SCC File No.: 40780

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

B E T W E E N:

TAMMY MARION BOUVETTE

APPELLANT
(Appellant)

- and -

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

- and -

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PART I — OVERVIEW

1. The Canadian Civil Liberties Association, the CCLA, argues that s. 686(2) of the *Criminal Code*[1] grants appellate courts a broad, flexible remedial discretion that should not be limited to prefabricated categories. In particular, the CCLA submits that that discretion is broad enough to allow an acquittal to remedy a miscarriage of justice where that appears to be the likely result on a re-trial, regardless of whether a re-trial is practically feasible.

2. The CCLA agrees with the parties to this appeal that s. 686(2)(a) is not exhausted by cases where an acquittal is the only reasonable verdict. As the Court of Appeal for Ontario explained in *Truscott*, "[t]he remedial discretion in s. 686(2) is sufficiently broad to permit resort to a more vigorous review of the evidentiary record in those cases where that approach is required by the interests of justice."[2]

3. The *Truscott* decision is an example of a situation where fairness required an acquittal. The remedial alternatives available to the court – to stay the proceedings under s. 686(8) of the *Code* or remitting the decision to proceed to the Attorney General – were not sufficient to dispel the miscarriage of justice that had stained the appellant's conviction.

4. But *Truscott* is only one such example. There are other circumstances where the interests of justice will require an acquittal. This is so because both a judicial stay and leaving to the Crown to consider whether and how to proceed are, as the court below properly recognized, inferior remedies. A judicial stay will only be ordered in the "clearest of cases".[3] A Crown stay or a withdrawal are products of functionally unreviewable prosecutorial discretion that this Court has elsewhere found inadequate to satisfy the interests of justice.[4] All "leave in place the stigma that accompanies being the subject of an unresolved allegation[.]"[5]

5. The CCLA argues that this unsatisfactory reality militates in favour of a broader approach

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[1] *Criminal Code*, RSC 1985, c. C-46.
[2] *Truscott (Re)*, 2007 ONCA 575, at paras. 259.
[3] *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309.
[4] *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 94.
[5] Reasons for Judgment of the Court of Appeal, at para. 122 [Appellant's Record ("AR"), Vol. I, Tab 5].

to s. 686(2). Specifically, it submits that, where a miscarriage of justice has been identified, the appellate court's ability to provide an appropriate remedy in the interests of justice includes entering an acquittal where that appears to be the likely result on a re-trial, whether or not a re-trial is practically feasible.

PART II — QUESTIONS IN ISSUE

6. The CCLA intervenes on a single question of law in this appeal: whether s. 686(2)(a) permits a court of appeal to enter an acquittal even if there remains a possibility of conviction on a re-trial. The submissions below advance the CCLA's view that s. 686(2) confers a broad remedial discretion that permits appellate courts to order an acquittal to remedy a miscarriage of justice even where there remains evidence on which a jury could convict and a re-trial is practically feasible.

PART III — STATEMENT OF ARGUMENT

A. The Current Jurisprudence Unduly Narrows Section 686(2)

7. Section 686(2) of the *Criminal Code*, provides that, where an appellate court allows an appeal against conviction under s. 686(1)(a), the court "shall quash the conviction and (1) direct a judgment or verdict of acquittal to be entered; or (2) order a new trial."

8. In most instances, the nature of a conviction's infirmity reveals the appropriate remedy. If the appellate court determines that a verdict is unreasonable or cannot be supported by the evidence within the meaning of s. 686(1)(a)(i), it must enter an acquittal. The Crown, having failed to tender evidence capable of supporting a conviction at the first trial, is not entitled to a second opportunity to do so.[6] Conversely, an appellate court will order a new trial if an error of law has rendered a conviction untenable, as s. 686(1)(a)(ii) contemplates, but the entirety of the record still offers a reasonable possibility of conviction.[7] All of this is settled law.

