
CANADA / JUDGMENT

R. v. Subramaniam

2022 BCCA 141

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 141 R. v. Subramaniam

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Subramaniam,

2022 BCCA 141

Date: 20220419

Docket: CA47073

Between:

Regina

Respondent

And

Rajkumar Subramaniam

Appellant

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Abrioux

On appeal from: Orders of the Supreme Court of British Columbia, dated

October 18, 2019 (conviction) and October 21, 2020 (sentence)

(R. v. Subramaniam, New Westminster Docket X080597).

Counsel for the Appellant:

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Counsel for the Respondent:

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Place and Date of Hearing:

Vancouver, British Columbia

October 26, 2021

Place and Date of Judgment:

Vancouver, British Columbia

April 19, 2022

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Fitch

Summary:

The appellant appeals from his conviction by jury of unlawful importation of a controlled substance and possession of a controlled substance for the purpose of trafficking. He alleges that the trial judge erred in his instructions to the jury in three ways: by leaving wilful blindness with the jury and his instructions on that issue; in his instructions on the fact-finding process; and in his instructions on the control element of possession of a controlled substance.

Held: Appeal allowed. Wilful blindness was properly left with the jury and the instructions on wilful blindness did not, standing alone, warrant intervention. The judge's instructions, however, viewed cumulatively were confusing, and it could not be said that the jury was left with no misapprehension as to the correct burden and standard of proof to apply. The instructions on the fact-finding process, in particular, may have left the jury in a position to convict the appellant on a standard lower than proof beyond a reasonable doubt; this error could not be cured by reading the charge as a whole. The curative proviso was not applicable because it could not be said that the verdict would be the same had this error not been made.

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Reasons for Judgment of the Honourable Mr. Justice Abrioux:

I. Introduction

- [1] On October 18, 2019, following an eight-day jury trial, the appellant was convicted of unlawful importation of a controlled substance contrary to s. 6(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA] and possession of a controlled substance for the purpose of trafficking contrary to s. 5(2) of the CDSA.
- [2] Mr. Subramaniam challenges these convictions on several grounds, which I shall outline below.
- [3] He also seeks to tender fresh evidence, including a document entitled "U.S. Customs and Border Protection Person Encounter Detail", which confirms that he entered the United States on the date of the alleged offences, July 1, 2014, at 11:03 a.m. He submits this evidence relates to a key issue at the trial, being the length of time he was in the United States that day, and provides "strong corroborative evidence" of his version of events.
- [4] The appellant testified at the trial and his credibility was clearly central to the issues the jury had to decide.
- [5] For the reasons that follow, I would allow the appeal.

II. Background

- [6] I shall summarize the key evidence at the trial as it relates to the issues on appeal.
- [7] On July 1, 2014, at approximately 7:30 pm, Mr. Subramaniam attempted to cross the Pacific Highway border crossing from the United States into British Columbia. He was driving a Mitsubishi Montero. At the primary inspection booth, Mr. Subramaniam encountered a Canada Border Services Agency ("CBSA") officer, Officer Hui, who referred him for secondary inspection. There was some dispute at trial over the precise details of their interaction. The Crown relied on Officer Hui's testimony that Mr. Subramaniam acted suspiciously and made inconsistent statements, while Mr. Subramaniam's evidence was that Officer Hui simply misunderstood his statements, including when he had entered the United States earlier that day.
- [8] Border officers testified that Mr. Subramaniam made statements that he had crossed into the United States at around 8 a.m., while Mr. Subramaniam testified that he had left his home at 8 a.m. but did not cross the border until around 11 a.m. The fresh evidence sought to be tendered relates to this issue.
- [9] Another CBSA officer, Officer Sangha, conducted a secondary search of the Montero. He noted that the carpeting in the rear cargo area appeared newer than the carpeting elsewhere in the vehicle and found a small aftermarket storage tray built into the floor. On further

inspection, he also observed a larger metal box compartment, but was unsure how to access this area. He sought assistance from another CBSA officer who used an upholstery tool to lift the floor. The officers were then able to observe, but not access, several packages wrapped in brown packing tape. At this point, the Montero was moved to a secure area and the officers sought further assistance from Superintendent Hainsworth.

