcript, AR Vol II Tab 10 at T8/36 – T9/6; T11/1 – 9; T19/25 – 28.
[3] Feb 20, 2018 Transcript, AR Vol II Tab 10 at T9/13 – 15; T12/1 – 27.
[4] Feb 20, 2018 Transcript, AR Vol II Tab 10 at T12/31 – 33; T27/3 – 4.
[5] Feb 20, 2018 Transcript, AR Vol II Tab 10 at T28/19 – T29/5.
[6] Feb 20, 2018 Transcript, AR Vol II Tab 10 at T11/14 – 38.
[7] Feb 20, 2018 Transcript, AR Vol II Tab 10 at T15/18 – 23.

hanging by the till. Mr. Patel complied.[8] The offender also asked for the coin dispenser and Mr. Patel gave it to him.[9] The two men then fled the scene by heading south.[10]

9. The police used a canine unit and the dog picked up a track leading south but lost it eventually.[11] The track led the police to a couple of dumpsters on the south-west corner of the Subway building where the police found a 6 to 8-inch kitchen knife.[12] The appellant's residence at 2234 McDonald Street was in a south-west direction from the Subway about ten blocks away.[13]

10. On July 13, 2016, Cst. Griffiths received an anonymous tip implicating the appellant in the crime.[14] As part of a surveillance operation, the police took photographs of the appellant around town. The photographs revealed the appellant was wearing a pair of distinctive Reebok running shoes, predominately white in colour, with black shoe laces, a black toe, black markings on the sides and white straps hanging loosely to the sides.[15] Cst. Griffiths compared these shoes to the robbery photographs and believed that the distinctive shoes and the manner in which they were worn were very similar.[16] Cst. Griffiths said that despite this similarity, it was not clear the shoes in the robbery photographs bore the Reebok brand.[17]

11. On August 11, 2016, the police executed a search warrant at 2234 McDonald Street and arrested Matthew Tone on an unrelated warrant and detained him on the robbery investigation. He provided a warned statement but was released without being charged for that offence.[18] The police arrested the appellant after dropping off Matthew Tone at the house on the same day.

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[8] Feb 20, 2018 Transcript, AR Vol II Tab 10 at T16/6 – T17/15.
[9] Feb 20, 2018 Transcript, AR Vol II Tab 10 at T17/17 – T18/38.
[10] Feb 20, 2018 Transcript, AR Vol II Tab 10 at T19/33 – 38.
[11] Feb 21, 2018 Transcript, AR Vol III Tab 10 at T189/41 – T190/30.
[12] Feb 21, 2018 Transcript, AR Vol III Tab 10 at T175/15 – 39.
[13] Feb 21, 2018 Transcript, AR Vol III Tab 10 at T176/29 – 41; T189/24 – 30; See CA Reasons, AR Vol I Tab 5 at para 11.
[14] Feb 20, 2018 Transcript, AR Vol II Tab 10 at T48/25 – 27.
[15] Feb 20, 2018 Transcript, AR Vol II Tab 10 at T55/6 – T56/40.
[16] Feb 20, 2018 Transcript, AR Vol II Tab 10 at T49/28 – 36; T57/4 – 9.
[17] Feb 20, 2018 Transcript, AR Vol II Tab 10 at T78/35 – T79/16.
[18] Feb 21, 2018 Transcript, AR Vol III Tab 10 at T179/12 – T180/31.

The Appellant's Statement

12. Cst. Lawrence took a statement from the appellant on August 11, 2016. At trial, Cst. Lawrence testified that the appellant's height, weight and stature was the same as the armed robber.[19]

13. During his statement to the police, the appellant kept adding more details about the crime as the interview progressed.[20] Throughout, the appellant claimed to be concerned about being a 'rat' or a 'snitch.' Initially, he said his housemates Dustin Fiddler and Matthew Tone were responsible for the robbery but added that these men had others commit the crime. He finally named Bradley Robinson and Mr. Fiddler's cousin, nicknamed Littleman, as the men who went to the restaurant while Mr. Tone and Mr. Fiddler waited in a car. The appellant denied personally committing the crime but claimed he told all four men how to commit the robbery.

14. The appellant had been living at 2234 McDonald Street with Dustin Fiddler and Matthew Tone.[21] On the day of the robbery, Mr. Tone and Mr. Fiddler were talking about getting more money and needing more alcohol for the rest of the weekend.[22] The appellant did not want to deal with this so he left to Jenna Tiszauer's house at around 5 p.m., where he stayed until about 11 p.m. and came home around midnight.[23]

15. The appellant said when he left the house Mr. Tone and Mr. Fiddler "didn't have a dime to their name," but they had "an 8 ball of meth" and "there was a lot of change" by the time the appellant returned.[24] The three left to pick up Tara Regan and partied at the house until 4 or 5 in the morning.[25]

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[19] Dec 13, 2017 Transcript, AR Vol II Tab 9 at T7/26 – 28.
[20] Dec 13, 2017 Transcript, AR Vol II Tab 9 at T39/30 – 33; T43/24 – 28; Statement, AR Vol III Tab 12 at p 29.
[21] Statement, AR Vol III Tab 12 at p 7 – 8.
[22] Statement, AR Vol III Tab 12 at pp 6, 10.
[23] Statement, AR Vol III Tab 12 at pp 10, 11.
[24] Statement, AR Vol III Tab 12 at pp 20, 24, 26.
[25] Statement, AR Vol III Tab 12 at p 12.

16. Cst. Lawrence showed the appellant still photographs from Subway's video footage as well as photographs the police had taken of the appellant around town. Cst. Lawrence pointed out the distinctive shoes in both sets of photographs.[26] The appellant admitted the shoes were his,[27] but explained that he would not have committed a robbery wearing something that "identifiable,"[28] that he did not keep his belongings under lock and key,[29] that he was not the only person who wore those types of shoes with the Velcro to the side,[30] and that Mr. Tone or someone else must have taken the shoes and framed him.[31]

17. The appellant then said "Matthew and Dustin did it."[32] The appellant acknowledged that the man with the knife was different in size compared to Matthew Tone or Dustin Fiddler.[33] The appellant then said "they had somebody else do it"[34] and "they had somebody hold the door and they had somebody go in."[35] The appellant admitted that before leaving to Ms. Tiszauer's, he had instructed the group on how to commit a robbery:

> I pretty much told them the day before or even while we were drinking I think how to do a robbery what to say how to do it how long to be in there … Before I left to go to Jen's ... And they were talking about how they needed money and this and that [unintelligible] just go fucking do a robbery man it's easy you're in you're out less than 30 seconds to a minute you make sure you have a ride parked a block away and it's simple you simply just go for the money you don't worry about anything else and you just go … Give me the money that's all I want I'm not gonna hurt you that's it all you say.[36]

18. Initially, the appellant claimed he did not know who had personally committed the robbery but knew that Matthew and Dustin had given a ride to someone to commit the crime.[37] He even

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[26] Statement, AR Vol III Tab 12 at pp 16 – 17.
[27] Statement, AR Vol III Tab 12 at p 29.
[28] Statement, AR Vol III Tab 12 at p 32.
[29] Statement, AR Vol III Tab 12 at p 32.
[30] Statement, AR Vol III Tab 12 at pp 29 – 30.
[31] Statement, AR Vol III Tab 12 at pp 18, 33, 34.
[32] Statement, AR Vol III Tab 12 at p 20.
[33] Statement, AR Vol III Tab 12, at pp 20, 21, 46.
[34] Statement, AR Vol III Tab 12 at p 21.
[35] Statement, AR Vol III Tab 12 at p 25.
[36] Statement, AR Vol III Tab 12 at p 25; see also pp 38, 39 and 41.
[37] Statement, AR Vol III Tab 12 at p 26 and 27.

