APPEALS

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APPELLATE PROCEDURE

A. EXTENSIONS OF TIME TO APPEAL

i. The Test

The appellate court has discretion to grant or refuse an extension of time to appeal: *R v Ansari,* 2015 ONCA 891 at para 21

Relevant factors that may be considered when an extension of time is sought include, but are not limited to:

- whether the applicant formed a bona fide intention to seek leave to appeal and communicated that intention to the opposite party within the time prescribed for filing the applicable notice;
- whether the applicant has accounted for or explained the delay in filing the notice; and
- whether the proposed appeal has merit: *Ansari* at para 22

Depending on the circumstances of the application, other factors may also influence the decision, including:

- The length of the delay.
- Prejudice to the respondent.
- The diligence or inattentiveness of counsel.
- Whether the applicant has taken the benefit of the judgment.
- whether the consequences of the conviction are out of all proportion to the penalty imposed
- whether the Crown will be prejudiced and whether the applicant has taken the benefit of the judgment: *Ansari* at para 23 and *R v AE,* 2016 ONCA 243 at para 36

In the final analysis, the overarching consideration is whether the applicant has demonstrated that the justice of the case requires that the extension of time be granted: *Ansari* at para 23

i. Examples from the Case Law

Extensions of time to appeal sentence may be granted where collateral consequences arise post-sentencing: *R v Ansari*, 2015 ONCA 891 *at paras 24-27; R v Chen*, 2016 ONCA 132

B. APPEAL OF REFUSAL TO EXTEND TIME

The circumstances in which the Court of Appeal will reconsider the decision of a single judge of that court to deny an application for an extension of time are narrow, and require the applicant to demonstrate that the justice of the case requires it: see R v Gatfield, 2016 ONCA 23 at paras 5, 11

The court has jurisdiction to grant leave to appeal under s. 131 of the Provincial Offences Act from a judgment that denies an extension of time to appeal under s. 116. However, because of the strict requirements of s. 131(2) governing the granting of leave, coupled with the deference owed to discretionary decisions such as denying an extension of time to appeal, leave to appeal to the appellate court from such decisions will necessarily be rarely granted: R v AE, 2016 ONCA 243 at para 35

C. REOPENING AN APPEAL

The Court of Appeal has jurisdiction to reopen an appeal that has not been heard on the merits. Outside of this limitation, the Court of Appeal has absolutely no power to reopen an appeal: R v Perkins, 2017 ONCA 152 at paras 11-19

D. JURISDICTION TO APPEAL

i. After death of Appellant

The jurisdiction to continue an appeal in a criminal matter, after the death of the appellant, should be exercised sparingly and only where it is in the interests of justice do so. That observation has even greater force in a prosecution under the Provincial Offences Act: *R v Hicks,* 2016 ONCA 291 at para 2

ii. After Dismissal following Notice of Abandonment

Where the appeal was not heard on the merits, the court of appeal has the discretion to set aside the dismissal and reopen the appeal if it is in "the interests of justice" to do so: *R v McDonald,* 2016 ONCA 288 at para 5

APPELLATE REVIEW

A. ACCUSED APPEAL

i. Accused Appeal and Curative Provisio under s.686(1)(b)(iv)

Section 686(1)(b)(iv) operates in tandem with s. 686(1)(b)(iii) to avoid quashing convictions on account of procedural or legal errors that could not realistically have had any impact on the verdict, the fairness of the trial, or the appearance of the fairness of the trial: *R v Noureddine,* 2015 ONCA 770 at paras 46-48

S.686(1)(b)(iv), permits the court of appeal to dismiss appeals despite procedural irregularities if:

1. The trial court maintained its jurisdiction over the class of offence charged; and
2. The appellant has suffered no prejudice as a result of the procedural irregularity:

The prejudice inquiry mandated by s.686(1)(b)(iv) looks both to actual prejudice to the accused, and prejudice to the due administration of justice. An appellate court may infer prejudice from the error without requiring the accused to demonstrate prejudice. The Crown may rebut the inference of prejudice: *Noureddine* at para 62; *R v Sciascia,* 2016 ONCA 411 at para 85

Factors such as the appearance of fairness are engaged when considering whether there has been prejudice to the due administration of justice, that is, whether there was a miscarriage of justice within the meaning of s. 686(1). A miscarriage of justice need not always be supported by the demonstration of actual prejudice to an appellant; sometimes, public confidence in the administration of justice is just as shaken by the appearance as by the fact of an unfair proceeding: *R v McDonald,* 2018 ONCA 369 at para 51

There are two situations where the curative proviso is appropriate: 1) where the error is harmless or trivial because the error relates to a minor aspect of the case, and thus could not have prejudiced the accused or affected the verdict; 2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict - i.e., there is no reasonable possibility that the verdict would have been different had the error not been made: *R v Van Every,* 2016 ONCA 87 at para 70; *R v Zoldi,* 2018 ONCA 384 at para 53; *R v Vorobiov,* 2018 ONCA 448 at para 70

It is not open to an appellate court to apply the curative proviso on its own motion. The proviso should be applied only upon submission from a party: *R v PG,* 2017 ONCA 351 at para 31

The curative proviso could apply even though no explicit reference to s.686(1)(b)(iii) of the *Criminal Code* was made by the Crown, provided that the substance of the *proviso* point was raised: *R v Ajisle,* 2018 ONCA 494; aff'd at 2018 SCC 51

Procedural irregularities that compromise the composition or selection of the trial court (e.g., improper jury selection or election) deprive that court of jurisdiction over the class of offence charged and are beyond the reach of s. 686(1)(b)(iv): *R v Sciascia,* 2016 ONCA 411 at para 83

A breach of s. 650(1) by exclusion of an accused from a part of his or her trial is a procedural irregularity to which s. 686(1)(b)(iv) can apply. However, unless there are exceptional circumstances, s. 686(1)(b)(iv) will not save a breach of s. 650(1) caused by the absence of the accused during closing arguments at the conclusion of dangerous offender proceedings. This is precisely what occurs when exclusively written argument is ordered by the trial judge and an opportunity to provide oral argument by the offender is denied. Such circumstances impair the appearance of fairness, compromise the transparency

of the trial proceedings and are at odds with the open court principle: *R v McDonald,* 2018 ONCA 384 at para 53

A. Onus:

The Crown bears the burden of demonstrating that the curative proviso is applicable and satisfying the court that the conviction should be upheld notwithstanding the legal error: *Van Every* at para 70

B. ACCUSED APPEAL OF CONVICTIONS BUT NO CROWN APPEAL OF ACQUITTALS

Where the Crown elects not to appeal acquittals, the appellate court has no jurisdiction to interfere with the verdicts of acquittal: *R v Poulin,* 2017 ONCA 175 at para 82

C. ACCUSED APPEAL ONE OR MORE, BUT NOT ALL, CONVICTIONS

The Court of Appeal has jurisdiction to allow an appeal only on a conviction that resulted in a miscarriage of justice and not the remaining convictions: *R v Quick,* 2016 ONCA 95 at para 42

D. ACCUSED APPEAL FROM CONVICTION ON INCLUDED OFFENCE:

If an accused appeals from conviction on an included offence, the appellate court cannot set aside the acquittal returned on the main charge absent an appeal by the Crown from that acquittal: *R v Noureddine,* 2015 ONCA 770 at paras 75-76

Section 686(8) does not allow an appellate court to make an ancillary order setting aside an acquittal on a related charge at the same trial: *Noureddine* at paras 75-76

E. ACCUSED APPEAL RESULTING IN RELATIVE NULLITY OF THE PROCEEDINGS

A "relative nullity" can be relied on only by a party whose personal interests had been adversely affected by the error. Where the Crown does not appeal an acquittal, only the accused can rely on an error resulting in a relative nullity of the proceedings to secure a new trial: *R v Noureddine,* 2015 ONCA 770 at paras 77-87

F. ACCUSED APPEAL DESPITE GUILTY PLEA

Generally speaking, a plea of guilty bars an accused to appeal interlocturory or pre-trial rulings, unless the plea of guilty can be set aside (for a full discussion of setting aside guilty pleas, see The Law, Pleas).