- [10] Over the course of several hours, CBSA officers attempted to access the larger compartment. During these attempts, the officers found hidden wiring and a device called a "DroneMobile" concealed in the dashboard of the Montero, which allowed for GPS tracking of the Montero and remote unlocking of its doors. When the officers ultimately gained access to the compartment, they found 33 packages wrapped in brown tape. Mr. Subramaniam was arrested and the packages, a BlackBerry device, paystubs, and receipts, were seized. The packages were later confirmed to contain 14.79 kilograms of methamphetamine, with an approximate wholesale value of \$375,000 or a street value of \$1.5 million.
- [11] At the trial, both the Crown and the defence agreed that the key issue was whether Mr. Subramaniam knew of the secret compartment and that it contained a controlled substance.
- [12] Mr. Subramaniam testified that he had no knowledge of the DroneMobile device, the secret compartment where the drugs were located, or the methamphetamine. In closing submissions, the defence argued that the appellant had unwittingly trafficked methamphetamine across the border, as he had no knowledge of the drugs and did not notice anything unusual about the vehicle. The defence theory was that the real individuals involved in the drug scheme were the appellant's brother, Luckshandran "Lucky" Subramaniam, and two of Lucky's alleged associates, Zemaan Chaudry and Rohen Sharma, and that these individuals used the DroneMobile device to facilitate trafficking.
- [13] In support of this theory, the defence relied on evidence of the timing of Mr. Subramaniam's crossing into the United States and the details of Mr. Subramaniam's purchase of the Montero.
- [14] The jury was provided with both oral and written instructions. I shall refer to the relevant portions of both the judge's opening comments to the jury and his final instructions as they relate to the various grounds of appeal.

III. On Appeal

- [15] Counsel for Mr. Subramaniam contends that the trial judge erred: (1) by leaving wilful blindness with the jury and in his instructions on this issue; (2) in his instructions regarding the fact-finding process, in particular by requiring the jury to convert all probable evidence into findings of fact; and (3) in his instructions on the control element of possession of a controlled substance.

- [16] The Crown responds that the judge properly left the question of wilful blindness with the jury and that his instructions on both that issue and control for the purposes of possession contained no reversible errors.
- [17] As far as the alleged errors in the fact-finding process are concerned, the Crown accepts that a portion of the judge's instructions "leaves something to be desired". It submits, however, that when the instructions are reviewed as a whole, the jury was properly charged and no reversible error was made.

IV. Discussion

A. Standard of Review

- [18] This was succinctly summarized by Dickson J.A. in *R. v. Chen*, 2020 BCCA 329:
- [21] Appellate courts consider jury charges fairly, contextually and as a whole. They adopt a functional approach to reviewing a charge and ask whether, when viewed as a whole, it enabled the jury to decide the case according to the law and the evidence. The salient question for determination is whether the trial judge instructed the jury properly, not whether the judge instructed the jury perfectly: *R. v. Calnen*, 2019 SCC 6 at paras. 6-8.
- [22] Trial judges are afforded considerable discretion and flexibility in crafting their jury charges. No particular set of words is mandatory and, when reviewing a charge, an appellate court will focus on its content, not its form

[Emphasis added.]

- [19] It is the general sense of the words that matters, not whether the judge recited a particular formula; the specific words used are a matter within the discretion of the trial judge and depend on the circumstances of the case: *R. v. Daley*, 2007 SCC 53 at para. 30.

B. Did the judge err in leaving wilful blindness with the jury and in his instructions on this issue?

- [20] On this ground of appeal, the appellant contends that the judge erred by:

- leaving the issue of wilful blindness with the jury;
- lowering the burden of proof for criminal liability by indicating that wilful blindness could be established on a standard of reasonable possibility; and
- failing to link wilful blindness to the subject matter of the charges--namely, a controlled substance.

- [21] Essentially, the appellant submits that since Mr. Subramaniam's knowledge was the key issue at trial, it was improper for the judge to leave "an additional, speculative option of wilful blindness to the jury". He says this error was compounded by the judge misstating the test for wilfulness blindness thus allowing the jury to "bypass the criminal burden of proof for mens rea".