provided a description of a man who had been at the house prior to the robbery who looked like the actual robber, saying "that's his fucking jacket that he was wearing when he left."[38]

19. Eventually, the appellant said that Mr. Tone and Mr. Fiddler told him that two other men, Bradley Robinson and Littleman, had committed the robbery according to the appellant's instructions.[39] He then clarified that when he was giving his instructions of how to commit a robbery, his audience actually consisted of four people: Littleman, Mathew Tone, Dustin Fiddler and Bradley Robinson.[40]

20. The appellant used Cst. Lawrence's cell phone to search, find and point out Bradley Robinson on Matthew Tone's Facebook account as the person who committed the robbery.[41] The appellant believed this to be the case for a number of reasons. He said Mr. Robinson shared the same weight and height profile as the robber.[42] The appellant said when he returned from Ms. Tiszaure's house, Mr. Robinson was given his share which was about a hundred dollars.[43] He said Mr. Robinson left soon after.[44]

21. The appellant said the "guy at the door is little man" and "the other guy is Bradley."[45] Mr. Tone and Mr. Fiddler waited in Mr. Fiddler's car a block away.[46] At home, the appellant heard the group bragging about the robbery and heard them say they had dropped one of the butcher knives as they were running.[47]

22. Towards the beginning of the interview, the appellant claimed when he got home from Jenna's, he saw "a bunch of change" on the counter and "some metal thing … underneath the

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[38] Statement, AR Vol III Tab 12 at pp 28 – 29.
[39] Statement, AR Vol III Tab 12 at 36.
[40] Statement, AR Vol III Tab 12 at 37.
[41] Statement, AR Vol III Tab 12 at pp 34 – 35.
[42] Statement, AR Vol III Tab 12 at p 35.
[43] Statement, AR Vol III Tab 12 at 36 and 37.
[44] Statement, AR Vol III Tab 12 at 37.
[45] Statement, AR Vol III Tab 12 at p 41; see also p 45.
[46] Statement, AR Vol III Tab 12 at pp 32, 41 and 46.
[47] Statement, AR Vol III Tab 12 at p 41.

deck," and he was told that the object was a piece of a radiator.[48] Later in the interview, the appellant clarified that the "metal thing underneath the stairs" contained change and "they dumped all the change out of it and they put it on the counter."[49]

23. A *voir dire* was held and the appellant's statement was ruled to be voluntary.[50] During the *voir dire*, the trial judge asked the purpose for which the Crown was tendering the statement. The Crown listed a number of reasons, one of which had to do with the appellant abetting the offence by instructing all four men on how to commit the robbery.[51]

24. The appellant did not testify at trial. Matthew Tone was subpoenaed but did not attend Court. The trial judge did not admit the transcript of Matthew Tone's testimony from the preliminary hearing into evidence.[52] The police interviewed Dustin Fiddler[53] but they were not able to confirm the identity of Littleman.[54] Aside from the appellant's statement, no other evidence was led at trial about Bradley Robinson.

Other Witnesses

25. The Crown called Jenna Tiszauer to prove the appellant was not with her when the robbery was committed. Ms. Tiszauer confirmed the appellant was not with her at the time in question. She also testified the appellant had asked her to lie about this in case anybody questioned her.[55] She had initially agreed but changed her mind because she did not want to get in trouble with the law.[56]

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[48] Statement, AR Vol III Tab 12 at p 26.
[49] Statement, AR Vol III Tab 12 at p 42.
[50] Dec 13, 2017 Transcript, AR Vol II Tab 9 at T53.
[51] Dec 13, 2017 Transcript, AR Vol II Tab 9 at T44/37 – 40.
[52] *Voir Dire* Judgment, AR Vol I Tab 3.
[53] Feb 20, 2018 Transcript, Vol II Tab 10 at T71/22 – 24.
[54] Feb 22, 2018 Transcript, AR Vol III Tab 10 at T184/15 – 17.
[55] Dec 14, 2017 Transcript, AR Vol II Tab 9 at T97/7 – 33.
[56] Dec 14, 2017 Transcript, AR Vol II Tab 9 at T100/5 – 11.

26. The Crown also called Tara Regan. She testified that she had gone to the appellant's house for drinks sometime in the summer of 2016.[57] During the visit, the appellant told her that he had committed the robbery with Littleman. Littleman had "held the door open" while the appellant went inside and got a cash register.[58]

27. Defence called Nicole Miller as a witness. She testified that sometime in July 2016, her ex-partner Matthew Tone told her that "him, his friend Littleman and his other buddy had committed the robbery."[59] In cross-examination, Ms. Miller clarified that Mr. Tone told her that he acted as the lookout during the robbery but did not tell her what roles 'his buddy' and Littleman played; neither did he divulge the identity of 'his buddy.'[60] Ms. Miller thought Mr. Tone was joking because she did not think he would commit a robbery.[61]

Arguments at Trial

28. Defence counsel's theory was that Tara Regan, Matthew Tone and Dustin Fiddler committed the robbery.[62] Defence counsel argued that Ms. Regan closely resembled the robber's physical appearance and voice and she was likely the masked robber.[63] Alternatively, defence counsel posited that either Matthew Tone or Littleman could have been the masked robber.[64] Defence counsel also suggested Dustin Fiddler provided the getaway car.[65] As for counselling or abetting, defence counsel argued the Crown had not proved the *actus reus* or *mens rea* for counselling the commission of a crime.[66]

29. The Crown's main argument was that the appellant was the masked robber. The Crown asked the Court to draw an inference that "only the main author of the robbery" would have had

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[57] Feb 21, 2018 Transcript, AR Vol III Tab 10 at T118/6 – 35.
[58] Feb 21, 2018 Transcript, AR Vol III Tab 10 at T120/14 – T121/23.
[59] Feb 23, 2018 Transcript, AR Vol III Tab 11 at T4/10 – 13.
[60] Feb 23, 2018 Transcript, AR Vol III Tab 11 at T8/14 – T9/17.
[61] Feb 23, 2018 Transcript, AR Vol III Tab 11 at T11/5 – 15.
[62] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T19/18 – 20.
[63] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T23/15 – 18; T29/19 – 29.
[64] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T29/32 – 35.
[65] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T26/6 – 7; T29/37 – 38.
[66] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T30/10 – 39.

the detailed knowledge that the appellant possessed about how the crime was committed.[67] For instance, the appellant knew the words the masked robber used inside the restaurant; the appellant spoke about the coin dispenser that the robbers stole; he knew about the type of knife the robbers used and knew that they lost the knife along the way; he knew that one of the culprits kept watch at the door and knew the robbers had a getaway car parked nearby.[68] The appellant also acknowledged that the shoes worn by the masked robber were his.[69] His attempts to fabricate an alibi showed a consciousness of guilt.[70] And, he resembled the masked robber in physical stature.[71]

30. The Crown presented a "subsidiary argument" in case the Court believed the appellant possessed detailed knowledge of the robbery because of what his friends told him after he returned home.[72] As such, the Crown argued that the appellant was guilty by abetting or counselling the offence when he provided specific advice and encouraged the enterprise with the promise of easy money. As mentioned above, the Crown at the *voir dire* stage had named four individuals who were abetted or counselled: "Mr. Fiddler and Mr. Tone, Mr. Bradley and another individual named Littleman."[73] Here, the Crown simply referred to the counselled or abetted individuals as the appellant's roommates, friends or "accomplice."[74]

31. The Crown also addressed Nicole Miller's testimony and argued that it should not be accepted for the truth of its contents. The Crown argued that Ms. Miller's evidence was neutral and did not contradict the Crown's case. This was because Ms. Miller had mentioned three people as being involved in the robbery but she did not know who the third person was.[75]

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[67] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T34/20 – 26.
[68] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T35/19 – T36/36.
[69] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T36/38 – T37/8.
[70] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T37/10 – T38/3.
[71] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T38/28 – 33.
[72] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T39/13 – 18.
[73] Dec 13, 2017 Transcript, AR Vol II at T44/37 – 40.
[74] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T39/18; T39/22; T40/14; T41/1.
[75] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T41/26 – 32.

