NOVA SCOTIA COURT OF APPEAL

Citation: R. v. Seymour, 2005 NSCA 5

Date: 20050107
Docket: CAC 207668
Registry: Halifax

Between:

Richard Elliott Seymour

Appellant

v.

Her Majesty the Queen

Respondent

Judge(s):	Saunders, Freeman & Fichaud, JJ.A.
Appeal Heard:	December 6, 2004, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Freeman and Fichaud, JJ.A. concurring.
Counsel:	Jim O'Neil, for the appellant William D. Delaney, for the respondent

Reasons for judgment:

[1] Following a trial before Nova Scotia Supreme Court Justice J. E. Scanlan, sitting with a jury, the appellant was convicted of arson and fraud related offences pertaining to the destruction of his motel and business establishment by fire and explosion on January 11, 2002. He was sentenced to three and one-half years incarceration in a federal institution.

[2] The appellant has abandoned his appeal against sentence and now restricts his appeal to his conviction, based on three principal submissions. First, the appellant alleges error on the part of the trial judge in the manner in which he disposed of the Crown's **Corbett** application. Second, the appellant says the trial judge erred in failing to disclose the contents of a jury note during the course of the jury's deliberations. Third, the appellant says the jury's verdict is unreasonable.

[3] Before turning to each of these assertions I will briefly set out the material facts by way of background. I will begin by summarizing what I view as the most important evidence led by the Crown.

Background Information

[4] Shortly after seven o'clock in the morning on January 11, 2002, an explosion rocked the Fort Lawrence Motel on the outskirts of Amherst. Persons working in premises nearby called 911 and within minutes the RCMP and local firefighters arrived at the scene.

[5] In simple terms, for ease of description, there were two buildings on the site, each containing motel units. The structure that was extensively damaged by explosion and fire is diagrammed to look like a T running north-south with the top of the T at the south end. This southern end of the structure housed the Eddy Pub and Grill, as well as the front door into the motel office.

[6] RCMP Constable Hannon was the first to arrive. After receiving a call from the dispatcher at 7:23 a.m., he executed a U-turn on the Trans Canada Highway and sped to the scene. He described a large ball of black smoke in the air. Upon arrival he saw the bar and grill section of the motel totally engulfed in flames. Debris had been blown out into the parking lot. The officer did not see anyone around. He attempted to open a door into the office area of the motel and found

that it was locked. He broke a windowpane and tried to open the door by reaching in and disengaging a lock, but he was unable to do so.

[7] Shortly after his arrival Constable Hannon was approached by the appellant, who identified himself as the owner. Constable Hannon asked the appellant if there was anyone else in the motel units and the appellant replied that there was not. The appellant said “I was just going to work by the front when she blew.”

[8] Constable Hannon entered the laundry room of the motel and found a small piece of fabric on fire on the floor. He seized the piece of fabric and had some difficulty extinguishing it before placing it in an exhibit bag. He also noticed a small fire on the floor of the linen room, next to the laundry room, and a green disposable lighter on the floor of the laundry room in front of a dryer. He seized the lighter as well.

[9] Constable Hannon searched a vehicle that was parked in front of the laundry room. He found keys in the vehicle, but none which would match the vehicle ignition. He also found a small bottle of isopropyl alcohol on the floor of the vehicle and a pair of gloves. He made arrangements to have the vehicle towed away from the building.

[10] Constable Hannon went with the appellant to his apartment within the building and noticed that there was a young girl sleeping in a bedroom. Later Constable Hannon and others searched the appellant’s apartment under the authority of a search warrant and seized a jacket and an open two litre jug of milk that was approximately two-thirds full.

[11] Thomas Bremner, then chief of the Amherst Fire Department, and William Crossman, the present chief, both attended at the fire. Mr. Bremner described the extent of devastation he observed upon arrival. The bar and lounge area was ablaze. There was also fire in what he referred to as the main building. Mr. Crossman testified that when he arrived at approximately 7:45 a.m., the whole structure of what was the Eddy Room was totally engulfed in fire.

[12] Among those firefighters who fought the blaze, one asked the appellant for the keys to a van which was parked near the motel and the appellant responded that he did not have the keys. Another firefighter shut off the valve on a large propane tank adjacent to the building. The tank was then moved to a safer location. Upon

inspection, the gauge on the tank showed that it was 60% full. Evidence at trial established that tanks of that type are routinely filled to only 80% capacity.

[13] Robert Hanley, a fire safety officer, spoke to the appellant that morning in the appellant's apartment. The appellant said that nobody was in the building and that everyone had been evacuated. The appellant told Mr. Hanley that the explosion had occurred as he walked towards the building and had come to within four or five feet of the door.

[14] At one point the appellant was seen to be wearing a jacket which appeared to be burned. This was seized by the police.

[15] Todd Seymour, the appellant's brother, worked at the Fort Lawrence Inn (part of the same establishment) as a bar tender. On January 10 he worked the 4:00 p.m. to midnight shift. Before locking up after his shift ended, he went downstairs to check the bathrooms and to make sure the back door was locked. He also checked the exterior door leading into the laundry room to ensure that it had been locked. As part of his closing routine Todd Seymour checked to see that all appliances were turned off. He left by the office door. When he closed up the building shortly before midnight, there was no one else inside.

[16] Todd Seymour said he saw his brother, the appellant, in the bar sometime on the evening of January 10. The appellant lived in an apartment in the adjacent building.

[17] Douglas Brine was employed at the Fort Lawrence Inn in January 2002. He had an apartment in the old section of the motel, next door to that of the appellant. On the morning of January 11 he was in his apartment having coffee when he heard a bang. Shortly thereafter he said he saw the appellant near his apartment and saw a young girl stick her head out the door of the appellant's apartment. When he saw the appellant at the time of the explosion, Mr. Brine heard the appellant say something about going over to get milk for his daughter. Mr. Brine described the appellant as looking like he was in shock or dazed.

