

CANADA / JUDGMENT

## Corbett v. R.

[1975] 2 SCR 275

### COURT

Supreme Court of Canada

### DECIDED

21 December 1973

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

Corbett v. R.

Collection

Supreme Court Judgments

Date

1973-12-21

Report

[1975] 2 SCR 275

### Judges

Abbott, Douglas Charles; Martland, Ronald; Judson, Wilfred; Spence, Wishart Flett; Pigeon, Louis-Philippe; Laskin, Bora; Dickson, Robert George Brian

On appeal from

British Columbia

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Corbett v. R., [1975] 2 S.C.R. 275

Date: 1973-12-21

Lawrence Wilburn Corbett Appellant;

and

Her Majesty The Queen Respondent.

1973: December 12; 1973: December 21.

Present: Abbott, Martland, Judson, Spence, Pigeon, Laskin and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Conviction on charge of non-capital murder—Appeal—Application of s. 613(1) (a) (i) of the Criminal Code, R.S.C. 1970, c. C-34.

The appellant was found guilty of non-capital murder. The essential witness for the Crown was the wife of the murdered man. She identified the accused at a line-up three days after her husband was killed, but there were some discrepancies between her statement of the facts and some relevant physical facts observed by other witnesses shortly after the crime. The Court of Appeal dismissed an appeal, and the only difference of opinion there was as to the application of s. 613 (1) (a) (i) of the Criminal Code which provides that a Court of Appeal may allow an appeal where it is of the opinion that the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.

Held (Spence and Laskin JJ. dissenting): The appeal should be dismissed.

Per Abbott, Martland, Judson, Pigeon and Dickson JJ.: If the judges of the majority in the Court of Appeal had held that their function under s. 613(1)(a)(i) was only to decide whether there was evidence, this would be reversible error. The Court of Appeal must satisfy itself not only that there was evidence requiring the case to be submitted to the jury, but also that the weight of such evidence is not so weak that a verdict of guilty is unreasonable. This cannot be taken to mean that the Court of Appeal is to substitute its opinion for that of the jury. The word of the enactment is “unreasonable”, not “unjustified”. The jurors are the triers of the facts and their finding is not to be set aside because the judges in appeal do not think they would have made the same finding if sitting as jurors. This is only to be done if they come to the conclusion that the verdict is such that no twelve reasonable men could possibly have reached it acting judicially. Section 4(5) of the Canada Evidence Act, which provides that the failure of a person charged, to testify, “shall not be made the subject of comment by the judge, or by counsel for the prosecution”, does not prevent the jury from taking the fact into account without being told. No one can reasonably think that a jury will fail, in reaching a verdict, to take into account the failure of the accused to testify. This being so, it is a fact properly to be considered by the Court of Appeal when dealing with the question: “Is this a reasonable verdict?”

Per Spence and Laskin JJ., dissenting: The difference between the question whether there is any evidence upon which a jury may convict and the question whether “the verdict is unreasonable or cannot be supported by the evidence” is not only the difference between s. 613(1)(a) (ii) and s. 613(1)(a)(i) but is the central matter that must engage the provincial appellate Court when its jurisdiction is invoked on an appeal from conviction on the grounds stated in s. 613(1)(a)(i). The majority of the Court of Appeal rested their dismissal of the accused’s appeal on the ground that there was evidence upon which the jury could convict.

The jury must have treated the wife of the victim as a credible witness. But the credibility of a witness to a jury cannot alone invalidate the contention that their verdict is unreasonable or cannot be supported on the evidence as a whole. This was the mistake that the majority of the Court of Appeal made in their approach to s. 613(1)(a)(i). The members of a provincial appellate Court must weigh the evidence in bringing their own judgment to bear on the issue whether the jury's verdict is unreasonable or cannot be supported by the evidence and they are entitled to substitute their opinion for that of the jury on that issue.

Failure to testify, if it can have any significance at all on an appeal by an accused, can go only to the dismissal of the appeal on the ground that there was no substantial wrong or miscarriage of justice, a matter that is related not to s. 613(1)(a)(i) but to s. 613(1)(a)(ii) relating to a wrong decision on a question of law. APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a conviction on a charge of noncapital murder. Appeal dismissed, Spence and Laskin JJ. dissenting.

