SUPREME COURT OF CANADA

CITATION: R. *v.* Cowan, 2021 SCC 45

APPEALS HEARD: May 12, 2021
JUDGMENT RENDERED: November 5, 2021
DOCKET: 39301

BETWEEN:

Jason William Cowan
Appellant

and

Her Majesty The Queen
Respondent

AND BETWEEN:

Her Majesty The Queen
Appellant

and

Jason William Cowan
Respondent

CORAM: Wagner C.J. and Moldaver, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 74)

Moldaver J. (Wagner C.J. and Côté, Martin and Kasirer JJ. concurring)

DISSENTING REASONS: (paras. 75 to 93)	Rowe J. (Brown J. concurring)

Jason William Cowan *Appellant*

v.

Her Majesty The Queen *Respondent*

- and -

Her Majesty The Queen *Appellant*

v.

Jason William Cowan *Respondent*

Indexed as: R. *v.* Cowan

2021 SCC 45

File No.: 39301.

2021: May 12; 2021: November 5.

Present: Wagner C.J. and Moldaver, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law — Parties to offence — Abetting — Counselling — Accused acquitted of armed robbery as party or principal — Court of Appeal holding that trial judge erred in law in assessing accused's liability as party for having abetted or counselled commission of offence by requiring Crown to prove that two specific individuals were principal offenders — Court of Appeal determining that error had material bearing on acquittal, setting aside acquittal and ordering new trial limited to theory of party liability — Whether trial judge erred in assessment of accused's guilt as party on basis of abetting or counselling — If so, whether error had material bearing on acquittal such that new trial warranted — Criminal Code, R.S.C. 1985, c. C-46, ss. 21(1)(c), 22(1).

Criminal law — Appeals — Powers of Court of Appeal — Accused acquitted of armed robbery as party or principal — Court of Appeal setting aside acquittal and ordering new trial limited to theory of party liability — Whether Court of Appeal erred in restricting scope of new trial to question of whether accused was guilty as party on basis of abetting or counselling — Criminal Code, R.S.C. 1985, c. C-46, s. 686(8).

Two individuals robbed a Subway restaurant. One wore a mask and brandished a knife, while the other stood watch at the front door. C was arrested in relation to the robbery and provided police with a statement denying involvement in the robbery but admitting that he had told a group of individuals — including his friends T and L — how to commit the robbery. C was subsequently charged with armed

robbery and tried by a judge alone. At trial, the Crown advanced two alternative theories of liability: that C was the masked robber and guilty as a principal offender under s. 21(1)(a) of the *Criminal Code*, or that C was guilty as a party to the armed robbery in that he either abetted the commission of the offence under s. 21(1)(c), or counselled its commission under s. 22(1). The trial judge rejected both theories of liability and acquitted C. In his view, the evidence fell short of proving that C was one of the principal offenders. Regarding party liability, he found that C could only be convicted as a party if the Crown established that C's friends T and L had committed the robbery, but he concluded that the evidence also fell short in this regard.

A majority of the Court of Appeal allowed the Crown's appeal, set aside C's acquittal and ordered a new trial. It found no error in the trial judge's analysis concerning C's role as a principal but held that the trial judge made a serious error on the issue of party liability, which may have affected the verdict. Accordingly, it ordered that the new trial be limited to the question of C's guilt as a party, on the basis of abetting or counselling. The dissenting judge would have dismissed the appeal in its entirety. C appeals as of right to the Court from the setting aside of his acquittal, and the Crown appeals with leave from the order of the Court of Appeal limiting the scope of the new trial.

Held (Brown and Rowe JJ. dissenting): C's appeal should be dismissed and the Crown's appeal should be allowed.

Per Wagner C.J. and **Moldaver**, Côté, Martin and Kasirer JJ.: There is agreement with the majority of the Court of Appeal that the trial judge erred in law in his analysis of party liability, which had a material bearing on the acquittal. However, the appropriate remedy is to set aside the acquittal and order a full new trial. While appellate courts have broad powers under s. 686(8) of the *Criminal Code* to make any order that justice requires, this does not include the power to limit the scope of a new trial to a particular theory of liability on a single criminal charge.

For the purposes of determining criminal liability, the *Criminal Code* does not distinguish between principal offenders and parties to an offence. Sections 21 and 22 codify both liability for an accused who participates in an offence by actually committing it (principal liability), and liability for an accused who participates in an offence by abetting or counselling another person to commit the offence (party liability). Where an accused prosecuted as an abettor or counsellor is being tried alone and there is evidence that more than one person participated in the commission of the offence, the Crown is not required to prove the identity of the other participant(s) or the precise part played by each in order to prove the accused's guilt as a party. The *actus reus* of abetting is doing something or omitting to do something that encourages the principal to commit the offence. As for the *mens rea*, the abettor must have intended to abet the principal in the commission of the offence and known that the principal intended to commit the offence. The *actus reus* of counselling is the deliberate encouragement or active inducement of the commission of a criminal offence. The person encouraged or induced by the counsellor must also actually participate in the

offence. As for the *mens rea*, the counsellor must have either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was likely to be committed as a result of the accused's conduct. Whether the person counselled is a principal or party is irrelevant since the focus on a prosecution for counselling is only on the counsellor's conduct and state of mind.

In the instant case, the trial judge erred in law in assessing C's liability as a party for having abetted or counselled the commission of the offence. By reasoning that the Crown was required to prove that T and L were the principals as a prerequisite to establishing C's guilt as a party, the trial judge misdirected himself on the law and failed to correctly assess the relevant evidence. The Crown was only required to prove that any one of the individuals encouraged by C went on to participate in the offence either as a principal offender — in which case C would be guilty as both an abettor and a counsellor — or as a party — in which case C would be guilty as a counsellor. C could still have been found guilty of being a party to the offence even if the precise identity or part played by each individual who participated in the commission of the offence was uncertain, so long as C had committed the necessary act with the requisite intent. There was therefore no need for the trial judge to focus on the identity of a given principal, whether or not the Crown identified specific individuals as principals to the offence.

To have an acquittal set aside due to a legal error, the Crown must satisfy an appellate court to a reasonable degree of certainty that the impugned error might have had a material bearing on the acquittal. In the present case, the Crown has met its burden. The trial judge structured his analysis of the evidence based on the erroneous premise that the Crown had to prove T and L were the principals before C could be convicted. He failed to recognize that the evidence before him was reasonably capable of establishing that C committed the prohibited act with the requisite intent for party liability on the basis of abetting or counselling. The verdict may well have been different if the trial judge had considered the evidence in light of the correct legal principles.

Where an appellate court allows an appeal and sets aside an acquittal, it has the power, under s. 686(4)(b)(i) of the *Criminal Code*, to order a new trial and to make any order, in addition, that justice requires under s. 686(8). Three conditions must be met for s. 686(8) to apply. First, the appellate court must have exercised one of the triggering powers conferred under s. 686(2), (4), (6) or (7). Second, the order issued must be ancillary to the triggering power in that it cannot be at direct variance with the court's underlying judgment. Third, the order must be one that justice requires. In the instant case, the second and third conditions were not met. In separating the Crown's theories of liability in its ancillary order, the Court of Appeal bifurcated the offence of armed robbery into two separate offences: robbery as a principal and robbery as a party, be it as an abettor or counsellor. The effect was to uphold C's acquittal on the single charge of armed robbery in part. This is at odds with the underlying judgment allowing

the Crown appeal and setting aside the verdict rendered on that charge as a whole. The ancillary order was also not one that justice required as it threatens the integrity of the criminal process by distorting the truth-seeking function of the courts. A trier of fact must be able to consider all theories of liability that have an air of reality based on the evidence adduced at the new trial. To prospectively deny a trier of fact the ability to consider a viable theory of liability would be to undermine their ability to carry out their core function: to determine whether the Crown has proven that the accused committed the offence(s) charged.

Finally, the doctrine of issue estoppel does not prevent the relitigation of the Crown's theory that C is guilty of armed robbery as a principal offender. No issue can be said to have been finally decided in the first trial because the result of that trial has been entirely set aside.

Per Brown and **Rowe** JJ. (dissenting): C's acquittal should be restored for the reasons of the dissenting judge at the Court of Appeal. It is not necessary to deal with the Crown's appeal; however, there is concern with what the majority has written in this regard.

