SCC File No. 40839

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

B E T W E E N:

HIS MAJESTY THE KING

APPELLANT /
RESPONDENT ON CROSS-APPEAL

- and -

JENNIFER PAN

RESPONDENT /
APPELLANT ON CROSS-APPEAL

-and-

DAVID MYLVAGANAM, DANIEL CHI-KWONG WONG, and LEONARD CRAWFORD

RESPONDENTS
APPELLANTS ON CROSS-APPEAL

-and-

ATTORNEY GENERAL OF ALBERTA

INTERVENER

FACTUM OF RESPONDENT ON APPEAL and FACTUM OF APPELLANT ON CROSS-APPEAL JENNIFER PAN, RESPONDENT/APPELLANT ON CROSS-APPEAL

(Pursuant to Rules 42 and 43 of the *Rules of the Supreme Court of Canada*)

HENEIN HUTCHISON ROBITAILLE LLP
235 King Street East
Toronto, ON M5A 1J9

Stephanie DiGiuseppe
Jessica Proskos
Tel.: (416) 368-5000
Fax: (416) 368-6640
Email: sdigiuseppe@hhllp.ca
jproskos@hhllp.ca

Counsel for the Respondent / Cross-Appellant, Jennifer Pan

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Respondent / Cross-Appellant, Jennifer Pan

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office – Criminal
720 Bay Street, 10th Floor
Toronto, ON M5G 2K1

Susan Reid
Jeremy Streeter
Stephanie Lewis
Tel: (416) 326-4600
Fax: (416) 326-4656
Email: Susan.Reid@ontario.ca
Jeremy.Streeter@ontario.ca
Stephanie.A.Lewis@ontario.ca

Counsel for the Appellant / Cross-Respondent, His Majesty the King

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, Ontario K1P 1J9

Nadia Effendi
Tel.: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Agent for Counsel for the Appellant / Cross-Respondent, His Majesty the King

JACK GEMMELL
Barrister & Solicitor
103 - 30 St.Clair Avenue West
Toronto, ON M4V 3A1
Tel: (647) 748-3147
Fax: (905) 916-5909
Email: jgemmell@rogers.com

Counsel for the Respondent / Cross-Appellant, David Mylvaganam

PETER COPELAND
Barrister & Solicitor
150 King Street West, Suite 200
Toronto, ON M5G 1J9
Tel: (416) 868-1825
Fax: (416) 868-1826
Email: pcopeland@petercopeland.com

Counsel for the Respondent / Cross-Appellant, Daniel Chi-Kwong Wong

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Matthew Estabrooks
Tel: (613) 786-0211
Fax: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

Agent for Counsel for the Respondent / Cross-Appellant, David Mylvaganam

LOCKYER ZADUK ZEEH
102 Atlantic Avenue, Suite #100
Toronto, ON M6K 1X9

Peter Zaduk
Jessica Zita
Tel: (416) 816-7670
Email: pzaduk@lzzdefence.ca

Counsel for the Respondent / Cross-Appellant, Lenford Crawford

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Matthew Estabrooks
Tel: (613) 786-0211
Fax: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

Agent for Counsel for the Respondent / Cross-Appellant, Lenford Crawford

JUSTICE AND SOLICITOR GENERAL
Appeals Unit
300 Centrium Place, 332-6 Avenue SW
Calgary, AB T2P 0B2

Andrew Barg
Tel: (403) 297-6005
Fax: (403) 297-3453
Email: andrew.barg@gov.ab.ca

Counsel for the Intervener, Attorney General of Alberta

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for Counsel for the Intervener, Attorney General of Alberta

TABLE OF CONTENTS

Tab **Page**

1. FACTUM OF RESPONDENT ON APPEAL 1

PART I – OVERVIEW AND STATEMENT OF FACTS 1

Overview 1

Statement of Facts 2

(a) Pan's Relationship with her Parents 2

(b) "Plan A" to Kill Hann Pan – Spring 2010 5

(c) "Plan B" to Kill Herself – Summer 2010 6

(d) Abandonment of "Plan B" 6

(e) The Evening of the Home Invasion 7

(f) The Target of the Plan 9

(g) The Two Scenarios Jury Instruction 11

(h) Decision of the Court of Appeal for Ontario 12

i. Linking the Offences under Scenario One and Lesser Included Offences 13

ii. Remitting Counts for Retrial 14

PART II – RESPONDENT'S POSITION ON QUESTIONS IN ISSUE 15

PART III – STATEMENT OF ARGUMENT 15

Issue #1: The Lower Court Correctly Interpreted and Applied the Air of Reality Test 15

(a) Air of Reality in the Court Below Conforms to the Jurisprudence of this Court 17

(b) There is No Conflict Between the "Some Evidence" and "Sufficient Evidence" Standard 22

(c) The Court of Appeal Properly Conducted a Limited Weighing of Evidence at the Inference-Drawing Stage 24

(d) There is No Room for Substantive Weighing of the Evidence 25

(e) The Air of Reality Test Properly Considers the Reasonable Doubt Standard 27

(f) The Trial Judge's Error in this Case 29

(g) The Appellate Court Correctly Applied the Test 33

(h) Avoiding Complex Jury Charges is No Reason to Alter the Test 35

Issue #2: The Lower Court Properly Applied the Correctness Standard 36

Issue #3: The Lower Court Correctly Declined to Invoke the Curative Proviso 38

Alternative Routes to Affirm the Lower Court's Order 40

PART IV – COSTS 40

PART V – ORDER REQUESTED 40

PART VI – SUBMISSIONS ON CASE SENSITIVITY 40
PART VII – TABLE OF AUTHORITIES 41

2. FACTUM OF APPELLANT ON CROSS-APPEAL 43
PART I – OVERVIEW AND STATEMENT OF FACTS 43
Overview 43
Statement of Facts 43
PART II – QUESTIONS IN ISSUE 45
PART III – STATEMENT OF ARGUMENT 46
Issue #1: Associated Counts Ought to be Remitted Where Doing Otherwise Would Risk the Possibility of Inconsistent Verdicts 46
(a) The Current Test for Remitting Associated Counts 46
(b) The Proposed Two-Prong Approach 46
(c) The Approach is Consistent with Statutory Interpretation 47
Section 686(1)(a)(i) 47
Section 686(1)(a)(ii) 48
Section 686(1)(a)(iii) 49
(d) The Approach Has Support in the Case Law 50
(e) The Approach is Consistent with the Interests of Justice 53
(f) Application to this Case 54
Issue #2: The Onus Should be on the Crown to Demonstrate Associated Counts Were Not Tainted by Legal Error 55
(a) The Framework Requires Clarification 56
(b) The Cross-Appellant's Proposal 56
(c) There is Support for the Cross-Appellant's Proposed Framework 57
(d) Application to this Case 59
Grounds Advanced by the Co-Respondents / Cross-Appellants 60
(a) The Crown's Use of a PowerPoint Presentation in Closing Submissions 60
(b) Issues Concerning Juror #4 61
(c) Carty's Propensity for Violence 61
PART IV – COSTS 62
PART V – ORDER REQUESTED 62
PART VI – SUBMISSIONS ON CASE SENSITIVITY 62
PART VII — TABLE OF AUTHORITIES 63

FACTUM OF RESPONDENT ON APPEAL

PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The test for determining which routes and verdicts should be left to a jury – the "air of reality" test – has been unaltered in substance for at least a century.[1] The test has been considered by this court in a series of cases. Since the early 2000s, its content has been definitively articulated, its constitutionality has been confirmed,[2] and it has been repeatedly affirmed.

2. In *R. v. Pan*, the Court of Appeal for Ontario conducted a meticulous application of the air of reality test to the evidence at trial and concluded that the trial judge erred by instructing the jury that, when determining the nature of any plan between the accused, there were only two plausible scenarios available on the evidence: either the co-accused conspired to kill both of Jennifer Pan's parents, or they conspired to commit a home invasion at the Pan residence, to which Jennifer Pan was not involved. In its judgement, the unanimous court below found that contrary to the trial judge's instruction, there was a third plausible scenario: it was possible for the jury to find that Pan participated in a plan to kill her father, while having a reasonable doubt as to whether her mother was also a target. The court concluded that the trial judge had erred in failing to leave the lesser and included offences of second-degree murder and manslaughter to the jury.

3. Not only was there an air of reality to the third scenario, but there was substantive evidence before the court supporting a plan to kill only Pan's father. This included Pan's evidence about the home invasion, evidence that she never planned to kill her mother and had a loving relationship with her, evidence about Pan and her father's strained relationship and the demands he made of her, and Pan's evidence that she had previously planned to only have her father killed.

4. A reasonable doubt that leads to an acquittal on the offence charged may arise through evidence or through an absence of evidence. Even if the jury rejected Pan's account in its entirety, the jury could conclude that the evidence in the Crown's case was sufficient to establish a plan to kill Hann Pan, on the criminal standard, but insufficient in respect of a plan to kill Bich-Ha Pan. Where

---

[1] *R. v. Fontaine*, 2004 SCC 27 ("***Fontaine***"), at para. 13.
[2] *R. v. Osolin*, [1993] 4 S.C.R. 595 ("***Osolin***"); *R. v. Cinous*, 2002 SCC 29 ("***Cinous***").

this finding is available, the result is that the jury must be instructed on the lesser included offences of second-degree murder and manslaughter.

5. The "two scenarios" instruction placed the jury in a false dilemma between acquitting Pan of all charges and convicting her of both first-degree murder and attempted murder. As a result of this substantial error, the lower court correctly remitted one count of first-degree murder for retrial. The law is settled and was applied correctly by the lower court. There is no basis to disturb the Court of Appeal's conclusions and the appeal ought to be dismissed, and her cross-appeal granted.

Statement of Facts

6. The Respondent accepts the Appellant's statement of facts but provides the following details in order to properly contextualize the legal issues arising on appeal.

7. On December 13, 2014, Jennifer Pan, David Mylvaganam, Daniel Wong and Lenford Crawford were convicted of the first-degree murder of Bich-Ha Pan (Pan's mother) and the attempted murder of Hann Pan (Pan's father). The four defendants were jointly tried, in addition to another defendant, Eric Carty, who had his charges severed upon his counsel becoming ill.

8. The charges arose from an incident that occurred at Pan's family home on November 8, 2010. On that date, three men entered Pan's home, held the three family members at gunpoint, demanded money, and shot Hann and Bich-Ha Pan. Pan's father survived the shooting, though he was severely wounded. Pan's mother died that evening from her injuries.

9. The Crown's theory was that Pan hired assailants to murder her parents and conspired with them to cover up the murder through a staged home invasion.

(a) *Pan's Relationship with her Parents*

10. Jennifer Pan is a complicated person, who has experienced depression, self-harm, and suicidal ideation. Her father, Hann Pan, had strict expectations of her which she felt she could not meet. When she failed to meet her father's expectations, Pan lied to her parents to avoid disgracing them. Specifically, she lied about her educational milestones, career prospects, and romantic life.

11. In 2009, Pan's relationship with her parents took a marked turn for the worse after she confessed that she had deceived them for years about significant aspects of her life. Contrary to what

she had told them, Pan had not graduated high school, attended Ryerson University or the University of Toronto, graduated with a degree in pharmacy, or volunteered at Sick Kids Hospital.[3]

12. During this time, it was also revealed that Pan had lied to her parents about the status of her relationship with Wong.[4] Pan was not allowed to have a boyfriend; however, she continued a secret relationship with Wong throughout the material time. [5]

13. After Pan's confession to her parents, her father told her to sever her relationship with Wong and return to school.[6] He imposed restrictions on her. She was not allowed out of the house and her electronics were to be taken away.[7] Pan's relationship with her father was particularly strained at this time. She testified that the trust had been lost, that she felt she was not the daughter that he wanted, and that no matter what she did or was willing to do, their relationship would never be the same.[8]

14. In early 2010, after suspicions were raised by her father, Pan confessed to more lies. She was not working at a pharmacy as she had told them, and she had continued to remain in touch with Wong.[9] Her father imposed stricter rules, including grounding, no ability to use the car, a requirement to continue her education, and a prohibition against contact with Wong.[10] When Pan's father later discovered that Wong had called the home,[11] he issued an ultimatum: either stay at home and go back to school or leave with Wong and never return.[12] Pan agreed to terminate her relationship with Wong.

---

[3] J. Pan Testimony (in-chief), Vol. 48, p. 42, at ll. 4-32, p. 43, at ll. 1-16, p. 54, at ll. 30-32, p. 55, at ll. 1-25, p. 58, at ll. 3-5, p. 60, at ll. 5-25 [**Appellant's Record ("A.R."), Part V, Vol. 48**].
[4] J. Pan Testimony (in-chief), Vol. 48, p. 54, at ll. 30-32, p. 55, at ll. 1-25, p. 58, at ll. 3-5, p. 60, at ll. 5-25 [**A.R., Part V, Vol. 48**].
[5] J. Pan Testimony (in-chief), Vol. 48, p. 29, at ll. 28-30; H. Pan Testimony (cross), Vol. 11, p. 11, at ll. 25-29 [**A.R., Part V, Vols. 48 and 11**].
[6] H. Pan Testimony (in-chief), Vol. 8, p. 42, at ll. 13-14 [**A.R., Part V, Vol. 8**].
[7] J. Pan Testimony (in-chief), Vol. 48, p. 61, at ll. 30-32 [**A.R., Part V, Vol. 48**].
[8] J. Pan Testimony (in-chief), Vol. 48, p. 81, at ll. 1-6 [**A.R., Part V, Vol. 48**].
[9] H. Pan Testimony (in-chief), Vol. 8, p. 47, at l. 12 [**A.R., Part V, Vol. 8**]; R. v. Pan, 2023 ONCA 362, ("Court of Appeal decision"), at para. 20 [**A.R., Part V, Vol. 1, p. 13**].
[10] H. Pan Testimony (in-chief), Vol. 8, p. 47, at ll. 19-24 [**A.R., Part V, Vol. 8**].
[11] J. Pan Testimony (in-chief), Vol. 48, p. 79, at ll. 24-27 [**A.R., Part V, Vol. 48**].
[12] H. Pan Testimony (in-chief), Vol. 8, p. 48, at ll. 6-8 [**A.R., Part V, Vol. 8**].

15. Around this time, there was turmoil in the home. Pan's father would not speak to her and ignored her questions.[13] Pan testified that she felt unwanted, unloved and unworthy, as well as angry and resentful at her father for ostracizing her.[14]

16. Pan's relationship with her mother, Bich-Ha Pan, was better than her relationship with her father, and there was little evidence that Pan had any motive or *animus* towards her mother. Pan testified that she had a very close relationship with her mother.[15] While her mother supported her father's rules and restrictions, she did so to conform with cultural expectations and "maintain domestic harmony".[16] Bich-Ha Pan did not fully ascribe to Hann's worldview and was more lenient. She made an effort to integrate Wong into the family, and when Pan's cellphone was confiscated, her mother would give her access to it.[17] Pan testified that she felt heartbroken and "disgusted" with herself for lying to her mother about her education, as her mother put less pressure on her to achieve academic excellence and simply wanted her to do her best.[18] Pan did not see any faults in her mother[19] and agreed with a suggestion on cross-examination that she was the "perfect mother".[20]

17. Other witnesses corroborated Pan's lack of *animus* towards Bich-Ha. Her brother, Felix Pan, testified that Bich-Ha protected Pan from Hann during family arguments.[21] He believed that if his parents separated, he and his sister would live with their mother.[22] Pan's friend Edward Pacificodor and her cousin Michelle Luong also testified that Pan had a loving relationship with her mother.[23]

---

[13] J. Pan Testimony (in-chief), Vol. 48, p. 82, at ll. 24-31 [**A.R., Part V, Vol. 48**].
[14] J. Pan Testimony (in-chief), Vol. 48, p. 85, at l. 32 to p. 87, at l. 28 [**A.R., Part V, Vol. 48**].
[15] J. Pan Testimony (cross), Vol. 50, p. 77, at ll. 25-27 [**A.R., Part V, Vol. 50**].
[16] Court of Appeal decision, at para. 21.
[17] J. Pan Testimony (in-chief), Vol. 48, p. 34, at ll. 6-8, and p. 63, at ll. 30-31 [**A.R., Part V, Vol. 48**].
[18] J. Pan Testimony (in-chief), Vol. 48, p. 22, at ll. 31-32, p. 23, at ll. 24-25 [**A.R., Part V, Vol. 48**].
[19] J. Pan Testimony (cross), Vol. 50, p. 77, at ll. 30-32 [**A.R., Part V, Vol. 50**].
[20] J. Pan Testimony (cross), Vol. 50, p. 310, at ll. 17-19 [**A.R., Part V, Vol. 50**].
[21] F. Pan Testimony (cross), Vol. 6, p. 147, at ll. 22-24 [**A.R., Part V, Vol. 6**].
[22] F. Pan Testimony (cross), Vol. 7, p. 33, at ll. 10-13 [**A.R., Part V, Vol. 7**].
[23] E. Pacificodor Testimony (cross), Vol. 17, at p. 21, at ll. 25-27 [**A.R., Part V, Vol. 17**]; M. Luong Testimony (cross), Vol. 19, at p. 11, at ll. 14-17, p. 17, at ll. 26-30 [**A.R., Part V, Vol. 19**].

