See paras. 24, 28

Case Name:

R. v. Jolivet

Her Majesty The Queen, appellant;
v.
Daniel Jolivet, respondent.

[2000] S.C.J. No. 28

[2000] A.C.S. no 28

2000 SCC 29

2000 CSC 29

[2000] 1 S.C.R. 751

[2000] 1 R.C.S. 751

185 D.L.R. (4th) 626

254 N.R. 1

J.E. 2000-1059

144 C.C.C. (3d) 97

33 C.R. (5th) 1

46 W.C.B. (2d) 97

File No.: 26646.

Supreme Court of Canada

1999: February 19 / 2000: May 18.

Present: L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC (56 paras.)

Criminal law -- Appeals -- Powers of Court of Appeal -- Accused convicted of murder -- Whether trial judge erred in refusing to allow defence counsel to comment on Crown's failure to call previously announced witness -- Whether majority of Court of Appeal erred in declining to apply curative proviso and ordering new trial -- Criminal Code, R.S.C., 1985, c. C-46, s. 686(1)(b)(iii).

Criminal law -- Appeals -- Appeals to Supreme Court of Canada -- Application of curative proviso raising question of law -- Criminal Code, R.S.C., 1985, c. C-46, s. 686(1)(b)(iii).

Criminal law -- Trial -- Jury -- Disclosure of evidence -- Accused alleging that jury members had inappropriate contacts with police during their deliberations which called for stay of proceedings -- Accused alleging that late disclosure of statement to police deprived him of right to make full answer and defence -- Court of Appeal's rejection of accused's allegations upheld.

The accused was convicted of four counts of murder. At trial, the circumstances leading to the four killings were described by the Crown's principal witness, an informer. At the opening of trial and again during the trial, Crown counsel made reference to an additional witness, B, who he said would be called to testify and who, he said, would corroborate in part the principal witness's testimony. Crown counsel later declined to call B. When defence counsel indicated that he wished to comment in his jury address on the Crown's failure, the trial judge offered the defence the opportunity to call B and cross-examine him, but that offer was rejected. The trial judge then indicated that if defence counsel commented on the Crown's failure to call B, he would instruct the jury that B could have been called by the defence as well as by the Crown. The Court of Appeal was unanimous in its finding that this ruling in effect prevented defence counsel from commenting on the Crown's failure to call its previously announced witness and that this was an error of law. The majority declined to apply the curative proviso of s. 686(1)(b)(iii) of the Criminal Code. The accused's appeal was therefore allowed and a new trial ordered. The Crown appealed to this Court. The accused cross-appealed on two grounds, arguing that, during their deliberations, the members of the jury had inappropriate contacts with several police officers which called for a stay of proceedings and that the late disclosure by the Crown of a statement to police deprived the accused of his right to make full answer and defence. As well, the defence made the preliminary objection that this Court was without jurisdiction to hear the Crown appeal on the ground that a division of opinion in an appellate court concerning the application of the curative proviso does not raise a question of law.

Held: The appeal should be allowed and the convictions restored. The cross-appeal should be dismissed.

As to the preliminary objection, the Court of Appeal was required to give legal substance to the statutory concept of "miscarriage of justice" and this involved a question of law. This Court therefore has jurisdiction to hear the appeal.

The Crown is under no obligation to call a witness it considers unnecessary to the prosecution's case. While the statements made in opening and in the course of trial were consistent only with the Crown's intention at that time to call B, a statement of intention does not necessarily amount to an undertaking and the trial judge found in favour of the Crown on that point. The Crown's conduct called for an explanation, but Crown counsel explained that he believed B would not be a truthful witness. As the trial judge accepted Crown counsel's explanation, there can be no question here of an abuse of process. Crown counsel is entitled to have a trial strategy and to modify it as the trial unfolds, provided that the modification does not result in unfairness to the accused. Where an element of prejudice results (as it did here), remedial action is appropriate.

The trial judge erred in effectively (if not explicitly) preventing defence counsel from commenting on the missing witness B. The fact that Crown counsel twice announced to the jury that B would be called produced an element of prejudice by asserting the existence of corroborative evidence. While the defence was not entitled to suggest that an adverse inference should be drawn that the testimony of B would have been favourable to the accused, it was entitled to suggest to the jury that the failure to call B left an unspecified hole in the Crown's proof. The denial of the defence right to comment was an error of law.

The majority of the Court of Appeal erred in declining to apply the curative proviso. The application of s. 686(1)(b)(iii) requires a court to consider the seriousness of the error in question, the effect it likely had upon the jury's inference-drawing process and the probable guilt of the accused on the basis of the legally admissible evidence untainted by the error. There is no reasonable possibility that the verdict would have been any different if the trial judge's error had not been made. While there were some inconsistencies in the testimony of the Crown's main witness, explanations were offered for these inconsistencies and it was open to the jury to accept or reject them. The trial judge instructed the jury that the evidence of the Crown's principal witness had not been corroborated in significant respects. The fact defence counsel was not in addition permitted to comment on the missing witness lost most of its significance in light of the judge's instruction on the lack of corroboration. It cannot be assumed that the jury had forgotten that what had been promised by the Crown had not been delivered.

The accused's cross-appeal should be dismissed for the reasons expressed in the Court of Appeal.

