

IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

BETWEEN:

**HER MAJESTY THE QUEEN**

Appellant  
(Respondent)

- and -

**CHIHEB ESSEGHAIER AND RAED JASER**

Respondents  
(Appellants)

- and -

**ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF  
ALBERTA, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)**

Interveners

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**FACTUM OF THE INTERVENER  
CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)  
(PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*)**

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## **PART I - OVERVIEW**

1. Section 686(1)(b)(iv) of the *Criminal Code* cannot save errors in the jury selection process that affect the composition of the jury. These errors encroach on the statutorily defined jury selection process—a process that provides predictable, objectively based guarantees of randomness and independence. A democratically established statutory guarantee of independence is of right in and of itself, which helps ensure jury impartiality. When a judge changes the rules, the error necessarily impacts the jury's independence *vis a vis* the trial judge.
2. Second, these types of errors diminish public confidence, including the defendant's confidence, in the independence of the jury. Conversely, strict adherence to jury selection procedures instills trust that the jury is actually independent of the judge, a message that is especially important for marginalized or racialized defendants who may already have good reason to distrust the criminal justice system.

## **PART II - STATEMENT OF POSITION**

3. Section 686(1)(b)(iv) of the *Criminal Code* is not applicable when a trial judge errs in a manner that affects the composition of the jury.

### PART III - LEGAL ARGUMENT

#### A. Jury independence is about the process not the result

4. Errors in the jury selection process interfere with the statutory framework that guarantees the independence of the jury. Section 11(d) of the *Charter* provides that every person charged with an offence has the right to be tried in a public hearing before an “independent and impartial tribunal.” Independence and impartiality are closely related but distinct concepts. Independence refers to the extent to which a tribunal is free of outside pressures from other branches of government including other judges.<sup>1</sup>

5. Impartiality refers to the state of mind of the decision maker. Le Dain J., writing for the Supreme Court in *R. v. Valente*, explained that the word impartial “connotes absence of bias, actual or perceived” whereas independence “connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the executive branch of government, that rests on objective conditions or guarantees.”<sup>2</sup> Independence includes freedom of influence from even judges.<sup>3</sup>

6. In relation to judges, this Court has held that independence refers to the objective structure of the court or tribunal in relation to others who could influence a judge’s

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<sup>1</sup> *R v Valente*, [1985] [2 SCR 673](#) at para 15; *R v Lippé*, [1991] [2 SCR 114](#) at para 41; *R v Généreux*, [1992] [1 SCR 259](#) paras 35 - 37.

<sup>2</sup> *Valente*, *ibid* at para 15.

<sup>3</sup> *Lippé*, *supra* at para 45; *Généreux*, *supra* at para 37.

decision.<sup>4</sup> Le Dain J. explained in *Valente* that the relevant legal question focuses on the “perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.”<sup>5</sup> Thus, as Lamer C.J. explained in *R. v. Généneux*, “[t]he appropriate question is whether the tribunal, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence.”<sup>6</sup>

7. Jury independence derives from both the statutory framework that governs the selection of the jury<sup>7</sup> as well as the rules that shape the relationship between the trial judge and the jury during the trial, including during deliberations.<sup>8</sup> The random selection of jurors who represent the community is one guarantee of independence.<sup>9</sup> Another guarantee rests in the clearly defined rules as to when a judge may interfere with the composition of the jury. These rules, which are defined in sections 632, 633, 640, and 644 of the *Criminal Code*, provide for deviations from randomness where there is sound basis for the removal of the juror.<sup>10</sup>

8. Errors in the selection process that impact the composition of the jury affect objective guarantees of randomness and independence. These errors cause prejudice by

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<sup>4</sup> *Généneux*, *supra* at para 37.

<sup>5</sup> *Valente*, *supra* at para 22.

<sup>6</sup> *Généneux*, *supra* at para 47.

<sup>7</sup> *R v Kokopenace*, [2015] [2 SCR 398](#) at para 49.

<sup>8</sup> *R v Rowbotham*; *R v Roblin*, [1994] [SCJ No 61](#) at para 24.

<sup>9</sup> *R v Bain*, [1992] [1 SCR 91](#).

