



SUPREME COURT OF CANADA

CITATION: R. v. J.F., 2013 SCC 12

DATE: 20130301

DOCKET: 34284

BETWEEN:

J.F.
Appellant
and
Her Majesty The Queen
Respondent
- and -
British Columbia Civil Liberties Association
Intervener

CORAM: McLachlin C.J. and LeBel, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT: Moldaver J. (McLachlin C.J. and LeBel, Fish, Rothstein, Cromwell and Karakatsanis JJ. concurring)
(paras. 1 to 76)

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R. v. J.F.

J.F.

Appellant

v.

Her Majesty The Queen

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and

British Columbia Civil Liberties Association

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Indexed as: R. v. J.F.

2013 SCC 12

File No.: 34284.

2012: October 12; 2013: March 1.

Present: McLachlin C.J. and LeBel, Fish, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal Law — Offences — Conspiracy — Parties to offences —

Whether a person can be a party to the offence of conspiracy — Whether party liability attaches to someone who knows of conspiracy and does something for the purpose of furthering unlawful object — Whether trial judge erred in instructions to jury pertaining to conspiracy — Whether curative proviso should be applied to uphold conviction — Co-conspirators' exception to the hearsay rule — Criminal Code, R.S.C. 1985, c. c-46, ss. 21(1), 465(1), 686(1)(b)(iii)

J, a youth, learned that his friend T and her sister R were planning to murder their mother by plying her with alcohol and drowning her, a plan which the sisters ultimately executed and were convicted for. The police found an MSN chat log between J and T in which J provided information to T about death by drowning; suggested that the sisters should give their mother codeine pills in addition to alcohol; and suggested ways to mislead the police. The Crown also led evidence that J supplied the girls with pills and met T and R after the murder to provide an alibi. The trial judge instructed the jury that J could be convicted of conspiracy to commit murder under s. 465(1) of the *Criminal Code* either as a principal, or as a party under ss. 21(1)(b) or (c) of the *Criminal Code*. J was convicted of conspiracy to commit murder. The Court of Appeal dismissed an appeal from the conviction but reduced J's sentence.

Held: The appeal should be dismissed.

Per McLachlin C.J. and LeBel, Fish, Rothstein, Cromwell, **Moldaver** and Karakatsanis JJ.: Party liability to conspiracy is an offence known to Canadian

law. Unlike attempted conspiracy, it does not involve stacking one form of inchoate liability upon another, and does not suffer from remoteness.

There are two schools of thought in Canada as to how, and under what circumstances, a person can be found liable as a party to the offence of conspiracy. The narrower approach (the *Trieu* model) limits such liability to aiding or abetting the formation of the agreement. The broader approach (the *McNamara* model) extends such liability to also include aiding or abetting the furtherance of the conspiracy's unlawful object. The approach to be followed is *Trieu* and not *McNamara*. Party liability is limited to cases where the accused aids or abets the initial formation of the agreement, or aids or abets a new member to join a pre-existing agreement.

The *Trieu* model is a legitimate basis for party liability to a conspiracy. A person becomes party to an offence if he aids or abets a principal in the commission of the offence. It follows that party liability to a conspiracy is made out where the accused aids or abets the *actus reus* of conspiracy, namely the conspirators' act of agreeing.

The *McNamara* model is not a basis for party liability to conspiracy. Acts that further the unlawful object of a conspiracy are not an element of the offence of conspiracy. Aiding or abetting the furtherance of the unlawful object does not establish aiding or abetting the principal with any element of the offence of conspiracy, and thus cannot ground party liability for conspiracy. However, where a person, with knowledge of a conspiracy, does or omits to do something for the

purpose of furthering the unlawful object, with the knowledge and consent of one or more of the existing conspirators, this provides powerful circumstantial evidence from which membership in the conspiracy can be inferred.

While party liability to conspiracy includes aiding or abetting the formation of a new agreement (the *Trieu* model), it also includes aiding or abetting a new member to join a pre-existing agreement. Such assistance or encouragement facilitates the new member's commission of the offence of conspiracy — that is, the *act* of agreeing.

In light of the conclusion that party liability does not extend to acts done in furtherance of the unlawful object of the conspiracy, party liability should not, in the present case, have been put to the jury. There is no evidence that J aided or abetted the initial formation of the agreement between R and T to murder their mother or aided or encouraged a new member to join the existing conspiracy. The trial judge's error, however, could not possibly have affected the verdict. The curative proviso under s. 686(1)(b)(iii) of the *Criminal Code* applies. The evidence implicating J as a member of the conspiracy was overwhelming and, once the jury rejected J's defence, a finding of guilt under s. 465(1) of the *Criminal Code* was inevitable.

Finally, the two grounds of appeal relating to evidence admitted under the co-conspirators' exception to the hearsay rule are dismissed.