T.A. Dohm, Q.C., for the appellant.

W.G. Burke-Robertson, Q.C., for the respondent.

### **The judgment of Abbott, Martland, Judson, Pigeon and Dickson JJ. was delivered by**

PIGEON J.—Appellant was found guilty of non-capital murder after a trial before Aikins J. and a jury at Prince George, B.C., on November 9, 1971. The essential witness for the Crown was the wife of the murdered man, one Mac-Donald. She was herself hit by three bullets fired at her by the murderer immediately after shooting her husband. She identified the accused at a line-up three days later, but there were some discrepancies between her statement of the facts and some relevant physical facts observed by other witnesses shortly after the crime.

In the Court of Appeal, there was unanimity as to the fairness of the address to the jury and the only question on which a difference of opinion arose was the application of subparagraph (a)(i) of s. 613.1 of the Criminal Code. This subparagraph provides that the Court of Appeal

- (a) may allow the appeal where it is of the opinion that
- (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.

The conclusion of the formal judgment of the Court of Appeal was:

THIS COURT DOTH ORDER AND ADJUDGE that the Motion for Leave to Appeal conviction aforesaid be and the same is hereby granted, the appeal from conviction aforesaid be and the same is hereby dismissed, the Honourable Mr. Justice Robertson who would have allowed the appeal dissenting with respect to the function of the Court under subparagraph 613 (1)(a)(i) of the Criminal Code.

The appeal to this Court was taken under s. 618.1(a) whereby a person convicted may appeal “on any question of law on which a judge of the court of appeal dissents”.

In my view, the reasons for judgment delivered by Branca and Taggart JJ.A. for the majority, and by Robertson J.A. dissenting, clearly show that the dissent is not on a question of law but solely on the application of the law. This is why it was found impossible to specify the grounds of law for the dissent, as required by s. 606.

Counsel for the accused, in his thorough argument, was equally unable to formulate any question of law arising out of the dissent. Here is how he stated the issue in the memorandum summarizing his submissions:

The error in law alleged is that the majority of the Court of Appeal were wrong in their approach to their function under Section 613.

It is submitted that the majority did not reach their own conclusions on the weight of the evidence as they must do in an appeal under Section 613 (1)(a)(i).

The Appellant urges that he is by law entitled to have the Provincial Appellate Court arrive at its own opinion judicially under this Section after a review of all the evidence in the case.

It is not sufficient for the Judges of the Provincial Appeal Court to consider only whether there is any evidence to support the conviction.

Of course, if the judges of the majority had held that their function was only to decide whether there was evidence, this would be reversible error. The Code expressly provides that the appeal may be allowed, not only when the verdict cannot be supported by the evidence but also when it is unreasonable. In other words, the Court of Appeal must satisfy itself not only that there was evidence requiring the case to be submitted to the jury, but also that the weight of such evidence is not so weak that a verdict of guilty is unreasonable. This cannot be taken to mean that the Court of Appeal is to substitute its opinion for that of the jury. The word of the enactment is “unreasonable”, not “unjustified”. The jurors are the triers of the facts and their finding is not to be set aside because the judges in appeal do not think they would have made the same finding if sitting as jurors. This is only to be done if they come to the conclusion that the verdict is such that no twelve reasonable men could possibly have reached it acting judicially.

I cannot read the reasons of the majority judges as implying that they did not apply the proper test and solely considered whether there was evidence. The two grounds of appeal dealing with this point were stated as follows in the notice of appeal:

3. The verdict of the jury should be set aside on the ground that it is unreasonable and perverse and such that no twelve men, properly directed, should reasonably have found.
4. The verdict of the jury should be set aside on the ground that it cannot be supported by the evidence.

On these, Branca J.A. said:

This Court cannot retry this case or substitute itself for the jury and find facts. That was the particular task of the jury. The function of this Court is purely to review the evidence and the directions of the learned trial Judge to the jury and to see whether or not the evidence reasonably supported the finding of the jury and to satisfy itself that the charge of the learned trial Judge was free of misdirection or non-direction and fairly related the evidence to the issues to be solved by the jury.