[18] RCMP Constable Smith met the appellant at the scene. At that time the appellant's daughter was still in the apartment in the old section of the motel. The building containing the apartment was on fire at that time. Constable Smith and the appellant went to the apartment to make sure that she was awake and was leaving.

Later, Constable Smith took a warned statement from the appellant which was admitted into evidence upon consent of the appellant and his counsel.

[19] Police officers observed that the appellant had burns on his hands and on his head. Constable Smith asked him if he would like to have medical treatment. The appellant declined. After he had been placed under arrest on a charge of arson Mr. Seymour was treated for his burns.

[20] Robert Orr, Deputy Fire Marshall for the Province of Nova Scotia, was qualified to give expert opinion evidence with respect to the identification and examination of fire burn patterns and the cause and origin of fire. During his examination of the site on January 13, he observed burn patterns consistent with the use of an accelerant. He also found rolls of linen which he referred to as "trailers" in a hallway running to that part of the motel which had been completely destroyed. In Mr. Orr's opinion, trailers were used to help fire move from one area to another. In the area of the most extensive burning there were two electrical hot water heaters and a propane water heater. He said a fuel line coming from the propane tank outside the building had been disconnected from the propane water heater. In Mr. Orr's opinion, the propane line had been removed so as to release propane into the building. Trailers were used to ignite the propane as it was coming down the hallway. Mr. Orr stated that the electrical hot water heaters were also a possible source of ignition.

[21] Dr. Leif Sigurdson, a plastic surgeon, was qualified to give expert opinion evidence with respect to the analysis and causes of burns. Dr. Sigurdson had previously examined photographs of the appellant taken on January 11, 2002. In Dr. Sigurdson's opinion, the pattern of the appellant's burns was consistent with an explosive type of event, a sudden release of energy that did not last for very long. It appeared that the appellant's hands would have been very close to a flame source. The forearms would have been a bit further away from the flame source, and the face was even further from the flame source. The right hand suffered a more severe injury than the left and the right side of the appellant's face appeared somewhat redder than the left side. In Dr. Sigurdson's opinion, at the time the injuries were inflicted there was a triangular configuration between the appellant's face and his hands.

[22] Mr. Donald Bartlett, an investigator with the Insurance Bureau of Canada, was qualified to give expert opinion evidence on the cause and origin of fire,

identification of burn patterns and combustion explosions. In his opinion the fire and explosion had originated in the pub and grill area and then travelled in a northerly direction through the building. He found burn patterns on the floor of the hallway that were consistent with the use of a liquid accelerant. He also noticed twisted lengths of orange or pink coloured cloth on the floor of the hallway which he said were used as a trailer or a wick. These can be used to assist in the spread of a fire or distance a person from the area of ignition.

[23] Mr. Bartlett also inspected and photographed a door which showed markings consistent with a liquid accelerant having been splashed on the door and then ignited. The only gas present in the pub and grill area was propane gas. Mr. Bartlett was of the opinion that the propane gas had ignited and exploded, its source being the disconnected propane hot water heater. Mr. Bartlett did not see any evidence of an object appearing to have fallen on the propane line. In his experience such events tend to flatten or distort the copper tubing. He said that the tubing showed no sign of damage; it simply appeared to have been manually pulled from the appliance. In Mr. Bartlett's opinion this loss occurred from a deliberately set fire and not one of accidental origin.

[24] Mr. Dale Stewart is the chief inspector for field safety with the Office of the Provincial Fire Marshal. He was qualified to give opinion evidence with respect to propane gas, fires and explosions involving propane, as well as the installation, repair and operation of propane appliances. The propane tank found on the property was 60% full when inspected by Mr. Stewart. In his opinion the copper line had been deliberately disconnected from the propane water heater. In his view, although the explosion may have been a propane explosion, the rapid and roaring fire afterwards probably was not. One explanation for this fire's spread was the presence of flammable liquid.

[25] Joseph Luce is an RCMP forensic chemist. He was qualified to give opinion evidence with respect to the identification and comparison of liquid fire accelerants and residue, as well as the identification and comparison of physical and trace evidence including fibres, textiles and textile damage assessment. When he examined the jacket worn by the appellant he confirmed the presence of gasoline. He also found three pieces of an orange fabric that had melted and stuck to the back of the jacket. He said the orange fabric stuck to Mr. Seymour's jacket was indistinguishable from pieces of orange fabric examined from the fire debris. He also found gasoline on the appellant's boots. He found isopropanol and acetone,

both of which can act as fire accelerants, on the appellant's shirt. He did not find evidence of any liquid fire accelerants on Mr. Seymour's pants. Mr. Luce examined the appellant's watch and found some melted orange fabric on the face of the watch.

[26] The Crown also led evidence as to the insurance coverage on the premises. Coverage for the building and contents destroyed in the loss totalled $650,000.00. Total coverage on all buildings was $1,380,000.00. The appellant was the named insured and his mother had an interest as a beneficiary under the policy. Following the loss the appellant filed a claim under the policy which was denied.

[27] The appellant testified, as did his former common law wife, Catherine Gale, and other witnesses.

[28] The appellant testified that on the morning of January 10 he had occasion to drive his van, later parking it in front of the motel. After lunch he took his truck to plow snow. Later he met his 13 year old daughter, Julie, in town and they had supper together. They returned to his apartment at the motel around 7:00 p.m. They watched television and later the appellant went over to the bar for about half an hour and chatted with a few of the customers. He said he returned to his apartment and went to bed around 10:00 or 10:30 p.m.

[29] He said that the bottle of rubbing alcohol found later in his van was a bottle he had taken from the maintenance shop a few days earlier. He said he intended to take the bottle to the motel office, but that with snow removal and other chores he never got around to it.