Cases Cited

Approved: *R. v. Trieu*, 2008 ABCA 143, 429 A.R. 200; *R. v. Bérubé* (1999), 139 C.C.C. (3d) 304, leave to appeal refused, [2000] 1 S.C.R. vii;

disapproved: *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193; *R. v. Vucetic* (1998), 129 C.C.C. (3d) 178; *United States of America v. Lorenz* (2007), 222 C.C.C. (3d) 16, leave to appeal refused, [2008] 1 S.C.R. vi (*sub nom. Cheema v. Attorney General of Canada on behalf of the United States of America*); *R. v. Taylor* (1984), 40 C.R. (3d) 222; **distinguished:** *R. v. Déry*, 2006 SCC 53, [2006] 2 S.C.R. 669;

referred to: *R. v. O'Brien*, [1954] S.C.R. 666; *R. v. Lam*, 2005 ABQB 849 (CanLII); *Papalia v. The Queen*, [1979] 2 S.C.R. 256; *Sheppe v. The Queen*, [1980] 2 S.C.R. 22; *R. v. Hibbert*, [1995] 2 S.C.R. 973; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411; *People v. Strauch*, 240 Ill. 60 (1909); *R. v. Alexander* (2005), 206 C.C.C. (3d) 233; *Paradis v. The King*, [1934] S.C.R. 165; *R. v. Genser* (1986), 39 Man. R. (2d) 203, aff'd [1987] 2 S.C.R. 685; *R. v. Vu*, 2012 SCC 40; *Bell v. The Queen*, [1983] 2 S.C.R. 471; *R. v. Carter*, [1982] 1 S.C.R. 938; *R. v. Naicker*, 2007 BCCA 608, 229 C.C.C. (3d) 187, leave to appeal refused, [2008] 1 S.C.R. xi; *R. v. Simpson*, 2007 ONCA 793, 230 C.C.C. (3d) 542, leave to appeal refused, [2008] 2 S.C.R. xi.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, art. 21(1), 465, 686(1)(b)(iii).

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Manning, Morris, and Peter Sankoff. *Manning Mewett & Sankoff: Criminal Law*, 4th ed. Markham, Ont.: LexisNexis, 2009.

Williams, Cameron R. “Complicity in a Conspiracy as an Approach to Conspiratorial Liability” (1968-1969), 16 *U.C.L.A. L. Rev.* 155.

APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Rouleau and Epstein J.J.A.), 2011 ONCA 220, 105 O.R. (3d) 161, 276 O.A.C. 292, 269 C.C.C. (3d) 258, 85 C.R. (6th) 304, [2011] O.J. No. 1577 (QL), 2011 CarswellOnt 2329, affirming the accused’s conviction for conspiracy to commit murder. Appeal dismissed.

Ian R. Mang and Shelley M. Kierstead, for the appellant.

Alexander Alvaro and Andreea Baiasu, for the respondent.

Ryan D. W. Dalziel and Micah B. Rankin, for the intervener.

The judgment of the Court was delivered by

MOLDAVER J. —

[1] In this appeal, the Court is required to decide whether the aiding and abetting provisions in the *Criminal Code*, R.S.C. 1985, c. C-46, are applicable to the offence of conspiracy and, if so, how and under what circumstances. Appellate courts are divided on these questions, and the case at hand provides an opportunity to resolve the conflicting approaches.

I. Background

[2] The appellant was convicted of conspiracy to commit murder following a trial before Van Melle J. of the Ontario Superior Court of Justice and a jury. He was tried as a youth and received a sentence of 12 months' imprisonment and 6 months' conditional supervision in the community.

[3] The appellant appealed to the Ontario Court of Appeal against both conviction and sentence. His appeal from conviction was dismissed; his appeal from sentence was allowed and the sentence was reduced to 8 months in custody and 4 months' conditional supervision (2011 ONCA 220, 105 O.R. (3d) 161).

[4] The appellant appeals his conviction to this Court with leave. As I have said, the primary issue is whether a person can be found liable as a party to the offence of conspiracy and, if so, under what circumstances.

[5] The charge of conspiracy to commit murder, for which the appellant stands convicted, revolves around the killing of A.K. by her two daughters R and T. The evidence at the appellant's trial established that R and T conspired to kill their mother and eventually carried out their plan. R and T were tried as youths and both were convicted of first degree murder.

A. *The Case Against the Appellant*

[6] The theory of the Crown against the appellant was that he and T were friends and that he learned from T that she and R were planning to kill their mother. It was their intention to ply her with alcohol, drown her in the family bathtub, and make it look like an accident.

[7] According to the Crown, the appellant took various steps to help R and T achieve their plan. An MSN chat log, discovered by the police on a computer belonging to R and T, contained a revealing conversation between the appellant and T a few days before the killing. In that conversation, the appellant provided information to T about death by drowning and explained what R and T should do if their mother woke up during the drowning process. He further suggested that in addition to plying their mother with alcohol, R and T should give her about five Tylenol 3 pills as this would "knock [her] right out" (A.R., at p. 198). Autopsy results revealed codeine in A.K.'s blood at 3.5 times the upper therapeutic level — a level consistent with the consumption of four to six Tylenol 3 tablets. The Crown

advanced evidence that it was the appellant who supplied R and T with Tylenol 3 tablets shortly before the killing.

[8] In the same conversation, the appellant promised to provide R and T with an alibi for the time of the murder and he proposed a plan that he described as “irrefutable”. R and T did not take up the appellant’s suggestion, choosing instead to follow a plan of their own which involved meeting the appellant and another friend at a specified restaurant a short time after the killing. Evidence presented by the Crown showed that the appellant agreed to that suggestion and attended the restaurant as planned.

[9] Finally, in the same chat with T, the appellant offered to be present with R and T when the police arrived and he suggested ways in which R and T should behave to mislead the police. At one point in his conversation with T, the appellant made the following telling admission: “I’m involved this much, I’m willing to help you out with any of it [T]” (A.R., at p. 197).

[10] In a statement made to the police following his arrest, the appellant did not deny that he was the one communicating with T in the MSN chats; rather, he maintained that he was not being serious and did not expect that his comments would be taken seriously (R.F., at para. 20).