Can it be said that the verdict of the jury in this case is perverse, that is, that the verdict is so patently unreasonable and unjust as to satisfy this Court that no reasonable jury of twelve men, considering the evidence as a whole and acting judicially in accordance with judicial instructions, would reach the verdict in question? It is only on this basis that a verdict given by a jury may be considered as perverse. However, a verdict cannot be said to be perverse where there is evidence to support the conclusion arrived at by the jury particularly where the instructions from the learned trial Judge are as full and as fair and as lucid as they were in the instant case.

In my view, there is nothing from which it might be deduced that the learned judge only considered whether there was evidence. If there had been no evidence, it would have been the duty of the trial judge to withhold the case from the jury. This is not what was considered. The point dealt with assumed that the case was properly before the jury. It was asked in effect whether they could reasonably answer "Guilty" and, in my opinion, that was the proper test before the Court of Appeal.

At the end of his reasons, Branca J.A. added:

....The accused did not testify. He was under no duty to do so and was entitled to rely upon the presumption of innocence and the fact that the Crown had to prove his guilt beyond a reasonable doubt. The fact that he did not testify did not relieve the Crown of the duty of proving his guilt beyond a reasonable doubt, but where as here there was evidence of a direct nature which inculpated him and which the jury accepted as truthful then this Court may well consider his failure to testify as a factor in disposing of this appeal.

Assuming that the correctness of that statement is a question of law that may be considered on this appeal, I can find no reason for disagreeing with it. Section 4.5 of the Canada Evidence Act provides that the failure of a person charged "shall not be made the subject of comment by the judge, or by counsel for the prosecution", it does not prevent the jury from taking the fact into account without being told. No one can reasonably think that a jury will fail, in reaching a verdict, to take into account the failure of the accused to testify, specially in a case like this. This being so, it is a fact properly to be considered by the Court of Appeal when dealing with the question: "Is this a reasonable verdict?"

The other opinion for the majority was given by Taggart J.A. With respect to the reasonableness of the verdict, he said:

Undoubtedly there was evidence tending to weaken Mrs. MacDonald's evidence of identification but in the final analysis it was for the jury, after directions from the presiding Judge which I can only describe as being scrupulously fair to the appellant, to decide whether to accept or reject the evidence of identification. In these circumstances I cannot say that the jury were perverse in accepting evidence of identification nor is this a case where this Court should apply the provisions of Code s. 613(1)(a)(i).

From this it is abundantly clear that the learned judge did not confuse the function of the Court in considering the reasonableness of a verdict with its function in deciding whether there was any evidence at all. Therefore, neither he nor Branca J.A. differed in law from the view expressed by the dissenting judge, Robertson J.A., who said:

It being the duty of the court to reach a conclusion whether the verdict is unreasonable or cannot be supported by the evidence, the court must consider the weight of the evidence. Here undoubtedly the court can properly be influenced by the weight that the jury must have given to it (particularly where there is conflict between the evidence of different witnesses but this does not relieve the court of the duty to reach its own conclusion. For the court to say, "Yes, it is our conclusion that the verdict is unreasonable or cannot be supported by the evidence, but the jury is the finder of facts and obviously thought that the verdict was reasonable and could be so supported, and so we shall not interfere" is, in my opinion, to exercise the Court's function in something less than a judicial fashion. In the final analysis, it is an abdication by the Court in favour of the jury, an abnegation by the Court of its judicial duty. By such an attitude the Court is declining to give effect to conclusion and opinion that the appellant was entitled to have it arrive at.

I do not read the above as meaning that the duty of the Court of Appeal is to reach its opinion on the basis of what its members think they would have decided if sitting as the jury so that, if they are not convinced that they would have rendered the same verdict, they are to find it unreasonable. If that is what the learned judge meant, then I must disagree with him because that is not the proper test. As previously noted, the question is whether the verdict is unreasonable, not whether it is unjustified. The function of the court is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered.