(b) *"Plan A" to Kill Hann Pan – Spring 2010*

18. Pan testified that in the spring of 2010, at a time when her relationship with her family was strained, she planned to have her father killed. According to Pan, the plan began with her friend Andrew Montemayor confiding in her about how he wanted to kill his father, which led her to speak to him about killing her own father.[24] Both testified that Pan told Montemayor that she was fed up with the "house arrest" and asked him to help her "get rid of the stress".[25]

19. Montemayor then introduced Pan to his roommate, Ricardo Duncan, to help execute the plan. Pan testified that she asked Duncan to kill her father outside of his place of business and offered him $1,500 (in two installments) to carry out the plan.[26] Pan testified that "Plan A" was ultimately aborted later that summer, when Duncan disappeared with her money and stopped answering her calls.[27]

20. Montemayor and Duncan gave inconsistent evidence at trial about whether Pan wanted to kill both of her parents or only her father in the spring 2010:

a. Montemayor's testimony vacillated between affirming a plan to kill both of Pan's parents and affirming a plan to kill only her father, not her mother.[28] He then testified in re-examination that he was not sure if she mentioned one parent or two;[29]

b. Duncan agreed that Pan approached him, but denied being part of a plan to kill and denied receiving $1,500. He testified that in July 2010, when Pan asked him to kill her parents, he told her to "fuck off", hung up the phone, and did not speak to her again.[30] In cross-examination, Duncan testified that Pan referred to only wanting her "parent" killed.[31] He also said that Pan told him that she only wanted her father

---

[24] J. Pan Testimony (in-chief), Vol. 48, p. 89, at ll. 21-29 [**A.R., Part V, Vol. 48**].
[25] J. Pan Testimony (cross), Vol. 50, p. 153, at 1l. 23-26 [**A.R., Part V, Vol. 50**]; A. Montemayor Testimony (cross), Vol. 29, p. 114, at ll. 25-28 [**A.R., Part V, Vol. 29**].
[26] J. Pan Testimony (in-chief), Vol. 48, p. 92, at l. 3 to p. 94, at l. 21 [**A.R., Part V, Vol. 48**].
[27] J. Pan Testimony (in-chief), Vol. 48, p. 95, at l. 23, to p. 96, at l. 5 [**A.R., Part V, Vol. 4**8].
[28] A. Montemayor Testimony (cross), Vol. 29, p. 355, at l. 6, and p. 114, at l. 29 to p. 115, at l. 2 [**A.R., Part V, Vol. 29**].
[29] A. Montemayor Testimony (re-exam), Vol. 29, p. 356, at ll. 21-22 [**A.R., Part V, Vol. 29**].
[30] R. Duncan Testimony (in-chief), Vol. 30, p. 24, at l. 17 to p. 26, at l. 8 [**A.R., Part V, Vol. 30, PDF 26**].
[31] R. Duncan Testimony (cross), Vol. 30, p. 126, at ll. 21-23 [**A.R., Part V, Vol. 30, PDF 126**].

killed.[32] In re-examination, Duncan adopted a long passage from his statement to police where he refers to a plan to kill "parents".[33] The specific distinction between "parent" in his testimony and "parents" in his police statement was never put to him.

21. Pan testified that "Plan A" never included a plan to have her mother killed. She testified that her mother was *never* the target of a plan to kill, and in fact, made utterances to Montemayor to the effect that she did not want to be separated from her mother.[34]

(c) *"Plan B" to Kill Herself – Summer 2010*

22. In late summer 2010, Pan was isolated, depressed and engaging in self-harm. By August of 2010, she felt "undeserving of life".[35] She had tried to kill herself in the past, but had failed.

23. Pan testified that out of desperation, she formed a plan with Lenford Crawford, whom she knew as "Homeboy" (a friend of Wong's) to organize her own death. Pan testified that she and Homeboy agreed on a price of $10,000 for the killing.[36] Pan gave evidence that she did not plan nor want to have her parents killed during this time. However, she led Wong to believe that the plan was to murder her father, not herself, so that he would not intercede to save her.[37]

24. Pan testified that there were a number of contacts between the parties in September and October 2010 in alleged furtherance of the plan to kill herself.

(d) *Abandonment of "Plan B"*

25. Pan testified that in September 2010, her relationship with her father began to improve. She was feeling more accepted and included in the family and felt that reconciliations with her father were possible.[38] This was in part due to the fact that she had been accepted into a post-secondary institution

---

[32] R. Duncan Testimony (cross), Vol. 30, p. 126, at ll. 27-30 [**A.R., Part V, Vol. 30, PDF 126**]. When asked if Pan "made reference to wanting mom and dad killed", Duncan replied, "Dad, yes.".

[33] R. Duncan Testimony (cross), Vol. 30, p. 171, at ll. 2-32 [**A.R., Part V, Vol. 30, PDF 171**].

[34] J. Pan Testimony (in-chief), Vol. 48, p. 89, at ll. 6-11, and Vol. 50, p. 275, at l. 25 [**A.R., Part V, Vols. 48 and 50**].

[35] J. Pan Testimony (cross), Vol. 50, p. 161, at l. 25 [**A.R., Part V, Vol. 50**].

[36] J. Pan Testimony (in-chief), Vol. 48, p. 119, at ll. 10-12 [**A.R., Part V, Vol. 48]**.

[37] J. Pan Testimony (in-chief), Vol. 48, p. 11, at ll. 1-6, & J. Pan Testimony (cross), Vol. 50, p. 126, at ll. 1-8 & J. Pan Testimony (cross), Vol. 51, p. 58, at ll. 21-24 [**A.R., Part V, Vols. 48, 50 and 51**].

[38] J. Pan Testimony (in-chief), Vol. 48, p. 148, at ll. 30-31 [**A.R., Part V, Vol. 48**].

and her father seemed "ecstatic" for her.[39] For this reason, she decided to call off "Plan B" with Homeboy to have herself killed. With Wong's help, Pan and Homeboy negotiated an $8,500 cancellation fee.[40] Pan testified that it was the collection of the cancellation fee that was the subject of the communications that took place before the home invasion in November 2010.[41]

(e) *The Evening of the Home Invasion*

26. On the day of the home invasion, there was further contact between the parties. Crawford texted Pan, "[to] after work ok will be game time".[42] Pan testified that this was a reference to picking up his cancellation fee after he finished work.[43]

27. On the evening of the home invasion, the Pan family had dinner together at home. Pan's friend Adrien Tymkewyz then arrived at the house to watch television with her. He arrived around 6:30 p.m. and stayed until around 9:00 p.m.[44] Tymkewyz testified that Pan's demeanour that night was normal.[45]

28. At 7:00 p.m., Pan's mother left for her line dancing class, and at 8:30 p.m., Pan's father went to bed.[46] At around 9:30 p.m., Pan's mother returned home from line dancing.[47]

29. Pan spoke on the phone with Montemayor that evening. In his testimony, Montemayor claimed that Pan disclosed details of plan to kill her parents that night.[48] Pan denied this.[49]

30. Pan then called another friend, Pacificodor. Pacificodor testified that there was nothing unusual or out of the ordinary with Pan's behaviour.[50] He testified that their call ended abruptly and

---

[39] J. Pan Testimony (in-chief), Vol. 48, p. 124, at ll. 3-8 [**A.R., Part V, Vol. 48**].
[40] J. Pan Testimony (in-chief), Vol. 48, p. 17, at ll. 17-18, p.136, at ll. 29-30 [**A.R., Part V, Vol. 48**].
[41] J. Pan Testimony (in-chief), Vol. 48, p. 164, at ll. 1-9, p. 198, at ll. 24-30 [**A.R., Part V, Vol. 48**].
[42] Exhibit 139B – Technical Data Recovery Report [**Appeal Book, Vol. 4, p. 1505**].
[43] J. Pan Testimony (in-chief), Vol. 48, p. 215, at ll. 7-9 [**A.R., Part V, Vol. 48**].
[44] A. Tymkewycz Testimony (in-chief), Vol. 16, p. 169, at ll. 20-27 [**A.R., Part V, Vol. 16**].
[45] A. Tymkewycz Testimony (in-chief), Vol. 16, p. 169, at ll. 9-13 [**A.R., Part V, Vol. 16**].
[46] J. Pan Testimony (cross), Vol. 51, p. 192, at ll. 24-27 [**A.R., Part V, Vol. 51**].
[47] J. Pan Testimony (cross), Vol. 51, p. 191, at ll. 1-2 [**A.R., Part V, Vol. 51**].
[48] A. Montemayor Testimony (re-exam), Vol. 29, p. 354, at l. 31, to p. 355, at l. 11 [**A.R., Part V, Vol. 29**].
[49] J. Pan Testimony (cross), Vol. 51, p. 148, at l. 18, to p. 150, at l. 12 [**A.R., Part V, Vol. 51**].
[50] E. Pacificodor Testimony (in-chief), Vol. 16, p. 255, at ll. 22-24 [**A.R., Part V, Vol. 16**].

that, from Pan's tone, it sounded like that something had happened or interrupted her.[51] Pan testified that while on the phone, she heard her mother yell to her father from downstairs.[52]

31. At 10:14 p.m., three figures could be seen on surveillance entering the Pan home through the front door. Hann Pan testified that he awoke to a person pointing a gun to his face. The gunman said, "where is the fucking money?" before bringing him downstairs.[53] Hann Pan testified that on his way downstairs, he saw his daughter in the hallway near her bedroom, with a man holding a gun to her.[54] Jennifer Pan testified that this intruder asked her if she had money or cash. Pan and her father were both directed to go downstairs,[55] where Pan's mother was sitting on the sofa. A man was also behind her holding a gun to her. Mr. Pan was ordered to sit on the sofa and was struck on the head by a gun.[56]

32. Pan, her captor, and another intruder then went upstairs to the master bedroom.[57] The two intruders ransacked the room for money, and Pan was then tied to a banister.[58] Mr. and Mrs. Pan were then ordered downstairs to the basement by the intruders. In the basement, one intruder asked another, "should we tie them up or tape them up? To exit by the front door or the rear door?".[59] The other replied, "shoot and exit by the front door".[60] The Pans were then told to cover their heads with blankets and sit on the sofa.[61]

33. Hann Pan was then shot. When he regained consciousness, his wife's body was lying at his feet.[62] She had been fatally shot. Pan ran out of the house and told his neighbour to call 911, stating

---

[51] E. Pacificodor Testimony, Vol. 16, p. 258, at ll. 26-29 [**A.R., Part V, Vol. 16**].
[52] J. Pan Testimony (in-chief), Vol. 48, p. 245, at ll. 9-11 [**A.R., Part V, Vol. 48**].
[53] H. Pan Testimony (in-chief), Vol. 8, p. 67, at ll. 21-22 [**A.R., Part V, Vol. 8**].
[54] H. Pan Testimony (in-chief), Vol. 8, p. 72, at ll. 19-22 [**A.R., Part V, Vol. 8**].
[55] J. Pan Testimony (in-chief), Vol. 48, p. 246, at l. 31 to p. 248, at l. 26 [**A.R., Part V, Vol. 48**].
[56] H. Pan Testimony (in-chief), Vol. 8, p. 79, at ll., 12-13, p. 82, at l. 27 to p. 83, at l. 13 [**A.R., Part V, Vol. 8**].
[57] J. Pan Testimony, Vol. 48, p. 250, at ll. 2-6 [**A.R., Part V, Vol. 48**].
[58] J. Pan Testimony, Vol. 48, p, 250, at l. 19 to p. 251, at l. 20, and p. 251, at ll. 25-26 [**A.R., Part V, Vol. 48**].
[59] H. Pan Testimony (in-chief), Vol. 9, p. 8, at ll. 25-27 [**A.R., Part V, Vol. 9**].
[60] H. Pan Testimony (in-chief), Vol. 9, p. 9, at l. 13 [**A.R., Part V, Vol. 9**].
[61] H. Pan Testimony (in-chief), Vol. 9, p. 9, at l. 22 [**A.R., Part V, Vol. 9**]; Court of Appeal decision, at para. 36.
[62] H. Pan Testimony (in-chief), Vol. 9, p. 9, at l. 29 [**A.R., Part V, Vol. 9**].

"[m]y house was robbed and I was shot". [63] Pan also called 911 while tied to a banister, unharmed on the second floor.

(f) *The Target of the Plan*

34. The Crown's theory was that Pan hired assailants to kill both of her parents, and conspired with them to stage a home invasion robbery whereby they would both be shot.

35. The only direct evidence of a plan to kill both parents came from Montemayor, a witness with questionable credibility, who claimed to have had a conversation with Pan just prior to the murder. Montemayor testified that Pan told him that that night, she was going to go through with a plan for a home robbery whereby she would be tied up and her parents would be shot.[64] At trial, Montemayor was materially inconsistent on this very point. In prior statements, he either claimed not to have spoken to Pan that night, or that his memory of the phone call at issue was "vague".[65]

36. There was also evidence before the jury of text message communications between the defendants Mylvaganam and Carty on October 31, 2010, but those conversations did not address the *target* of the plan. The Crown placed heavy reliance on the "ten stacks" message, which it argued was evidence of a plan to kill two people. The text messages read:[66]

> Carty: Ten stacks
>
> Mylvaganam: Ya.
>
> Mylvaganam: Wen u ready k
>
> Carty: Ya 5each ting
>
> Mylvaganam: Me u
>
> Carty: Ya bt u all da way and all ten 4u

37. The Appellant argues that this exchange demonstrates there was a plan to kill two people ("5each ting" meaning "$5,000 per person"). Another compelling interpretation of these messages is

---

[63] H. Pan Testimony (in-chief), Vol. 9, p. 10, at l. 28 to p. 11, at l. 2 [**A.R., Part V, Vol. 9**].
[64] A. Montemayor Testimony (in-chief), Vol. 29, p. 31, at 1. 8 to p. 32, at l. 3 [**A.R., Part V, Vol. 29**].
[65] A. Montemayor Testimony (cross), Vol. 29 p. 342, at l. 25 to p. 343, at 1. 3 [**A.R., Part V, Vol. 29**].
[66] Exhibit 85B – Telus Overview [**Appeal Book, Vol. 2, p. 609**].

Carty telling Mylvaganam that if they do the job together, they will split the fee ("5each ting", meaning "it's a $5,000 each kind of thing"), but if Mylvaganam does it alone, he will receive the whole fee ("bt u all da way and all ten 4 u", meaning "if you do it alone, then you will get the whole $10,000"). The idea that the "5each" refers to splitting the fee is reinforced by the portion of the exchange where Mylvaganam says "Me u" and Carty replies "Ya".

38. The primary circumstantial evidence relied upon by the Appellant with respect to the target of the killing related to allegations of a prior plan to kill both parents and evidence of Pan's alleged motive and *animus* against both parents. On appeal, the Respondents pointed to circumstantial evidence that would allow the jury to find that there was a plan to kill Pan's father, but not her mother:

a. **Evidence that the previous plan to kill in the summer of 2010 was a plan to kill Hann Pan only:** Pan testified that she had never – at any point – planned or wanted to have her mother killed. The same was not true about her father. Pan testified as to the details of "Plan A" to have her father killed at his workplace. Duncan gave conflicting evidence about whether Pan wanted to kill "her parent" or both parents, but acknowledged in cross-examination that she only wanted her father killed. Montemayor testified that there was a plan to kill only her father, not her mother, though he was inconsistent on this point.

b. **Evidence that Pan had motive and *animus* in relation to her father, but not her mother, with whom she had a good relationship with:**

i. *Animus against father*: Pan testified that her father had strict expectations which did not align with her personal goals and expectations. She and her father had a particularly strained relationship after her lies were revealed and Hann Pan issued her an ultimatum. Her father ostracized her and made her feel unwanted, unloved and unworthy. This culminated in a plan by Pan to have her father killed.

ii. *Absence of animus towards mother:* Pan testified that her relationship with her mother was better than her relationship with her father. She described a close emotional connection with her mother. Her brother

corroborated her lack of motive or *animus* towards her mother, as did other witnesses, including her friend and cousin.

c. **The actions of the perpetrators in the home:** the way the perpetrators conducted themselves in the house suggests there was not a plan to kill both parents. Hann Pan testified that the perpetrators repeatedly asked him for money. Pan testified that they ransacked the master bedroom. Hann Pan also testified that he saw his daughter paraded through the home at gun point, and later, with her hands bound and tied to a railing. If the plan had been to kill both parents and keep Pan alive (who was allegedly part of the plan), there would have been no reason to put on the charade of robbery or to victimize Jennifer Pan. Hann Pan also testified that right before the shooting, the following exchange occurred between his captors: "should we tie them up or tape them up? To exit by the front door or the rear door?" The other replied, "shoot and exit by the front door." This exchange is inconsistent with a plan to kill both parents from the outset and is indicative of a developing plan as the home invasion progressed.

(g) *The Two Scenarios Jury Instruction*

39. During the pre-charge conference, the trial judge was urged to leave second-degree murder and manslaughter with the jury in relation to all of the accused.[67] This was on the basis that Pan's mother may have been killed in the course of a plan to kill only Pan's father.

40. The trial judge ultimately determined that he would not leave second-degree murder with the jury. In an email to counsel dated November 16, 2010, the trial judge held that there was no air of reality to Pan's assertion that the jury could find that the Crown had established the essential element of planning/common intention in respect of Pan's father, but not her mother.[68] The email stated:

> I am not satisfied that there is an air of reality to the assertion that one plausible scenario arising on the evidence is that there was a common criminal venture to murder Pan that resulted in some member of the common design murdering Pan. I am satisfied that two plausible scenarios arise from the evidence and . our discussions of each party's position. First, that there was a planned and deliberate attack on the Pans. Second, that there was a joint plan or agreement to commit a home

[67] Court of Appeal decision, at para. 66.
[68] Exhibit AAA – Email from Boswell J. dated November 16, 2014 [**Appeal Book, Vol. 13, p. 6222**].

> invasion/robbery and that the Pans were shot in the course of it. I have arranged the instructions accordingly.