[30] On the morning of January 11 the appellant got up and went into the kitchen to see what was needed for breakfast. He said he found that the milk had been left out from the night before. Knowing his daughter preferred cold milk, he put what was there back in the fridge and told Julie that he was going to the motel to get supplies. He said he approached the front door lobby entrance, put his key in the lock and felt an explosion. He said something hit him from behind and he found himself on the ground in a dazed condition. He said his jacket was on fire. He rubbed himself off and got up. Shortly thereafter he went back to his apartment to find his daughter, told her they had a fire and to get dressed as quickly as possible. He went outside where RCMP Constable Hannon met him. Later he said he returned to his apartment to check on his daughter and changed his clothes. He

removed the jacket and put on a heavy sweater and cap. The appellant said he had no idea how the explosion and fire started, and he denied any involvement in the loss.

[31] During his testimony he acknowledged a criminal conviction in 1993 which he said was related to a break-up with his common law wife at a time when he was drinking heavily. That description was confirmed by Ms. Catherine Gale, who testified that in 1993 the appellant broke into their home and wrecked some of the furniture. No theft of property occurred. The appellant was ordered to make restitution in the amount of $9,000.00. Ms. Gale said that money had been paid.

[32] Julie Seymour, the appellant's 13 year old daughter, described staying overnight with her father at his apartment in the motel on January 10-11, 2002. She said her father awakened her that morning and told her he was running over to the motel. She started to take a shower when suddenly the water shut off and everything shook. She said her father had been gone only a few minutes.

Points in Issue

[33] At the hearing before us, counsel for the appellant, who had also represented Mr. Seymour at trial, confirmed that the appellant had abandoned his appeal of sentence and now restricted his appeal to an appeal against conviction, confined to three submissions which were advanced as the following questions:

1. Did the learned trial judge err in law by incorrectly ruling that the appellant's prior conviction for a break and enter was admissible into evidence and that the appellant was liable to be cross examined in regards to it?
2. Did the learned trial judge err in law by failing to disclose the contents of a jury note to the appellant?
3. Was the verdict of the jury unreasonable?

[34] I will now address each of the appellant's three grounds of appeal in that same sequence.

First Submission: The **Corbett** application

[35] To place the appellant's submission in context, it is important to understand the circumstances surrounding the Crown's application, the positions taken by counsel at the trial, and how the trial judge came to dispose of it.

[36] At the close of its case the Crown notified the defence that it intended to introduce at least part of Mr. Seymour's criminal record into evidence for the purpose of cross-examination. The appellant's criminal record consisted of four previous convictions:

> 1982 - failure to provide a breath sample
> 1987 - failure to appear
> 1987 - driving while impaired, and
> 1993 - break and enter with intent contrary to s. 348(1) of the **Criminal Code**, for which he received a suspended sentence, three year's probation and was ordered to pay restitution of $9,179.03.

The Crown chose not to introduce into evidence the first three convictions. The sole issue before the trial judge related to the break and enter conviction.

[37] The Crown attorney at trial, Mr. Baxter, made the following submissions:

> . . . the accused has four convictions, My Lord, '82 in Calgary, failed to provide a breath sample, '87, failed to appear, '87, driving while impaired. I don't really think - - I'll be frank with the Court that it's a copy of the CPIC for the Court, I don't really think that those first three are much assistance to the jury in assessing credibility one way or the other. So I would not be seeking to cross-examine on the first three items anyway.
>
> I have a different opinion on the last item, which is break enter and commit for which the accused received a suspended sentence, three years probation, and restitution of just under $10,000. It's certainly the Crown's position that this is - - number 1, it's not nearly so dated as the first one in time that's coming up to 10 years old. But it's a - - it's a serious indictable offence for which dishonesty is a major concern. There's a restitution order there, so obviously property was taken in a manner that is illegal. So the Crown's position is, I guess, briefly, we do not seek to cross-examine on the first three convictions, we would seek to cross-examine on the fourth as it is a - - I think, a valuable aid to the jury in assessing credibility, and that it's probative value does not outweigh

> its prejudicial effect. Obviously, I would say more than that - - what I'm saying now, but that's my preliminary position.

[38] Mr. O'Neil, counsel to the appellant, opposed the Crown's application, but did so without in any way referring the trial judge to the circumstances of the 1993 conviction for break and enter. Appellant's counsel restricted his brief submission to the staleness of the offence and prejudice to his client. He put it this way:

> . . . In my view, even if this were 50 years old, it doesn't matter, given its B and E, I think it's going to influence the jury and it will do so to make them have a very bad opinion of my client, and in fact, so much so, because the nature of the case is circumstantial and it's really going to - - a lot of it's going to rely on credibility, that this very old conviction would certainly cast him in a bad light, so much so that I think, and I realize he's not entitled to the most favourable trial, but he's certainly entitled to a fair trial.
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> . . .
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> . . . Now in this case I submit that since this is such an old offence, it is old, it's over a decade old, that - - that it has limited probative value. If this were like 10 of them, I may - - it may be - - but just one of them, and that it's so - - it will be - - it will be a magnet for attention, and that I think that when my client testifies, this is going to stick out in their mind. I don't think they'd get around, in such a case where his credibility is important. I - - I can't add to it, you have the position, My Lord.

[39] After conducting a *voir dire* and considering counsels' submissions, Scanlan, J. ruled that the Crown would be permitted to introduce Mr. Seymour's prior conviction for break and enter with intent, and to cross-examine the appellant on that record should he choose to testify. Justice Scanlan said in part:

> I consider not only the fact that it is prejudicial, because basically any cross-examination on any conviction is potentially prejudicial. But in this case I am satisfied that the fact that it is some nine years before the alleged offence is not enough in terms of lapse of time to alone exclude it from consideration or cross-examination. It is somewhat related in terms of the fact that it relates to questions of credibility, and indeed, integrity of the accused individual. The fact that there is restitution in the amount of $9179.03 bespeaks of the fact that it was certainly money related, as I understand the charges before the Court are money related, in the sense that they suggest there's an allegation of fraud, or intention to defraud the insurance company. So they're certainly in the same sphere when it comes to connection.