Issue estoppel precludes the Crown from relitigating an issue that has been determined in the accused's favour in a prior criminal proceeding. There are three requirements for its application: the issue must have been decided in a prior proceeding; the decision must be final; and the parties to the two proceedings must be the same. The Court of Appeal found no error as to the acquittal based on C having committed

the robbery as a principal. This finding should not be set aside. Preventing the Crown from relitigating issues resolved in favour of the accused during the first trial is a question of fairness to the accused, integrity and coherence of the criminal process, and finality. An accused should not have to mount a second defence in the absence of a relevant reversible error. There is also disagreement with the majority's conclusion relating to the exercise by courts of appeal of their powers under s. 686(8) of the *Criminal Code*. In the present case, no error in principle has been shown and the Court of Appeal order is not clearly wrong. First, the order is not at direct variance with the underlying judgment. There is no rule that a charge as a whole must be retried if a new trial is ordered on a count alleging an offence which may be committed in different ways. Rather, whether or not a full new trial should be ordered depends on the degree to which counts, and modes of committing offences charged as a single count, are interconnected. The question is one of being able to isolate the legal error. Second, the Court of Appeal's order was not contrary to what justice requires. The order promoted fairness to C, the efficient use of the court's resources, and the integrity of the criminal justice process.

Cases Cited

By Moldaver J.

Applied: *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Huard*, 2013 ONCA 650, 302 C.C.C. (3d) 469; *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198; *R. v. Isaac*, [1984] 1 S.C.R. 74; *R. v. Thatcher*, [1987] 1 S.C.R. 652; *R. v. R.V.*,

2021 SCC 10; *R. v. MacKay*, 2005 SCC 79, [2005] 3 S.C.R. 725; **considered:** *R. v. Ekman*, 2006 BCCA 206, 209 C.C.C. (3d) 121; *R. v. Ekman*, 2004 BCSC 900; **referred to:** *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Sparrow* (1979), 51 C.C.C. (2d) 443; *R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432; *R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Thomas*, [1998] 3 S.C.R. 535; *R. v. Warsing*, [1998] 3 S.C.R. 579; *R. v. Beaulac*, [1999] 1 S.C.R. 768; *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779; *R. v. Last*, 2009 SCC 45, [2009] 3 S.C.R. 146; *R. v. Bernardo* (1997), 105 O.A.C. 244; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. Guillemette*, [1986] 1 S.C.R. 356; *R. v. Alec*, [1975] 1 S.C.R. 720; *R. v. Cook* (1979), 47 C.C.C. (2d) 186; *R. v. Ruptash* (1982), 36 A.R. 346; *R. v. Druken*, 2002 NFCA 23, 211 Nfld. & P.E.I.R. 219; *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316; *Gray v. Dalgety & Co. Ltd.* (1916), 21 C.L.R. 509; *R. v. Duhamel (No. 2)* (1981), 131 D.L.R. (3d) 352, aff'd [1984] 2 S.C.R. 555; *Welch v. The King*, [1950] S.C.R. 412.

By Rowe J. (dissenting)

R. v. Mahalingan, 2008 SCC 63, [2008] 3 S.C.R. 316; *R. v. Punko*, 2012 SCC 39, [2012] 2 S.C.R. 396; *R. v. R.V.*, 2021 SCC 10; *R. v. MacKay*, 2005 SCC 79, [2005] 3 S.C.R. 725.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 21, 22, 265(1)(a), (b), 343(d), 344, 351(2), 686(2), (4), (6), (7), (8).

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Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 5th ed. by Sidney N. Lederman, Alan W. Bryant and Michelle K. Fuerst. Toronto: LexisNexis, 2018.

Spencer-Bower, George. *The Doctrine of Res Judicata*, 2nd ed. by Sir Alexander Kingcome Turner. London, U.K.: Butterworths, 1969.

Vauclair, Martin, et Tristan Desjardins, avec la collaboration de Pauline Lachance. *Traité général de preuve et de procédure pénales*, 27e éd. Montréal: Yvon Blais, 2020.

APPEALS from a judgment of the Saskatchewan Court of Appeal (Jackson, Ottenbreit and Kalmakoff JJ.A.), 2020 SKCA 77, 389 C.C.C. (3d) 258, [2020] S.J. No. 251 (QL), 2020 CarswellSask 325 (WL Can.), setting aside a decision of Zarzeczny J., 2018 SKQB 75, [2018] S.J. No. 102 (QL), 2018 CarswellSask 118 (WL Can.). Appeal by Jason William Cowan dismissed, appeal by Her Majesty the Queen allowed, Brown and Rowe JJ. dissenting.

Thomas Hynes, for the appellant/respondent Jason William Cowan.

Pouria Tabrizi-Reardigan, for the respondent/appellant Her Majesty the Queen.

The judgment of Wagner C.J. and Moldaver, Côté, Martin and Kasirer JJ. was delivered by

MOLDAVER J. —

I. Overview

[1] Two individuals robbed a Subway restaurant in Regina, Saskatchewan, on July 7, 2016. One wore a mask and brandished a knife, while the other stood watch at the front door. The robbers made off with $400 and a coin dispenser.

[2] A police investigation led to the arrest of the accused, Jason William Cowan. He was subsequently charged with armed robbery, contrary to ss. 343(d) and 344 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[3] Mr. Cowan was tried by a judge alone. At trial, the Crown advanced two theories of liability: first, that Mr. Cowan was the masked robber and was therefore guilty as a principal offender; second, and in the alternative, that Mr. Cowan was guilty as a party to the armed robbery in that he either abetted the commission of the offence under s. 21(1)(c) of the *Criminal Code*, or counselled its commission under s. 22(1).

[4] The trial judge rejected both theories of liability and acquitted Mr. Cowan. In his view, the circumstantial evidence fell short of proving that Mr. Cowan was one of the principal offenders. As for party liability, he found that Mr. Cowan could only be convicted as a party if the Crown established that two of Mr. Cowan's friends —

Matthew Tone and a man known as "Littleman" — had committed the robbery. Once again, he found that the evidence relied upon by the Crown fell short in this regard.

[5] The Crown appealed from Mr. Cowan's acquittal. A majority of the Court of Appeal for Saskatchewan allowed the appeal. In doing so, it found no error in the trial judge's analysis or conclusion concerning Mr. Cowan's role as a principal offender. On the issue of party liability, the majority took a different view. In its opinion, the trial judge erred in holding that it was incumbent on the Crown to prove that Mr. Tone and Littleman were the persons who committed the robbery in order to find Mr. Cowan guilty of abetting or counselling the commission of the offence. According to the majority, this error was serious and it may well have affected the verdict. Hence, the majority allowed the appeal, set aside the acquittal and ordered a new trial. However, because the error related solely to the issue of party liability, the majority ordered that the new trial be limited to the question of "whether Mr. Cowan is guilty of robbery, as a party, on the basis of abetting or counselling" (C.A. reasons, 2020 SKCA 77, 389 C.C.C. (3d) 258, at para. 50). Writing in dissent, Jackson J.A. would have dismissed the appeal in its entirety.

[6] This case involves an appeal by both Mr. Cowan and the Crown. On his appeal, Mr. Cowan relies upon the view of the dissenting judge at the Court of Appeal that the trial judge did not err in his analysis of party liability and that there was no basis in fact or law for the majority to interfere with the verdict of acquittal. Moreover, he agrees with the dissenting judge that even if the trial judge did err in his analysis of

party liability, the error was not material and did not meet the high test required for setting aside an acquittal. For its part, the Crown appeals, with leave, from the order of the Court of Appeal, on the issue of whether the majority erred in limiting the scope of the new trial to a single theory of liability. The Crown contends that the majority did not have the power to place any limits on the scope of the new trial; rather, it should simply have ordered a full new trial on the charge of armed robbery.

[7] For the reasons that follow, I would dismiss Mr. Cowan's appeal and allow the Crown's appeal. I am in agreement with the majority of the Court of Appeal that the trial judge committed an error of law in his analysis of party liability, which had a material bearing on the acquittal. The appropriate remedy is therefore to set aside the acquittal and order a new trial. However, in my respectful view, the new trial must be a full retrial. While appellate courts have broad powers under s. 686(8) of the *Criminal Code* to "make any order, in addition, that justice requires", this does not include the power to limit the scope of a new trial to a particular theory of liability on a single criminal charge.