9. It is also uncontroversial that s. 686(1)(a)(i) captures *most* cases justifying an acquittal. As the *Truscott* Court stated, "[i]n normal circumstances, an appellant will be acquitted by an appellate court only if he or she can demonstrate that an acquittal is the only reasonable verdict. The test is

[6] *Truscott*, at paras. 247.
[7] *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, at p. 916.

a strict one. The court must be satisfied that no jury acting judicially could reasonably convict on the evidence."[8] The CCLA does not dispute this proposition: it accurately describes the test for an unreasonable verdict under *Yebes* and *Biniaris* and correctly notes that the usual remedy for *other* types of error is a new trial.[9]

10. However, the CCLA, like the parties to this appeal, submits that s. 686(1)(a)(i) does not exhaust an appellate court's discretion to enter an acquittal. Appellate courts, including this Court,[10] have recognized that certain circumstances can justify an acquittal even if there remains evidence that could reasonably support a conviction on a retrial.[11] Such an interpretation fits comfortably within the open-ended language of s. 686(2). There is no reason to think that Parliament intended to restrict the availability of an acquittal to the narrow band of cases captured by s. 686(1)(a).

11. But the circumstances in which the interests of justice will require such an approach remain unclear. Appellate courts generally agree that the impossibility of conducting a new trial, as in *Truscott* itself, can justify entering an acquittal, but disagree on whether other "unusual" cases trigger a more flexible remedial discretion. In *Truscott*, the Court acknowledged that a new trial could result in an acquittal or a conviction,[12] meaning that an acquittal was not available under the usual analysis.[13] But the Court also noted several factors that distinguished the reference before it from routine appeals, including the Crown's concession that a new trial would not be possible.[14]

12. In those "unusual circumstances", ordering a new trial "would be unfair to the appellant and [do] a disservice to the public." Thus, the Court determined that the interests of justice required the appellant be entitled to an acquittal if, "based on all the information now available, […] it is clearly more probable than not that the appellant would be acquitted at a hypothetical new trial."

13. The Court of Appeal did not intend to limit discretionary acquittals to certain categories of

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[8] *Truscott*, at para. 752.
[9] *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, [2000] 1 S.C.R. 381.
[10] *R. v. Dunlop and Sylvester*, [1979] 2 S.C.R. 881.
[11] *Truscott*, at para. 249; *R. v. Dhillon*, 2014 BCCA 480.
[12] *Truscott*, at para. 265.
[13] See, e.g. *R. v. Hinse*, [1997] 1 S.C.R. 3, at para. 2.
[14] *Truscott*, at paras. 254 and 260.

non-"routine" cases. Its language is clear: ordering a new trial where a conviction is a reasonable verdict is not "appropriate in all circumstances. Some cases fall outside of the norm." Indeed, the Court noted other cases that may justify a broader remedial approach, such as "where an appellant has fully served his or her sentence, or has already been subjected to several trials."[15] Clearly, it did not view the impossibility of a new trial as a condition precedent to entering an acquittal.

14. Yet some appellate courts have interpreted *Truscott* as narrowing s. 686(2)'s remedial discretion. In *R. v. Dhillon*, for example, on which the court below relied, the Court of Appeal for British Columbia refused to order an acquittal because "the fresh evidence is not sufficiently cogent to exclude the reasonable possibility of a conviction"[16] and "unlike *Truscott*, the trial could proceed again."[17] And, in *R. v. Ostrowski*, the Manitoba Court of Appeal remarked that the *Truscott* approach "is intended to address the situation where there will be no new trial even though the evidence could lead to either a conviction or an acquittal."[18]

15. This interpretation of *Truscott* artificially confines the remedial discretion of appellate courts. Neither the Court of Appeal's reasons in *Truscott* nor the language of s. 686(2) itself requires such sparing resort to the power of acquittal. And, as the CCLA argues below, there are circumstances where an acquittal is not only a possible remedy, but the preferrable one. Where such a result appears likely on a re-trial, only an acquittal can restore a prosecution tainted by a miscarriage of justice.

B. The Inadequacy of a Judicial Stay

16. An appellate court's refusal to enter an acquittal does not necessarily condemn a successful appellant to a new trial. Rather, the court can stay the new trial according to the residual power in s. 686(8) of the *Code*.[19] Some appellate courts, like the BCCA in both *Dhillon*[20] and in the decision below,[21] have resorted to judicial stays under s. 686(8) in cases that exhibited unusual

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[15] *Truscott*, at para. 249.
[16] *R. v. Dhillon*, 2014 BCCA 480, at para. 50.
[17] *Dhillon*, at para. 54.
[18] *R. v. Ostrowski*, 2018 MBCA 125, at para. 24.
[19] *Truscott*, at para. 246.
[20] *Dhillon*, at para. 54.
[21] Reasons of the Court of Appeal, at para. 146 [AR, Vol. I, Tab 5].

circumstances but where a new trial was nonetheless possible.