[22] The Crown argues that wilful blindness was properly left with the jury since there was evidence from which the jury could conclude that the appellant knew about the secret compartment.

[23] In my view, wilful blindness was properly left with the jury. I agree with the Crown that in the circumstances of this case, wilful blindness would relate to the appellant's knowledge that a controlled substance was in the secret compartment. There was a body of circumstantial evidence from which it would have been open to the jury to conclude that the appellant was aware of that compartment, including that:

- Mr. Subramaniam had owned the Montero for over a year at the time of the offence;
- significant modifications had been made to the vehicle that increased its value as a means of smuggling;
- an account for the DroneMobile device was activated in the appellant's name 11 days after he purchased the vehicle; and
- bags of groceries had been placed on top of the area where the shallow tray, newer carpet, and secret compartment were located.

[24] The next issue is whether the judge's instructions had the effect of lowering the burden of proof for criminal liability by indicating that wilful blindness could be established on a standard of reasonable possibility. In that regard, the appellant takes issue with the following passage:

In the present case, there is no direct evidence of wilful blindness on the part of Mr. Subramaniam. However, I must explain this aspect of "knowledge" to you because, as I will discuss later in this Charge, you will, as you review the circumstantial evidence, consider plausible theories or reasonable possibilities that could explain or account for the evidence before you. If you consider a theory that Mr. Subramaniam might have been wilfully blind, and find that on all the evidence to be a reasonable theory and not mere speculation, such a theory would be consistent with a finding of guilt because knowledge includes wilful blindness.

[Emphasis added.]

[25] In his factum, the appellant argues that:

This instruction was fundamentally flawed because it equated a finding of non-speculative evidence of wilful blindness with a finding of guilt. This instruction, which was the only direction the jury received on wilful blindness, indicated that this alternative route to proving the mens rea only required a threshold of proof of a "reasonable possibility" or "plausible theory".

[26] The Crown's position is that this impugned instruction was

part of a larger charge and read as a whole, the charge clearly conveyed the proper standard of proof to the jury. The wilful blindness instruction would not have conveyed to the mind of the jury that it was open to them to convict on a lesser standard than reasonable doubt. Only by isolating a single passage and taking it out of context would any concern arise.

[27] In that regard, the judge did instruct the jury that "knowledge includes wilful blindness" and that the elements of the offences including knowledge must be proven beyond a reasonable doubt. An example of this is found in the following passage of the instructions:

The second thing the Crown must prove, knowledge of possession, is not so straightforward, and along with the knowledge and intention elements of Count 1 I have already discussed, I suggest this is the area which will dominate your deliberations. To convict Mr. Subramaniam on this count, you will have to be satisfied beyond a reasonable doubt that he knew there was a controlled substance in his vehicle with, again, wilful blindness being included in the definition of knowledge.

[Emphasis added.]

However, I note that the impugned instruction on wilful blindness, at para. 24 above, was provided later in the charge.

[28] In my view, there is an overlap between this aspect of the appeal regarding the wilful blindness instruction and the final ground which relates to the instructions regarding the fact-finding process generally.

[29] While the impugned instruction was problematic, I would not allow the appeal on this ground alone. I am not satisfied that, based on this instruction alone the jury would have failed to understand that the essential element of knowledge--which it had been instructed included wilful blindness--had to be established by the Crown beyond a reasonable doubt.

[30] I would also not accept the appellant's submission that the instructions failed to link wilful blindness to the subject matter of the charges--namely, a controlled substance.

[31] I am satisfied that the instructions as a whole made it clear to the jury that the principal factual issue for them to decide was whether the appellant knew of the existence of the secret compartment and its contents.

[32] Accordingly, I would not accede to this ground of appeal.

[33] And yet for the reasons I shall explain, the charge on wilful blindness, in my view, contributed to final instructions which when considered as a whole, were unsatisfactory on the issues going to the burden of proof and the approach the jury should take to the fact-finding process.