The Trial Decision

32. The trial judge summarized the evidence including the appellant's police statement. Notably, the trial judge was under the impression that the appellant had named only two individuals, Matthew Tone and Littleman, as the people who committed the crime: "During the interview, he named two others, Matthew Tone and 'littleman' who he claims did this robbery."[76] He repeated this misconception when analysing the liability of the appellant as a party to the offence.[77]

33. Similarly, when he summarized Nicole Miller's testimony, the judge seemed to think that Ms. Miller had mentioned only two culprits: "Matthew Tone … told her … that he did the robbery with 'littleman' a person she really did not know and whose name is still unknown to her."[78] Again, he repeated this misconception when analysing the appellant's liability as a party.[79]

34. The trial judge did not accept the appellant was liable as a principal offender. In reaching this conclusion, the judge was not prepared to accept the evidence of Tara Regan "without more" because she was an unsavoury witness.[80] He moved on to consider the remaining evidence. He said the appellant's considerable knowledge about the robbery was only circumstantial evidence respecting the identity of the people involved in the robbery.[81] Next, the judge found that the shoes depicted in the two different sets of photographs appeared to be dissimilar.[82] He did not mention the appellant's admissions about the shoes.

35. As a result, the judge was not satisfied that the appellant's guilt as the principal offender was the only rational inference that could be drawn from the circumstantial evidence. There was another reasonable possibility. The judge relied on the appellant's police interview and Tara Regan's testimony to conclude that "some of the persons named by Mr. Cowan" who were "present

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[76] QB Reasons, AR Vol I Tab 4 at para 21.
[77] QB Reasons at paras 44 and 49.
[78] QB Reasons at para 32.
[79] QB Reasons at para 46.
[80] QB Reasons at paras 37 – 38.
[81] QB Reasons at para 38.
[82] QB Reasons at para 39.

at 2234 McDonald Street … might well have been the principal committers of this robbery," including "Mr. Tone and 'littleman.'"[83]

36. The judge then considered the appellant's liability as a party to the offence. Throughout, the judge almost exclusively referred to Matthew Tone and Littleman as the individuals relevant to the analysis. The judge noted the appellant "clearly admits that he told the persons, which he claimed committed the robbery, namely 'Mathew' … and 'littleman' how to do it."[84] He also noted that the appellant's instructions "[compare] very closely" with how the crime was committed.[85]

37. The judge again reviewed the evidence for Matthew Tone and Littleman's involvement. He noted that other than Nicole Miller's hearsay evidence, the appellant's statement was the only other source of evidence that implicated Matthew Tone and Littleman. The judge believed that the appellant even appeared confused on the issue and had at one point referred to "Bradley" as the person committing the robbery even though no evidence existed respecting this individual. On top of this, the trial judge found the appellant to be of an unsavoury character, with a motive to fabricate, whose statement contained contradictions and inconsistencies.[86] The judge therefore concluded the Crown had not proved "beyond a reasonable doubt, that it was Matthew Tone and 'littleman' who participated as principals in the commission of this crime."[87] The appellant was acquitted and the Crown appealed.

Majority Opinion of the Court of Appeal

38. At the Court of Appeal, the Crown argued that the trial judge had committed legal errors in relation to both the principal and party theories of liability. Under the party theory, the judge misinterpreted sections 21(1) and 22 of the *Criminal Code* when he required the Crown to prove the identity of the principal robbers.

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[83] QB Reasons at para 42.
[84] QB Reasons at para 44.
[85] QB Reasons at para 44.
[86] QB Reasons at para 46.
[87] QB Reasons at para 49.

39. The majority judges agreed. They reviewed legislation and case law, and concluded that an accused person is liable for abetting or counselling any party to an offence and not just a principal actor. The trial judge had committed a legal error when he required the Crown to prove "beyond a reasonable doubt, that it was Matthew Tone and 'littleman' who participated as principals in the commission of the crime."[88]

40. The majority judges identified two ways in which this error affected the trial judge's view of the evidence and led to the acquittal. First, the trial judge mischaracterized the Crown's argument by focusing on Mr. Tone and Littleman as potential principals even though the Crown had never said the robbery could only have been committed by these two individuals.[89]

41. Second, the majority judges listed evidence that supported the party liability theory and which the trial judge had overlooked as a result of the legal error:

a. The appellant had told the police that the robbery was committed by four people: Mr. Fiddler and Mr. Tone waited in the car while Mr. Robinson and Littleman went inside the Subway restaurant;
b. Mr. Fiddler and Mr. Robinson were part of the group that received instructions from the appellant on how to commit a robbery; and
c. The appellant had witnessed Mr. Robinson take his portion of the proceeds.[90]

42. According to the majority judges, the trial judge had focused needlessly and erroneously on whether the Crown had proved beyond a reasonable doubt that Mr. Tone and Littleman were the principal offenders while failing to consider critical evidence that, if accepted, supported conviction on the basis of abetting and counselling. Because of this, the trial judge's legal error had a material bearing on the acquittal and necessitated a new trial.[91]

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[88] QB Reasons at para 49; CA Reasons at para 37.
[89] CA Reasons para 41.
[90] CA Reasons at para 42.
[91] CA Reasons at paras 39 and 42.

43. Under the principal offender theory, the Crown at the Court of Appeal argued that the trial judge had failed to consider evidence in its totality, improperly applied the criminal standard of proof to individual items of evidence or peripheral factual issues, and misapplied the law in assessing the credibility of an 'unsavoury witness.'

44. The majority judges declined to intervene on these grounds. They dismissed this ground of appeal from the bench without reasons. In their written judgment, they simply stated that even if the trial judge had made these alleged errors, the errors did not have a material bearing on the acquittal.[92] They ordered a new trial but directed that the new trial be confined to whether the appellant abetted or counselled the offence. The majority judges neither mentioned nor relied on any case law, statutory provisions or legal principles that justified a limited trial.[93]

45. This Court has granted the Crown leave to appeal the order restricting the scope of the new trial.

The Dissenting Opinion

46. In her dissenting opinion, Justice Jackson agreed with the majority judges on the proper interpretation of sections 21(1)(c) and 22(1) of the *Criminal Code*.[94] Nevertheless, she believed the trial judge had not committed an error by limiting the analysis to Matthew Tone and Littleman because the judge was simply responding to the evidence and the submissions, which had narrowed the field to these two individuals as principals. She also reasoned that the alleged error would not have affected the outcome because the Crown's case relied on the appellant's statement, which the trial judge must be taken to have rejected.

47. Given that the appellant adopts and in large part summarizes the dissenting judge's reasons, we will consider them in a more comprehensive fashion in our arguments.

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[92] CA Reasons at para 20.
[93] CA Reasons at para 50.
[94] CA Reasons at para 61 and 75.

PART II – ISSUES

A - Issues on the Appeal as of Right

48. Did the trial judge err in considering the appellant's liability as abettor or counsellor? Yes.

49. Did the trial judge's error materially affect the acquittal? Yes.

B - Issue on the Crown's Appeal by Leave

50. Did the majority judges of the Saskatchewan Court of Appeal err by ordering a trial limited to the issue of party liability? Yes.