An appellant who has pled guilty is required to obtain leave to withdraw the plea of guilty or persuade the court to exercise its jurisdiction under s. 686(1)(a)(iii) and allow the appeal, despite the plea, on the ground that there was a miscarriage of justice.

The proper procedure to preserve an accused's right to challenge the correctness of a pre-trial ruling on appeal is to have the accused accept the Crown's case and call no evidence. The parties can invite a conviction based on an agreed statement of facts. This procedure would preserve the accused's right of appeal without imposing the additional burden of setting aside the guilty plea: *R v Faulkner,* 2018 ONCA 174 at paras 90-93

BAIL PENDING APPEAL

See General Topics on Law: Judicial Interim Release: Bail Pending Appeal

CROWN APPEAL

G. GENERAL PRINCIPLES

Under s. 676(1)(a) of the Code, the Crown's right of appeal from an acquittal is limited to "any ground of appeal that involves a question of law alone": *R v KS,* 2017 ONCA 307 at para 7; *R v George,* 2017 SCC 38

In order for the Crown to succeed on an appeal from acquittal, it must show "in the concrete reality of the case at hand" that the legal error had some material bearing on the acquittal, such that the outcome may well have been affected by the legal error: *R v Hall,* 2016 ONCA 013 at para 29. There must be reasonable degree of certainty as to the materiality of the legal error: *George; R v Sault,* 2018 ONCA 970, at para 4

The court cannot allow an appeal from an acquittal on the basis of "a miscarriage of justice": *Hall* at para 34

The crown must rely on the actual trial record - not the record that might have existed had different tactical decisions been made at trial: *Hall* at para 32

The Crown must rely on the factual scenario legal submissions advanced at trial. To do otherwise on appeal would be unfair to the trial judge and the respondent: *R v Tran,* 2016 ONCA 48 at para 4

Section 676(2) gives the Crown a right of appeal on the main charge even if there is a conviction on the included offence.

The Appellate court may decline to entertain a new theory of liability advanced by the Crown on appeal where to do so would be unfair to the accused and offend the principle of double jeopardy: *R v Patel,* 2017 ONCA 702 at paras 6-12, 58-60

FRESH EVIDENCE

A. THE RATIONALE FOR ADMISSIONS

The rationale for the admission of fresh evidence is that, in some cases, the potential for a miscarriage of justice outweighs countervailing concerns of finality and order, values essential to the integrity of the criminal process: *R v Bos,* 2016 ONCA 443 at para 118

There are essentially two categories of fresh evidence (1) on the basis of non-disclosure giving rise to a breach of the right to make full answer and defence (the "*Dixon* test"); or (2) on the basis that the cogency of the evidence is such that it warrants admission and the interests of justice require that it be received, governed by the test first set (the "*Palmer* test").

i. THE PALMER TEST TEST

There is no requirement that a party to a criminal proceeding first obtain leave before pursuing a fresh evidence application. Instead, the admission of fresh evidence is governed by the following test: *R v Forcillo,* 2018 ONCA 402 at para 94

The appellate court must consider the following factors when deciding a fresh evidence application:

1. whether by due diligence the party seeking to admit the fresh evidence could have adduced it at trial;
2. whether the evidence bears upon a potentially decisive issue;
3. whether the evidence is reasonably capable of belief; and
4. whether it could reasonably be expected to have affected the result at trial, if believed: *Palmer v. The Queen*, [1980] 1 SCR 759 (SCC); *Bos* at para 119; *R v Abbey,* 2017 ONCA 640 at para 44; *R v MGT,* 2017 ONCA 736 at paras 100-102

This four-part test was recast into a three-part inquiry in *R v Truscott*, 2007 ONCA 575, at para. 92:

- Is the evidence admissible under the operative rules of evidence (the "admissibility component")?
- Is the evidence sufficiently cogent in that it could reasonably be expected to have affected the verdict ("cogency criterion")?
- What is the explanation offered for the failure to adduce the evidence at trial and should that explanation affect the admissibility of the evidence ("the due diligence" criterion)?

The "due diligence" criterion is not a precondition to admissibility. Instead, it is a factor to consider: *R v Plein,* 2018 ONCA 748 at para 57

The cogency requirement asks three questions:

> 1) Is the evidence relevant in that it bears upon a decisive or potentially decisive issue at trial?
>
> 2) Is the evidence credible in that it is reasonably capable of belief?
>
> 3) Is the evidence sufficiently probative that it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result? *R v Plein,* 2018 ONCA 748 at para 63

For an overview of fresh evidence in relation to a breach of the right to disclosure, see Charter: Section 7: Right to Disclosure

ii. The Dixon Test

There are two components to the *Dixon* test. First, the court asks whether there has been a breach of the Crown's duty to disclose. A time-sensitive approach governs this inquiry as it would be unfair to consider allegations of failed disclosure through the lens of current day rules and practices. If the court concludes that, at the relevant time, the Crown failed in its disclosure obligations, then *Dixon* requires that the court go on to consider whether there exists a "reasonable possibility" that the non-disclosure: (a) impacted the outcome of the trial; or (b) impacted the overall fairness of the trial process . Although a

reasonable possibility must be more than "entirely speculative" in nature the "mere existence of such a possibility constitutes an infringement of the right to make full answer and defence": *R v Biddle,* 2018 ONCA 520 at paras 17-19

In the context of a witness recanting trial testimony, the cogency requirement is the controlling factor. This factor requires answers to three questions: (1) whether the proposed evidence is relevant; (2) whether the evidence is credible; and (3) whether the evidence is sufficiently probative: *Allen*, 2018 ONCA 498 (at paras. 92-95)

A recantation can be proffered or admitted: (1) as substantive evidence; and/or (2) as impeachment of trial testimony. In the former case, the fresh evidence must be credible. In the latter, the value of the fresh evidence is not dependent on credibility but on the inconsistency with the trial testimony. Nevertheless, credibility will still inform the analysis.

For a non-exhaustive list of factors to consider in assessing the credibility of a recantation, see *Allen* at paras 100-101.