I do not find it necessary to review the authorities cited by Robertson J.A. because none of them appears to me to differ from what I have stated to be the proper view of the law and it does not appear to me that the learned judge intended to depart. In my view, his dissent was solely based on a different view of the facts, which he expressed in the closing paragraph of his reasons in the following words:

Summing up my view, the testimony put forward in support of the Crown's case was too unsafe, its nature was too dubious, to rest a conviction on it, and the verdict was, therefore, unreasonable and not supported by the evidence.

I would dismiss the appeal.

### **The judgment of Spence and Laskin JJ. was delivered by**

LASKIN J. (dissenting)—There are two issues in this appeal by the accused from the affirmation by the British Columbia Court of Appeal (Branca and Taggart JJ.A., Robertson J.A. dissenting) of his conviction of non-capital murder. The first issue is a jurisdictional one, involving the authority of this Court to entertain the appeal under s. 618(1)(a) of the Criminal Code. The second issue, which arises only if there is jurisdiction, is whether this Court should properly dispose of the appeal on the merits of the substantive contentions or whether, if there be error in law in the position taken and the disposition made by the majority of the British Columbia Court of Appeal, the case should be remitted to that Court or there should be a new trial. Counsel for the accused and for the Crown in this Court were at one in stating that if there was such error in the provincial appellate Court as to give this Court authority to intervene, the case should go back to the provincial appellate Court to be dealt with on a proper application of s. 613(1)(a) (i) of the Criminal Code. It is in respect of this provision that the question of jurisdiction of this Court to entertain the appeal under s. 618(1)(a) arises.

Section 618(1)(a) reads as follows:

A person who is convicted of an indictable offence other than an offence punishable by death and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents, ...

Whether there has been a dissent by Robertson J.A. on a question of law may be gleaned both from the formal judgment of the British Columbia Court of Appeal and from the reasons for judgment of the three members of that Court who sat on the accused's appeal from his conviction.

The formal judgment, so far as relevant, is in these words:

This Court Doth Order and Adjudge that ... the appeal from conviction aforesaid be and the same is hereby dismissed, the Honourable Mr. Justice Robertson who would have allowed the appeal dissenting with respect to the function of the Court under subparagraph 613(1)(a)(i) of the Criminal Code.

Section 613(1)(a)(i) is as follows:

On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit, on account of insanity, to stand his trial, or against a special verdict of not guilty on account of insanity, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

What is said by counsel for the appellant to be the question of law upon which Robertson J.A. dissented is the misinterpretation of s. 613(1)(a)(i) in the exercise by the majority of the British Columbia Court of Appeal of its function thereunder. In considering this issue, it is necessary to avoid blurring it by reliance on the unobjectionable (and in this case, indeed, exemplary) charge of the trial judge to the jury. Whether the trial judge has properly discharged his function is one thing, and is not disputable here; whether the Court of Appeal has done so is quite a different thing.

There is a similar need, on the question under consideration, of distinguishing the function of the jury and the function of the Court of Appeal in examining the jury's verdict under the prescriptions of s. 613(1)(a)(i). If there is no evidence upon which a properly-instructed jury could convict, that would raise a question of law under s. 613(1)(a)(ii); and, moreover, if at the close of the Crown's case the trial judge concludes that there is no case to go to the jury he would direct that a verdict of acquittal be entered. However, if the case goes to the jury, either after election by the accused not to offer evidence (as in this case) or after evidence is also given by the defence, the fact that the jury convicts on the evidence is not, ipso facto, determinative of the inapplicability of s. 613(1)(a)(i). The difference between the question whether there is any evidence upon which a jury may convict and the question whether "the verdict is unreasonable or cannot be supported by the evidence" (and I emphasize the words "any" and "the") is not only the difference between s. 613(1)(a)(ii) and s. 613(1)(a)(i) but is the central matter that must engage the provincial appellate Court when its jurisdiction is invoked on an appeal from conviction on the grounds stated in s. 613(1)(a)(i). Otherwise, the invocation of the provincial appellate Court's power under s. 613(1)(a)(i) becomes an exercise in futility and obliges an appellant to limit himself or herself to resort to s. 613(1)(a)(ii) on a question of law.