B. *The Crown’s Closing Address and the Trial Judge’s Instructions to the Jury*

[11] Crown counsel in her closing address invited the jury to find the appellant guilty on one of two bases: either as a *principal* in the conspiracy, or as a *party* to the conspiracy under ss. 21(1)(b) or (c). In other words, the Crown argued that either the appellant had become a member of the conspiracy between R and T or, in the alternative, he had become an aider or abettor of the conspiracy.

[12] The trial judge acceded to the Crown's request that the jury be instructed on both bases of liability. The relevant portions of the charge on party liability are reproduced in full below:

A person also commits an offence if he does anything for the purpose of helping another person to commit the offence.

Anyone who actively assists or encourages somebody else to commit an offence is as guilty of the offence as the person who actually commits it. I remind you though that mere knowledge of, discussion, or passive acquiescence in a plan of criminal conduct is not of itself sufficient.

...

It is the position of the Crown that [the appellant] can be convicted of conspiracy as either a full partner like [T] and [R] or if he was a party to the conspiracy. He is a party to the conspiracy by aiding, which means assisting, or abetting, which means encouraging [T] and [R] in their plan to murder — in the plan to murder [the deceased].

Some of you might think that [the appellant] was a main partner of the plan that he agreed to murder [the deceased]. Others might agree at the end of the day that he was only a party to the conspiracy in that he assisted or encouraged the girls in their murder plot. The Crown's position is that [the appellant] was involved in this conspiracy because he provided at least one of the following:

- Advice about the drowning process and how to act when interacting with the police.

- Help with details of the plan including combining alcohol and Tylenol 3's and what to do if she woke up part way through.
- An agreement to assist with the alibi and attended at Jack Astor's the night of the murder.
- Or Tylenol 3's to facilitate her death. [A.R., at pp. 60 and 67-70]

C. *Appeal to the Ontario Court of Appeal*

[13] On his appeal from conviction to the Ontario Court of Appeal, the appellant raised several grounds, one being that the jury should not have been instructed on party liability. Rosenberg J.A., on behalf of a unanimous court, disagreed. In his view, on the facts of the case, the appellant could be convicted as a party to the offence of conspiracy to commit murder “if he aided or abetted the sisters within the meaning of s. 21(1) [of the *Criminal Code*] to pursue their unlawful object” (para. 27 (emphasis added)).

[14] Having concluded that party liability was available, Rosenberg J.A. reviewed the instructions on party liability and found them to be deficient. In his view, they “were generic, divorced from the facts of the case and failed to make clear that the jury had to find that the appellant knew the object of the conspiracy and that his assistance was intended to assist [R and T] in pursuing the unlawful object of murdering their mother” (para. 29).

[15] Despite this deficiency, Rosenberg J.A. was satisfied that the curative proviso in s. 686(1)(b)(iii) of the *Code* could safely be applied to uphold the

conviction. In this regard, he observed that the defence put forward by the appellant — his comments in the MSN chats to T were not to be taken seriously — “did not depend on whether the appellant was a principal in, or a party to, the conspiracy” (para. 74). If the jury accepted his position or it raised a reasonable doubt, he would be acquitted. On the other hand, if the jury rejected his position, “a finding of guilt was inevitable”. Rosenberg J.A. further noted that the appellant’s MSN chats with T constituted “direct evidence, in his own words, of the appellant’s role in the conspiracy”. It followed, in his view, that the “[appellant’s] liability as a party or a member of the conspiracy was overwhelming”.

II. Overview of Issues on Appeal

[16] Against that backdrop, I turn to what I believe are the two main issues in this appeal, namely: Can a person be a party to the offence of conspiracy *as a matter of law* and, if so, how and under what circumstances? For the reasons that follow, I am satisfied that a person can be a party to the offence of conspiracy as a matter of law under s. 21 of the *Code*.

[17] The more perplexing issue — and the one that in my view forms the centerpiece of this appeal — is how and under what circumstances. The answer to that question hinges on how one conceptualizes the offence of conspiracy for purposes of party liability. Accepting that the prohibited act in a conspiracy (the *actus reus*) consists of an agreement by two or more persons to pursue an unlawful object, specifically a criminal offence (*R. v. O’Brien*, [1954] S.C.R. 666), the question

that arises is this: Should party liability be restricted to those who aid or abet the agreement that forms the basis of the conspiracy, or does party liability extend as well to those who aid or abet the furthering of the unlawful object of the conspiracy?

[18] Canadian jurisprudence on the subject is divided. Alberta and Quebec have adopted the narrower approach, restricting party liability to those who aid or abet the agreement itself, with a particular focus on its formation. See *R. v. Trieu*, 2008 ABCA 143, 429 A.R. 200, and *R. v. Bérubé* (1999), 139 C.C.C. (3d) 304 (Que. C.A.), leave to appeal refused, [2000] 1 S.C.R. vii. Ontario and British Columbia have adopted the broader approach, expanding party liability to also include those who aid or abet the furthering of the unlawful object. See *R. v. McNamara (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.); *R. v. Vucetic* (1998), 129 C.C.C. (3d) 178 (Ont. C.A.); and *United States of America v. Lorenz* (2007), 222 C.C.C. (3d) 16 (B.C.C.A.), leave to appeal refused, [2008] 1 S.C.R. vi (*sub nom. Cheema v. Attorney General of Canada on behalf of the United States of America*).

[19] The case at hand provides this Court with an opportunity to resolve the conflicting viewpoints. The first order of business, however, is to address the seminal question raised by the appellant, namely: Can a person be a party to the offence of conspiracy as a matter of law?