> I am not satisfied that the accused should be put in a position whereby it looks as though he has never committed any offences ever in his life, that would be to mislead the jury, when, in fact, there is evidence of the conviction that relates to dishonesty as regards taking money.

[40] The seminal case on this subject is the decision of the Supreme Court of Canada in **R. v. Corbett**, [1988] 1 S.C.R. 670. In that case the accused was charged with first degree murder in respect of the death of one of his associates in the drug trade. At trial, credibility was a crucial issue. The accused denied any involvement in the killing and attacked the credibility of the Crown's witnesses who identified him as the killer. He elected to testify and his counsel sought to prevent the Crown from cross-examining him on his previous record under s. 12(1) of the **Canada Evidence Act**, R.S.C. 1985, c. C-5. This section of course provides that a witness, which includes any accused who chooses to testify, may be questioned as to whether he or she has been convicted of any offence. In **Corbett**, counsel for the accused argued that to permit cross-examination and proof of the accused's prior convictions, in particular a previous conviction for non-capital murder, would be so highly prejudicial as to infringe the accused's **Charter** right to a fair trial. The trial judge rejected the argument. In his charge, the trial judge warned the jury not to use the criminal record of the accused for any purpose other than credibility. The accused was found guilty of second degree murder and the British Columbia Court of Appeal dismissed his appeal from conviction. The principal issue before the Supreme Court of Canada was whether the accused had been deprived of his right to a fair hearing guaranteed by s. 11(d) of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 by reason of the introduction of evidence of his earlier conviction for non-capital murder. The Court dismissed the appeal. Chief Justice Dickson, writing for the majority, explained the history that led to s. 12 of the **Canada Evidence Act**. He wrote at ¶ 21:

> . . . What lies behind s. 12 is a legislative judgment that prior convictions do bear upon the credibility of a witness. In deciding whether or not to believe someone who takes the stand, the jury will quite naturally take a variety of factors into account. They will observe the demeanour of the witness as he or she testifies, the witness' appearance, tone of voice, and general manner. Similarly, the jury will take into account any information it has relating to the witness' habits or mode of life. There can surely be little argument that a prior criminal

> record is a fact which, to some extent at least, bears upon the credibility of a witness. Of course, the mere fact that a witness was previously convicted of an offence does not mean that he or she necessarily should not be believed, but it is a fact which a jury might take into account in assessing credibility.

[41] Citing this Court's decision in **R. v. Grosse** (1983), 9 C.C.C. (3d) 465, as well as other authorities, the court determined that s. 12 of the **Canada Evidence Act** did not violate the guarantee contained in s. 11(d) of the **Charter**. The Chief Justice repeatedly emphasized a preference for providing juries with all relevant evidence, accompanied by clear instructions as to how the evidence may be used. He stated at pp. 691-692:

> In my view, the best way to balance and alleviate these risks is to give the jury all the information, but at the same time give a clear direction as to the limited use they are to make of such information. Rules which put blinders over the eyes of the trier of fact should be avoided except as a last resort. It is preferable to trust the good sense of the jury and to give the jury all relevant information, so long as it is accompanied by a clear instruction in law from the trial judge regarding the extent of its probative value.
>
> . . . We should regard with grave suspicion arguments which assert that depriving the jury of all relevant information is preferable to giving them everything, with a careful explanation as to any limitations on the use to which they may put that information. So long as the jury is given a clear instruction as to how it may and how it may not use evidence of prior convictions put to an accused on cross-examination, it can be argued that the risk of improper use is outweighed by the much more serious risk of error should the jury be forced to decide the issue in the dark.

[42] It was the Court's view that it would only be in unusual circumstances that the right to a fair trial could be undermined by permitting full cross-examination on a prior record pursuant to s. 12 of the **Canada Evidence Act**. Dickson, C.J. observed at p. 692:

> One can now add on the accused's side of the balance the discretion in the trial judge to exclude evidence of prior convictions in those unusual circumstances where a mechanical application of s. 12 would undermine the right to a fair trial.

[43] It ought to be remembered that we are dealing here with the exercise of a trial judge's discretion. As the Court stated in **Corbett** a trial judge has a discretion to exclude prejudicial evidence of previous convictions in an appropriate

case. La Forest, J., in dissent (although not with respect to this particular point) described the deference owed on appellate review to the exercise of a trial judge's discretion. He said at p. 746:

> I would stress, however, that, as is the case when an appellate court undertakes to review a trial judge's decision which is based at least in part on the unique circumstances of the case before him and his own first-hand view of the proceedings, restraint ought to be exercised in interfering with a trial judge's exercise of discretion. More specifically, an appellate court should never, in the absence of clear error, simply substitute its own view of how that discretion ought to have been exercised for that of the trial judge.

[44] The principle of appellate deference in matters relating to a trial judge's decision whether to exclude evidence of previous convictions has been reiterated in numerous instances. See, for example, **R. v. Mulligan** (1997), 115 C.C.C. (3d) 559 (Ont. C.A.); **R. v. Warriner**, [2001] O.J. No. 4311 (Q.L.) (Ont. C.A.); and **R. v. Gayle** (2001), 54 O.R. (3d) 36; 154 C.C.C. (3d) 221 (Ont. C.A.), leave to appeal dismissed, [2001] S.C.C.A. 359 .