II. Facts

[8] The events giving rise to these appeals occurred between approximately 9:00 and 9:30 p.m. on July 7, 2016. The sole employee working at the Subway restaurant at the time of the robbery was in the back area of the restaurant when he heard the front door open. He came out and saw that two individuals had entered — one was standing watch by the front door, while the other was approaching the counter

with his face masked and a knife in his hand. The masked robber proceeded to jump over the counter and instruct the employee to place the money from the cash register, totalling $400, into a Subway sandwich bag. He then noticed a coin dispenser and demanded that the employee give it to him. The employee complied. The robbers left, taking the cash and coin dispenser with them.

[9] While the robbers could not be identified by the employee, the masked robber could be seen in the restaurant's security camera footage wearing distinctive running shoes.

[10] A few days later, the police received an anonymous tip implicating Mr. Cowan in the robbery and placed him under surveillance. As part of the surveillance operation, the police took photographs of Mr. Cowan showing him wearing a pair of running shoes that closely resembled those worn by the masked robber.

[11] Some weeks later, on August 11, 2016, the police arrested Mr. Cowan, in relation to the robbery, at a residence on McDonald Street located a few blocks away from the Subway restaurant. He was taken to the police station, where he provided a recorded statement denying having any involvement in the robbery and claiming he had an alibi. He explained that he was at the McDonald Street residence on the day of the robbery, but that he had left around 5:00 p.m. to go to the house of a friend named Jenna-Lee Tiszauer. He then went on to admit that while he was not directly involved in the robbery, on that same day, a group of individuals at the McDonald Street

residence were talking about "how they needed money" and that he told them "how to do a robbery what to say how to do it how long to be in there" (trial reasons, 2018 SKQB 75, at paras. 24-25 (CanLII)). Initially, he said this conversation occurred with Mr. Tone and an individual named Dustin Fiddler. Later, he added that Littleman and an individual named Bradley Robinson were also present.

[12] When shown photographs of the robbery from the Subway restaurant security camera footage, Mr. Cowan identified Littleman as the robber standing watch at the door and Mr. Robinson as the masked robber. Later, he told the police that Mr. Fiddler and Mr. Tone had driven Littleman and Mr. Robinson to the restaurant and had waited in Mr. Fiddler's vehicle during the robbery.

[13] Mr. Cowan was subsequently charged with "steal[ing] Canadian currency and a coin dispenser from Subway while armed with an offensive weapon, contrary to section 343(d) . . . of the *Criminal Code*" (armed robbery) (A.R., vol. I, at p. 2).[1] At trial, the Crown advanced two alternative theories of liability to establish Mr. Cowan's guilt — either he was the masked robber and therefore a principal offender, or he was a party in that he abetted or counselled the commission of the offence.

[1] Mr. Cowan was also charged with intending to commit a robbery with his face masked, contrary to s. 351(2) of the *Criminal Code*. He was acquitted of that charge at trial and the Crown did not appeal from it. The Court of Appeal ordered a new trial solely on the charge of armed robbery, albeit restricting the scope of that new trial to the issue of party liability. The parties raised no issues nor did they make submissions relating to the charge of masked robbery with intent. Accordingly, any issues relating to or arising from it are not before us.

[14] In support of its main theory — that Mr. Cowan was a principal offender — the Crown relied on the available circumstantial evidence, including that Mr. Cowan's statement revealed a degree of knowledge regarding the robbery which supported his direct involvement; that the robbery had been committed in a manner consistent with the way Mr. Cowan described it in his statement; and that Mr. Cowan's shoes matched those worn by the masked robber. The Crown also tendered evidence from Ms. Tiszauer to challenge Mr. Cowan's alibi. She testified that Mr. Cowan had approached her and asked if she would provide him with an alibi, even though they had not been together on the evening of the robbery. Finally, the Crown called an individual named Tara Regan, who testified that at some point in the summer of 2016, Mr. Cowan told her that he committed the robbery with Littleman.

[15] As for its alternative theory — that Mr. Cowan was a party to the robbery because he abetted or counselled the commission of the robbery — the Crown primarily relied on Mr. Cowan's statement in which he admitted to having told Mr. Fiddler, Mr. Tone, Mr. Robinson, and Littleman "how to do [the] robbery and what to say exactly" (A.R., vol. II, at p. 47).

[16] For its part, the defence called an individual named Nicole Miller, who testified that in July 2016, Mr. Tone told her that three people had committed the robbery, "him, his friend Littleman and his other buddy" (A.R., vol. III, at pp. 116 and 120). She did not know who the "other buddy" was. Mr. Cowan did not testify.

III. Decisions Below

A. *Court of Queen's Bench for Saskatchewan, 2018 SKQB 75 (Zarzeczny J.)*

[17] The trial judge acquitted Mr. Cowan. He found that the Crown had failed to establish Mr. Cowan's guilt beyond a reasonable doubt on either theory of liability.

[18] With respect to Mr. Cowan being the principal offender, the trial judge rejected Ms. Regan's evidence that Mr. Cowan had confessed to his involvement in the robbery. According to the trial judge, she was an unsavoury witness, whose evidence was neither reliable nor trustworthy. He then reviewed the remaining circumstantial evidence and concluded that Mr. Cowan's guilt as a principal offender was not the only rational inference that could be drawn from it.

[19] Having rejected the Crown's theory of principal liability, the trial judge turned to consider whether Mr. Cowan was guilty as a party on the basis of abetting or counselling. He explained that in Mr. Cowan's statement, he "clearly admits that he told the persons, which he claimed committed this robbery, namely [Mr. Tone and Littleman] how to do it" (para. 44). While this evidence confirmed that the instructions given by Mr. Cowan closely compared to the manner in which the robbery was carried out, the trial judge reasoned that he was unable to find Mr. Cowan guilty, as the evidence did not satisfy him that Mr. Tone and Littleman were the individuals who participated in the commission of the offence as principal offenders. This was essential, in his view, to convict Mr. Cowan as a party on the basis of abetting or counselling.

B. *Court of Appeal for Saskatchewan, 2020 SKCA 77, 389 C.C.C. (3d) 258 (Jackson (Dissenting), Ottenbreit and Kalmakoff JJ.A.)*

[20] The Crown appealed from the acquittal on the charge of armed robbery. It did so on the basis that the trial judge committed legal errors in relation to both the principal and party theories of liability.

[21] The Court of Appeal unanimously agreed that the trial judge did not commit any legal errors in rejecting the Crown's theory that Mr. Cowan was a principal offender. The court was divided, however, on whether he erred in assessing Mr. Cowan's guilt as a party on the basis of abetting or counselling.

[22] The majority was of the view that the trial judge erred in law by "instructing himself that, as a prerequisite to establishing Mr. Cowan's culpability on either the basis of abetting the commission of the robbery, under s. 21(1)(c) or on the basis of counselling the commission of that offence under s. 22(1) the Crown was required to prove that Mr. Tone and [Littleman] were the principal offenders" (para. 25). In its opinion, to establish Mr. Cowan's guilt as an abettor, the Crown was not required to prove that the individual he had abetted was "*the* principal offender", as long as Mr. Cowan committed the prohibited act with the intention of abetting "*a* principal offender", an individual who "participate[d] in the offence as an aider or abettor", or an individual who "was involved in the commission of the offence in a way that would, on its own, attract criminal liability" (paras. 28-30 (emphasis in original)). Similarly, for counselling, the Crown was not required to prove that the individual

counselled by Mr. Cowan was the principal offender, as long as that individual participated in the offence, either as a principal or party.

[23] Applying the test from *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, the majority found that the error had a material bearing on the acquittal because it led the trial judge to mischaracterize the Crown's position in relation to party liability and overlook important evidence. Nowhere in the trial record did the Crown assert that it could *only* have been Mr. Tone or Littleman who committed the robbery. Rather, there was evidence in Mr. Cowan's statement that Mr. Fiddler and Mr. Robinson were also present when Mr. Cowan was providing instructions on how to carry out a robbery. Moreover, in his statement, Mr. Cowan described how the robbery had been committed by Mr. Robinson and Littleman, while Mr. Tone and Mr. Fiddler were waiting in the getaway car. Collectively, this evidence was "capable of supporting a conviction on the basis of abetting or counselling *if* the trial judge had accepted it as fact and applied the correct legal analysis to it" (para. 42 (emphasis in original)).