III. Analysis

A. *Can a Person be a Party to the Offence of Conspiracy as a Matter of Law?*

[20] Section 465 of the *Criminal Code* criminalizes the offence of conspiracy. Conspiracy to commit murder, the crime at issue here, is a free-standing offence under s. 465(1)(a) of the *Code*, which reads as follows:

465. (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

(a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and liable to a maximum term of imprisonment for life;

[21] Like all conspiracies, conspiracy to commit murder is a form of inchoate liability. The crime is complete when two or more persons agree to kill a third party. No one need be killed; nor is it necessary that any steps be taken to bring about the murder.

[22] Section 21(1) of the *Code* sets out three ways in which someone can be found liable as “a party to an offence”.

21. (1) Every one is a party to an offence who

(a) actually commits it;
(b) does or omits to do anything for the purpose of aiding any person to commit it; or
(c) abets any person in committing it.

[23] Nothing in the language of s. 21 suggests that party liability does not apply to offences that punish inchoate behaviour. The appellant’s real complaint, as I

understand it, is that party liability ought not to apply to the offence of conspiracy because being a party to a conspiracy “is an offence unknown to the law” (A.F., at para. 41). It suffers from the same problem of remoteness that led this Court in *R. v. Déry*, 2006 SCC 53, [2006] 2 S.C.R. 669, to conclude that “attempted conspiracy” is not an offence known to law. As Fish J. explained, the separate rationales underlining the offences of “conspiracy” and “attempt” lose their justification when these two forms of inchoate liability are stacked upon one another:

When applied to conspiracy, the justification for criminalizing attempt is lost, since an attempt to conspire amounts, at best, to a risk that a risk will materialize. [para. 50]

[24] Much as the appellant seeks to apply the logic of *Déry* to party liability where the offence in issue is conspiracy, I am respectfully of the view that the comparison is inapt — no less so than comparing apples with oranges. Quite simply, unlike the crime of attempt, party liability is not inchoate. In order for the Crown to rely on party liability, the underlying offence must have been committed by the principal. Consequently, being a party to a conspiracy does not involve stacking one form of inchoate liability upon another.

[25] The appellant raised this argument before the Court of Appeal. Rosenberg J.A. rejected it for the following reasons, with which I agree:

In my view, the holding in *Déry* does not warrant reconsideration of this court’s decisions in *McNamara* and *Vucetic*. Party liability for conspiracy does not suffer from the problem of remoteness identified in

Déry with respect to attempt to conspire. A person can be liable as a s. 21(1) party to conspiracy only if the Crown proves an agreement by at least two other people to commit a substantive offence. If no agreement materialized, the alleged party's conduct would be at most an attempt to conspire and would fail on the holding in *Déry*. If, however, the accused is a party to the conspiracy, . . . the risk of commission of the criminal offence has sufficiently materialized to warrant criminal sanction. [Emphasis added; para. 20.]

[26] I would accordingly not give effect to this aspect of the appellant's argument. In short, I am satisfied that being a party to a conspiracy is an offence known to law. The more difficult question, to which I now turn, is how and under what circumstances a person can be found liable as a party to a conspiracy.

B. *How and Under What Circumstances Can a Person be Found Liable as a Party to the Offence of Conspiracy?*

(1) The Two Approaches in Canadian Jurisprudence

[27] As mentioned, there are two schools of thought in Canada as to how, and under what circumstances, a person can be found liable as a party to the offence of conspiracy — the narrower view and the broader view.

[28] The leading authority in support of the narrower view is *Trieu*. The facts are straightforward. Trieu operated a small business selling cellular phones. He sold phones to five people who were involved in a conspiracy to traffic in cocaine. Trieu knew that the conspirators were engaged in drug trafficking, that they worked as a group, and that they would use the phones in their trafficking operation. He claimed,

however, that he was not a member of the conspiracy and denied agreeing with any of the conspirators to traffic in cocaine.

[29] The trial judge acquitted Trieu (*R. v. Lam*, 2005 ABQB 849 (CanLII)). In his view, the evidence fell short of establishing that Trieu was a member of the conspiracy. He also rejected the Crown's alternate theory that in selling cellular phones to the conspirators, Trieu intentionally assisted the conspirators in attaining their object — trafficking in cocaine — and as such, he should be found liable as a party to the offence of conspiracy.

[30] Recognizing that there were two lines of authority on the subject, the trial judge adopted the narrower approach. In his view, party liability for the offence of conspiracy did not extend to those who took steps to further the unlawful object of the conspiracy; rather, it was restricted to those who aided in the formation of the agreement that had a particular unlawful object as its goal. And since there was no evidence that Trieu aided in the formation of the agreement hatched by the conspirators, he could not be found liable as a party to the offence of conspiracy.

[31] The Crown appealed Trieu's acquittal to the Alberta Court of Appeal, claiming that the trial judge erred in taking the narrower approach to party liability. The Court of Appeal disagreed.

[32] On behalf of the court, Costigan J.A. commenced his analysis by reviewing some of the basic principles applicable to the law of conspiracy and party

liability. Citing this Court's decisions in *Papalia v. The Queen*, [1979] 2 S.C.R. 256, and *Sheppe v. The Queen*, [1980] 2 S.C.R. 22, he noted that the essence of the offence of conspiracy is the agreement, and acts done in furtherance of the unlawful object are not an element of the offence. He cited *R. v. Hibbert*, [1995] 2 S.C.R. 973, for the proposition that "[t]o be a party to an offence, a person must aid the principal in the commission of that offence" (para. 32).

