Court File No. 38129

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

- and -

DEAN DANIEL KELSIE

Respondent
(Appellant)

- and -

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA,
ATTORNEY GENERAL OF ONTARIO, and
CRIMINAL LAWYERS' ASSOCIATION

Interveners

FACTUM OF THE INTERVENER CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

Fenton, Smith Barristers
235 King Street East, 2nd Floor
Toronto, ON M5A 1J9

Ian R. Smith
T: (416) 955-0367
F: (416) 955-0367
E: ismith@fentonlaw.ca

Counsel for the Intervener
Criminal Lawyers' Association (Ontario)

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Matthew S. Estabrooks
T: (613) 786-0211
F: (613) 788-3573
E: matthew.estabrooks@gowlingwlg.com

Agent for the Intervener
Criminal Lawyers' Association (Ontario)

TO:

Supreme Court of Canada
The Registrar
310 Wellington Street
Ottawa, ON K1A 0J1

AND TO:

JENNIFER A. MacLELLAN, Q.C.
MARK SCOTT, Q.C.
Nova Scotia Public Prosecution Service (Appeals Branch)
1505 Barrington Street, Suite 1225
Maritime Centre
Halifax, NS B3J 3K5

Tel.: (902) 424-4923
Tel.: (902) 424-6795
Fax: (902) 424-4484
E-mail: jennifer.maclellan@novascotia.ca
E-mail: mark.scott@novascotia.ca

Counsel for the Appellant,
Her Majesty the Queen

D. LYNNE WATT
Gowling WLG (Canada) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Tel.: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.ca

Agent for Counsel for the Appellant,
Her Majesty the Queen

PHILIP CAMPBELL
Lockyer, Campbell Posner
Barristers and Solicitors
30 St. Clair Avenue West, Suite 103
Toronto, ON M4V 3A1

Tel.: (416) 847-2560
Fax: (416) 847-2564
E-mail: pcampbell@lcp-law.com

Counsel for the Respondent,
Dean Daniel Kelsie

MATTHEW S. ESTABROOKS
Gowling WLG (Canada) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Tel.: (613) 786-0211
Fax: (613) 788-3573
E-mail: matthew.estabrooks@gowlingwlg.ca

Agent for Counsel for the Respondent,
Dean Daniel Kelsie

AMBER PASHUK
Public Prosecution Service of Canada
7685 Hurontario Street, Suite 400
Brampton, ON L6W 0B4

Tel: (905) 457-2143
Fax: (905) 457 -3988
E-mail: amber.pashuk@ppsc-sppc.gc.ca

Counsel for the Intervener, Director of Public Prosecutions

FRANÇOIS LACASSE
Directeur des poursuites penales du Canada
160 rue Elgin, 12ieme etage
Ottawa, ON K1A 0H8

Tel: (613) 957-4770
Fax: (613) 941-7865
E-mail: francois.lacasse@ppsc-sppc.gc.ca

Agent for the Intervener, Director of Public Prosecution

MICHAEL BERNSTEIN
Attorney General of Ontario
720 Bay Street, 10th Floor
Toronto, ON M5G 2K1

Tel: (416) 326-2302
Fax: (416) 326-4656
Email: michael.bernstein@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

KAREN PERRON
Borden Ladner Gervais LLP
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Tel: (613) 236-4795
Fax: (613) 230-88842
Email: kperron@blg.com

Agent for the Intervener, Attorney General of Ontario

TABLE OF CONTENTS

PART I: OVERVIEW

1. By Order dated February 7, 2019, Justice Brown granted the Criminal Lawyers' Association (Ontario) ("the CLA") leave to intervene. Accordingly, the CLA makes the following respectful submissions for the assistance of the Court.

2. The CLA takes no position on the facts of this case and relies on the facts as set out in the factums of the parties and in the judgment of the Court of Appeal.