41. When instructing on possible routes to liability, the trial judge put only those two scenarios to the jury: under scenario one, the attack on the Pans was a single, planned and deliberate attack, where the intention was to kill both parents; and under scenario two, the attack on the Pans arose out of a joint plan or agreement to commit a home invasion/robbery, and the Pans were shot in the commission of the robbery.[69] In describing scenario one, the trial judge told the jury that they could either find that the accused person participated in both the murder and attempted murder, or they could find that person not guilty.[70] Alternatively, if the jury found them guilty of the first-degree murder of Pan, the jury would necessarily find them guilty of the attempted murder of Pan.[71] The jury was not left with the option of separately considering the two counts.

42. While the trial judge instructed the jury that they did not have to find that either scenario occurred,[72] the trial judge made it clear to the jury that there were only two possible factual findings available regarding the motivating force behind the home invasion.

(h) *Decision of the Court of Appeal for Ontario*

43. On appeal, Pan and her co-defendants argued that the trial judge erred by restricting the possible routes to liability to just those two scenarios: first, by improperly linking the verdicts on the murder and the attempt murder counts, when they should have been instructed to consider the charges separately, as a verdict of guilty on one did not lead inextricably to a verdict of guilty on the other; and second, that the trial judge ought to have left the included offences of second-degree murder and manslaughter as possible verdicts in relation to the death of Pan's mother, as there was a possibility that the jury might have concluded that, while Pan had planned for her father to be killed, there was a reasonable doubt as to whether she had such a plan for her mother.

44. The Court of Appeal for Ontario agreed that the trial judge erred in this regard and held that the defendants were entitled to a new trial on the charge of first-degree murder.

---

[69] Jury Charge, Vol. 64, p. 318, at ll. 10-21 [**A.R., Part V, Vol. 64**].
[70] Jury Charge, Vol. 64, p. 319, at ll. 14-16 [**A.R., Part V, Vol. 64**].
[71] Jury Charge, Vol. 64, p. 319, at ll. 17-19 [**A.R., Part V, Vol. 64**].
[72] Jury Charge, Vol. 64, p. 292, at l. 28 to p. 293, at l. 17 [**A.R., Part V, Vol. 64**].

i. Linking the Offences under Scenario One and Lesser Included Offences

45. The Court of Appeal for Ontario correctly noted that generally, a jury must be instructed to consider their verdict on each count separately.[73] It held that the trial judge erred by concluding that the verdicts on first-degree murder and attempted murder were inextricably linked; while the offences may have been linked because they arose out of the same events, the verdicts were not.[74]

46. Similarly, the Court of Appeal for Ontario correctly noted that the question to be determined on the air of reality test was "whether there was some evidence that might have led the jury to rationally and logically have a reasonable doubt with respect to the elements of the first-degree murder count on the facts with respect to Pan's mother but not have that same doubt on the facts as it related to Pan's father".[75] The court held there was evidence that might have raised a reasonable doubt as to whether the murder of Pan's mother was the result of a planned and deliberate murder, as opposed to being an unfortunate consequence of the planned and deliberate murder of Pan's father.[76]

47. The court cited the following evidence in support of the "some evidence" standard:[77]

a. Pan's evidence that she never planned to kill her mother, and that "Plan B" was just for herself to be killed;

b. Pan's evidence about the home invasion;

c. Pan's evidence about her strained relationship with her father and the rules and directives he laid down for her, evidence that was also confirmed by Pan;

d. Pan's evidence that she had a loving and supportive relationship with her mother, as confirmed by her brother, her cousin, and a friend;

e. Pan's evidence that her mother only supported her father's rules because of cultural expectations; and

---

[73] Court of Appeal decision, at para. 53.
[74] Court of Appeal decision, at para. 55.
[75] Court of Appeal decision, at para. 57.
[76] Court of Appeal decision, at para. 67.
[77] Court of Appeal decision, at para. 56.

f. Pan's evidence that, in spring 2010, she planned with Montemayor and Duncan to only have her father killed, not her mother.

48. The court noted that the evidence did not have to rise to the level of showing that it *would* have raised a reasonable doubt on first-degree murder, thereby supporting a conviction for an included offence, only that it might realistically have done so.[78] The court concluded that in this case, there was a some evidence (or an air of reality) that the jury might have a reasonable doubt on whether there was a deliberate plan to kill Pan's mother (as opposed to her father).[79]

49. The court further concluded that the jury may have had a doubt about the planned and deliberate murder of Pan's mother, but still be satisfied that the defendants knew that the murder of Pan's mother was a probable consequence of a plan to kill her father, thus giving rise to a conviction for second-degree murder.[80] It was also possible for the jury to have a reasonable doubt about the planned and deliberate murder of Pan's mother, but still be satisfied that there was a reasonably foreseeable risk of non-trivial bodily harm to Pan's mother through the implementation of the plan to kill Pan's father, thus giving rise to a conviction for manslaughter.[81]

ii. Remitting Counts for Retrial

50. Pan argued at the Court of Appeal that given the error, the convictions for both first-degree murder and attempted murder must be remitted for retrial as it was not possible to separate the impact of the jury instruction error on the two counts. The court disagreed. The court noted that it failed to see how the attempted murder conviction was tainted by the failure to leave the lesser included offences to the jury on the murder charge.[82] The court further found that the error did not impact on whether the attack on Pan's father was the result of a planned and deliberate murder that went wrong.[83]

---

[78] Court of Appeal decision, at para. 67.
[79] Court of Appeal decision, at paras. 70-71.
[80] Court of Appeal decision, at para. 72.
[81] Court of Appeal decision, at para. 72.
[82] Court of Appeal decision, at para. 146.
[83] Court of Appeal decision, at para. 146.

51. The court therefore allowed the appeals on the convictions for the first-degree murder of Pan's mother and ordered a new trial. The appeals on the convictions for the attempted murder of Pan's father were dismissed and not remitted for retrial.

PART II – RESPONDENT'S POSITION ON QUESTIONS IN ISSUE

52. The Appellant raises three questions on appeal:

(1) Whether the lower court correctly applied the air of reality test to the alternative theory of liability;

(2) Whether the lower court failed to afford deference to the trial judge's determination of the air of reality to the alternative route to liability; and

(3) Whether the lower court failed to apply the *curative proviso*.

53. The Respondent submits that the answer to (1) is that the air of reality test is settled law: the evidentiary threshold of "some evidence" and the issue of weighing of the evidence were definitively resolved by this court in *Cinous* and correctly applied by the Court of Appeal in this case. The Respondent further submits that the answer to (2) is that the standard of review is correctness, as unanimously confirmed by this court in *Alas* and as properly applied by the Court of Appeal. The Respondent further submits that the answer to (3) is that the lower court correctly declined to invoke the *curative proviso* in this case.

PART III – STATEMENT OF ARGUMENT

Issue #1: The Lower Court Correctly Interpreted and Applied the Air of Reality Test

54. The test for determining which routes and verdicts should be left to a jury – the air of reality test – has been "unaltered in substance for at least a century".[84] It imposes an evidentiary burden on the accused to point to "some evidence" upon which the jury could logically arrive at a reasonable doubt as to the existence of an element of the offence charged (or "principal offence"), while maintaining inferences in support of each essential element of the included offence (or "lesser offence"). If the evidence permits such inferences to be drawn, the corresponding included offence(s) must be left with the jury in deliberations. This is an articulation of the well-known "some evidence"

[84] *Fontaine*, at para. 13.

threshold, applied to the unique inferential reasoning process necessary to assess whether evidence is capable of supporting a conviction on a lesser and included offence.

55. The term "air of reality test" describes a concrete, uniform evidentiary threshold that is applied in a wide variety of legal contexts. However, partly because the evidentiary threshold is so versatile and adaptable, slight differentiation in its articulation is sometimes necessary to accurately express the relationship between the evidentiary threshold and the issue before the court. Even where the syntax changes, the conceptual threshold of "some evidence" remains constant. It is meant to express the minimum amount of evidence necessary to support a reasonable inference on a finding essential to the jury's verdict.

56. Any attempt to re-negotiate the "some evidence" threshold at the core of the "air of reality test" is constrained by constitutional principles. The low evidentiary burden affirmed in this court's jurisprudence is concordant with the presumption of innocence enshrined in s. 11(d) of the *Canadian Charter of Rights and Freedoms,* and the right to trial by jury enshrined in s. 11(f) of the *Charter*.[85]

57. Practically, the burden exists to remove "outlandish" defences from the jury's purview.[86] While its existence may prevent confusion and unreasonable verdicts, the test persists in the face of the *Charter's* protections for the simple reason that it is a low evidentiary threshold, which does not allow for credibility or reliability assessments, substantive weighing of evidence, findings of fact, or the drawing of factual inferences.[87] As such, it does not usurp the jury's function or displace the presumption of innocence.

58. Critically, to meet the test in the context of lesser and included offences, the accused need not prove anything, but must merely point to evidence which is capable of raising a reasonable doubt as to the presence of a required element of the offence.[88] This court has consistently affirmed the importance of the reasonable doubt standard and any change to this careful framework threatens the constitutionality of the air of reality test.

---

[85] *Osolin*.
[86] *Cinous*, at paras. 83-85.
[87] See *Osolin*, *Cinous*, and *Fontaine*.
[88] *Osolin,* at p. 690, citing Hogg: *Constitutional Law of Canada* (3rd ed. 1992), Vol. 2, at pp. 48-15.

59. The Appellant suggests several deficiencies in the lower court's articulation and application of the air of reality test, namely that the Court of Appeal: (a) failed to consider whether the evidence was "sufficient", and instead applied a lower test of "some evidence"; (b) failed to conduct a "contextual analysis"; (c) failed to engage in substantive weighing of the evidence; and (d) conflated reasonable doubt with air of reality. In fact, the court below applied the correct test and conducted an unimpeachable analysis of the application of the legal standard to this factually and legally complex case. There is no basis to overturn the Court of Appeal's analysis.

(a) *Air of Reality in the Court Below Conforms to the Jurisprudence of this Court*

60. In this case, the lower court articulated and applied the correct test for determining an air of reality to included offences. The court specifically adopted an articulation of the test that had been recently expressed by Doherty J.A. in *Ronald,* which also involved the application of the air of reality test in the context of party liability for murder. Doherty J.A. expressed – and the court below adopted – the air of reality test for included offences, as follows:

a. "There should be no instruction on potential liability for an included offence only when, on a consideration of the totality of the evidence and having due regard to the position of the parties and the proper application of the burden of proof, there is no realistic possibility of an acquittal on the main charge and a conviction on an included offence."[89]

b. "Second-degree murder must be left with the jury if there is a reasonable possibility that the jury could have a doubt as to whether the murder was planned and deliberate."[90]

c. "However, when deciding whether second degree murder should be left with the jury, the trial judge does not ask if the evidence points more strongly to second degree murder than to planning and deliberation, but instead asks whether a

[89] *R. v. Ronald*, 2019 ONCA 971 ("***Ronald***"), at para. 42, adopted at Court of Appeal decision, at para. 58.
[90] *Ronald,* at para. 46, adopted at Court of Appeal decision, at para. 61.

> reasonable jury, properly instructed, could have a doubt as to whether Ronald had planned and deliberated the murder."[91]

61. The court below also relied on a similar articulation of the standard put forward by Watt J.A. in *R. v. Chacon-Perez*: the evidence adduced at trial must be such that it permits a reasonable jury, properly instructed, to conclude that the essential elements of the included offence have been established, but not those of the principal offence.[92] In the paragraph cited by the lower court, Watt J.A. set out the obligation to consider contextual factors when applying the test, such as the whole of the evidence at trial, the triable issues raised by that evidence, and the position of the parties.[93]

62. The Court of Appeal correctly paraphrased the foregoing analysis of the test to state, "the air of reality test for an included offence requires that a jury, properly instructed, may be satisfied beyond a reasonable doubt of elements of an included offence but not be so satisfied regarding the elements of the principal offence."[94] The test applied in the court below meticulously adheres to the controlling jurisprudence of this court. The criticisms levied by the Appellant against the lower court's articulation rely on decontextualized passages in seminal cases, which are not applicable to the precise legal question raised on this appeal.

63. *Cinous*[95] – a case about leaving the defence of self-defence to the jury in the context of a murder trial – is the controlling authority on the interpretation and application of the air of reality test. However, *Cinous* did not create the test. It simply articulated and affirmed the core elements of the test, as well as its nature and purpose, which had been considered on numerous occasions and clearly and authoritatively set out.[96] In *Cinous* this court further confirmed that the test to be considered on the air of reality inquiry was "whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit".[97] This is the exact formulation that was cited and applied by the

---

[91] *Ronald,* at para. 59, adopted at Court of Appeal decision, at para. 62.
[92] *R. v. Chacon-Perez,* 2022 ONCA 3 ("***Chacon-Perez**"),* at para. 158.
[93] *Chacon-Perez*, at para. 129.
[94] Court of Appeal decision, at para. 59.
[95] *Cinous*.
[96] *Cinous*, at paras. 48-49, citing *Osolin*; *R. v. Park*, [1995] 2 S.C.R. 836 ("***Park***"); *R. v. Davis*, [1999] 3 S.C.R. 759.
[97] *Cinous*, at para. 49.

lower court in this case,[98] with minor syntactic modification to allow for the fact that the issue under consideration relates to lesser and included offences, not defences.

64. C*inous* confirmed that in applying the test, a trial judge's must consider the totality of the evidence and assume the evidence relied upon to be true.[99] The judge is not to make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences.[100] Nor is the judge to assess whether the issue is likely, unlikely, somewhat likely, or very likely to succeed.[101] The threshold determination is not aimed at deciding substantive merit, or how the jury should ultimately decide the issue.[102] That role is reserved for the jury.[103] Rather, the question for the judge is whether the evidence discloses a real issue to be decided by the jury.[104]

65. When determining whether necessary inferences are available in the absence of direct evidence, the trial court must consider whether the circumstantial evidence in the case is capable of establishing the requisite element. In *Cinous,* the court adopted the well-known "limited weighing" inference-drawing analysis from *Arcuri* to describe the proper analysis to be applied.[105] In so doing, the court was careful to re-affirm that the application of the *Arcuri* test does not allow for credibility assessment, weighing of evidence, making findings of fact, or drawing factual inferences.[106]

66. Since the decision in *Cinous*, this court has confirmed the approach a trial judge should take when applying the air of reality test.[107] In *Fontaine*, the court confirmed that in applying the air of reality test, a trial judge is to consider the totality of the evidence and assume the evidence relied upon to be true.[108] Similarly, in *Pappas*, this court affirmed that while limited weighing is appropriate,

---

[98] *Ronald,* at para. 59, adopted at Court of Appeal decision, at para. 62 ("whether a reasonable jury, properly instructed, could have a doubt as to whether Ronald had planned and deliberated the murder").

[99] *Cinous*, at para. 53. See also *Osolin*, *Park*.
[100] *Cinous*, at para. 54.
[101] *Cinous*, at para. 54.
[102] *Cinous*, at para. 54.
[103] *Cinous*, at para. 54.
[104] *Cinous*, at para. 54.
[105] *Cinous*, at para. 83.
[106] *Cinous*, at paras. 88-91.
[107] See, for example, *Fontaine*; *R. v. Pappas*, 2013 SCC 56 ("***Pappas***"); *R. v. Gauthier*, 2013 SCC 32 ("***Gauthier***").
[108] *Fontaine*, at para. 68.

substantive weighing is not.[109] Further, in *Gauthier*, this court confirmed that the burden on the accused is merely evidential – the trial judge must identify the evidence most favourable to the accused and assume it to be true.[110] This is because the air of reality test is only concerned with whether or not an issue should be "put in play" – in other words, submitted to the jury for consideration.[111] An included offence is "put in play" in cases where the jury, having found that there is some evidence on each essential element of a principal offence, could, based on the totality of the evidence, have a reasonable doubt on an element of the principal offence while still maintaining findings on all elements of the included offence.

67. The Appellant also attempts to draw upon language from *Aalders*, *Osolin*, and *Park* to suggest alterations to the air of reality test. These alterations are either based on misinterpretations of the case law in this area or are inapplicable to the task before this court.

68. First, the Appellant places great weight on the case of *Aalders,* suggesting that it defines the air of reality test for included offences. In truth, *Aalders* contains a fact-driven, four-paragraph analysis of whether there was an air of reality to manslaughter on the evidence adduced in that case. While the court applied the air of reality test to the question of available verdicts, it did not engage substantively with the definition of the air of reality test in the context of included offences.

69. The factual application from *Aalders* is irrelevant to this case. In *Aalders,* this court found that there was no air of reality to the accused's defence of manslaughter, as the killing had every indication of being planned and deliberate. While the reasons are appropriately skeptical of the incongruence between Aalder's testimony and other evidence, it is clear that Aalders was guilty of murder on his own evidence. In his testimony, Aalders admitted to aiming his gun at the deceased's body, closing his eyes, and firing eight times at close range in a small, confined area. This admission was coupled with forensic evidence regarding the bullet wounds. Unsurprisingly, the court found no air of reality to manslaughter as Aalder's evidence amounted to an admission of the secondary *mens rea* for murder: an intention to cause grievous bodily harm, reckless as to whether death ensues. The *Aalders* case provides limited guidance on the correct articulation of the air of reality test to lesser offences.

---

[109] *Pappas*, at para. 22.
[110] *Gauthier*, at para. 25.
[111] *Fontaine*, at para 68; *Cinous*, at para. 52.

70. The Appellant also cites *Aalders,* along with other cases, for the proposition that more is required than a "bare assertion" by the accused – more than a "facile mouthing of some easy phrase of excuse" – to raise an air of reality.[112] This is settled law. However, the issue of "bare assertion" is not raised in this case. This is not a case where the Appellant asks this court to rely upon Pan's bare assertion that she did not plan to kill her mother against all odds, evidence, and logic. Rather, this is a case about what inferences were available based on the very same body of circumstantial evidence the Crown put to the jury to substantiate their theory of a plan to kill both parents.