[24] Accordingly, the majority allowed the appeal, set aside the acquittal, and ordered a new trial. In directing the new trial, however, it held that since the court had rejected the Crown's grounds of appeal concerning Mr. Cowan's liability as a principal, the scope of the trial should be limited to "whether Mr. Cowan is guilty of robbery, as a party, on the basis of abetting or counselling" (para. 50).

[25] The dissenting judge would have dismissed the appeal entirely and upheld the acquittal. In her opinion, the trial judge did not err by limiting himself to

considering Mr. Tone and Littleman as being the principals to the offence. The trial judge named those two individuals because "they were the only . . . 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" (para. 62). The trial judge was therefore merely responding to the evidence and submissions before him.

[26] The dissenting judge went on to note that even if the trial judge did err, the error was not sufficiently material to have had a bearing on Mr. Cowan's acquittal. This was because the trial judge discounted Mr. Cowan's statement, which was the only evidence that could have supported the possibility that someone other than Mr. Tone or Littleman was a principal. If Mr. Cowan's statement was not sufficient to permit the trial judge to draw the inference that Mr. Tone or Littleman were principals, it would not have supported the "less obvious" inference that anyone else was a principal.

IV. Issues

[27] I would state the issues in these appeals as follows:

(1) Did the trial judge err in his assessment of Mr. Cowan's guilt as a party on the basis of abetting or counselling?

(2) If so, could the error reasonably be thought to have had a material bearing on Mr. Cowan's acquittal such that a new trial is warranted?

(3) If a new trial is required, did the Court of Appeal err in restricting the scope of the new trial to the question of whether Mr. Cowan is guilty as a party on the basis of abetting or counselling?

V. Analysis

A. *The Trial Judge Erred*

[28] In my respectful view, the trial judge erred in law in assessing Mr. Cowan's liability as a party for having abetted or counselled the commission of the offence. Specifically, as I will explain, by reasoning that the Crown was required to prove that Mr. Tone and Littleman were the principals in the commission of the armed robbery as a prerequisite to establishing Mr. Cowan's guilt as a party, the trial judge misdirected himself on the law and, as a result, failed to correctly assess the relevant evidence.

(1) The Law

[29] For the purposes of determining criminal liability, the *Criminal Code* does not distinguish between principal offenders and parties to an offence (*R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 13). An accused's guilt is the same regardless of the way in which they participated in the offence — the person who provides the gun is guilty of the same offence as the person who pulls the trigger (*ibid.*; *R. v. Huard*, 2013 ONCA 650, 302 C.C.C. (3d) 469, at para. 59).

[30] Sections 21 and 22 of the *Criminal Code* set out the various ways in which an accused may participate in and be found guilty of a particular offence. Those provisions codify both liability for an accused who participates in an offence by actually committing it, under s. 21(1)(a) (principal liability); and liability for an accused who participates in an offence by, for example, abetting or counselling another person to commit the offence, under s. 21(1)(c) or s. 22(1) (party liability) (*R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, at para. 51).

[31] Where, as here, an accused is being tried alone and there is evidence that more than one person participated in the commission of the offence, the Crown is not required to prove the identity of the other participant(s) or the precise part played by each in order to prove an accused's guilt as a party (*R. v. Isaac*, [1984] 1 S.C.R. 74, at p. 81, citing *R. v. Sparrow* (1979), 51 C.C.C. (2d) 443 (Ont. C.A.), at p. 458). This principle applies where an accused is prosecuted as either an abettor or counsellor.

[32] The essential elements of abetting are well established. The *actus reus* of abetting is doing something or omitting to do something that encourages the principal to commit the offence (*Briscoe*, at paras. 14-15). As for the *mens rea*, it has two components: intent and knowledge (para. 16). The abettor must have intended to abet the principal in the commission of the offence and known that the principal intended to commit the offence (paras. 16-17).

[33] Although the jurisprudence setting out the elements of abetting refers to encouraging "the principal", intending to abet "the principal", and knowing that "the

principal" intended to commit the offence, the Crown is not required to prove the identity of "the principal" or their specific role in the commission of the offence for party liability to attach (*R. v. Thatcher*, [1987] 1 S.C.R. 652, at pp. 687-89).

[34] In *Thatcher*, the accused was charged with first degree murder. To establish his guilt, the Crown presented two alternative theories of liability. It argued that the accused was either the principal offender, in that he personally murdered the victim, or a party to the offence, in that he had the victim murdered by someone else. The trial judge instructed the jury that the Crown's inability to adduce evidence of another specific, identified individual as the person who actually committed the murder did not preclude the jury from finding the accused guilty as a party. The jury returned a verdict of guilty on the offence of first degree murder. The accused appealed on the basis that the trial judge erred in instructing the jury that the Crown was not required to prove the identity of the principal offender. His appeal was dismissed by the Court of Appeal for Saskatchewan. On further appeal, this Court agreed with the Court of Appeal, holding that the trial judge's instructions were "perfectly proper", because "[t]here is, of course, no burden on the Crown to point to a specific, identified person as the personal assailant of the victim" (pp. 687-88).

[35] Similar principles apply to counselling, which is defined in the *Criminal Code* to include "procur[ing], solicit[ing] and incit[ing]" (s. 22(3)). The *actus reus* is the "deliberate encouragement or active inducement of the commission of a criminal offence" (*R. v. Hamilton*, 2005 SCC 47, [2005] 2 S.C.R. 432, at para. 29 (emphasis

deleted)). The person deliberately encouraged or actively induced by the counsellor must also actually participate in the offence (para. 63, per Charron J., dissenting on other grounds; *Criminal Code*, s. 22(1)). As for the *mens rea*, the counsellor must have "either intended that the offence counselled be committed, or knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact likely to be committed as a result of the accused's conduct" (*Hamilton*, at para. 29).

[36] While one of the requisite elements of counselling is the actual participation in the offence by the person counselled, that person can participate not only as a principal, but also as a party. This is reflected by the wording of s. 22(1), which states that an accused is a party if they "counse[l] another person to be a party to an offence and that other person is afterwards a party to that offence". The precise manner of participation is irrelevant, since whether the person counselled is a principal or a party, "[t]he focus on a prosecution for counselling is on the counsellor's conduct and state of mind, not that of the person counselled" (*Hamilton*, at para. 74).

(2) Application

[37] Applying these principles to the case at hand, it is clear that to establish Mr. Cowan's guilt as a party on the basis of abetting or counselling, the Crown was not required to prove the identity of Mr. Tone and Littleman as the principal offenders or the precise role played by them in the commission of the offence. The Crown was only required to prove that any one of the individuals encouraged by Mr. Cowan went on to

participate in the offence either as a principal offender — in which case Mr. Cowan would be guilty as both an abettor and a counsellor — or as a party — in which case Mr. Cowan would be guilty as a counsellor.[2]

[38] Despite this, the trial judge reasoned that Mr. Cowan could not be convicted of either abetting or counselling the commission of the robbery because the Crown had not met its burden of proving "that Matthew Tone and [Littleman] were involved as principals in the commission of this robbery" (para. 48). He repeated this point, explaining that "before the accused can be convicted of aiding, abetting or counselling the commission of this Subway robbery . . . 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" (para. 49).

[39] With respect, it is clear from these passages that the trial judge misdirected himself on the applicable legal principles underlying ss. 21(1)(c) and 22(1). He then assessed the evidence in light of these incorrect principles, concluding that "there is not sufficient evidence implicating or proving, beyond a reasonable doubt, that Matthew Tone and [Littleman] were the persons involved in committing this robbery"(para. 45).

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[2] I leave for another day the question of whether an accused can be liable as an abettor under s. 21(1)(c) where they are found to have abetted a party to an offence, other than the principal offender. This question has no bearing on the outcome of this appeal since, even if s. 21(1)(c) applies only to those who abetted a principal offender, the trial judge erred in failing to recognize that he could find Mr. Cowan guilty if he was satisfied, beyond a reasonable doubt, that Mr. Cowan encouraged at least one of the individuals who participated in the commission of the offence either as a principal (abetting or counselling) or a party (counselling). Accordingly, I should not be taken as endorsing the Court of Appeal's comments, at paras. 28-30 of its reasons, suggesting that criminal liability for abetting can attach where an accused abets a non-principal party (e.g., an abettor).

