



SUPREME COURT OF CANADA

CITATION: R. v. Pickton, 2010 SCC 32, [2010] 2 S.C.R. 198

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BETWEEN:

Robert William Pickton
Appellant
and
Her Majesty The Queen
Respondent

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 36)

Charron J. (McLachlin C.J. and Deschamps, Abella,
Rothstein and Cromwell JJ. concurring)

**PARTIALLY CONCURRING
REASONS:** (paras. 37 to 88)

LeBel J. (Binnie and Fish JJ. concurring)

R. v. Pickton, 2010 SCC 32, [2010] 2 S.C.R. 198

Robert William Pickton

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Pickton

2010 SCC 32

File No.: 33288.

2010: March 25; 2010: July 30.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Trial — Fair trial — Charge to jury — Accused charged with several counts of first degree murder — Crown maintaining that accused actually shot and killed victims — Trial judge instructing jury that if they had reasonable doubt whether accused shot victims they

should return not guilty verdict — Trial judge subsequently instructing jury following question during their deliberations that they could find that accused was killer if he “was otherwise an active participant” in killings — Accused convicted of second degree murder — Whether trial judge’s response to jury question undermined fairness of trial and occasioned miscarriage of justice — Whether instructions as a whole, including response to jury question, adequately conveyed law on potential routes to criminal liability.

The accused was charged with several counts of first degree murder after the police found the dismembered remains of the victims on his property. Throughout the trial, the Crown maintained that the accused had actually shot and killed the women. The defence took the position that the Crown had failed to prove that the accused was the sole perpetrator, suggesting the potential involvement of others to the exclusion of the accused. On the fourth and last day of instructions to the jury, the defence requested that the trial judge specifically instruct the jury in accordance with the respective theories of the parties. The Crown consented to the request and the trial judge instructed the jury on those counts in respect of which the evidence was clear that the victim had died of a gunshot wound that, if they found that the accused had shot the victims, they should find that the Crown has proven the identity of the killer. On the other hand, if they had a reasonable doubt about whether or not he had shot the victims, they should return a verdict of not guilty. Following a question from the jury on the sixth day of deliberations, the trial judge re-instructed the jury that they could also find that the accused was the killer if he “was otherwise an active participant” in the killings. At the conclusion of the lengthy trial, the jury returned a verdict of guilty of second degree murder on each of the counts. The accused appealed his convictions, arguing that the trial judge’s retraction of the “actual shooter” instruction on the sixth

day of deliberations adversely impacted on the fairness of the trial and occasioned a miscarriage of justice. The Court of Appeal, in a majority decision, rejected the accused's argument and upheld the convictions. The dissenting judge would have granted a new trial on the ground that the trial judge's failure to instruct the jury on the law of aiding and abetting and how it might apply to this case amounted to a miscarriage of justice.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ.:

The majority of the Court of Appeal was correct in finding that no miscarriage of justice was occasioned in this trial. While it was the Crown's theory that the accused was the sole perpetrator, the record revealed that other routes to liability were also at issue. Not only did the defence theory itself put the participation of others at issue, but the accused's own statements to the police, which implied the involvement of others but not to the exclusion of the accused, alone made it necessary for the trial judge to instruct the jury on potential routes to liability that went beyond the respective positions of both the Crown and the defence. In his charge, the trial judge explained to the jury what effect any finding that others might have participated in the commission of the offences would have on the question of the accused's criminal liability. The crux of the other suspects instructions was that it did not matter whether the accused acted alone or with others; provided that he "actively participated" in the killings, and thus had a physical role in them, he could be found criminally liable. The impugned answer to the jury question was consistent with this instruction and, therefore, the contention that the defence was somehow taken by surprise by this course of events is not borne out on the record.

Furthermore, regardless of counsel's joint position, the trial judge should not have agreed to include the "actual shooter" instruction in the charge. This instruction was not only erroneous in law, but on the facts of this case, it was its addition to the charge which courted a miscarriage of justice. The jury was invited to acquit the accused based on a factual doubt which at law did not necessarily exculpate him. The trial judge properly re-instructed the jury by changing the actual shooter instruction to include the possibility that the accused was "otherwise an active participant in the killing", so that this instruction was consistent with the other suspects instructions and responsive to the evidence and the central issues of the trial.

The instructions as a whole adequately conveyed to the jury what it needed to know to consider the alternate routes to liability properly. This case was never about whether the accused had a minor role in the killing of the victims. It was about whether or not he had actually killed them. Having regard to the overwhelming evidence about the accused's having been actively involved in the actual killing of the victims, either by acting alone or in concert with others, and to the charge as a whole, the expressions "acted in concert with" and "active participant in the killing" compendiously captured the alternative routes to liability that were realistically in issue in this trial. While the trial judge could have instructed the jury more fully on the different modes of participation that could ground criminal liability, including the law on aiding and abetting, there was neither a legal error, because he correctly instructed the jury as to the essential elements which the Crown had to prove to establish liability for the murders, nor a miscarriage of justice, because the jury could not have been led into improper reasoning. The absence of an instruction on aiding and abetting could only have enured to the accused's benefit.

Per Binnie, LeBel and Fish JJ.: The jury was not properly informed of the legal principles which would have allowed them to consider evidence of the accused's aid and encouragement to an unknown shooter as an alternative means of imposing liability for the murders, but the curative proviso found in s. 686(1)(b)(iii) of the *Criminal Code* applies. There was overwhelming evidence of the accused's participation in the murders and, from whichever perspective his participation is considered, he was necessarily either a principal or an aider or abettor. Indeed, a properly instructed jury would likely have convicted the accused of first degree rather than second degree murder.

In relation to causation-based offences such as murder, there can be a difference between factual causation, the scientific "but-for" cause of death, and legal causation, directed at whether the accused person should be held criminally responsible for the consequences that occurred. Party liability as codified in s. 21 of the *Criminal Code* often bridges the gap which might otherwise exist between factual and legal causation. But, it remains the duty of the trial judge to convey to the jury as triers of fact the relevant legal principles and how they apply to the evidence adduced at trial, so as to avoid the legally irrelevant uncertainty which otherwise might arise.

Although the ultimate legal liability is the same for a principal or an aider or abettor, the findings of fact necessary and specific legal principles which apply to each are different. In the case of an aider or abettor, the main focus is on the intention with which the aid or encouragement was provided. On the record in this case, the acts of aiding or abetting relied upon to make the accused liable for the murders could have included many things, which could

similarly have provided the necessary evidence of intention.

Given that there was no evidence that there was more than one operative cause of death, an instruction as to “concerted action” between the accused and one or more third parties needed to make clear to the jury that, if they had a reasonable doubt that the accused personally committed the murders, they needed to be satisfied beyond a reasonable doubt that he at least aided or abetted them. Both the general instruction and the amended “actual shooter” portions of the charge were misleading, and wrong in law. The words “or was otherwise an active participant” did not convey the adequate causal requirement between the accused’s acts and the deaths of the victims for principal liability. The words “or actively participated in the killing of the victim” impermissibly opened up the possibility of the accused’s having acted as an aider or abettor without any further instruction on that route of liability.

Finally, similar fact evidence will be admissible not only to show that an accused personally committed each offence charged as a principal, but also to raise the possibility that the offences were committed, in the alternative, by an accused as an aider or abettor. But, the requisite pattern of conduct must be sufficiently connected to both possibilities on all of the counts.

Cases Cited

By Charron J.

Distinguished: *R. v. Ranger* (2003), 178 C.C.C. (3d) 375; **referred to:** *R. v. Rose*, [1998] 3 S.C.R. 262; *R. v. Thatcher*, [1987] 1 S.C.R. 652.

By LeBel J.

Considered: *R. v. Suzack* (2000), 141 C.C.C. (3d) 449; **distinguished:** *R. v. Thatcher*, [1987] 1 S.C.R. 652; *Miller v. The Queen*, [1977] 2 S.C.R. 680; **referred to:** *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123; *Chow Bew v. The Queen*, [1956] S.C.R. 124; *R. v. Harder*, [1956] S.C.R. 489; *R. v. Sparrow* (1979), 51 C.C.C. (2d) 443; *R. v. Isaac*, [1984] 1 S.C.R. 74; *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488; *R. v. Mena* (1987), 34 C.C.C. (3d) 304; *R. v. McMaster*, [1996] 1 S.C.R. 740; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *R. v. Mercer*, 2005 BCCA 144, 202 C.C.C. (3d) 130, leave to appeal refused, [2005] 2 S.C.R. x; *R. v. Perrier*, 2004 SCC 56, [2004] 3 S.C.R. 228; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 21, 229, 231(5), 686(1)(b)(iii).