71. The Appellant also cites select portions of *Osolin,* which, when read in isolation and decontextualized from their surroundings, may suggest greater judicial intervention in the application of the air of reality test. Read as a whole, these sections of *Osolin* simply assert the basic rule that an air of reality cannot be found where there is merely "some evidence" of the offence or defence, but rather requires "some evidence" on each essential element. This, again, is settled law, which was reflected in the lower court's proper articulation of the test.[113]

72. Finally, the Appellant points to the rule in *Park* which states that an air of reality cannot be based on evidence which is logically inconsistent with evidence that is not materially in dispute. The Appellant suggests that this element of the analysis was missing from the lower court's decision.

73. In *Park*, the accused testified as to the contents of his own mind and described an inculpatory *mens rea* (wilful blindness as to the complainant's consent). This court concluded that an air of reality to the defence of mistaken belief in consent could not be based on circumstantial evidence which contradicted "the totality of the evidence which is not materially in dispute".[114] The simple proposition that there will be no air of reality to a defence where the accused testifies and provides inculpatory admissions – which we see in both *Aalders* and *Park* – is not controversial. Nor is it relevant to the task before this court.

74. This is not a case where Pan testified to an inculpatory version of events, which the Crown could rely upon as an admission of guilt – leaving the parties *ad idem* on the issue of *mens rea*. Pan's testimony was exculpatory. To sustain a conviction, the Crown had to advocate for the jury to adopt a two-stage reasoning process: (i) reject Pan's evidence regarding the target of the plan; and (ii) rely

---

[112] *Osolin*, at pp. 648-649.
[113] Court of Appeal decision, at para. 59.
[114] *Park*, at paras. 29-30.

on circumstantial evidence from a variety of sources to arrive at an inculpatory finding regarding a plan to kill both parents. The thought process required to convict on a lesser included offence in the death of Bich-Ha Pan required the exact same two steps. The only distinction would be the factual finding(s) the jury came to in its analysis under stage (ii) – a task which is properly its sole purview. If it arrived at certain factual findings urged by the Appellant, it would find a plan to kill both parents. If, however, it found the evidence in respect of a plan to kill Bich-Ha Pan was insufficient to meet the criminal standard, it could convict on a lesser offence in relation to her death.

75. Thus, as the lower court recognized, within the two-stage reasoning process relied upon by the Crown to sustain a conviction, there were factual inferences available to the jury which could lead them to the conclusion that Pan was guilty of second-degree murder or manslaughter. It was therefore incumbent upon the trial judge to instruct the jury on those offences. Doing so would not offend the rule put forward in the *Park* case.

76. For all of these reasons, this court should affirm the articulation of the air of reality test adopted by the Court of Appeal: the air of reality test for an included offence requires that a jury, properly instructed, may be satisfied beyond a reasonable doubt of the elements of an included offence, but not be so satisfied regarding the elements of the principal offence.

(b) *There is No Conflict Between the "Some Evidence" and "Sufficient Evidence" Standard*

77. The Appellant argues that a review of provincial appellate authority on the air of reality test shows a trend in cases moving away from the standard of "sufficient evidence" with limited weighing of the evidence, towards "some evidence" with no weighing permitted.[115] Contrary to the Appellant's assertion, there is no conflict between the use of the terms "some evidence" and "sufficient evidence," which are used referentially to describe the application of a single evidentiary threshold.

78. More importantly, and contrary to the Appellant's position, the Court of Appeal for Ontario's articulations of permissible weighing in the air of reality test reveals a full understanding of the proper analysis, which is both correct in law and consistent with this court's jurisprudence.

79. In *Cinous,* this court comprehensively explained how to interpret references to the term "sufficient evidence" in the air of reality jurisprudence. At paragraph 70, it noted:

---

[115] Factum of the Appellant/Respondent on Cross-Appeal, at para. 43.

> The key point about "sufficiency" is rooted not in a legal text, but in ordinary language. The statement that "the evidence is sufficient" on its own is meaningless, in the same way that the statement "two dollars is sufficient" is meaningless. The question arises: sufficient for what purpose? Evidence, or anything else for that matter, is sufficient or insufficient in relation to a specific standard or criterion. In the criminal law, evidence is measured against two distinct standards, corresponding to two distinct issues. First, evidence can be sufficient or insufficient to meet the evidential burden imposed by the air of reality test. Second, evidence can be sufficient or insufficient to establish guilt beyond a reasonable doubt or to warrant an acquittal. The first issue, which is the subject matter of the evidential burden (or "minor burden") relating to defences, is reserved for the judge. The second issue, which is the subject matter of the persuasive burden (or "major burden" or "primary burden" or "legal burden") is reserved for the jury.[116]

80. This court in *Cinous* went on to confirm that the evidentiary threshold for the air of reality test is "some evidence" on each essential element required in law to support the route and verdict proposed.[117] In the context of defences, for example, this means some evidence on each essential element of the defence. Where the threshold of "some evidence" is met, there will be "sufficient evidence" to put the defence to the jury.

81. This was explicitly confirmed by this court in *Fontaine*:

> Again, the ultimate issue is whether the jury is persuaded that the accused probably perpetrated the alleged criminal act in a state of automatism. For the issue to reach the jury, **there must be some evidence** upon which that finding could reasonably be made by a properly instructed jury acting judicially. **If there is, the evidence is said to be "sufficient"** — the evidentiary burden has been discharged and automatism is "in play" before the jury.[118] [emphasis added.]

82. This is also consistent with the approach in *Gauthier,* which confirmed that to meet the test, it is not enough to simply identify "some" or "any" evidence. The evidence must "sufficient," in the sense that it is reasonably capable of supporting the inferences required for the defence to succeed.[119]

83. The Appellant points to *Tenthorey* and *Doxtator* to suggest that the Court of Appeal for Ontario has departed from this standard. In fact, *Tenthorey* affirms the application of a limited weighing analysis in the inference-drawing process.[120] It goes on to explain that where exculpatory

---

[116] *Cinous*, at para. 70.
[117] *Cinous*, at para. 88.
[118] *Fontaine*, at para. 90.
[119] *Gauthier,* at para. 60, citing *Cinous*, at paras. 82-83.
[120] *R. v. Tenthorey,* 2021 ONCA 324("***Tenthorey***"), at para. 71.

inferences are available, or where there is direct evidence in support of a finding on an included offence, the finding must be left with the jury "regardless of how incredible or unreliable the evidence may be, or how unlikely it is that the trier-of-fact will ultimately draw the relevant inferences".[121] The cited passage in *Doxtator* simply affirms the well-known rule that the judge assessing air of reality takes the evidence at its highest, without making any determination on credibility and reliability – a standard so familiar it may be regarded as trite. These are straightforward applications of the constitutional imperatives under s. 11(d) and 11(f) articulated in *Osolin*.

84. This court ought to reject the Appellant's position that appellate courts have been inconsistent in their approach to the air of reality test, thus requiring clarification of the test, and again affirm the rigorous approach articulated in the lower court's decision.

85. Even if there was inconsistency in the jurisprudence of the Court of Appeal for Ontario, there would be no indication that it affected the court's reasoning in this case. The court below appreciated the syntactic distinction between the "some evidence" requirement and the "sufficient evidence" requirement, which communicate the application of the same evidentiary threshold to distinct aspects of the air of reality test. In fact, it drew this distinction explicitly, stating: "the fact remains that there was some evidence that might have caused the jury to have a reasonable doubt as to whether the plan was to deliberately kill Pan's mother (as opposed to her father). The issue was then whether there was an air of reality to an included offence."[122]

(c) *The Court of Appeal Properly Conducted a Limited Weighing of Evidence at the Inference-Drawing Stage*

86. This was not a case where the "some evidence" standard on the third scenario could be satisfied by direct evidence, as there was no direct evidence of a plan to kill only Hann Pan in November 2010. Montemayor's testimony (alleging that Pan disclosed a plan to him over the phone) inexorably linked both parents. If it was accepted by the jury, it would inevitably lead into scenario one. However, if the jury rejected Montemayor's evidence, there was circumstantial evidence remaining regarding the target of the plan, which did not inexorably link the parents. The argument in support of an air of reality to the included offences is premised on that circumstantial evidence. Thus, the limited weighing analysis was properly focused on whether there was some evidence of a

[121] *Tenthorey*, at para. 71.
[122] Court of Appeal decision, at para. 71.

plan to kill Hann Pan that could be relied upon, without logically requiring a simultaneous inference of a plan to kill Bich-Ha Pan. The Court of Appeal appreciated the requirement for limited weighing under *Cinous* and conducted the analysis appropriately.

87. The Appellant suggests that the Court of Appeal only considered whether there was a "possibility" that the plan to kill targeted only Hann Pan, when it ought to have considered whether there was a "reasonable possibility."[123] This interpretation of the Court of Appeal's reasons is unsustainable. In the passages excerpted at paragraph 49 of the Appellant's factum, the court explains that, "[t]he question is whether there was some evidence that might have led the jury to rationally and logically have a reasonable doubt" regarding the elements of first-degree murder, "but not have that same doubt on the facts as it related to Pan's father" [emphasis added].[124] In the remainder of the paragraph, when the court uses the phrase "that possibility", it is referring back to the articulation above, which requires not simply a possible inference of reasonable doubt, but a logical and rational inference of reasonable doubt – in other words, a "reasonable possibility" of reasonable doubt.

88. In the impugned passage, the court below does exactly as *Cinous* instructs – first it identifies that "some evidence" exists and then it subjects that evidence to limited weighing to determine whether the evidence identified is capable of supporting the necessary inferences. Here, the necessary inferences must permit the jury to have a reasonable doubt with respect to an element of the principal offence, while maintaining the inferences required to convict on the included offence. In other words, was it possible for the jury to make a series of logically consistent inferences, which would leave them with a reasonable doubt on a plan to kill Bich-Ha Pan, while sustaining all inferences necessary to find that there was a plan to kill Hann Pan? If it can, the trial judge is constitutionally prohibited from interfering with the availability of those inferences by failing to leave the lesser offences to the jury. The Court of Appeal's reasoning on this point is impeccable.

(d) *There is No Room for Substantive Weighing of the Evidence*

89. The Appellant suggests that this court has contemplated that trial judges should engage in limited substantial weighing of evidence relating to a potential included offence. There is no authority or support in the existing jurisprudence for the Appellant's position that a limited credibility analysis

[123] Factum of the Appellant/Respondent on Cross-Appeal, at paras. 49-50; Court of Appeal decision, at para. 57.
[124] Factum of the Appellant/Respondent on Cross-Appeal, at para. 79.

or any other form of substantive weighing of the evidence should be considered in the air of reality test. In fact, the opposite is true.

90. In *Fontaine,* this court confirmed that the trial judge, in determining whether a defence is "in play", must assume the truth of the evidence that tends to support it, leaving the reliability, credibility and weight of that evidence to the jury.[125] More recently in *Pappas,* the court again confirmed that a trial judge applying the air of reality test cannot consider issues of credibility and reliability, weigh evidence substantively, make findings of fact, or draw determinate factual inferences.[126] Provincial appellate courts have also been consistently applying the test from *Cinous*, and refusing to engage in an assessment of credibility and reliability when determining if there is an air of reality.[127]

91. Moreover, the Appellant has not suggested that any aspect of the air of reality test meets the high standard required for this court to overturn its own precedent. It is clear that the seminal cases of *Osolin, Cinous,* and *Fontaine* – not to mention the multiples cases affirming them – were not rendered *per incuriam,* nor is the standard within them unworkable or eroded by legal or societal change.[128]

92. The air of reality test, like its counterparts in the committal and directed verdict tests, is intimately concerned with the availability of inferences. What the Appellant refers to as "limited weighing" in the application of the test is nothing more than a recognition that the court's residual gatekeeper function regarding logically available inference-drawing, remains available in this analysis.[129] Thus, where a party puts forward a bald assertion that an essential element is present or absent, without providing a basis on which a jury could reasonably make that inference on the whole of the evidence, the trial judge may withdraw the inference from the jury's consideration.[130] The trial judge may also withdraw verdicts which would require logically inconsistent inferences. However, contrary to the Appellant's position, this standard inference-drawing analysis does not import any form of limited credibility analysis or substantive weighing, into the air of reality test.

---

[125] *Fontaine*, at para. 72.
[126] *Pappas*, at para. 22.
[127] See for example *R. v. Brick*, 2023 SKCA 107; *R. v. Morgan*, 2023 BCCA 226; *R. v. Wong*, 2022 ABCA 171; *R. v. Barrett,* 2022 ONCA 355.
[128] *R. v. Kirkpatrick,* 2022 SCC 33, at para. 116.
[129] *Cinous*, at para. 91; *Pappas*, at para. 25. See also *Park*.
[130] *Pappas*, at para. 26.

93. By explicitly eliminating any substantive weighing from the analysis, the air of reality test has been intentionally designed to avoid intrusion by the trial judge into the constitutionally-protected discretion of the jury as trier of fact.[131] The judge is not to draw determinate factual inferences, but rather is to come to a conclusion about the field of factual inferences that could reasonably be drawn from the evidence.[132] It was on this basis that the court in *Osolin* concluded that the air of reality test does not usurp the role of the jury.

94. The Appellant's position that limited credibility and reliability assessments or limited substantive weighing exercises ought to be part of the air of reality test runs contrary to the court's decisions in *Cinous*, *Fontaine*, *Osolin,* and *Pappas*. The law in this area is clear: limited weighing in the inference-drawing process is permitted; usurping the constitutionally protected fact-finding role of the jury is not. The Crown has not provided any basis that could compel this court to reconsider these bedrock legal principles, which have wide application across various aspects of criminal law.

(e) *The Air of Reality Test Properly Considers the Reasonable Doubt Standard*

95. The Appellant contends that the court below erroneously conflated the reasonable doubt standard with the air of reality analysis. As the foregoing analysis has demonstrated, the air of reality test must include consideration of the ultimate task before the jury. To acquit of a principal offence and convict of an included offence, the jury must have a reasonable doubt as to the essential element of the offence which creates the distinction between the principal and included offence. At the same time, and as the court below recognized, it must be logically possible for the jury to have a reasonable doubt on the distinguishing element while maintaining the inferences required to establish the essential elements of the included offence, otherwise the only options legally available to the jury will be conviction on the principal offence and acquittal.[133] Thus, in a prosecution for first-degree murder under s. 231(2), it must be logically possible for the jury to have a reasonable doubt on planning and deliberation, while maintaining the inferences for all other elements of murder, in order to leave second-degree murder with the jury. To leave manslaughter with the jury, it must be possible for the jury to have a reasonable doubt on specific intent, while maintaining all other essential elements of homicide.

---

[131] *Cinous*, at para. 54. See also *Osolin*.
[132] *Cinous*, at para. 91.
[133] Court of Appeal decision, at paras. 64-65.

96. Any articulation of the test which does not explicitly connect the inference drawing analysis to the possibility for reasonable doubt would offend this court's careful jurisprudence recognizing the primacy of the presumption of innocence to the air of reality analysis, and thereby run afoul of ss. 11(d) and 11(f) of the *Charter*.

97. As the court below correctly observed, due to the routes to party liability in this case, an air of reality to the lesser and included offences could not be premised simply on a reasonable doubt regarding planning and deliberation.[134] Rather, the relationship between the unknown shooters and the Respondents had to be carefully scrutinized to determine whether a legal route to the included offences was available, even if the trier of fact had a reasonable doubt regarding a prior plan to kill Bich-Ha Pan. The Court of Appeal's careful attention to this aspect of the test – a direct application of the limited weighing standard from *Cinous* – does not, as the Appellant suggests, "collapse" the concepts of reasonable doubt and air of reality. It maintains the constitutional imperative that the reasonable doubt standard must inform the air of reality analysis for lesser and included offences.

98. In this case, simply instructing the jury on the possibility of reasonable doubt with respect to planning and deliberation was insufficient to capture the full range of legal findings available on the facts. Pan's potential role in the events of November 8 was as a planner.[135] If the jury had a reasonable doubt that she participated in any plan to kill, the correct finding was an acquittal on all charges. But the binary choice presented in the two scenarios instruction failed to account for the availability of reasonable doubt in relation to a plan to kill her mother, which would not inexorably lead to a finding of reasonable doubt regarding a plan to kill her father. Thus, the legal result of these conceptually extricable findings had to be considered. Here, a reasonable doubt merely on a plan to kill her mother would not necessarily lead to an acquittal. It would logically allow for a concurrent finding that she planned to kill her father, which would result in an acquittal for first-degree murder in the death of her mother, but conviction for either manslaughter or second-degree murder.

99. As the Respondent argued at trial,[136] there is a legally significant distinction between a plan to kill her father and a plan to kill both parents. A plan to kill both parents would result in conviction

---

[134] Court of Appeal decision, at para. 64.
[135] Factum of the Appellant/Respondent on Cross-Appeal, at para. 55.
[136] Pre-Charge Conference, Vol. 59, p. 41, l. 27 – p. 42, l. 15; p. 241, l. 28 – p. 247, l. 25; p. 247, l. 5 - p. 247, l. 25 [**A.R., Part V, Vol. 59, PDF 42; 242-248**].

for the first-degree murder of Bich-Ha Pan as a party to a planned and deliberate murder. A plan to kill Hann Pan alone would result in a conviction for second-degree murder pursuant to s. 21(2), if the jury also found that Pan subjectively believed that the death of her mother (or a category of persons to which she belonged) was a "probable consequence" of a common purpose to kill Hann Pan.[137] This finding is unlikely. If the jury found that Pan did not meet the *mens rea* requirements for murder under s. 21(2), they ought to have been instructed to consider the *mens rea* for manslaughter: was bodily harm to Bich-Ha Pan (or a category of persons to which she belonged), objectively foreseeable as a result of Pan's unlawful plan to kill her father? If the answer was yes, and all other elements were proven, a conviction for manslaughter would result. If the answer was no, Pan could be acquitted in relation to the death of her mother and convicted in relation to the attempted murder of her father.