[33] Having identified the basic principles that apply to the law of conspiracy and parties, Costigan J.A. turned to the facts of *Trieu* and commented as follows:

It follows from these principles that for Trieu to be a party to the offence of conspiracy to traffic in cocaine, the Crown had to prove that Trieu performed acts for the purpose of aiding the formation of an agreement to traffic in cocaine. Acts performed after the agreement was formed did not aid in the commission of the offence of conspiracy on the facts of this case. Therefore, Trieu could not be a party to the offence of conspiracy for facilitating the conspirators in attaining their object of trafficking in cocaine. Although acts performed after the agreement was reached could have aided in the commission of the offence of trafficking, Trieu was not charged with the offence of trafficking. [Emphasis added; para. 33.]

[34] *Trieu* was brought to the attention of the Court of Appeal in the present case. Rosenberg J.A. considered the reasoning underlying the narrower approach endorsed by *Trieu* but refused to follow it, choosing instead the more expansive approach adopted by the Ontario Court of Appeal in *McNamara* and *Vucetic*.

[35] At issue in *McNamara* was whether two individuals and a company were liable as co-conspirators for joining an ongoing bid-rigging scheme operated by a number of pre-existing conspirators. One of the issues before the Court of Appeal was whether the two individuals and the company could be found liable as parties to the offence of conspiracy. The court answered that question in the affirmative:

On the other hand, if, at any time before the object of the conspiracy had been attained, that is, the receipt of the contract money from the Crown, [the individuals and the company] abetted or encouraged any of the conspirators to pursue its object, they would become parties to the criminal offence of conspiracy by virtue of s. 21 of the *Code*. [Emphasis added; p. 454.]

[36] In *Vucetic*, the Ontario Court of Appeal re-affirmed the expansive approach to party liability endorsed in *McNamara*:

However, in order to find him guilty as an aider and abettor, the jury would have to be instructed that the appellant knew the object of the conspiracy and that his assistance was intended to assist the conspirators in attaining their unlawful criminal object. [Emphasis added; para. 7.]

[37] In choosing to follow *McNamara* and *Vucetic*, Rosenberg J.A. made the following observations in his reasons:

Again, I can see no basis in principle for refusing to follow *McNamara* and *Vucetic* on this issue. I appreciate the point made in *Trieu* that the essence of a conspiracy is an agreement, but it is not an agreement in the abstract; it is an agreement to attain a common goal, a particular unlawful object. . . .

Admittedly, including party liability for aiding or abetting pursuit of the unlawful object blurs the line between the conspiracy and the substantive offence. The distinction, however, is that party liability for conspiracy requires proof of an agreement; there is no requirement of proof that the unlawful object was attained. Liability as a party to the substantive offence requires proof that the substantive offence was committed. Thus, in this case, the appellant could be guilty of conspiracy if he aided or abetted the sisters within the meaning of s. 21(1) to pursue their unlawful object, even if they ultimately did not carry out the plan or the deceased had survived the attempt on her life. [paras. 26 and 27]

[38] To sum up, the cases illustrate two strands of authority. The first, favoured in *Trieu*, is narrower, grounding party liability on aiding or abetting the agreement itself, specifically its formation. The second, as endorsed in *McNamara*, is broader, including within the ambit of party liability aiding or abetting the furtherance of the conspiracy's unlawful object. The question remains which of these two approaches should be adopted.

(2) The Approach to be Followed

[39] The scope of party liability for conspiracy turns on a proper understanding of the elements of the offence of conspiracy. That is because, to be a party to an offence, a person must aid or abet the principals “in the commission of the offence”: *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 16. With respect to the offence of conspiracy, this Court in *Papalia* held that “[t]he *actus reus* is the fact of agreement” (p. 276). Aiding or abetting the formation of an agreement between conspirators (as contemplated in *Trieu*) amounts to aiding or abetting the

principals in the commission of the conspiracy, and should therefore lead to party liability for conspiracy.

[40] Earlier in these reasons, I explained why, as a matter of law, a person can be found liable as a party to the offence of conspiracy. Once that is accepted, I see no reason in principle or policy why the limited form of party liability contemplated in *Trieu* should not be criminalized.¹ The parties and the intervener have submitted no authorities or academic writings to the contrary — and I know of none. Nor do those who advocate the more expansive approach to party liability sanctioned by *McNamara* question the *Trieu* model as a basis upon which party liability for the offence of conspiracy may be grounded. Indeed, in the present case, Rosenberg J.A. recognized it as such.

[41] It follows, in my view, that the *Trieu* model represents a legitimate basis upon which party liability for the offence of conspiracy may be found. I hasten to add that a review of the jurisprudence in Canada and elsewhere reveals that there are few reported cases where the facts have come within the *Trieu* paradigm. *Trieu* itself was not such a case. And the only authority that has come to my attention is *People v. Strauch*, 240 Ill. 60 (1909). In that case, a father introduced his son to another person with the intention that they enter into a conspiracy, which they did. The father was convicted as a party to the conspiracy for aiding and abetting its formation.

¹ I should point out that on the *Trieu* model, if A brings B and C together in the expectation that they will enter into a conspiracy, but B and C do not do so, A cannot be found liable of the offence of attempted conspiracy since no such offence exists at law. See *Déry*.