Fresh evidence will not be admitted merely to add a "third voice" to the issues canvassed at trial: *R v Forcillo,* 2018 ONCA 402, at para 109

GROUNDS OF APPEAL

B. INCONSISTENT VERDICTS

For a verdict to be inconsistent there must be no realistic view of the evidence or any rational logical basis upon which the verdicts may be reconciled: *R v Siddiqui,* 2016 ONCA 376 at para 13

The law does not require an otherwise unassailable conviction to be set aside in a judge alone trial because an inconsistent, demonstrably unsound acquittal has been entered on a functionally identical charge in the same proceedings. It is not an appropriate outcome to deem a demonstrably reasonable conviction to be unreasonable because of an inconsistent acquittal that is grounded in a clear legal error.

The Crown does not have to appeal and set aside an acquittal in order to resist an accused's challenge to the reasonableness of an allegedly inconsistent conviction. When an accused person asks to have an inconsistent conviction set aside, the reasons for that inconsistency are put in issue. Where, on an examination of those reasons, the acquittal shows itself to be defective, an appeal court must take the fact the acquittal is wrongful into account in deciding whether to grant the relief the appellant requests: *R v Plein,* 2018 ONCA 748 at paras 23, 42, 47, 48

In other words, where an inconsistent verdict results from a legally unsound acquittal and the factual findings on the acquittal are not inconsistent with the factual findings on the conviction, an appellate court is not required to set aside the conviction, even if the Crown did not appeal the acquittal: *R v Horner,* 2018 ONCA 971, at para 19; see also para 25

That being said, the Crown would be well advised, if it wishes to resist an inconsistent verdict appeal, to cross-appeal an acquittal it wishes to call into question: *Plein* at para 48

C. UNREASONABLE VERDICT

i. General Principles

The power to overturn a verdict based on unreasonableness can be found in section 686(1)(a)(i) of the *Criminal Code.*

The reasonableness of the verdict is a question of law: *R v Ellis,* 2016 ONCA 358 at para 28

The appellate court must determine is whether, on the *whole* of the evidence, the verdict is one that a properly instructed trier of fact, acting judicially, could reasonably have rendered: *R v Wolynec,* 2015 ONCA 656 at paras 72-73; *R v Smith,* 2016 ONCA 25 at para 71; *R v McCracken,* 2016 ONCA 228 at para 23; *R v Tsekouras,* 2017 ONCA 290 at para 225

In the context of a judge alone trial, "the court of appeal often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion": *Ellis* at para 29

Where the Crown's case depends on inferences drawn from primary facts, the question, in assessing the reasonableness of the verdict, becomes: could a trier of fact acting judicially be satisfied that the accused's guilt was the only reasonable conclusion based on the totality of the evidence: *Ellis,* at para 30; *R v George-Nurse,* 2018 ONCA 515 at para 26, 31

A verdict may also be unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that is:

i. plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding; or
ii. incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge: *Tsekouras* at para 226

Whether a trial judge has drawn the proper inference from a fact or group of facts established by the evidence is a question of fact, as is whether the whole of the evidence is sufficient to establish an essential element of an offence. Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by a trial judge unless those findings and inferences are:

i. clearly wrong;
ii. unsupported by the evidence; or
iii. otherwise unreasonable.

Any error must be plainly identified and be shown to have affected the result. In other words, the error must be shown to be at once palpable and overriding: *Tsekouras* at para 230

An unreasonable verdict may arise from unreasonable credibility findings. An appellate court must determine whether the assessments of credibility "cannot be supported on any reasonable view of the evidence": *R v KM,* 2016 ONCA 347 at para 11;

In considering the reasonableness of the verdict, an appellate court may infer from the appellant's failure to testify, an inability to provide an innocent explanation: *Tsekouras* at para 227

The Appellate court must examine the *weight* of the evidence, not its bare sufficiency; the court is entitled to re-examine and reweigh the evidence only to determine whether the evidence, as a whole, is reasonably capable of supporting the verdict rendered: *R v Smith,* 2016 ONCA 25 at para 72

An unreasonable verdict does not arise where the prosecution fails to prove an unessential element of the offence (e.g., the date of a sexual assault): *R v AMV*, 2015 ONCA 457 at paras 26-28

iii. In Jury Trials

A. The Test

The test is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered.

The test for unreasonableness imports not only an objective assessment, but also a subjective one: *R v AA,* 2015 ONCA 558 at paras 139-140; *R v Smith,* 2016 ONCA 25 at para 71

The question is:

1. whether the verdicts are supportable on any theory/reasonable view of the evidence consistent with the legal instructions given by the trial judge; and
2. whether proper judicial fact-finding, applied to the evidence as a whole, precludes the conclusion reached by the jury: Cite: *R v BH*, 2015 ONCA 642 at para 20; *R v Tyler,* 2015 ONCA 599 at para 8 [quote]; *R v Pannu*, 2015 ONCA 677 at para 163; *R v Jones-Solomon,* 2015 ONCA 654 at para 67; *R v Smith,* 2016 ONCA 25 at para 73; *R v Dodd,* 2015 ONCA 286 at paras 56-58; *R v McCracken,* 2016 ONCA 228 at para 24

The reviewing court must ask not only whether there is evidence in the record to support the verdict, but also whether the jury's conclusion conflicts with the bulk of judicial experience: *R v BH*, 2015 ONCA 642 at para 19; R v. Pannu, 2015 ONCA 677 at paras 161-162; *R v Smith,* 2016 ONCA 25 at para 73

Circumstances in which a special caution to the jury is necessary about a certain witness or certain type of evidence are reflective of accumulated judicial experience and may factor into an appellate court's review for reasonableness: *R v Jones-Solomon,* 2015 ONCA 654 at para 67

In a case in which the accused gives evidence, an acquittal does not necessarily mean the complainant was not believed. The jury may accept or reject some, none, or all of a witness's evidence: *R v BH*, 2015 ONCA 642 at para 22

In a case in which the accused does not give evidence, an appellate court is entitled to take this into account in determining whether a jury verdict survives a reasonableness analysis under s. 686(1)(a): R v. Pannu, 2015 ONCA 677 at para 14

The Crown cannot rely on improper instructions to which it acquiesced to reconcile unreasonable verdicts: *R v Walia,* 2018 ONCA 197 at para 16

B. On a Multi-Count Indictment

On a multi-count indictment against a single accused, the "verdicts will be supportable if the trial judge's instructions were proper legal instructions that could have led the jury to accept a theory of the evidence producing these verdicts": *R v BH*, 2015 ONCA 642 at para 20 [quote]; *R v Tyler,* 2015 ONCA 599 at para 8 [quote]

If there are multiple counts against a single accused, "different verdicts may be reconcilable on the basis that the offences are temporally distinct, or are qualitatively different, or dependent on the credibility of different complainants or witnesses": *R v BH*, 2015 ONCA 642 at para 23 [quote]

The onus of establishing that a verdict is unreasonable on the basis of inconsistency with other verdicts is a difficult one to meet because the jury, as the sole judge of the facts, has a very wide latitude in its assessment of the evidence: *R v BH*, 2015 ONCA 642 at para 20 [quote]; *R v Tyler,* 2015 ONCA 599 at para 8 [quote]