PART III – ARGUMENTS

A - The Appeal as of Right

Legal Principles

51. This appeal does not raise any issues concerning the legal requirements of abetting or counselling under sections 21(1) and 22 of the *Criminal Code*. The dissenting judge agreed with the majority judges' summary of the law. Two principles emerged from that summary.

52. First, the Crown is not required to prove an accused person abetted or counselled a principal offender. The person abetted or counselled simply needs to be a party to the offence in one of the three ways listed in section 21(1).[95] Second, an accused person may be convicted as party to an offence even if the identity of other participants is unknown and even if the exact role of other participants is uncertain.[96]

53. The second principle was articulated in the passage below from the Ontario Court of Appeal decision of *R v Sparrow* and has since been approved and applied a number of times by this Court:

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[95] CA Reasons at paras 28, 35 – 36 (majority) and 61 (dissent).
[96] CA Reasons at para 28 – 29 (majority) and 76 (dissent).

> I am of the view that it is also appropriate, where an accused is being tried alone and there is evidence that more than one person was involved in the commission of the offence, to direct the jury with respect to the provisions of s. 21 of the Code, even though the identity of the other participant or participants is unknown, and even though the precise part played by each participant may be uncertain. It is, in my view, however, improper to charge the jury with respect to the liability of the accused as a party under s. 21 where there is no evidence proper to be left with the jury that more than one person was actually involved in the commission of the offence.[97]

54. In *R v Thatcher* the Crown at trial had argued that either Mr. Thatcher personally murdered his ex-wife or he had her murdered by someone else. Over defence counsel's objection, the trial judge told the jury that the Crown's inability to adduce evidence of another individual or individuals actually murdering the victim did not stop the jury from finding that the killing was done on Mr. Thatcher's behalf and the jury could find him guilty as a party to murder.[98]

55. On appeal, Mr. Thatcher argued that there was no evidentiary basis for a direction pursuant to section 21 of the *Criminal Code* and the trial judge had erred by instructing the jury on party liability.[99] This Court disagreed and outlined "some evidence" that pointed to Mr. Thatcher "not having committed the crime personally." Relying on *Sparrow v R*, the Court added that "There is, of course, no burden on the Crown to point to a specific, identified person as the personal assailant of the victim."[100] The trial judge's direction was therefore "perfectly proper."[101]

56. With these principles in mind, we turn to Justice Jackson's dissenting opinion and the appellant's arguments.

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[97] *R v Sparrow* (1970), 51 CCC (2d) 443 (ONCA) at p 458 [*Sparrow*]; see *R v Isaac*, [1984] 1 SCR 74 (SCC) at p 81; *R v Thatcher*, [1987] 1 SCR 652 (SCC) at p 688 *d – g* [*Thatcher*].
[98] *R v Thatcher* at p 681 *d – g*.
[99] *R v Thatcher* at p 658 *a – c*.
[100] *R v Thatcher* at p 687 *h – j*.
[101] *R v Thatcher* at p 688 *g – h*.

The Judge Erred by Limiting the Analysis to Whether the Appellant Had Abetted or Counselled Principals

57. Justice Jackson believed the trial judge had not committed a legal error by requiring the Crown to prove that Matthew Tone and "littleman" had "participated as principals" as a precondition to finding the appellant guilty of being a party to the offence. This was because the trial judge was simply responding to "evidence and submissions made to him" and had focused on Matthew Tone and Littleman as principals because "they were the only other likely candidates seriously put forward by anyone as having had any role in the commission of the robbery and their suggested role was as principals only."[102]

58. In Justice Jackson's view the Crown presented its case only in terms of principals. Under the party liability theory, the Crown spoke of the appellant encouraging others "'to do the robbery', never once saying that those who played a lesser role were anything other than principals." Justice Jackson believed this was the reason the Crown at trial had invited the Court to reject Nicole Miller's testimony, the defence witness who had said Matthew Tone, Littleman and a third individual had committed the crime. It was telling that the Crown did not say these individuals should be considered "in some other capacity other than as principals." Therefore, the trial judge spoke in terms of Matthew Tone and Littleman as principals, because that is how the Crown had argued its case.[103]

59. Respectfully, there are several flaws in the dissenting judge's reasoning. First, the Crown's theory did not involve multiple co-principals and the Crown never suggested the trial judge should take a radically different view of the evidence. The video footage from the Subway restaurant showed a single masked and armed intruder. There was only one principal offender who wore a mask and wielded a knife. Everyone, including the appellant, spoke about the involvement of others who helped with the robbery in various ways.

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[102] CA Reasons at para 62.
[103] CA Reasons at para 69.

60. Second, the Crown did not have to map out the roles of other individuals as a precondition to proving the appellant's guilt. Even so, while discussing the appellant's statement, the Crown referred to the role other individuals had played in the crime, such as the "lookout" who stayed at the door and the "getaway vehicle that was waiting two blocks away."[104]

61. Third, Nicole Miller's evidence was inadmissible because it was hearsay. Despite this, the Crown went on to argue that Ms. Miller had not named the "third person" and her "evidence doesn't contradict the Crown's case in any way and … doesn't add anything either to the Crown's case."[105] It should be remembered that Ms. Miller had testified that Matthew Tone was the lookout but she could not say what roles Mr. Tone's unnamed friend or Littleman had played.[106] This meant Nicole Miller's evidence was compatible with both party and principal theories. Contrary to what Justice Jackson suggests, aside from the hearsay issue, the Crown did not seem to have a problem with the roles Ms. Miller assigned to other parties, including Matthew Tone in the lesser role of a lookout.

62. Fourth, with respect to narrowing the field to Matthew Tone and Littleman, in its closing arguments on party liability the Crown left the field open as wide as possible by referring to the appellant's "roommates," "friends" or "accomplice."[107] At the *voir dire* stage, the Crown sought to tender the appellant's statement for the purpose of showing that he had given instructions to "Mr. Fiddler and Mr. Tone, Mr. Bradley and another individual named Littleman."[108] The Crown's submissions therefore did not narrow the field to Mr. Tone and Littleman and did not suggest their role was as principals only.

63. Justice Jackson believed both "the evidence and submissions"[109] had pointed to these two men as principals. We now turn to the evidence.

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[104] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T36/26 – 34.
[105] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T41/17 – 32.
[106] Feb 23, 2018 Transcript, AR Vol III Tab 11 at T8/14 – T9/17.
[107] Feb 26, 2018 Transcript, Vol III Tab 11 at T39/18; T39/22; T40/14; T41/1.
[108] Dec 13, 2017 Transcript, AR Vol II Tab 9 at T44/37 – 40.
[109] CA Reasons at para 62.

