S.C.C. File No.: 37479

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

BETWEEN:

SPENCER LEE JORDAN

APPLICANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

REPLY TO RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(SPENCER LEE JORDAN, APPLICANT)
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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MEMORANDUM OF ARGUMENT

1. It's submitted the Crown's response further support the reasons for this Court to grant leave in this case. This is not a '*factually'* based application/appeal, attracting a higher degree of deference, as intimated by the Respondent. The central issues in this case have not been specifically considered by the Court. The contention made by Crown counsel that the essence of this Application for Leave to Appeal is a dispute about the facts resulting in the convictions rendered by the Court of the Queen's Bench of Alberta (the "trial judge") and the Court of Appeal of Alberta (the "ACA") is erroneous.

2. Again, the issues posited in the Applicant's leave materials have not been either considered or otherwise thoroughly settled by this Honourable Court. Issues of a national importance have been clearly raised. There are unsettled legal principles that require this Honourable Court's guidance and final decision. A final decision on these issues is critical. Overall, the lower Courts' (and Crown's) interpretation of the applicable legal principles will, *inter alia*, subtly devolve the test of *mens rea* for murder to an objective standard, contrary to *Martineau*, *Logan* and *Harris*, *infras*.

Common-Sense Inferences and Section 229(a)(ii)

3. The trial judge found that Mr. Jordan did not: (a) intend to kill; (b) understand the limits of the assault levied against the victim; (c) comprehend that the victim was suffering from life threatening injuries. The trial judge concluded that the required intent of s. 229(a)(i) was not present in the evidentiary state. Under her s. 229(a)(ii) analysis, it is fair to infer that those findings are ignored, and the 'common-sense inference' was employed as a juridical tool to support the conviction for second-degree murder. As stated in the Applicant's leave memorandum, this is logically and legally inconsistent. Contrary to the Crown's suggestion, *Regina* v. *Cooper*, [1993] 1 SCR 146, does not provide a complete response to the circumstances of this case. The scope of the law remains unsettled. The Crown, with respect, is incorrect relative to the scope of *Cooper*, *supra*, as that case does not consider the quality of inferences made by the trial judge.

4. The rulings, in this case, are problematic because: (a) the difference, in *mens rea*, between the two (2) subsections of s. 229 is slight (a factor in favour of this courts intervention); (b) the findings under s. 229(a)(ii) thwarted any consideration of the findings of fact made relative to Mr. Jordan's state of mind, and thereby preferring a "*common-sense inference*" on **objective terms**; and (c) the use of an **objective standard** in the assessment of *mens rea*, is unconstitutional as the *mens rea* for murder must remain subjective to be constitutionally compliant. The approach utilized by the trial Judge and upheld by the ACA would subtly shift the standard to an objective test using a juridical tool: *common-inference*. That shift should be constitutionally impermissible.

Causation, Section 21, Assessorial Common-Law Tools

5. The Trial Judge and the ACA conflated factual and legal causation.[1] The former concerns how a person died, while the latter query focuses on attributing criminally responsible. The Trial Judge could not determine whether Ms. Magoon or Mr. Jordan administered the fatal blow but that it didn't matter due to s. 21(1)(a), and s.21(2), and the accessorial common-law principles. While trite, it is noted that causation; and *mens rea* are disjunctive principles. In this case, the *mens rea* finding is predicated on a *non-sequitor.* It is logically inconsistent, *post hoc; ergo propter hoc,* because the trial court found that one has "*committed*" a homicide (as required by the text of the *Code*) without the factual underpinnings buttressing factual or legal causation. Even if the finding may be coined an '*alternative'* finding, there was no evidence of a "*common-intention*" as required by *Regina* v. *Ball*.[2] Instead, the evidence found could at best be described as "*individual participation*" without knowledge of the others acts; nor was there evidence of "*an interrelated series of events*"; a "*single transaction ending in the death of the victim of a "joint" assault*".[3] The Respondent's response submission at para. 44 of their brief is telling. It states that the Applicant was party to "*assaults throughout the day, at least one of which caused the cerebral edema which was the primary cause of Meika's death*". The trial judge could not determine who caused the edema, or when. By that order of logic, if one parent were to physically discipline a child lawfully, or illicitly but not to the level where the *mens rea* for murder is established; and the other parent

[1] *R.* v. *Maybin* 2012 SCC 24, para. 31
[2] *R.* v. *Ball,* 2011 BCCA 11, para. 32
[3] *R.* v. *Maybin* BCSC 1277, paras. 208-209

were to discipline the child unlawfully resulting in the child's death, at a later time, since "*at least one*" of the parents killed the child, both should be convicted of murder. Such a proposition requires this Court's attention.

6. Also, the inferences relied on by the Courts below to establish a common-intention are impermissible. It was temporally indeterminable to determine when Mr. Jordan was aware of certain illicit acts committed by Ms. Magoon when provide the statements to the undercover officers ("Vic" et. al.) in this case. The use of "*after the fact*" statements without the requisite '*carbon-dating'* is an error because it fails to focus on the "*specific moment when the act was committed*" to determine the subjective foresight at that point.[4] To convict Mr. Jordan, it must have been known, at the time of the offence or before it, that death was likely. A vague realization of that reality is insufficient.[5] The evidence did not establish that Mr. Jordan knew the information imparted to the undercover operatives at the time of the alleged offence or that the victim's death was reasonably foreseeable. Like the circumstances in *Regina v Maybin*, *infra*, it was unknown, if the Mr. Jordan or Ms. Magoon's assault caused the death of the victim. Since they did not join in on the others conduct, they did not act in concert. Put differently, one co-accused did not put the deceased in a position to be assaulted by the other co-accused: they were not part of one transaction that both were party to as required by s. 21(1)(a) to factually and legally establish them as co-perpetrators. Akin to the bouncer Gains in *Maybin, supra;* or the factual matrix in *Regina v. Shilon*[6], Mr. Jordan and Ms. Magoon had no mutual intention; nor did they act in concert. In fact, the trial judge found they did not act in concert. Nor is this a situation like the driver of the stolen truck in *Shilon* or the Maybin brothers in *Maybin* where those parties "*set up*" the victim for another actor to cause their death. Neither the Applicant or Ms. Magoon's conduct set up the victim to be killed by the other.[7]

[4] *R.* v. *Shand* 2001 ONCA 5, leave denied 2012 CarswellOnt 270 (S.C.C.), paras. 150-153
[5] IBID, paras. 150-153
[6] *R.* v. *Shilon* [2006] O.J. No. 4896 (Ont. C.A.), para. 35
[7] See also *R.* v. *Schell* 1977 CarswellOnt 982 (Ont. CA) and the second appeal arising from the second trial in that case of *R.* v. *Schell* 1979 CarswellOnt 1914 (Ont. C.A.) resulting in a complete acquittal. The facts and circumstances bear resemblance to the facts of the herein matter.

7. The inferences drawn regarding the layout of the home raises yet another concern because the trial judge infers what Mr. Jordan "*ought to have known.*" They import an objective standard into murder offences, which according to *Regina* v. *Logan*[8] and the OCA in *Regina v. Harris*[9] *and Regina v. Martineau*[10] are constitutionally impermissible. Being a party to the offence of murder cannot be inferred on an objective basis, and even if it could, the Trial Judge made factual findings that prevent such an inference being applied. The accepted facts indicate that there was no expressed agreement between the Appellant and Magoon; no evidence the Appellant and Magoon inflicted blows to the deceased at the same time or in the others presence all the time; and both the Appellant and Magoon were unware of the nature of the force being used by the other.[11] Where such findings are made, an inference like that permitted in *Regina v Walle*[12], cannot be sustained to impute an assessorial relationship to murder.