C. Did the judge err in his instruction to the jury on the control element of possession of a controlled substance?

[34] The appellant challenges the judge's instruction on control, specifically the portion where he stated:

The third thing the Crown must prove is control. Usually, a person has control over something when he or she has it in his or her physical possession and knows that she has it in his in his or her possession. Here you do not need to find that Mr. Subramaniam had specific knowledge of how to operate the locking mechanism of the secret compartment in order to find he had control over its contents. It will be open to you to find Mr. Subramaniam had control if you find that he knew of the existence of the secret compartment, and knew it contained a controlled substance.

[35] According to the appellant, this instruction misstated the law on control because:

- it invited the jury to make a finding of control based on knowledge, which collapsed two distinct elements of the offence;
- the judge failed to instruct the jury that control over the vehicle did not equate with a finding of control over the controlled substance; and
- the judge failed to instruct the jury that control is not established upon proof of only passive knowledge of the controlled substance.

[36] I would not accede to this ground of appeal. It bears emphasis that the appellant and Crown agreed, as both told the jury in their opening statements and closing addresses, that the case concerned Mr. Subramaniam's knowledge of the secret compartment and its contents.

[37] In his factum, the appellant argues that the judge essentially instructed the jury that "knowledge was sufficient to prove control". In my view, he did no such thing. Nor did he invite the jury to apply a legal presumption of control. As is apparent from the impugned instruction, the judge simply observed that a person usually has control over something that they knowingly have in their physical possession, and that it was "open" to the jury to find that control had been established.

[38] Furthermore, the charge made it clear from the outset that possession, including the requirement of control, was an essential element that had to be proven by the Crown beyond a reasonable doubt. In my view, it cannot be said that the judge "collapsed two distinct elements of the offence". They were listed and dealt with separately in the jury charge.

[39] Knowledge was the second requirement the judge listed, with control being the third. I agree with the Crown that it was reasonable for the judge in the circumstances of this case to describe the requirement of control in the manner he did: that both the finding of knowledge of the secret compartment containing the methamphetamine, and control of the substance must co-exist with physical possession, and with each other, in order for possession to be proven: *R. v. Morelli*, 2010 SCC 8 at para. 16.

D. Did the judge err in his instructions to the jury regarding its fact-finding process?

1. Introduction

[40] In my view, the appeal turns on this ground.

[41] The impugned instruction on this ground of appeal is found in the introduction to the final jury charge. In his written instructions, under the heading "Evidence and Fact", the judge instructed the jury:

I will go over with you again the meaning of "reasonable doubt", and how that test is different than the test of the "balance of probabilities" or "more probable than not". As I will explain to you, the standard of proof beyond a reasonable doubt applies to every essential element of each charge against Mr. Subramaniam. That standard does not apply to your consideration of whether the evidence has proven facts. If you accept evidence as being probably true, or more probably true than not true, then you must take that evidence as proof of a fact. The use of the "beyond a reasonable doubt" standard comes at a later stage of your analysis, when you consider whether all of the evidence - both the facts you have found, based on evidence accepted by you as probably true, and evidence you do not believe, or have rejected, or are uncertain about - leaves you with reasonable doubt as to Mr. Subramaniam's guilt.

[Italic emphasis in original, underline emphasis added.]

[42] The statement "I will go over with you again" refers to the judge's opening comments to the jury at the outset of the trial. What followed was the first time the judge had instructed the jury on reasonable doubt in the final instructions.

[43] The thrust of the appellant's submission on this ground is that the judge erred in his instructions on the fact-finding process by telling the jury that it "must" convert the evidence they found to be "probably true" into proof of that fact. Mr. Subramaniam says that this instruction usurped the fact-finding independence of the jury, and created a real risk that the jury would convict the appellant on a standard of probability. He submits that neither of these errors are capable of being mitigated by other portions of the charge.

[44] The appellant also emphasizes what the judge instructed the jury a few moments later:

My role in the trial is to serve as the judge of the law. When you decide what the facts of this case are, you must apply the rules of the law I will give you. And, when you decide whether the Crown has proven the essential elements of the offences with which Mr. Subramaniam is charged beyond a reasonable doubt, you must apply the law as I explain it to you my instructions to you during the trial have been recorded, and these instructions I'm giving you now are also being recorded and preserved in this written form. But the Court of Appeal cannot correct any errors you might make in applying the law because your deliberations will be carried out in secret. There will be no record of your discussions for the Court of Appeal to review. Therefore, it is very important that you accept my instructions on the law without question.