[42] That brings me to the broader approach endorsed in *McNamara* and the central issue in this appeal — namely, whether party liability can attach to someone who knows of a conspiracy and who does (or omits to do) something for the purpose of furthering its unlawful object.

[43] With respect to those who hold a different view, I have concluded that it should not. Party liability should be restricted to conduct that aids or abets the formation of the *agreement* that comprises the essence of the crime of conspiracy. In all other cases, a conviction for conspiracy will not lie absent proof of membership in the conspiracy.

[44] As I have explained, agreement is a central element to the offence of conspiracy. Conversely, an act done in furtherance of the unlawful object is not an element of the offence of conspiracy. Although such acts can serve as circumstantial evidence to support the existence of a conspiracy, they are not themselves a component of the *actus reus* of conspiracy. Indeed, a conspiracy can be established in the absence of any overt acts done in furtherance of its unlawful object. In other words, “[t]he crime of conspiracy is complete once the agreement is reached”: *Trieu*, at para. 31.

[45] It follows, in my view, that the broader approach as endorsed in *McNamara* must be rejected. Aiding or abetting the furtherance of the unlawful object does not establish aiding or abetting the principal with any element of the offence of conspiracy. It cannot ground party liability for conspiracy.

[46] The conclusion I have reached is consistent with the following observation from a Harvard Law Review article, with which I agree:

But to aid and abet a crime it is necessary not merely to help the criminal, but to help him in the commission of the particular criminal offense. A person does not aid and abet a conspiracy by helping the “conspiracy” to commit a substantive offense, for the crime of conspiracy is separate from the offense which is its object. It is necessary to help the “conspiracy” in the commission of the crime of conspiracy, that is, in the commission of the act of agreement. Only then is it justifiable to dispense with the necessity of proving commission of the act of agreement by the defendant himself. In all other cases, to convict the defendant of conspiracy it is necessary to prove not only knowledge on his part that he was helping in a wrongful enterprise, but also knowledge on another’s part that he intended to do so, and at least a tacit agreement to give and accept such help.

(“Developments in the Law: Criminal Conspiracy” (1958-1959), 72 *Harv. L. Rev.* 920, at pp. 934-35). [Emphasis added; footnotes omitted.]

[47] In an article entitled “Conspiracies and Attempts”, in National Criminal Law Program, *Substantive Criminal Law* (1990), vol. 1, Justice David Doherty (then of the Supreme Court of Ontario), expressed the same view:

The aiding and abetting provisions [ss. 21(1)(b) and (c) of the *Code*] should apply to conspiracy charges. They must, however, be applied with caution. Those sections require that the assistance be rendered for the purpose of assisting the commission of the crime. In the context of a conspiracy charge, the alleged acts of assistance or encouragement should have to be done for the purpose of aiding or assisting the act of agreeing. Conduct which aids or assists in the achievement of the object of the conspiracy should not be equated with assistance in the making of the conspiracy. [Emphasis added; p. 36.]

See also M. Manning and P. Sankoff, *Manning, Mewett and Sankoff: Criminal Law* (4th ed. 2009), at p. 316.

[48] Those who prefer the *McNamara* approach fear that persons who have not become members of the conspiracy, but who have nonetheless done things to further the conspiracy's unlawful object, will, despite their moral culpability, slip through the cracks — that is, unless the unlawful object of the conspiracy is attained or attempted, in which case they could be charged as parties to the substantive offence or to an attempt to commit that offence.

[49] Thus, in the case at hand, the fear is that, had R and T not killed their mother or attempted to do so, the appellant would have ended up going free, despite his efforts to further the planned killing, unless the Crown could prove that he entered into the agreement formulated by R and T and thus became a member of the conspiracy.

[50] Much as I appreciate the concern raised by those who prefer the more expansive *McNamara* approach, viewed realistically, I consider it to be more imaginary than real.

[51] In *R. v. Alexander* (2005), 206 C.C.C. (3d) 233 (Ont. C.A.), a case involving various charges, including conspiracy to extort, Doherty J.A. stated the following:

The appellants' submissions stand on firm legal footing. The *actus reus* of the crime of conspiracy lies in the formation of an agreement, tacit or express, between two or more individuals, to act together in pursuit of a mutual criminal objective. Co-conspirators share a common goal borne out of a meeting of the minds whereby each agrees to act together with the other to achieve a common goal.

It follows from the mutuality of objective requirement of the *actus reus* that a conspiracy is not established merely by proof of knowledge of the existence of a scheme to commit a crime or by the doing of acts in furtherance of that scheme. Neither knowledge of nor participation in a criminal scheme can be equated with the *actus reus* of a conspiracy: see *R. v. Lamontagne* (1999), 142 C.C.C. (3d) 561 (Que. C.A.), at 575-76; *R. v. Cotroni, supra*, at pp. 17-8. Knowledge and acts in furtherance of a criminal scheme do, however, provide evidence, particularly where they co-exist, from which the existence of an agreement may be inferred. [Emphasis added; citations omitted; paras. 46-47.]

I agree with the emphasized comment, but would state it slightly differently and in somewhat more emphatic terms.

[52] In my view, where a person, with knowledge of a conspiracy (which by definition includes knowledge of the unlawful object sought to be attained), does (or omits to do) something for the purpose of furthering the unlawful object, with the knowledge and consent of one or more of the existing conspirators, this provides powerful circumstantial evidence from which membership in the conspiracy can be inferred. To be precise, it would be evidence of an agreement, whether tacit or express, that the unlawful object should be achieved. Ultimately, that issue is one for the trier of fact, who must decide whether any inference other than agreement can reasonably be drawn on the evidence. But, as I will explain, the case at hand

illustrates how a constellation of such facts can make a finding of membership a virtual certainty.