Cases Cited

Applied: Mahoney v. The Queen, [1982] 1 S.C.R. 834; R. v. Biniaris, [2000] 1 S.C.R. 381, 2000 SCC 15; distinguished: R. v. Pétel, [1994] 1 S.C.R. 3; R. v. McMaster, [1996] 1 S.C.R. 740; referred to: Lemay v. The King, [1952] 1 S.C.R. 232; R. v. Yebes, [1987] 2 S.C.R. 168; R. v. Cook, [1997] 1 S.C.R. 1113; R. v. Stinchcombe, [1991] 3 S.C.R. 326; R. v. V. (J.) (1994), 91 C.C.C. (3d) 284; R. v. O'Connor, [1995] 4 S.C.R. 411; Blatch v. Archer (1774), 1 Cowp. 63, 98 E.R. 969; R. v. Rooke (1988), 40 C.C.C. (3d) 484; Graves v. United States, 150 U.S. 118 (1893); Murray v. Saskatoon, [1952] 2 D.L.R. 499; United States v. Hines, 470 F.2d 225 (1972), certiorari denied, 410

U.S. 968 (1973); Duke Group Ltd. (in Liquidation) v. Pilmer & Ors, [1998] A.S.O.U. 6529 (QL); O'Donnell v. Reichard, [1975] V.R. 916; R. v. Zehr (1980), 54 C.C.C. (2d) 65; R. v. Koffman and Hirschler (1985), 20 C.C.C. (3d) 232; R. v. Dupuis (1995), 98 C.C.C. (3d) 496; Vetrovec v. The Queen, [1982] 1 S.C.R. 811; R. v. Bevan, [1993] 2 S.C.R. 599.

Statutes and Regulations Cited

Criminal Code, R.S.C., 1985, c. C-46, s. 686(1)(b)(iii) [am. c. 27 (1st Supp.), s. 145; am. 1991, c. 43, s. 9 (Sch., item 8)].

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Mewett, Alan W. "No Substantial Miscarriage of Justice". In Anthony N. Doob and Edward L. Greenspan, eds., Perspectives in Criminal Law. Aurora, Ont.: Canada Law Book, 1985, 81.
Sopinka, John, Sidney N. Lederman and Alan W. Bryant. The Law of Evidence in Canada, 2nd ed. Toronto: Butterworths, 1999.
Wigmore, John Henry. Evidence in Trials at Common Law, vol. 2. Revised by James H. Chadbourn. Boston: Little, Brown, 1979.

APPEAL and CROSS-APPEAL from a judgment of the Quebec Court of Appeal (1998), 125 C.C.C. (3d) 210, 20 C.R. (5th) 326, [1998] Q.J. No. 1221 (QL), allowing the accused's appeal from his conviction on four counts of murder and ordering a new trial. Appeal allowed and convictions restored. Cross-appeal dismissed.

Henri-Pierre Labrie and Jacques Pothier, for the appellant. Alain Brassard, for the respondent.

Solicitor for the appellant: Henri-Pierre Labrie, Longueuil, Quebec. Solicitor for the respondent: Alain Brassard, Salaberry-de-Valleyfield, Quebec.

The judgment of the Court was delivered by

1 **BINNIE J.**:-- This appeal requires the Court to consider the circumstances in which the Crown's failure to call an important witness at a criminal trial can be the subject of comment in the defence jury address or the basis of a trial judge's "missing witness" jury instruction.

2 The issue arises in this way. The respondent, Daniel Jolivet, was found guilty by a jury of four counts of murder in killings that were described as a settling of scores in the stolen goods and drug

trade. The conviction was based largely on the testimony of an informer named Claude Riendeau. In the course of the trial, Crown counsel indicated to the jury on two separate occasions that the Crown would be calling one of the respondent's sometime "business" associates, Gérald Bourgade, to corroborate important admissions said to be made by the respondent in the presence of Riendeau and Bourgade. Just prior to the close of the case for the prosecution, he advised the court that the Crown no longer intended to call Bourgade.

3 This surprising reversal of position by the Crown was accompanied by an explanation that the Quebec Court of Appeal described as "astonishing". Crown counsel said that even though he had put Bourgade on the list of Crown witnesses for trial, and had twice referred to Bourgade's expected appearance before the jury, he had concluded, somewhat belatedly, that he did not consider truthful the testimony given by Bourgade at the preliminary inquiry.

4 The defence wished to comment on the missing Bourgade in its closing address, but was effectively prevented from doing so by the trial judge, who also declined to give any jury instruction on the point. The Quebec Court of Appeal held unanimously that this refusal to allow defence counsel to comment on the missing witness was an error.

5 A majority of the Quebec Court of Appeal ordered a new trial. Robert J.A., dissenting, concluded that there was no reasonable possibility that the verdict would have been different had the trial judge permitted the defence to make its comment. He would therefore have refused a new trial and dismissed the appeal. On appeal as of right to this Court, the respondent took the position that such a division of opinion in an appellate court does not raise any question of law, and that this Court lacked jurisdiction to continue with the appeal. The Crown relied on the statement of the Court in Mahoney v. The Queen, [1982] 1 S.C.R. 834, at p. 852, that "[t]he Court of Appeal must give substance to the concept of 'miscarriage of justice' and this involves a legal determination". The panel of the Court hearing this appeal reserved the question as to whether the reasonableness of a possible verdict raises a question of law to be revisited by the full Court on a comparable objection in R. v. Biniaris, [2000] 1 S.C.R. 381, 2000 SCC 15, in relation to s. 686(1)(a)(i) of the Criminal Code, R.S.C., 1985, c. C-46. Judgment in Biniaris was recently released on April 13, 2000. For the reasons given in that case, the correctness of the dictum from Mahoney is affirmed and the preliminary objection to jurisdiction is therefore dismissed.

6 On the substantive issues, for the reasons which follow, my view is that the Quebec Court of Appeal was correct in concluding that the trial judge ought to have permitted defence counsel to comment on the Crown's failure to call the corroborative witness, but that the majority erred in refusing to apply the curative proviso of s. 686(1)(b)(iii). I would therefore set aside the majority decision of the Quebec Court of Appeal on the narrow issue of whether or not the curative proviso applies and allow the Crown's appeal, notwithstanding the error of law committed by the trial judge. The jury verdict of guilt is therefore reinstated.

Relevant Statutory Provisions

7 Criminal Code

> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> ...
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law,
>
> ...
>
> (b) may dismiss the appeal where
>
> ...
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred;

Facts

The Trial -- Quebec Superior Court -- Biron J.