17. However, as the decision below correctly points out, "a stay is, from the perspective of the appellant, an inferior remedy."[22] This is so for two reasons.

18. First, an appellate court's discretion to stay proceedings is extremely limited. This Court has described a stay of proceedings as "draconian",[23] "the most drastic remedy a criminal court can order",[24] a remedy of "last resort",[25] and "that ultimate remedy".[26]

19. The analysis justifying a stay reflects its drastic nature. First, there must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome."[27] Second, there must be no alternative remedy capable of redressing the prejudice. Third, where there is still uncertainty, the court must balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits".[28]

20. Second, even if the appellant is successful in obtaining a stay, it is only a partial balm to the interests of justice. The Court below noted that, while a stay removes the stigma of a conviction, it "leave[s] in place the stigma that accompanies being the subject of an unresolved allegation".[29]

21. Though a stay "permanently halts the prosecution of an accused",[30] and "will be such a final determination of the issue that it will sustain a plea of *autrefois acquit*",[31] it leaves unresolved the factual basis of an allegation. In doing so, it frustrates the truth-seeking function of the trial

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[22] Reasons of the Court of Appeal, at para. 122 [AR, Vol. I, Tab 5].
[23] *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70, at para. 117.
[24] *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 30.
[25] *Taillefer*, at para. 117, citing *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 77.
[26] *Babos*, at para. 30.
[27] *Babos*, at para. 32, quoting *R. v. Reagan*, 2002 SCC 12, at para. 54.
[28] *Babos*, at para. 32, quoting *Reagan*, at para. 57; *Dhillon*, at para. 37; see also *R. v. Nixon*, 2011 SCC 3, at para. 38, discussing the test for a stay of proceedings under s. 24(1) of the *Canadian Charter of Rights and Freedoms*.
[29] Reasons of the Court of Appeal, at para. 122 [AR, Vol. I, Tab 5], citing *Truscott*, at para. 265; *R. v. Jewitt*, [1985] 2 S.C.R. 128, at p. 148.
[30] *Babos*, at para. 30; *Dhillon*, at para. 32.
[31] *Jewitt*, at p. 148.

such that "the public is deprived of the opportunity to see justice done on the merits."[32] A judicial stay of proceedings thus "functions as a third verdict between guilty and not guilty."[33]

22. For this reason, appellate courts have recognized that charges subject to a stay can still "hang over the head" of the accused although there is "no forum for its further processing".[34] Indeed, Professor Roach has written that "[a] judicial stay of proceedings can promote continuing suspicion especially when the previously convicted person requests an acquittal…Judicial stays may prevent subsequent prosecutions, but they also suggest that courts were unwilling to acquit the previously convicted person."[35]

23. And, while the presumption of innocence formally applies to a stayed allegation, such a conclusion is "legally correct but practically unrealistic."[36] It may leave the impression that "the authorities", in a broad sense, still believe in the validity of the charge.[37]And, with no forum to resolve the allegation on its merits, the appellant must bear the brand of continued suspicion in perpetuity.[38] The appellant must live their life under the shadow of this ever-present cloud.[39]

24. Professor Roach argues that this Court is aware of the stigma perpetuated by a judicial stay. In *R. v. Hinse*, this Court first granted leave to the appellant to appeal from a decision imposing a stay of proceedings[40] before substituting for an acquittal two years later. [41] These decisions demonstrate that, even in the jurisprudence of this Court, a stay is an inferior remedy, and a poor substitute where an accused deserves an acquittal. The CCLA submits that this Court should recognize the authority of provincial appellate courts to order acquittals where an acquittal appears

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[32] *Babos*, at para. 30.
[33] Kent Roach, "The Wrongfully Convicted Deserve Acquittals Not Prosecutorial Stays", 2024 102-1 *Canadian Bar Review* 201 [**Roach**], at p. 204.
[34] *Walsh (Re)*, 2008 NBCA 33, at para. 55, quoting *Amato v. The Queen,* [1982] 2 S.C.R. 418, at p. 457.
[35] Roach, at pp. 212-13.
[36] *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken: Report and Annexes* (St John's: 2006) (The Right Honourable Antonio Lamer) [***Lamer Inquiry***], at p. 319
[37] *Lamer Inquiry*, at p. 318.
[38] *Ostrowski*, at para. 24.
[39] *Lamer Inquiry,* at p. 319.
[40] *R. v. Hinse*, [1995] 4 S.C.R. 597.
[41] *R. v. Hinse*, [1997] 1 S.C.R. 3.

to be the likely result on a re-trial, regardless of whether a re-trial is practically feasible. In these circumstances, a stay is too blunt a remedy to further the interests of justice.