64. The appellant, in his statement to the police, started by talking only about his housemates Dustin Fiddler and Matthew Tone, did not want to divulge more names out of fear of being a 'rat' or 'snitch' but suggested Dustin and Matthew had other people commit the crime. He then spoke in clear terms of Littleman and Bradley Robinson as the two individuals who entered the Subway restaurant, with Bradley as the masked robber. This progression can be roughly summarized by the following chronological excerpts from the appellant's police interview:

- "Matthew and Dustin did it … I didn't say Dustin was in the store." [110]
- "They had somebody hold the door and they had somebody go in."[111]
- "Matt and Dustin drove somebody to the robbery …"[112]
- "Dustin waited a block away in his fucking green Jimmy …"[113]
- The appellant used Facebook to point out Bradley Robinson to the officer.[114]
- "They've also said that that Bradley and little man Bradley did it … just how how fucking you told us."[115]
- The appellant said he had instructed "Little man Mathew Dustin and Bradley."[116]
- "Two people in the car the two people at the at the store the first the fucking guy at the door is little man the other guy is Bradley yes I told them how to do it …"[117]
- "What I can do is I can point you in the direction that people actually did it … Bradley Robinson and little man …"[118]

65. As this summary suggests, the appellant's statement did not narrow the likely culprits to Matthew Tone and Littleman. As for other witnesses, Tara Regan pointed to the appellant as the

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[110] Statement, AR Vol III Tab 12 at p 20.
[111] Statement, AR Vol III Tab 12 at p 25.
[112] Statement, AR Vol III Tab 12 at pp 26 – 27.
[113] Statement, AR Vol III Tab 12 at p 32.
[114] Statement, AR Vol III Tab 12 at p 35.
[115] Statement, AR Vol III Tab 12 at p 36.
[116] Statement, AR Vol III Tab 12 at p 37.
[117] Statement, AR Vol III Tab 12 at p 41.
[118] Statement, AR Vol III Tab 12 at p 45.

masked robber and Littleman as the lookout,[119] while Nicole Miller's hearsay testimony pointed to Littleman, an unknown individual and Mathew Tone as the lookout. [120]

66. There is a far simpler explanation for all this and it is rooted in the trial judge's own clear and explicit words, which did not require any extraneous interpretation or contextual analysis to uncover deeper meanings. In narrowing the field to Matthew Tone and Littleman, the judge was explicitly focused on the appellant's police statement and not the arguments at trial. In this, the judge was wrong to think the statement named only Matthew Tone and Littleman, and he was wrong to think the Crown was required to establish the identity of the principal offenders as a precondition to proving the appellant's guilt as a party.

67. In the summary portion of the judgment, the trial judge said that "During the interview, he [the appellant] named two others, Matthew Tone and 'littleman' who he claims did this robbery."[121] In making that statement, the trial judge clearly misapprehended the contents of the appellant's admissions to the police. The appellant had named four individuals, not just two. Once again, when considering the appellant's liability as a party to the offence, the trial judge said, "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 'Mathew' (taken to be Matthew Tone) and 'littleman' how to do it."[122]

68. Contrary to what Justice Jackson suggests, the narrowing of the field to Littleman and Mr. Tone had little to do with the arguments at trial and everything to do with the judge's serious misunderstanding of the appellant's statement and, as we shall see, misapprehensions about the law.

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[119] Feb 21, 2018 Transcript, AR Vol III at T120/5 – 6 and T121/8 – 14.
[120] Feb 23, 2018 Transcript, AR Vol III at T4/10 – 13; T8/22 – T9/17.
[121] QB Reasons at para 21.
[122] QB Reasons at para 44; see also para 49.

69. The judge concluded the Crown had failed to prove the appellant had abetted or counselled Matthew Tone and Littleman as principals to the offence. The reasoning behind this was erroneous in four related ways.

70. First, criminal liability attached to abetting or counselling any party to an offence and not just the principals. The judge committed a legal error when he expressly required the Crown to prove the identity of the principal offenders:

> … 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.[123]
>
> I cannot be satisfied that the Crown has proven, beyond a reasonable doubt … that Matthew Tone and "littleman" were involved as principals in the commission of this robbery.[124]
>
> … 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.[125]

71. Second, if any of this was unclear, then the trial judge's failure to mention Dustin Fiddler even as a potential candidate confirmed that he was solely concerned with whether the appellant had counselled or abetted the principals to the offence. This is because the appellant had pointed to Mr. Fiddler as a party who never actually set foot in the store but waited in the getaway car. In the words of the appellant, "Matthew and Dustin did it" but "I didn't say Dustin was in the store."[126] The appellant also said "Dustin waited a block away"[127] and this was according to his instructions to "make sure you have a ride parked a block away."[128] Even in defence counsel's view at trial, Mr. Fiddler was involved in committing the offence.[129] Contrary to what the

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[123] QB Reasons at para 45.
[124] QB Reasons at para 48.
[125] QB Reasons at para 49.
[126] Statement AR Vol III Tab 12 at p 20.
[127] Statement AR Vol III Tab 12 at p 32.
[128] Statement AR Vol III Tab 12 at p 25.
[129] Feb 26, 2018 Trial Transcript Vol III Tab 11 at T19/18 – 20.

appellant seems to suggest, the exclusion of Mr. Fiddler proves that the judge was not merely using a broad but imprecise term to capture the "'persons involved' in committing this robbery."[130]

72. Third, aside from the trial judge's problematic focus on the "principal" offenders, his search for proof of the perpetrator's identity was itself erroneous, because there was "no burden on the Crown to point to a specific, identified person" as the one who committed the offence as a precondition to finding the appellant guilty as a party.[131] This error was also manifested in the judge's unwillingness to consider Bradley Robinson due to the supposed poor quality of the evidence surrounding this individual.[132]

73. Lastly, none of this can be explained away by suggesting that the judge had just poorly expressed his scepticism about the connection between the crime and the appellant's instructions. To the contrary, the judge spoke about the connection between the appellant's instructions and the robbery in clear and strong terms. He said there was "no question" that details of how the robbery was committed were "much the same as Mr. Cowan suggested it should be done by the others he named."[133] He also said the following in paragraph 44 of the judgment:

> 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 Mr. Patel 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.[134]

74. The "problem," as the trial judge called it in the next paragraph, was that he did not think the Crown had proved the identity of Matthew Tone and Littleman beyond a reasonable doubt.[135] This was a clear legal error.

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[130] Appellant's factum at para 36.
[131] *R v Thatcher* at p 687 *j*.
[132] QB Reasons at para 46.
[133] QB Reasons at para 38.
[134] QB Reasons at para 44.
[135] QB Reasons at para 45.

The Error Had a Material Bearing on the Acquittal

75. The majority judges believed the errors had a material bearing on the acquittal because, as a result of the legal errors, the trial judge focused on legally irrelevant criteria instead of considering important and relevant evidence that supported conviction.[136]

76. In her dissenting opinion, Justice Jackson acknowledged the Crown did not have to prove the identity of the individuals involved. However, she stated that the Crown was still required to prove that 1) the appellant had abetted and counselled one or more individuals and 2) these individuals went on to commit the offence as parties.[137] She did not believe the Crown could have discharged this duty, because the evidence for all this came from the appellant's statement. According to Justice Jackson, "the trial judge did not believe much of anything from Mr. Cowan's statement"[138] and must be taken to have rejected it.[139]

77. As the majority judges correctly stated, the trial judge "did not go so far as to say that he rejected Mr. Cowan's statement or that it could not be relied upon."[140] But there are two additional reasons why the judge cannot be said to have rejected the statement.

78. First, the trial judge was prepared to accept a number of critical facts from the appellant's statement to the police. We quoted paragraph 44 of the trial decision above, in which the judge relied on the appellant's "interview statement and those passages of it quoted in this judgment" to say that the appellant "clearly" admitted to instructing his friends, that his instructions compared "very closely" to how the crime was committed, and that the words uttered by the masked man were "virtually identical" to the appellant's advice.[141]

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[136] CA Reasons at para 39.
[137] CA Reasons at para 75.
[138] CA Reasons at para 78.
[139] CA Reasons at para 53; see also Appellant's factum at para 44.
[140] CA Reasons at para 45.
[141] QB Reasons at para 44.