[45] The thrust of the appellant's first ground of appeal is that the trial judge erred in inferring that the previous conviction for break and enter, for which restitution had been ordered, related to dishonesty. The difficulty I have with the appellant's submission on this issue is that the appellant never informed Justice Scanlan of the circumstances surrounding his 1993 conviction until the trial judge had completed the *voir dire* and decided the matter. It was only after the trial judge's decision on the *voir dire*, when presenting his own defence evidence to the jury, that the appellant and his former common law wife, Ms. Gale testified as to the circumstances which led to Mr. Seymour's 1993 conviction. They then explained that they had lived common law from 1988 to 1992, but that after separating and at a time when Mr. Seymour was distraught and drinking heavily he broke into the premises they had once shared and wrecked the furnishings, thus leading to his conviction and a restitution order for the amount of the damage. It is unfortunate that the appellant chose not to advise the trial judge of these circumstances during the course of the *voir dire*, or present such evidence during that stage of the trial. The appellant can hardly criticize Justice Scanlan's exercise of discretion in this respect when not only was such evidence not called on the application, but counsel chose not to even inform the trial judge of the circumstances surrounding the incident.

[46] Neither Ms. Gale nor Mr. Seymour were challenged by the Crown on cross-examination with respect to their description of the circumstances surrounding that incident leading to Mr. Seymour's conviction. Their testimony concerning the incident would have been of considerable assistance to the jury in evaluating the evidence of the previous conviction and in forestalling any apparent prejudicial effect of the evidence of that conviction.

[47] In any event, I am satisfied that Justice Scanlan gave clear, complete and proper instructions to the jury on the issue of Mr. Seymour's prior criminal conviction and its prohibited use when considering such evidence during their deliberations. His instructions to the jury on this issue included the following:

> When Mr. Seymour gave evidence, he was asked whether he had been convicted of a criminal offence involving a break-and-enter in relation to his former partner or wife. This criminal record was introduced into evidence only for the purpose of testing the credibility or truthfulness of Mr. Seymour as a witness.
>
> You may use the evidence of the criminal record when you consider Mr. Seymour's credibility in order to decide whether a person with a criminal record of this nature is the kind of witness who you might choose to believe. Please remember that a criminal record does not necessarily mean that someone is a liar in the same way that a clean record does not mean that somebody is necessarily truthful.
>
> When you examine Mr. Seymour's criminal record, consider three things. First, you should consider the nature of the offence. In particular, you should consider whether Mr. Seymour had committed an offence that involves dishonesty. A conviction for an offence that involves dishonesty obviously has more bearing on credibility than a conviction for an offence that does not involve dishonesty.
>
> Mr. Seymour said this offence occurred a long time ago during a matrimonial breakdown. He says he was intoxicated. He went on to say that he paid restitution to his wife or former partner. His estranged partner was called to give evidence to say that, yes, it was in fact paid.
>
> You should consider when Mr. Seymour committed the offence. A recent conviction may be more relevant to the issue of credibility than a conviction for an offence that was committed a long time ago. These things should help you in deciding whether or not you believe Mr. Seymour's evidence.

> It is important however - and I say again it is important however - for you to understand that this previous conviction is not evidence of Mr. Seymour's guilt at this trial. You are not allowed to treat this conviction as evidence that Mr. Seymour is more likely to have committed the offence or offences in the indictment.
>
> Also you are not allowed to treat Mr. Seymour's criminal record as evidence that he is more likely to commit criminal acts in general. The only reasons evidence of a criminal record was admitted, and the only way that you can use it, is for the purpose of deciding whether or not you believe Mr. Seymour's testimony.
> (Underlining mine)

[48] After completing his charge and the jurors had retired to the jury room, Scanlan, J. invited counsel to comment upon his charge. Counsel for the appellant raised a single point concerning evidence he had hoped would be highlighted in the charge. No complaint was raised with respect to the trial judge's instructions on the issue of the appellant's prior convictions. While it is true that at trial, counsel for the appellant did not attack the credibility of the Crown witnesses per se, the absence of such an attack does not displace the principle approved in **Corbett** that s. 12 of the **Canada Evidence Act** applies except in cases where its mechanical application would undermine the right of an accused to a fair trial.

[49] Justice Scanlan's clear and complete instructions to the jury on this issue obviated any real risk of prejudice to the appellant arising out of the disclosure of his conviction in 1993. I am not persuaded that the trial judge erred in the way in which he exercised his discretion in this case. I would dismiss this first ground of appeal.

Second Submission: The Jury Note

[50] Again it is important to place the appellant's argument in context. Counsel finished their closing arguments to the jury late in the afternoon on June 10, 2003. The next morning Justice Scanlan charged the jury and they retired for deliberations at 11:19 hours. Later that afternoon the jury sent a note to the judge (Exhibit 59) requesting that certain evidence be replayed. That was done and the replaying of the evidence wrapped up that evening, after which the jury returned to their hotel.

[51] Court reconvened the next morning, June 12 at 9:05 hours. The record establishes that approximately two and one-half hours later, at 11:37 hours, court reconvened. Evidently Justice Scanlan had been handed a note from the jury which, for reasons that are not apparent from the record, he chose not to disclose to counsel. To properly understand the sequence of events thereafter I will reproduce what appears from the transcript verbatim:

> COURT RECONVENED (11:37 hrs.)
>
> **JURY RETURNED**
>
> THE COURT Counsel, at 11:10 I received a note from the jury. Because of the specific contents of the note, I'm not going to read it to you. I will only say to you that the jury is having difficulty. And given the amount of time we've spent so far, I think it's proper that I do an exhortation at this point in time to encourage the jury to keep going. That's what I would like to do.
>
> Members of the jury, as I just indicated, I understand that you're having difficulty reaching a unanimous verdict. At this stage of the trial, there are limits on what I may say to you, because my remarks may have a greater impact on your verdict than any other instruction.
>
> While it is not mandatory that you reach a unanimous verdict, it is obviously desirable. You took an oath to give a true verdict based on the evidence. You must do your utmost to live up to that oath.
>
> The law gives me the discretion to discharge you from returning a verdict. I can do so whenever it appears that further deliberations would be futile. However, the law says that I should not exercise this power lightly or too quickly. Often juries are able to reach agreement if they're given more time.
>
> In saying this, I'm not trying to persuade you to change your minds. Rather, I encourage you to present your own views of the evidence to your fellow jurors, and ensure that everyone's opinion receives your consideration.
>
> If you've formed an opinion about the proper verdict, I ask you to still keep an open mind and carefully consider your colleagues' point of view. Your verdict must be based on the evidence and my instructions. Do not allow yourselves to be influenced by outside considerations.