8 At trial, the circumstances leading to the four killings were recounted by the Crown's principal witness, Claude Riendeau, an informer. A detailed account of that testimony is found in the meticulous reasons for judgment of Robert J.A., dissenting, reported at (1998), 125 C.C.C. (3d) 210, and will not be repeated here. The respondent chose not to testify.

9 On two separate occasions during the trial, counsel for the Crown made reference to an additional witness, Gérald Bourgade, who he said would be called to testify and who was expected to confirm in part the testimony of Riendeau. The first reference to this witness was made in the Crown's opening address to the jury:

> [TRANSLATION] You will hear two people, Riendeau and Bourgade, who heard the accused announce his intention to get rid of two of the victims, Leblanc and Lemieux, and were there when he made certain preparations for that crime. Riendeau will then tell you that on the day after the crime, he met Jolivet, who admitted having made a clean sweep. You will also see that Riendeau, at that

> time, saw narcotics -- cocaine from the victims -- in the possession of the accused or other people under his control. And we will then present you with circumstantial evidence that partly relates to the accused, and other circumstantial evidence, all kinds of minor circumstances to show you that the witnesses Riendeau and Bourgade could not have made up their story and that it is based on independent facts we can prove to you. [Emphasis added.]

The Crown again stated that Bourgade would be called by way of an objection during the defence's cross-examination of Riendeau:

> [TRANSLATION]
>
> Q.: And the reason Mr. Bourgade called you to tell you that is because ...
>
> [The Crown]:
>
> I object. The reason Bourgade called him, it's Bourgade who will tell us that. It's not him. [Emphasis added.]

Crown counsel later declined to call Bourgade but, as mentioned, failed to explain why, given his disbelief in Bourgade's testimony, he had subsequently put Bourgade's name on the list of Crown witnesses to be called at trial and at the trial itself had affirmed his intention of calling Bourgade on two separate occasions in front of the jury.

10 During discussions with the trial judge and Crown counsel in the absence of the jury, defence counsel indicated that he wished to comment in his jury address on the Crown's failure to call Bourgade. The trial judge pointed out that the Crown is under no obligation to call every witness who may have some knowledge of the relevant events and that it was his practice to so instruct the jury. Instead, the trial judge offered defence counsel the opportunity to call Bourgade and cross-examine him, but that offer was rejected. The trial judge then indicated that if defence counsel commented on the Crown's failure to call Bourgade, the trial judge would instruct the jury that Bourgade could have been called by the respondent as well as the Crown. Faced with this warning, defence counsel did not raise the issue in the jury address and the trial judge said nothing on the point in his charge.

Quebec Court of Appeal (1998), 125 C.C.C. (3d) 210

11 The Court of Appeal was unanimous in its finding that defence counsel should have been allowed to comment on the Crown's failure to call its previously announced witness, Bourgade. Fish J.A. held (at p. 219) that the curative proviso should not be applied in the present case because the

accused's right to a "fair trial" had been compromised by the combined effect of:

> (1) the Crown's repeated statements that Bourgade would be called as a witness; (2) the Crown's disclosure to the jury of the incriminating evidence Bourgade was expected to give; (3) the Crown's failure to call Bourgade; (4) the astonishing reason invoked for this decision; and (5) the impairment of defence counsel's right, in these circumstances, to comment on Bourgade's absence.

The trial judge's error caused a substantial wrong to the accused and the trial judge's offer of the witness in cross-examination was not enough to cure that wrong. Vallerand J.A., in concurring reasons, agreed with Fish J.A. The appeal was therefore allowed, Robert J.A. dissenting, and a new trial ordered.

Analysis

12 Counsel generally avoid leading a jury to anticipate more than he or she can deliver. Jurors are likely to remember unfulfilled promises and draw their own conclusions, whether or not the shortfall is specifically brought to their attention. Here the Crown told the jury about the existence of Gérald Bourgade and his expected corroborative testimony and subsequently failed to deliver. The respondent was nevertheless convicted. Defence counsel argues that he was entitled to rely on expectations induced by the statements of Crown counsel that an important witness would be called, and to shape his trial strategy accordingly. If Crown counsel, as here, resiles from a position plainly stated, what is the precise mischief and what is the appropriate remedy?

13 It is important to emphasize at the outset that the defence does not pretend that the evidence of Gérald Bourgade would have been exculpatory. Defence counsel had received full disclosure on this point and had heard Bourgade's testimony at the preliminary inquiry. There is no suggestion in this case that the Crown's conduct prevented the defence from having timely access to relevant information. While Bourgade's statement to the police and his evidence at the preliminary inquiry were inconsistent in some respects with the testimony of Riendeau, Bourgade's testimony nevertheless incriminated the respondent. Defence counsel clearly had no intention of accepting the trial judge's offer at the conclusion of the case to allow Bourgade to be called for the purpose of a defence cross-examination:

> [TRANSLATION]
>
> Mr. MacDONALD:
>
> I have the name Bourgade as a witness.

THE COURT:

Yes. Counsel, you have known since last Thursday that the Crown was not calling him. Did you ask to cross-examine him?

Mr. MacDONALD:

I have no request ...

THE COURT:

Are you requesting that now?

Mr. MacDONALD:

No. Am I ... ? Pardon?

THE COURT:

Are you asking that he be called ...

Mr. MacDONALD:

I have no ...

THE COURT:

... so that you can cross-examine him?

Mr. MacDONALD:

> ... I do not wish to have Mr. Bourgade called.