100. Traditional concerns associated with improper linking of counts are relevant here. Of note, due to the rigidity of the "two scenarios" instructions, if the jury found that Pan bore some responsibility for the death of her father, they would inevitably convict her of first-degree murder in the death of her mother. The jury may also have been left with the impression that all evidence of planning simpliciter was evidence of the planning and deliberation required to elevate the murder of Bich-Ha Pan to first-degree murder, instead of critically analyzing the evidence to hold the Crown to its burden on this point.

(f) *The Trial Judge's Error in this Case*

101. In Pan's case, it was an error on the part of the trial judge to refuse to leave second-degree murder and manslaughter with the jury. There was some evidence upon which the jury might have a reasonable doubt as to whether there was a plan to kill Pan's mother, while maintaining the necessary

---

[137] Section 21(2) of the *Criminal Code* "extends liability to those engaged in one unlawful purpose to incidental or collateral crimes (*R. v. Simon*, 2010 ONCA 754, at para. 42). Pursuant to the section, a party will be guilty of a principle's additional murder if the party knew that the commission of the murder of Person B would be a probable consequence of carrying out the common intention to kill Person A. Where the common intention provisions govern liability for a subsequent homicide, the objective *mens rea* "ought to have known" will not suffice to establish culpability for murder: *R. v. Logan*, [1990] 2 S.C.R. 731, relying upon *R. v. Martineau*, [1990] 2 S.C.R. 633 and *R. v. Vaillancourt,* [1987] 2 S.C.R. 636. See also *R. v. Sit,* [1991] 3 S.C.R. 124; *R. v. Kirkness,* [1990] 3 S.C.R. 74.

inferences to sustain a conviction in relation to the death of her father. If the jury found that the evidence of planning was sufficient to infer a conspiracy to kill existed between the parties, the jury had significant evidence available to it to determine that there was a plan to kill Hann Pan, which did not inexorably entail a plan to kill Bich-Ha Pan. As such, it was logically possible for the jury to conclude beyond a reasonable doubt that there was a plan to kill Hann, while maintaining a reasonable doubt on the plan to kill Bich-Ha.

102. When considering a multi-count indictment, the jury must normally "give separate consideration to his or her verdict on each count."[138] There was nothing about the evidence in this case which meant that a finding that Pan participated in a plan to kill would result inexorably in a finding that she planned to kill both parents – or even that the plan related to two people. The evidence regarding the target(s) of the plan was inconclusive. In fact, the identity of the target(s) of the plan was one of the most central and contentious issues in the trial. Multiple inferences regarding the target(s) of the plan were available on the facts, including the inference that the plan targeted Pan herself, the inference that it targeted both parents, and the inference that it targeted one parent. Only the last scenario was artificially withheld from the jury's consideration.

103. First, the jury had before it a significant body of evidence of motive and *animus* towards Hann Pan. This evidence came from multiple testimonial sources, including Pan, her brother, her cousin, her friend, and Hann Pan himself. While there was some evidence of a motive and *animus* towards Bich-Ha Pan, this was offset by substantial evidence that Pan had a loving relationship with her mother. If the jury accepted a strong motive in relation to Hann Pan, and no motive in relation to Bich-Ha Pan, this alone could have resulted in a finding beyond a reasonable doubt with respect to a plan to kill her father, while maintaining a reasonable doubt with respect to a plan to kill her mother.

104. In addition, Pan's admissions regarding "Plan A" (to kill her father) was strong evidence of motive, *animus,* and desire to kill in relation to Hann Pan proximate to the time of the shooting. Pan never admitted to any murderous intent towards her mother. The jury could logically infer that the strong *animus* disclosed by the Respondent's admission on Plan A persisted to the time of the shooting. An admission of murderous intent is compelling evidence. It cannot seriously be said that the jury had equal evidence of a plan to kill each parent, or that the evidence of planning was

[138] *R. v. Howe*, (2005) 192 C.C.C. (3d) 480 (Ont. C.A.), at para. 44.

inextricably linked, in the face of such a probative admission in relation to one parent and not the other.

105. Given the lack of similar evidence directed towards Bich-Ha Pan, the jury could have been left with a reasonable doubt as to whether there was a plan to kill her. A reasonable doubt "is not an inference or a finding of fact that needs support in the evidence presented at trial."[139] Rather, it may be based on common sense or uncertainty and may arise from an absence of evidence. The "beyond a reasonable doubt" threshold describes how sure the jury must be before making a finding on the criminal standard. Where the jury is engaged in a determination based on circumstantial evidence, it "can consider other reasonable alternative explanations for the conduct" to conclude that the Crown has not discharged its onus.[140]

106. In addition, the jury could have relied on evidence of the shooting itself in support of a reasonable doubt on whether the plan was to shoot both parents. The shooters engaged in significant subterfuge in their interactions with Pan, including tying her to the banister and treating her like a victim. Their behaviour supports an inference that they planned to leave a witness alive, who could be called upon to corroborate Pan's innocence.

107. Importantly, the jury could have accepted all of the evidence above and been left with a reasonable doubt on the existence of a plan to kill Bich-Ha Pan, while maintaining an inference that there existed a plan to kill Hann Pan. This is the precise focus of the "limited weighing" analysis from *Cinous.* In this case, an appropriate exercise of limited weighing supports the lower court's result.

108. The Appellant points to the existence of contradictory evidence to suggest that this analysis was not available. For example, the Appellant points to the testimony of Montemayor and Duncan alleging that Pan disclosed a plan to kill both parents. But it was possible for the jury to reject the *viva voce* testimony of both witnesses on this point, while still inferring that Pan was engaged in a plan to kill Hann Pan.

109. The Appellant also points to the text message between Carty and Mylvaganam about "two stacks" – but a completely plausible alternate inference was available to the jury regarding the

---

[139] *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at pp. 600-610. See also *R. v. Villaroman,* 2016 SCC 33("***Villaroman***"), at para. 28, citing *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 36. See also *R. v. Ali,* 2021 ONCA 362, at para. 97.
[140] *Villaroman,* at paras. 28, 35-42.

interpretation of these messages: that the reference to two stacks related to splitting the money between two shooters, not payment for two separate murders. Logically, the jury could have adopted this alternative inference, while still maintaining the inference that there was a plan to kill Hann Pan. This analysis can be applied to every piece of evidence listed at paragraph 60 of the Appellant's factum, and this court will come to the same result on limited weighing. None of the evidence put forward makes it logically impossible for the jury to have a reasonable doubt regarding a plan to kill Bich-Ha Pan while maintaining an inference that a plan existed to kill Hann Pan. This is quintessentially the task of the limited weighing analysis from *Cinous*. The court must maintain a focus on the legal availability of the necessary findings, and not fall into fact-finding exercises that usurp the jury's role.

110. The Appellant also points to several examples of internal inconsistencies in Pan's testimony. Even if these inconsistencies exist, they do not engage the rule in *Park,* which holds that where "evidence which is materially in dispute is, realistically viewed, clearly logically inconsistent with evidence which is not materially in dispute, then it can be concluded as a matter of both law and logic that there can be no air of reality to the defence to which those logical inconsistencies relate".[141] In this case, there was no admission by the defence as to the target of the plan, or even the number of people targeted by the plan. The target of the plan was the central issue in dispute at trial. Thus, none of the evidence which the Appellant relies on to establish an air of reality is inconsistent with a material admission, and therefore does not run afoul of the rule in *Park*.

111. It is trite law that a jury can believe all, some, or none of a witness's evidence.[142] Clearly, the jury could rely on Pan's probative admission that she had recently harboured murderous intent towards her father to contribute to a finding of strong *animus* against him, without accepting her testimony that her motive and *animus* dissipated within months of "Plan A" – which the jury might conclude was self-serving. Clearly, the jury could disbelieve Pan's testimony in relation to the target of "Plan B", without disbelieving her admissions of *animus* in relation to her father. In fact, the Crown at trial urged both interpretations of the evidence upon the jury,[143] and the Crown on appeal only appears to take issues with the legally available inferences that result from that "splicing", not truly

---

[141] *Park*, at para. 29.
[142] *Park*, at para. 25.
[143] Crown Closing Submissions, Vol. 62, p. 302, at ll. 1-8; p. 313, at ll. 23-32; p. 338, at ll. 13-21 [**A.R., Part V, Vol. 62**].

the splicing itself. It is clear, however, that if Pan's admission regarding the target of "Plan A" could be used to support *any* inference regarding the target of "Plan B", it could support an inference that the target was Hann Pan, without necessarily supporting an inference that the target was Bich-Ha Pan.

112. The Appellant invites this court into error by asking it to weigh the evidence regarding the target of the plan substantively, and to prefer the limited circumstantial evidence that points to a plan to kill both parents over the circumstantial evidence that points to a plan to kill only Hann Pan. The Appellant also fails to acknowledge that a reasonable doubt on a plan to kill Bich-Ha Pan could arise on the relative lack of evidence of motive or *animus* towards her.

113. By confining the jury to two possible scenarios, the trial judge improperly usurped the fact-finding function of the jury. As a result of the trial judge's decision, Pan was deprived of a fair presentation of her case, her counsel was limited in his closing submissions, and the jury was not provided with all verdicts available on the evidence.

(g) *The Appellate Court Correctly Applied the Test*

114. The Court of Appeal for Ontario correctly applied the air of reality test in concluding that the trial judge erred in failing to leave the included offences with the jury. The lower court correctly noted that the question to be determined was whether there was "some evidence" that might have led the jury to have a reasonable doubt with respect to the essential elements of the principal offence.[144] The court correctly instructed itself that its role was not to determine "whether the evidence on the one side outweighed the evidence on the other".[145]

115. The court further concluded, citing *Cinous*, that there was some evidence before the jury that Pan's plan related only to her father and not to her mother.[146] This evidence included:

a. Pan's evidence that she never planned to kill her mother, and that "Plan B" was for herself;

b. Pan's evidence about the home invasion;

c. Pan's evidence about her troubled relationship with her father and the strict rules he imposed;

---

[144] Court of Appeal decision, at para. 57.
[145] Court of Appeal decision, at para. 57.
[146] Court of Appeal decision, at paras. 55, 70.

d. Pan's evidence that she had a positive relationship with her mother, as confirmed by her brother, cousin and friend; and

e. Pan's evidence that "Plan A" with Montemayor and Duncan was to have her father killed.[147]

116. The lower court correctly noted that instructing on included offences, without any real evidentiary basis, would risk a compromised verdict.[148] However, in this case, there was not just a mere bald assertion. Rather, the court concluded that there was some evidence that might have allowed the jury to conclude that Pan's plan to kill related only to her father and not to her mother.[149] In other words, there was evidence that might have raised a reasonable doubt as to whether the murder of Pan's mother was the result of a planned and deliberate murder, as opposed to being an unfortunate consequence of the planned and deliberate murder of Pan's father.[150]

117. Further, the court correctly concluded that it was not the role of the trial judge to usurp the jury's role by deciding whether:

a. The jury might have had a doubt about the planned and deliberate murder of Pan's mother, but be satisfied that the appellants knew that her murder was a probable consequence of a plan to kill her father; or

b. The jury had a doubt about the planned and deliberate murder of Pan's mother, but would be satisfied that there was a reasonably foreseeable risk of non-trivial bodily harm through the implementation of the plan to kill Pan's father.[151]

118. After considering the totality of the evidence and, per *Cinous,* assuming it to be true, the court correctly concluded that there was some evidence (or an air of reality) that the jury might have a reasonable doubt on whether there was a deliberate plan to kill Pan's mother (as opposed to her father). As such, the "some evidence" threshold was met in this case. The law is settled and the test was correctly applied. This court should affirm the Court of Appeal's decision.

---

[147] Court of Appeal decision, at para. 55.
[148] Court of Appeal decision, at para. 65.
[149] Court of Appeal decision, at para. 67.
[150] Court of Appeal decision, at para. 67.
[151] Court of Appeal decision, at para. 72.

(h) *Avoiding Complex Jury Charges is No Reason to Alter the Test*

119. The Appellant also suggests that it may be permissible for a trial judge to decline to leave a lesser included offence with the jury to avoid complex jury charges.[152] This argument is untenable and there is no basis in law to entertain it.

120. The failure to afford a jury an opportunity to consider returning a verdict on an included offence, where that verdict is reasonably available, will constitute reversible error unless the Crown can show that it had an overwhelming case on the main charge.[153] However, such an error is usually beyond the reach of the *curative proviso* for two reasons: (1) it cannot be said, in the face of a determination that the included offence should have been left with the jury – which involves a determination that there was a realistic possibility of an acquittal on the full offence – that the evidence supporting the conviction on the full offence was "overwhelming" for the purpose of applying the *proviso*; and (2) the error can seldom be said to be harmless as it will often have a potential impact on the verdict selected by the jury.[154]

121. The type of judicial action suggested by the Appellant, if permitted, would offend the presumption of innocence enshrined in s. 11(d) of the *Charter* for the sake of expediency. The failure to afford a jury an opportunity to consider a verdict on a lesser included offence has a constitutional dimension, as it undermines the possibility that the defendant could be innocent of the principal offence, and guilty of only the included offence. Such an error may then produce a wrongful conviction on the principal offence.

122. Furthermore, deciding not to leave a lesser included offence with the jury to avoid a complex jury charge – despite the fact that the air of reality test has been met – runs contrary to the case law that prohibits a weighing of the evidence when determining if there is an air of reality. As mentioned, the test has been intentionally designed to avoid intrusion by the trial judge into the constitutionally protected discretion of the jury.[155] The air of reality test is not meant to consider whether the basis for an included offence is likely, unlikely, somewhat likely, or very likely to succeed, or be the verdict

---

[152] Factum of the Appellant/Respondent on Cross-Appeal, at paras. 56-58.
[153] *R. v. Sarrazin*, 2010 ONCA 577 ("***Sarrazin* (ONCA)**"), at para. 77, aff'd on appeal, *R. v. Sarrazin*, 2011 SCC 54 ("***Sarrazin* (SCC)**").
[154] *R. v. Ronald*, 2019 ONCA 971, at paras. 66-67, citing *R. v. Haughton*, [1994] 3 S.C.R. 516, aff'g *R. v. Haughton* (1992), 11 O.R. (3d) 621 (C.A.) ("***Haughton***").
[155] *Cinous*, at para. 54.

returned at the end of the trial.[156] Permitting the trial judge to make this determination in order to avoid a complex jury charge, in light of the case law that explicitly prohibits this type of weighing, would run afoul to the core elements of the test.

123. The Respondent urges this Court to decline the Appellant's proposition in this regard.

Issue #2: The Lower Court Properly Applied the Correctness Standard

124. This Court has consistently held that the interpretation of a legal standard and the determination of whether there is an air of reality constitute questions of law, reviewable on a standard of correctness. This was articulated first in *Cinous*,[157] was directly considered in *Tran*,[158] and was affirmed in *Buzizi*[159] and *Alas*.[160] It is routinely applied in appellate courts throughout Canada: see, for example, *Rasberry* (Alberta),[161] *Arjun* (British Columbia),[162] *Douglas* (Manitoba),[163] *Gendron* (Quebec),[164] and *Hayes* (Ontario).[165]

125. This Court's decision in *Tran* is the controlling authority on this issue and is binding on all other appellate courts in Canada. Just two years ago in *Alas,* the Appellant Crown (Ontario), argued that "some deference" was required in the analysis.[166] Their submission was rejected by this Court. The Appellant has not provided the court with any basis to depart from the principles of horizontal *stare decisis* recently affirmed in *Kirkpatrick* and overturn itself on the standard of review for applications of the air of reality test.

126. The correctness standard is appropriate in the context of the air of reality test. As explained in *Tran,* this is because the air of reality test refers to the inquiry into whether there is an evidential

---

[156] *Chacon-Perez*, at para. 165.
[157] *Cinous*, at para. 55.
[158] *R. v. Tran*, 2010 SCC 58("***Tran***"), at para. 40.
[159] *R. v. Buzizi*, 2013 SCC 27("***Buzizi***"), at para. 15.
[160] *R. v. Alas*, 2022 SCC 14, at para. 3.
[161] *R. v. Rasberry,* 2017 ABCA 135, at para. 53, application for leave to appal dismissed, *Rasberry v. Her Majesty the Queen*, 2019 CanLII 1631 (SCC) and *Rasberry v. Her Majesty the Queen*, 2017 CanLII 80432 (SCC).
[162] *R. v. Arjun,* 2015 BCCA 273, at para. 32.
[163] *R. v. Douglas*, 2017 MBCA 63, at para. 28.
[164] *Gendron c. R.,* 2019 QCCA 1959, at para. 15.
[165] *R. v. Hayes*, 2020 ONCA 284, at para. 50.
[166] See Factum of the Appellant in *R. v. Alas*, 2022 SCC 14, at para. 75.

foundation.[167] Statements that there is or is not an air of reality express a legal conclusion about the presence or absence of an evidential foundation.[168] Thus, the air of reality inquiry is not a review of the trial judge's assessment of the evidence, but rather of the judge's legal conclusions.[169]

127. In *Pan*, the Court of Appeal did not expressly speak to the standard of review when considering whether the trial judge erred in failing to leave second-degree murder and manslaughter to the jury. However, as acknowledged by the Appellant, it is implicit that the court did not afford any deference to the trial judge's assessment.[170] This was the correct approach in light of the governing authority from this court on the standard of review being correctness. The appellate court was reviewing the trial judge's *conclusion* that the air of reality test had been met. No deference was to be afforded as the trial judge's assessment of the evidence was not the subject of the review.