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Donald and Low JJ.A.), 2009 BCCA 299, 272 B.C.A.C. 252, 459 W.A.C. 252, [2009] B.C.J. No. 1251 (QL), 2009 CarswellBC 3826, upholding the accused's convictions. Appeal dismissed.

Gil D. McKinnon, Q.C., Patrick McGowan and Marilyn Sandford, for the appellant.

Gregory J. Fitch, Q.C., and John M. Gordon, Q.C., for the respondent.

The judgment of McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

CHARRON J. —

1. Overview

[1] Robert William Pickton became a person of interest to the police in early 2001 when a task force began collecting the DNA of women missing from the downtown eastside of Vancouver. All the missing women were drug-dependent sex-trade workers who had frequently worked in that area. Mr. Pickton operated a pig butchering business adjacent to his residence on his family's property in Port Coquitlam, east of Vancouver. The investigation culminated in the discovery of the dismembered remains of many of the women on Mr. Pickton's property, some in buckets in a freezer in his workshop, some in a garbage pail in the piggery near the

slaughterhouse, others elsewhere on the property.

[2] Mr. Pickton was charged with 27 counts of first degree murder.

[3] In pre-trial rulings, the trial judge quashed one count and severed 20 others and the trial proceeded on the remaining six counts of first degree murder. At the conclusion of what was a lengthy trial, the jury returned a verdict of not guilty of first degree murder, but guilty of second degree murder on each of the six counts.

[4] The Crown appealed successfully to the Court of Appeal for British Columbia from the severance order and the six acquittals of first degree murder. A unanimous court ordered a new trial on all 26 counts of first degree murder. No appeal is taken from this judgment. It has been stayed pending final resolution of Mr. Pickton's appeal.

[5] Mr. Pickton appealed from his convictions of second degree murder. His appeal essentially turned on whether the trial judge's responses to a question by the jury undermined the fairness of the trial by introducing, as the defence contended, an alternate, ill-defined route to conviction at this late stage of the trial. Mr. Pickton based this contention on the following course of events.

[6] Throughout the trial, the Crown maintained that Mr. Pickton actually shot/killed the six women. The defence took the position that the Crown failed to prove that Mr. Pickton was the sole perpetrator, suggesting the potential involvement of others to the exclusion of Mr.

Pickton. On the fourth and last day of instructions to the jury, the defence requested that the trial judge specifically instruct the jury in accordance with the respective theories of the parties by adding what has been referred to as the “actual shooter” instruction. The Crown consented to the request, and the trial judge accordingly gave the following jury instruction in respect of the first three counts, each relating to a victim who, it was accepted by both counsel, died as a result of a gunshot wound to the head (the Crown relied on a similar-fact inference to prove that the other three women had also been murdered by Mr. Pickton):

If you find that Mr. Pickton shot [name of victim], you should find that the Crown has proven [element 3, the identity of the killer]. On the other hand, if you have a reasonable doubt about whether or not he shot her, you must return a verdict of not guilty on the charge of murdering her. [Emphasis added.]

Mr. Pickton argued that for the trial judge to later retract from this instruction on the sixth day of deliberations, by instructing the jury that they could also find that he was the killer if he “was otherwise an active participant” in the killings, occasioned a miscarriage of justice.

[7] Low J.A. (Finch C.J.B.C. concurring) rejected Mr. Pickton’s argument (2009 BCCA 299, 272 B.C.A.C. 252). While it was the Crown’s theory that Mr. Pickton was the sole perpetrator, the record revealed that other routes to liability were also at issue throughout the trial. Accordingly, the trial judge correctly instructed the jury in several parts of the charge that it was not necessary to find that Mr. Pickton acted alone in order to find him guilty of the offence. The jury’s question whether they could find that Mr. Pickton was the killer if they inferred that he “acted indirectly” stemmed from the inconsistency in the charge between these other suspects instructions and the actual shooter instruction. The trial judge was correct to rectify the

inconsistency, and in the majority's view, the overall instructions with respect to the parties issue were adequate.

[8] Donald J.A., in dissent, would have granted a new trial on the ground that the trial judge's failure to instruct the jury on the law of aiding and abetting and how it may apply to this case amounted to a miscarriage of justice to which the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46, could not be applied.

[9] In this Court, Mr. Pickton repeats his argument that there was a miscarriage of justice and relies for support on the dissenting judgment of Donald J.A.

[10] In my view, the majority was correct in finding that no miscarriage of justice was occasioned in this trial. There is no question that the trial judge could have instructed the jury more fully on the different modes of participation that could ground criminal liability, including the law on aiding and abetting. In hindsight and from a legalistic standpoint, it is easy to argue that he probably should have done so. However, the adequacy of the jury instructions must be assessed in the context of the evidence and the trial as a whole. There is nothing wrong, particularly in complex or lengthy trials, with the trial judge and counsel's narrowing the issues for the jury by focussing on what is actually and realistically at issue in the case, provided that, at the end of the day, the jury is given the necessary instructions to arrive at a just and proper verdict.

[11] Realistically, this case was never about whether Mr. Pickton had a minor role in the

murder of the victims. It was about whether or not he had actually killed them. Accordingly, the jury was left with instructions that required the Crown to prove that he “actively participated”, and thus had a physical role, in the killings of the six women. As stated earlier, from a legalistic standpoint, these instructions did not reflect all potential modes of participation. However, by limiting the grounds of liability in this manner, the instructions were unduly favourable to the defence. Mr. Pickton argues nonetheless that there was a miscarriage of justice. His argument rests on the fact that the trial judge ultimately retracted the actual shooter instruction from the jury’s consideration. In my view, this argument must fail. The actual shooter instruction was not only erroneous in law, but also on the facts of this case it was its *addition* to the charge which courted a miscarriage of justice. The jury was invited to acquit Mr. Pickton based on a factual doubt which at law did not necessarily exculpate him. The trial judge was therefore correct in ultimately rectifying this error by appropriately re-charging the jury.

[12] Further, given the evidence at trial, the absence of an instruction on Mr. Pickton’s liability as an aider and abettor could only have enured to his benefit. Although imperfect, the overall charge adequately conveyed to the jury the relevant legal principles as they applied to the facts of the case. I would dismiss the appeal and affirm the convictions.

2. Analysis

[13] As outlined above, the central issue in this appeal is whether, in the context of the main charge and the trial as a whole, the trial judge’s response to the sole question posed by the jury effectively changed the “goal posts”, as Mr. Pickton’s counsel put it, thereby adversely

impacting on the fairness of the trial. A subsidiary issue arises whether the instructions as a whole, including the response to the jury question, adequately conveyed the law on the potential routes to criminal liability.

[14] The evidence adduced at trial was described in considerable detail by Low J.A., at paras. 6-118. None of this evidence is at issue in this appeal. In order to situate the issues in their factual context, it will suffice to outline briefly the more salient features of the evidence, as presented by the parties in their respective facts.

[15] The Crown summarizes its case against Mr. Pickton as follows:

The evidence established that Pickton frequented the [downtown eastside of Vancouver] DTES and used the services provided by sex trade workers. He lured these women away from their usual working areas to his Port Coquitlam farm 30 kilometres away by offering additional money, drugs, or both. A firearm consistent in its calibre and class characteristics with the gun used to kill three of the women was found in the laundry room of his residential trailer. Pickton had lived in this trailer, situated at the north end of the 17 acre farm, since 1997. Various restraint devices, some bearing DNA matched to Pickton, were found in his bedroom and in a duffle bag in the loft area of his workshop, one of a number of outbuildings at the north end of the property used by Pickton in his daily activities. Personal belongings and trace DNA of four of the six victims were found throughout Pickton's trailer. Together with the recovered bodily remains, all this evidence was located within a 70 metre radius of his trailer.

Pickton was a butcher by avocation. He had the tools of the trade and slaughtered pigs in his slaughterhouse on the farm on a weekly basis. The state of the remains of three of the victims (bisected skulls, hands and feet) showed unmistakable signs of having been butchered in a manner similar to the way Pickton butchered large pigs, including the vertical bisection of the skull using a saw and the removal of the hands and feet by a process known as disarticulation.