<sup>10</sup> *Ibid.*

constituting the jury differently than it otherwise would have been but for the error. They also reflect changes in the statutorily defined process aimed at establishing jury independence. In essence, the trial judge substitutes his or her own rule(s) in place of the statutory scheme designed by the legislature. If jury independence is established by “objective conditions or guarantees of independence”, then the trial judge’s error, which modifies those rules, necessarily diminishes the jury’s independence from the trial judge.

**B. Diminished confidence**

9. Protection of jury independence helps promote public confidence in the fairness of the jury process. It also displays a guarantee of fairness for those criminal defendants that might otherwise distrust judges who they see as part of the state, along with police prosecutors. Whether this viewpoint is reasonable, it is understandable when a defendant belongs to a marginalized community—especially a racialized community that is unrepresented in positions of power but overrepresented in jails.

10. A defendant’s belief in the fairness of the process has immediate practical consequences. For one thing, it allows the defendant to focus on the presentation of the defence at trial, rather than occupying his or her time with thoughts of how else the trial judge influenced the jury.

11. Second, it allows the defendant to be more trusting of the process. In recent years, there has been growing awareness that innocent people wrongfully plead guilty to crimes they did not commit, at times, due to mistrust in the judicial process. This problem arises from a variety of factors, including socio-economic circumstances that cause defendants

to lose faith in the fairness and reliability of the criminal trial process, in addition to the overuse of pre-trial detention.<sup>11</sup>

12. In one case, *R v Hanemaayer*, the miscarriage of justice resulted when the defendant lost confidence, in part, because of the apparent reaction of the trial judge.<sup>12</sup> In that case, Mr. Hanemaayer was accused of a crime that Paul Bernardo actually committed. Mr. Hanemaayer, who was charged on the basis of flawed eye-witness identification evidence, pleaded guilty because he believed he was going to lose the case and wanted to avoid the harsher prison sentence he would receive if convicted after trial. Except for the guilty plea, Mr. Hanemaayer had always maintained his innocence. The Ontario Court of Appeal accepted that he decided to plead guilty because “he lost his nerve”, he believed that “his lawyer was not making headway in convincing the judge”, and he believed he would receive a longer sentence if he continued on with trial. On appeal, the court accepted that the identification evidence that had implicated Mr. Hanemaayer in the crime was flawed and entered an acquittal.<sup>13</sup>

13. Whether to plead “not guilty” and proceed to trial can be very difficult for defendants who assert their innocence but are concerned about the risks inherent in proceeding to trial. The decision is especially agonizing for those who are offered

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<sup>11</sup> See Kent Roach, “The Wrongful Conviction of Indigenous People in Australia and Canada”, (2015) 17 Flinders Law Journal.

<sup>12</sup> *R v Hannemayer*, [2008 ONCA 580](#) para 11.

<sup>13</sup> *Ibid* at paras 21.

resolution positions with little or no additional jail time. It is in those circumstances where innocent people may choose to plead guilty to a crime they did not commit in order to avoid the potential negative consequences of trial, such as the risk of substantial time in custody.<sup>14</sup> Some of these individuals are inherently distrustful of judges. Confidence in the jury system—including the independence of the jury in relation to the trial judge—can instill greater trust in the justice system.

### **C. Conclusion**

14. Errors that effect the composition of the jury cannot be viewed as procedural irregularities that cause no prejudice. The error itself changes the composition of the jury; it also alters the objective conditions or guarantees that establish the jury's independence in relation to the trial judge. For those reasons, section 686(1)(b)(iv) of the *Criminal Code* does not apply to these types of errors in the selection process.

## **PART IV - COSTS AND ORDER SOUGHT**

15. The CLA does not seek costs and asks that no costs be awarded against it. The CLA takes no position on the disposition of this appeal and cross-appeal.

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<sup>14</sup> See G. Kellough & S. Wortley, "Remand for Plea" *Brit J Criminol* (2002) 42 186 [Kellough & Wortley]; as well as Christopher Sherrin, "Excessive Pre-Trial Incarceration" 17 *Sask. L. Rev.* 55 at 64.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of September, 2020.



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## PART VII – TABLE OF AUTHORITIES

<b>Authority</b>	<b>Para.</b>
<i>R v Valente</i> , [1985] <a href="#">2 SCR 673</a>	<b>5, 6</b>
<i>R v Lippé</i> , [1991] <a href="#">2 SCR 114</a>	<b>5, 6</b>
<i>R v Généreux</i> , [1992] <a href="#">1 SCR 259</a>	<b>5, 6</b>
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