8. Yet another issue is the Trial Judge's imputation of the level knowledge to Mr. Jordan of Ms. Magoon's conduct. This reasoning is erroneous because both applicants would have had to have known, at the time of the assault, that the discipline meted out to the victim by the other exceeded the lawful parameters of s. 43 of the *Code*. As stated in *Regina* v. *Adams*[13] it is insufficient to know that the co-accused committed some act of violence to attract criminal liability for a full *mens rea* offence requiring subjective intent, such as murder. Knowledge of the requisite intent of the principal must be established beyond a reasonable doubt. That evidence simply did not exist in this case.

9. Lastly, for s. 21(2) to have application, the two (2) accused must "*assist each other*" with the intention in common. In *Regina* v. *Moore*[14] the Ontario Court of Appeal ("OCA") concluded that an agreement to assist in carrying out a common, unlawful purpose was a pre-requisite to

[8] *R.* v. *Logan*, [1990] 2 S.C.R. 71 para. 45
[9] *R.* v. *Harris* 1989 CarswellOnt 91 (Ont. C.A.) leave to appeal denied 1989WL935897 (S.C.C.)
[10] *R.* v. *Martineau*, [1990] 2 S.C.R. 633, p. 682
[11] *R.* v. *Magoon*, 2015 ABQB 351, para 159.
[12] *R.* v. *Walle* 2012 SCC 41, para. 20
[13] *R. v. Adams* (1989), 49 C.C.C. (3d) 100 (Ont. C.A.), para. 46
[14] *R. v. Moore* [1984] O.J. No. 134 (Ont. C.A.)) leave to appeal refused [1985] S.C.C.A. No. 248, para 52.

trigging s. 21(2).[15] Further, in *Regina* v. *S. (J.)*[16] the OCA considered whether s. 21(2) could be put to a jury in the circumstances where an accused was a gunfight against a third-party, where that third-party accidentally killed an innocent bystander. The OCA, in *S.(J).* ruled that it could not be put to the jury because the section expressly requires a *common intention* between the person who actually commits the crime and the person who is rendered liable for that crime under s. 21(2). The common intention must be "*to carry out an unlawful purpose*" and "*to assist each other therein*." Section 21(2) addresses situations in which two (2) individuals pursue a common unlawful object <u>together</u> and one of them commits an offence other than the common unlawful object in the course of pursuing that common purpose,[17] which is not supported by the accepted findings of fact in this case.

Conclusion

10. Based on the foregoing the test for leave has been met by the Applicant, and he seeks an ordering granting the same, should one be required.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of July 2017.

For:

_____
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Counsel for the Applicant
Spencer Lee Jordan

_____
Jeinis S. Patel
Co-Counsel for the Applicant,
Spencer Lee Jordan

[15] Ibid, para. 21.
[16] *R. v. S. (J.)* 2008 ONCA 544
[17] Ibid, para. 44.

TABLE OF AUTHORITIES

STATUTE AND REGULATION PROVISIONS

CRIMINAL CODE **R.S.C. 1985, c C-46**

Murder

229 Culpable homicide is murder
(a) where the person who causes the death of a human being
(i) means to cause his death, or
(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
(c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

Parties to the 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

***CODE CRIMINEL*, LRC (1985), Ch. C-46**

229 L'homicide coupable est un meurtre dans l'un ou l'autre des cas suivants :
a) la personne qui cause la mort d'un être humain:
(i) ou bien a l'intention de causer sa mort,
(ii) ou bien a l'intention de lui causer des lesions corporelles qu'elle sait être de nature à causer sa mort, et qu'il lui est indifférent que la mort s'ensuive
ou non;
b) une personne, ayant l'intention de causer la mort d'un être humain ou ayant l'intention de lui causer des lésions corporelles qu'elle sait de nature à causer sa mort, et ne se souciant pas que la mort en résulte ou non, par accident ou erreur cause la mort d'un autre être humain, même si elle n'a pas l'intention de causer
la mort ou des lésions corporelles à cet être humain;
c) une personne, pour une fin illégale, fait quelque chose qu'elle sait, ou devrait savoir, de nature à causer la mort et, conséquemment, cause la mort d'un être
humain, même si elle désire atteindre son but sans causer la mort ou une lésion corporelle à qui que ce soit

***CODE CRIMINEL*, LRC (1985), Ch. C-46**

Participants à une infraction

21 (1) Participent à une infraction:
a)quiconque la commet réellement;
b)quiconque accomplit ou omet d'accomplir quelque chose en vue d'aider quelqu'un à la commettre;
c)quiconque encourage quelqu'un à la commettre.

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.
R.S., c. C-34, s. 21.

Intention commune

(2) Quand deux ou plusieurs personnes forment ensemble le projet de poursuivre une fin illégale et de s'y entraider et que l'une d'entre elles commet une infraction en réalisant cette fin commune, chacune d'elles qui savait ou devait savoir que la réalisation de l'intention commune aurait pour conséquence probable la perpetration de l'infraction, participe à cette infraction.
S.R., ch. C-34, art. 21

1989 CarswellOnt 91
Ontario Supreme Court, Court of Appeal

R. v. Harris

1989 CarswellOnt 91, 32 O.A.C. 131, 45 C.R.R. 330, 48 C.C.C. (3d) 521, 70 C.R. (3d) 57, 7 W.C.B. (2d) 89

R. v. HARRIS

Howland C.J.O., Morden and Griffiths JJ.A.

Heard: January 26, 1989
Judgment: April 10, 1989
Docket: No. 349/88

Counsel: *J.L. Hill* , for appellant.
W.J. Blacklock , for the Crown.

Subject: Criminal

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Criminal law

I General principles
I.6 Parties
I.6.b Aiders and abettors

Criminal law

VI Offences
VI.103 Murder
VI.103.c Constructive murder (causing death in commission of offence)
VI.103.c.vi Miscellaneous

Headnote

Criminal Law --- General principles involving criminal law — Involvement in crime — Complicity — Aiders and abettors

Proviso not to be relied on where murder conviction of party based on unconstitutional s. 213(d), now s. 230(d), of Criminal Code. .

Words “ought to have known” in s. 21(2) of Criminal Code being unconstitutional, and inoperative in determining liability of

party in murder case.

Convicting of murder on basis of objective foresight required by s. 21(2) of Criminal Code being contrary to s. 7 of Charter of Rights and Freedoms.

The accused and a co-accused, W., agreed to rob a taxi driver. They directed the cab to an isolated industrial park, at which point W. stabbed the driver. The accused gave a statement to the police admitting that he knew that W. was going to kill the cab driver. The accused and W. were jointly tried on an indictment charging first degree murder. At trial, the accused testified that he really meant he ought to have known that W. was going to kill the cab driver. His position was that W. repeatedly told him he was going to kill the cab driver but that he thought W. was joking and told him that he was crazy. The accused maintained that he did not honestly believe that W. was serious and that it was not his purpose to aid or abet W.'s murder of the cab driver. The trial judge included in his instructions to the jury that they could convict the accused of second degree murder under ss. 213(*d*) [now s. 230(*d*)] and 21(2) of the Criminal Code if they were satisfied that the men had formed an intention in common to carry out a robbery, that it was a probable consequence of the robbery that W. would have a knife during the robbery and would use it if necessary, that the accused knew or ought to have known that the use of the knife was probable, and that death had resulted from the knife. The accused was convicted of second degree murder, and appealed on the basis that s. 213(*d*), on which the verdict was based, had since been declared unconstitutional.