The underlying defence complaint relates to trial tactics. The defence claims that the Crown's failure to follow through on what the defence sees as a commitment to call Bourgade deprived it of an opportunity to attempt to create conflicts between the evidence of the Crown's principal witnesses. Such conflicts between two incriminating witnesses could potentially raise a reasonable doubt in the mind of the jury that the prosecution had proved its case. This potential benefit, however, has to be seen in light of the actual benefit to the defence of having the Crown decide to go to the jury on the basis of the uncorroborated evidence of one unsavoury witness, Riendeau. Defence counsel was astute to play up the silver lining in the threatened black cloud of Bourgade's corroborative evidence, but in the end it seems he was not unhappy to see Bourgade fail to materialize. In addition, the defence says that statements to the jury by the Crown about what Bourgade was expected to say in effect put Bourgade's testimony before the jury unsworn and without any benefit of cross-examination. At a minimum, the defence says it ought to have been allowed to call the jury's attention to the Crown's inconsistencies and failed promises.

1. The Crown Was Under No Obligation to Call Bourgade

14 It was established in Lemay v. The King, [1952] 1 S.C.R. 232, affirmed in R. v. Yebes, [1987] 2 S.C.R. 168, and reaffirmed in R. v. Cook, [1997] 1 S.C.R. 1113, that the Crown is under no obligation to call a witness it considers unnecessary to the prosecution's case. In Lemay, supra, Kerwin J. stated, at p. 241:

> Of course, the Crown must not hold back evidence because it would assist an accused but there is no suggestion that this was done in the present case or, to use the words of Lord Thankerton, "that the prosecutor had been influenced by some oblique motive."

15 The reference to evidence that "would assist an accused" was made, of course, before the enhanced disclosure obligations on the Crown were laid down in R. v. Stinchcombe, [1991] 3 S.C.R. 326, and in any event referred, in context, to evidence that was exculpatory, not, as here, to evidence which offers only the potential for raising inconsistencies among witnesses who have only inculpatory evidence to offer. In general, witnesses should be called by the party that wants their evidence.

16 In Cook, L'Heureux-Dubé J., for the Court, stated that the Crown had no duty to call witnesses "regardless of their truthfulness, desire to testify, or of their ultimate effect on the trial" (para. 19), and endorsed what was said on that point by LeBel J.A. (as he then was) in R. v. V. (J.) (1994), 91 C.C.C. (3d) 284 (Que. C.A.), at pp. 287-88:

> [TRANSLATION] Crown counsel, of course, while bound by strict duties so as

> to ensure the preservation of the integrity of the criminal justice system, however must operate in the context of an adversarial procedure. Once he has satisfied the obligation to disclose the evidence, it is for him, in principle, to choose the witnesses necessary to establish the factual basis of his case. If he does not call the necessary witnesses or evidence, he exposes the prosecution to dismissal of the charge for having failed to establish its case completely and in accordance with the reasonable doubt rule. However, once this obligation has been met and if improper motives cannot be imputed to him, such as the desire, for example, to hide exculpatory evidence, as a general rule, he will be considered to have properly executed this part of his function in the criminal trial. The defence may, at that time, do its work and call its own witnesses, if it considers it appropriate to do so.

L'Heureux-Dubé J. thus stated in Cook that "[a]s a general principle, we have recognized that for our system of criminal justice to function well, the Crown must possess a fair deal of discretion" (para. 19). Imposition of a duty to call particular witnesses would unnecessarily constrain the exercise of the Crown's prosecutorial discretion. The statements made in opening and in the course of trial were consistent only with the Crown's intention at that time to call Bourgade, but a statement of intention does not necessarily amount to an undertaking or commitment and the trial judge found in favour of the Crown on that point. Fish and Vallerand JJ.A. considered that in light of the Crown's statements in front of the jury, Bourgade should have been called "[a]bsent an unforeseen impediment or other satisfactory explanation" (p. 222). I agree that the Crown's conduct called for an explanation, but Crown counsel explained that he believed Bourgade would not be a truthful witness. If the Crown's explanation is believed (as it was), I think the trial judge was correct to shift the focus from the dispute about whether the witness should be called to whether and what remedial steps needed to be taken to address any unfairness created by the Crown's change of position.

17 At that stage, the trial court had a number of options to address any unfairness created by the Crown's change of position, as pointed out by L'Heureux-Dubé J. in Cook, at para. 39:

> In my view, placing an obligation upon the Crown to call all witnesses with information bearing on the case would disrupt the inherent balance of our adversary system. I note, however, that the accused is also not obliged to call the witness... . [T]here are other options which are available to the accused in an appropriate case including, but not limited to, asking the trial judge to call the witness, commenting in closing on the witness' absence, or asking the trial judge to comment. [Emphasis in last sentence added.]

It is these "other options" that we are required to address more fully in this case.

2. The Crown's Conduct Did Not Amount to an Abuse of Process

18 The Court recognized in Cook that, in some circumstances, a perverse or oppressive exercise

of the prosecutorial discretion could amount to an abuse of process. Concern about the truthfulness of a witness is not a perverse consideration. In this case, Crown counsel explained to the trial judge why he did not wish to call Bourgade:

> [TRANSLATION] Bourgade testified at the preliminary inquiry. What do you want from me if I did not believe him at the end of the preliminary inquiry? Am I going to be forced to put him on the witness stand?

Fish J.A. found it hard to reconcile this explanation with Crown counsel's subsequent decision to put Bourgade's name on the list of Crown witnesses to be called at trial if "he had already concluded that Bourgade was a liar" (p. 220). Even more damaging were his subsequent affirmations in front of the jury that Bourgade would be called. While I share some of Fish J.A.'s misgivings, the fact is the trial judge was there and accepted the explanation and I am not prepared to find that Crown counsel misled the trial court on this point. It is certainly possible that Crown counsel went through the early stages of the trial with the intention of calling Bourgade, and that it was only at the point of actually putting Bourgade in the witness box that he faced up to serious professional misgivings about asking the jury to rely on the man's credibility.