Pickton told Andrew Bellwood that he lured sex trade workers from the DTES to his home, had sex with them, restrained them with handcuffs, strangled them with a piece of wire, butchered them in his slaughterhouse and disposed of their remains, including at a rendering plant. Pickton regularly disposed of barrels of offal at a

rendering plant near the DTES. Recovered from the headboard of Pickton's bed was a knotted length of insulated electrical wire capable of being used as a ligature. Pickton made no mention of others in his description of this scheme.

An eyewitness, Lynn Ellingsen, testified she accompanied Pickton to the DTES one evening where he engaged a sex trade worker and brought her back to the farm. Later that evening, Ellingsen saw Pickton disembowelling the woman in his slaughterhouse. Ellingsen identified this woman as the victim in Count 5.

Both Bellwood and Ellingsen provided statements to the police recounting this confession and this eyewitness account before any remains of the victims had been found at the north end, Pickton's end, of the farm.

In his formal statement to the police, Pickton admitted to being the "head honcho" responsible for the deaths of missing women, but said that others were involved too. His references to the involvement of others did not, at the same time, exclude his own participation in the killings. To an undercover officer posing as his cellmate, Pickton admitted to being a serial killer who had killed forty-nine women and planned to kill one more to make an "even fifty." He told the officer that he disposed of his victims' remains at a rendering plant. He admitted getting caught because he had become "sloppy towards the end." The victims whose heads, hands and feet were recovered from his outbuildings were the last three victims in time.

[16] In turn, Mr. Pickton sets out in his factum the thrust of the defence advanced at trial:

The Defence responded to the Crown's case by attempting to show that Pickton's farm was a bee-hive of activity, that other persons, unknown and known (Dinah Taylor, Pat Casanova), used Pickton's place to kill the women without Pickton being criminally involved. Pickton did not testify but he called 31 witnesses. The Defence argued that Pickton's statements to the police did not amount to reliable admissions that he killed anyone. Rather, Pickton scored low on verbal intelligence tests, was simply parroting back to the police accusations that were put to him in a 12 hour interrogation in an attempt to get the police off his property and lessen the impact of the investigation on those close to him. The Defence submitted that his admissions to the cell plant reflected his unsophisticated efforts to impress his cell mate. The Defence argued that Ellingsen and Bellwood, who were subject to a strong *Vetrovec* instruction, were chronic drug users, entrenched in a criminal life style, and that their testimony was implausible, unreliable, and unconfirmed by the rest of the evidence. The Defence contended that the forensic evidence did not support the Crown's theory.

[17] The Crown took and maintained the position throughout the trial that Mr. Pickton was the sole perpetrator of all six murders. The defence relentlessly tried to discredit the Crown's theory by suggesting the potential involvement of others, some named and others not, to the exclusion of Mr. Pickton. Mr. Pickton's counsel took great pains to demonstrate how the Crown's sole perpetrator theory permeated each step of the proceedings and, likewise, how the defence strategy was reflected at each of those steps, from the defence's opening statement to the jury to its submissions on the jury question.

[18] There is no question that the respective positions of the Crown and the defence permeate the entire record. The Crown consistently maintained that one person committed all of the murders on the indictment and that that person was Mr. Pickton. The defence maintained that he was not criminally involved. The Crown's sole perpetrator theory is perhaps understandable, given the cogency of the evidence pointing to Mr. Pickton at the centre of this inhuman scene. It was also responsive to the tactic adopted by the defence to deflect any criminal responsibility from Mr. Pickton to other individuals. However, the question that arises is whether, in the particular circumstances of this case, the Crown was bound to the theory that it advanced.

[19] Counsel for Mr. Pickton stresses that this appeal is not about whether the Crown has the right to modify its theory or strategy as the trial progresses. He acknowledges that, as a general rule, the Crown has that right. As Binnie J. (dissenting, but not on this point) noted in *R. v. Rose*, [1998] 3 S.C.R. 262: "The notion that it is sufficient for the accused to respond to the 'Crown theory of the case' also suffers from the practical difficulty that the Crown's theory of the case is a moving target that has to adjust to meet new or changing circumstances during the trial,

including what the Crown hears in the defence closing address” (para. 27). Counsel also takes no issue with the principle that “a trial judge has a duty to instruct the jury on all routes to liability which arise from the evidence, even if the Crown chooses not to rely on a particular route”. He concedes that, as a general rule, the trial judge has that obligation (A.F., at para. 83). The issue, he argues, is whether in the particular circumstances of this case, the Crown’s so-called change in position and the trial judge’s amendment of the instructions after the jury asked their question undermined the fairness of the trial. In effect, he contends that the defence was unfairly taken by surprise by this turn of events.

[20] Counsel argues that what occurred here impacted on the fairness of the trial much as was found by the Court of Appeal for Ontario in *R. v. Ranger* (2003), 178 C.C.C. (3d) 375. In that case, Ranger and an individual named Kinkead were both charged with murder in relation to the stabbing of two sisters, but were tried separately. At Ranger’s trial, it was the Crown’s theory that Ranger, who had been in a relationship with one of the sisters and was upset over her intention to leave the country, had gone to her house to kill her and had enlisted Kinkead to help him. The Crown’s case, as put to the jury, relied on proving that Ranger and Kinkead were in the home together and that one or both had killed one or both sisters. Ranger’s defence was based, in part, on alibi evidence. Ultimately, the trial judge’s instructions left it open to the jury to find Ranger guilty, even if they did not accept that he was present at the time of the killings, if they were satisfied that he somehow aided or abetted Kinkead in the killings. In light of what had happened at trial, the Court of Appeal concluded that it was reasonable for defence counsel to have understood that Ranger’s conviction would be grounded on proving that he was in the house at the time of the murders. Consequently, by putting the additional theory to the jury without prior

notice to the defence, the trial judge had undermined Ranger's ability to make full answer and defence.

[21] Low J.A. held that "*Ranger* is distinguishable from the present case because, as I have attempted to demonstrate, the defence here knew that the co-principal theory of liability would be left with the jury" (para. 168). I agree with Low J.A.'s assessment of the record and with his conclusion on this point. The fallacy of Mr. Pickton's argument lies in the fact that the *defence theory itself* put the participation of others at issue. Throughout the trial, the defence by its approach urged the jury to consider that others may have actually killed the victims. An inevitable consequence of going down that road is that the jury would have to be instructed on how this could, if at all, impact on Mr. Pickton's own criminal liability. As Low J.A. aptly observed:

The defence team was composed of experienced criminal defence counsel who could not have failed to be aware throughout of a co-party route to liability, as much as they might have wished to avoid it by confining the Crown to its sole-perpetrator theory. Nor could they not have known of the legal duty of the trial judge to instruct the jury on any party route to liability that emerged from the evidence. They could not have confined the court in the manner they hoped to confine the Crown. An examination of the record makes this very apparent. [para. 121]

[22] Moreover, based on Mr. Pickton's own statements alone, it was necessary to instruct the jury on potential routes to liability that went beyond the respective positions of *both* the Crown and the defence. As Low J.A. noted:

In his formal statement to the police and in his statements to the cell plant, the appellant mentioned the involvement of other people. At no time during these

conversations did he say that others were involved to the exclusion of him. His mention of others has to be viewed in the context of his admissions of his own involvement. He said to the interviewing officers that he was the “head honcho” and the “head guy”. This implies the involvement of others but not to the exclusion of the appellant. He said that other people were involved “but that’s here nor there”. Presumably he meant “neither here nor there”. He said that a lot of people were “coming down” and “there is a lot of the other people involved too”. The appellant told the cell plant that “there will be about 15 other people are gonna go down . . . some will go down the tank”.

Viewed by themselves or in the context of the appellant’s admissions, these statements, although argued by the defence as raising a reasonable doubt about the appellant being the killer, could also lead to the conclusion that the appellant acted in concert with others. Throughout the trial, the necessity for instruction on the law of parties was apparent. [Emphasis in original; paras. 134-35.]