3. The CLA does take a position on the law, however. The decision of the Nova Scotia Court of Appeal and the arguments of the appellant Crown require this Court to consider the application of the curative proviso found in section 686(1)(b)(iii) of the *Criminal Code*. It is the position of the CLA that the proviso, properly interpreted, is an important component of the criminal law's broad effort to protect against wrongful convictions. Bearing that broad purpose in mind, the CLA urges the Court to leave unchanged the line of authority which holds that resort may rarely be made to the proviso to preserve a conviction in circumstances where the trial judge failed to leave an included offence. Similarly, the CLA takes the position that the current formulation of the test for the application of the proviso, which requires the Crown to show either "harmless error" or an "overwhelming case", serves the administration of justice well and needs no adjustment. Indeed, this formulation serves to guard against both unjust convictions *and* wasteful and unnecessary retrials that deplete the scarce resources of the criminal justice system.

PART II: QUESTIONS IN ISSUE

4. In its factum, the appellant raises four questions in issue, the fourth of which relates to the application of the proviso in this case. The CLA takes no position with respect to the proper application of the proviso to the facts of this case, but will address the following questions relating to the proviso, all of which are raised in the *Appellant's Factum*:

(i) How should the proviso be applied where the trial judge errs by failing to leave with the jury an available lesser and included offence?[1]

Where the trial judge has failed to leave the jury with a properly available lesser and included offence, the proviso should not be invoked to dismiss the appeal. If conviction for the lesser offence was properly available, then the legal error is not harmless. If there is an air of reality to culpability for a lower level of liability, then the Crown's case cannot be said to be overwhelming.

(ii) Should the Court revisit the ruling in *Regina v. Jackson*?[2]

There is no need to revisit this decision, nor the Court's approach to the proviso more generally. That approach properly recognizes both the need to afford accused persons fair trials and the wisdom of avoiding unnecessary retrials

(iii) What role does that fact of the scarce resources of the criminal justice system play in the proper analysis of the proviso?[3]

Concern about the scarce resources of the criminal justice system and wasteful retrials is one of the two reasons for the very existence of the proviso. If the Court's current interpretation of the proviso is properly applied, unnecessary re-trials will be avoided.

---

[1] *Appellant's Factum*, at paras. 124 – 128.
[2] *Appellant's Factum*, at para. 130.
[3] *Appellant's Factum*, at para. 131.

PART III: ARGUMENT

Introduction – The Proviso's Important Role in Protecting Against Wrongful Convictions

5. Criminal law has long worried about the conviction of the innocent. The burden and standard of proof, the rules of evidence, the law of criminal procedure, rules about courtroom conduct, and appellate rights all play their part in the justice system's never-ending and multi-pronged project to ensure that only the guilty are punished. The provisions of the *Criminal Code* which govern appeals, properly understood, are part and parcel of this project. Appellate lawyers and judges subject trial records, rulings, reasons for conviction, and jury instructions to meticulous inspection in order to determine whether a conviction was unreasonable (s. 686(1)(a)(i)), whether there was an error of law (s. 686(1)(a)(ii)), or whether there was a miscarriage of justice at trial (s. 686(1)(a)(iii)).[4]

6. Where such scrutiny reveals an error of law, the appeal will be denied only where the record reveals that the trial court's guilty verdict represents no substantial wrong or miscarriage of justice (s. 686(1)(b)(iii)). The proviso applies only where the appellate court is safely assured that the guilty verdict is sound notwithstanding an identifiable error in law. The proviso does *not* apply where, in the case of a jury trial, "it is possible that a properly instructed jury might have come to a different conclusion."[5] In other words, where it is possible, but for the error of law, that an acquittal might have been entered, or that the jury might have convicted the accused of a lesser offence, the appellate court must not invoke the proviso. The proviso then, properly interpreted and applied, should guard against wrongful convictions.[6]

7. This Court's current interpretation of the proviso is, it is submitted, the proper interpretation: the proviso is available to the Crown in two circumstances: (1) where the error at

---

[4] As Doherty J.A. observed in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), while "s. 686(1)(a) provides three distinct bases upon which this court may quash a conviction, each shares the same underlying rationale. A conviction which is the product of a miscarriage of justice cannot stand."