The distinction that I have noted in the powers vested in the provincial appellate Court under s. 613(1)(a)(i) and (ii) has been part of the Criminal Code since the introduction of those provisions, in substantially the same wording, by 1923 (Can.), c. 41, s. 9. The fact that it would generally be a narrow jurisdiction that a provincial appellate Court would exercise under s. 613(1)(a)(i) does not permit it to abdicate judgment, however tempting or comforting it would be to rest on a jury's verdict simpliciter. Certainly, it could become a nice question of judgment whether the evidence, although sufficient to permit the case to go to a jury, is yet not enough to support the verdict, or whether, on the evidence as a whole the verdict is unreasonable.

The dissent of Robertson J.A. is on this very point, namely, that his brethren of the majority rested their dismissal of the accused's appeal on the ground that there was evidence upon which the jury could convict. I read their reasons to say exactly that, whether they meant it or not.

The matter before this Court does not arise in a trivial case, although I hasten to say that it should make no difference whether an accused is here, on the point under discussion, in a matter as grave as non-capital murder or in one infinitely lighter. It arises, moreover, not upon a verdict based upon a conflict of oral testimony as to whether what the accused did amounted to non-capital murder but, rather, upon the identification of the accused by the wife of the victim, uncorroborated in any particular save by her reiteration, and with her evidence of the

occurrence completely shaken by the evidence of various physical facts which simply do not square with her narrative. The trial judge said in the course of his charge that “the Crown’s case is difficult and seems to me a bit puzzling”. There was no motive for the accused to kill the victim; and the trial judge rightly added in this connection that “where there is no motive proved the effect is to make it that much less likely that the man is the man who killed”.

Of course, to convict, the jury must have accepted the identification evidence; it must have treated the wife of the victim as a credible witness in that respect. But the credibility of a witness to a jury cannot alone invalidate the contention that their verdict is unreasonable or cannot be supported on the evidence as a whole. It is my view that this is the mistake that the majority of the Court of Appeal made in their approach to s. 613(1)(a)(i). The reasons of both Branca J.A. and of Taggart J.A. explicitly recognize the incompatibility of the physical evidence, as, for example, where in the room the victim was found after the fatal shooting and where blood was found, with the testimony of the victim’s wife as to what happened after she admitted the person, said by her to be the accused, to the motel unit occupied by her and her husband. Branca J.A. dealt with s. 613(1)(a)(i) as follows:

Can it be said that the verdict of the jury in this case is perverse, that is, that the verdict is so patently unreasonable and unjust as to satisfy this Court that no reasonable jury of twelve men, considering the evidence as a whole and acting judicially in accordance with judicial instructions, would reach the verdict in question? It is only on this basis that a verdict given by a jury may be considered as perverse. However, a verdict cannot be said to be perverse where there is evidence to support the conclusion arrived at by the jury particularly where the instructions from the learned trial Judge are as full and as fair and as lucid as they were in the instant case.

This, in my view, is patent error which is underlined in the following portion of the dissenting reasons of Robertson J.A.:

It being the duty of the court to reach a conclusion whether the verdict is unreasonable or cannot be supported by the evidence, the court must consider the weight of the evidence. Here undoubtedly the court can properly be influenced by the weight that the jury must have given to it (particularly where there is conflict between the evidence of different witnesses), but this does not relieve the court of the duty to reach its own conclusion. For the court to say, “Yes, it is our conclusion that the verdict is unreasonable or cannot be supported by the evidence, but the jury is the finder of facts and obviously thought that the verdict was reasonable and could be so supported, and so we shall not interfere” is, in my opinion, to exercise the Court’s function in something less than a judicial fashion. In the final analysis, it is an abdication by the Court in favour of the jury, an abnegation by the Court of its judicial duty. By such an attitude the Court is declining to give effect to conclusion and opinion that the appellant was entitled to have it arrive at.

The error of Branca J.A. is compounded by the concluding sentence of his reasons when he said:

The fact that he did not testify did not relieve the Crown of the duty of proving his guilt beyond a reasonable doubt, but where as here there was evidence of a direct nature which inculpated him and which the jury accepted as truthful, then this Court may well consider his failure to testify as a factor in disposing of this appeal.