[23] Accordingly, the trial judge did not confine his instructions to the Crown’s sole perpetrator theory, but explained to the jury what effect any finding that others may have participated in the commission of the offences would have on the question of Mr. Pickton’s criminal liability. I will refer to these instructions compendiously as the “other suspects instructions”. Low J.A. reviewed the relevant parts of the jury charge at some length at paras. 140-44 and 156. This analysis need not be repeated here. Suffice it to note that the other suspects instructions in question went along the same lines as the following instruction given to the jury immediately following the trial judge’s explanation of the elements of the offence of first degree murder:

[8] A person commits an offence if he, alone or along with somebody else or others, personally does everything necessary to constitute the offence. Accordingly, it is not necessary for you to find that Mr. Pickton acted alone in order to find him guilty of the offence. You may find that Mr. Pickton acted in concert with other persons, although you may not know who they are. It is sufficient if you are satisfied beyond a reasonable doubt, having considered all the evidence, that he actively participated in the killing of the victim. It is not sufficient that he was merely present or took a minor role. The issue for you to decide is whether you are satisfied that it has been

proven that he was involved to the extent that the law requires [to] establish his criminal liability. [Emphasis added.]

[24] The other suspects instructions were responsive to the evidence and the central issues raised at trial, and they are entirely correct in law. More importantly, on the question that occupies us, the record reveals that it was known throughout the trial to both Crown and defence counsel that the jury would be instructed along these lines. While the wording contained in earlier drafts differed somewhat from para. 8 reproduced above (see discussion at paras. 250-51 of Donald J.A.'s dissenting reasons), the crux of the anticipated other suspects instructions was the same: it did not matter whether Mr. Pickton acted alone or with others, for he could be found criminally liable, provided that he "actively participated" in the killings, and thus had a physical role in them. As we shall see, the impugned answer to the jury question was consistent with this instruction. In answer to the question whether they could find that Mr. Pickton was the killer if they inferred that he "acted indirectly", the members of the jury were ultimately instructed that they could do so, provided they found that he "was otherwise an active participant" in the killings. The contention that the defence was somehow taken by surprise by this course of events is not, therefore, borne out on the record.

[25] In any event, I do not understand Mr. Pickton's miscarriage of justice argument to be founded on the content of any of the other suspects instructions. His argument that the "goal posts" were unfairly changed at a late stage of the trial rests instead on the fact that the trial judge's answer to the jury's question effectively retracted from another instruction, the "actual shooter" instruction, which related to element three of the offence, namely the identity of the killer. For convenience, I repeat the actual shooter instruction here:

If you find that Mr. Pickton shot [name of victim], you should find that the Crown has proven [element 3, the identity of the killer]. On the other hand, if you have a reasonable doubt about whether or not he shot her, you must return a verdict of not guilty on the charge of murdering her. [Emphasis added.]

[26] Low J.A. reviewed in some detail the discussions between counsel and the trial judge concerning this instruction (paras. 145-50). It is clear from this review that the wording of this instruction was only finalized in discussions between counsel and the trial judge during the course of the fourth and last day of the charge to the jury. Quite clearly, the latter part of the actual shooter instruction was inconsistent with the other suspects instructions and was also completely erroneous in law. While both counsel may have been content with this instruction in light of their respective theories, it is my view that it should never have been suggested to the trial judge that this instruction was appropriate in law in the context of the evidence in this trial. In particular, as Low J.A. rightly noted, at para. 205, “the Crown should have been adamantly opposed to these paragraphs and . . . the failure to oppose them was the root cause of the jury question”.

[27] Regardless of counsel’s joint position, the trial judge should not have agreed to include this instruction in the charge. Discussions between counsel and the trial judge about the content of the charge can provide invaluable assistance in crafting correct jury instructions and, as such, should be encouraged. However, it is the trial judge’s role to instruct the jury on all relevant questions of law that arise on the evidence. In some cases, these instructions will not accord with the position advanced by counsel for the Crown or the defence.

[28] As events turned out, the inconsistency occasioned by the addition of the actual

shooter instruction was not lost on the jury, nor ultimately on the trial judge. On the sixth day of deliberations, the jury submitted the following question:

When considering Element 3 [the identity of the killer] on one or more of the counts, are we able to say “Yes”, if we infer that the accused acted indirectly?

As explained in considerable detail by Low J.A., at paras. 184-206, after hearing submissions from counsel about the question, the trial judge recharged the jury by essentially repeating some of the other suspects instructions and the actual shooter instruction. Shortly after the recharge, however, and as he later explained in his written reasons for the ruling, the trial judge became concerned that the actual shooter paragraphs were inconsistent with the other suspects instructions and were not responsive to the evidence and the central issues of the trial. The trial judge therefore asked the jury to suspend their deliberations temporarily, and, after advising counsel of his intention, he re-instructed the jury by changing the actual shooter instruction so that it was consistent with the other suspects instructions. The corrected paragraph, which applied to the victims of counts 1 to 3, read as follows:

If you find that Mr. Pickton shot [name of victim] or was otherwise an active participant in her killing, you should find that the Crown has proven this element. On the other hand, if you have a reasonable doubt about whether or not he was an active participant in her killing, you must return a verdict of not guilty. [Emphasis added.]

[29] Mr. Pickton argued that the re-instruction gave rise to two errors. First, the trial judge committed a procedural error by failing to inquire as to the meaning of the jury’s question. Second, he erred by modifying the contents of the actual shooter instruction. Low J.A. dismissed

Mr. Pickton’s argument that the jury question was ambiguous and that specific inquiry as to its meaning was required. I agree. As Low J.A. rightly observed:

. . . the trial judge properly took a conservative approach in conversing with the jury to avoid an improper intrusion into the substance of the jury’s deliberations.

. . . Such enquiry could have led to a significant error. The judge made it clear to the jury at the end of the first recharge that if he had not given them the clarification they needed, they could ask a further question. This was a long trial conducted at considerable public expense. It was in the interest of all concerned, including the appellant, that any risk of impairing the integrity of the trial should be minimized. The trial judge’s exercise of caution was the preferred approach in the circumstances. [paras. 197-98]

Low J.A. also found no substantive error. He held that “the trial judge was correct in holding that the three actual shooter paragraphs were wrong in law and that he had an obligation to correct them” (para. 206). I agree.

[30] On the central issue in this appeal, I therefore conclude that the trial judge’s response to the question posed by the jury did not adversely impact on the fairness of the trial as the appellant contends.

[31] The remaining question is whether the other suspects instructions contained in several parts of the charge adequately conveyed to the jury what it needed to know to consider the alternate routes to liability properly. LeBel J. is of the view that they did not. However, as he concludes that “there exists on the record overwhelming evidence of Mr. Pickton’s guilt, and no miscarriage of justice was occasioned by this error in the instructions” (para. 39), he would apply the curative proviso and dismiss the appeal. I arrive at the same disposition but by a different

route.

[32] I do not find it necessary to consider the curative proviso, as it is my view that the jury instructions on the alternate routes to liability were adequate in the context of the evidence and the issues raised at trial. I share my colleague's opinion that, on a review of the record, "the Crown presented compelling, overwhelming evidence of the participation of Mr. Pickton in the murders" (para. 86). To be clear, this compelling evidence of participation was not about Mr. Pickton having played some minor role in the murders; it was about his having been actively involved in the actual killing of the victims, either by acting alone *or* in concert with others. I add "or in concert with others" as I take issue with LeBel J. when he says that the only logical conclusion was "that only one person, i.e. the person wielding the gun, could have caused the deaths of the victims in each of the counts" (para. 41). The evidence was not so clear that all six victims had died from a gunshot wound to the head, or that only one person participated in their actual killing. In his statement to Mr. Bellwood, Mr. Pickton said that he would handcuff his victims and strangle them, a version of events which was supported by the evidence of an electrical wire capable of being used as a ligature recovered from the headboard of his bed. In his statement to the police, Mr. Pickton referred to himself as the "head honcho", suggesting the involvement of others. Having regard to the nature of the evidence about Mr. Pickton's participation and to the charge as a whole, it is my view that the expressions "acted in concert with others" and "active participant in the killing" compendiously captured the alternative routes to liability that were realistically in issue in this trial. The jury was also correctly instructed that it could convict Mr. Pickton if the Crown proved

this level of participation coupled with the requisite intent.