[Emphasis added.]

- [45] In its factum, the Crown acknowledges that the underlined sentence in para. 41 above "leaves something to be desired" and submits that "[the judge's] instruction appears to be aimed at explaining to the jury that in considering the evidence in support of a conviction, they were obliged to consider any evidence that was probably true and should not apply the criminal standard of proof".
- [46] In its oral submissions, the Crown went somewhat further, calling the instruction "unnecessary and confusing" but argued that, when the statement was considered within the context of the charge as a whole, it would have been clear to the jury that the criminal standard of proof applied to each of the essential ingredients of the offences.

2. Discussion

Positions of the Parties

- [47] To properly understand the positions of the appellant and the Crown, it is necessary to first place the impugned instruction in the context of where it appears in the charge and the additional instructions which were given by the judge and which may bear on this ground of appeal.
- [48] Before doing so, I would also refer to what the judge told the jury in his opening comments at the commencement of the trial:

You'll note that I've drawn a distinction between evidence and facts. Let me explain. Juries typically have evidence placed before them in a number of forms, mostly in the form of testimony from witnesses, but also possibly photographs or documents. The evidence you hear becomes fact when you decide a particular piece of evidence is more probably true than not.

[Emphasis added.]

- [49] The appellant links this statement to the impugned instruction in the final instructions and argues that "the theory of probability permeates throughout the charge".
- [50] The appellant says that it is clear that questions of fact fall within the exclusive domain of the jury and that judicial interference with the fact-finding process amounts to a "usurpation of the jury's exclusive fact-finding role": *R. v. White*, [1998] 2 S.C.R. 72 at para. 27. Accordingly, while a judge may give an opinion on a question of fact, he or she must also make clear to the jury that "the opinion is given as advice and not direction": *R. v. Gunning*, 2005 SCC 27, at para. 27.
- [51] The appellant's argument is summarized in his factum this way:
62. This instruction was erroneous because it required the jury to convert all probable evidence into "proof of a fact". As a matter of basic principle, this instruction interfered with the fact-finding independence of the jury. The jury was directed to find facts wherever the evidence reached a threshold of more probable than not. A trial judge may express some opinion on the evidence and fact-finding process; however, he or she must also make clear that the jury

is not bound by those opinions, and is not required to "find the facts in a way a judge has indicated"

63. Here, the impugned direction violated the division of responsibilities between the trier of fact and a trial judge. It interfered with the jury's ability to find facts as they saw fit. There are numerous circumstances where a trier of fact would reasonably decline to find a proven fact, despite considering certain evidence to be probably true. This includes where the evidence is contradicted by other credible evidence, or where the fact involves a determination that is central to guilt. The trial judge's unusual instruction required that in every circumstance where the jury found evidence to be probable, it must be converted into a proven fact.

[Emphasis in original.]

- [52] The Crown points to other portions of the charge as a basis for its submission that the impugned statement was later clarified by the judge and argues that when the charge is considered contextually and as a whole, it would have been clear to the jury that the criminal burden of proof applied to the essential elements of both offences contained in the indictment.

- [53] For example, later in his instructions, the judge said:

I also caution you that it is the individual elements that are subject to the test of reasonable doubt, not the individual pieces of evidence. Your task is to judge whether the evidence you accept to be more probably true than not, as a whole, forms a sufficient factual basis for you to conclude that each essential element of the offences has been proven beyond a reasonable doubt.

[Emphasis added.]

- [54] The judge also ended the substantive portion of his instructions by telling the jury:

Finally, I remind you that an inference from the whole of the circumstantial evidence of Mr. Subramaniam having knowledge of the secret compartment, and knowledge that there were controlled substances concealed inside should be the only reasonable inference that the evidence permits. If there is any other reasonable inference inconsistent with Mr. Subramaniam's guilt then you must acquit him, because in that case the Crown will have failed to prove guilt beyond a reasonable doubt. That will be so even if you were to view the alternative inference as unlikely or improbable, because the standard of proof that must be met by the Crown, as I have explained, is much higher than just probability. The test is not whether an inference is probable or improbable, but whether it is reasonable, given the evidence and absence of evidence assessed logically and in light of human experience and common sense.