Held:

Appeal allowed; conviction set aside; new trial ordered.

This was not a case for application of the "no substantial wrong or miscarriage of justice" proviso under s. 613(1)(*b*)(iii) [now s. 686(1)(*b*)(iii)] of the Criminal Code. Even assuming that the phrase "ought to have known" in s. 21(2) of the Criminal Code was applicable, it was for the jury to decide the guilt or innocence of the accused on a charge combining s. 212(*a*)(i) [now s. 229(*a*)(i)] or (ii) with s. 21(2). They should weigh the effect of the apparently serious and incriminating admissions made by the accused in his written and oral statements to the police in the light of his testimony under oath, during which he repeatedly denied that he seriously believed the expressed intention of W. to kill the taxi driver.

On a charge of murder as defined in s. 212(*a*)(i) or (ii), where s. 21(2) is invoked to determine the liability of a party to the murder, the words "ought to have known" in s. 21(2) are inoperative and should be ignored. Murder based on s. 212(*a*)(i) or (ii) must be based on the subjective foresight of the perpetrator, and it is contrary to the principles of fundamental justice under s. 7 of the Charter of Rights and Freedoms for a party to be convicted of murder on the basis of the combination of the objective foresight required by s. 21(2) and the s. 212 murder provisions.

Table of Authorities

Cases considered:

R. v. Logan (1988), 67 O.R. (2d) 87, 68 C.R. (3d) 1, 46 C.C.C. (3d) 354, 57 D.L.R. (4th) 58, 30 O.A.C. 321 (C.A.) — *followed*
R. v. Vaillancourt, [1987] 2 S.C.R. 636, 60 C.R. (3d) 289, 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, 32 C.R.R. 18, 68 Nfld. & P.E.I.R. 281, 209 A.P.R. 281, 10 Q.A.C. 161, 81 N.R. 115 [Que.]*applied*

Statutes considered:

Canadian Charter of Rights and Freedoms

s. 1

s. 7

Criminal Code, R.S.C. 1970, c. C-34 [now R.S.C. 1985, c. C-46]

s. 21(2)

s. 212 [now s. 229]

s. 213(*d*) [am. 1980-81-82-83, c. 125, s. 15; now s. 230; am. R.S.C. 1985, c. 27 (1st Supp.), s. 40(2)]

s. 214(2) [re-en. 1974-75 — 76, c. 105, s. 4; now s. 231]

s. 613(1)(*b*)(iii) [now s. 686(1)(*b*)(iii)]

Criminal Code, R.S.C. 1985, c. C-46

s. 686(1)(*b*)(iii)

Words and phrases considered:

OUGHT TO HAVE KNOWN

In the case of *R. v. Logan* [(1988), 30 O.A.C. 321 . . . following *R. v. Vaillancourt* . . . [1987] 2 S.C.R. 636 . . . the [Ontario] court [of Appeal] held that the phrase "ought to have known" contained in s. 21(2) [of the *Criminal Code*, R.S.C. 1985, c.46] was inoperative to determine the guilt of a party charged with attempted murder.

. . . . .

Although *Logan* was a case of attempted murder, I am unable to distinguish it in principle from the present case of murder. Murder, based on s. 212(a)(i) or (ii), no less than attempted murder, must be based on the subjective foresight of the perpetrator, and a party should not be convicted of murder on the basis of the combination of the objective foresight required by s. 21(2) of the *Criminal Code* and the s. 212 murder provisions.

Appeal by accused from conviction of second degree murder.

The judgment of the court was delivered by *Griffiths J.A.* :

1 The appellant and his co-accused, Lance Timothy Woods, were tried by judge and jury on an indictment charging that:

> ... they on or about the 26th day of August in the year 1983, at the Municipality of Metropolitan Toronto in the Judicial District of York, did murder one Philip Davidson and did thereby commit first degree murder, contrary to the *Criminal Code* .

2 On 31st May 1984 the appellant was found guilty of second degree murder and his co-accused, Woods, guilty of first degree murder. The appellant appeals against his conviction on the ground that he was convicted of second degree murder as a result of the combined operation of the provisions of s. 21(2) and the former s. 213(*d*) (now s. 230(*d*)) of the Criminal Code, and that s. 213(*d*) has since been declared constitutionally invalid by the Supreme Court of Canada in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, 60 C.R. (3d) 289, 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, 32 C.R.R. 18, 68 Nfld. & P.E.I.R. 281, 209 A.P.R. 281, 10 Q.A.C. 161, 81 N.R. 115 [Que.].

3 The Crown's case at trial was that the appellant had gone with Woods to a shopping mall in Mississauga. Woods then purchased a hunting knife, intending to use it in a robbery of a taxi driver. The Crown alleged that Woods told the appellant that he was going to kill the taxi driver in the course of the robbery. Subsequently, the two men hailed a taxi, driven by the victim, Philip Davidson. They instructed Davidson to take them to an isolated industrial park in Toronto. As the appellant stepped out of the taxi, Woods handed the driver a $20 bill. When the driver looked down to make change, Woods took out the knife, reached over the seat and stabbed the driver in the neck, causing his death.

4 The only issue at trial so far as Woods was concerned was whether, in stabbing the victim to death, he had committed a planned and deliberate murder, that is, first degree murder, or whether, as his counsel contended, he was guilty only of second degree murder.

The Charge to the Jury

5 The appellant's defence at trial was that he did not believe that Woods was serious when he told him that he was going to kill the taxi driver. The trial judge charged the jury that they could convict the appellant of first degree murder only if he had aided and abetted what he knew to be a planned and deliberate murder. The trial judge also instructed the jury that the appellant would be guilty of second degree murder by virtue of the combined application of ss. 21(1) and 212(*a*) (now s. 229(*a*)) of the Criminal Code only if they were satisfied beyond a reasonable doubt that the appellant intended to aid or abet such a murder. He instructed the jury that they might have some doubt as to liability on this basis, in light of the appellant's evidence that he did not believe Woods was serious when he told him he was going to kill the taxi driver. In his charge to the jury the trial judge said with respect to the appellant:

> He can be (and I think likely will be) found guilty as a party to a constructive murder under s. 213, which I will deal with shortly.

6 The trial judge then instructed the jury that they could convict the appellant of second degree murder under ss. 213(*d*) and 21(2) of the Criminal Code if they were satisfied beyond a reasonable doubt that:

7 (1) the appellant and Woods formed an intention in common to carry out a robbery and to assist each other therein;

8 (2) it was a probable consequence of the robbery that Woods would have a knife during the robbery and would use it if necessary;

9 (3) the appellant *knew or ought to have known* that the use of the knife was probable; and

10 (4) death resulted from the knife.

11 On this appeal, the Crown conceded that, given the particular charge to the jury, the appellant was undoubtedly convicted as a s. 21(2) party to a s. 213(*d*) murder, and that, in the light of the Supreme Court of Canada decision in *Vaillancourt* , supra, holding s. 213(*d*) of no force and effect, the conviction cannot be supported on that basis. The Crown submits, however, that no substantial wrong or miscarriage of justice has occurred, because the jury would necessarily have found the appellant guilty of second degree murder had they been properly instructed on the interaction and applicability of ss. 212(*a*)(i) and (ii) and 21(2) of the Criminal Code.