[33] Based on the evidence, the trial judge could have, and in hindsight probably should have, also instructed the jury on Mr. Pickton's potential liability for acts of aiding and abetting, such as luring the victims to the farm, providing them with drugs or subduing them, as my colleague points out. However, I am not persuaded that in the context of this case the failure to give such further instruction amounted to legal error. Nothing would have been gained in this trial by explaining to the jury the distinctions between an accused's participation as principal, co-principal, or aider and abettor. By requiring proof that Mr. Pickton actively participated in the killing of the victims, by acting either on his own or in concert with others, there was no risk that the jury might convict him on the basis of conduct that did not attract criminal liability for the murders. The other suspects instructions, when read in the context of the charge as a whole, effectively rendered the distinctions between these various modes of participation legally irrelevant. The crucial issue is not whether the trial judge properly labelled the nature of Mr. Pickton's liability. As aptly stated in *R. v. Thatcher*, [1987] 1 S.C.R. 652, "[t]he whole point of s. 21(1) is to put an aider or abettor on the same footing as the principal" (p. 689). The determinative question is whether the trial judge correctly instructed the jury as to the essential elements which the Crown had to prove to establish Mr. Pickton's liability for the murders. Clearly, he was guilty of murder if the Crown proved the elements of the offences as explained in the charge to the jury. I therefore conclude that there was no legal error.

[34] I also respectfully disagree with Donald J.A. that the failure to instruct the jury

more fully on the law of aiding and abetting occasioned a miscarriage of justice. The instructions could not have led the jury into improper reasoning. The narrow focus which was placed on the alternate route to liability, requiring the Crown to prove that Mr. Pickton actively participated in the actual killing of the victims, restricted the scope of potential acts which could have grounded criminal liability and therefore enured to Mr. Pickton's benefit. I find it unhelpful to speculate on the unusual verdict of second degree murder in the context of this appeal. As noted at the outset, the Crown successfully appealed from the six acquittals of first degree murder and the issues raised in the court below in the context of that appeal are not before us.

[35] I therefore conclude that the instructions adequately conveyed to the jury what it needed to know to consider the alternate routes to liability properly. The law requires no more.

3. Disposition

[36] For these reasons, I would dismiss the appeal and affirm the convictions.

The reasons of Binnie, LeBel and Fish JJ. were delivered by

LEBEL J. —

I. Introduction

[37] The primary issue in this appeal is the adequacy of jury instructions given at the end of a long and disturbing six-count murder trial which lasted almost a full year. Although we must necessarily conduct a careful review of those trial proceedings with a view to ensuring that justice is done on the particular facts of this case, it is also important that the applicable law be carefully delineated and clarified for future cases. I am reminded of the words of Doherty J.A. in *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont. C.A.), at para. 19: “[D]etached and reflective appellate review of the trial process is perhaps most important in notorious, emotion-charged cases involving the least deserving accused.”

[38] The notion of “co-principal” liability, properly understood, did not arise on the evidence presented at trial, although other forms of party liability did. Even if the instruction receives a new label of “other suspects” liability, this cosmetic, rhetorical change does not dispel the error or change the reality of what happened during the trial. The re-charge whereby the trial judge instructed the jury that they could convict Mr. Pickton if they found he was the actual shooter or “was otherwise an active participant” in the killings clearly opened up party liability as an alternate route to conviction. That having been done, it was an error for the trial judge not to have left a full aiding and abetting instruction with the jury in order to set out the alternate route properly by which the jury could convict Mr. Pickton for the six murders with which he was charged. The phrases “active participation”, “acting in concert”, or “joint venture” do not in and of themselves adequately convey the law of party liability to a trier of fact.

[39] With respect, I must therefore disagree with my colleague Charron J. that the trial judge's overall instructions, including the re-charge following the jury's question on the sixth day of their deliberations, can be said to have adequately conveyed the relevant legal principles as they applied to the facts of the case. She concludes that "[t]he instructions could not have led the jury into improper reasoning" (para. 34). It is indeed hazardous to speculate on the process of the jury's deliberation, but, the unusual verdict of second degree murder returned by the jury after they posed their question may well suggest that the instructions in this case were inadequate. However, as there exists on the record overwhelming evidence of Mr. Pickton's guilt, and no miscarriage of justice was occasioned by this error in the instructions, I would apply the curative proviso found in s. 686 of the *Criminal Code*, R.S.C. 1985, c. C-46, dismiss the appeal, and affirm the convictions.

II. Overview

[40] Although I agree with the summary of the facts in the reasons of Justice Charron, a brief review of some particular facts and of certain aspects of the trial proceedings is necessary. Mr. Pickton was tried on six counts of first degree murder. The trial itself took almost a year to complete, and a total of 129 witnesses were called by both the Crown and the defence. Mr. Pickton himself did not testify, although the Crown relied on inculpatory admissions made by Mr. Pickton in a formal statement to the police, and later to an undercover officer in one of the police cells. The defence challenged the reliability and credibility of those inculpatory statements, as well as the testimony of a

number of key Crown witnesses, and pointed to evidence that implicated at least two other individuals in the murders.

[41] I wish to emphasize that both counsel accepted at the outset that the victims in the first three counts died as a result of a single gunshot wound to the head. There was no evidence that anything else caused or contributed to the deaths. The Crown relied on a similar fact inference to prove that the other victims had been murdered in the same manner. The logical conclusion from this accepted fact, as it was presented to the jury, was then that only one person, i.e. the person wielding the gun, could have caused the deaths of the victims in each of the counts, although others may have been involved to various degrees in the surrounding circumstances.

[42] The Crown argued persistently throughout the trial that Mr. Pickton was the “sole perpetrator” of the murders in this case, and emphatically denied the involvement of any other persons. The defence advanced the theory that various third parties were involved, to the exclusion of Mr. Pickton. The defence thus adduced evidence which it hoped would undermine the theory of the Crown, and raise a reasonable doubt in the minds of the jury that Mr. Pickton had himself murdered the women in each of the six counts.

[43] The oral charge to the jury took place over the course of four days. On the first day, the trial judge gave the following general instruction to the jury, after setting out the elements of the offence:

A person commits an offence if he, alone or along with somebody else or others, personally does everything necessary to constitute the offence. Accordingly, it is not necessary for you to find that Mr. Pickton acted alone in order to find him guilty of the offence. You may find that Mr. Pickton acted in concert with other persons, although you may not know who they are. It is sufficient if you are satisfied beyond a reasonable doubt, having considered all the evidence, that he actively participated in the killing of the victim. It is not sufficient that he was merely present or took a minor role. The issue for you to decide is whether you are satisfied that it has been proven that he was involved to the extent that the law requires to establish his criminal liability.

[44] The elements of the offence of first degree murder were set out as follows:

There are five elements to the offence of first degree murder:

- Element 1: That the individual named in the count was killed by means of an unlawful act.
- Element 2: That the named victim was killed at the time and place stated in the Indictment.
- Element 3: That the accused is the individual who killed that person.
- Element 4: That the accused either meant to cause the victim's death or meant to cause bodily harm that he knew was likely to cause her death and was reckless about whether or not it caused death.
- Element 5: That the death of the named victim was planned and deliberate.

[45] On the third day of the charge to the jury, the trial judge gave a more specific instruction on the possible involvement of third party suspects in the murders. He cautioned the jury that they need not determine all aspects of what happened in the case, nor whether one or more other person was involved in any or all of the counts, so long as they were satisfied beyond a reasonable doubt that Mr. Pickton had committed any or all

of the offences with which he was charged. He repeated that Mr. Pickton would be criminally liable even if the jury found that others may have been involved, so long as they were satisfied that he “actively participated” in killing a victim or victims.

[46] On the last day of jury instruction, the trial judge re-instructed the jury on the elements of the offence of murder, as they related to each specific count. On the first three counts, where it had been accepted that the cause of death of each victim was a single gunshot wound to the head, the trial judge gave the following instruction on element 3, which came to be known as the “actual shooter” instruction:

If you find that Mr. Pickton shot [the victim], you should find that the Crown has proven this element. On the other hand, if you have a reasonable doubt about whether or not he shot her, you must return a verdict of not guilty on the charge of murdering her.

[47] The jury came back, on the sixth day of their deliberations, with the following question:

When considering Element 3 on one or more of the counts, are we able to say “Yes”, if we infer that the accused acted indirectly?

[48] At first, the trial judge simply directed the jury’s attention to the original para. 8 of the instructions, set out above, and also referred them to a portion of the original jury instructions which contained the “actual shooter” instruction. But, after a brief period of reflection, the trial judge recalled the jury and re-charged them for a second time, advising the jury to replace their written instructions with an amendment to the “actual shooter”

instruction in counts 1 through 3 with the following paragraph:

If you find that Mr. Pickton shot [the victim] or was otherwise an active participant in her killing, you should find that the Crown has proven this element. On the other hand, if you have a reasonable doubt about whether or not he was an active participant in her killing, you must return a verdict of not guilty. [Emphasis added.]