128. The Appellant asserts that the correctness standard does not recognize the trial judge's unique position and advantage.[171] However, this court has held that "the trial judge is not at all in the 'best position' to determine whether a defence has an air of reality, since that is a question of law".[172]

129. As with the air of reality test, in its analysis of so-called "competing" jurisprudence in the standard of review analysis, the Appellant points to accurate expressions of the standard of review and puts them forward as inconsistencies. For example, the Court of Appeal for Ontario has acknowledged limited deference to the trial judge's analysis of inferences which can be drawn from the evidence, but no deference on the ultimate finding of whether there is an air of reality to the defence (or included offence as the case may be). An example of this distinction in the case at bar would be to allow some deference to the trial judge in determining what interpretations of the "two stacks" text messages were available on the evidence as a whole, but no deference as to whether the "two stacks" messages were capable of supporting an air of reality to the lesser included offences of second-degree murder or manslaughter. This detail-oriented aspect of the standard of review is not engaged on the issues before the court at this time.

---

[167] *Tran*, at para. 40, citing *Cinous*, at paras. 50, 55; *Osolin*, at p. 682.
[168] *Tran*, at para. 40, citing *Cinous*, at paras. 50, 55; *Osolin*, at p. 682.
[169] *Tran*, at para. 40.
[170] Factum of the Appellant/Respondent on Cross-Appeal, at para. 73.
[171] Factum of the Appellant/Respondent on Cross-Appeal, at para. 62.
[172] *Buzizi*, at para. 15.

130. Truly, the question of standard of review is not a live issue in this appeal. Despite vigorous submissions by trial counsel that second-degree murder and manslaughter should be left with the jury, the trial judge rendered his decision by way of a brief email, which does not lay out the test he applied or the evidence he considered. Even if the standard was something less than correctness, this would not be an appropriate case for deference.

Issue #3: The Lower Court Correctly Declined to Invoke the *Curative Proviso*

131. This was not an appropriate case for application of the *curative proviso.* The law governing application of the *proviso* to errors in the charge on included offences is neither confusing nor inconsistent.[173] Rather, the law in this area is clear and was correctly applied by the lower court.

132. The *curative proviso* will generally not be available in cases where included offences are not left with the jury and the jury convicts of a more serious offence.[174] As the Court of Appeal for Ontario explained in *Ronald*, a determination that the included offences should have been left with the jury because there was a realistic possibility of an acquittal on the more serious offence is incompatible with a determination that the evidence supporting the conviction was "overwhelming".[175] Further, the verdict may have been different if the jury had been presented with "the full menu of legally available verdicts".[176] As such, a failure to leave included offences that have an air of reality can seldom be said to be harmless or to have caused no substantial wrong or miscarriage of justice. [177]

133. Here, the lower court did not simply conclude that the *curative proviso* had no application as a matter of principle, as the Appellant suggests.[178] Rather, the court concluded that it had no

---

[173] Factum of the Appellant/Respondent on Cross-Appeal, at para. 77.
[174] See *R. v. Doxtator*, 2022 ONCA 155 ("***Doxtator* (ONCA)**"), at para. 52. There is only one recognized situation in which the court may apply the *curative proviso* to the erroneous failure to leave a possible verdict on an included offence: the court can take into account findings of fact implicit in the verdicts returned by the jury as long as those verdicts are not tainted by the legal error, and those findings are unambiguously revealed by the verdict. See *Haughton; Sarrazin* (SCC), at para. 31. This situation is not applicable in this case.
[175] *Ronald*, at para 66.
[176] *Ronald*, at paras. 66-67. See also *Sarrazin* (SCC), at para. 31.
[177] *Haughton; Doxtator* (ONCA), at para. 52.
[178] Factum of the Appellant/Respondent on Cross-Appeal, at para. 79.

application *in this case*.[179] Specifically, the court held that there was a real likelihood that a jury, left only with the choice of convicting Pan of first-degree murder or acquitting, would opt for the verdict that recognized some responsibility in her mother's death and held her accountable for her actions.[180]

134. As noted, an appellate court may take into account findings of fact implicit in the verdicts, as long as those verdicts are not tainted by the legal error, and those findings are unambiguously revealed by the verdict. The difficulty in this case is that the jury's verdict regarding the death of Pan's mother was tainted by the erroneous omission of the included offences. This is because, as the lower court concluded, there was some evidence that the jury might have a reasonable doubt on whether there was a deliberate plan to kill Pan's mother (as opposed to just her father). It is because of this evidence that the Appellant cannot satisfy its burden of demonstrating an overwhelming Crown case.

135. Also, the evidence of a plan to kill both parents was far from overwhelming. The only evidence that the Appellant points to at paragraph 60 of its factum, which directly supports a finding that Pan conspired with her co-accused in November of 2010 in an explicit plan to kill both her parents, came from the testimony of Montemayor.[181] At trial, Montemayor was confronted with prior inconsistent statements on this very point, where he either claimed not to have spoken to Pan that night, or that his memory of the phone call at issue was "vague".[182] There were also additional specific and general credibility issues with his evidence when considered as a whole. All the other evidence which the Appellant points to in support of a plan to kill both parents does not speak directly to the identity of the target(s), as between one parent or both.

---

[179] Court of Appeal decision, at paras. 142-143.
[180] Court of Appeal decision, at para. 143.
[181] The Appellant also refers briefly to evidence that Pan told Wong that she wanted to kill both her parents. However, as the Appellant acknowledges at paragraph 17 of its Factum, Wong's evidence was not ultimately admissible against Pan at trial. In the case against Pan, the jury could only consider Wong's out-of-court statement on the first step of the *Carter* test to determine whether a conspiracy existed between the parties. They could not use it in their ultimate determination of guilt, as it did not describe a step taken in furtherance of a joint venture.
[182] A. Montemayor Testimony (cross), Vol. 29 p. 342, at l. 25 to p. 343, at 1. 3 [**A.R., Part V, Vol. 29**].

136. If the included offences had been left to the jury, the trial judge would have provided appropriate instructions about the evidence that could have given rise to a reasonable doubt in the jury's minds about planning and deliberation regarding the death of Pan's mother.[183] Instead, the jury instruction in this case wrongly narrowed the proper scope of the jury's deliberations, as not all verdicts reasonably available on the evidence were left for their consideration. It cannot be said that, had the jury been left with other possible verdicts that would have held Pan accountable, either manslaughter or second-degree murder, the jury would necessarily have still convicted her of first-degree murder. Thus, the failure to leave the other verdicts cannot be said to be harmless and it would not have been appropriate to invoke the *curative proviso* in this case.

Alternative Routes to Affirm the Lower Court's Order

137. The Respondent adopts the submissions of Co-Respondents Wong, Mylvaganam, and Crawford as alternate routes to uphold the lower court's order, pursuant to Rule 29(3).

PART IV – COSTS

138. The Respondent seeks no costs and asks that no costs be awarded against her.

PART V – ORDER REQUESTED

139. The Respondent respectfully requests that the appeal be dismissed.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

140. The Respondent acknowledges the publication ban and sealing orders set out in paragraph 88 of the Appellant's Factum. The Respondent has no submissions on the impact of the restrictions on the Court's reasons in the appeal and cross-appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of May, 2024.

Stephanie DiGiuseppe
Jessica Proskos

[183] See *Doxtator* (ONCA), at para. 52.

41

PART VII – TABLE OF AUTHORITIES

CASES	CITED AT PARAGRAPH NO.
Gendron c. R., 2019 QCCA 1959	124
R. v. Alas, 2022 SCC 14	53, 124, 125
R. v. Ali, 2021 ONCA 362	105
R. v. Arjun, 2015 BCCA 273	124
R. v. Barrett, 2022 ONCA 355	90
R. v. Brick, 2023 SKCA 107	90
R. v. Buzizi, 2013 SCC 27	124, 128
R. v. Chacon-Perez, 2022 ONCA 3	61, 122
R. v. Cinous, 2002 SCC 29	1, 53, 57, 63-66, 79, 80, 82, 86, 88, 90-94, 97, 107, 109, 115, 118, 122, 124, 126
R. v. Davis, [1999] 3 S.C.R. 759	63
R. v. Douglas, 2017 MBCA 63	124
R. v. Doxtator, 2022 ONCA 155	83, 132, 136
R. v. Fontaine, 2004 SCC 27	57, 66, 81, 90, 91, 94
R. v. Gauthier, 2013 SCC 32	66, 82
R. v. Hayes, 2020 ONCA 284	124
R. v. Howe, (2005) 192 C.C.C. (3d) 480 (Ont. C.A.)	102
R. v. Kirkness, [1990] 3 S.C.R. 74	
R. v. Kirkpatrick, 2022 SCC 33	91, 125
R. v. Logan, [1990] 2 S.C.R. 731	99
R. v. Martineau, [1990] 2 S.C.R. 633	99
R. v. Morgan, 2023 BCCA 226	90

R. v. Osolin, [1993] 4 S.C.R. 595	1, 56-58, 63, 64, 67, 70, 71, 83, 91, 93, 94, 126
R. v. Pappas, 2013 SCC 56	66, 90, 92, 94
R. v. Park, [1995] 2 S.C.R. 836	63, 64, 67, 72, 73, 75, 92, 110
R. v. Rasberry, 2017 ABCA 135, application for leave to appal dismissed, *Rasberry v. Her Majesty the Queen*, 2019 CanLII 1631 (SCC) and *Rasberry v. Her Majesty the Queen*, 2017 CanLII 80432 (SCC)	124
R. v. Ronald, 2019 ONCA 971	60, 63, 120, 132
R. v. Sarrazin, 2010 ONCA 577, aff'd on appeal, *R. v. Sarrazin*, 2011 SCC 54	120, 132
R. v. Simon, 2010 ONCA 754	99
R. v. Sit, [1991] 3 S.C.R. 124	99
R. v. Tenthorey, 2021 ONCA 324	83
R. v. Tran, 2010 SCC 58	124-126
R. v. Vaillancourt, [1987] 2 S.C.R. 636	99
R. v. Villaroman, 2016 SCC 33	105
R. v. Wong, 2022 ABCA 171	90
Schuldt v. The Queen, [1985] 2 S.C.R. 592	105
LEGISLATION	**SECTION(S)**
Canadian Charter of Rights and Freedoms *Charte canadienne des droits et libertés*	11(d), 11(f) 11(d), 11(f)
Criminal Code *Code criminel*	21(2) 21(2)

FACTUM OF APPELLANT ON CROSS-APPEAL

PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. The "tainting doctrine" applied by appellate courts to determine whether a particular count should be remitted for retrial following a finding of legal error, has not received holistic consideration by this court. The current test is deficient in that it fails to address the problem posed where an appellate court's decision to uphold a conviction on one count, while remitting another count for retrial, might result in inconsistent verdicts in the future. Under the existing jurisprudence interpreting s. 686(1)(a), an inconsistent verdict is both an unreasonable result and emblematic of a miscarriage of justice which requires intervention. Appellate courts should remit "associated counts" to avoid the possibility of inconsistent verdicts arising out of separate trials on factually intertwined events.

2. The Cross-Appellant suggests a novel, yet simple and straightforward, enhancement to the test for remittance of counts under s. 686(1)(a): where affirming the conviction on an associated count would be inconsistent with an available jury verdict on a count that has been remitted for retrial, the "associated count" must also be remitted. If this court were to adopt the Cross-Appellant's proposed test, it would bring the law in this area into conformity with other closely related areas, such as the law of severance and the law surrounding inconsistent jury verdicts. It would also ensure that the application of s. 686(1)(a) is in line with fundamental legal values, such as finality, fairness, and consistency of result.

Statement of Facts

3. The facts are as stated in Part I of the Respondent's factum on the main appeal. The following additional facts are presented for consideration of the grounds argued on cross-appeal.

4. The Cross-Appellant, Jennifer Pan, and three co-accused, were convicted on December 13, 2014, of the first-degree murder of Bich-Ha Pan (her mother) and the attempted murder of Hann Pan (her father). Pan appealed her convictions. One of the primary issues before the Court of Appeal for Ontario was whether the trial judge had erred by instructing the jury that only two possible scenarios were available on the evidence, either: (i) Pan planned to kill both her parents; or (ii) the killings arose

out of a plan to commit a home invasion to which Pan was not involved. The trial judge further instructed the jury that on the first scenario, Pan should be found guilty of first-degree murder and attempted murder, and on the second scenario, Pan should be acquitted of both charges.

5. On appeal, the defendants argued that there was an air of reality to a third scenario: that Pan planned to murder her father, but not her mother. This scenario would open up routes of liability for second-degree murder or manslaughter in relation to her mother's death. The defendants argued on appeal that if the "two scenarios" ground was successful, both the convictions for first-degree murder of Pan's mother and the attempted murder of Pan's father should be remitted for retrial.

6. On May 19, 2023, the lower court released its judgment in Pan's conviction and sentence appeal. The court correctly held that there was an air of reality to a "third scenario" (a plan to kill Hann Pan only). This necessarily meant that the trial judge had erred by: (i) improperly linking the verdicts on the murder charge and the attempt murder charge; and (ii) by not leaving the included offences of second-degree murder and manslaughter as possible verdicts for all the accused in relation to the death of Pan's mother.[1]

7. Once the court concluded that the appeal should be allowed on the basis of an error of law, the court turned to the secondary issue of the remedy to be imposed pursuant to s. 686(1) of the *Criminal Code*. As a remedy for the "two scenarios" error, the lower court ordered a new trial for each accused on the first-degree murder charge (the "remitted count"), while leaving their attempted murder convictions untouched (the "associated count").

8. The court applied a test which was recently articulated by the Court of Appeal for Ontario in *Ronald*[2] and implicitly considered by this court in the as of right appeal in *Doxtator* (where this court affirmed the application of the test in *Ronald* put forward in MacPherson J.A.'s dissent).[3] The test asks whether the legal errors in relation to the remitted counts in the indictment have tainted the reasoning process in relation to the associated counts. The Court of Appeal did not consider whether a new trial might be ordered pursuant to s. 686(1) to prevent the possibility of future inconsistent verdicts, though this point was argued.

---

[1] Court of Appeal decision, at paras. 51-74.
[2] See *Ronald*.
[3] *R. v. Doxtator*, 2022 SCC 40, adopting the dissenting reasons of MacPherson J.A. in *R. v. Doxtator*, 2022 ONCA 155.

9. The lower court concluded that the attempted murder convictions ought to stand, because they were not tainted by the failure to leave second-degree murder and manslaughter as included offences on the murder charge.[4] The failure to leave routes to included offences did not impact the jury's finding that the attack on Pan's father was the result of an unsuccessful attempt to commit a planned and deliberate murder.[5] Thus, only the first-degree murder convictions were remitted for retrial.

10. As a result, Pan and her co-defendants remain convicted of the attempted murder of her father, while they await a new trial in relation to the murder of Pan's mother.

PART II – QUESTIONS IN ISSUE

11. This appeal raises an issue regarding the test future appellate courts ought to apply to determine whether associated counts may be remitted for retrial to prevent the possibility of future inconsistent verdicts. This question engages the statutory interpretation of s. 686(1)(a), including whether s. 686(1)(a) is only retrospective, or whether appellate courts have the jurisdiction to consider prospective factors when determining the issue of remedy.

12. The questions raised by the Cross-Appellant are:

(1) Should appellate courts remit associated counts where doing otherwise would risk the possibility of inconsistent trial verdicts arising out of factually intertwined events?

(2) Is the tainting doctrine established and applied by appellate courts part of the test for remittance under s. 686(1)(a) or is it part of the test for the application of the *curative proviso* under s. 686(1)(b)? Who bears the onus for establishing tainting and the remittance of associated counts?

13. The Appellant on Cross-Appeal submits that the answer to (1) is that this court ought to adopt a two-prong test to determine whether associated counts may be remitted for retrial, considering: first, whether the legal error(s) in relation to the remitted counts have tainted the reasoning process in relation to the associated counts; and second, whether associated counts may be remitted to prevent the possibility of future inconsistent verdicts arising out of factually intertwined events.

---

[4] Court of Appeal decision, at para. 146.
[5] Court of Appeal decision, at para. 146.

14. The Appellant on Cross-Appeal further submits that the answer to (2) is that this court should acknowledge an onus on the Crown to demonstrate that the conviction was not tainted by legal error, in conjunction with the law regarding the application of the *curative proviso*.

PART III – STATEMENT OF ARGUMENT

Issue #1: Associated Counts Ought to be Remitted Where Doing Otherwise Would Risk the Possibility of Inconsistent Verdicts

(a) *The Current Test for Remitting Associated Counts*

15. Section 686(1)(a) provides three distinct bases upon which an appellate court may quash a conviction. Section 686(1)(a)(i) of the *Criminal Code* provides that the court may allow an appeal where the verdict is unreasonable or cannot be supported on the evidence. Section 686(1)(a)(ii) provides that the appeal may be allowed if the judgment of the trial court should be set aside as a result of an error of law. Other situations which may justify the intervention of an appellate court fall into a residual category under s. 686(1)(a)(iii) which refers to the notion of a "miscarriage of justice".

16. If a count is remitted for retrial due to a legal error (a "remitted count"), the appellate court may also remit associated counts (counts that are tried together, assuming there is a sufficient factual and legal nexus with the remitted counts) that have been tainted by the legal error on the remitted count. This is referred to as the tainting doctrine. The analysis asks the appellate court to consider whether the legal errors in relation to the remitted counts have tainted the reasoning process in relation to the associated counts, such that they ought to be remitted for trial.

(b) *The Proposed Two-Prong Approach*

17. Currently, there is no recognized ability for an appellate court to remit an associated count for retrial where the conviction is not tainted by the legal error, but there is the possibility of creating an inconsistent verdict if the associated count is not remitted.