Factual Background

12 The following is a review of the evidence relevant to the submission of the Crown.

13 At the time of the offence, the appellant was 21 years old, married and without children. He had been unemployed for about one year. He had been raised in foster homes and had completed Grade IX in a special class for slow learners by age 16.

14 The appellant testified that he had known his co-accused, Woods, for about two weeks prior to the offence. On the day of the offence, 26th August 1983, the appellant met Woods at a shopping mall around 4:30 p.m. The two then went to a store, where Woods purchased a hunting knife. According to the appellant, Woods initially told him he was going to use the knife for hunting.

15 The two men left the shopping mall on their bicycles and drove first to Wood's place and then to the appellant's apartment. The appellant testified in chief that before they got to his apartment Woods said he wanted to rob a taxi driver, because he needed some money to go up north, and that he was going to "dummy" the taxi driver. The appellant asked Woods what he meant, to which Woods replied that he was going to "kill" or "wipe out" the taxi driver. The appellant testified that in response to Wood's statement of his intention to kill, the appellant told Woods that he was "crazy", and that he repeated this to Woods four or five times over the evening.

16 The pair then left the appellant's place, and according to the appellant he then agreed to rob the taxi driver, but the appellant repeated in his testimony at trial that he never took seriously Woods's threat to kill the driver. After the appellant and Woods left his place they initially went to a store to buy cigarettes, and on the way Woods again mentioned that he wanted to rob a taxi driver. He suggested to the appellant that he go back to his place and telephone a taxi. The appellant refused to do this, because, he testified, it would create a record of the telephone call to the taxi. The appellant testified that Woods again said he was going to kill the taxi driver so "he wouldn't be able to testify", and the appellant replied, "You're crazy", and he repeated in his testimony that he could not believe it. When the appellant told Woods he was "crazy", the appellant said Woods had no reaction; he simply said "nothing, nothing, totally nothing".

17 The two men walked to the Long Branch loop, where they knew some taxis would be waiting. Before they arrived at the loop, they had a further discussion about the robbery. The appellant testified that Woods gave him $40, and it was understood that the appellant was supposed to hand the taxi driver the money, while Woods would rob him at knife-point. The appellant agreed to this. The appellant went on to testify that Woods did tell him to act as a "decoy" by paying the money and that Woods would then stab the driver. The appellant testified that he once again told Woods he was "crazy" and that he "did not believe" that Woods would do it. Again Woods's reaction, however, was simply to maintain silence.

18 The appellant testified that they then hired a taxi-cab and that the appellant took $40 from Woods and got into the front seat of the taxi. Woods then directed the taxi driver to an isolated industrial park. Woods handed the driver $20. The appellant testified that he then got out of the taxi-cab. The appellant said that he heard a "thud" and some shuffling and Woods then got out and said, "Run, I stabbed him!" The appellant testified that he then left Woods, because he wanted to get to a telephone, as he believed a "man's life was in jeopardy".

19 Under cross-examination by the Crown, the appellant admitted that the robbery was to be a 50-50 split and that he had in fact agreed to do the robbery, on the way to his place after they had left Woods's residence. In his cross-examination he affirmed that the possible killing of the taxi driver was discussed on more than one occasion, but continued to maintain his position that he told Woods that he was "crazy" or that he said to Woods that he "did not believe him". The appellant also conceded in cross-examination that, although he thought the knife would be used only to threaten the cab driver, if the cab driver had offered any resistance there was at least the possibility that Woods would use the knife.

20 The victim taxi driver was stabbed around 9:00 p.m. He died from loss of blood from a single stab wound to the neck.

21 Following the homicide the appellant left the scene, and approximately one hour later he telephoned the police to report that he had "witnessed a stabbing". In response to this telephone call, two police officers, Sergeant Hein and P.C. Walker, were dispatched to meet the appellant at a shopping plaza. They met at approximately 10:12 p.m. and the appellant

advised them that he had been with a "guy" whose name he could not recall, although he gave the police the home address of Woods. The appellant's first version of the events of the night, as related to the police, was as follows:

> We'd been together since 4:30. I only knew him for a couple of weeks. He wanted to meet somebody in the factories and told me to wave over a taxi; so I waved over a taxi. I met him at Burnhamthorpe and Central Park Road. We met at the mall. We met at Square One, and he bought a Kodiak knife. We went to my place and then to meet someone in the factories. We walked over to Lakeshore and he told me to flag a taxi down. I did, and he told him where to go. We got to the factory and I got out. He handed him a twenty. I was in front and he was behind the taxi guy. I got out and saw my buddy gave him $20 bill, and next I heard was a shuffling noise and he got out and said, "Gary, I stabbed him." We took off to the right of the cab, ran around the side of the factory, we cut over into someone's back yard. And as we kept running, he said: "I've got to get rid of the shirt." All this time he was wiping the knife off on his shirt. As we were running through people's backyards they saw us. We then walked up the street and split.

22 After giving the police the above preliminary statement, the appellant accompanied the police to the scene of the crime, to generally retrace the route that he and Woods had taken when they fled the scene. Eventually the appellant was taken to the police station, where he provided a more detailed oral statement, of which the following is a portion:

> Q. Do you know Tim Woods?
>
> A. Yes, I met him two or three weeks ago at Patty Button's place. Patty is a Born-Again Christian.
>
> Q. I understand you phoned the police tonight from a pay phone and reported a stabbing?
>
> A. That's right. I called from the pay phone. I waited for them to come and see me.
>
> Q. Tell us what happened.
>
> A. I was with Tim Woods when he stabbed a taxi driver tonight. I didn't know he was going to do it.
>
> Q. How did it happen?
>
> A. We went to the Long Branch loop and I flagged down an Arrow taxi. Tim got in the back and I sat in the front. I saw the taxi coming along the Lakeshore from Port Credit. The loop was empty. Tim asked the driver to take us to Transpo on Milvan. When we got there, the driver asked if we wanted to be let out at the front or back of the factory.
>
> Q. Where were you parked?
>
> A. In the driveway.
>
> Q. What happened next?
>
> A. I opened my door. Tim handed the driver a $20 bill. As the cabbie was fooling around with the money, I heard a thud and a lot of shuffling. I was standing outside the cab, and then Tim jumped out the door behind the driver and said, "I stabbed him. Come on, let's get out of here." We ran through the factories and over the fence. He was wiping blood on my shirt from the knife.
>
> Q. I don't see any blood on your shirt.
>
> A. No, no, I lent him a shirt earlier at my place.
>
> Q. What did the shirt look like?
>
> A. It is white. I don't remember if it is long-sleeved or short-sleeved.

Q. Why did you lend him the shirt?

A. To hide the knife. Tim was very pissed off. He said he left the sheath of the knife there in the car.

Q. Where did Tim get the knife?

A. We were at Square One in Mississauga today, in a small store there, and Tim bought the knife from a lady.

Q. Can you describe the knife?

A. It was a Kodiak knife with a 5 1/2-inch blade in a sheath. The handle of the knife was bone with a gold cap. He asked to see three, a Bowie, the Kodiak and another little knife. Tim paid $107 plus $7 tax for the knife.