[53] In so concluding, I note that conspiracies are often proved by way of circumstantial evidence. Direct evidence of an agreement tends to be a rarity. However, it is commonplace that membership in a conspiracy may be inferred from evidence of conduct that assists the unlawful object. Justice Rinfret made this basic point in *Paradis v. The King* (1933), [1934] S.C.R. 165, some eight decades ago:

Conspiracy, like all other crimes, may be established by inference from the conduct of the parties. No doubt the agreement between them is the gist of the offence, but only in very rare cases will it be possible to prove it by direct evidence. [p. 168]

[54] Furthermore, it is not necessary that all members of a conspiracy play, or intend to play, equal roles in the ultimate commission of the unlawful object. Indeed, members in a conspiracy need not personally commit, or intend to commit, the offence which each has agreed should be committed: *R. v. Genser* (1986), 39 Man. R. (2d) 203 (C.A.), aff'd [1987] 2 S.C.R. 685.² Any degree of assistance in the furtherance of the unlawful object can lead to a finding of membership as long as agreement to a common plan can be inferred and the requisite mental state has been established.

² In my view, *R. v. Taylor* (1984), 40 C.R. (3d) 222 (B.C.S.C.) (S.C.) – which takes the contrary position – was wrongly decided.

[55] I do not gainsay the possibility that someone, with knowledge of an ongoing conspiracy, could do something for the purpose of furthering the unlawful object without the knowledge or consent of the existing conspirators. An example would be where A and B conspire to kill C. D learns of the conspiracy and wishes to facilitate the murder. Unbeknownst to A or B, D prevents a warning message from reaching the intended victim, C: W. R. LaFare, *Substantive Criminal Law* (2nd ed. 2003), vol. 2, at p. 270. In such circumstances, an agreement, tacit or otherwise, between the person providing the assistance (D) and the existing conspirators (A and B) would be a fiction as neither A nor B was aware of, or agreed to, D's efforts.

[56] That situation does not arise here, and I leave for another day whether a person providing "clandestine" assistance in furtherance of the unlawful object of an ongoing conspiracy could be found liable of any crime if the conspirators did not commit or attempt to commit the substantive crime that formed the object of the conspiracy and if his own efforts did not rise to the level of an attempt at the substantive offence.

(3) Aiding or Abetting a Pre-Existing Agreement

[57] Beyond the debate between the narrower and broader approaches, a question arises as to whether, within the narrower approach, the *Trieu* model should be limited only to those who aid in the formation of a *new* agreement to pursue an unlawful object or whether its reach should extend to those who aid or abet a *pre-existing* agreement.

[58] In support of its position that the latter approach should be followed, the Crown relied in part on this Court's recent decision in *R. v. Vu*, 2012 SCC 40. In particular, the Crown maintained that because conspiracy has been identified as a continuing offence (*Bell v. The Queen*, [1983] 2 S.C.R. 471, at p. 488), party liability can attach to anyone who aids or abets the agreement at any point during the life of the conspiracy.

[59] In *Trieu*, Costigan J.A. opined that because conspiracy is an ongoing crime, party liability can arise after the initial agreement is formed if, for example, a person aids in the addition of a new member to join an existing conspiracy (para. 34). Justice Doherty also took the position that party liability attaches to someone who encourages or assists others to join an existing agreement: "Conspiracies and Attempts", in National Criminal Law Program, *Substantive Criminal Law* (1990), vol. 1, at p. 37. These authorities observe, and I agree, that aiding or encouraging someone to become a member of a pre-existing conspiracy facilitates that new member's commission of the offence of conspiracy — that is, the *act* of agreement. To be consistent in principle, party liability should thus extend to assistance or encouragement that results in the addition of a new member to a pre-existing conspiracy.

[60] In this case, the Crown argued that the appellant could become a party to the conspiracy by encouraging the sisters to continue their conspiracy when there were signs that they might abandon it (R.F., at para. 34). As well, at least one

American author has suggested that a person might be found liable as a party to the offence of conspiracy ‘by facilitating the continuance of the conspiracy as by ‘providing the group with a hideout so that it does not have to disband’” (C. R. Williams, “Complicity in a Conspiracy as an Approach to Conspiratorial Liability” (1968-1996), 16 *U.C.L.A. L. Rev.* 155, at p. 162, citing “Developments in the Law: Criminal Conspiracy”, at pp. 934-35). The same author suggests that “encouraging one or more persons to follow through with already formulated conspiratorial plans” might also attract party liability (p. 162).

[61] I would not give effect to the Crown’s argument. As a preliminary matter, the argument goes beyond the limited situation endorsed by Costigan J.A. in *Trieu* and by Doherty J. in his article. And as to the substance of the Crown’s point, though I acknowledge that these acts can be viewed as aiding or abetting the agreement itself, such behaviour is equally if not more consistently characterized as aiding or abetting the furtherance of the unlawful object, and thus captured by the *McNamara* model. As I explained earlier, the *McNamara* model should not lead to party liability for conspiracy. The Crown should thus not be able to achieve through the back door what principle has denied from the front.

[62] In my view, the Crown’s argument in favour of criminalizing aiding or abetting a pre-existing agreement (short of adding a new member to the agreement) is a solution in search of a problem. As I have explained, these acts, which aid or abet the furtherance of the unlawful object, provide circumstantial evidence from which

membership can be inferred. In cases where the circumstantial evidence falls short of establishing membership, there are other charges open to the prosecution. In some instances, the Crown will be able to rely on party liability to charge the substantive offence that forms the object of the conspiracy, or an attempt to commit that offence; in other instances, the offence of counselling the substantive offence may apply.