[40] On this issue, I am unable to endorse the dissenting judge's opinion in the Court of Appeal that the trial judge did not err in singling out Mr. Tone and Littleman, because he was simply responding to the evidence and submissions before him. With respect, the record illustrates that other individuals were put forward as potentially being involved in the robbery. For instance, in closing submissions at trial, defence counsel began his remarks by explaining that the defence's theory was that "Tara Regan, Matthew Tone and Dustin Fiddler" had "committed the robbery that is the subject matter of this proceeding" (A.R., vol. III, at p. 131). Defence counsel also suggested that "Matthew Tone, Tara Regan or any number of robbers [could] have worn [the] pair of shoes" seen on the security camera footage of the robbery (p. 137). Further, he noted that the robbers had likely escaped using a vehicle, and that "Dustin Fiddler owned a vehicle" (p. 138).

[41] The Crown suggested a similarly broad lens on the party theory, noting in closing submissions that Mr. Cowan had instructed all of his "friends" how to commit the robbery:

> So in my respectful submission when Mr. Cowan, according to his testimony, again this is in our subsidiary argument, when — if he said to his friends, when he know[s] that they're in need of money, just go — just go do a robbery, it's easy and then give[s] them further advi[c]e about how to do it, is committing an offence by the way of Section 21 (c) of the *Criminal Code*.
>
> (A.R., vol. III, at p. 152)

[42] This theory accorded with Mr. Cowan's statement, in which he told the police that Littleman, Mr. Tone, Mr. Robinson, and Mr. Fiddler were all present at the McDonald Street residence when he explained how to commit the robbery. In discussing the admissibility of that statement, the Crown pointed out that Mr. Cowan not only admitted to encouraging Mr. Tone and Littleman, but also to encouraging Mr. Robinson and Mr. Fiddler. The Crown argued that "the accused [admitted to abetting] in the commission of an offence when he sa[id] that he told Mr. Fiddler and Mr. Tone, Mr. [Robinson] and another individual named Littleman how to do the . . . robbery and what to say exactly" (A.R., vol. II, at p. 47).

[43] The majority of the Court of Appeal was therefore correct to find that there was "nothing in the trial record to indicate that the Crown asserted it could *only* have been Mr. Tone and [Littleman] who entered the Subway restaurant to commit the robbery" (para. 41 (emphasis in original)).

[44] In any event, even if the evidence and submissions had, in fact, focused on Mr. Tone and Littleman, this did not insulate the trial judge from legal error. As I have explained, Mr. Cowan could still have been found guilty of being a party to the offence even if the precise identity or part played by each individual who participated in the commission of the offence was uncertain, so long as Mr. Cowan had committed the necessary act with the requisite intent (*Isaac*, at p. 81, citing *Sparrow*, at p. 458; *Pickton*, at para. 58; *Thatcher*, at pp. 687-89). There was therefore no need for the trial judge to focus on the identity of a given principal, whether or not the Crown identified

specific individuals as principals to the offence. Rather, all that was required was for him to find that Mr. Cowan had encouraged at least one of the individuals who participated in the commission of the offence, be it as a principal (abetting or counselling) or a party (counselling). Respectfully, the trial judge erred in failing to recognize this.

[45] Having found that the trial judge committed an error of law, I must now determine whether that error warranted appellate intervention.

B. *The Legal Error Had a Material Bearing on the Acquittal*

[46] Acquittals are not overturned lightly (*R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595, at para. 2). To have an acquittal set aside due to a legal error, the Crown bears the burden of satisfying an appellate court to a reasonable degree of certainty that the impugned error of law might have had a material bearing on the acquittal (*Graveline*, at para. 14). This does not mean that the Crown is required to persuade the court that the verdict would necessarily have been different but for the error (*ibid.*). Instead, the Crown must show that the verdict may well have been affected by it (*R. v. Morin*, [1988] 2 S.C.R. 345, at p. 374).

[47] Here, I am satisfied that the Crown has met its burden of showing that the legal error had a material bearing on the acquittal. The trial judge structured his analysis of the evidence based on the erroneous premise that the Crown had to prove that

Mr. Tone and Littleman were the principals before Mr. Cowan could be convicted as an abettor or counsellor.

[48] In particular, he analyzed the evidence before him as follows:

> In his interview statement and those passages of it quoted in this judgment, Mr. Cowan clearly admits that he told the persons, which he claimed committed this robbery, namely "Matthew" (taken to be Matthew Tone) and "littleman" how to do it. The evidence of [the Subway employee] and the Subway video confirms that the counselling and instructions that the accused gave respecting how this robbery should be done compares very closely with how it was committed. The language used by the principal robber and the statements he made are virtually identical to the advice Mr. Cowan says he gave to those he claims committed it. [para. 44]

This evidence, as the trial judge summarized it, was reasonably capable of establishing that Mr. Cowan committed the prohibited act with the requisite intent for party liability on the basis of abetting or counselling. Failing to recognize this, however, the trial judge went on to ask the wrong question, namely whether the evidence was sufficient to establish the identity and involvement of Mr. Tone and Littleman as principal offenders. He concluded it was not, and, therefore, that he could not find Mr. Cowan guilty under the party theory. It follows that the verdict may well have been different if the trial judge had considered the evidence in light of the correct legal principles.

[49] The trial judge's concluding remarks bear this out. Indeed, he directly acquitted Mr. Cowan on the basis of the lack of evidence tending to show that Mr. Tone and Littleman were the principal offenders:

> In the circumstances, before the accused can be convicted of aiding, abetting or counselling the commission of this Subway robbery by Matthew Tone and "littleman" as the accused at some point in his statement says they did, I must be satisfied, beyond a reasonable doubt, that it was Matthew Tone and "littleman" who participated as principals in the commission of this crime. The evidence that I have reviewed does not satisfy me, beyond a reasonable doubt, that they did so and accordingly that the accused aided, abetted or counselled the persons who did commit this crime within the meaning of ss. 21 and 22 of the *Criminal Code*.
>
> In the result, I find the accused, Jason Cowan, not guilty . . . . [paras. 49-50]

[50] This passage is a clear indication that the trial judge's legal error was inextricably intertwined with the verdict of acquittal, and not just a slip of the pen as suggested by the dissenting judge.

[51] On this point, the dissenting judge reasoned that even if the trial judge made the legal error alleged, it could not have affected the verdict because Mr. Cowan's statement, which was "the source of the evidence to support the named individuals as something other than *principals* or that someone else was a principal or a party", was rejected by the trial judge (C.A. reasons, at para. 53 (emphasis in original)). While the dissenting judge is correct to note that the trial judge had reservations as to the veracity of Mr. Cowan's statement, it cannot be said that he rejected it as a whole. Rather, his criticisms were aimed predominantly at undermining the strength of Mr. Cowan's claims regarding the involvement of Mr. Tone and Littleman in the robbery. As I have explained, the focus on Mr. Tone and Littleman is indicative of the trial judge's failure to recognize the true nature of the Crown's burden.

[52] Having found that the legal error played a material role in the outcome, the acquittal must be set aside. (*R. v. R.V.*, 2021 SCC 10, at para. 42, citing *Graveline*, at para. 14). I turn now to the Crown's appeal to determine the appropriate remedy.

C. *The Appropriate Remedy Is a Full New Trial*

[53] Where, as here, an appellate court allows an appeal from an acquittal and sets aside that verdict, it has the power, pursuant to s. 686(4)(b)(i) of the *Criminal Code*, to order a new trial. That is the remedy the Crown seeks in this case. It maintains, however, that the trial should be a full retrial and not, as the Court of Appeal ordered, one that "proceed[s] from the footing that the question to be determined is whether Mr. Cowan is guilty of robbery, as a party, on the basis of abetting or counselling" (para. 50). I agree. In my respectful view, by limiting the new trial in this manner, the court exceeded the scope of its powers under s. 686(8) of the *Criminal Code*.

(1) Section 686(8) of the *Criminal Code*

[54] Where an appellate court exercises its powers under s. 686(2), (4), (6) or (7), it may also "make any order, in addition, that justice requires" under s. 686(8). This power, however, is not limitless. As this Court recently explained in *R.V.*, for an appellate court to issue an additional order under its s. 686(8) residual power, three conditions must be met (para. 74, citing *R. v. Thomas*, [1998] 3 S.C.R. 535). First, the court must have exercised one of the triggering powers conferred under s. 686(2), (4), (6) or (7). Second, the order issued must be ancillary to the triggering

power in that it cannot be "at direct variance with the court's underlying judgment" (*Thomas*, at para. 17; see also *R. v. Warsing*, [1998] 3 S.C.R. 579, at paras. 72-74). Third and finally, the order must be one that "justice requires".