79. Second, it is true that the judge had reservations about the statement and whether the appellant had been truthful.[142] But the judge cannot be said to have rejected or disbelieved the appellant's police statement in its entirety, because the judge used the statement itself to acquit the appellant as a principal offender. To be precise, the trial judge was not satisfied beyond a reasonable doubt that the appellant was the principal offender because the appellant's statement raised a 'reasonable possibility' that people whom the appellant counselled, including Mr. Tone and Littleman, were the ones who committed the offence:

> There are "other reasonable possibilities" … 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 2234 McDonald Street, 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 house at 2234 McDonald Street the day of the robbery. I therefore find the accused not guilty as having committed this robbery as a principal.[143]

80. This brings us to the error at the heart of the dissenting opinion as well as the trial judgment. As this Court observed in *R v Thatcher*, section 21(1) was meant to prevent absurd or unjust results in scenarios like the following: one of two people commit a murder, each only admits to assisting the other in carrying out the crime, but neither person's role as principal or party can be determined with certainty.[144]

81. In this hypothetical scenario, the party liability provisions prevent either party from going free notwithstanding the uncertainty surrounding the precise nature of their involvement. The Crown submits the party liability provisions of the *Criminal Code* prevent an acquittal rooted in a reasonable doubt or possibility that the offender could have committed the same crime in a different way. This means that under these provisions, evidence of aiding, abetting, counselling or personally committing a crime can only be evidence of guilt not innocence.

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[142] QB Reasons at para 47.
[143] QB Reasons at para 42.
[144] *R v Thatcher* at p 699 *d – i*.

82. Despite this, the appellant was acquitted of personally robbing a Subway store because of the possibility that the people whom he counselled did the robbery instead.[145] At the same time, and contrary to the legal principles discussed above, the appellant was acquitted of abetting or counselling because the precise identity of the principal offender could not be determined with certainty.

83. The appellant and Justice Jackson believe the problem stemmed from the Crown positing "two mutually exclusive alternatives to finding guilt."[146] On this view, the alternate theories forced the judge to take two different views of what the statement revealed about the appellant's criminality. Justice Jackson suggested that the Crown should have kneaded the two theories into logical coherence and "put forward a theory that Mr. Cowan was a principal and that he had aided others who had committed the robbery with him."[147] The Crown's failure to do so "actually created the reasonable doubt that led the trial judge to conclude Mr. Cowan could not be convicted as a principal."[148]

84. There are a number of difficulties with this position. First, regardless of how the Crown presented its case, the trial judge seemed to have at least entertained the possibility that the appellant abetted or counselled others and then committed the crime with them: "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 house at 2234 McDonald Street the day of the robbery."[149]

85. Second, the theory suggested by Justice Jackson (counselling and acting as a principal) would have forced the Crown to prove the appellant was a principal to the offence. This would have subverted the rationale behind sections 21(1) and 22 – namely, holding an accused person equally accountable as a party or principal.

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[145] QB Reasons at para 42.
[146] CA Reasons at para 74.
[147] CA Reasons at para 74.
[148] CA Reasons at para 74.
[149] QB Reasons at para 42.

86. Third, by its very nature, the party liability sections of the *Criminal Code* make alternate factual theories of culpability possible. The situation is not unique to our case.[150] It is unclear why this should have presented any difficulty to a trial judge sitting without a jury.[151]

87. Some of the evidence presented in this trial strongly leaned towards the principal liability theory: Jenna Tiszauer's evidence that the appellant had fabricated an alibi and Tara Regan's evidence that the appellant had admitted to having committed the crime. While others could support either theory: evidence from Darshit Patel and the officers about how the crime was committed as well as the appellant's statement.

88. With regards to the appellant's statement, the Crown invited the judge to make an inference based on the appellant's police interview that "only the main author of the robbery" would have had the detailed knowledge that the appellant possessed.[152] In case the judge was not prepared to make this inference, the Crown invited the judge to take the statement at face value and as evidence that the appellant counselled and abetted others.[153] There were no fundamental or irreconcilable problems posed by this approach.

89. Justice Jackson believed the two theories had the effect of planting a reasonable doubt in the mind of the judge. She explained this in the following passage:

> But the Crown's approach to the evidence also had consequences for how the trial judge viewed Mr. Cowan's guilt under the second theory. All of the same evidence that the Crown stated should be taken to prove beyond a reasonable doubt that Mr. Cowan had committed the robbery was now to be considered as proving conclusively the contrary: that he had abetted or counselled someone else in the commission of the offence.[154]

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[150] *R v Thatcher* at pp 698 *g* – 699 *b*.
[151] See for instance *R v Thatcher* at p 704 *c* – *h*, Lamer, J.
[152] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T34/20 – 26.
[153] Feb 26, 2018 Transcript, AR Vol III Tab 11 at T39/13 – 18.
[154] CA Reasons at para 74.

90. Here, Justice Jackson seems to suggest that it is possible for a trial judge to harbour a reasonable doubt about one way an accused could have committed an offence because he or she could have committed it in another way. In fact, that is exactly what the trial judge did. He acquitted the appellant for personally robbing the Subway because it was possible that the people counselled by him had done so instead.[155] None of this was permitted under the party liability provisions of the *Criminal Code*. Under these sections, evidence that an accused abetted, counselled or personally committed an offence could only be evidence of guilt not innocence.

91. Also, the record does not show that the trial judge actually took two different views of the appellant's statement. Under the principal liability theory, he relied on the statement as well as other evidence to conclude that other people who were at the appellant's house could have committed the crime: "The robbers may or may not have been the accused and/or any of the other persons including Mr. Tone and 'littleman.'"[156] Under the party liability theory, he carried on with the same view of the evidence but acquitted the appellant because he was not satisfied that the Crown had proved beyond a reasonable doubt that it "was Matthew Tone and 'littleman' who participated as principals in the commission of this crime."[157] His view of the evidence did not change. Nothing was required of the trial judge other than applying the correct law to the view of the evidence he seems to have adopted across both principal and party liability sections of the judgment.

92. In discussing the materiality of the error, Justice Jackson was also generally concerned about the quality of the evidence surrounding Dustin Fiddler, Littleman and Bradley Robinson and the roles they each might have played in the robbery.[158] In this, she seems to have lost sight of the principle that the appellant could be found guilty of being a party to the offence even if the identity of other participants was unknown and even if the precise part played by each participant was uncertain.[159]

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[155] QB Reasons at para 42.
[156] QB Reasons at para 42.
[157] QB Reasons at para 49.
[158] CA Reasons at paras 85 – 87, 89 and 91.
[159] *R v Sparrow* at p 458.

93. To sum up, the trial judge's legal errors materially affected the acquittal because, as a result of these errors, the judge focused on legally irrelevant issues to the detriment of critical evidence that supported a conviction. It is true that a good portion of this evidence came from the appellant's statement and it is true that the judge had reservations about the appellant's truthfulness. But it cannot be said that the judge completely rejected the statement, because he never said so; because he actually accepted a number of important facts from the statement; and because he used the statement to arrive at a 'reasonable possibility' that led to the appellant's acquittal as a principal offender. The majority judges were correct to conclude that the judge's errors materially affected the acquittal. The verdict would not necessarily have been the same if the errors had not occurred.[160] The appeal as of right should be dismissed.

B - The Crown's Appeal of the Order Limiting the Scope of the Trial

94. The majority judges of the Court of Appeal found the trial judge's party liability analysis to be tainted by a legal error that materially affected the acquittal. A new trial was necessary. As for the trial judge's principal liability analysis, they did not decide whether any errors had actually occurred. Rather, they simply reasoned that even if the analysis was erroneous, "it could not be said that the materiality of the error or errors had been demonstrated with a reasonable degree of certainty."[161] Accordingly, they directed that the new trial be confined to the issue of whether the appellant abetted or counselled the offence. They did not refer to any statutory provisions or legal principles that justified this order.[162] The Attorney General believes the majority judges erred by ordering a limited-scope trial.

95. In response to the Crown's leave application, the appellant argued the majority judges were correct to restrict the new trial to the issue of party liability because doing so accorded with the doctrine of issue estoppel, which prevented the Crown from re-litigating the issue of principal liability that had been already resolved in the appellant's favour.