[5] T. Quigley, Annotation to *R. v. Sarrazin* (2011), 88 C.R. (6th) 88 at 90.

[6] Quigley, *supra*, note 5; H. Stewart, "When is a Harmless Error Harmful? A Comment on *Sarrazin*" (2011), 88 C.R. (6th) 110.

trial was harmless and (2) where the Crown's case is overwhelming.[7] This test requires no adjustment. It is relatively straightforward in application and logical in theory: it is self-evident that harmless errors should not result in a windfall for the convicted appellant and that more significant errors might be found to be immaterial where the Crown's case is overwhelming. These two standards simultaneously prevent unnecessary and unjustified re-trials while setting a high bar for the Crown ("harmless" or "overwhelming") to justify sustaining a conviction in the face of legal error.[8] It is in this way that the proviso as interpreted by this Court works as a bulwark against wrongful convictions.

The Proviso and the Failure to Leave an Included Offence

8. Where the error made at trial is the failure to leave for the jury's consideration a lesser and included offence, resort to the proviso should rarely, if ever, be appropriate.[9] As Lord Tucker wrote in *Bullard v. The Queen*,[10] it would be a "grave miscarriage of justice" to deprive an accused person of the possibility of a conviction for a lesser and included offence where there is evidence to support such a conclusion. Lord Tucker added that where such an error is made, "it is idle to speculate what verdict the jury would have reached."[11]

9. This reasoning from *Bullard* was relied upon by McLachlin J. (as she then was) in *R. v. Jackson* and animated the Court's conclusion respecting the proviso in that case. Justice McLachlin wrote as follows:

> I am not satisfied that it is clear that a jury, properly instructed, would necessarily have returned a verdict of second degree murder against Davy. He was entitled to have the verdict of manslaughter put to the jury. We cannot be certain that if this had been done, and notwithstanding the correct instruction on murder, that the verdict might not have been different. This is, consequently, not a proper case for the application of s. 686(1)(b)(iii).[12]

---

[7] *R. v. Khan*, [2001] 3 S.C.R. 823, at paras. 28 - 31; *R. v. Sarrazin*, 2011 SCC 54, per Binnie J., at para. 25; *R. v. Van*, 2009 SCC 22, at paras. 34 – 36.
[8] Stewart, *supra*, note 6.
[9] *R. v. Haughton*, [1994] 3 S.C.R. 516, at para. 2; *Sarrazin* (S.C.C.), supra, note 7, per Binnie J., at paras. 30 - 31; *R. v. Sarrazin*, 2010 ONCA 577, per Doherty J.A., at paras. 64, 87.
[10] [1957] A.C. 635 at 644.
[11] *Ibid*.
[12] [1994] 4 S.C.R. 573, at para. 45.

10. It is submitted that these passages from *Bullard* and *Jackson* make it plain that the failure to leave included offences should rarely, if ever, be saved by the proviso. It is impossible to say that the error was harmless when the jury was deprived of a legally available option. This Court took up the issue again in *R. v. Sarrazin*.[13] Justice Binnie writing for the majority, made this point in the following way: "… no one really knows what the actual jury would have done if its members had been properly presented with all the verdicts that might reasonably have arisen on the evidence."[14] As the Crown appellant acknowledges in this case,[15] sometimes the fear is that juries reach compromise verdicts when choosing between the stark choice of a conviction for murder or an "unpalatable" acquittal. But it is not only the unpalatable acquittal which can generate an improper conviction for murder; the failure to leave with the jury all available choices creates injustice because we know that human decision-making is affected by the available options.[16] Where one or more options are kept from the decision-maker, injustice may result.[17] This was the observation of the High Court of Australia in *Gilbert v. The Queen*,[18], adopted on this point by Justice Binnie in *Sarrazin*.[19] Callinan J. wrote in *Gilbert* as follows:

> It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice.[20]