C. Examples from the Case Law

R v Dodd, 2015 ONCA 286 [insufficient identification of alleged murderer]

R v Phillips, 2018 ONCA 651 [insufficient identification of alleged assailant]

R v Robinson, 2017 ONCA 645 [insufficient evidence of mens rea for first degree murder]

iv. In Judge-Alone Trials

In a judge-alone trial, appellate intervention is necessary where the reasons of the trial judge disclose that:

1. the judge was not alive to an applicable legal principle; or
2. the judge entered a verdict inconsistent with the factual conclusions the judge had reached: *R v AA,* 2015 ONCA 558 at paras 141

Appellate courts have somewhat broader scope to review the verdicts of trial judges, as opposed to juries, for unreasonableness, because trial judges give reasons for their conclusions: *R v Laine,* 2015 ONCA 519 at para 64

A. Ground #1: not alive to legal principles

A verdict is not necessarily unreasonable because a trial judge has erred in his or her analysis. The court must determine whether the *verdict* is unreasonable in light of the totality of the evidence: *R v AA,* 2015 ONCA 558 at paras 142

B. Ground #2: verdict inconsistent with factual conclusions

Under this expanded scope of review, an appellate court is entitled to intervene where a trial judge draws an inference or makes a finding of fact that is plainly contradicted by the evidence relied upon for that purpose or is demonstrably incompatible with evidence that is not otherwise contradicted or rejected by the trial judge: *R v Wolynec,* 2015 ONCA 656 at para 74; *R v Smith,* 2016 ONCA 25 at para 74-75

Whilte the appellate court may consider flaws in the reasoning process, the focus never shifts from the conclusion reached at trial. There must be a demonstrated nexus between the error in reasoning and the verdict rendered. Even if there is an error that is demonstrably incompatible with the evidence adduced at trial, the verdict is not necessarily unreasonable: *R v Wolynec,* 2015 ONCA 656 at para 76

Unreasonable verdicts of the nature marked out under this expanded review for unreasonableness are exceedingly rare: *R v Wolynec,* 2015 ONCA 656 at para 77

An appellate court must accord great deference to the trial judge's assessment of the witnesses' credibility. A verdict anchored in an assessment of credibility is only unreasonable if the trial court's assessment of credibility cannot be supported on any reasonable view of the evidence: *R v AA,* 2015 ONCA 558 at para 143; *R v Jones-Solomon,* 2015 ONCA 654 at para 67; *R v Sinobert*, 2015 ONCA 691 at para 109: *R v Benson,* 2015 ONCA 827 at para 21; *R v George-Nurse,* 2018 ONCA 515 at para 26

It is important to bear in mind that a trier of fact can accept some, none, or all of what a witness says: *R v BW,* 2016 ONCA 96 at para 5

v. Circumstantial Case

An unreasonable verdict may be established where, in a circumstantial case, there were reasonable inferences available other than guilt.

Appellate courts may refer to an accused's silence as indicative of an absence of an exculpatory explanation when considering an unreasonable verdict argument on appeal. However, the accused's failure to testify is generally relevant only in cases where the Crown has adduced a compelling body of evidence. No adverse inference can be drawn if there is no case to answer. A weak prosecution's case cannot be strengthened by the failure of the accused to testify: *R v George-Nurse,* 2018 ONCA 515 at paras 17-18, 33

D. CIRCUMSTANTIAL EVIDENCE

An appellate court's review of circumstantial evidence turns on "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence": *R v Jackson,* 2018 ONCA 460 at para 27; *R v Villaromen,* 2016 SCC 33 at para 55

Under s. 686(1)(a)(i) and s. 822(1) of the *Criminal Code*, the jurisdiction of the appeal court to review a trial judge's finding as to sufficiency of the evidence is limited. An appeal court is not entitled to retry the case or to substitute its own view of the evidence for that of the trial judge. An appeal court cannot interfere with a trial judge's factual findings unless they are unreasonable or unsupported by the evidence, or contain palpable and overriding error: *Jackson* at paras 29-30

E. MISAPPREHENSION OF EVIDENCE

i. DEFINITION

A misapprehension of the evidence may relate to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence: *R v Thompson*, 2015 ONCA 800 at para 39;

vi. BURDEN TO MEET

The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction": *R v Spence,* 2018 ONCA 427 at para 54

Put another way, a misapprehension of evidence may warrant appellate intervention if it is material to the trial judge's reasoning process and amounted to:

- An error of law
- An unreasonable verdict
- a miscarriage of justice
- a 'miscarriage of justice' embraces any error that deprives an accused of a fair trial

> *R v. Wolynec*, 2015 ONCA 656 at paras 88-91; *R v. Pannu*, 2015 ONCA 677 at paras 90-91; *R v Milliken*, 2015 ONCA 897 at para 6; *R v. Abdullahi*, 2015 ONCA 549 at para 6; *R v Hemsworth,* 2016 ONCA 85 at para 40

An error in the assessment of the evidence will amount to a miscarriage of justice only if striking it from the judgment would leave the trial judge's reasoning on which the conviction is based on unsteady ground: *R v DR,* 2016 ONCA 162 at para 10

While the failure to consider all of the evidence is an error of law, "unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in this respect: *R v Tippett,* 2015 ONCA 697 at para 27

vii. REMEDY

If the appellant establishes an unreasonable verdict or a miscarriage of justice, s/he is entitled to an acquittal. If he establishes an error of law, the Crown must prove that there was no miscarriage of justice under s.686(1)(b)(iii): *R v Vant*, 2015 ONCA 481 at paras 108-109

F. UNEVEN SCRUTINY OF THE EVIDENCE

i. THE TEST

Subjecting the evidence of the defence to a higher or stricter level of scrutiny than the evidence of the Crown is an error of law, which displaces the deference normally owed to a trial judge's assessment of credibility. But, to succeed, defence must point to something substantial in the record: *R v Rhayel,* 2015 ONCA 377 at para 96; *R v JA,* 2015 ONCA 754 at para 35

To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.: *R v DJL*, 2015 ONCA 333 at para 10; *R v. Andrade*, 2015 ONCA 499 at para 39; *R v AF,* 2016 ONCA 263 at para 6

It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could

have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment: *Andrade* at para 39 (citation ommitted); *Rhayel* at para 95; *R v Radcliffe,* 2017 ONCA 196 at para 24

In the absence of palpable and overriding error, an appellate court cannot reassess and reweigh evidence: *Radcliffe* at para 26

In making this argument, counsel should also be mindful that the trial judge is entitled to accept some, none, or all of the witness' evidence: *R v Laine*, 2015 ONCA 519 at para 47

It is difficult to succeed in this type of argument for two reasons: 1) Credibility findings are the province of the trial judge and attract a very high degree of deference on appeal; and 2) Appellate courts invariably view this argument with skepticism, seeing it as a veiled invitation to reassess the trial judge's credibility determinations: *Rhayel* at para 97; *AF* at para 6

A failure to adequately scrutinize the weaknesses in the Crown's case and appreciate the position of the defence warrants reversal on any of three basis: inadequate reasons; unreasonable verdict; or miscarriage of justice: R v Wolynec, 2015 ONCA 656 at para 38

Applying different levels of scrutiny results in an unfair trial & a miscarriage of justice, even if there was enough evidence to support a conviction: *R v Gravesand,* 2015 ONCA 774 at para 43

In *Barnes*, 2017 ONSC 2049, the appellate court allowed the accused's appeal from conviction for one count of assault against his common law wife, on the basis of an uneven scrutiny of evidence. The court held that the trial judge rejected the accused's evidence as implausible and incredible for tenuous reasons with respect to matters that were collateral to the issue of whether an assault occurred. On the other hand, the trial judge glossed over problems with the complainant's account of events, which included the absence of visible injuries. Further, the trial judge engaged in speculation in considering evidence he found corroborative of her account of the assault. The court concluded that accused had not received a fair trial, and was the victim of a miscarriage of justice.