C. The Interests of Justice Cannot Depend on the Discretion of the Crown

25. If the court does not enter a stay, the decision to conduct further proceedings falls to the Attorney General. The Crown then has four options: first, to proceed to trial; second, to offer no evidence and invite an acquittal, third, to seek a withdrawal of the charge; and fourth, to enter a stay of proceedings according to s. 579 of the *Code*.[42] If the Attorney General chooses the second option, the appellant would have his acquittal. On either of the two last options, there would be no final verdict.[43]

26. The CCLA submits that both a withdrawal and a prosecutorial stay are insufficient to satisfy the interests of justice where a conviction is tainted by a miscarriage of justice. As between the two, a withdrawal is to be preferred. "A withdrawal must take place at a public court proceeding, there is some degree of judicial supervision and the accused is entitled to appear in court with counsel and seek judicial remedies. These are important differences that do not apply to a Crown stay."[44]

27. A prosecutorial stay, on the other hand, is a much more opaque process.[45] And yet, like a judicial stay, a prosecutorial stay fails to remove the stigma perpetuated on the accused by virtue of being the subject of an unresolved criminal allegation. The resort to a prosecutorial stay in the *Milgaard* case, for example, had "devastating effect on [Mr. Milgaard]. It encouraged wide-spread suspicion among some that he was guilty."[46] A commission of inquiry echoed these sentiments, writing that the prosecutorial stay in that case left Mr. Milgaard "with significant stigma" and "without a chance of a not guilty verdict."[47]

28. Indeed, an appellant who sees their conviction overturned on the basis of a miscarriage of

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[42] *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (Winnipeg: 2007) (The Honourable Patrick J LeSage, QC) [***Driskell Inquiry***], at p. 130.
[43] *Truscott*, at para. 271.
[44] *Driskell Inquiry*, at para. 131
[45] *Lamer Inquiry*, at para. 318.
[46] Roach, at p. 203.
[47] Roach, at p. 204.

justice will likely feel the lingering stigma perpetuated by a prosecutorial stay much more sharply than that left by a judicial stay, for two reasons. First, courts have consistently held that a prosecutorial stay does not protect an appellant from re-prosecution on the same stayed charge. It will therefore not sustain a plea of *autrefois acquit*.[48]

29. In other words, a Crown stay places the charge into a state of dormancy, liable to be reawakened at any moment.[49] Prosecutors thus have "nothing to lose"[50] in entering a stay. The prosecution can be continued within a year on the same information or indictment or recommenced later.[51] The deeming provision in s. 579(2) simply means that the Crown would have to commence afresh, with a new indictment.[52]

30. For the appellant, the stayed charge acts as the proverbial "sword of Damocles", constantly threatening the sting of renewed prosecution.[53] As counsel for the appellant in *Truscott* eloquently put it, "if the court were to follow this course, and depending on the decision of the Attorney General, the appellant, an acknowledged victim of a miscarriage of justice, would be left in a limbo-like state where his culpability for Lynne Harper's murder would remain unresolved in the eyes of the law."[54]

31. Second, the Crown's discretion to enter a stay of proceedings is functionally unreviewable. As a decision regarding the nature and extent of the prosecution and the Attorney General's participation in it, a stay falls under the expansive aegis of prosecutorial discretion, reviewable solely for abuse of process.[55] That is, "Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system".[56]

32. This discretion is doubtless an important part of the criminal process.[57] But to leave the fate

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[48] Roach, at p. 208; *Jewitt*, at p. 56.
[49] *Driskell Inquiry*, at p. 126
[50] *Lamer Inquiry*, at p. 317.
[51] Roach, at p. 216, quoting the *Lamer Inquiry*, at p. 317.
[52] *Driskell Inquiry*, at p. 126.
[53] Roach, at p. 214, quoting DE Greenfield, "The Position of the Stay in Magistrate's Court" (1961) 4 Crim LQ 373 at p. 374.
[54] *Truscott*, at para. 261.
[55] *R. v. Anderson*, 2014 SCC 41, at paras. 40, 44, quoting *R. v. Nixon*, 2011 SCC 3, at para. 47.
[56] *Anderson*, at paras. 50 and 51.
[57] *Anderson*, at para. 37.