Q. What did you do then?

A. We went to the Toronto-Dominion Bank to see if we could get his green card back — the bank at King and Highway 10. We went on our ten-speeds. I saw Tim talk to a woman in the bank. He generally asked if there was a way he could get his green card back, and she said "Yes, in seven days." He had pushed the wrong keys and the machine ate his card. We left the bank and rode our ten-speeds to my place. I was supposed to meet my wife there at 7:00 p.m. We waited until 7:14 p.m., and during this time I lent him the shirt. We then left our bikes there and walked to the Long Branch loop. My wife did not come home.

Q. What was the knife for?

A. *Tim told me he wanted to travel up north and needed some money . He said he would like to dummy a cab driver and get some money .*
Q. *What does "dummy" mean to you?*

A. *He told me "wipe out" or "kill"* . On the way to the loop, he talked about it. The loop is about a mile and a half from my place.

Q. Why did you walk to the loop?

A. It was my idea to walk to the loop, as I knew there were cabs there. I didn't want a cab to come to my place.

Q. Why?

A. Because there would be a record.

Q. Gary, there seems to be more to this than you said.

A. *I'll level with you . I knew, I knew at Square One . He told me he was going to kill a cab driver and take the money . I knew what he wanted to do and I went with him . He gave me $40 and I was supposed to pay the driver when we got to the boonies and distract him and Tim would knife him and kill him and we would take his money* . Tim gave the driver a $20 bill before I had a chance to pay him. I started to get out of the car and he stabbed him and we ran away; then he was wiping blood on the shirt. He was mad that he left the sheath in the car, because his fingerprints were on it. [emphasis added]

23 The appellant then provided the police with a written statement signed by him, which read as follows:

Question: On Friday August 26, 1983, at approximately 9:30 p.m., a cab driver by the name of Philip DAVIDSON was stabbed to death on Milvan Dr., Toronto. What, if anything, can you tell us about this?

Answer: I was with Tim WOODS. We met today at the Central Parkway mall. We went to Square One to a little store there that had a lot of knives. He bought a Kodiak knife with a five and a half inch blade from the East Indian girl. He

paid $114.00 for the knife, it was in a sheath. After we left the store, we went to the TD Bank at 10 and King and then we went to my place. *At Square One he talked about dummying a cab driver and taking the money as he wanted to travel up north . I asked him what he meant by dummying and he said wipe out, kill* . He asked for a shirt at my place to conceal the knife. I gave him a white shirt of mine and he put it on over his T-shirt. We waited for my wife to come home and when she didn't arrive we left our bikes at my place and walked to the Long Branch Loop. On the way there we talked about robbing a cab driver, any cab driver. He said he would do everything. I saw a cab coming from Port Credit and I flagged it down and that was it. Before the cab stopped, he told me he had a place lined up in a factory area. I didn't know where the place was but he did. *From what he said I understood that he was going to knife the cab driver* . I went with him because I had nothing better to do this evening, I should have stayed home with my wife. When the cab stopped I got in the front and Tim got in the back. Tim told the driver to go to Transpo factory. He said it was 121 Milvan Dr. The cab driver said he will get us to the area and Tim can point out the area where we wanted to go. We went up the 400 to Finch and along Finch and over to Milvan whatever. He pulled into the factory after Tim told him that that was the place. I got out of the car, I knew what was going to happen. The driver said the fare was eighteen something. Tim handed him a twenty dollar bill and as the driver was shuffling with the money I heard a thud and some shuffling. Then TIM got out of the car and said: "I stabbed him, let's run" or something along that line. We ran away. I saw the cab pull out forwards, it was coasting forwards. We ran through the factories and over fences. He was mad about leaving the sheath in the car. He wiped the blood from the knife on the shirt that I gave him. We split up. I became scared because the whole situation was out of proportion. I went immediately to the phone and called the police and gave my name and told them about the stabbing. After 45 minutes the police came. I also called my wife and Patti BUTTON from the phone, the phone booth at Satterly and Islington.
Question: *Did you know he was going to kill the cab driver before you got in the cab?*

Answer: *Yes, I knew . After it happened I felt sorry and guilty and that is why I called* . I was very concerned about the cab driver's life.

Question: Is there anything further that you wish to tell us about this matter?

Answer: I am real sorry but that doesn't help now. [emphasis added]

The Application of S. 686(1)(b)(iii) (Formerly S. 613) of the Criminal Code

24 The Crown submits that, even though the verdict of second degree murder was based on the now-unconstitutional s. 213(*d*) of the Code, this court should apply the proviso in s. 686(1)(*b*)(iii) to dismiss the appeal. The Crown submits that no substantial wrong or miscarriage of justice has occurred, because a reasonable jury, if charged on the combined effect of ss. 212 (now s. 229) and 21(2) of the Criminal Code, would necessarily have found the appellant guilty of second degree murder.

The Relevant Portions of the Code

25 Section 212 of the Criminal Code, so far as it is material, read:

212. Culpable homicide is murder

(*a*) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not ...

26 Section 21(2) reads:

> (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. [emphasis added]

27 The Crown submits that, on the evidence, the appellant's liability as a party to the offence of murder under s. 21(2) of the Code is clear, for the following reasons:

28 1. There is no dispute on the evidence that the appellant and Woods formed an intention in common to carry out a robbery and to assist each other in accomplishing this "unlawful purpose".

29 2. Woods intentionally killed the taxi driver and was guilty of a s. 214(2) (now s. 231(2) (planned and deliberate)) first degree murder.

30 3. On his own evidence, the appellant *ought to have known* that Woods was serious when he said he intended to kill a taxi driver, or the appellant *should have known* that Woods would use the knife to intentionally inflict bodily harm that Woods would know was likely to cause death and that Woods would be reckless whether death ensued or not.

31 In support of the submission that the appellant "ought to have known" within the purview of s. 21(2) of the Code, the Crown emphasizes in particular the following answer given by the appellant in his written statement to the police:

> Question: Did you know he was going to kill the cab driver before you got in the cab?
>
> Answer: Yes, I knew. After it happened I felt sorry and guilty and that is why I called. I was very concerned about the cab driver's life.

32 In *R. v. Giff* (1988), 64 C.R. (3d) 328, 42 C.C.C. (3d) 524, 28 O.A.C. 3 , this court said at p. 339:

> We accept as a general proposition that we are not entitled to decide questions of fact required to be found by the jury that were not left with them.

33 In my view, even assuming that the phrase "ought to have known" contained in s. 21(2) of the Code is applicable, it nevertheless remains the function of the jury, in deciding the guilt or innocence of the accused, to weigh the effect of the apparently serious and incriminating admissions made by the appellant in his written and oral statements to the police in the light of his testimony under oath, during which he repeatedly denied that he seriously believed the expressed intention of Woods to kill the taxi driver. If the jury accepted the appellant's sworn testimony, they might well have concluded that the Crown had not proven that the appellant in fact either *knew* or *ought to have known* of Woods's intention to kill. I am not satisfied that a jury properly charged would necessarily have rejected the testimony of the appellant given under oath at trial and would have found him guilty of second degree murder.

Are the Words "Ought to Have Known" in S. 21(2) of the Code Constitutionally Invalid in a Charge of Murder?

34 There remains what, in my view, is a more difficult issue, and that is, in the light of the decision of the Supreme Court of Canada in *R. v. Vaillancourt* , supra, and the decision of this court in *R. v. Logan* , 28th December 1988 [now reported 67 O.R. (2d) 87, 68 C.R. (3d) 1, 46 C.C.C. (3d) 354, 57 D.L.R. (4th) 58, 30 O.A.C. 321], whether the words "ought to have known" contained in s. 21(2) of the Code should be considered inoperative, where that section is being applied in combination with the Code ss. 212(*a*)(i) and 212(*a*)(ii) murder provisions.