19 The onus to establish an abuse of process on a balance of probabilities rests on an accused: R. v. O'Connor, [1995] 4 S.C.R. 411, at para. 69. As the trial judge accepted Crown counsel's explanation that he did not call Bourgade because he considered him untruthful, there can be no question here of an abuse of process. Crown counsel, on this view, was acting to protect the integrity of the judicial system, not to compromise it.

20 L'Heureux-Dubé J. observed in Cook, supra, at para. 58, that "oblique motive" (the phrase used in Lemay, supra) generally implies improper conduct on the part of the Crown, and where it exists would likely give rise to a legitimate claim for an abuse of process. She added, however, that a concern about the Crown's motive that does not constitute an abuse of process may nevertheless be a factor in deciding what remedial action is appropriate, including the trial judge exercising his or her discretion to have the witness called.

21 Apart from his concern about Bourgade's truthfulness, Crown counsel may have reasoned that Riendeau's evidence went into the record better than he expected and at that stage he had no desire to expose it to inconsistent statements (which may themselves have been untruthful) emanating from Bourgade. If this was a concern that entered into the exercise by Crown counsel of his discretion, it is a concern shared by any prudent counsel faced with running his case effectively in an adversarial system. It is not the duty of the Crown to bend its efforts to provide the defence with the opportunity to develop and exploit potential conflicts in the prosecution's testimony. This is the stuff of everyday trial tactics and hardly rises to the level of an "oblique motive". Crown counsel is entitled to have a trial strategy and to modify it as the trial unfolds, provided that the modification does not result in unfairness to the accused. Where an element of prejudice results (as it did here), remedial action is appropriate.

3. Was the Jury Entitled to Draw an Adverse Inference from the Crown's Failure to Call Bourgade?

22 Cook, supra, listed some possible options to rectify any prejudice created by the Crown's failure to call a witness. These included a defence comment on that failure in its closing jury address. The purpose of making such a comment to the jury is inevitably to invite the jury to draw an adverse inference against the Crown's case. The questions at this point are, therefore, What circumstances justify such a comment, and What is the precise content of the adverse inference against the Crown's case that the defence is entitled to request?

23 Put at its highest, the Crown's failure to call Bourgade could in theory have led the jury to draw the adverse inference that Bourgade's testimony, if called, would have been unfavourable to the Crown. In my view, there was no basis to ask the jury to draw such a strong inference in this case.

24 Neither the defence nor the Crown have suggested that Bourgade would in fact have offered exculpatory evidence. The "adverse inference" principle is derived from ordinary logic and experience, and is not intended to punish a party who exercises its right not to call the witness by imposing an "adverse inference" which a trial judge in possession of the explanation for the decision considers to be wholly unjustified.

25 The general rule developed in civil cases respecting adverse inferences from failure to tender a witness goes back at least to Blatch v. Archer (1774), 1 Cowp. 63, 98 E.R. 969, where, at p. 65, Lord Mansfield stated:

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

26 The principle applies in criminal cases, but with due regard to the division of responsibilities between the Crown and the defence, as explained below. It is subject to many conditions. The party against whom the adverse inference is sought may, for example, give a satisfactory explanation for the failure to call the witness as explained in R. v. Rooke (1988), 40 C.C.C. (3d) 484 (B.C.C.A.), at p. 513, quoting Wigmore on Evidence (Chadbourn rev. 1979), vol. 2, at para. 290:

> In any event, the party affected by the inference may of course explain it away by showing circumstances which otherwise account for his failure to produce the witness. There should be no limitation upon this right to explain, except that the trial judge is to be satisfied that the circumstances thus offered would, in ordinary logic and experience, furnish a plausible reason for nonproduction. [Italics in original; underlining added.]

27 The party in question may have no special access to the potential witness. On the other hand,

the "missing proof" may lie in the "peculiar power" of the party against whom the adverse inference is sought to be drawn: Graves v. United States, 150 U.S. 118 (1893), at p. 121. In the latter case there is a stronger basis for an adverse inference.

28 One must also be precise about the exact nature of the "adverse inference" sought to be drawn. In J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at p. 297, para. 6.321, it is pointed out that the failure to call evidence may, depending on the circumstances, amount "to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it" (emphasis added), as stated in the civil case of Murray v. Saskatoon, [1952] 2 D.L.R. 499 (Sask. C.A.), at p. 506. The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference". Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony. Other jurisdictions also recognize that in many cases the most that can be inferred is that the testimony would not have been helpful to a party, not necessarily that it would have been adverse: United States v. Hines, 470 F.2d 225 (3rd Cir. 1972), at p. 230, certiorari denied, 410 U.S. 968 (1973); and the Australian cases of Duke Group Ltd. (in Liquidation) v. Pilmer & Ors, [1998] A.S.O.U. 6529 (QL), and O'Donnell v. Reichard, [1975] V.R. 916 (S.C.), at p. 929.

29 Applying these principles to the present facts, I think that if Crown counsel's explanation of his change of intention is accepted, the Crown acted in accordance with its ethical responsibilities, and an adverse inference that Bourgade would have given evidence unfavourable to the Crown would not be justified. If nothing had been said about Bourgade to the jury, that would have been an end to the matter. The complicating factor is that Crown counsel, despite his misgivings, twice announced to the jury that Bourgade would be called, and these announcements perhaps led the jury to anticipate that the Crown's case was stronger than it turned out to be. It is because of those announcements that I think a defence comment would have been appropriate.

30 Crown counsel's comment had produced an element of prejudice by asserting the existence of corroborative evidence. An adverse inference of "unhelpfulness" would have been a fair result of the Crown's failure to substantiate its assertion.

4. Was the Defence Therefore Entitled to Comment on the Crown's Change of Position in its Jury Address?

31 The defence was asked by the trial judge to state precisely what he intended to say to the jury about the missing witness. Defence counsel made clear the very limited nature of his proposed comment:

> [TRANSLATION] All that I want to point out to the jury is that we would have been perhaps more enlightened if the Crown had called Mr. Bourgade who, according to Mr. Riendeau, was present when St-Pierre returned to the scene. Mr.