of an appellant to the Crown's quasi-unimpeachable discretion can have serious repercussions on those who have suffered a miscarriage at the hands of the state's criminal apparatus. They must live under the edge of the sword of Damocles while the Crown, the very agent of that miscarriage of justice, "never has to say it's sorry – or, for that matter anything at all…The Crown, in short, never has to publicly justify its use of the power to stay proceedings."[58]

33. This Court has recognized that, in some contexts, prosecutorial discretion is insufficient to guard individuals against state excess. In *Nur*, this Court rejected the argument that a mandatory minimum law that imposes grossly disproportionate sentences in foreseeable cases may be saved from unconstitutionality by prosecutorial discretion to proceed summarily rather than by indictment.[59] This Court reasoned that, to leave an appellant's constitutional right –in this context, s. 12 of the *Charter* – to the Crown rather than the judiciary would "lead[] to the same uncertainty and unpredictability in the law that this Court attempted to guard against in *R. v. Ferguson*".[60] That is, the very certainty and predictability that underpins the rule of law.[61]

34. This Court's jurisprudence with respect to s. 12 of the *Charter* is, of course, not completely analogous to the case at hand. The task of protecting individuals against cruel and unusual punishment clearly rests with the judiciary.[62] Still, this Court should recognize here, as it has elsewhere, that "[t]he protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control."[63]

35. To leave an individual's ability to live a life free from stigma and the ever-present threat of re-prosecution behind the obscure, anachronistic wall of prosecutorial discretion would inevitably fail the interests of justice. Three public inquiries have recognized as much, and recommended that a prosecutorial stay not be entered unless there is a reasonable prospect of re-prosecution.[64]

36. Thus, where the state's own rights-infringing conduct has produced a miscarriage of justice,

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[58] *Lamer Inquiry*, at p. 318.
[59] *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 92.
[60] *R. v. Bertrand Marchan*, 2023 SCC 26, at para. 163.
[61] *R. v. Ferguson*, 2008 SCC 6, at para. 59.
[62] *Nur*, at para. 87.
[63] *Nur*, at para. 95, quoting *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 103-4
[64] Roach, at p. 206.

appellate courts should resort to their broad remedial authority and enter an acquittal where that appears to be the likely result on a re-trial. In these circumstances, entering an acquittal is not only possible; it is preferrable. Both a judicial stay of proceedings and leaving the decision to proceed in the hands of the Crown fail to satisfy the interests of justice. Only an acquittal rescues an appellant from "the unfair position of having the stigma of the charges hanging over [them], yet never being in the position to fully defend [themselves]."[65]

37. The appellant should not be made to bear the unfair repercussions of a miscarriage of justice based simply on the fact that that a re-trial is practically possible. There is no requirement in either s. 686(2) or in *Truscott* that a new trial be impossible before an appellate court extends such a remedy. Indeed, entering an acquittal in these circumstances is consistent with some of this Court's early decisions on the issue.[66]

38. Perhaps most importantly, an acquittal allows both the accused to move on from an unresolved allegation and the criminal justice system to move on from a miscarriage of justice that marred its prosecution. And, by integrating a requirement that any new trial would likely result in an acquittal, an acquittal also resolves any lingering factual uncertainty.

39. For these reasons, this Court should recognize that, where an appellate court identifies a miscarriage of justice, s. 686(2) vests that court with the authority to enter an acquittal where that appears to be the likely result on a re-trial, whether or not a re-trial is practically feasible. In such circumstances, fairness may require it.

PARTS IV AND V — SUBMISSIONS ON COSTS AND ORDER SOUGHT

40. The CCLA seeks no costs and asks that no costs be awarded against it. The CCLA takes no position on the disposition of this appeal.

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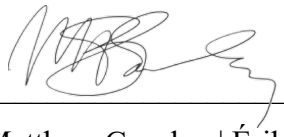
[65] *Ostrowski*, at para. 24.
[66] *Dunlop and Sylvester*, at p. 900; *Brouillard Also Known As Chatel v. The Queen*, [1985] 1 S.C.R. 39, at p. 53.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of June, 2024.



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