11. The House of Lords also followed this line of reasoning in *R. v. Coutts*,[21] recognizing that the range of choices offered inevitably affects the deliberation process. In so ruling, Lord Bingham observed that juries do not "adopt a mechanistic approach to the task of fact-finding, oblivious to

---

[13] *Supra*, note 7.
[14] *Ibid*., per Binnie J., at para. 22.
[15] *Appellant's Factum*, at para. 125.
[16] Stewart, *supra*, note 6. See also: *Sarrazin* (Ont. C.A.), *supra*, note 9, per Doherty J.A., at paras. 94 – 95; *Sarrazin* (S.C.C.), *supra*, note 7, per Binnie J., at paras. 31, 36.
[17] *Sarrazin* (S.C.C.), *supra*, note 7, per Binnie J., at paras. 30 – 39.
[18] [2000] HCA 15.
[19] *Sarrazin*, *supra*, note 7, per Binnie J., at para. 36.
[20] *Gilbert*, *supra*, note 18, per Callinan J., at para. 101.
[21] [2006] UKHL 39.

the consequences of their conclusion."[22] Lord Hutton similarly declined "to attribute to juries an adherence to principle and an obliviousness to consequences which is scarcely attainable."[23]

12. In addition to the inability to declare the failure to leave an included offence as a harmless error, such a failure will rarely if ever be overcome because the Crown's case can be said to be overwhelming. In part, that will be because proof of the defendant's mental state will rarely be overwhelming in such cases: if there is an air of reality to a lower level of *mens rea*, it is submitted that it will almost never be the case that the Crown has advanced overwhelming evidence of the higher level of *mens rea*. The very existence of that air of reality means that the case for the Crown cannot be overwhelming because the jury has a real choice to make between two or more alternatives.[24] Similar reasoning would apply where the issue is not *mens rea*, but, as in *Sarrazin*, whether causation was proven beyond a reasonable doubt.

13. Finally, under this heading, it is dangerous to reason backwards from a jury's verdict or verdicts to determine that they would necessarily have rejected an included offence that was not left to them. As noted above, such reasoning ignores our shared experience of human decision-making being affected by the available choices. In addition, however, convictions for inchoate offences like conspiracy may not be useful in determining the level of *mens rea* later at the time of the actual commission of the substantive offence. Instead of trying to divine what the jury *might* have been thinking, the Court's focus should be on whether there was an air of reality to the included offence not left with the jury. Where the answer to that question is "yes", the proviso should not be applied. In this regard, Professor Quigley adds the following important point: "we should not overlook the appearance of justice. The reasonable observer, as well as the accused, might well say that upholding a conviction where the jury was not given all of its legal options is an unjust result."[25]

---

[22] *Ibid.*, per Bingham L.J., at para. 21.
[23] *Ibid.*, per Hutton L.J., at para. 99.
[24] Stewart, *supra*, note 6., para. 7.
[25] Quigley, *supra*, note 5.

Should* Jackson *be Revisited?

14. The appellant has expressly asked the Court to revisit and reconsider the judgment in *Jackson.*[26] It is submitted that there is no need to do so. For the reasons described above, *Jackson*'s conclusions on the application of the proviso are unassailable. Where an air of reality exists for a lesser and included offence it should be left with the jury. The failure to do so will be a legal error typically unsusceptible to the application of the proviso. *Jackson*'s analysis of the proviso takes up just one paragraph in that judgment and represents a straightforward and correct application of the law respecting the proviso where included offences are concerned.

15. Moreover, this Court was recently invited to revisit the application of the proviso and to relax the circumstances in which it is available. In 2011 in *Sarrazin*, the Court did review the application of the proviso and considered a proposal from Moldaver J.A., as he then was, to relax the Court's approach to the proviso by making it available in cases where the Crown's case was "not quite overwhelming" and the errors "though not insignificant, are highly unlikely to have affected the result."[27] There is no need to revisit the law respecting proviso a second time this decade. This Court in *Sarrazin* unanimously rejected the "relaxed" or "holistic" approach suggested by Justice Moldaver. In the meantime, the law on the proviso as articulated in *Sarrazin* has worked generally well in practice and does not now need to be relaxed. The appellant points to no case decided since *Sarrazin* (apart from the case at bar) that it says was wrongly decided because the appellate court followed the harmless error/overwhelming case formulation of the proviso and the *Jackson/Sarrazin* near prohibition on resort to the proviso where there was a failure to leave an included offence. There has been no groundswell of judgments in the country's appellate courts expressing concern about the law in this area, nor a collection of academic commentary criticizing the way the proviso is applied.[28] It is submitted that the reason that there