35 At trial the jury appears to have been concerned with the effect of the words "ought to have known" contained in s. 21(2) of the Code, because after deliberating for little more than an hour, they returned with a question, asking:

> If I [we] have a reasonable doubt that Harris did not believe at the time of the offence that there was going to be a killing, how do I [we] interpret ss. 21 and 213?

36 In response to this question the trial judge repeated his charge in relation to s. 21(2) and s. 213(*d*) of the Criminal Code, emphasizing that under s. 21(2) it was necessary only that the Crown prove under the joint application of these sections that the appellant knew or "*ought to have known* " that Woods would use the knife in the commission of the robbery or in the flight from it.

37 In *Vaillancourt* , supra, the Supreme Court of Canada held that s. 213(d) of the Criminal Code is inconsistent with s. 7 of the Canadian Charter of Rights and Freedoms because liability for murder might be imposed without even an objective foreseeability of death. The court also held that s. 213(*d*) could not be supported under s. 1 of the Charter as a reasonable limit "demonstrably justified in a free and democratic society".

38 Striking down s. 213(*d*) of the Criminal Code, Lamer J. (with whom Dickson C.J.C. and Estey and Wilson JJ. concurred) reasoned that certain crimes, such as murder, because of the special nature of the stigma and penalties which follow conviction, require some minimum mental element. In the case of murder, this means at least an objective foresight of death. While careful to limit the ratio of his judgment to this narrow holding, Lamer J. observed at p. 134 [C.C.C.]:

> I am presently of the view that it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of *subjective* foresight. [emphasis added]

39 This court in *R. v. Logan* , supra, following *Vaillancourt* , held that it was contrary to the principles of fundamental justice to find a party liable for attempted murder on the basis of an objective mens rea when the perpetrator of the crime could be found guilty only on proof of a specific intent to kill. Accordingly, the court held that the phrase "ought to have known" contained in s. 21(2) was inoperative to determine the guilt of a party charged with *attempted* murder.

40 In *Logan* , three accused, Hugh Logan, Warren Johnson and Clive Brown, were charged with attempting to murder Barbara Turnbull. The Crown led evidence that the three men, armed with loaded revolvers, entered a Becker's store intending to commit a robbery. One of them, Hugh Logan, shot the lone cashier, Barbara Turnbull, in the neck at close range, causing near-fatal injuries. The cash register was looted and the robbers fled. Warren Johnson and a fourth accused, Sutcliffe Logan, were found guilty of attempted murder on the basis that they were parties to the offence within the meaning of s. 21(2) of the Criminal Code.

41 In commenting on the case as it was presented to the jury, this court said at pp. 77-78 [p. 47 (C.R.)]:

> In this case it was open to the jury to conclude, as instructed by the trial judge, that Warren Johnson and Sutcliffe Logan had formed an intention in common with Hugh Logan to rob the Becker's store and to assist each other in planning and in carrying out the robbery, and *that they knew* that it was a probable consequence of the carrying out of the robbery that Hugh Logan would shoot with the intention of killing. The mens rea necessary for a finding of guilt on that basis, as authorized by s. 21(2), would not, in our opinion, be contrary to the principles of fundamental justice.
>
> However, it was open to the jury to have a reasonable doubt as to whether Warren Johnson and Sutcliffe Logan knew that it was a probable consequence of the carrying out of the robbery that Hugh Logan would shoot with intent to kill. The jury could have concluded that Warren Johnson and Sutcliffe Logan ought to have known that such would be a probable consequence of the carrying out of the robbery. The jury might thus have found them guilty *on the basis of objective foreseeability* .
>
> As previously noted, on a charge of attempted murder, the necessary mens rea must be that of an intention to kill. *In our opinion, insofar as s. 21(2) permits a conviction of a party for the offence of attempted murder on the basis of objective foreseeability, a lesser degree of mens rea than is required for the principal, it is contrary to the principles of fundamental justice* . Nor do we think that this departure from the principles of fundamental justice can be saved by s. 1 of the Charter. [emphasis added]

42 This court in *Logan* set aside the convictions for attempted murder against Johnson and Sutcliffe Logan. The court declined to invoke the proviso in s. 613(1)(*b*)(iii) (now s. 686(1)(*b*)(iii)), because it concluded that it was open to a jury to have a reasonable doubt that Johnson and Sutcliffe Logan *knew* that it was a probable consequence of the carrying out of the robbery that Hugh Logan would shoot *with intent* to kill.

43 Central to the decision of this court in *Logan* is the finding that it is contrary to the principles of fundamental justice, guaranteed by s. 7 of the Charter, to impose liability for attempted murder on an accessory on the basis of objective foresight, that is, the foresight of an ordinary person, but require proof of subjective intent to cause death on the part of the actual perpetrator.

44 *Logan* held that where two parties form an intent in common to rob and to assist each other in planning and carrying out the robbery, and where one party *actually knew* that it was a probable consequence of carrying out the robbery that the other party would shoot with the intent of killing, then it would not be contrary to the principles of fundamental justice to hold both the principal offender and the party equally guilty. In such a case, liability of the perpetrator and the accessory would each be determined on the basis of a subjective mens rea requiring proof that each had actual foresight of the consequences of the wrongful conduct.

45 Although *Logan* was a case of attempted murder, I am unable to distinguish it in principle from the present case of murder. Murder, based on s. 212(*a*)(i) or (ii), no less than attempted murder, must be based on the subjective foresight of the perpetrator, and a party should not be convicted of murder on the basis of the combination of the objective foresight required by s. 21(2) of the Criminal Code and the s. 212 murder provisions.

46 Murder, as defined in subs. (*a*)(i) and (ii) of s. 212, requires proof first of an intention to kill a victim or of an intention to cause bodily harm to a victim with actual knowledge of the likelihood of death and a recklessness as to its occurrence. In either case, the mens rea is subjective.

47 At trial, the Crown's case was that Woods was guilty of, at least, second degree murder because he stabbed the taxi driver intending to kill him. On that theory of the case, following the principles enunciated in *Logan* , supra, it would be contrary to the principles of fundamental justice to direct the jury that they should convict the appellant on the objective test of the ordinary person, that is, that he *ought to have known* in the circumstances that Woods would stab with the intention of killing.

48 Even if the Crown's case had been prosecuted on the theory that Woods was guilty of murder under s. 212(*a*)(ii) of the Code, this would require proof of an intent by Woods to cause the victim bodily harm that Woods subjectively knew was likely to cause death, and that Woods was reckless whether death ensued or not. Under the present wording of s. 21(2), the Crown would then be required to prove that the appellant had formed an intention in common with Woods to carry out the robbery and to assist Woods for that purpose, and further: (a) that the appellant ought to have known that Woods would stab the taxi driver; and (b) that the appellant ought to have known that the stabbing was likely to cause death.

49 In short, whether the Crown's theory of murder as committed by Woods depends on proof of the elements of s. 212(*a*)(i) or 212(*a*)(ii), the mens rea to be proven on the part of Woods was subjective, whereas under the present wording of s. 21(2) the appellant might well be convicted as a party to the murder on the basis of objective foresight of the conduct of Woods.

50 On the charge of murder as defined in s. 212(*a*)(i) or (ii), where s. 21(2) is invoked to determine the liability of a party to the murder, I would, following *Logan* , supra, hold that the words "ought to have known" in that section are inoperative and that these words should be ignored in determining the guilt of the party to the offence of murder.