G. FAIL TO RESOLVE INCONSISTENCIES

The failure to address and explain the resolution of major inconsistencies in the evidence of material witnesses is an error of law: *R v Williams*, 2018 ONCA 138

H. INSUFFICIENT REASONS

i. GOVERNING PRINCIPLES

An appellate court, proceeding with deference, must ask whether the reasons considered with the evidentiary record, the submissions of counsel, and the live issues at trial reveal the basis for the verdict. The question is whether the reasons were so deficient as to foreclose meaningful appellate review: *R v DES,* 2018 ONCA 1046, at para 13

The trial judge's duty to give reasons applies to both convictions and acquittals: *R v Sliwka,* 2017 ONCA 426 at para 26

Reasons that may adequately explain why a judge had a reasonable doubt, may be inadequate to explain why a judge was satisfied beyond a reasonable doubt. Similarly, reasons may be adequate if an appeal from those reasons is limited to a question of law, as in the case of Crown appeals from acquittals, but may be inadequate if the appeal extends to questions of fact, as in the case of appeals from convictions: *Sliwka* at para 27

For a review of the Several basic principles that govern the review of the sufficiency of the reasons delivered at the conclusion of proceedings in which the credibility and reliability of the testimony of the principal witnesses is the focal point, see: *R v. AA,* 2015 ONCA 558 at paras 116-121

For a review of the several basic principles that govern the review of the sufficiency of the reasons, the form that these arguments take, the requirements upon the trial judge, and the burden the appellant bears in order to succeed on this basis, see: *R v Wolynec,* 2015 ONCA 656 at paras 52-60

Where a case turns largely on determinations of credibility, the sufficiency of the reasons should be considered in light of the deference afforded to trial judges on credibility findings. Only rarely will deficiencies in a trial judge's credibility analysis warrant appellate intervention, although a failure to sufficiently articulate how credibility concerns have been resolved may rise to the level of reversible error: *R v JA*, 2015 ONCA 754, at para 37; *R v JL,* 2018 ONCA 756, at para 40

The degree of detail required to explain findings of credibility will vary with the evidentiary record and trial dynamics: *R v DES,* 2018 ONCA 1046, at para 9

Determinations of credibility are inherently discretionary and absent a palpable and overriding error an appellate court should not interfere. Rarely will deficiencies in the trial judge's credibility analysis as expressed in the reasons for judgment merit intervention on appeal: *R v JE,* 2018 ONCA 1045, at para 5; see also *R v Vining,* 2018 ONCA 1078first, at para 15

While a trial judge need not resolve every inconsistency that arises on the evidence, reasons a acquire particular importance where the trial judge must "resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record." A trial judge's failure to explain significant inconsistencies in the evidence may give rise to reversible error: *R v JJ,* 2018 ONCA 756 at para 41; *JL* at para 41

A trial judge is presumed to know the law. If a phrase in a trial judge's reasons is open to two interpretations, the one consistent with the trial judge's knowledge of the applicable law must be preferred over the one erroneously applying the law: *R v Luceno*, 2015 ONCA 759 at para 59

While the failure to consider all of the evidence is an error of law, "unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in this respect: *R v Tippett*, 2015 ONCA 697 at para 27

Judicial reasons that amount to the "bottom line" or decision of the trial judge are not reasons that in any way explain that decision or expose it to proper appellate review: *Sliwka* at para 30

It is an error of law for a trial judge to convict without providing an analysis of the elements of the offence and whether/why they have been met: R v. Hilan, 2015 ONCA 455

A trial judge is not required to refer to every piece of evidence or argument made by counsel: *R v Brownlee,* 2018 ONCA 99 at para 37

Subject to a duty of procedural fairness, there is no general duty to provide reasons for an evidentiary ruling. The failure to give reasons on an evidentiary ruling is not fatal provided that the decision is supportable on the evidence or the basis for the decision is apparent from the circumstances. The importance of the subject-matter of the ruling also has a bearing on whether procedural fairness compels reasons: *R v Brooks,* 2018 ONCA 587 at para 20

In *Brooks*, the Court of Appeal held that the admission of hearsay was a critical part of the Crown's case, and that the appellant had a right to understand the basis for the admission of the evidence. As a result, the Court held that, as a matter of fairness, the trial judge was obliged to provide reasons, and it was an error of law to fail to do so: *Brooks* at para 21.

In *Zagrodskyi,* the Ontario court of appeal set aside a conviction for sexual assault where the trial judge failed to give sufficient reasons by simply stating that, based on all the evidence, he was satisfied beyond a reasonable doubt of the guilt of the accused: 2018 ONCA 34 at paras 10-11

In *Black,* the Supreme Court of Canada reversed a conviction for importing and adopted the reasons of Pardu J.A. in dissent, finding that that trial judge failed to provide sufficient reasons on the *mens rea* of the offence, that is, whether the accused knew about the drugs in a suitcase that he allegedly checked in at the airport. Justice Pardu reasoned that the trial judge made conclusory statements without engaging in the necessary reasoning on the issue of *mens rea*. Pardu J.A. concluded her reasons by reiterating the principle that appellate courts should not "engage in a reassessment of aspects of the case not resolved by the trial judge" and "the appeal court ought not to substitute its own analysis for that of the trial judge." Justice Pardu further stated that "there may be an implicit route available from the trial judge's explicit factual findings at para. 26 to a finding of the appellant's guilt, but it is not appropriate for this court to attempt to discern that route and explain it:" 2017 ONCA 599 at paras 39-40, rev'd at 2018 SCC 10

INTERVENTIONS

Interventions in criminal matters, where the liberty of the accused is at stake, should be granted sparingly. The court will consider, among other things, the nature of the case, the issues that arise and the likelihood that the applicant can make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

Subsection 7.2.10.4 of the Practice Direction Concerning Criminal Appeals at the Court of Appeal for Ontario sets out the materials that must be filed on a motion to intervene:

> After the date for the hearing of the motion to intervene is confirmed, the moving party must file a notice of motion, motion record, factum, and other material for use by the court. [Emphasis added.]

These requirements are mandatory.
A motion record is necessary to provide context for the motion, to identify the issues, the positions taken by the parties to the appeal and to enable the court to ascertain whether the contribution of the proposed intervener will inform the court's appreciation of the issues.