[49] Three days later, the jury convicted Mr. Pickton of six counts of second degree murder.

[50] Although both the Crown and the defence are entitled to advance their own theories of the case as they see fit, the logical middle ground which arose on the totality of the evidence here was the possibility that, although Mr. Pickton was not necessarily the “sole perpetrator” of each of the six killings, he was still involved in the circumstances of their deaths to such an extent that criminal liability ought to extend to him as a party to the offences. The issue on this appeal is whether the phrase “or was otherwise an active participant” in the killing, in context of the instructions as a whole, adequately conveyed to the jury the law of parties as it arose on the evidence presented at trial. In my view, it did not.

III. Analysis

A. *Forms of Party Liability Under the Criminal Code*

[51] Generally speaking, there are two forms of liability for *Criminal Code* offences, primary or principal liability (actually or personally committing the offence), and secondary liability (also known as party liability), both codified in s. 21 of the *Criminal Code*. Whether an accused is found guilty either as a principal offender or as a party to the offence, the result is the same in law: the accused will be convicted of the substantive offence. It is for this reason that it is sometimes said that it is “a matter of indifference” at law whether an accused personally committed a crime, or alternatively, aided and/or abetted another to commit the offence: *R. v. Thatcher*, [1987] 1 S.C.R. 652, at p. 694; *Chow Bew v. The Queen*, [1956] S.C.R. 124, at p. 127. This is also why the Crown need not specify in an indictment the nature of an accused’s participation in an offence: *R. v. Harder*, [1956] S.C.R. 489; *Thatcher*, at p. 694.

[52] Section 21 of the *Criminal Code*, which codifies both co-principal and party modes of liability, provides 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.

[53] Section 21 makes it clear that an accused cannot escape liability simply because one or more other persons could also be found liable for the same offence. Thus, under s. 21(1)(a), every person who commits all of the elements of an offence will face criminal liability as a co-principal along with any others who also committed all elements of that offence. Under s. 21(1)(b) and (c), an accused will be found liable for an offence even if he or she did not commit all elements of that offence, but provided aid or encouragement, with the requisite *mens rea*, to another person who did commit the offence.

[54] Where, as here, an accused is charged with murder, the law of party liability under s. 21 therefore provides for the various ways in which an accused can be found guilty of murder under s. 229 of the *Criminal Code*, notwithstanding that under some of the modes of participation, the accused has not actually caused the death of the victim according to the standard set out in that offence. In essence, though it may not be the case that the accused actually did not kill the victim, he or she can still be held liable for the murder.

B. *Instructions About Party Liability*

[55] Where a trial is by judge and jury, the relevant principles of party liability must be carefully explained so that they can be properly applied to the evidence, and correctly set out in the jury instructions. This is particularly important where there is potential

involvement of third parties in the offence, but that involvement is unclear, and the accused is the only person being tried in the trial. As stated by Martin J.A. in *R. v. Sparrow* (1979), 51 C.C.C. (2d) 443 (Ont. C.A.), at p. 458, and quoted with favour in *R. v. Isaac*, [1984] 1 S.C.R. 74, at p. 81, and *Thatcher*, at p. 688:

I am of the view that it is also appropriate, where an accused is being tried alone and there is evidence that more than one person was involved in the commission of the offence, to direct the jury with respect to the provisions of s. 21 of the *Code*, even though the identity of the other participant or participants is unknown, and even though the precise part played by each participant may be uncertain.

[56] The decision of this Court in *Thatcher* provides some guidance as to the relevant principles of party liability and how they might be incorporated into jury instructions. The trial judge in *Thatcher* had read the contents of s. 21(1) to the jury and described what was meant by the term “aiding” or “abetting” by stating that it meant “intentional encouragement or assistance in the commission of the offence”, and noting that the actual perpetrator need not be identified. He then provided the following instruction to the jury:

It is not your concern whether some other person or persons have neither been charged or found guilty of the offence of murder. Nor is it your concern whether or not the person who actually committed the crime is known. If you are satisfied from the evidence that JoAnn Thatcher was murdered and that this accused aided or abetted in the commission of the murder, it is open to you to find him guilty of murder. But again if the Crown has failed to satisfy you that Colin Thatcher either committed the murder or that someone else did so, aided and abetted by Colin Thatcher, then you must give him the benefit of the doubt and find him not guilty. [p. 688]

[57] This Court in *Thatcher* found that, since there was evidence to support the

alternate theory of aiding and abetting, it was properly left to the jury and this instruction was adequate. It went on to consider whether the trial judge's failure to relate the law of aiding and abetting to the evidence was an error in that case. In finding that the failure to do so was not wrong in that case, our Court stated:

Instead of carving his jury charge into discrete sections in which he reviewed the evidence consistent with Thatcher having personally committed the murder, Thatcher having committed the murder by means of s. 21(1), and, finally, Thatcher not having committed the murder at all, the trial judge simply went through the evidence of each witness in turn. I do not think he was wrong in this. Much of the Crown evidence was consistent with either Crown theory, and much of the defence evidence was consistent with either Thatcher's innocence or his guilt under s. 21(1). It is not incumbent on a trial judge to go through the evidence in a repetitive fashion which could only have bored the jury. Nor do I think we should assume jurors are so unintelligent that they will fail to see the obvious: the presence of a government car at the home of the victim, when combined with evidence suggesting that the man in the car was not Thatcher, may point to Thatcher's having aided and abetted; and surely they can discern that the alibi evidence, if believed, when combined with the murder weapon evidence, may point to a similar conclusion.

Furthermore, it is obvious that the two Crown theories are not legally different views of what happened. The whole point of s. 21(1) is to put an aider or abettor on the same footing as the principal. To stress the difference between the Crown theories might leave a jury with the erroneous impression that it is vital for the jurors to decide individually and collectively which way the victim was killed. [Emphasis added; emphasis in original deleted; p. 689.]

[58] Three principles from the decision in *Thatcher* are relevant here. First, if there is evidence admitted at trial which properly supports an alternate mode of liability under s. 21, an instruction on that section should be left with the jury, even though the identity of the other participant or participants is unknown, and even though the precise part played by each participant may be uncertain. Second, it is not necessary for the trial judge to relate the law to the evidence which could support the alternate theory of aiding and

abetting where evidence adduced by the Crown relates to either mode of participation, and evidence adduced by the defence relates to either the accused's innocence or the accused's guilt under the relevant subsection(s) of s. 21. Finally, a jury need not be unanimous on the nature of the accused's participation in the offence, so long as it is satisfied that the accused either committed the offence personally or, alternatively, aided and abetted another to commit the offence, provided the jury is satisfied beyond a reasonable doubt that the accused did one or the other.

[59] The distinction between this case and the facts in *Thatcher* is that the jury instructions here are said to encompass only two possible forms of liability: principal liability and co-principal liability. The potential liability of Mr. Pickton as an aider and abettor was not before the jury in any meaningful way. It therefore cannot be said that the jury was properly informed of the legal principles which would have allowed them as triers of fact to consider evidence of Mr. Pickton's aid and encouragement to an unknown shooter, as an alternative means of imposing liability for the murders.

[60] In relation to causation-based offences such as murder, the distinction in the *Criminal Code* between actually committing the offence under s. 229, and committing the offence as an aider and abettor under s. 21 relates in part to the fact that there can be a difference between factual and legal causation of death. As stated by the majority of this Court in *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488, factual causation can more properly be understood as the scientific "but-for" cause of death, whereas the issue of legal causation is directed at "whether the accused person should be held criminally responsible

for the consequences that occurred” (para. 45). While the ultimate determination of criminal liability will be based on the principles of legal causation, a finding as to the factual cause of death can still inform which modes of liability are available on the evidence.

[61] A jury does not engage in a two-part analysis as to factual and legal causation. Rather, as noted in *Nette*, “in the charge to the jury, the trial judge seeks to convey the requisite degree of factual and legal causation that must be found before the accused can be held criminally responsible for the victim’s death” (para. 46). In this way, party liability as codified in s. 21 of the *Criminal Code* often bridges the gap which might otherwise exist between factual and legal causation. But it remains the duty of the trial judge to convey to the jury as triers of fact the relevant legal principles and how they apply to the evidence adduced at trial, so as to avoid the legally irrelevant uncertainty which otherwise might arise.