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[160] *R v Graveline*, 2006 SCC 16.
[161] CA Reasons at para 20.
[162] CA Reasons at para 50.

96. However, the majority judges never mentioned this principle. If issue estoppel was the deciding principle that justified a limited trial, the Court would have raised it with counsel and would have invited submissions on whether the principle applied to the case at hand. It did not do so. The Saskatchewan Court of Appeal recently ordered another limited trial in another Crown appeal involving party liability and simply relied on its own decision in *R v Cowan* and made no reference to issue estoppel.[163] In any event, we will address the question of issue estoppel in our arguments. The Crown submits the doctrine has no application to the case at hand.

97. The Crown also submits the order for a limited trial was erroneous for a number of reasons. It contravened precedent from this Court. It disregarded how the law views party liability provisions of the *Criminal Code*. It split integral components of a single-count offence and treated them as if they were distinct offences. It went against principles of appellate review by upholding reasons not the verdict. And it will impair the second trial court's truth-seeking functions. Because the order tugs at so many issues and legal principles, our arguments are inevitably interrelated.

Ancillary Orders under Section 686(8)

98. A court of appeal's jurisdiction and powers in matters of criminal law are purely statutory.[164] When a court of appeal orders a new trial, it may in some instances make an ancillary order limiting the scope of the trial. The power to do so comes from section 686(8) of the *Code*.

99. The power under this section is not limitless. The section restricts a court of appeal's discretion to what "justice requires." Moreover, an ancillary order rendered under section 686(8) cannot be at direct variance with the court's underlying judgment and must be consistent with section 686 read in its entirety.[165]

100. In the past, this Court has upheld an order for a limited trial on the discrete, post-verdict issue of entrapment.[166] However, it has ordered full trials in the following circumstances: where

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[163] *R v Nelson*, 2021 SKCA 37 at paras 53 – 54.
[164] *R v Thomas*, [1998] 3 SCR 535 (SCC) at para 14 [*Thomas*].
[165] *R v Thomas* at paras 17 and 20.
[166] *R v Pearson*, [1998] 3 SCR 620 (SCC).

fresh evidence relating to the defence of not criminally responsible by reason of mental disorder raised the spectre of acquittal on the substantive charge;[167] where a new trial limited to a choice between manslaughter or second-degree murder was tantamount to entering a partial conviction in the context of a jury trial;[168] or where a court of appeal erroneously limited a new trial to determining if a crime was committed in a specific way.[169] The last of these was *R v MacKay* and it is closely analogous to the facts of our case.

The Court of Appeal Erred by Contravening Precedent from This Court

101. In *R v MacKay* a jury acquitted the accused of a charge of aggravated assault. The evidence at trial engaged two different ways in which a person could commit an assault – by applying force under section 265(1)(a) or by threatening to apply force under section 265(1)(b). The trial judge instructed the jury only on the first definition of assault. The accused was acquitted. The New Brunswick Court of Appeal found this to have been an error, set aside the verdict of acquittal and ordered a new trial. Because a jury had already found the accused not guilty of aggravated assault by applying actual force, the Court of Appeal limited the scope of the trial to assault by threats.[170]

102. The New Brunswick Court of Appeal did not mention issue estoppel but appeared to be concerned about principles of fairness and finality that underlie the doctrine. The Court sought to "preserve the accused's acquittal as rendered" because it believed the accused was "entitled to have his acquittal as pronounced by the jury shielded from incursion."[171]

103. This Court disagreed, overturned the order limiting the scope of the new trial and offered the following explanation:

> Sections 265(1)(a) and 265(1)(b) do not create separate offences but simply define two ways of committing the same offence. Based on its conclusion that the verdict would not necessarily have been the same had the jury properly been instructed on both parts of the definition, the only avenue open to the Court of Appeal was to set aside the verdict of acquittal and order a new trial without restriction. The scope of

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[167] *R v Warsing*, [1998] 3 SCR 579 (SCC).
[168] *R v Thomas* at para 22.
[169] *R v MacKay*, 2005 SCC 79.
[170] *R v MacKay*, 2004 NBCA 66 at paras 34 – 37.
[171] *R v MacKay*, 2004 NBCA 66 at paras 33 – 34; see also *R v MacKay*, 2005 SCC 79 at para 2.

> the appropriate instruction on the definition of assault at the new trial can only be determined on the basis of the evidence adduced at that new trial.[172]

104. *R v MacKay* is analogous because party liability provisions of the *Criminal Code* do not create separate offences either. They simply define different ways of committing the same offence. The point was made clear by this Court's decision in *R v Thatcher:*

> This provision is designed to make the difference between aiding and abetting and personally committing an offence legally irrelevant. It provides that either mode of committing an offence is equally culpable and, indeed, that whether a person personally commits or only aids and abets, he is guilty of that offence, in this case, causing the death of JoAnn Wilson, and not some separate distinct offence. This is in contrast with the provisions of the Code relating to accessories after the fact or conspirators (ss. 421 and 423) which create distinct offences for involvement falling short of personal commission.[173]

105. The Saskatchewan Court of Appeal's ancillary order directly contravened this Court's decision in *R v MacKay*. The Court of Appeal acted as if the appellant had been indicted, tried and acquitted on two separate charges that differentiated between modes of committing the crime. In fact, section 21(1) was designed to relieve the Crown from choosing between different forms of participating in an offence.[174] Just like *R v MacKay*, once the majority judges decided that the verdict would not necessarily have been the same if the trial judge had not committed an error, the only avenue was to order a new trial without restrictions.

The Court of Appeal Erred by Splitting Integral Parts of a Single Count Offence

106. Principal and party liability are matters that are integral to an offence. A new trial cannot be ordered based on constituent parts of a single count offence. This view is supported by other provincial court of appeal cases.

107. In the Newfoundland Court of Appeal decision of *R v Druken*, the Court allowed the Crown's appeal from an acquittal on the charge of murder because the jury had not been instructed

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[172] *R v MacKay*, 2005 SCC 79 at para 4.
[173] *R v Thatcher* at 690 *a – e*.
[174] *R v Thatcher* at p 694 *b – e*.

on the included offence of manslaughter. The Court ordered a new trial but restricted it to manslaughter.

108. The Court did so for a number of reasons. First, the Crown on appeal had agreed that if the sole issue on which the trial judge erred was the failure to instruct the jury on manslaughter, then the new trial should be limited to manslaughter.[175] Second, it was in the interests of justice to limit the new trial in this way. This was because the trial Crown had argued the jury should not be instructed on manslaughter but the Crown had changed its position on appeal.[176] Third and most important, the Court found that the trial judge had not made any substantive or procedural errors with respect to the trial for murder; rather, the error had to do with an "included, separate offence."[177] The situation would have been different if the error was about section 21(1) and party liability. As the Court explained, issues such as these would have been integral to the very offence that was the subject of the trial:

> In assessing the appropriateness of limiting the scope of the new trial, I would also distinguish the decision in *R. v. Cousins, supra*. In that case, after the accused had been acquitted of murder, a new trial was ordered due to the failure of the trial judge to instruct the jury on the issue of whether Cousins was a party to the offence. This amounted to an error integral to the offence of murder since the issue was whether the accused was guilty of murder, either as the person who committed the offence or as a party.[178]

109. In the case at hand, the majority judges of the Saskatchewan Court of Appeal ordered a new trial on the substantive offence but limited it to a particular mode of participation. In doing so, the Court split an integral issue in half and treated various modes of committing an offence as if they were discrete offences contrary to the provisions of the *Criminal Code*.