The factum of a party seeking leave to intervene will set out, among other things, the submissions that the moving party would make at the hearing of the appeal and will demonstrate how the test for intervention is met. In some cases, it may be advisable to file a draft factum, containing the submissions that will be made if leave to intervene is granted.

The factum assists the court in preparing for the motion and in probing the position of the proposed intervener and the respondent on the motion. It assists the court in determining whether the proposed intervener would make a useful contribution beyond that offered by the parties, without causing injustice to the immediate parties.

Injustice can occur, for example, where the intervener is not simply offering a new perspective on the issues, but is raising new issues. It can also occur where the intervener's perspective is no different from the perspective being advanced by one of the parties. Deciding whether an intervener meets the conditions for intervention frequently requires a careful analysis of the submissions of the parties to the appeal and the arguments the intervener proposes to advance.

Where the material before the court is that the proposed intervener might be able to make a useful contribution to the appeal without prejudice to the parties, that is not sufficient to permit the party to intervene: *R v MC,* 2018 ONCA 606 at paras 3-11, 16

MOOTNESS

The general test an appellate court should apply when considering whether to proceed with an appeal rendered moot by the death of an accused, is whether there exist special circumstances that make it "in the interests of justice" to proceed:

this discretion should be exercised only in exceptional circumstances where the appellant's death is survived by a continuing controversy which requires resolution in the interests of justice.

Three principal rationale underlie the policy or practice governing the continuance of moot appeals and inform the exercise of the circumscribed discretion to determine the appeal despite the party litigant's death:

i. the existence of a truly adversarial context;
ii. the presence of particular circumstances which justify the expenditure of limited judicial resources to resolve the issue; and
iii. the respect shown by courts to limit themselves to their proper adjudicative role, as opposed to making freestanding legislative-type pronouncements.

The court undertakes a two-step approach to the hearing of moot appeals. The first step involves an inquiry and determination whether the required tangible and concrete dispute has disappeared and the issues have become academic. If the case ascends the first step, the court should then determine whether it should exercise its discretion to hear the case: *R v Beaton,* 2018 ONCA 924, at paras 9-11; *Queen v Mosher et al,* 2015 ONCA 72

NEW ISSUES RAISED ON APPEAL

A. RAISED BY THE PARTIES

When an issue has not been raised at trial and the record on that issue is incomplete, the appellate court generally will not entertain the issue on appeal: *R v Pino*, 2016 ONCA 389 at para 45; *R. v. Reid*, 2016 ONCA 524

This applies to constitutional arguments as well: *R v Vu,* 2018 ONCA 436 at para 88

That being said, despite the fact that the appellate court is not the place to develop an evidentiary record, the court will hear a constitutional argument raised for the first time on appeal where the problems with assembling an appropriate record are outweighed by the appellant's legitimate interest in advancing the constitutional issue: *R v JD,* 2018 ONCA 947, at para 3-7

The decision to grant or refuse leave to permit a new argument is a discretionary decision informed by a balancing of the interests of justice as they affect all parties: *R v Zvolensky,* 2017 ONCA 475 at para 4; *Vu* at para 89

The rationale is based on: (i) prejudice to the other side which lacks the opportunity to respond and adduce evidence; (ii) the absence of a sufficient record; (iii) the societal interest in finality and the expectation that criminal cases will be disposed of at first instance; and (iv) the responsibility of defence counsel to advance all appropriate arguments at first instance: *R v Giamou,* 2017 ONCA 466 at para 9; see also *R v Mian,* 2014 SCC 54

The burden is on the party who seeks to raise the new issue to satisfy three preconditions:

1. the evidentiary record must be sufficient to permit the appellate court to fully, effectively and fairly determine the issue raised on appeal;
2. the failure to raise the issue at trial must not be due to tactical reasons; and
3. the court must be satisfied that no miscarriage of justice will result from the refusal to raise the new issue on appeal: *Giamou* at para 10; *R v Ruthowsky,* 2018 ONCA 552 at para 27

In short, while an appellate court may hear and decide new issues not raised at trial, its discretion to do so should not be exercised routinely or lightly. Before

doing so, the court "must be satisfied that the new issue raised on appeal can be fully, effectively and fairly addressed even though it was not raised at trial": *R v Dhanaswar,* 2016 ONCA 229 at para 5 (citations ommitted)

Although an appellate court will generally not entertain a constitutional argument on appeal that was not argued below, it has a discretion to do so. It is arguable that the discretion be exercised in circumstances where a provision of the *Criminal Code* has been found to be constitutionally infirm in previous judgments and no one brought this to the attention of the sentencing judge: *R v Hewitt,* 2018 ONCA 293 at para 8

B. RAISED BY THE COURT

While appellate courts have the discretion to raise a new issue, this discretion should be exercised only in rare circumstances. An appellate court should only raise a new issue when failing to do so would risk an injustice. At all times the discretion is limited by the requirement that raising the new issue cannot suggest bias or partiality on the part of the court. Courts cannot be seen to go in search of a wrong to right.

Where there is good reason to believe that the result would realistically have differed had the error not been made, this risk of injustice warrants the court of appeal's intervention. The standard of "good reason to believe" that a failure to raise a new issue "would risk an injustice" is a significant threshold which is necessary in this context in order to strike an appropriate balance between the role of appellate courts as independent and impartial arbiters with the need to ensure that justice is done.

In order to raise a new issue, the court should also consider whether it has the jurisdiction to consider the issue, whether there is a sufficient record on which to raise the issue and whether raising the issue would result in procedural prejudice to any party.

When an appellate court raises a new issue, there must be notification and opportunity to respond. The court of appeal must make the parties aware that it has discerned a potential issue and ensure that they are sufficiently informed so they may prepare and respond. The court should raise the issue as soon as is

practically possible after the issue crystallizes so as to avoid any undue delay in the proceedings. However, notification of the new issue may occur before the oral hearing, or the issue may be raised during the oral hearing. The notification should not contain too much detail, or indicate that the court of appeal has already formed an opinion, however it must contain enough information to allow the parties to respond to the new issue.

The requirements for the response will depend on the particular issue raised by the court. Counsel may wish to simply address the issue orally, file further written argument, or both. The underlying concern should be ensuring that the court receives full submissions on the issue. If a party asks to file written submissions before or after the oral hearing, there should be a presumption in favour of granting the request.

Recusal of a judge or panel should be rare and should be governed by the overriding consideration of whether the new issue or the way in which it was raised could lead to a reasonable apprehension of bias: *R v Mian,* 2014 SCC 54

SELF REPRESENTED LITIGANTS

Appellate courts ought not to take a rigid or technical approach when identifying the grounds of appeal that a self-represented litigant is raising.