> St-Pierre could have been called, Mr. St-Pierre who was at the scene of the incident, according to what Mr. Riendeau said. Why did the Crown not call these witnesses? Period.

(I note, parenthetically, that none of the judges accepted the defence objection to the Crown's failure to call St-Pierre, whose evidence had been rejected as untruthful in other Superior Court proceedings.)

32 The trial judge took the view that even this limited defence comment would contradict his standard jury instruction on the matter of calling witnesses, as follows:

> [TRANSLATION] In a criminal trial, the Crown is not obliged to call all the witnesses who may have knowledge of the questions in issue... . The accused is no more obliged than the Crown in this regard. At this point in time, the Crown's case as well as the accused's case is closed. Even if you would like the evidence to be more complete on certain points, you will have to render a verdict on the evidence as it is at this time.

The trial judge therefore said that if defence counsel made the proposed comment (reproduced above), the trial judge would instruct the jury that it was equally open to the defence to call Bourgade. The trial judge's comment had the effect of precluding the defence from commenting on a weakness in the Crown's case, and thereby took away the appropriate remedy to address any unfairness created by the Crown's conduct.

33 The trial judge's reaction (as well as his standard charge that "[t]he accused is no more obliged than the Crown in this regard" (emphasis added)) wrongly equated the position of the Crown and the defence. The accused, on these facts, was not "obliged" at all. He was entitled to the presumption of innocence and the burden was on the Crown to prove him guilty beyond a reasonable doubt. The Crown had a burden of proof to discharge and was obliged to call witnesses to deal with the disputed facts. Wigmore on Evidence, supra, at para. 290, underlines the importance of the burden of proof in relation to the adverse inference issue:

> The opponent whose case is a denial of the other party's affirmation has no burden of persuading the jury. A party may legally sit inactive, and expect the proponent to prove his own case. Therefore, until the burden of producing evidence has shifted, the opponent has no call to bring forward any evidence at all, and may go to the jury trusting solely to the weakness of the first party's evidence. Hence, though he takes a risk in so doing, yet his failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise the first party would virtually be evading his legitimate burden. This distinction has been recognized and is reasonable. [Italics in original; underlining added.]

34 In light of the importance of Bourgade's expected "corroboration", and the emphasis put on it

by the Crown in its opening statement, it was open to the defence to comment on the "missing witness" as well as any other aspect of the Crown's case that might lead to a reasonable doubt. The defence, it will be recalled, merely wanted to point out to the jury "that we would have been perhaps more enlightened if the Crown had called Mr. Bourgade who, according to Mr. Riendeau, was present when St-Pierre returned to the scene". The right of the defence to make such a comment was not dependent on showing the Crown had acted on an "oblique motive" in failing to call the expected witness. In its opening the Crown apparently considered it necessary to call Bourgade to make its case, and had then failed to call Bourgade, arguably acknowledging by its reversal of plans that the case presented against the respondent was not as broadly based as originally anticipated. This was relevant information for the jury to consider. The Crown, not the defence, told the jury about the existence of Bourgade and that he would be part of the Crown's case. The defence was entitled to suggest to the jury that the failure to call Bourgade left an unspecified hole in the Crown's proof.

35 The defence, for the reasons mentioned, was not entitled to suggest that an adverse inference should be drawn that the testimony of Bourgade would have been favourable to the respondent, but defence counsel specifically disavowed any intention of going that far.

36 The right of the defence to address the jury on what the Crown chooses to put before the jury is fundamental to a fair trial and should only be limited for good and sufficient reason. There was no such reason here.

5. Did the Trial Judge Err by Failing to Deal in His Jury Instructions With the Crown's Failure to Call Bourgade?

37 In Cook, supra, L'Heureux-Dubé J. mentioned that one option "in an appropriate case" would be for the trial judge to comment in his or her instruction to the jury on the missing witness (para. 39). An instruction by the trial judge is more significant than a defence comment because it lends the judge's authority to what would otherwise be merely a piece of defence advocacy. As pointed out by Robert J.A. in this appeal, the reference in Cook to an "appropriate case" invokes the prior jurisprudence which warns of the dangers of commentary by the trial judge on what is, in effect, counsel's conduct of the case. In R. v. Zehr (1980), 54 C.C.C. (2d) 65 (Ont. C.A.), Brooke J.A. emphasized this point, at p. 68:

> While permissible in some cases, comment on the failure to call a witness should only be used with great caution. This kind of comment from a trial Judge can seriously affect what might otherwise be the jury's assessment of the credibility of those who do testify and perhaps, more importantly the integrity of the case. Such comment and instruction whether referable to the prosecution or the defence is really a comment on the conduct of the case and the instruction gives it some evidentiary significance.

38 A similar caution was expressed by Martin J.A. in R. v. Koffman and Hirschler (1985), 20

C.C.C. (3d) 232 (Ont. C.A.); and by Esson J.A. in Rooke, supra, at pp. 517-18.

39 It is clear from these authorities that it will rarely be "appropriate" for the trial judge to comment on the failure of the Crown to call a particular witness, and even more rare to do so with respect to the defence. As Brooke J.A. went on to say in Zehr, supra, at pp. 68-69:

> There are many reasons why counsel may choose not to call a witness, and our Courts will rarely question the decision of counsel, for the system proceeds on the basis that counsel conducts the case. Often a witness is not called, and if the reason was known it would not justify an instruction that an adverse inference might be drawn from the witness not being called. Of importance under our system, counsel is not called upon, or indeed permitted, to explain his conduct of a case [to the jury].