The reference to failure to testify, if it can have any significance at all on an appeal by an accused, can go only to the dismissal of the appeal on the ground that there was no substantial wrong or miscarriage of justice, a matter that is related not to s. 613(1)(a)(i) but to s. 613(1)(a)(ii) relating to a wrong decision on a question of law. Indeed, in his concluding sentence Branca J.A. reaffirms what I have said is a mistaken view of the function of an appellate Court under s. 613(1)(a)(i); to say, as he does, that the appeal fails because there is evidence inculpating the accused which was accepted by the jury is to disregard the duty fixed by s. 613(1)(a)(i).

Even if the reasons of Taggart J.A. did not disclose the error which is evident in those of Branca J.A., that would not affect the conclusion that the appeal is properly before this Court under s. 618(1)(a). In my opinion, however, they do disclose the same erroneous approach. This is what he said:

Undoubtedly there was evidence tending to weaken Mrs. MacDonald's evidence of identification but in the final analysis it was for the jury, after directions from the presiding Judge which I can only describe as being scrupulously fair to the appellant, to decide whether to accept or reject the evidence of identification. In these circumstances I cannot say that the jury were perverse in accepting evidence of identification nor is this a case where this Court should apply the provisions of Code s. 613(1)(a)(i).

This is simply a rejection of the contentions of the appellant under s. 613(1)(a)(i) on the ground that the jury was entitled to accept the identification evidence, and that acceptance accordingly excluded perverseness or any interference with their verdict on the ground that the verdict, on the whole of the evidence, was unreasonable. It is not an assessment by Taggart J.A. of the weight of the evidence, which is included in the duty laid upon the provincial appellate Court by s. 613(1)(a)(i). The members of that Court must surely weigh the evidence in bringing their own judgment to bear on the issue whether the jury's verdict is unreasonable or cannot be supported by the evidence. They are quite entitled to substitute their opinion for that of the jury on that issue.

I have already adverted to the fact that an appellate Court may be reluctant to upset a jury verdict on simply a scrutiny of a lifeless record. Such reluctance must not, however, be translated into a principle of non-reviewability, and this, in my opinion, is what has happened in the present case. I readily agree that it is oversimplification to make the test of interference whether the appellate Court would have given the same verdict. That cannot be known until there has been full reconsideration of the record of evidence upon which the verdict was based. Such reconsideration may very well dispose the appellate Court to say that, although we might not have arrived at the same verdict, we do not think it is unreasonable, nor do we think that it is unsupported by the whole of the evidence. On the other hand, the reconsideration might lead to the conclusion that the verdict should be upset on one or other of the stated grounds. The

difficulty that s. 613(1)(a)(i) presents is in its invitation to verbal formulas which are rationalizations of conclusions reached otherwise. Section 613(1)(a)(i) is a source of power which a provincial appellate Court can use liberally or restrictively. The Supreme Court of Canada cannot monitor that use when the provincial appellate Court has shown that it is its independent assessment that governs, albeit there is understandable acknowledgment of the advantages possessed by the jury. That, however, is not this case.

The majority of the British Columbia Court of Appeal in the present case failed to be responsive to their function under s. 613(1)(a)(i) which was stated by that Court, differently constituted, in *R. v. Inglehart*[2], where Bull J.A., speaking for the Court, said this (at p. 215):

It is not the function of the Court to retry an appellant or decide his innocence or guilt. That is for the jury. However, it is the duty of the Court to decide whether a verdict of the jury is reasonable, whether it can be supported, having regard to the evidence. It should set aside a verdict of a jury, even if there is some evidence upon which the latter could find guilt, if it is determined that the charge is not proved with a certainty necessary to support a verdict of guilty and on the facts a conviction would be unsafe and the verdict on the whole unsatisfactory.