---

[26] *Appellant's Factum*, para. 130.
[27] *Sarrazin* (Ont. C.A.), *supra*, note 9, per Moldaver J.A., at para. 107, footnote 13.
[28] Nor, as the respondent points out, has the Crown pointed to any new social science research suggesting that the *Sarrazin* Court's views about jury decision-making being affected by the available choices are now considered incorrect. See: *Respondent's Factum*, at para. 107.

has been no widespread expression of such concern or criticism is that the current formulation of the proviso is workable, logical and just.

16. Notably, the appellant asserts that "clearly it is time to revisit the proviso"[29] but proposes no alternative formula for the interpretation of s. 686(1)(b)(iii), preferring instead to attack the idea that manslaughter was left at all[30] and to shudder at the "notion of a re-trial for this 17-year old murder".[31] The CLA takes no position on whether manslaughter ought to have been left or whether there should be a new trial, but the former argument is an argument about whether there was an error, not about the application of the proviso, while the latter argument, respecting the costs of retrials, is one for which the current interpretation of the proviso already accounts (more will be said about this below). Not having explained how *Jackson* ought to be "revisited," we are left to infer that the current approach to the proviso ought to be relaxed in some undefined way in order to allow the appeal in this case. However, the result of any such relaxation so as to excuse more errors of law would be to increase the risk of wrongful convictions left uncorrected by our appellate courts. No such relaxation should be undertaken.

Scarce Resources and the Proviso

17. One of the justifications proposed for relaxing the law respecting the proviso is the cost to the administration of justice when new trials are ordered unnecessarily. In this case, the appellant relies on this Court's judgment in *R. v. Jolivet*[32] for the proposition that the costs of a new trial are too high when the evidence against the defendant is strong and there is no realistic possibility that such a new trial would yield a different result.[33]

18. In *Sarrazin*, both the majority and the minority of this Court rejected this kind of justification for relaxing the interpretation of the proviso. Justice Binnie, writing for the majority, acknowledged the costs of new trials, but nevertheless disagreed "that the burden on the Crown to

---

[29] *Appellant's Factum*, at para. 130.
[30] *Ibid*.
[31] *Ibid.*, at para. 131.
[32] 2000 SCC 29.
[33] *Appellant's Factum*, para. 131.

avoid a retrial should be watered down." In so doing, he emphasized the accused person's right to a trial by jury which ordinarily includes the right to a properly instructed jury. Citing the courts' long experience in these matters, he held that the harmless error / overwhelming case formulation of the proviso struck the right balance and, when applied, safely guides us on the question of when there will be no realistic possibility that a new trial will produce a different verdict.[34] Justice Binnie found that allowing appellate courts to weigh the precise effect of a legal error to determine whether it was not "so prejudicial as to have affected the outcome" was "too delicate" an exercise.[35] Lord Mance in *Coutts*, made a similar observation:

> There is no reliable means by which an appellate court can, on so particular a basis, measure whether or how a jury may react to an unnatural limitation of the choices put before it. One is entitled to assume that juries go about their task in the utmost good faith, but the concern is with sub-conscious as well as conscious reactions. Like my noble and learned friends, I find persuasive the reasoning of Callinan J. in *Gilbert v. The Queen* [at para. 101], to the effect that, as a matter of human experience, a choice of decisions may be affected 'by the variety of choices offered, particularly when … a particular choice [is] not the only or inevitable choice.[36]