[Emphasis added.]

[55] The Crown, in its factum, also points to numerous instances in the charge where standard jury instructions were provided, which were correct at law, including, to name a few: that they were the sole judges of the evidence and facts arising from that evidence; that the facts "are the things you choose to believe from the evidence"; and that the jury could only find the appellant guilty after "you consider all the evidence, and only if you are satisfied the crown has proven its case beyond a reasonable doubt".

Analysis

[56] In *R. v. Whitmore*, 2021 BCCA 302 Madam Justice Newbury observed:

[27] In *R. v. Lifchus* [1997] 3 S.C.R. 320, a case that is often the starting-point for the assessment of jury charges concerning reasonable doubt and the presumption of innocence, the Court acknowledged that it was "possible" an error in the instructions as to the standard of proof might not constitute reversible error. The Court cited [*R. v. W.(D.)*, [1991] 1 S.C.R. 742] for the proposition that the verdict ought not to be disturbed "if the charge, when read as a whole, makes it clear that the jury cannot have been under any misapprehension as to the correct burden and standard of proof to apply". On the other hand, if the charge gives rise to the reasonable likelihood that the jury misapprehended the standard of proof, the "verdict generally will have to be set aside and a new trial directed." (*Lifchus* at para. 41.)

[Emphasis in original.]

[57] In my view, the main question to be answered regarding this ground of appeal is whether, reading the charge as a whole, it is "clear that the jury cannot have been under any misapprehension as to the correct burden and standard of proof to apply". Answering this question will entail considering:

- the impugned instruction itself;
- its location in the charge; and
- whether other instructions effectively cured the impugned statement.

[58] First of all, in my view, the impugned statement was more than unusual or "leaving something to be desired". It was, as the Crown noted during the hearing of the appeal, "confusing".

[59] I would go further and say that not only was it unclear as to what the judge was intending to convey to the jury in making the statement, it was also unnecessary.

[60] It also does not accord with suggested model jury instructions. For example, in *Gerry Ferguson et al.*, *Canadian Criminal Jury Instructions*, 4th ed. (Vancouver: The Continuing Legal Education Society of British Columbia, 2005) (loose-leaf updated 2021) at 4.02.7, the suggested charge to a jury on fact and evidence is:

The facts are the things you choose to believe from the evidence. From the facts that you find, you may draw inferences to find other facts, and you may rely on those inferences in determining whether [the accused] is guilty or not guilty. You do not eliminate from consideration evidence you do not believe or have rejected. Evidence that is not accepted may still raise a reasonable doubt. Your verdict is to be reached on the whole of the evidence.

[61] Other model jury instructions do not include a suggested paragraph explaining the difference between evidence and fact, thus avoiding the issues raised with respect to the impugned statement in this case. For instance, the Canadian Judicial Council's model jury instructions include the following instructions on fact and evidence:

You are the sole judges of the facts. You must decide this case only on the evidence presented to you in this courtroom.

In a few moments I will explain the essential elements that the Crown must prove beyond a reasonable doubt to establish [the accused]'s guilt. For the moment, the important point for you to understand is that the requirement of proof beyond a reasonable doubt applies to each of those essential elements. It does not apply to individual items of evidence. You must decide, looking at the evidence as a whole, whether the Crown has proved [the accused]'s guilt beyond a reasonable doubt.

[62] David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Thompson Reuters, 2015) takes a similar approach. It states, in its suggested opening jury instructions: "To decide what the facts are in this case, you may consider only the evidence that you hear and see in the courtroom" (emphasis in original): at 43. However, it does not provide instructions on how to determine which evidence is, or becomes, fact.

[63] Although not articulated as such by the appellant, this ground of appeal raises issues that share some of the features of what has become known as a "Miller error": see *R. v. Miller* (1991), 68 C.C.C. (3d) 517. Such an error is one which "effectively directs the jury to ignore evidence which is neither accepted nor rejected, and limits their consideration of the evidence to only the evidence which the jury accepts as true": *R. v. Skiffington*, 2004 BCCA 291 at para. 16.