The essence of the jury system is the process of jurors reasoning together by exchange of views. You're expected to pool your views of the evidence and listen carefully to one another. There must be some give and take in the exchange of your opinions. But you should not treat your own genuinely-held views of the evidence as if they are of minor importance just for the sake of reaching a verdict.

This case may be one of those occasions in which it's not possible for you to reach a unanimous verdict. That will not reflect badly upon you, providing you made an honest effort to judge the case to the best of your abilities.

I can only ask you to give it one more try. This is a time to re-examine the evidence of my instructions, to listen to each other, carefully consider the various positions of your fellow jurors, by reasoning together to see if you can agree on a unanimous verdict.

If there is anything else I can help you with, please let me know. And I'm going to ask you to retire to the jury room. I want to speak to counsel. And then I understand, because of the conditions in the jury room, that you want to come back in here and continue deliberations. I understand as well that lunch is ordered. So once we've discussed with counsel, we'll let you know back in here and we'll clear out. Okay, thank you very much.

JURY RETIRES FOR DELIBERATIONS (11:40 HR)

THE COURT Counsel, normally I would give you or read to you the contents of the note. This is one note that is not appropriate to give you the contents of. The essence of the message was conveyed to you by me saying that they are having difficulty, and I need say no more.

I'm going to have the note marked as an exhibit, but I'd also instruct that it remain sealed. I've read it and nobody else has. Okay, we'll mark it as an exhibit.

EXHIBIT 60 (ENTERED) - NOTE FROM JURY NOT READ TO COUNSEL AND SEALED

THE COURT Aside from that, counsel, you heard me say to the jury they're having difficulty because of the humidity and the heat in that room, so we are going to vacate this Courtroom and let them deliberate in here and keep everybody away from it. So don't come and go to and from the Courtroom itself, okay. I do thank you for your cooperation in that regard. I know this is normally your space.

MR. O'NEIL Then I'll take my stuff back here.

THE COURT Okay. Any questions concerning the comments, counsel? They haven't been going that long when you consider that four hours of yesterday was playing of evidence so - -

MR. O'NEIL I find that a hard area of law. I never know - - I would want to make representations if there were ever going to be a second exhortation, but they haven't been there that long, I realize.

THE COURT Well, like I say, they haven't been there that long when you add up the deliberation time.

MR. O'NEIL That's right. A lot of it was exhibit time last night so - -

THE COURT Okay?

COURT RECESSED (11:42 hrs.)

COURT RECONVENED (14.43 hrs.)

JURY RETURNED AND POLLED - ALL PRESENT

THE CLERK Members of the jury, have you agreed upon a verdict?

FOREPERSON Yes.

THE CLERK What is your verdict for count number 1?

FOREPERSON Count number 1, we find the defendant guilty. [cell phone rings]

THE CLERK What is your verdict for count number 2?

FOREPERSON Count number 2, guilty. [cell phone rings]

THE COURT Whose cell phone is that?

MR. O'NEIL It was on because of the call from the Court. Sorry about that, My Lord.

MR. BAXTER I couldn't hear the verdict on count 1.

THE COURT Guilty.

MR. BAXTER Okay, thank you.

THE CLERK Members of the jury, you have found the accused, Richard Elliot Seymour, guilty and it has been so recorded. Are you all in agreement?

JURY Yes.

[52] The contents of the jury note which had been sealed by Scanlan, J. as Exhibit 60 was opened by order of this Court, dated May 25, 2004, so as to permit counsel to properly prepare for the appeal. The note is initialled by the trial judge, shows the time as 11:10 and reads:

Formal vote taken

10 Guilty on both counts

2 Not Guilty on both counts

[53] I fail to understand why the trial judge declined to disclose the contents of this jury note to counsel. Doing so would not have trespassed upon the solemnity of the jury's deliberations, nor the confidentiality attached to their work. That said, the question is whether such non-disclosure breached Mr. Seymour's right to be present in court during the whole of his trial contrary to s. 650 of the **Criminal Code**, and if it did, whether the appeal ought to be dismissed nonetheless by operation of the so-called curative provisions of s. 686.

[54] After carefully considering the record and the submissions of counsel, I am of the opinion that this is a case which justifies the application of s. 686(1)(b)(iv). I will now explain my reasons for coming to that conclusion.

[55] Crown counsel on appeal concedes that the trial judge's failure to disclose the contents of the jury note in this case amounts to a breach of s. 650 of the **Criminal Code**, but one that can be cured by operation of s. 686(1)(b)(iv). I agree.