The Court of Appeal Erred by Upholding and Overturning Reasons

110. By reasoning as they did, the majority judges simultaneously upheld and overturned portions of the trial judge's reasons for the judgment and not the ultimate verdict. However,

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[175] *R v Druken*, 2002 NFCA 23 at para 89 [*Druken*].
[176] *R v Druken* at paras 42 and 94.
[177] *R v Druken* at paras 96.
[178] *R v Druken* at para 95; see *R v Cousins* (1997), 119 CCC (3d) 432 (NFCA), leave to appeal to SCC refused, [1997] SCCA No 543.

appeals under the *Criminal Code* are against orders not reasons. The language in sections 675 and 676 (rights of appeal) and section 686 (powers of the court of appeal) bear out this principle by exclusively referring to orders, judgments or verdicts of acquittal or conviction.

111. Under section 686(4), the Court of Appeal had two options. It could dismiss the appeal or it could allow the appeal, set aside the verdict and order a new trial. The Court elected a third option. It allowed the appeal on that portion of the reasons dealing with whether the appellant abetted or counselled the offence, but dismissed the appeal on the portion of the reasons dealing with the appellant's culpability as a principal offender and foreclosed the issue of principal liability from being revisited at the new trial. The Court of Appeal confused the trial judge's analysis with the fruits of that analysis and rendered a judgement that was contrary to principles of appellate review and section 686(4) of the *Criminal Code*.

The Ancillary Order Was at Variance with the Underlying Judgment

112. The ancillary order must not be at variance with the Court's underlying judgment.[179] The underlying judgment here was an order for a new trial because the appellant's acquittal of a charge of armed robbery was tainted by a legal error. The ancillary order limited the trial to one way the crime could have been committed. The majority judges in effect upheld the appellant's acquittal based on one mode of participation in the crime and overturned the acquittal based on another mode of participation. But when it came to culpability, it was a matter of indifference to the law which alternative actually occurred.[180] The ancillary order was therefore at variance with the Court's underlying judgment.

The Ancillary Order Is Contrary to The Interests of Justice

113. The ancillary order will have profound implications for the new trial. The order will turn the new trial into a subsidiary proceeding designed to correct the first judge's errors of reasoning. The new judge will have to redo portions of the first trial judge's analysis (party liability) while being bound by other portions (principal liability), which may or may not have been erroneous.[181]

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[179] *R v Thomas* at para 17.
[180] *R v Thatcher* at p 694 *h*.
[181] See *R v Katigbak*, 2011 SCC 48 at para 85.

This is because the majority judges did not conclude that the first trial judge's principal liability analysis was free of error. They simply reasoned that "even if the trial judge's reasons revealed an error or errors … it could not be said that the materiality of the error or errors had been demonstrated with a reasonable degree of certainty."[182]

114. Key evidence that was presented at the first trial, such as the false alibi evidence from Jenna Tiszauer and the appellant's informal admission to Tara Regan, will be presumably inadmissible because they speak directly to the appellant's culpability as a principal offender. Again, this will be the case even though the first trial judge may have erred in law in how he considered this evidence.

115. Evidence of witnesses who testified at the first trial will not necessarily stay the same. Neither will they necessarily be interpreted in the same way. New evidence might emerge. This time, the Crown might be able to secure Matthew Tone's presence. Unlike the first trial, the appellant might decide to take the stand. As a result of the ancillary order, if all the evidence at the new trial strongly supports the appellant's culpability as a principal offender but not abettor or counsellor, he will be acquitted.

116. The ancillary order will fundamentally impair the truth-seeking functions of the trial court and is therefore contrary to the interests of justice.

Issue Estoppel Does Not Apply

117. Although this Court in *R v MacKay* did not decide the case in terms of issue estoppel, the Court's treatment of the two definitions of assault as an indivisible whole has direct implications for the doctrine of issue estoppel.

118. The Court of Appeal in *MacKay* had tried to preserve the accused's acquittal and to shield it from incursion. Nothing impugned the jury's acquittal of the accused on the basis of assault by force. There was no reason to interfere with the jury's verdict and the jury had found the accused

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[182] CA Reasons at para 20.

not guilty beyond a reasonable doubt of aggravated assault by way of applying force. When this Court ordered a new trial, it did so because the jury had not considered an additional way the crime could have been committed.

119. The implications of this Court's decision are clear. Given that the full definition of assault was never put to the jury, the issue of whether the accused committed an assault could not be said to have been conclusively resolved in the accused's favour. Issue estoppel could not apply because only issues decided in the accused's favour are subject to the doctrine.[183]

120. Accordingly, once a court of appeal overturns an acquittal and orders a new trial on a single count offence, the doctrine of issue estoppel cannot split a single offence into its constituent parts that were either correctly decided at the first trial, incorrectly decided, or, in the appellant's case, possibly incorrectly decided but may not have materially affected the outcome with reasonable certainty. Not much remains for retrial after a single count offence is broken up in this fashion.

121. Another requirement of issue estoppel is that the judicial decision that is said to create the estoppel must be final.[184] In the case at hand, the Crown had appealed the verdict from the trial. As already discussed, the Court of Appeal did not have the power to selectively uphold portions of the lower court's judgment or discrete issues on the pathway to the verdict. It could only uphold the verdict. In the circumstances of this case, the very notion of issue estoppel is at odds with the powers of appellate review. The appropriate place to consider whether the scope of a new trial on the same charge should be limited is under section 686(8) of the *Criminal Code*.

122. To conclude, the majority judges' ancillary order is against the interests of justice and powers of appellate review. The majority judges erred by making the order and the Crown respectfully submits the order should be quashed.

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[183] *R v Mahalingan*, 2008 SCC 63 at para 22 [*Mahalingan*].
[184] *R v Mahalingan* at para 49.

PART IV – COSTS

123. The Attorney General makes no submissions regarding costs.

PART V – ORDER SOUGHT

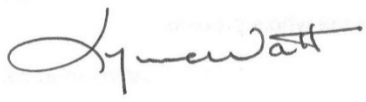
124. The Attorney General respectfully requests that the appeal as of right be dismissed and the Saskatchewan Court of Appeal's order for a new trial be affirmed without restriction as to the scope of the new trial.

PART VI – CONFIDENTIALITY ORDER

125. There are no sealing orders, confidentiality orders or publication bans in this case.

ALL OF WHICH is respectfully submitted.

DATED at the City of Regina, in the Province of Saskatchewan, this 24th day of March, 2021.



for:

Pouria Tabrizi-Reardigan
Agent of the Attorney General for the Province of Saskatchewan, Counsel to Her Majesty the Queen

PART VII – TABLE OF AUTHORITIES

		Cited at Paragraph
1	*R v Cousins* (1997), 119 CCC (3d) 432 (NFCA), leave to appeal to SCC refused, [1997] SCCA No 543.	108
2	*R v Druken*, 2002 NFCA 23.	107, 108
3	*R v Graveline*, 2006 SCC 16.	93
4	*R v Isaac*, [1984] 1 SCR 74 (SCC).	53
5	*R v Katigbak*, 2011 SCC 48.	113
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8	*R v Mahalingan*, 2008 SCC 63.	119, 121
9	*R v Nelson*, 2021 SKCA 37.	96
10	*R v Pearson*, [1998] 3 SCR 620 (SCC).	100
11	*R v Sparrow* (1970), 51 CCC (2d) 443 (ONCA).	53, 92
12	*R v Thatcher*, [1987] 1 SCR 652 (SCC).	53, 54, 55, 72, 80, 86, 104, 105, 112
13	*R v Thomas*, [1998] 3 SCR 535 (SCC).	98, 99, 100, 112
14	*R v Warsing*, [1998] 3 SCR 579 (SCC).	100