[62] In some cases, the involvement of one or more persons other than the accused in the circumstances of the offence may be clear, but the extent of their involvement is uncertain. If the offence is murder, it may be clear that only one person, the accused or a third party or parties, factually caused the death of the victim and that the persons involved who did not factually cause the victim’s death “aided or abetted” the person who did, but the uncertainty may lie with *which* one person, the accused or a third party, factually caused the death. In that case, the law has established that this uncertainty does not lead to the inevitable acquittal of the accused. The principles of legal causation then come into

play and justify a conclusion that the accused committed the murder in both situations (legal cause), regardless of whether he or she was the principal (primary factual cause), or an aider and abettor (secondary legal cause): *Thatcher*, at p. 690.

[63] In certain circumstances, uncertainty as to the involvement of known or unknown third parties as co-principals in the offence may also be legally irrelevant. Co-principal liability is codified in s. 21(1)(a) of the *Criminal Code*: “Every one is a party to an offence who actually commits it”. It therefore arises whenever two or more people “actually commit” an offence to make both people individually liable for that crime. It also arises where two or more persons together form an intention to commit an offence, are present at the commission of the crime, and contribute to it, although they do not personally commit all of the essential elements of that offence (*R. v. Mena* (1987), 34 C.C.C. (3d) 304 (Ont. C.A.), at p. 316). If the trier of fact is satisfied beyond a reasonable doubt that the accused committed all elements of the crime, it does not matter whether another person may also have committed it.

[64] In relation to murder, which, as noted above, is premised on a causal requirement (the allegedly unlawful act must “cause” death), the classic scenario in which the potential for co-principal liability arises is when two or more persons assault the victim at the same time, by beating him or her to death: see, for example, *R. v. McMaster*, [1996] 1 S.C.R. 740. In a joint beating case, since each accused commits each element of the offence of murder (the entire *actus reus* and *mens rea* of the offence), and only factual causation may be uncertain (which person delivered the “fatal” blow), legal causation will allow for

uncertainty as to the actual act which caused the death. The only requirement for “causation of death” is that related to murder/manslaughter generally. It must be established that each accused’s assault of the victim was a “significant contributing cause” (for manslaughter or murder generally) or an “essential, substantial and integral part of the killing” (for first degree murder under s. 231(5)): *Nette*, at para. 73.

[65] Co-principal liability can also arise for offences other than murder, as s. 21 applies to all offences set out in the *Criminal Code*. Indeed, many other offences without causal requirements would lend themselves more clearly to a “co-principal” type situation, as they are offences which are often committed by more than one person, such as robbery, kidnapping, or breaking and entering. In those cases, the *actus reus* or acts that make up the offence can extend over minutes or hours or days, and different elements or portions of the offence can be completed by different persons (if one person breaks the window of a premises, and both persons enter it, they are both still actually committing the same break and enter). In this way, co-principal liability can arise whether the acts of each accused are committed sequentially (one acts first, the other acts second, and the *actus reus* of the offence is only complete after the second act), or whether the acts are concurrent (both accused persons act at the same time, each committing the entire *actus reus*).

[66] For an assaultive act potentially to give rise to a charge of murder or manslaughter, two things must be established: the victim must actually die, and the assault must be a “significant contributing cause” of the death. This is why co-principal liability

for murder or manslaughter in the latter sense (concurrent acts) is much more likely. If two people each individually assault the victim, it may be unclear which of the two assaults actually caused the victim's death as opposed to other injuries. In law, there is no need to determine who struck the "fatal blow" for co-principal liability to flow to each participant in the assault. Whether one assault, or some combination of the two, caused the death is irrelevant for co-principal liability, as long as both assaults are found to be a "significant contributing cause" of death.

[67] Where the cause of death could clearly only have been inflicted on the victim by one person, however, and there is no evidence of any other force being applied to the victim prior to death, then absent any other evidence, likely the only logical inference is that there exists only a single principal offender. The principles of criminal causation demand such a conclusion, as there cannot be said to be any other "significant contributing cause" to the death. In that situation, the potential of co-principal liability is eliminated.

[68] Some confusion exists in the co-principal cases as to whether two or more people are co-principals by virtue of the fact that they "acted in concert" as a part of a "common scheme" or "joint agreement". The source of this confusion may stem in part from a misunderstanding of what decisions such as *R. v. Suzack* (2000), 141 C.C.C. (3d) 449 (Ont. C.A.), actually held and stood for. In *Suzack*, the accused and another man attacked and beat the victim and one of them fired the fatal shots, although each testified that the other had been the shooter. In *Suzack*, the Court of Appeal commented on the terminology used in the instructions by the trial judge as follows:

It is beyond question that where two persons, each with the requisite intent, act in concert in the commission of a crime, they are both guilty of that crime. Their liability may fall under one or more of the provisions of s. 21(1) of the *Criminal Code*: *R. v. Sparrow* (1979), 51 C.C.C. (2d) 443 (Ont. C.A.) at 457-58. Trainor J. told the jury that if Suzack and Pennett jointly participated in the murder with the necessary intent, they were “liable as principals”. This is potentially a mischaracterization of their liability. They may have been principals or they may have been aiders or abettors depending on what each did in the course of the common design: *R. v. Simpson* (1988), 38 C.C.C. (3d) 481 (S.C.C.) at 488-91. As Griffiths J.A. said in *R. v. Wood* (1989), 51 C.C.C. (3d) 201 (Ont. C.A.) at 220:

Where evidence of concerted action in the commission of the offence exists, as in the present case, then it is open to a jury to convict all of the accused either as principals, under s. 229(a), or as aiders or abettors pursuant to s. 21 of the *Code*, even though the extent of the individual participation in the violence is unclear.

I do not, however, regard Trainor J.’s error in terminology as having any significance. The crucial issue is not whether he properly labelled the nature of the appellants’ liability, but whether he properly instructed the jury as to the essential elements which the Crown had to prove to establish joint liability for murder where the jury could not determine which of the two had fired the fatal shots. [Emphasis added; paras. 152-53.]

[69] In *Suzack*, both principal liability and aiding and abetting were properly before the jury. It was for this reason that if one or the other modes of liability was made out that it was “unnecessary to label the nature of his participation” (para. 155). In addition, both of these modes of liability, taken together, described “Suzack’s potential liability for murder as a participant in a common scheme . . . to commit murder” (para. 157). The decision in *Suzack*, however, also makes it clear that the phrases such as “concerted action”, “acted in concert”, “common design”, “participation in a common scheme”, and “joint participation” are phrases which properly capture the entire gamut of principal liability, co-principal liability and liability as an aider or abettor. They cover the entire

range of party liability set out in s. 21(1) and are not limited to s. 21(1)(a).

C. Application to the Record

[70] In this case, it was accepted in counts 1 through 3 that the factual cause of death of those victims was a gunshot wound to the head. Therefore, regardless of what else happened before or after each of the victims was murdered, only one person actually fired the bullet which caused the victims' deaths.

[71] There was no evidence of any other "significant contributing cause" to the deaths of the victims other than the gunshot wounds. There was no basis on the evidence admitted at trial to infer that two persons, acting together, caused the deaths of the victims in any of the six counts such that they would be rendered co-principals; there could only have been one shooter of the gunshot which caused the victims' deaths. I agree with the appellant that the potential for a situation such as in *Miller v. The Queen*, [1977] 2 S.C.R. 680, simply did not exist here. There was no evidence that there may have been one person holding the gun, and one person who pulled the trigger, and thus two participants in the unlawful act causing death. Potential liability for other forms of participation in those murders had to flow, not through co-principal liability, but through aiding and abetting.

[72] The majority of the Court of Appeal in this case did not appear to think it was necessary that the trial judge give particular instruction on the provisions of s. 21. The majority noted that s. 21(1) was "designed to make the difference between aiding and

abetting and personally committing an offence legally irrelevant” (2009 BCCA 299, 272 B.C.A.C. 252, at para. 221, quoting Dickson C.J. in *Thatcher*), and that even if an instruction on aiding and abetting was legally available, the appellant likely benefited from its omission (para. 231).