Disposition

51 I would allow the appeal, set aside the conviction, and order a new trial.

Appeal allowed; new trial ordered.

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Most Negative Treatment: Not followed
Most Recent Not followed: R. v. Singh | 1993 CarswellOnt 2410, [1993] O.J. No. 2156, 21 W.C.B. (2d) 80 | (Ont. C.A., Sep 22, 1993)

1977 CarswellOnt 982
Ontario Court of Appeal

R. v. Schell

1977 CarswellOnt 982, 33 C.C.C. (2d) 422

Her Majesty The Queen, Respondent and Dale Cameron Schell and Kathleen Winnifred Paquette, Appellants

Zuber, Evans, MacKinnon, JJ.A.

Heard: November 4, 1976
Judgment: January 17, 1977
Docket: None given.

Counsel: *Michael J. Moldaver* , for the Appellant, Schell.
Harvey Spiegel , for the Appellant, Paquette.
Edward Then , for the Respondent.

Subject: Criminal; Criminal; Evidence

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Criminal law

I General principles
I.6 Parties
I.6.c Common intent

Criminal law

VIII Trial procedure
VIII.8 Charging jury or self-instruction
VIII.8.l Direction on joinder
VIII.8.l.ii Joinder of accused
VIII.8.l.ii.C Miscellaneous

Criminal law

VIII Trial procedure
VIII.10 Verdict
VIII.10.a Directed verdict
VIII.10.a.iii Miscellaneous

Evidence

II Proof
II.8 Proof of specific issues

II.8.e Intent

Evidence

XV Character
XV.6 Similar fact evidence
XV.6.b To rebut defence

Headnote

Criminal Law --- General principles involving criminal law — Involvement in crime — Complicity — Parties by common intention

Manslaughter — Accused mother and common law husband charged with murder in death of infant following severe beating -- Prior abuse of child by both accused — Trial Judge not charging jury in respect of common intention under s. 21(2) of the Code — Trial Judge instructing jury that there was no evidence of aiding and abetting — Non-direction amounting to misdirection in circumstances in failure to direct acquittal of both accused if jury unable to decide who killed child -- Conviction for manslaughter set aside and new trial ordered on charge of manslaughter — Open to properly instruct jury to apply s. 21(2) and convict both accused on basis that they formed common intention to carry out unlawful purpose of child abuse — Criminal Code, R.S.C. 1970, c. C-34, s. 21(2).

Criminal Law --- Evidence — Legal proof — Proof of intent

Accused mother and common law husband charged with murder in death of infant following severe beating — Prior abuse of child by both accused — Trial Judge not charging jury in respect of common intention under s. 21(2) of Code — Trial Judge instructing jury that there was no evidence of aiding and abetting — Non-direction amounting to misdirection in circumstances in failure to direct acquittal of both accused if jury unable to decide who killed child — Conviction for manslaughter set aside and new trial ordered on charge of manslaughter — Open to properly instructed jury to apply s. 21(2) and convict both accused on basis that they formed common intention to carry out unlawful purpose of child abuse ± Criminal Code, R.S.C. 1970, c. C-34, s. 21(2).

Criminal Law --- Trial by indictment — Charging jury — Direction on joinder — Joinder of accused

Homicide — Manslaughter — Accused mother and common law husband charged with murder in death of infant following severe beating — Prior abuse of child by both accused — Trial Judge not charging jury in respect of common intention under s. 21(2) of Code — Trial Judge instructing jury that there was no evidence of aiding and abetting — Non-direction amounting to misdirection in circumstances in failure to direct acquittal of both accused if jury unable to decide who killed child -- Conviction for manslaughter set aside and new trial ordered on charge of manslaughter — Open to properly instructed jury to apply s. 21(2) and convict both accused on basis that they formed common intention to carry out unlawful purpose of child abuse — Criminal Code, R.S.C. 1970, c. C-34, s. 21(2).

Criminal Law --- Trial by indictment — Verdict — Directed verdict

Homicide — Manslaughter — Accused mother and common law husband charged with murder in death of infant following severe beating — Prior abuse of child by both accused — Trial Judge not charging jury in respect of common intention under s. 21(2) of Code — Trial Judge instructing jury that there was no evidence of aiding and abetting — Non-direction amounting to misdirection in circumstances in failure to direct acquittal of both accused if jury unable to decide who killed child -- Conviction for manslaughter set aside and new trial ordered on charge of manslaughter — Open to properly instructed jury to apply s. 21(2) and convict both accused on basis that they formed common intention to carry out unlawful purpose of child abuse --Criminal Code, R.S.C. 1970, c. C-34, s. 21(2).

Evidence --- Exclusionary rules — Admissibility of character evidence — In criminal matters — Similar fact evidence — To rebut specific defence

Accused mother and common law husband charged with murder in death of infant following severe beating -- Male accused raising defence of accident in statement -- Evidence of prior abuse of child by accused admissible to rebut defence of accident and to show motive of hostility to victim -- Incumbent upon Trial Judge to explain to jury that evidence of prior abuse can be used only to extent that it relates to material issue and not for purpose of demonstrating propensity to commit crime.

***Zuber, J.A.*:**

1 The Appellants, Dale Cameron Schell and Kathleen Winnifred Paquette, were charged with the murder of Diane Paquette. They were tried at Sault Ste. Marie and were found not guilty of murder, but guilty of manslaughter. Each appellant was sentenced to three years imprisonment.

2 The appellants now appeal their convictions and alternatively appeal the sentence imposed. It is the appeal against conviction that has been the principal subject of the argument before this Court.

3 The appellants advance two grounds of appeal. The first concerns the instructions of the trial judge to the jury. The second is based on the admission of evidence of previous acts of misconduct by each of the accused. An appreciation of the grounds of appeal requires discussion of the facts but since I have reached the conclusion there must be a new trial, I will deal with the facts only to the extent necessitated by the issues raised on this appeal.

4 Dale Cameron Schell lived with Kathleen Winnifred Paquette as man and wife, an arrangement which commenced in August of 1974. The household also included three children of Kathleen Paquette by a prior marriage, namely Michel aged 4, Diane aged 3 and Rene aged 2.

5 On February 21, 1975, Schell brought the child Diane to the Sault Ste. Marie General Hospital. The child was in critical condition and died on February 22nd. The medical evidence demonstrated that death was caused by destruction of the vital centres of the brain as a result of a subdural hematoma. This particular subdural hematoma was described as acute and would ordinarily be caused by one or more blows of considerable force to the head, or a very violent shaking of the child, which would cause the head to flop back and forward. There was no direct evidence adduced by the Crown as to the manner of infliction of the fatal injury.

6 In addition to the fatal injuries sustained by Diane, there was abundant medical evidence that Diane had suffered a large number of bruises as well as a serious abdominal injury. All of these injuries were sustained over an extended period of time and were not consistent with ordinary play or falling. None of these injuries, however, contributed to Diane's death.

7 The case for the prosecution was based upon the following components. Firstly, the injury which caused death was alleged to be of the kind that must have been unlawfully inflicted by some person. Secondly, the two accused were the only two people who had custody and control of Diane during material times and therefore were virtually the only ones who had the opportunity to inflict the fatal injury. Thirdly, the Crown introduced a substantial amount of evidence to demonstrate that on prior occasions each accused had severely mistreated Diane. There was, for example, evidence that the accused Paquette had thrown Diane some five or six feet through the air resulting in the child landing on the floor. There was evidence that the accused Schell had kicked the child Diane. There was also evidence that on one occasion the accused Schell and Paquette had taken Diane and Michel and started them fighting. This was accomplished by each adult controlling the fists of a child. This process was stopped only when Michel's nose was bloodied and Diane's lip was bleeding. The final aspect of the Crown's case was based on several statements given by the accused Schell, which suggested the child had suffered the fatal injury accidentally, or at least that he has no knowledge of how the injury was sustained. There was some evidence which tended to show that parts of these statements were false.