Branca J.A. took this approach in the later case of *R. v. Mohinder Singh Dhillon*[3], as did Robertson J.A. who participated in that appeal. In the present case, Robertson J.A. followed it again but Branca J.A. did not. In following it, Robertson J.A. concluded upon an extensive review of the evidence, both testimonial and physical, that “the testimony put forward in support of the Crown’s case was too unsafe, its nature was too dubious, to rest a conviction on it, and the verdict was, therefore, unreasonable and not supported by the evidence”. In the result, he would have allowed the appeal, quashed the conviction and directed an acquittal.

In my opinion, the same result should have been reached by the majority, had they exercised their reviewing function under a proper appreciation of the duty demanded of them by s. 613(1)(a)(i). Their error in this respect was on a question of law upon which there was a dissent, and this Court thus has jurisdiction in this appeal. Having that jurisdiction, this Court is empowered by s. 623(1) of the Criminal Code to make the order which the provincial appellate Court might have made upon a proper appreciation of the law. In this respect, I can add nothing to what Robertson J.A. has said in his careful judgment, and I would, accordingly, allow the appeal, set aside the conviction and enter a verdict of acquittal. Although counsel for the accused and for the Crown were content to have the case remitted to the Court of Appeal for reconsideration under the view of s. 613(1)(a)(i) which that Court ought to have taken, I see no advantage in doing so in this case.

As a postscript to these reasons, I refer to the recent judgment of the House of Lords in *Stafford v. Director of Public Prosecutions*[4], in which I find support for my view of the independent function of an appellate Court under s. 613(1)(a)(i). The House of Lords was concerned with s. 2(1) of the Criminal Appeal Act, 1968 (U.K.), c. 19 which, inter alia, directs the Court of Appeal to allow an appeal from conviction “if they think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory”. This

provision replaced s. 4(1) of the Criminal Appeal Act, 1907 (U.K.), c. 23, which was the source of our s. 613(1)(a). Although there is a reference in the reasons of Lord Kilbrandon (reasons were also delivered by Viscount Dilhorne, by Lord Diplock and by Lord Cross of Chelsea) to the view that the 1968 provision may have enlarged the authority of the Court of Appeal beyond that given by the 1907 Act, the reasons of all the Law Lords make it clear that the Court of Appeal in exercising its appellate function is to do so according to what “they think”.

The *Stafford* case was one in which fresh evidence was adduced on appeal, and it was in the light of that evidence as well as of the record at trial that the Court of Appeal considered whether the conviction should be set aside as unsafe or unsatisfactory. It declined to do so, and the issue on further appeal was whether it ought to have asked itself whether the jury might have had a reasonable doubt even if the Court of Appeal itself did not. The House of Lords made it quite clear that it was for the Court of Appeal, or for the House of Lords on further appeal as in this case, to make their independent determination.

Lord Kilbrandon did say that, under the 1907 Act, emphasis was laid not so much on unreasonableness of the verdict but on whether it was unsupported by the evidence; and he stated that verdicts which were supported by evidence which in law the jury could accept were held to be unassailable. I do not, as these reasons show, take so narrow a view of the appellate Court’s function; and Lord Kilbrandon noted that it would have been possible for the Courts, after 1907, to have said that if a verdict was unsafe or unsatisfactory it was not reasonable. That is my view, and it is illustrated in the following passage in Lord Kilbrandon’s reasons (at p. 769):

A conviction depending solely on the fleeting identification by a single stranger could, for example, have been upheld, though on a different view of the 1907 Act it would have been possible to condemn it as unreasonable, just as today it would very probably be thought unsafe or unsatisfactory, and be set aside on those grounds.

Appeal dismissed, SPENCE and LASKIN JJ. dissenting.

Solicitor for the appellant: Thomas A. Dohm, Vancouver.

Solicitors for the respondent: Alexander, Guest & Co., Vancouver.

[1] [1973] 4 W.W.R. 234, 11 C.C.C. (2d) 137.

[2] [1968] 1 C.C.C. 211.

[3] [1973] 1 W.W.R. 510.

[4] [1973] 3 All E.R. 762.

**Source & reproduction note**

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**        <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/5430/index.do>

**CASE PAGE**                <https://chat.esheria.ai/case-law/canada/corbett-v-r-1973>

Prepared on 24 October 2026 · Esheria