18. The idea that an inconsistent verdict could result from the appellate court's own application of s. 686 is inconsistent with the appellate system's core function. It would be antithetical to the purpose and intent of the provision for the same section that aims to cure miscarriages of justice, to permit appellate courts to enable the production of inconsistent verdicts. However, the current interpretation of the s. 686 test, which is retroactively focused on the events at trial, does not explicitly

provide courts with the power to prevent this outcome. The solution is to develop a test which permits this court to consider the potential for future inconsistent verdicts – a prospective factor – under s. 686(1)(a).

19. As such, that this court ought to adopt a two-prong test to apply to remittance of associated counts. Following a finding of legal error, appellate courts should remit associated counts:

(1) Where the legal error on a remitted count taints the associated count, such that the verdict on the associated count may have been impacted by the error; or

(2) Where affirming the conviction on an associated count has the potential to be inconsistent with an available jury verdict on a count that has been remitted due to a legal error.

20. Expanding the test in this way is permissible in light of the principles of statutory interpretation, has support in the case law, and is ultimately in the interests of justice.

(c) *The Approach is Consistent with Statutory Interpretation*

21. If expansion of the test is desirable, this court must consider whether the statutory text in s. 686 of the *Criminal Code* permits this result. The Cross-Appellant submits that it does.

22. The test for remittance of associated counts can be expanded to include consideration of potential future inconsistent verdicts, pursuant to ss. 686(1)(a)(i), (ii) or (iii) of the *Criminal Code*.

Section 686(1)(a)(i)

23. Section 686(1)(a)(i) provides one avenue for expansion of the test. This section allows appellate courts to remit counts for retrial where "it is unreasonable or cannot be supported on the evidence" (emphasis added). This is the provisions that is most often relied upon to address errors premised on inconsistent verdicts under the existing case law.[6]

24. Though the question of whether a verdict is supported by the evidence is necessarily retrospective, the use of the conjunctive "or" in the wording of s. 686(1)(a)(i) confirms that the provision differentiates between verdicts which are remitted because they are "unreasonable" and

[6] See, for example, *R. v. R.V.*, 2021 SCC 10, at para. 28; *R. v. J.F.*, 2008 SCC 60, at para. 59 (dissenting reasons of Deschamps J.), citing *R. v. Pittiman*, 2006 SCC 9, at paras. 6-7.

those which are unsupported on the trial record.[7] The focus of the analysis under 686(1)(a)(i) must remain on the verdict itself, not on the reasoning process at trial.

25. The statutory language of s. 686(1)(a)(i) does not provide any explicit indication that the reasonableness of the verdict is frozen in time at the end of the trial. To the contrary, the use of the present tense verb "is unreasonable" in s. 686(1)(a)(i), rather than the passive verb "was", provides some indication that an outcome yielded through the appellate process which might affect the integrity of the verdict may be considered when determining whether upholding a trial verdict is reasonable or unreasonable. Review of verdicts for reasonableness also recognizes that, even where a trial is error-free, appellate intervention may sometimes be necessary to avoid an injustice.[8]

26. For these reasons, the Cross-Appellant submits that a verdict may be considered "unreasonable" where affirming that verdict could create a potential future inconsistent verdict, thus allowing for an expansion of the test for remittance under ss. 686(1)(a)(i) of the *Criminal Code*.

Section 686(1)(a)(ii)

27. Section 686(1)(a)(ii) has been interpreted broadly by the courts[9] and provides an additional avenue for expansion of the test. The sub-section provides for verdict that "should be set aside on the ground of a wrong decision on a question of law". While this section has been interpreted as requiring that "the judgment must have been based, or have possibly been based, on an erroneous legal norm", the statutory language "should be set aside on the grounds of" is actually quite permissive.[10]

28. This court has never been directly asked to consider whether a count "should" be set aside, following a finding of error, to prevent future harm, such as a potential future inconsistent verdict. However, there is nothing in the statutory language that precludes this interpretation. To the contrary, the section is future-oriented, asking the court to consider what *should* happen to remediate the effects of the legal error identified.

---

[7] *R. v. Sinclair*, 2011 SCC 40, at para. 77 (concurring reasons of Charron J.), citing *R. v. Beaudry*, 2007 SCC 5 at para. 89 (dissenting opinion of Fish J.).
[8] *R. v. Shaw*, 2024 ONCA 119, at para 144, citing *R. v. Yebes*, [1987] 2 S.C.R. 168, at pp. 180-181; 183-186; *R. v. Biniaris*, 2000 SCC 15, at paras. 36, 38-42; *R. v. Tat* (1997), 35 O.R. (3d) 641 (C.A.), at paras. 97-98; *R. v. Phillips*, 2018 ONCA 651, at para. 51.
[9] *R. v. Tayo Tompouba*, 2024 SCC 16 ("***Tayo Tompouba***"), at para. 60.
[10] *R. v. Khan*, 2001 SCC 86 ("***Khan***"), at para. 60.

Section 686(1)(a)(iii)

29. The proposed expansion to the test for remittance of associated counts may also be considered under the statutory jurisdiction conveyed by s. 686(1)(a)(iii), which allows for remittance if, on any ground, "there was a miscarriage of justice."

30. The miscarriage of justice test has been described as the residual test for other situations which may justify intervention.[11] Section 686(1)(a)(iii) covers "irregularities" that either rendered the trial unfair for the accused or created the appearance of unfairness.[12] Though such errors are often more akin to procedural irregularities, they still often find their root in some error of law, in the sense that the irregularity would not have occurred if the appropriate legal norms had been followed.[13] Where "something irregular" has occurred during the course of a trial that results in "unfairness" or the "appearance of unfairness," a miscarriage of justice may result.[14]

31. The use of the wording "was" in s. 686(1)(a)(iii) does not prevent expansion of the test for remittance. Courts have demonstrated that there is flexibility in the statutory language that would permit appellate courts to act to prevent miscarriages from justice occurring in the future.

32. For example, in *Truscott,*[15] the Court of Appeal for Ontario recognized some flexibility in its statutory jurisdiction under s. 686. It held that in exceptional circumstances, an acquittal may be entered under s. 686(2) — even where the test for substituted verdicts was not met — to prevent potential future unfairness to the appellant, uphold the public interest, or to protect the integrity of the administration of the criminal justice system.[16]

33. Further, in *Bouvette*,[17] the British Columbia Court of Appeal concluded that the conviction entered following the appellant's guilty plea was the product of a miscarriage of justice and must be set aside under s. 686(8). However, it determined that a stay of proceedings for abuse of process was the proper remedy, not an acquittal, focusing on prospective concerns such as avoiding a potential

---

[11] *Khan*, at para. 61.
[12] *Khan*, at para. 61.
[13] *Khan*, at para. 61.
[14] *Khan*, at para. 67.
[15] *Truscott (Re),* 2007 ONCA 575 ("***Truscott***").
[16] *Truscott*, at para. 265.
[17] *R. v. Bouvette*, 2023 BCCA 152 ("***Bouvette***").

future trial, which would be an "unjust" result that would violate fundamental principles of justice and garner "systemic prejudice".[18] The court further held that the inquiry for setting aside a guilty plea must be "sufficiently flexible to take account of the almost infinite range of circumstances that might be said to have contributed to a miscarriage of justice."[19]

34. The three grounds for intervention under s. 686(1)(a) identified above have the same underlying principle: an appellate court can generally intervene where the error is prejudicial to the accused.[20] Under the existing jurisprudence interpreting s. 686(1)(a), an inconsistent verdict is both an unreasonable result and emblematic of a miscarriage of justice. Unreasonable verdicts are, by nature, prejudicial to the accused and require appellate intervention.[21] Finally, an appellate court has broad power under s. 686(8) to make "any order that justice requires" when exercising its statutory power under s. 686(2). Thus, there is room for an expansion of the test for remittance under ss. 686 of the *Criminal Code* that is consistent with the principles of statutory interpretation.

(d) *The Approach Has Support in the Case Law*

35. There is support in the case law for the Appellant's proposal to expand the test for remittance of associated counts and for the idea that an appellate court may act prospectively to prevent future unfairness to the appellant when granting a remedy under s. 686.

36. Most notably, this Court in *Nygaard*[22] took proactive action to fashion a remedy which would prevent the possibility of inconsistent verdicts in the future. In *Nygaard*, co-appellants Nygaard and Schimmens both appealed their murder convictions. This court allowed the appeal on the basis that the trial court erroneously admitted evidence relevant to Schimmens' alibi defence. The court applied a tainting analysis, concluding that the erroneously admitted evidence affected only Schimmens, and ordered a retrial. Nonetheless, the court held that it also needed to order a new trial for Nygaard as it was the only way to prevent the possibility that a new trial would produce an "incongruous and unacceptable result" should "Schimmens, the prime mover in the crime" be found guilty of second-

[18] *Bouvette*, at paras. 144-145.
[19] *Bouvette*, at para. 85.
[20] *Tayo Tompouba*, at paras. 54, 56.
[21] *Tayo Tompouba*, at para. 56.
[22] *R. v. Nygaard*, [1989] 2 S.C.R. 1074 ("***Nygaard***"), at p. 1094.

degree murder, "while Nygaard, the party to the crime" was found guilty of first-degree murder.[23] To prevent the possibility of inconsistent verdicts, this court took a future-focused, protective approach to avoid a result which might cause significant unfairness to the defendants and bring the administration of justice into disrepute.

37. Provincial appellate courts have also held that in exceptional circumstances, the court may impose a remedy under s. 686 of the *Criminal Code* which takes potential future unfairness into account. The Court of Appeal for Ontario in *Ronald* took a future-focused approach to prevent an inconsistent result which might cause a miscarriage of justice. In *Ronald*, the court was considering the issue of tainting in a factual scenario similar to the appeal before this court. The Crown's theory was that the appellant, Bhupinderpal Gill, who was the victim's husband, had conspired to murder his wife with the appellant, Gurpreet Ronald. Gill and Ronald had been romantically involved for years. There was no evidence that Gill participated in his wife's murder, except as a co-conspirator in a plan to murder his wife that was carried out by Ronald.

38. At trial, the judge gave the jury an "all or nothing" instruction, instructing that both Gill and Ronald were either guilty of first-degree murder, or not guilty. On appeal, counsel submitted that the failure to leave a conviction for second-degree murder as a possible verdict for Ronald was a reversible error. The court agreed and a new trial was ordered for her.

39. The court in *Ronald* then applied a tainting analysis and concluded that the legal error with respect to Ronald tainted the conviction for Gill. When determining whether Gill ought to receive a new trial, the court noted that even if they were incorrect that there was an error of law, if only Ronald was retried, there was a risk that Ronald (the actual alleged killer) could end up convicted of second-degree murder, while Gill (the alleged co-conspirator, not the perpetrator), would remain convicted of first-degree murder.[24] The court therefore ordered that Gill ought to receive a new trial, as such verdicts would represent an "incongruous and unacceptable result".[25]

40. In *Bouvette*, the British Columbia Court of Appeal also acted to prevent a result that may cause significant unfairness to the defendant. The court there was concerned with the effect of ordering a new trial where the accused had already served her full sentence for the offence, even

---

[23] *Nygaard*, at p. 1094.
[24] *Ronald*, at para. 79.
[25] *Ronald*, at para. 83.

though the test for entering an acquittal on appeal had not been met. In that case, the appellant entered a guilty plea to criminal negligence causing death. On appeal, the appellant sought the admission of fresh evidence tendered to establish material non-disclosure by the Crown and police prior to the date upon which the plea was entered. She aimed to demonstrate the reasonable possibility that she would not have plead guilty had such disclosure been made. By the time her appeal was decided, the appellant had served the entirety of her 12-month sentence in custody.

41. The British Columbia Court of Appeal concluded that the conviction entered following the appellant's guilty plea was the product of a miscarriage of justice and must be set aside. However, it determined that an acquittal was not the appropriate remedy for the violation, as the test for such a remedy had not been met. In holding that the proper remedy was to stay the prosecution on appeal for abuse of process, the court focused on prospective concerns: avoiding a potential future trial, which the court found would be an "unjust" result that would violate fundamental principles of justice and garner "systemic prejudice".[26] While this remedy was granted under s. 686(8) as opposed to s. 686(1) or (2), it nonetheless reinforces the flexibility of this court to consider prospective factors when fashioning a just remedy.

42. Again, in *Truscott*, the Court of Appeal for Ontario acted to prevent potential future unfairness to the appellant. The court here was dealing with an application for fresh evidence that significantly undermined the medical evidence relied on by the Crown in a murder trial that began in 1959. The evidence was led to establish the victim's time of death, which was a crucial component of the Crown's case. On appeal, the court found that the medical evidence was not reliable. As such, the conviction could not stand and was quashed as a miscarriage of justice.[27]

43. The court held that for the appellant, a new trial could result either in an acquittal or a conviction (most likely an acquittal). This finding by an appellate court would, in most cases, lead to an order for a new trial. However, the Court of Appeal for Ontario found that, on the particular facts in *Truscott,* ordering a new trial would be unfair to the appellant and would do a disservice to the public. The court held that in exceptional circumstances, an acquittal may be entered under s. 686(2) — even where the test for substituted verdicts was not met — to prevent potential future unfairness to the appellant, uphold the public interest, or to protect the integrity of the administration of the

[26] *Bouvette*, at paras. 144-145.
[27] *Truscott*, at para. 8.

criminal justice system.[28] After concluding that a retrial would undermine those values, the Court of Appeal for Ontario ruled that it had statutory discretion to impose an acquittal in exceptional circumstances on the basis that an acquittal at any retrial would be more probable than not.[29]

44. Existing jurisprudence on these issues thus supports the expansion of the test for remittance of associated counts to allow the court to act prospectively to prevent future unfairness to the appellant when granting a remedy under s. 686.

(e) *The Approach is Consistent with the Interests of Justice*

45. It is in the interests of justice that the test for remittance of counts be expanded to prevent a future miscarriage of justice, which would be otherwise insulated from curial review.

46. The current test, which is focused only on tainting, is deficient in that it fails to address the problem posed where an appellate court's decision to uphold a conviction on one count, while remitting another count for retrial, might result in inconsistent verdicts.

47. A jury renders inconsistent verdicts when it finds an accused both guilty and not guilty of the same conduct.[30] In other words, verdicts are deemed inconsistent if no properly instructed jury could reasonably have returned them both.[31] Inconsistent verdicts are unreasonable as a matter of law and must be remitted for reconsideration pursuant to s. 686(1)(a)(i) of the *Criminal Code*. It would therefore be inconsistent with the purpose of s. 686(1) if courts were to uphold convictions, even where doing so might foreseeably result in future inconsistent verdicts, which would be insulated from curial review.

48. Unsurprisingly, the common law has developed procedural rules which aim to avoid the proliferation of inconsistent results. This is well exemplified in the law on severance. When a trial court considers whether to sever co-accused, appellate courts have cautioned that joint trials serve the interests of justice because they "enhance the truth-finding exercise and preclude the possibility of inconsistent verdicts."[32] Where the court is considering severance of counts, the factual and legal

---

[28] *Truscott*, at para. 265.
[29] *Truscott*, at paras. 265-269.
[30] *R. v. R.V.*, 2021 SCC 10, at para. 1.
[31] *R. v. J.F.*, 2008 SCC 60, at para. 23, citing *R. v. Pittiman*, 2006 SCC 9.
[32] *Sarrazin* (ONCA), at para. 59.

nexus between the counts and the possibility that separate trials could result in inconsistent verdicts are both significant factors favouring a single trial.[33] The strong presumption for joint trials yields only where a joint trial would result in injustice to one accused (severance of co-accused) or where the ends of justice require that result (severance of counts). Inconsistent findings arising out of the same subject-matter is an undesirable result that erodes faith in the efficacy of the justice system.

49. Further, the criminal burden of proof, the presumption of innocence, the principle of finality, the standard of appellate review, *stare decisis*, issue estoppel, and the "double jeopardy" principle, are all examples of our legal system's preoccupation with promoting certainty and finality. The test for appellate action pursuant to s. 686 of the *Criminal Code,* and the jurisprudence under it, also promote this goal by preventing the proliferation of multiple results before multiple decision-makers, applying the same legal principles to the same evidence. Where an appellate court affirms a conviction or acquittal, their decision has the benefit of imparting certainty and finality into our system. However, where affirming that count could later result in an inconsistent verdict that is insulated from review, there is no true finality. The result is rather one of perpetual uncertainty, haunted by the spectre of wrongful conviction.

50. It is therefore in the interests of justice that the test for remittance of counts be modified to prevent a future miscarriage of justice that could be insulated from curial review.

(f) *Application to this Case*

51. Pan has been granted a retrial for the count of first-degree murder with respect to her mother, Bich-Ha Pan. The attempted murder count with respect to her father, Hann Pan, has not been remitted. This court ought to remit Pan's attempted murder conviction for retrial as, though the conviction itself may not have been tainted by legal error, there is the possibility of creating an inconsistent verdict if the associated count is not remitted.

52. It is without question that at the retrial, an acquittal is a verdict that must remain available to the jury; failure to leave open the possibility of an acquittal would deprive Pan of her constitutional right to be presumed innocent.[34] Factually, an acquittal is available to the jury pursuant to scenario

[33] *R. v. L. E.,* [1994] O.J. No. 2641 (Ont. C.A.).
[34] *R. v. Mahalingan*, 2008 SCC 63, at para. 57.

two – that the Pans were murdered in a home invasion. As such, given the routes to liability in this case, an outright acquittal in relation to the death of Bich-Ha Pan could only follow if the jury had a doubt about Pan's participation in a plan to kill her father: there is no other route to an acquittal.

53. Instructing a future jury that they may acquit Pan on this basis would necessarily invite the jury to deliberate on a verdict that is inconsistent with the attempted murder conviction, as it would logically entail a doubt that Pan was involved in the plan to murder her father. Were that acquittal to occur, the fact that Pan would continue to serve a life sentence for the attempted murder of her father because another jury came to the opposite result would constitute an inconsistent and unjust result.