[55] Here, I am of the view that the second and third conditions for exercising s. 686(8) were not met, as the ancillary order limiting the scope of the new trial was at variance with the underlying judgment and was not an order that justice required.

[56] According to the Court of Appeal, the scope of the new trial had to be limited to the question of whether Mr. Cowan was guilty of armed robbery as a party on the basis of abetting or counselling, since the legal error only pertained to the trial judge's analysis of party liability and the Crown's grounds of appeal relating to principal liability were rejected. With respect, this was an error. The new trial must be on all available modes of committing the offence.

[57] As I have explained, ss. 21 and 22 do not create multiple offences; rather, they merely provide alternative paths to the same destination by setting out different ways in which an accused may participate in and be found guilty of an offence. Yet, in separating the Crown's theories of liability in its ancillary order, the Court of Appeal bifurcated the offence of armed robbery into two separate offences: robbery as a principal and robbery as a party, be it as an abettor or counsellor. Thus, the effect of the ancillary order restricting the scope of the new trial was to uphold Mr. Cowan's acquittal on the single charge of armed robbery *in part*. This is at odds with the underlying judgment allowing the Crown appeal and setting aside the verdict rendered

on that charge *as a whole*. Put simply, the ancillary order gave rise to a partial acquittal on a single criminal charge — a two-headed hydra-like creation unknown to Canada's criminal law.

[58] On this issue, this Court's decision in *R. v. MacKay*, 2005 SCC 79, [2005] 3 S.C.R. 725, is particularly instructive. There, the accused was acquitted at trial after being charged with aggravated assault. On appeal, the Court of Appeal set aside the acquittal and ordered a new trial on the basis that the trial judge erred in failing to instruct the jury with respect to the definitions of assault, set out in s. 265(1). Specifically, while he had correctly instructed the jury with respect to s. 265(1)(a) (assault by applying force), he refused to instruct it on s. 265(1)(b) (assault by threatening to apply force). In ordering the new trial, the court ruled that the scope of that trial should be limited to whether the accused was guilty of aggravated assault, as defined in s. 265(1)(b).

[59] In this Court, Charron J. upheld the Court of Appeal's decision on the merits of the appeal, but found that it erred in restricting the scope of the new trial. She explained that since subss. 265(1)(a) and (b) "do not create separate offences but simply define two ways of committing the same offence", the trial judge's error meant that the "only avenue open to the Court of Appeal was to set aside the verdict of acquittal and order a new trial without restriction" (para. 4). She did not suggest, let alone find, that the order restricting the scope of the new trial was wrong because "it was not possible to isolate the potential application of the two legal standards [in

subss. 265(1)(a) and (b)] from the facts — the factual and legal issues were interconnected" (Rowe J.'s reasons, at para. 90). I find it inconceivable that Charron J. would have left out such an important qualifier had it played any role — much less a determinative one — in her decision to set aside the order restricting the scope of the new trial.

[60] Justice Charron's reasoning in *MacKay* applies equally in this case. The fact that *MacKay* was a jury trial, such that there were no reasons to explain how the jury arrived at its decision, is of no moment. The jury's reasoning process could not have been clearer. It was only instructed on s. 265(1)(a). The trial judge made no mention of s. 265(1)(b). In his instructions, he told the jury that "[i]f you are not satisfied beyond a reasonable doubt that [the accused] intentionally applied force to [the victim] you must find [the accused] not guilty" (para. 1). It follows that the jury could only have acquitted on the basis that it was not satisfied that the accused intentionally applied force to the victim under s. 265(1)(a).

[61] Accordingly, just as subss. 265(1)(a) and (b) do not create separate offences, the party liability provisions at issue here also do not; rather, they define different ways of committing the same offence. And, as in *MacKay*, the Court of Appeal here erred in treating modes of committing an offence as if they were distinct verdicts in themselves that could be severed.

[62] I am therefore satisfied that the Court of Appeal's ancillary order is inconsistent with its underlying order to have the charge retried in its entirety.

[63] The ancillary order was also not one that justice required. In Canadian criminal law, the concept of the "interests of justice" has come to be understood as encompassing the interests of the accused, the interests of the Crown, broad-based societal concerns, and the integrity of the criminal process (*R. v. Beaulac*, [1999] 1 S.C.R. 768; *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at paras. 32-36; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at para. 52; *R. v. Last*, 2009 SCC 45, [2009] 3 S.C.R. 146, at para. 16; *R. v. Bernardo* (1997), 105 O.A.C. 244, at paras. 16 and 20). Here, in my view, the ancillary order threatens the integrity of the criminal process by distorting the truth-seeking function of the courts.

[64] As one of the purposes of the criminal process is to foster a search for truth, justice cannot require that a trier of fact be restricted in their ability to determine how, if at all, an accused participated in a given offence. Rather, a trier of fact must be able to consider any and all theories of liability that have an air of reality based on the evidence adduced at the new trial (*Huard*, at para. 60). To prospectively deny a trier of fact the ability to consider a viable theory of liability would be to undermine their ability to carry out their core function: to determine whether the Crown has proven that the accused committed the offence(s) charged. This approach is consistent with the Court's reasoning in *MacKay*, where Charron J. held that the "scope of the appropriate instruction on the definition of assault at the new trial [could] only be determined on the basis of the evidence adduced at th[at] new trial" (para. 4).

[65] As a practical matter, upholding the Court of Appeal's ancillary order would mean that if, at the new trial, the defence adduced evidence showing that Mr. Cowan did not abet or counsel anyone because he was, in fact, the principal offender, and the trier of fact believed that evidence or it raised a reasonable doubt, the trier of fact would have no option but to acquit Mr. Cowan of the charge of armed robbery. Such a result would make a mockery of the justice system and cannot be what justice requires.

[66] It is important to note that my conclusion that the Court of Appeal was not permitted to restrict the available theories of liability at the new trial should not be taken to mean that appellate courts do not have the power to limit the scope of a new trial in all circumstances. For instance, courts have held that an appellate court may limit the scope of a new trial to a lesser and included offence where it is satisfied that the reversible error only tainted the verdict on that offence and it sets aside the verdict on that charge only (see, e.g., *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. Guillemette*, [1986] 1 S.C.R. 356; *R. v. Alec*, [1975] 1 S.C.R. 720; *R. v. Cook* (1979), 47 C.C.C. (2d) 186 (Ont. C.A.); *R. v. Ruptash* (1982), 36 A.R. 346 (C.A.); *R. v. Druken*, 2002 NFCA 23, 211 Nfld. & P.E.I.R. 219). The critical distinction, however, is that a lesser and included offence is a *separate* offence and not, as here, one way of committing a single offence. Likewise, in *R.V.*, the issue centred on alleged inconsistent verdicts in the context of three separate offences — a far cry from the present case where we are dealing with a single count of armed robbery that could be committed in different ways. Nor is this a case where "the Crown [is] seeking to overturn acquittals

in order to try to change theories or tactics, or to present the same case to a different decision-maker in the hopes of getting a different result" (Rowe J.'s reasons, at para. 91). None of those improper motives can be ascribed to the Crown in this case.

(2) Issue Estoppel

[67] Before concluding, I wish to briefly address the matter of issue estoppel. Mr. Cowan has argued that this Court cannot order a full new trial because the doctrine of issue estoppel prevents the re-litigation of the Crown's theory that he is guilty of armed robbery as a principal offender. Specifically, he argues that the requirements of issue estoppel are satisfied, since the trial judge's finding that the Crown had not met its burden of proving that he was a principal offender was: (1) a final decision; (2) made in a prior proceeding; (3) that involved the same parties (citing *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, at paras. 52 and 55-56). Respectfully, I would reject Mr. Cowan's submissions on this point. While the doctrine of issue estoppel is available to an accused in the criminal law context, it is not available to Mr. Cowan here to preclude this Court from ordering a full retrial on the charge of armed robbery.