The Canadian Judicial Council's *Statement of Principles on Self-Represented Litigants and Accused Persons* has been endorsed by the Supreme Court of Canada in *Pintea v. Johns*, 2017 SCC 23, at para. 4, and by the Court of Appeal in *Moore v. Apollo Health & Beauty Care*, 2017 ONCA 383, at paras. 42-45, and in *R. v. Tossounian*, 2017 ONCA 618, at paras. 36-39. According to these principles, self-represented persons are expected to familiarize themselves with relevant legal practices and to prepare their own case. However, self-represented persons should not be denied relief on the basis of minor or easily rectified deficiencies in their case. Judges are to facilitate, to the extent possible, access to justice for self-represented persons.

Appellate judges should therefore attempt to place the issues raised by a self-represented litigant in their proper legal context: *R v Morillo,* 2018 ONCA 582 at paras 10-12

PRECEDENT

A. ENDORSEMENTS

Reasons given by way of endorsement are mainly directed at giving the immediate parties an understanding of why the court disposed of the appeal as it did. Jurisprudential principles intended to be articulated for the first time take the form of written judgments. Care must be taken not to construe an endorsement as supporting broad principles that were not specifically addressed: *R v Martin,* 2016 ONCA 840 at para 18

That said, the weight to be given to an endorsement will vary widely. Sometimes the general principles of law have already been established by full written reasons in prior cases and it is only necessary for the Court to apply those principles to the case before it. Sometimes the jurisprudential heavy lifting in the particular case has been done by the court at first instance and there is little, if anything, for the appellate court to add apart from its agreement with that reasoning: *Martin* at para 19

B. OVERTURNING PRECEDENT

See *R v Carter,* 2015 SCC 5

STANDARD OF REVIEW

A. APPELLATE REVIEW OF JURY CHARGES

The focus of appellate review of jury charges is whether, after a functional and contextual review of the charge and of the trial as a whole, the jury instructions

adequately prepared the jury for deliberations: *R v Barrett,* 2016 ONCA 002 at para 18; *R v CKD,* 2016 ONCA 66 at para 22

B. APPELLATE REVIEW OF CONSTITUTIONAL QUESTIONS

The standard of review on questions of constitutional interpretation is correctness. That said, the Supreme Court in *Bedford v. Canada (AG)*, 2013 SCC 72 at paras 49 at 56,established that absent reviewable error in the trial judge's appreciation of the evidence, an appellate court should not interfere with the trial judge's conclusions on social, legislative or adjudicative facts: *York (Regional Municipality) v Tsui,* 2017 ONCA 230 at para 54

C. APPELLATE REVIEW OF REGULATORY BOARDS

The Registrar of Firearms has specialized expertise. A Registrar's decision is entitled to deference and is reviewed on a reasonableness standard...On review, the provincial court engages in its own fact finding, but under the umbrella of deference: *R v Vivares,* 2016 ONCA 001 at paras 24-25

D. APPELLATE REVIEW OF SENTENCE

Pursuant to s.687 of the *Criminal Code,* where the appeal court finds the sentencing judge committed an error in principle, the court must impose a new sentence and cannot remit the matter back to the sentencing judge for sentencing: *R v MacIntyre-Syrette,* 2018 ONCA 259 at para 25

POWERS OF THE COURT OF APPEAL

A. GENERAL LAW

Appellate courts are creatures of statute. Their jurisdiction is defined and circumscribed by the enabling statutory authority. As are the rights of appeal and the remedies available from panels and single judges of appellate courts: *R v Reyes,* 2018 ONCA 156 at para 11

B. PROCEDURAL POWERS

Section 683(1) sets out the powers of the court of appeal to make orders of a procedural nature in order to facilitate the adjudication of an appeal, where it is in the interests of justice to make such procedural orders.

Section 683(3) expressly expands the scope of the procedural orders the court of appeal can make, beyond those enumerated in subsection (1), to include any power which can be exercised in civil matters.

s. 683(3) of the Criminal Code can be read as extending the statutory criminal jurisdiction of the court of appeal beyond the jurisdiction expressly granted by Parliament in the *Criminal Code*. Parliament intended that the court of appeal have the same evidentiary and procedural powers necessary to adjudicate criminal appeals as it does for civil appeals: *R v Perkins,* 2017 ONCA 152 at paras 20-23

S. 679(10) of the *Criminal Code* authorizes the Court of Appeal to order that an appeal be expedited: see, for example, *R v Ruthowsky,* 2018 ONCA 552 at para 48

C. SUBSTANTIVE POWERS

i. POWER TO ORDER COSTS: SECTION 683(3)

The court of Appeal does not have the power to order costs on the hearing and determination of an appeal: *R v Floward Enterprises Ltd.,* 2017 ONCA 643

ii. Power to Amend Indictment: Section 683(1)(g)

The power to amend a count in an information or indictment on appeal provided by s. 683(1)(g) is broad. An appellate court has the discretion to amend the indictment or information to conform to the evidence at trial, including by substituting a different charge. The court of appeal may amend an indictment where it considers it in the interests of justice. This power will not be exercised if, the court is of the opinion that the accused has been misled or prejudiced: *R v Emery,* 2016 ONCA 204 at para 3; *R v Robinson,* 2018 ONCA 741 at para 14

Prejudice may arise where, for example, the accused has made a tactical decision to testify on the charge on the indictment, which incriminated him on the charge proposed to be substituted by the appellate court: *Robinson* at para 15

iii. Power to Impose Mandatory Ancillary Orders on Sentence Appeal

In a sentence appeal, the appellate court has jurisdiction to impose a mandatory ancillary order that the trial judge did not impose at first instance: *R v Versnick,* 2016 ONCA 232 at para 2

iv. Power to Appoint Counsel: Section 684(1)

Pursuant to s. 684, the appellate court has the authority to assign counsel to act on the accused's behalf if, in its opinion: 1) it is desirable in the interests of justice that he should have legal assistance; and 2) it appears that he does not have sufficient means to obtain that assistance.

The applicant, bears the burden of proof on the application. In deciding an application under s. 684(1), the court must consider three general questions:

1. Does the applicant have the means to hire counsel privately?
2. Has the applicant advanced arguable grounds of appeal?
3. Does the applicant have the ability to effectively advance his or her appeal without the assistance of counsel?

In answering this question, the court should examine such matters as the complexity of the legal arguments to be advanced on appeal and the applicant's ability to make legal argument in support of the grounds of appeal: *R v Staples,* 2016 ONCA 362 at paras 31-34

Some examples of successful applications include: *R v McCullough,* 2017 ONCA 315

The availability of assistance from the Ontario Inmate Appeal Duty Counsel Program the Program should not undermine meritorious s. 684 applications: *R v Brown,* 2018 ONCA 9

The Court may impose a required contribution agreement, as a term of a 684 order: *R v Josipovic,* 2018 ONCA 199 at para 15

v. POWER TO ORDER REPORT BY JUDGE: S.682(1) OF CRIMINAL CODE

Section 682(1) of the Code requires a trial judge, at the request of the Court of Appeal, to report on "the case or on any matter relating to the case that is specified in the request."