54. Moreover –to the extent that this factor is relevant – a retrial on both counts would have a negligible effect on the resources of the trial court. Given how factually intertwined the counts are, a retrial on the first-degree murder count would involve the same evidence as a retrial for the attempted murder count. Practically, a retrial on both counts would not significantly affect the witness list or the time required for trial; it would only lengthen the jury charge to some degree.

55. Thus, this case provides the court with an opportunity to create a single cohesive test under s. 686(1)(a), which acknowledges the full gamut of potential relationships between counts in multi-count indictments. While the second prong of the proposed test – remitting a count where affirming the conviction has the potential to be inconsistent with an available verdict on a remitted count – will arise rarely, its recognition is fundamental. It results from an extension of settled law on inconsistent verdicts within a single trial and is congruent with the law in other related areas.

56. For these reasons, Pan submits that this Court ought to adopt the proposed two-prong test for remittance and remit the associate count of attempted murder for retrial.

Issue #2: The Onus Should be on the Crown to Demonstrate Associated Counts Were Not Tainted by Legal Error

57. This court has never explicitly considered the analytical framework for the application of the tainting doctrine within the statutory scheme of s. 686. It is necessary to establish whether the tainting doctrine is ultimately part of the analysis under the test to allow the appeal in s. 686(1)(a) or a component of the application of the *curative proviso*. This will determine who bears the burden of establishing that an associated count should or should not be remitted under s. 686(2). It will further

contribute to clarity and predictability of the law, as is necessary to uphold the goal of administrative efficiency within the justice system.

(a) *The Framework Requires Clarification*

58. While the tainting analysis is often invoked to determine the issue of remittance of counts, there is a lack of consistency in the framework applied by appellate courts. In *Ronald* and *Figueroa*,[35] the Court of Appeal for Ontario has construed the tainting analysis through an application of the *curative proviso*. Conversely, the Nova Scotia Court of Appeal has made repeated, explicit reference to the idea that the tainting doctrine comes into the analysis of remittance through application of s. 686(1)(a).[36]

59. While the analysis under s. 686(1)(a) and the analysis under the *curative proviso* are closely related – the *proviso* itself is often said to derive from the combined application of ss. 686(1)(a)(ii), (b)(ii), (b)(iii) and s. 686(2) of the *Criminal Code* – the question of whether tainting is part of the initial determination under s. 686(1)(a) or falls under the application of the *proviso* is an important one. The resolution of this issue will determine who bears the legal onus to establish that an associated count should or should not be remitted following a finding of legal error. It could also constrain application of the tainting doctrine, as the *proviso* can only be applied if the Crown explicitly or implicitly raises it.[37]

(b) *The Cross-Appellant's Proposal*

60. The Cross-Appellant submits that, where counts are tried together and are not the subject of severance, it can be presumed that there exists a sufficient factual and legal nexus between the counts, such that they can be deemed "associated counts". Where one count is remitted for retrial, the presumption should be that all associated counts are also to be remitted. The court should then acknowledge an onus on the Crown to demonstrate that the convictions on all associated counts ought not to be remitted in conjunction with the law regarding the application of the *curative proviso* pursuant to s. 686(1)(b)(iii) of the *Criminal Code*.

---

[35] *Ronald*, at paras. 64-65; *R. v. Figueroa*, 2008 ONCA 106 at paras. 51-59.
[36] *R. v. Downey*, 2022 NSCA 59, at para. 43; *R. v. Hannan*, 2023 NSCA 7, at para. 136.
[37] *R. v. Samaniego*, 2022 SCC 9, at para. 66.

(c) *There is Support for the Cross-Appellant's Proposed Framework*

61. The Cross-Appellant's position that the burden ought to be on the Crown to demonstrates that (i) the conviction on associated counts was not tainted by legal error, or (ii) affirming associated counts would not result in inconsistent verdicts, has support in the case law.

62. In *Morrissey*, Doherty J.A. indicated that s. 686(1)(a)(ii) "presumes that an error in law produces a miscarriage of justice unless the Crown can demonstrate the contrary with the requisite degree of certainty" through invocation of the *proviso*.[38] Similarly, this court recently, in *Tayo Tompouba*, also discussed who bears the onus of establishing that an error of law was or was not prejudicial to the accused, thus requiring appellate intervention. This court held that demonstrating that there was an error of law, in itself, is sufficient to give rise to a presumption of prejudice against an accused.[39] Because errors of law are presumed to be prejudicial to the accused, and presumed to produce a miscarriage of justice, the Crown must bear the onus of establishing the absence of prejudice by invoking the *curative proviso*, if it chooses to do so.[40] This presumption seems to suggest that the onus is on the Crown to disqualify associated counts from remittance by establishing that the counts are not tainted or otherwise affected by legal error.

63. Justice Doherty's application of the tainting doctrine in *Morrisey*, as applied more recently in *Ronald*, is derived from a long line of caselaw emanating from the Court of Appeal for Ontario,[41] and affirmed more recently in *Sarrazin*[42] and *Doxtater*.[43]

64. In *Ronald,* Doherty J.A. considered the issue of tainting in the context of determining whether the *curative proviso* ought to apply due to the trial judge's erroneous failure to leave with the jury a possible verdict that arose on the evidence in a murder case. As noted above, the trial judge gave the

---

[38] *R. v. Morrissey,* (1995), 22 O.R. (3d) 514 (Ont. C.A.). See also *R. v. J.P,* 2014 NSCA 29, at para. 96.
[39] *Tayo Tompouba*, at paras. 57-58, 80.
[40] *Tayo Tompouba*, at para. 58.
[41] See *Ronald*, at para. 68, citing *Haughton*; *Elkins*, at pp. 170-172, leave to appeal refused, [1996] S.C.C.A. No. 62; *R. v. Mulligan* (2006), 80 O.R. (3d) 537 (Ont. C.A.), at para. 60; *Sarrazin* (ONCA), at paras. 70-72; *Sarrazin* (SCC), at paras. 30-31; *R. v. Pilon*, 2009 ONCA 248, at paras. 76-80; *R. v. Humaid,* (2006), 81 O.R. (3d) 456 (Ont. C.A.), at paras. 88-90, leave to appeal refused, [2006] S.C.C.A. No. 232.
[42] *Sarrazin* (ONCA).
[43] *Doxtator* (ONCA).

jury an "all or nothing" instruction, instructing that both Gill and Ronald were either guilty of first-degree murder, or not guilty. On appeal, counsel submitted that the failure to leave a conviction for second-degree murder as a possible verdict for Ronald was a reversible error. Counsel argued that Ronald may have formed the intention to kill while involved in some kind of verbal altercation with the victim. On this version of events, the murder was intentional, but not planned and deliberate, and so Ronald could properly be convicted of second but not first-degree murder. Gill argued on appeal that by failing to leave the possibility of a conviction for the included offence of second-degree murder as it related to Ronald, the trial judge removed a crucial part of Gill's defence that Ronald had acted alone.

65. The court in *Ronald* noted that there was evidence that could support a finding that Ronald murdered Gill, but did not plan and deliberate on the murder. The evidence, however, did not exclude the possibility that Ronald killed the victim pursuant to a plan she had formed with Gill. Nonetheless, when determining if the included offence of second-degree murder ought to be left with the jury, the trial judge does not ask if the evidence points more strongly to second-degree murder than to planning and deliberation, but instead asks whether a reasonable jury, properly instructed, could have a doubt as to whether Ronald had planned and deliberated the murder.[44] In this case, there was such a possibility. As a result, the court concluded that the trial judge erred in law by failing to leave with the included offence of second-degree murder to the jury.[45]

66. The court held that Ronald was entitled to a new trial, unless the Crown could demonstrate that the error caused no substantial wrong or miscarriage of justice in accordance with s. 686(1)(b)(iii) of the *Criminal Code*.[46] The burden was on the Crown to show either that the legal error was so minor as to be harmless, or the evidence was so overwhelming as to satisfy the court that the verdict would necessarily have been the same had the error not been committed.[47] In considering the applicability of the *proviso*, the court noted it could take into account findings of fact implicit in the verdict(s) returned by the jury as long as those verdicts were not tainted by the legal error.[48]

---

[44] *Ronald,* at para. 59.
[45] *Ronald*, at para. 64.
[46] *Ronald*, at paras. 64-65.
[47] *Ronald*, at para. 65, citing *Khan*, at paras. 26-31; *Sarrazin* (ONCA), at para. 65.
[48] *Ronald*, at paras. 68, 72.

67. Similarly, when determining whether the verdict against Gill was tainted by the legal error with respect to Ronald, the court noted that it was the Crown's onus to demonstrate that Gill's first-degree murder conviction was not tainted by the failure to leave the possibility of a conviction on second degree murder with the jury in respect of Ronald.[49] The court concluded that Gill's conviction was tainted. By not leaving second-degree murder with the jury, the trial judge effectively removed from the jury's consideration one of the two bases upon which Gill had asked the jury to conclude that Ronald acted alone.[50] The court concluded that the verdict against Gill was tainted by the legal error with respect to Ronald, and as such, the *proviso* could not be applied to affirm Ronald's conviction.[51]

68. In *Ronald*, the court properly placed the burden upon the Crown to prove that the verdict against Gill was not tainted by the legal error with respect to Ronald. This court should recognize an onus on the Crown to demonstrate, as in *Ronald*, that an associated count ought or ought not to be remitted for retrial.

(d) *Application to this Case*

69. The Court of Appeal for Ontario in this case concluded that the attempted murder conviction for Pan's father ought to stand as it failed to see why the attempted murder convictions were in any way tainted by the failure to leave second-degree murder and manslaughter as included offences on the murder charge.[52] However, the court did not articulate whether the tainting doctrine was considered as part of the test for remittance under s. 686(1)(a), or part of the test for the application of the *curative proviso* under s. 686(1)(b). It appeared to place the onus on the Cross-Appellants to establish tainting and that the associated count of attempted murder ought to be remitted for retrial with the first-degree murder count.

70. The Cross-Appellant submits that since the attempted murder and first-degree murder counts were tried together in this case, the lower court should have safely presumed that there was a sufficient factual and legal nexus between the counts, such that they could be deemed "associated counts". Since Pan's first-degree murder conviction was remitted for retrial upon a finding that the trial judge had

---

[49] *Ronald*, at para. 72.
[50] *Ronald*, at para. 73.
[51] *Ronald*, at para. 75.
[52] Court of Appeal decision, at para. 146.

committed a legal error, the presumption should have been that the attempted murder count would be remitted as an associated count. The lower court should then have acknowledged an onus on the Crown to demonstrate that the attempted murder count was not tainted by the legal error with respect to the "two scenarios" instruction or would not result in an inconsistent verdict. The lower court did not apply this analysis, and erred by placing the burden upon the Cross-Appellants to demonstrate that the attempted murder conviction was tainted by the legal error and ought to be remitted.

71. An acknowledgement by this court that the onus is on the Crown would be in line with prior jurisprudence that requires the Crown to disqualify associated counts from remittance by establishing that the counts were not tainted or otherwise affected by legal error. The Cross-Appellants' proposed approach ought to be adopted and Pan's attempted murder conviction ought to be remitted for trial along with the first-degree murder count.

Grounds Advanced by the Co-Respondents / Cross-Appellants

(a) *The Crown's Use of a PowerPoint Presentation in Closing Submissions*

72. Co-Respondent/Cross-Appellant, Mylvaganam, appeals on the issue of whether the trial judge erred in permitting the prosecution's OPP PowerPoint presentation to go into the jury room. Mylvaganam submits that the admission and use of presentations like the OPP PowerPoint should be governed by predictable and consistent evidentiary rules rather than the more uncertain exercise of discretionary trial management powers. Mylvaganam proposes a number of procedural requirements for the admissibility and use of such presentations and suggests that the trial judge erred in their approach to this issue.

73. Pan relies on the submissions of Mylvaganam on this ground. Pan submits that if the trial judge is found to have erred in this regard, the error impacts all defendants equally. In addition, Pan experienced particular prejudice as a result of this error. The failure to include the November 2, 2010, texts between Carty and Mylvaganam between 4:35 and 4:45 p.m. in the PowerPoint misled the jury in their interpretation of the "ten stacks" texts – an important component of the Crown case against Pan. In addition, the Crown PowerPoint included references to Pan's communication with her co-accused on the evening of November 10 that aligned with the Crown's theory, but omitted her conversations with Pacificodor and innocuous text messages she exchanged with Wong. These conversations were important pieces of evidence to corroborate her testimony that November 10 was

a normal evening prior to the home invasion (scenario two). If a new trial is ordered for Mylvaganam on the basis of this ground proving successful, Pan submits that a new trial should also be ordered for her as well.

(b) *Issues Concerning Juror #4*

74. Co-Respondents/Cross-Appellants, Mylvaganam and Wong, also cross-appeal on a number of issues regarding an allegation of juror bias. Specifically, Wong puts forth the following grounds:

(1) The trial judge, in considering whether there was a reasonable apprehension of bias, failed to assess the evidence from the perspective of a reasonable person;

(2) The trial judge, in considering whether to discharge a juror, erred by failing to consider the interactions between the juror's wife and one of the defence lawyers;

(3) The trial judge failed to conduct a sufficient inquiry into the juror issues; and

(4) The Court of Appeal for Ontario, in its review of the juror issues, erred by deferring to the trial judge's decision.

75. Pan relies on the submissions of Wong on this ground. Similarly, Pan submits that if the trial judge is found to have erred in this regard, the error impacts all defendants equally. If a new trial is ordered for Wong on the basis of this ground proving successful, Pan submits that a new trial should also be ordered for her as well.

(c) *Carty's Propensity for Violence*

76. Co-Respondent/Cross-Appellant, Crawford, also cross-appeals on an issue regarding the trial judge's failure to properly direct the jury on the evidence of Eric Carty's propensity for violence and his association with the defendants.

77. Pan relies on the submissions of Crawford on this ground. Similarly, Pan submits that if the trial judge is found to have erred in this regard, the error impacts all defendants equally. The prejudicial effect of the propensity evidence is exacerbated where that evidence leads the trier of fact to infer guilt by association. Here, the Crown's theory was that Crawford was the link between Carty and Pan. This line of reasoning made Pan appear guilty of conspiring to commit murder based on impermissible propensity reasoning – because she was connected to Carty, a murderer. The trial

judge's instructions to the jury did not mitigate this prejudice against Pan, and as such, if a new trial is ordered for Crawford on the basis of this ground proving successful, a new trial should also be ordered for Pan.

PART IV – COSTS

78. The Cross-Appellant seeks no costs and asks that no costs be awarded against her.

PART V – ORDER REQUESTED

79. The Cross-Appellant respectfully requests that her cross-appeal be allowed and the conviction for attempted murder be remitted for retrial.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

80. The Appellant on Cross-Appeal acknowledges the publication ban and sealing orders set out in paragraph 88 of the Appellant's Factum. The Appellant on Cross-Appeal has no submissions on the impact of the restrictions on the Court's reasons in the appeal and cross-appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of May, 2024.

Stephanie DiGiuseppe
Jessica Proskos
Counsel for the Appellant, Jennifer Pan

PART VII — TABLE OF AUTHORITIES

CASES	
Reference	**Paragraph**
R. v. Beaudry, 2007 SCC 5	25
R. v. Biniaris, 2000 SCC 15	26
R. v. Bouvette, 2023 BCCA 152	32, 39, 40
R. v. Downey, 2022 NSCA 59	58
R. v. Doxtator, 2022 SCC 40	9
R. v. Doxtator, 2022 ONCA 155	9, 63
R. v. Elkins, 1995 CanLII 3510	63
R. v. Figueroa, 2008 ONCA 106	58
R. v. Hannan, 2023 NSCA 7	58
R. v. Haughton, [1994] 3 S.C.R. 516	63
R. v. Humaid, (2006), 81 O.R. (3d) 456 (Ont. C.A.), leave to appeal refused, [2006] S.C.C.A. No. 232	63
R. v. J.F., 2008 SCC 60	24, 46
R. v. J.P, 2014 NSCA 29	62
R. v. Khan, [2001] 3 S.C.R. 823	28, 31, 66
R. v. L.E., [1994] O.J. No. 2641 (Ont. C.A.)	47
R. v. Mahalingan, 2008 SCC 63	52
R. v. Morrissey, (1995), 22 O.R. (3d) 514 (Ont. C.A.)	62, 63
R. v. Mulligan, 2006 CanLII 15625 (Ont. C.A.)	63
R. v. Nygaard, [1989] 2 S.C.R. 1074	35, 36
R. v. Phillips, 2018 ONCA 651	26
R. v. Pilon, 2009 ONCA 248	63
R. v. Pittiman, 2006 SCC 9	
R. v. R.V., 2021 SCC 10	24, 46

R. v. Ronald, 2019 ONCA 971	9, 36, 37, 38, 58, 63, 64, 65, 66, 67, 68
R. v. Samaniego, 2022 SCC 9	59
R. v. Sarrazin, 2010 ONCA 577	47, 63, 66
R. v. Sarrazin, 2011 SCC 54	63
R. v. Shaw, 2024 ONCA 119	26
R. v. Sinclair, 2011 SCC 40	25
R. v. Tat, (1997), 35 O.R. (3d) 641 (C.A.)	26
R. v. Tayo Tompouba, 2024 SCC 16	28, 33, 62
R. v. Yebes, [1987] 2 S.C.R. 168	26
Truscott (Re), 2007 ONCA 575	32, 41, 42

STATUTES & REGULATIONS	
Reference	**Section**
Criminal Code, RSC 1985, c. C-46	686(1)(a), 686(1)(b), 686(2), 686(8)
Code criminel, LRC 1985, c. C-46	686(1)(a), 686(1)(b), 686(2), 686(8)