19. In effect, the need to avoid wasteful re-trials was baked into s. 686(1)(b)(iii) by Parliament. It is obvious that one of the aims of the section is to avoid retrying cases where the guilty verdict represents "no substantial wrong or miscarriage of justice." The other aim is to guard against wrongful verdicts by ensuring a new trial where it cannot be said that "there is no realistic possibility that a new trial would produce a different verdict."[37] *Sarrazin* and *Jolivet* are essentially *ad idem* on this issue. Indeed, Justice Binnie relied on *Jolivet* in making the point.[38] Professor Stewart aptly summarizes the law as follows:

> The role of the proviso is to avoid the many costs – not just fiscal, but personal and emotional – associated with a new trial, where there is (notwithstanding the error of law) no serious remaining doubt as to the accused's guilt. But where there is such doubt, the commitment of the justice system to avoiding wrongful convictions makes those costs

---

[34] Justice Cromwell, writing for the minority, expressly agreed with Justice Binnie, that the Court "should not 'water down' our approach to the applying the proviso." See *Sarrazin* (S.C.C.), *supra*, note 7, per Cromwell J., at para. 42.
[35] *Sarrazin*, *supra*, note 7, per Binnie J., at paras. 24 – 28.
[36] *Coutts*, *supra*, note 21, per Mance L.J., at para. 99.
[37] *Sarrazin*, *supra*, note 7, per Binnie J, at para. 24.
[38] *Ibid*., at paras. 24, 27.

worth bearing, and the division of roles between trial and appellate courts makes a new trial the right vehicle for resolving the factual issues.[39]

Conclusion

20. It is respectfully submitted that the Court's approach to the proviso as currently formulated strikes the right balance between the ideal of perfectly instructed juries and the need to avoid pointless and wasteful trials. A relaxation of the proviso would prejudice the defendants' rights to fair jury trials for the sake of the social cost of new trials – a cost that is already recognized in section 686(1)(b)(iii) and the Court's interpretation of that section. Relaxing the application of the proviso to excuse more error-infected trials will exact its own costs: to fairness, respect for the administration of justice, increased risk of wrongful convictions, and all the costs which flow from such wrongful convictions.

PART IV: COSTS

21. The CLA seeks no order as to costs and asks that no costs order be made.

PART V: ORDER SOUGHT

22. The CLA takes no position on the proper disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of March, 2019.

FOR Ian R. Smith
Fenton, Smith Barristers

Counsel for the Intervener
Criminal Lawyers' Association (Ontario)

---

[39] Stewart, *supra*, note 6. See also: *Sarrazin* (S.C.C.), *supra*, note 7, per Binnie J. at paras. 22, 27; *Jolivet, supra*, note 32, at para. 46.

PART VI: TABLE OF AUTHORITIES

Cases and Articles Cited	Paragraph References
Bullard v. the Queen, [1957] A.C. 635	8, 10
Gilbert v. The Queen, [2000] HCA 15	10, 18
R. v. Coutts, [2006] UKHL 39	11, 18
R. v. Haughton, [1994] 3 S.C.R. 516	8,
R. v. Jackson, [1994] 4 S.C.R. 573	4, 9, 10, 14, 15, 16
R. v. Jolivet, 2000 SCC 29	17, 19
R. v. Khan, [2001] 3 S.C.R. 823	7
R. v. Morrissey (1995), 97 C.C.C. (3d) 193 (Ont. C.A.)	6
R. v. Sarrazin, 2011 SCC 54	7, 8, 10,15, 18, 19
R. v. Sarrazin, 2010 ONCA 577	8, 10, 15
R. v. Van, 2009 SCC 22	7
T. Quigley, Annotation to *R. v. Sarrazin* (2011), 88 C.R. (6th) 88 at 90	6, 13
H. Stewart, "When is a Harmless Error Harmful? A Comment on *Sarrazin*" (2011), 88 C.R. (6th) 110	6, 7, 10,12, 19

PART VII: LEGISLATION CITED

Legislation Cited	Paragraph References
Criminal Code, s. 686	3, 5, 6, 9, 16, 19, 20