[73] The problem with this line of reasoning is that it ignores the fact that aiding and abetting were not before the jury as alternate routes to liability, and co-principal liability was not available on the evidence. While it may be true that a separate party instruction on co-principal liability may not generally be necessary, given that its elements are the same as for sole principal liability, the same cannot be said of liability as an aider or abettor. Although the ultimate legal liability is the same for a principal or for an aider or abettor, the findings of fact necessary and the specific legal principles which apply to each are different.

[74] It was necessary on the evidence for the trier of fact to decide that Mr. Pickton was either liable for the murders as the actual shooter, or that he was liable through his assistance to an unknown third party who was the actual shooter. It was not relevant for the jury to direct their minds to the possibility that Mr. Pickton and a third party both caused the victims’ deaths as co-principals, and not helpful to provide them with an instruction which opened up party liability, but stopped short of setting out its relevant principles as they applied to the evidence. The possibility that Mr. Pickton only aided and abetted the murders *was* legally relevant on the evidence in this case.

[75] In my view, then, the majority of the Court of Appeal erred when it found that there was “no difference” in the party liability analysis where, on one hand, there are two people, each of whom fires a gun at the victim and it cannot be determined forensically who fired the fatal shot, and where, on the other hand, two people are acting “in concert” to lure and kill the victim, although only one of them wields the gun which causes the death (para. 221). In the latter situation, an instruction on aiding and abetting should be put to the jury.

D. *Aiding and Abetting*

[76] The main focus of s. 21(1)(b) and (c) is on the intention with which the aid or encouragement has been provided. The act or omission relied upon must in fact aid or abet, and it must also have been done with the particular intention to facilitate or encourage the principal’s commission of the offence, with knowledge that the principal intends to commit the crime: *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at paras. 14 and 16-18. To be found liable for first degree murder as an aider and abettor of a planned and deliberate murder, an accused must have knowledge that the murder was planned and deliberate: *Briscoe*, at para. 17. Wilful blindness will satisfy the knowledge component of s. 21(1)(b) or (c): *Briscoe*, at para. 21.

[77] On the record in this case, the acts of aiding or abetting relied upon to make Mr. Pickton liable for the murders could have included many things, from the “luring” of the victims to the farm, to providing them with drugs or subduing them, to encouraging

a third party killer by making it known that Mr. Pickton would help dismember and dispose of the bodies so that the killer would not get caught. This same evidence could similarly have provided the necessary evidence of intention and knowledge, including knowledge of the planned and deliberate nature of the murders.

[78] Again, for whatever reason, aiding and abetting was not left with the jury by the trial judge. The jury could not have convicted the appellant on the two alternative modes of liability legally available on the evidence, that is, that Mr. Pickton *either* committed the murders himself, *or* aided and abetted them. There was no air of reality to a co-principal mode of liability, and as such, any instruction suggesting its possibility was incorrectly left with the jury. An instruction as to “concerted action” between Mr. Pickton and one or more third parties needed to make clear to the jury that if they had a reasonable doubt that Mr. Pickton himself personally committed each of the murders in question, they needed to be satisfied beyond a reasonable doubt that he at least aided and abetted each of them.

[79] Both the general instruction set out in para. 44, and the amended “actual shooter” portions of the charge were misleading, and wrong in law to the extent they opened up party liability but failed to set out the law of aiding and abetting. As to the amendment of the “actual shooter” provisions, suffice it to say that, absent an aiding and abetting alternative, all that the trial judge could have said on Element 3 for counts 1 through 3 was, as stated in the original instructions, that the jury had to find beyond a reasonable doubt that Pickton was the “actual shooter”. That was the correct articulation of principal liability on the evidence presented at trial. The insertion of the words “or was otherwise

an active participant in [the] killing” impermissibly opened up the possibility of Pickton’s having acted *as an aider and abettor* without any further instruction on that route of liability.

[80] The words “or was otherwise an active participant” did not convey the adequate causal requirement between the appellant’s acts and the deaths of the victims for principal liability. Given that there was no evidence in any of the counts that there was more than one operative cause of death, the instructions should have made it clear that the jury could only convict Mr. Pickton of the killings if they were satisfied beyond a reasonable doubt, having considered all the evidence, that he *either* personally shot the victims *or* aided and abetted another person in the killings.

E. *Similar Fact Evidence*

[81] As a final note, there appears to have been some uncertainty, during the course of the trial, as to whether similar fact evidence could have been used to support an alternate theory of aiding and abetting, had Mr. Pickton’s liability for the murders as a party under s. 21 been left with the jury (see the respondent’s factum at p. 53, fn. 25, concerning the potential applicability of the decision in *R. v. Mercer*, 2005 BCCA 144, 202 C.C.C. (3d) 130, leave to appeal refused, [2005] 2 S.C.R. x). This may have been the source of the Crown’s decision to proceed strictly on a “sole perpetrator” theory, as the admission of similar fact evidence was crucial to a conviction on all counts, and particularly in relation to counts 4 through 6.

[82] This problem was addressed by Low J.A. for the majority of the Court of Appeal, in finding that the admission of count-to-count similar fact evidence was not restricted to the sole perpetrator route to liability. Justice Low explained that such evidence “was admissible because of a pattern of events and a pattern of conduct linking the appellant to those events that merited consideration on each count of the evidence on all counts, and the evidence of Ellingsen [one of the witnesses] on all counts” (para. 177). Furthermore, he concluded that no special instruction to the jury was required with respect to that evidence, and that *R. v. Perrier*, 2004 SCC 56, [2004] 3 S.C.R. 228, did not apply to this case:

No such link [as explained in *Perrier*] became necessary in the present case. The evidence was capable of establishing that the appellant was the one constant in the sequence of events that I have described more than once in these reasons. In admitting the similar fact evidence, the trial judge was satisfied that there was evidence tending to connect the appellant to all six murders, an issue not contested by the appellant at trial or on appeal. There was no suggestion, even by the defence, that there might have been a group of murderers and that the appellant might have been a participant in one or more of the murders but not in the others. The evidence supported the conclusion that the appellant committed each of the killings or that he actively participated in each of them (or one or more of them) in concert with another person. I agree with the Crown that the probative value of the similar fact evidence was the same regardless of the route to criminal liability each juror preferred. The concern addressed in *Perrier* does not arise. [para. 181]

[83] I agree with Low J.A. that similar fact evidence will be admissible not only to show that an accused personally committed each offence charged as a principal, but also to raise the possibility that the offences were committed, in the alternative, by an accused as an aider and abettor. But the requisite pattern of conduct must be sufficiently connected

to both possibilities on all of the counts.

F. *The Curative Proviso*

[84] Having found an error on a question of law, I must now turn to the curative proviso found in s. 686(1)(b)(iii) of the *Criminal Code*. As our Court has held on many occasions, not every error will lead to the quashing of a verdict of guilty by an appellate court (*R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34).

[85] Some errors may be so innocuous or so irrelevant to the questions at issue that there is little likelihood that they would have had any impact on the verdict. Other errors may be more serious, but the proviso will also apply because there is overwhelming evidence of the guilt of the accused and, on that evidence, a properly instructed jury would necessarily return a verdict of guilty (*R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, at para. 82). In my view, this is the case in the instant appeal. As mentioned above, there were serious errors in relation to a key issue at trial, criminal participation in the offences, in both the instructions to the jury and in response to its question. Nevertheless, in order to assess the possible impact of these errors, the context of the trial as a whole must be kept in mind.

[86] The trial was all about the participation of Mr. Pickton in the murders of the six victims. I will not attempt to review here all of the evidence offered by the Crown during what was a very long trial. However, on a review of the record, in my opinion, the Crown

presented compelling, overwhelming evidence of the participation of Mr. Pickton in the murders. From whichever perspective we consider the participation of Mr. Pickton, on the evidence, he was necessarily either a principal or an aider or abettor. It would surpass belief that a properly instructed jury would not have found him guilty of murder in the presence of such cogent evidence of his involvement. Indeed, this properly instructed jury would likely have convicted Mr. Pickton of first degree rather than second degree murder.

[87] Certainly, this was a long and difficult trial — but it was also a fair one. Despite the errors set out above, there was no miscarriage of justice occasioned by the trial proceedings. Mr. Pickton was entitled to the same measure of justice as any other person in this country. He received it. He is not entitled to more.

IV. Disposition

[88] For these reasons, I would dismiss the appeal and affirm the convictions.

Appeal dismissed.

Solicitor for the appellant: Gil D. McKinnon, Vancouver.

Solicitor for the respondent: Attorney General of British Columbia, Vancouver.