Nevertheless, cases calling for judicial comment will arise. Here, for instance, if defence counsel had not been content to pick holes in the prosecution's case and had gone further to suggest that an adverse inference could appropriately be drawn that Bourgade's evidence, if called, would have supported the respondent, a correcting instruction would have been warranted. An inappropriate comment by Crown counsel on a missing defence witness would similarly warrant a judicial correction: R. v. Dupuis (1995), 98 C.C.C. (3d) 496 (Ont. C.A.).

40 Much, of course, must be left to the discretion of the trial judge who has a "feel" for the nuances of the trial as it proceeds, and is in the best position to ensure its fairness. Here defence counsel was effectively prevented from alluding to the missing Bourgade. Neither defence nor prosecution made any comment and thus no "correction" was called for.

6. Did the Trial Judge Err in Failing to Warn the Jury Specifically to Disregard Crown Counsel's Opening Statement Regarding the Nature of Bourgade's Evidence?

41 The trial judge gave the jury the usual instruction that statements by counsel do not constitute evidence, but did not specifically link this instruction to Crown counsel's opening statement that [translation] "You will hear two people, Riendeau and Bourgade, who heard the accused announce his intention to get rid of two of the victims, Leblanc and Lemieux, and were there when he made certain preparations for that crime" (emphasis added).

42 Although this statement signalled the nature of Bourgade's evidence, it did not add anything of substance to what the jury was told it could expect to hear from Riendeau, who was subsequently called. In other words, Bourgade was presented to the jury as a corroborative witness who could support in some respects, but not go beyond, Riendeau's evidence. The trial judge dealt at length in his instruction with the dangers of relying on Riendeau's uncorroborated testimony, including the warning contemplated in Vetrovec v. The Queen, [1982] 1 S.C.R. 811. In my view, the trial judge's decision to deal with the problem raised by the Crown's opening with a Vetrovec warning rather

than by dealing specifically with the missing Bourgade was within the ambit of his discretion.

7. Error of the Trial Judge

43 I therefore agree that the trial judge erred in effectively (if not explicitly) preventing defence counsel from commenting on the missing witness Bourgade, but otherwise I would reject, for these reasons and the reasons given by Robert J.A., the various additional objections to the fairness of the trial urged by the respondent in the main appeal and in his cross-appeal.

8. Availability of the Curative Proviso in This Case

44 Section 686 of the Criminal Code (variously called "the curative proviso" or "the proviso") allows an appellate court to dismiss an appeal notwithstanding that "the appeal might be decided in favour of the appellant" on an error of law if the court is of the opinion that "no substantial wrong or miscarriage of justice has occurred". More precisely, the relevant text of s. 686 provides as follows:

> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> ...
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law,
>
> ...
>
> (b) may dismiss the appeal where
>
> ...
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred;

45 In its written submissions to the Quebec Court of Appeal, the Crown defended the rulings of the trial judge on their merits and did not raise the curative proviso as an alternative submission. The possibility of its application was raised in oral argument by that court, and belatedly pursued by the Crown. The respondent contends that, in these circumstances, the Court of Appeal did not have the authority to apply s. 686(1)(b)(iii). He relies primarily on two recent decisions of this Court: R.

v. Pétel, [1994] 1 S.C.R. 3, and R. v. McMaster, [1996] 1 S.C.R. 740. In the Pétel case, Lamer C.J. found that the trial judge had erred in the answer he provided to a question from the jury and declined to apply the curative proviso of the Criminal Code, stating, at p. 17:

> In the Court of Appeal and in this Court, however, counsel for the Crown did not argue that, given the evidence in this case, no substantial wrong or miscarriage of justice occurred, and that s. 686(1)(b)(iii) of the Criminal Code should thus be applied. The Crown has the burden of showing that this provision is applicable: Colpitts v. The Queen, [1965] S.C.R. 739. This Court cannot apply it proprio motu. Having found an error of law in the judge's answer to the question by the jury, I must accordingly dismiss the appeal and affirm the order for a new trial. [Emphasis added.]

In the McMaster appeal, Lamer C.J. relied on the above passage and ordered a new trial for both appellants. Again, the Crown had not raised s. 686(1)(b)(iii) of the Code in argument.

46 This aspect of the respondent's argument must be rejected. The onus rests upon the Crown to satisfy the court that there is no reasonable possibility that the verdict would have been different had the trial judge not committed an error of law. It is true that if the Crown does not offer the court oral or written submissions with respect to the application of this statutory provision, the court will not second-guess that exercise of the prosecutor's discretion. That being said, Lamer C.J. did not suggest in Pétel or McMaster that it would be wrong for a Court of Appeal to raise the issue of the curative proviso, and leave the ultimate decision up to the Crown. The Court would be failing its institutional responsibilities by withholding such a suggestion in circumstances where it thought the issue ought at least to be considered. Ordering a new trial raises significant issues for the administration of justice and the proper allocation of resources. Where the evidence against an accused is powerful and there is no realistic possibility that a new trial would produce a different verdict, it is manifestly in the public interest to avoid the cost and delay of further proceedings. Parliament has so provided.

47 The facts of this appeal differ from those in Pétel or McMaster. While Crown counsel did not raise the curative proviso in his written material to the Court of Appeal, he did so during his oral argument. As Robert J.A. notes at pp. 277-78:

> [TRANSLATION] However, the [Crown] at the hearing before us raised the application of the curative proviso and advanced reasons which tend to show that the [accused] had not suffered any prejudice from the error committed.
>
> ...
>
> Counsel for the [Crown] argued that if there was an error, this error had not caused the [accused] any prejudice. [Emphasis added.]

The Crown having accepted the court's invitation to invoke s. 686(1)(b)(iii) at the time of the hearing, it went on to attempt to satisfy the onus, and joined issue on that point with the defence. In these circumstances, there is no valid procedural objection to the Court of Appeal, after considering the submissions of both sides, addressing the issue whether no substantial wrong or miscarriage of justice had occurred.