[63] To sum up, party liability to a conspiracy is limited to cases where the accused encourages or assists in the initial formation of the agreement, or when he encourages or assists new members to join a pre-existing agreement.

C. *Application to this Case*

[64] In light of my conclusion that party liability does not extend to acts done in furtherance of the unlawful object of the conspiracy, I agree with the appellant that party liability should not, in the circumstances, have been left to the jury. There is no evidence that the appellant aided or abetted the formation of the agreement to murder A.K. or aided or encouraged a new member to join the existing conspiracy. That said, like the Court of Appeal, I am satisfied that the error, though significant, could not possibly have affected the verdict.

[65] The evidence implicating the appellant as a member of the conspiracy was overwhelming. The Crown presented a powerful body of evidence from which the jury could find that the appellant, with knowledge of the conspiracy between R and T, provided advice and offered assistance to them, with their knowledge and

consent, for the purpose of facilitating the killing of their mother. As he said in his MSN conversation with T, shortly before the murder occurred, “I’m involved this much, I’m willing to help you out with any of it [T]” (A.R., at p. 197). That, along with other evidence which implicated the appellant in providing the Tylenol 3 pills and attending a restaurant after the killing to provide R and T with an alibi, provided the jury with all the evidence it needed to find an agreement between the appellant and R and T that the murder should be carried out. Nothing more was needed to establish the appellant’s membership in the conspiracy. It is immaterial that the appellant, unlike R and T, took no part in the actual killing of A.K. Once the jury rejected his explanation that he was not being serious, as it must have, a finding of guilt on the basis of membership was inevitable.

[66] I should point out that in the circumstances, the decision on the part of the Crown to charge the appellant with conspiracy to commit murder very much softened the blow that could otherwise have befallen him. The assistance he provided to R and T in facilitating the murder, which they eventually committed, could well have led to a charge of first degree murder against him.

[67] Accordingly, I would dismiss the appeal from conviction. I do so mindful of two alternate grounds of appeal raised by the appellant.

[68] First, the appellant submits that evidence admitted under the co-conspirators’ exception to the hearsay rule did not satisfy the principled approach to hearsay. Specifically, he complains that statements made by T should not have been

admitted for their truth because T was available as a witness and could have been called by the Crown. I would not give effect to this submission. Defence counsel at trial did not raise this issue with the trial judge. Had he done so, the Crown may have chosen to call T as a witness. In the circumstances, defence counsel's decision not to raise the matter could well have been a tactical choice — and as no issue is taken with the competence of trial counsel, I see no need to address this ground further.

[69] Second, the appellant says that the trial judge failed to instruct the jury that the co-conspirators' exception applied only to membership and not to party liability. Once again, defence counsel at trial did not raise this issue with the trial judge. Moreover, the instructions given by the trial judge on the co-conspirators' exception referred to use of that evidence only to prove membership. There was no suggestion that the evidence could be used to prove party liability. That being so, I would not give effect to this ground.

[70] Furthermore, in light of my conclusion that the facts of this appeal do not give rise to party liability for the offence of conspiracy, this is not an appropriate case to determine how, if at all, the framework for the co-conspirators' exception established by *R. v. Carter*, [1982] 1 S.C.R. 938, might apply in the case of a party to a conspiracy.

[71] As a final matter, I note that there are conflicting appellate decisions on the applicability of the co-conspirators' exception where conspirators are tried separately: *R. v. Naicker*, 2007 BCCA 608, 229 C.C.C. (3d) 187, leave to appeal

refused, [2008] 1 S.C.R. xi; *R. v. Simpson*, 2007 ONCA 793, 230 C.C.C. (3d) 542, leave to appeal refused, [2008] 2 S.C.R. xi. This issue, however, was not raised before us or in the courts below. Accordingly, I see no need to consider it.

IV. Conclusion

[72] The aiding and abetting of a conspiracy is an offence known to Canadian law. The offence is made out where the accused aids or abets the *actus reus* of conspiracy, namely the *act of agreeing*. It follows that the approach adopted in *Trieu* is the only basis upon which party liability for the offence of conspiracy may be found. The *McNamara* approach is rejected.

[73] I caution, however, that the behaviour captured by *McNamara* may well support a charge of conspiracy. As indicated, where a person with knowledge of a conspiracy does (or omits to do) something for the purpose of furthering the unlawful object, with the knowledge and consent of one or more of the existing conspirators, this provides powerful circumstantial evidence of his membership in the conspiracy.

[74] The approach I have adopted brings a measure of simplicity and clarity to the law. Party liability to a conspiracy is limited to cases where the accused encourages or assists in the initial formation of the agreement, or where he encourages or assists new members to join a pre-existing agreement.

[75] For the reasons above, I would dismiss the appeal from conviction.

V. Appeal from Sentence

[76] Before this Court, the appellant also sought to appeal his sentence, even though he did not apply for or receive leave to do so. I see no basis for granting leave to appeal from sentence. Accordingly, I would not consider the proposed sentence appeal.

Appeal dismissed.

Solicitors for the appellant: Mang, Steinberg, Toronto.

Solicitor for the respondent: Attorney General of Ontario, Toronto.

Solicitors for the intervener: Bull, Housser & Tupper, Vancouver.