A trial judge should not use the report to supplement his or her reasons. In such circumstances, a trial judge's report will be held invalid: *R v Kreko,* 2016 ONCA 367 at paras 33-34

vi. POWER TO ORDER NEW TRIAL: SECTION 686(1)(A)

Where an appeal court allows an appeal of an acquittal on the basis that the trial judge did not instruct the jury on a second, alternative way of committing the same offence (e.g., assault under s.265(1)(a) and 265(1)(b)), the appropriate remedy is to vacate the acquittal on the one count put to the jury and to order a new trial on both counts. The appellate court cannot simply order a new trial on the count that was not put to the jury, as the verdict may not necessarily have been the same had both avenues to conviction: *R v Ferdinand,* 2018 ONCA 836, at para 7

vii. Power to Order New Trial under s.686(1)(a)(iii)

Pursuant to s.686(1)(a)(iii), the Court of Appeal may allow a conviction appeal where the court is of the opinion that there was a miscarriage of justice: *R v Johnson-Lee,* 2018 ONCA 1012, at para 73

If an error deprives the accused of a fair trial, it constitutes a miscarriage of justice within the meaning of s. 686(1)(*a*)(iii) and a reversible error will have occurred.

A court of appeal should carefully weigh the whole of the circumstances of the case in determining whether the trial has been rendered unfair. However, the trial cannot be held to a standard of perfection, provided it remains fair in reality and in appearance.

There is no limit on the particular type of error that will constitute a miscarriage of justice. An error or misconduct that could well have affected the jury's assessment of guilt or innocence will suffice. So, too, will conduct that is so egregious so as to bring the administration of justice into disrepute or to lead reasonable people to believe that the appearance of justice has been undermined: *R v Johnson-Lee,* 2018 ONCA 1012, at paras 71-73

viii. Power to Substitute Verdict: s.686(4)(b)(ii)

Pursuant to s. 686(4)(b)(ii) of the *Criminal Code* the Court of Appeal can enter convictions where the accused should have been found guilty of an offence, but for an error of law. In doing so, the Court may further impose a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose such a sentence: *R v McBride,* 2018 ONCA 323 at para 61

ix. Power to Order the Examination of a Witness: s.683(1)(b)

Under s. 683(1)(b) of the *Criminal Code* an appellate court can order the examination of a witness. However, it may do so only in respect of evidence that may be relevant to an issue on a pending appeal: *R v Reyes,* 2018 ONCA 607 at para 9

PROVINCIAL OFFENCES APPEALS

i. CERTIORARI

Subsection 141(4) of the *Provincial Offences Act* requires a court to find that a substantial wrong or miscarriage of justice has occurred before granting relief by way of *certiorari: R v Singh,* 2018 ONCA 506 at para 13

ii. APPEALS

The relevant parts of s.131 of the *POA* state:

> **Appeal to Court of Appeal**
>
> **131** (1) A defendant or the prosecutor or the Attorney General by way of intervention may appeal from the judgment of the court to the Court of Appeal, with leave of a judge of the Court of Appeal on special grounds, upon any question of law alone or as to sentence.
>
> **Grounds for leave**
>
> (2) No leave to appeal shall be granted under subsection (1) unless the judge of the Court of Appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted.
>
> **Appeal as to leave**
>
> (3) No appeal or review lies from a decision on a motion for leave to appeal under subsection

The relevant parts of s. 139 of the *POA* state:

> **Appeal to Court of Appeal**
>
> 139(1) An appeal lies from the judgment of the Ontario Court of Justice in an appeal under section 135 to the Court of Appeal, with leave of a judge of the Court of Appeal, on special grounds, upon any question of law alone.
>
> **Grounds for leave**

(2) No leave to appeal shall be granted under subsection (1) unless the judge of the Court of Appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted.

The threshold for granting leave to appeal under ss. 131 and 139 of the *Provincial Offences Act* requires the Applicant to establish:

i. Special Grounds
ii. on a question of law alone
iii. that, in the particular circumstances of the case, it is essential in the public interest or for the due administration of justice that leave be granted

What constitutes "special grounds" in s. 131(1) is informed by the requirement in s. 131(2) that it is essential in the public interest or for the due administration of justice that leave be granted. The threshold for granting leave is very high. The same considerations apply in respect of appeals under s. 139 of the Provincial Offences Act: *R v El-Kasir,* 2017 ONCA 531 at paras 21-22; *R v Morillo,* 2018 ONCA 582 at paras 5-8

In order to meet this standard, the legal issue raised should be significant and have some broad importance. Generally speaking, the implications of the legal issue should go beyond the case at hand. The strength of the proposed grounds of appeal is also a material consideration if there is a real risk that there may have been a miscarriage of justice or a denial of procedural fairness: *Morillo* at para 9

SENTENCE APPEALS

On appeal, fresh evidence showing that the appellant suffers from mental illness that has a detrimental effect on his ability to earn money to pay the fines, may demonstrate to the appeal court that it is in the interests of justice that the total amount of the fines be reduced: *R v AE,* 2016 ONCA 243 at para 57

SUMMARY CONVICTION APPEALS

A. APPEALING A SUMMARY CONVICTION ACQUITTAL

Section 813(b)(i) of the Criminal Code allows the Crown to appeal the trial judge's decision to the summary conviction appeal court upon questions of law alone, questions of mixed fact and law, or questions of fact: *R v Balogun-Jubril,* 2016 ONCA 199 at para 9

B. APPEALING A SUMMARY CONVICTION APPEAL

An appellant can only appeal a summary conviction appeal with leave on a question of law alone, not a question of fact or mixed fact and law: *R v Balogun-Jubril,* 2016 ONCA 199 at paras 7-8; *R v Lam,* 2016 ONCA 850 at para 9

The relevant factors to be considered when deciding whether to grant leave to appeal in summary conviction proceedings are:

1. the significance of the proposed question of law to the general administration of criminal justice; and
2. the strength of the appeal: *R v Owens*, 2015 ONCA 652; *R v Khanna,* 2016 ONCA 39 at para 4; *Balogun-Jubril* at para 8; *Lam* at para 10

The first category arises where the merits of the legal question are arguable, even if not strong, if the legal question has broader significance to the administration of justice: *Khanna* at para 5; *Lam* at para 10

The second category arises where there appears to be a "clear" legal error, even if it doesn't have significance to the braoder administration of justice - especially where the conviction is serious and the applicant faces a significant deprivation of liberty: *Khanna* at para 5

Almost by definition, complaints about misapprehension of evidence by the summary conviction appeal court are case-specific and do not transcend the idiosyncrasies of the case at hand: *Lam* at para 13

It is insufficient to invoke the frequency with which a certain offence populate the lists in the Ontario Court of Justice: *Lam* at para 14

SUPREME COURT APPEALS

A. SENTENCE APPEALS

To obtain leave to appeal to the Supreme Court of Canada from a sentence imposed, varied or affirmed by a Court of Appeal, an applicant must demonstrate that the appeal should be entertained by the SCC becasuse of :

1. the question raised, by reason of its public importance or
2. the importance of any issue of law or of mixed law and fact involved in that question or
3. the nature or significance of the question, for any other reason

The Supreme Court of Canada has jurisdiction under s. 40(1) of the *Supreme Court Act* to assess the fitness of a sentence. But, as a matter of policy, the Court has decided that it should not do so. It deals with principle, not fitness: *R v Boussoulas,* 2018 ONCA 326 at para 15