[56] Let me begin by disposing of a point not argued by the appellant in his written submission, but which arose during the course of questioning from the panel. As illustrated earlier, the note from the jury read:

> Formal vote taken
>
> 10 Guilty on both counts
>
> 2 Not Guilty on both counts

I place no emphasis on the word "Formal" in the note from the jury, nor do I infer that by expressing themselves in such a fashion, the jurors may have been under the mistaken impression that their job "was over" despite the fact that at that point they were split 10:2 in favour of a guilty verdict on both counts. In dispensing with this point I make several observations. First, the note is not framed as a question. It does not - at least on its face - signal any confusion concerning the requirement for unanimity on any verdict they ultimately decided to render. Such a requirement, coupled with a proper indication that each juror had the right to disagree, was carefully explained by Justice Scanlan in his jury instructions. As well this particular segment of his charge came at the end of the judge's instructions and so would still have been fresh in the minds of the jurors, at this early stage and relatively soon in their deliberations. I am also satisfied in reading the trial judge's exhortation to the jurors that he once again properly explained the requirement for unanimity in reaching any verdict, balanced by the instruction that despite best efforts it might well be impossible for them to reach a unanimous verdict, which would in no way reflect badly upon them fulfilling their sworn responsibilities as jurors. There is nothing in the record suggesting any confusion on the part of the jury following the exhortation. Nor is there any indication from the exchange between the trial judge and counsel following his exhortation that in the minds of counsel at least the jury was confused or that what the judge had said by way of exhortation was inappropriate or ought to be amplified or changed. The transcript shows defence counsel agreeing with the trial judge and choosing not to raise any objection or concerns except to say:

> MR. O'NEIL I find that a hard area of law. I never know - - I would want to make representations if there were ever going to be second exhortation, but they haven't been there that long, I realize.

> THE COURT Well, like I say, they haven't been there that long when you add up the deliberation time.
>
> MR. O'NEIL That's right. A lot of it was exhibit time last night so - -

[57] I will turn now to the essential point made by the appellant that his right to a fair trial was prejudiced by the judge's failure to disclose the contents of the jury note, thereby depriving him of the opportunity to make representations concerning the note. This, it is argued, had the effect of excluding the appellant from a vital part of his trial which, he submits, constitutes a fatal error, justifying an acquittal or, in the alternative, a new trial.

[58] In this submission the appellant cites two principal authorities, the decision of the Supreme Court of Canada in **R. v. Tran**, [1994] 2 S.C.R. 951; and the decision of the Manitoba Court of Appeal in **R. v. Fontaine** (2002), 168 C.C.C. (3d) 263. In my opinion **Tran** has little application to this case, and **Fontaine** is easily distinguishable from what occurred here. I believe that the Manitoba Court of Appeal's decision in **R. v. Halliday** (1992), 77 C.C.C. (3d) 481 is much closer to the facts before us.

[59] In the appellant's submission the Supreme Court's decision in **Tran** has "overruled" **Halliday**. I respectfully disagree for reasons I will now set out.

[60] **Tran** does not involve or consider any jury note or exhortation issues. The facts and questions that arose in **Tran** related to the adequacy of translation services provided to an accused pursuant to s. 14 of the **Canadian Charter of Rights and Freedoms** right. There are no **Charter** issues in this case. In **Tran**, the Vietnamese accused was charged with sexual assault. Identification was a critical issue at trial given discrepancies between the accused's appearance at trial and earlier descriptions given by the victim to the police. The defence called the accused's court-appointed interpreter to testify about the accused's weight at the time the attack was alleged to have taken place. Instead of translating his testimony in full as he gave it, and as instructed by the trial judge and defence counsel, the interpreter answered in English and only summarized his evidence in Vietnamese at the end of his direct examination and again after his cross-examination. As well, an exchange between the trial judge and the interpreter which followed his cross-examination did not appear to have been interpreted at all. The accused was convicted. He appealed his conviction on the grounds that

the identification evidence was flawed and that deficiencies in the translation of the evidence deprived him of the right to be actually present at his trial, contrary to s. 650 of the **Criminal Code**. The conviction was upheld on appeal. The main issue before the Supreme Court of Canada was whether the failure to provide the accused with full and contemporaneous translation of all of the evidence at trial constituted a breach of his right to an interpreter, as guaranteed by s. 14 of the **Charter**. Writing for a unanimous court, Chief Justice Lamer allowed the appeal, quashed the conviction and ordered a new trial after finding that the accused's s. 14 **Charter** rights had been violated.

[61] In my respectful view the only portion of **Tran** which is relevant to the case at bar is found in pp. 1008 - 1009 of the judgment where Lamer, C.J. discusses the appropriate remedy under s. 24(1) following a s. 14 **Charter** breach, and why the curative provisions in the **Criminal Code** do not apply in such an instance:

> Section 686(1)(b)(iii) is designed to avoid the necessity of setting aside a conviction for minor or "harmless" errors of law where the Crown can establish that no substantial wrong or miscarriage of justice has occurred. Section 686(1)(b)(iv), a relatively new provision of the *Code* introduced in 1985, is also designed to permit a court to dismiss an appeal from a conviction, but in cases of procedural irregularity where the Crown can show that the accused suffered no prejudice. In other words, where the fairness of the proceedings has not been detrimentally affected, the *Code* effectively permits the error in question to be "cured", thereby allowing the appeal from conviction to be dismissed.
>
> While denial of a *Charter* right constitutes an error of law, it is by its very constitutional nature a serious error of law, and certainly not one which, for *Criminal Code* purposes, can be characterized as minor or harmless, or as a "procedural irregularity". Therefore, I find as a matter of law that a violation of s. 14 of the *Charter* precludes application of both s. 686(1)(b)(iii) and s. 686(1)(b)(iv) of the *Code*. To the extent that a particular *Charter* violation is more or less serious and/or prejudices an accused to a greater or lesser degree, this raises remedial issues which fall squarely to be decided under s. 24(1) of the *Charter*, not under the *Criminal Code*.

[62] With respect, it seems to me that the appellant's reliance upon **Tran** is misplaced. There are no **Charter** issues here which would oust the application of s. 686(1)(b)(iv). While a violation of the s. 14 **Charter** right precludes the application of both s. 686(1)(b)(iii) and s. 686(1)(b)(iv) because the irregularities cannot be characterized as "minor or harmless," it does not follow that procedural

irregularities cannot be cured by s. 686(1)(b)(iii) and 686(1)(b)(iv) where **Charter** rights are not involved. It is precisely the purpose of s. 686(1)(b)(iv) to cure procedural irregularities which have not caused prejudice to the accused.