9. Application of Section 686(1)(b)(iii) to the Facts of This Case

48 In this Court, the Crown conceded that the trial judge's conduct amounted, for all practical purposes, to a refusal of defence counsel's request to address the jury on the issue of the Crown's failure to deliver on its stated and restated intention to call Bourgade. The question at this stage is whether there is any reasonable possibility that the verdict would have been different if this error had not been made: R. v. Bevan, [1993] 2 S.C.R. 599, per Major J., at pp. 616-17.

49 In my view, the curative proviso applies in this case because I do not think that the respondent suffered any significant prejudice to the fairness of his trial by reason of the judge's error. Bourgade's evidence was purely corroborative. Without Bourgade the Crown risked an acquittal because it relied on the evidence of an unsavoury witness, Riendeau, uncorroborated by any other testimony. The Crown's failure to call Bourgade created a potential advantage for the defence.

50 The defence had no right to compel the Crown to call Bourgade, and waived its own right to do so. There is no issue here of evidence improperly admitted or improperly withheld. There is only an unanswered question put to Riendeau in cross-examination, and the unfulfilled announcement of Bourgade's evidence in the Crown's opening. As to the former issue, the defence question put to Riendeau on cross-examination ("[what is] the reason Mr. Bourgade called you to tell you that ...?") interrupted by the Crown ("I object. The reason Bourgade called him, it's Bourgade who will tell us that") was, as framed, plainly designed to elicit hearsay and ought not to have been answered irrespective of the Crown's misconceived reference to Bourgade. The case therefore comes down to the prejudicial impact, if any, of the judge's refusal to allow defence counsel to remind the jury of something that didn't happen, i.e., Bourgade's appearance. While the missing Bourgade had not been put in the box to corroborate Riendeau's testimony as originally anticipated, the trial judge did remind the jury in his Vetrovec warning that Riendeau was an unsavoury witness whose evidence had not been corroborated at all in material aspects. The bottom line is that the jury convicted the respondent largely on the basis of Riendeau's testimony notwithstanding the monumental defence attack on Riendeau's credibility and repeated warnings by the trial judge to approach Riendeau's evidence with great caution. On this point, I agree with Professor Mewett that:

> It does not usurp the function of the jury to hold that the verdict must necessarily have been the same so long as consideration is given not only to the amount of the evidence against the accused, but also to any finding that the jury must have made on the basis of the evidence properly before them.

> (A. W. Mewett, "No Substantial Miscarriage of Justice", in A. N. Doob and E. L. Greenspan, eds., Perspectives in Criminal Law (1985), 81, at p. 102.)

51 The alleged prejudice to defence tactics was defence counsel's loss of opportunity to work Riendeau and Bourgade into contradicting each other in their collective incrimination of the respondent. It would be speculative in the extreme to suggest that the damage to the defence by Bourgade's corroboration of significant parts of Riendeau's testimony could (or would) have been outweighed by such contradictions (if any) on secondary matters.

52 The contrary view accepted by the majority of the Court of Appeal was that "the [accused's] right to a fair trial was compromised" because of "the combined effect" of a number of factors, only one of which was the judge's "impairment of defence counsel's right, in the circumstances, to comment on Bourgade's absence" (p. 219). The other factors that concerned the Court of Appeal related to the conduct of Crown counsel in promising, then failing to call, Bourgade's evidence, with an explanation which the trial judge (albeit not the Court of Appeal) was prepared to accept. With respect, I do not see these factors as cumulative. Without the Crown's comments in relation to Bourgade, the defence would not have had the basis to make its proposed comment in the first place. The original complaints merged, in a manner of speaking, in the remedy. The only question at this stage is whether and to what extent the effective denial of that remedy impacted on the outcome of the trial.

53 In my view, there is no reasonable possibility that the verdict would have been any different if the trial judge's error had not been made. While there were some inconsistencies in the testimony of the Crown's main witness, Riendeau, explanations were offered for these inconsistencies and it was open to the jury to accept or reject them. In the three days it took to cross-examine Riendeau, the defence had ample opportunity to effectively challenge his credibility in the eyes of the jury, and did a thorough job with what they had to work with. The trial judge thoroughly instructed the jury on the theories of both the defence and the Crown, as well as the dangers of relying solely on Riendeau's testimony. The fact defence counsel was not permitted to comment on the missing witness does not mean the jury had forgotten that what had been promised by the Crown had not been delivered.

54 The application of s. 686(1)(b)(iii) requires the court to consider the seriousness of the error in question, the effect it likely had upon the jury's inference-drawing process and the probable guilt of the accused on the basis of the legally admissible evidence untainted by the error (Mewett, supra, at p. 98). While the trial judge erred, the error did not vitiate the fairness of the trial in any significant way. Nor is there any reasonable possibility that the proposed defence comment would have changed the outcome of the trial. The fact is that the jury was willing to convict the respondent on the basis of Riendeau's uncorroborated evidence. Despite the defence attack and the judge's warning, the jury clearly must have accepted Riendeau's version of events. Even if the trial judge had allowed defence counsel to criticize the Crown's failure to call a further Crown witness, there is no reasonable possibility, in my view, that the jury's verdict would have been different. I would

therefore allow the appeal.

The Cross-Appeal

55 The respondent cross-appeals on two separate grounds, both of which were dismissed by Robert J.A. for a unanimous Court of Appeal. Firstly, the respondent argues that, during their deliberations, the members of the jury had inappropriate contacts with several police officers which called for a stay of proceedings. Secondly, the respondent submits that the late disclosure by the Crown of Nicole Lalonde's statement to police deprived the respondent of his right to make full answer and defence. The respondent asks this Court to order a new trial on these grounds as well. For the reasons expressed by Robert J.A. in the court below, I would dismiss the cross-appeal.

Disposition

56 The Crown's appeal is allowed. The Quebec Court of Appeal's order for a new trial is set aside and the guilty verdict against the respondent restored. The respondent's cross-appeal is dismissed for the reasons of Robert J.A.

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