[64] The impugned instruction in *Miller*, at 540, was:

Now to this point, ladies and gentlemen, in describing your function I have referred to "evidence" and I have referred to "finding of fact", and they are two different things. Let me try to explain the difference to you.

If you imagine the evidence you have heard as a big pile, what you have to do now is you have to look at the pile and go through the pile and determine what parts of that pile you accept as true and reliable, and you must then remove from the larger pile that part of it which you accept as true and reliable. That second pile becomes the facts or the source from which you make your judgment as to what the facts of the case are. So, evidence is what you have heard, the exhibits that have been received, and the admissions. Facts are the conclusions you draw from the

evidence you accept. So, the first process you go through is to take this big pile of evidence, and out of it to sort the evidence that you accept, and then from that smaller pile to make your findings of fact. There are no facts in this case until you decide that something is a fact. To this point in the trial we have only evidence, not facts.

If you reject evidence, that means it is simply excluded from your consideration, and you proceed to make findings of fact based on the evidence you accept.

[65] With respect to this instruction, the Ontario Court of Appeal said, at 543:

In the present case, the impugned direction did not instruct the jury to apply proof beyond a reasonable doubt in two stages. In our opinion, however, it was a misdirection to instruct the jury to examine the evidence in a first stage, to eliminate all evidence except that which the jurors accepted as true and reliable (a lower standard than proof beyond a reasonable doubt), and then to consider only the residual in arriving at their verdict. This involved the injection of artificial rules for the jury and constituted "an intrusion into the province of the jury". We believe it is wrong and prejudicial to confine the jury, in their initial findings of fact, to evidence accepted as true and reliable; evidence which is neither rejected nor accepted should survive to the final stage of the jury's determination on the crucial application of reasonable doubt.

The Court held that the misdirection could not be cured by reading the charge as a whole; it allowed the appeal and ordered a new trial.

[66] Similar errors were advanced in *Skiffington and R. v. Plewes*, 2000 BCCA 278, although in the former the appeal was dismissed. In *Plewes*, however, the jury charge included the instruction that "[t]he things that you choose not to accept must not be taken into account when arriving at your verdict": at para. 22. This error constituted the basis for allowing the appeal and ordering a new trial.

[67] In this case, the question then becomes whether, taking the cumulative view, it can be said that other instructions effectively cured the impugned statement, which it is of assistance to repeat here: "[i]f you accept evidence as being probably true, or more probably true than not true, then you must take that evidence as proof of a fact".

[68] In its submissions, the Crown points to other portions of the instructions which were correct at law, including those mentioned at para. 53 and submits that any confusion with respect to the impugned statement was later clarified.

[69] While it cannot be said with any degree of confidence what the judge was intending to convey by making the statement in question to the jury, the fact remains that it was contained in his instructions; it is not possible to ascertain what use the jury made of this instruction when engaged in their deliberations.

- [70] When I consider the charge as a whole, I conclude that the impugned instruction could be seen to invite the jury to place the evidence into two "piles"--to use the expression from Miller--the first being what they accepted as being probably true, or more probably true than not true, and the second "pile" consisting of evidence they did not accept. Then, if the evidence fell into the former "pile", the jurors may have felt that they "must take that evidence as proof of a fact".
- [71] From this, there was a reasonable likelihood that the jury may have misapprehended the standard of proof by concluding that a proven fact, for example, the appellant's knowledge regarding the secret compartment and what it contained, was a factual issue, to be established on a balance of probabilities as opposed to an essential element of the offence to be proven by the Crown beyond a reasonable doubt.
- [72] To put the matter another way, in my view there was a realistic possibility that, having been instructed that it must find facts if they were probably true, the jury could have grounded their conviction on the basis that the Crown had established knowledge based on a standard of probably true facts. This would be contrary to the correct approach whereby, having considered all of the evidence--including that which they did not believe--the jury was satisfied that the Crown had proven the essential elements of the offences beyond a reasonable doubt.
- [73] The context of the statement is also significant. First, I consider the judge's instruction at the commencement of the trial that "[t]he evidence you hear becomes fact when you decide a particular piece of evidence is more probably true than not".
- [74] There is then the impugned instruction on fact-finding, contained in the introduction to the charge. Notwithstanding other standard instructions which were correct at law, for example at para. 53 above, there is also the problematic instruction in the wilful blindness portion of the charge which, for convenience, I will repeat:
- [C]onsider plausible theories or reasonable possibilities that could explain or account for the evidence before you. If you consider a theory that Mr. Subramaniam might have been wilfully blind, and find that on all the evidence to be a reasonable theory, and not mere speculation, such theory would be consistent with a finding of guilt, because knowledge includes wilful blindness.
- [Emphasis added.]
- [75] While, as noted earlier, I would not allow the appeal on the ground of the wilful blindness portion of the charge alone, this instruction was indicative of what was, as a whole, a confusing charge.
- [76] It is true, as the Crown submits, that the final substantive instructions to the jury before they retired to deliberate included the following:

