SUPREME COURT OF CANADA

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Case in Brief: *R. v. Cowan*

Judgment of November 5, 2021 | On appeal from the Court of Appeal for Saskatchewan
Neutral citation: 2021 SCC 45

The Supreme Court orders a new trial for a Saskatchewan man accused of armed robbery.

Two people 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 only employee on duty at the time could not identify the two robbers, but the restaurant security camera had captured images of the masked person.

An anonymous tip implicated Jason William Cowan and he was arrested soon after. Mr. Cowan denied having any involvement in the incident and he claimed to have an alibi. However, he did admit to telling a group of people "how to do a robbery" on the same day it occurred. Police also noted that Mr. Cowan had been wearing shoes that closely resembled those worn by the masked person in the images from the security camera.

When police showed Mr. Cowan the images from the security camera, he named two of his acquaintances. He called the lookout person "Littleman" and the armed robber Mr. Robinson. Mr. Cowan later named two more people. He told police that Mr. Fiddler and Mr. Tone had driven Littleman and Mr. Robinson to the restaurant and that they had waited in Mr. Fiddler's vehicle during the robbery.

Mr. Cowan was charged with armed robbery. He was tried by judge alone with no jury. At trial, the Crown advanced two theories about what happened. The first was that Mr. Cowan was the masked armed robber and, as a result, was guilty as a principal offender. The second theory was that if he was not the masked man, Mr. Cowan was a guilty party because he had either helped commit the crime or had advised others on how to do it. The trial judge rejected both theories and acquitted Mr. Cowan.

The Crown appealed to the Court of Appeal, which agreed with the trial judge that Mr. Cowan was not a principal offender. The judges did not all agree, however, with the trial judge's finding that the Crown had to first prove who had committed the actual robbery before finding Mr. Cowan guilty of helping or advising others on how to commit the crime. The majority of the Court of Appeal found that this error may have affected the verdict. They allowed the appeal, set aside the acquittal and ordered a new trial on the second theory of liability.

Both Mr. Cowan and the Crown appealed the Court of Appeal's ruling to the Supreme Court of Canada. Mr. Cowan argued that the trial judge made no error and that his acquittal should stand. The Crown argued that the Court of Appeal was not allowed to limit a new trial to a single theory of liability. Instead, the Crown said there should be a new trial on the charge of armed robbery as a whole.

The Supreme Court has dismissed Mr. Cowan's appeal and allowed the Crown's appeal. The new trial will be on the charge of armed robbery as a whole.

New trial required

Writing for a majority of the judges of the Supreme Court, Justice Moldaver said the trial judge committed an error of law in assessing Mr. Cowan's liability as a party to the offence.

To have an acquittal set aside due to a legal error, the Crown must satisfy an appeal court to a reasonable degree of certainty that the error could have changed the outcome of the trial. In this case, the judges said, the Crown had satisfied the Court. They said that the verdict may well have been different if the trial judge had considered the evidence in light of the correct legal principles.

Appeal courts may not limit the scope of a new trial to a particular theory of liability on a single criminal charge.

The majority said the new trial should be a "full new trial" that is not limited to a particular theory of liability. The majority explained that appeal courts may not limit the scope of a new trial to a particular theory of liability on a single criminal charge. They said, "as one of the purposes of the criminal process is to foster a search for truth,

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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."

Breakdown of the decision: ***Majority*****:** Justice Moldaver dismissed Mr. Cowan's appeal and allowed the Crown's appeal. He ordered a full new trial for Mr. Cowan on the charge of robbery (Chief Justice Wagner and Justices Côté, Martin and Kasirer agreed) | ***Dissenting*****:** Justice Rowe would have allowed Mr. Cowan's appeal and restored his acquittal (Justice Brown agreed)

More information (case # 39301): Decision | Case information | Webcast of hearing

Lower court rulings: judgment (Court of Queen's Bench for Saskatchewan) | appeal (Court of Appeal for Saskatchewan)