[68] Issue estoppel does not apply simply by virtue of the fact that a trial has been held. As the Court in *Mahalingan* explained, the decision that forms the basis for the issue estoppel must have been made in a prior proceeding that was final (paras. 52-55). That case, however, concerned two separate proceedings and not, as here, a trial and a retrial of the same case following a successful appeal. There is no final decision made in a prior proceeding where an appellate court finds that a verdict

of acquittal on a single criminal charge was tainted by legal error and, accordingly, renders that verdict invalid as a whole by setting it aside and ordering a new trial on the relevant charge. This premise was succinctly summarized more than a century ago in the case of *Gray v. Dalgety & Co. Ltd.* (1916), 21 C.L.R. 509 (H.C.A.), at p. 521, where Griffith C.J. stated: "I never before heard it suggested that a grant of a new trial was a final decision upon any point except that the matter should be further investigated".

[69] Moreover, as G. Spencer-Bower and A. K. Turner have explained in *The Doctrine of Res Judicata* (2nd ed. 1969), at para. 168 (cited with approval in *R. v. Duhamel (No. 2)* (1981), 131 D.L.R. (3d) 352, at p. 357 (Alta. C.A.), aff'd [1984] 2 S.C.R. 555), no party can be estopped from re-litigating an issue where a verdict is set aside and a new trial ordered:

> No finding of the court or of a jury of a trial which has proved abortive, a new trial having been directed, will give rise to a valid plea of estoppel. And a decision of the court setting aside the verdict of a jury, or setting aside a judgment entered pursuant thereto, and directing a new trial, will not result in either party being estopped *per rem judicatam* by anything held on the facts in the judgment in which the new trial is ordered, for the judgment must be read as deciding no more than that, the first trial being unsatisfactory, the issues tried therein should be re-submitted to the court for fresh consideration. [Footnotes omitted.]

[70] I agree with this statement. When an appellate court orders a new trial in a criminal prosecution, it does so to allow the opportunity "to correct errors in the proceedings at the first trial" (*Welch v. The King*, [1950] S.C.R. 412, at p. 417). Such a new trial is a "re-examination of a case on the same information or indictment", that

"supposes a completed trial, which for some sufficient reason has been set aside, so that the issues may be litigated *de novo*" (*ibid.* (emphasis deleted)).

[71] These principles were applied by the Court of Appeal for British Columbia in *R. v. Ekman*, 2006 BCCA 206, 209 C.C.C. (3d) 121. By way of background, in that case, the accused was acquitted at his first murder trial after his incriminating statement to the police was ruled inadmissible. On appeal, the court overturned that ruling and ordered a new trial. In the second trial, the accused was convicted of attempted murder, but acquitted of first degree murder. A Crown appeal from that acquittal was allowed and a third trial was directed on the charge of murder. At the third trial, the accused argued that issue estoppel prohibited the Crown from proceeding against him as the principal offender in the murder. He asked the trial judge for an order "limiting the scope of the new trial to the charge of first degree murder as a party only" (*R. v. Ekman*, 2004 BCSC 900, at paras. 3-4 (CanLII)). The trial judge rejected this submission. The third trial did not reopen an issue that had been finally decided as the result from the second trial — the acquittal for murder — was entirely set aside. Issue estoppel therefore had no application.

[72] The trial judge's reasoning was upheld by the Court of Appeal:

> Trial No. 3 did not reopen a matter that had been fully litigated between the parties because the result of Trial No. 2 was entirely set aside and a new trial was ordered on all issues. There were errors of law in the charge in Trial No. 2 that impeached the verdict. The Crown appeal in Appeal No. 2 advanced three grounds for setting aside the jury's verdict. This Court found it necessary to decide only one of those grounds but it is implicit in the decision that the whole of the verdict was tainted and had to

> be set aside. Otherwise, it would have been necessary to address the other grounds which attacked the entire verdict. All the issues of fact were therefore at large and to be considered afresh in Trial No. 3. No "scandal of conflicting decisions" is involved. No issue was finally decided in Trial No. 2 and, in my view, the doctrine of res judicata and issue estoppel has no application. [para. 22]

[73] Similarly, in the present case, no issue can be said to have been finally decided in the first trial because the result of that trial — the acquittal on the single charge of armed robbery — has been entirely set aside. As the trial judge committed a legal error that had a material bearing on Mr. Cowan's acquittal, the verdict is necessarily invalid. The findings in the first trial that led to his acquittal must therefore be set aside and cannot form the basis of a claim of issue estoppel.

VI. Conclusion

[74] In the result, I would dismiss Mr. Cowan's appeal and allow the Crown's appeal. The judgment of the Court of Appeal setting aside the acquittal on the charge of armed robbery and ordering a new trial is upheld, but para. 3 of that judgment, which orders that "the question to be determined [at the new trial] is whether Mr. Cowan is guilty of robbery, as a party, on the basis of abetting or counselling" is set aside. A full new trial on the armed robbery charge is ordered.

The reasons of Brown and Rowe JJ. were delivered by

ROWE J. —

[75] I would allow the appeal by Mr. Cowan and restore his acquittal. I would do so for the dissenting reasons of Justice Jackson, which I adopt, except for para. 61.[3]

[76] In light of the foregoing, it is not necessary for me to deal with the appeal by the Crown against the order of the Court of Appeal limiting the scope of the new trial. Nonetheless, I will do so in general terms, as I am concerned by what Moldaver J. has written in this regard.

[77] Issue estoppel precludes the Crown "from relitigating an issue that has been determined in the accused's favour in a prior criminal proceeding, whether on the basis of a positive finding or reasonable doubt" (*R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, at para. 31; see also *R. v. Punko*, 2012 SCC 39, [2012] 2 S.C.R. 396, at para. 7). As a result of the application of issue estoppel, in such cases, the Crown would be precluded not "from leading evidence on *any* issue raised in a previous trial that resulted in an acquittal" but "from leading evidence which is inconsistent with findings made in the accused's favour in a previous proceeding" (*Mahalingan*, at paras. 2 and 22 (emphasis in original); see also S. N. Lederman, A. W. Bryant and M. K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (5th ed. 2018), at

[3] Given the absence of submissions on this issue, I agree with my colleague Moldaver J. to "leave for another day the question of whether an accused can be liable as an abettor under s. 21(1)(c) [of the *Criminal Code*, R.S.C. 1985, c. C-46] where they are found to have abetted a party to an offence, other than the principal offender" (para. 37, fn. 2).

§19.152; M. Vauclair and T. Desjardins, in collaboration with P. Lachance, *Traité général de preuve et de procédure pénales* (27th ed. 2020), at No. 28.296).

[78] There are three requirements for issue estoppel to apply. First, the issue must have been decided in a prior proceeding, which "requires the court in the second trial to decide whether the issue the Crown is seeking to prove is the same as an issue resolved in the accused's favour in a prior criminal proceeding" (*Mahalingan*, at para. 52 (emphasis added)). Second, the decision must be final (para. 55). "Findings on particular issues at trial are final, unless overturned on appeal" (*ibid.*). My colleague Moldaver J. emphasizes in his reasons that the *verdict* was overturned by the Court of Appeal, such that the decision is not final. But issue estoppel is concerned with *issues* decided at trial, not the ultimate result of the litigation (*Mahalingan*, at paras. 17 and 52). Thus, even when a new trial is ordered, an accused should not have to relitigate issues decided in his favour that are not tainted by an error. Third, the parties to the two proceedings must be the same (paras. 56-57).

[79] Mr. Cowan went to trial accused of committing an armed robbery and having his face masked with intent to commit robbery. At trial, the Crown advanced two theories of liability: either Mr. Cowan perpetrated the robbery himself, or he abetted or counselled those who perpetrated the robbery. He was acquitted. The trial judge explained in his written reasons that he had a reasonable doubt as to the principal liability theory. The Court of Appeal found that the trial judge erred in law regarding abetting and counselling. But, it found no error as to the acquittal based on Mr. Cowan

having committed the robbery as a principal. In this regard, no legal error is alleged before this Court, as the Crown did not appeal from this part of the decision. Nonetheless, the Crown wants to pursue the same avenue to conviction in a second trial. The problem is that "[i]f having a reasonable doubt on a particular issue is not held to be a conclusive finding of fact, then very few issues will fall within issue estoppel's ambit, and the ends of finality will be poorly served" (*Mahalingan*, at para. 30). As this Court stated in *Mahalingan*, in a judge alone trial where reasons explain the decision, "these findings [on critical issues] must be accepted and cannot be relitigated in a subsequent trial, unless set aside on appeal" (para. 53). Here, because the findings on Mr. Cowan's principal liability were not tainted by an error, they should not be set aside.