8 Wayne Schell testified at trial and admitted that he had on occasion disciplined the children, including Diane. He denied, however, that he caused the fatal injury and he offered an explanation as to the statements that he had given. The accused Paquette did not testify.

9 I turn first to the question of the admissibility of the evidence of previous mistreatment of the child Diane by both accused. It was argued at some length that evidence relating to the previous acts of abuse to the deceased child was not admissible, since the previous acts were not sufficiently similar to the act alleged to have caused death, and further that this

evidence could not be utilized to rebut any defence of accident since no such defence was raised. While it may be that the defence chose not to argue this defence before the jury, it was certainly an issue raised by at least one of Schell's statements. In short, the position of the appellants is that the so called 'similar act' evidence in this case fails to fit precisely into any of the several exceptions to the general prohibition against the introduction of evidence of bad character of an accused.

10 The beginning point in considering this topic is almost always *Makin v. The Attorney General for New South Wales* , 1894 A.C.57 and the statement of Lord Herschell at p.65:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

Many subsequent cases dealing with this topic concern themselves with the so called exceptions set out in the second part of Lord Herschell's statement and there is no particular profit to be derived from a review of those cases. For as Arnup, J.A. stated in *Regina v. MacDonald* , 1974 27 C.R.N.S., p.219:

> This area of the law is one of great difficulty and the path for which these cases are the guideposts do not seem to me to have always proceeded in a straight line towards a readily definable destination.

11 In my respectful view, the kind of exercise that has occupied much of the time of this Court, i.e. the attempt to define the precise limits of the so called exceptions to the rule against the admission of character evidence, contains within it a misconception.

12 It should be kept in mind that the rule against the admission of character evidence for the simple purpose of showing that the accused is a bad man and, therefore, more likely to commit a crime than a good man, is itself an exception to the first proposition of admissibility, which is that any evidence which is relevant (i.e. rationally probative of a material fact) is admissible. In my view the previous acts of these two accused are obviously probative of guilt. In writing of character evidence generally Professor Wigmore observed that it is not only probative but perhaps too much so (see Wigmore On Evidence, Third Edition, Vol. 1, p.646).

13 The real object of the inquiry into admissibility then is to determine whether or not this evidence is covered by the exclusionary rule. The so called exceptions to the exclusionary rule, I think are better described as classes of cases not reached by the rule. The fact that these classes may be assembled into helpful lists should not suggest that the list is exhaustive, or the classes are separate, water-tight compartments.

14 In my respectful view, the rule is best stated in McCormick On Evidence, 2nd Edition, p.447, paragraph 190:

> The rule is that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character. There are numerous other purposes for which evidence of other criminal acts may be offered, and when so offered the rule of exclusion is simply inapplicable. Some of these purposes are listed below but warning must be given that the list is not complete, for the range of relevancy outside the ban is almost infinite; and further that the purposes are not mutually exclusive, for a particular line of proof may fall within several of them. Neither are they strictly co-ordinate. Some are phrased in terms of the immediate inferences sought to be drawn, such as plan or motive, others in terms of the ultimate fact, such as knowledge, intent or identity which the prosecution seeks to establish.

15 This view appears to me, at least, to be consistent with a position subsequently arrived at by the House of Lords in the *Director of Public Prosecution v. Boardman* (1975) A.C.421.

16 To return to the facts at hand, the evidence of the previous conduct of these two accused clearly falls outside the exclusionary rule. This evidence is relevant to show motive, i. e. hostility toward the victim, a course of conduct which culminated in homicide, and to rebut the defence of accident raised in the statement of Schell.

17 The trial judge will, of course, explain to the jury that the evidence of previous acts of mistreatment, if accepted by them, can be used only to the extent that it relates to a material issue and not merely for the purpose of demonstrating a propensity to commit crime.

18 The second ground of appeal is much more formidable and rests on the proposition that the jury should have been told that if they were satisfied beyond a reasonable doubt that Diane had been killed by either one of the two accused, but if they were unable to say which one of them, then both were entitled to be acquitted. (See *R. v. Abbott*, [1955] 2 All E.R. 899 , *King v. Reginam*, [1962] 1 All E.R. 816 ; *Rex v. Upton*, 25 C.C.C. 28).

19 One must necessarily preface an examination of this ground by first determining the use made, if any, of Section 21 of the Criminal Code, which is as follows:

> 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.
>
> (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.

20 In a discussion with counsel before the Charge to the Jury, the learned trial judge expressed the view that there was no basis in the evidence which would call for the application of Section 21(2) and as a result did not instruct the jury on this subsection.

21 In the course of the Charge, he did refer to and explain Section 21(1)(b) and (c) but also, and correctly, pointed out that there was no evidence as to how the death had been caused and no evidence of aiding or abetting. The Charge to the Jury dealt with the constituent elements of murder and manslaughter and in this respect the instructions to the jury were impeccable. The problem remains, however, that based on the instructions given to the jury, how can the conviction of both be supported? Having failed to instruct the jury on Section 21(2) and having pointed out the practical inapplicability of Section 21(1)(b) and (c), the Charge should have then proceeded to tell the jury that they should convict one or the other and if they could not decide which, then both were to be acquitted.

22 The Crown attempted to support the result on the basis that on the medical evidence the child died as a result of a blow or blows and therefore the jury must have been of the view that each accused administered a blow which caused, or substantially contributed to the death of the victim. This argument seems to me, with respect, to be an unrealistic distortion of the medical evidence, which indicates that while there may have been multiple blows, they arose from a single beating.

23 It must, therefore, be concluded that there was non-direction of the jury amounting to mis-direction and there must be a new trial. However, since there must be a new trial, I find that I cannot leave the matter without returning to the issue of whether or not Section 21(2) can apply to this case, and whether the section should have been left to the jury. The accused Paquette was the mother of Diane and was under a legal duty to care for her. The evidence is not clear as to what duties Schell assumed toward the children; it is therefore not clear whether or not Schell had any responsibility toward Diane pursuant to Section 197 of the Criminal Code. However, in the circumstances of this case Schell had at least a moral obligation to care for Diane. Against this background the evidence of separate and joint acts of abuse of Diane must be examined and construed. In my opinion it would be open to a jury to find that both accused had formed a common intention to carry out an unlawful purpose (i.e. child abuse) and assist each other therein, and each knew, or ought to have known, that

the unlawful infliction of bodily harm by the other was a probable consequence of carrying out that common purpose.

24 This view of Section 21(2) is, of course, premised on the assumption that the evidence at the new trial will be the same or similar to that given in the previous trial, and that assessment will have to be made by the trial judge. However, if a jury were so instructed on the facts that have appeared before us, they would be justified in convicting both accused. I have not been referred to, nor been able to find any cases of direct assistance on this last point. *Rex v. Gibbins and Proctor* , (1917) 13 C.A.R. 134, is, however, of at least peripheral support. In the result, there will be an order setting aside the convictions of both accused and directing a new trial of each accused on the charge of manslaughter.

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