If there is any other reasonable inference inconsistent with Mr. Subramaniam's guilt then you must acquit him, because in that case the Crown will have failed to prove guilt beyond a reasonable doubt. That will be so even if you were to view the alternative inference as unlikely or improbable, because the standard of proof that must be met by the Crown, as I have explained, is much higher than just probability.

[77] However, this statement accentuates the potential dilemma the jury was in. Essentially, the jury could not follow both this approach and that contained elsewhere in the charge, in particular the impugned statement which was made at the commencement of their instructions.

[78] Accordingly, since it is not clear that "the jury cannot have been under any misapprehension as to the correct burden and standard of proof to apply", the charge was fundamentally defective in this regard.

E. The curative proviso

[79] The Crown submits that if errors were made, they should be considered under the curative proviso found in s. 686(1)(b)(iii) of the Criminal Code, R.S.C. 1985, c. C-46. That section of the Criminal Code provides:

686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(b) may dismiss the appeal where

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred,

[80] There are two categories of error that can be cured by this provision. The first is where there is an "error that is harmless on its face or in its effect", such that the error could not have affected the verdict. The second is where there are errors serious enough to justify a new trial, but for the fact that the evidence adduced was so overwhelming that the reviewing court concludes there was no substantial wrong or miscarriage of justice: *R. v. Khan*, 2001 SCC 86 at para. 26.

[81] The curative proviso can only be applied where there is no reasonable possibility that the verdict would have been different had the error not been made: *Khan* at para. 28.

[82] For the reasons I have identified, the charge as a whole was confusing and it cannot be concluded that the jury was not left with the possibility of convicting the appellant based on a finding of probable guilt.

- [83] Nor can it be said that the evidence was so overwhelming that a conviction was inevitable, that is one so strong that the trier of fact would inevitably convict the accused on a retrial: Khan at para. 31. As Deschamps J. explained in R. v. Trochym, 2007 SCC 6:
- [82] This standard should not be equated with the ordinary standard in a criminal trial of proof beyond a reasonable doubt. The application of the proviso to serious errors reflects a higher standard appropriate to appellate review. The standard applied by an appellate court, namely that the evidence against an accused is so overwhelming that conviction is inevitable or would invariably result, is a substantially higher one than the requirement that the Crown prove its case "beyond a reasonable doubt" at trial. This higher standard reflects the fact that it is difficult for an appellate court, in particular when considering a jury trial, since no detailed findings of fact will have been made, to consider retroactively the effect that, for example, excluding certain evidence could reasonably have had on the outcome.
- [84] This was a circumstantial evidence case, including the appellant's exculpatory testimony and evidence in the Crown case, that there was a locked box in the car which someone other than the appellant may have had control.
- [85] There was a risk, given that this was a jury trial, that the finder of facts' reasoning process may have been flawed and the impact of that potential flaw cannot be known.
- [86] Accordingly, in my view, the curative proviso cannot apply.

V. Disposition

- [87] In light of the disposition I propose, it is not necessary to consider the application to adduce fresh evidence.
- [88] I would allow the appeal, set aside the convictions and order a new trial on both counts of the indictment.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Fitch"

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