[80] Preventing the Crown from relitigating issues resolved in favour of the accused during the first trial is a question of "fairness to the accused, integrity and coherence of the criminal process, and finality" (*Mahalingan*, at para. 59). In my view, even without limiting the scope of the new trial, the accused could raise issue estoppel at the second trial and the trial judge could find that the Crown is estopped from relitigating the principal liability issue.

[81] Issue estoppel exists to protect against relitigation about "specific, underlying elements of the Crown's case" (*Mahalingan*, at para. 41). The importance of this principle is explained because "[o]ther rules of criminal law do not completely meet the fairness concern of not requiring the accused to answer factual and legal issues

(short of the ultimate verdict) that have been resolved in his or her favour in a previous proceeding" (para. 40) and because "the criminal law abhors not only inconsistent verdicts, but inconsistent findings on specific issues" (para. 45).

[82] In my view, too narrow a view of issue estoppel can result in unfairness to accused persons. As I said at the hearing, the Crown's position seems to be informed by the motto, "if at first you don't succeed, try, try again" (transcript, at p. 26), such that it should get a second chance to obtain a conviction by means of an avenue of liability even where the trial judge acquitted on this basis and no legal error relevant to this was found. For me, the underlying principle is that an accused should not have to relitigate issues on a basis for conviction upon which he was acquitted wherein no error was found. The trial judge's findings should not be relitigated and the accused should not have to mount a second defence in the absence of a relevant reversible error. During the new trial, the Crown will seek to persuade the judge that Mr. Cowan committed the robbery as a principal. Will Mr. Cowan not, thereby, be required to defend himself against the same allegations twice under the same theory of liability for the same factual circumstance? He will and that will be unfair.

[83] Considering matters in addition to issue estoppel, I cannot agree with the majority's conclusions relating to the exercise by courts of appeal of their powers under s. 686(8) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[84] I do agree with the majority regarding the three conditions that must be met for an appellate court to make an order pursuant to s. 686(8): first, the court must have

exercised one of the triggering powers conferred under s. 686(2), (4), (6) or (7); second, the order issued must be ancillary to the triggering power, meaning it is not "at direct variance with the court's underlying judgment"; and, third, the order must be one that "justice requires" (*R. v. R.V.*, 2021 SCC 10, at para. 74). However, I do not agree with the majority's application of the test in this case, as I shall explain.

[85] Appellate courts exercise their powers under s. 686(8) flexibly, consistent with its broad and remedial purpose. It is for the Court of Appeal to exercise the discretion conferred thereby; it is for this Court to review that exercise of discretion. Unless the Court of Appeal erred in principle or the order is clearly wrong, it is not for this Court simply to substitute its own view.

[86] In my view, no error in principle has been shown and the Court of Appeal order is not clearly wrong. First, there is nothing to suggest that the order is at direct variance with the Court of Appeal's underlying judgment. Contrary to the position of the majority, there is no rule that a charge *as a whole* must be retried if a new trial is ordered on a count alleging an offence which may be committed in different ways. Rather, whether or not a full new trial should be ordered depends on the degree to which counts, and modes of committing offences charged as a single count, are "interconnected". *R.V.*, which the majority cites, explained this at paras. 42-44:

> In cases where the Crown has cross-appealed, the acquittal must be set aside if the Crown succeeds in proving that it was based on an error of law "which might reasonably be thought . . . to have had a material bearing on the acquittal" (*Graveline*, at para. 14). The next question is what should follow from setting aside that acquittal.

> For the most part, the *Criminal Code* provides the answer. Section 686(4)(b) of the *Code* instructs appellate courts allowing an appeal from an acquittal entered by a jury to order a new trial. Generally, all interconnected charges should be returned for retrial (*Pittiman*, at para. 14). In line with the test I have outlined, it may well be difficult for the appellate court to isolate the error to the acquittal, and a conviction cannot stand if it arises from an error of law. Unless the appellate court can conclude with a high degree of certainty that the legal error did not taint the conviction, setting aside the acquittal on a charge interconnected with a conviction will require retrial on all charges.
>
> Where an appellate court can isolate the legal error to the acquittal, that charge should be the only one sent back for a new trial and the conviction should stand. The error did not taint the conviction, so it should remain in place unless, of course, the conviction is found to be unreasonable on a ground other than inconsistency.

[87] The question is one of being able to isolate the legal error, not the manner in which the offences are structured in the *Criminal Code*. Even if an offence can be committed in several different ways, if it is clear, as in this case, that it cannot be proven that it was committed in one of those ways, there is no reason why an appellate court should not be able to limit the issues on new trial.

[88] *R. v. MacKay*, 2005 SCC 79, [2005] 3 S.C.R. 725, on which the majority also relies, illustrates my point. In that case, an accused was acquitted by a jury of aggravated assault under s. 265(1)(a) of the *Criminal Code*, but the trial judge refused to instruct them on the definition of assault under s. 265(1)(b). The New Brunswick Court of Appeal found that the trial judge had erred by failing to instruct the jury on the definition of assault in s. 265(1)(b) and ordered a new trial for aggravated assault

based on s. 265(1)(b) only. This Court overturned the decision and ordered a full new trial.

[89] A proper reading of *MacKay* does not support the majority's position that a full new trial must be ordered any time an offence can be committed in two different ways and an appellate court finds that the trial judge made an error with respect to one mode, but not the other. The majority says that the first jury's reasoning process in *MacKay* was "clear" in finding the accused did not have the intent to commit assault under s. 265(1)(a), yet this Court returned it for a full trial on both ss. 265(1)(a) and 265(1)(b). However, the issue is not whether the first trier of fact's decision is "clear" with respect to one mode of committing the offence, but whether the issue is so interconnected to the error made in respect of the second mode that a future trier of fact would necessarily need to reconsider both modes in order to reach a legally correct conclusion. This was the case in *MacKay*.

[90] The ways of committing an assault under ss. 265(1)(a) and 265(1)(b) are similar — s. 265(1)(a) concerns the intentional application of force whereas s. 265(1)(b) is about attempts or threats to apply force. Their application in a particular case may overlap. In *MacKay*, the trial judge refused to instruct the jury on s. 265(1)(b) because he concluded force was actually applied and that foreclosed its application. However, the Court of Appeal concluded that while the jury could have concluded that force may have been applied unintentionally, they also could have concluded that force was indicative of prior threats or attempts to apply force also amounting to an assault.

Without being instructed on s. 265(1)(b), the first jury was missing the necessary context to consider the facts against both legal standards and the requirements of the two subsections as compared to one another. In other words, it was not possible to isolate the potential application of the two legal standards from the facts — the factual and legal issues were interconnected. Where, as here, two modes of committing an offence have entirely different elements and are based on completely different factual foundations, there is no need in the new trial to reconsider how the legal standards of committing the offence as a principal could apply. Moreover, in this case there are reasons from a trial judge which explain why he rejected the theory that Mr. Cowan committed the offence as a principal. There is no error in those reasons. Thus, there is no principled basis to require that those issues be relitigated.

[91] Nor was the Court of Appeal's order contrary to what "justice requires". Aside from fairness to the accused, the Court of Appeal properly narrowed the issues to prevent an unnecessary expenditure of the courts' resources to relitigate matters where there was no error. In *R.V.*, at paras. 78-79, this Court encouraged the Crown to avoid proceeding on duplicative counts and thereby create inefficiency. The Court of Appeal order in this case is similarly consistent with promoting the expeditious use of court resources and encouraging the Crown to put its best foot forward at the first trial. In this sense, the "interests of justice" encompass not only fairness to the accused, but also the public interest in avoiding duplicative litigation in a busy court system. Nor is the integrity of the criminal justice system served by the Crown seeking to overturn

acquittals in order to try to change theories or tactics, or to present the same case to a different decision-maker in the hopes of getting a different result.

[92] The majority's judgment undermines the ability of courts of appeal to make ancillary orders that limit the issues at a new trial pursuant to s. 686(8) in a way that not only encourages relitigation, but also risks undermining public confidence in the justice system by increasing the likelihood of inconsistent results.

[93] In sum, I am of the view that the Court of Appeal did not err in limiting the issues on the new trial. This result promoted fairness to Mr. Cowan, the efficient use of the court's resources and the integrity of the criminal justice process. There is no reason to return the matter for trial on the issue of whether Mr. Cowan committed the offence as a principal.

Appeal by Jason William Cowan dismissed, appeal by Her Majesty the Queen allowed, BROWN *and* ROWE JJ. *dissenting.*

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