[63] Other cases to which we were referred where on appeal the court has refused to invoke the curative provisions, are easily distinguished. Their facts suggest either serious prejudice to the accused or where troubling questions arose as to the perceived fairness of the trial. To illustrate, I will refer to **R. v. Laws** (1998), 128 C.C.C. (3d) 516 (Ont. C.A.) as an example of a case where the curative provision was not applied to remedy a s. 650 breach. In that case the trial judge and Crown counsel met privately in a jury room on three occasions. The appellant and his counsel were excluded from these meetings and no transcript was kept of them. The matters discussed during these *ex parte* meetings had to do with the extent to which the defence would receive disclosure. The Ontario Court of Appeal found that there was prejudice to the accused flowing from these *ex parte* communications:

> [97] In our view, this is such a case. The three private *ex parte* meetings between the trial judge and Crown counsel constituted an important part of the trial resulting in significant disclosure decisions affecting the appellant's ability to make full answer and defence. Both the appellant and his counsel were excluded from these meetings. The appellant, therefore, had absolutely no window on this part of his trial. There was no transcription kept so that this court is equally without the ability to know what went on. The exclusion of the appellant was not due to mere inadvertence. Important decisions affecting the trial were made in his absence.

[64] Another such case relied upon by the appellant is **R. v. Vézina**, [1986] 1 S.C.R. 2. The accused were charged with various fraud related offences. At the close of the Crown's case the trial judge allowed the motion of the accused for a directed verdict of acquittal on two counts on the basis that there was no evidence to support those charges. The jury as directed returned a verdict of not guilty on those two counts. During the course of the jury's deliberation with respect to the remaining count, the trial judge received notes from two jurors questioning the impartiality of two other jurors. After consulting counsel for the parties and failing to obtain any consent as to what steps ought to be taken, the trial judge questioned the two complaining jurors in his chambers in the sole presence of a court reporter and concluded that their complaint was without foundation. He decided that there was no reason for the jury not to continue its deliberations. The jury found the

accused guilty on the remaining count of unlawful possession of stolen government bonds. The Quebec Court of Appeal allowed both the Crown's appeal from the directed verdicts of acquittal and the appeals of the accused from their conviction for possession, and in all cases ordered a new trial. Both the Crown and the accused then appealed to the Supreme Court of Canada where both appeals were dismissed.

[65] Here, I need only consider the Court's analysis of the trial judge's examination of the two jurors in his chambers, without the presence of the accused. The Court concluded this was a violation of s. 577 (now s. 650). The Court held that the right of an accused to be present at his trial meant that he had the right to have direct knowledge of anything that occurs in the course of his trial which could involve his vital interests. The Court was satisfied that where a judge was being told by jurors that the integrity of other jurors was in doubt, the accused's vital interests were in issue, such that the investigation and determination of that issue must then be conducted in the presence of the accused.

[66] The circumstances in **Vézina** are markedly different than the features of this case. Furthermore the Court in **Vézina** emphasized that because of the manner in which the appeal came to it (with a dissent as of right on different issues), it was then precluded from considering whether the curative provision of (then) s. 613(1)(b)(iii) was applicable following a violation of (then) s. 577. Equally significant is the fact that the Court expressed no comment concerning (now) s. 686(1)(b)(iv), then a relatively new provision of the **Code** introduced in 1985 after **Vézina** was argued (December 12, 1984) but before the Court released its judgment (January 30, 1986). In my respectful opinion there is nothing in **Vézina** or the other authorities upon which the appellant relies to assist him in the circumstances of his case.

[67] I turn now to a consideration of the Manitoba Court of Appeal's judgment in **Fontaine**. With respect, I do not see **Fontaine** as supporting the appellant's position. There the accused was charged with first degree murder, two counts of attempted murder, one count of criminal negligence causing death and one count of criminal negligence causing bodily harm. The accused deliberately drove his car with three passengers into a parked semi-trailer in an oncoming lane. One of his passengers died and the other two were injured. The trial judge instructed the jury that they could find the intent to kill the victim through the doctrine of transferred intent. During their deliberations, the jury sent a note to the judge indicating that it

was deadlocked. The note was not read out in court, but the trial judge exhorted the jury to attempt to reach a verdict. The jury sent another note indicating that further deliberation was futile because one juror was adamant in his or her opposition to the 11 others. The same note contained a question, in different handwriting, that one juror wished to speak to the judge. The trial judge exhorted the jury again, but did not reveal the contents of the note to counsel. The notes were sealed by the trial judge. Deliberations stopped for the night and when court reconvened, the trial judge indicated that the jury had sent her another note, informing her that two jurors were sick. The trial judge sealed the third note and, without investigation, the two sick jurors were dismissed. The trial judge refused to disclose the jury's notes to counsel. The jury returned four hours later with verdicts of guilty on all counts.

[68] The convictions for criminal negligence causing death and criminal negligence causing bodily harm were conditionally stayed. On appeal by the accused from his convictions, the appeal was allowed and a new trial ordered. The principal reason for allowing the appeal was on the basis of what the Manitoba Court of Appeal found to have been erroneous instructions from the trial judge when charging the jury on the necessary intent to ground a conviction for first degree murder. The court's subsequent review of the trial judge's handling of the various notes from the jury were said to add to its determination that a new trial was required. Writing for the court, Steel, J.A. put it this way:

> [4] I have come to the conclusion that the judge erred when she charged the jury on the availability of s. 229(b) of the *Criminal Code* in these circumstances so as to give rise to a conviction for first degree murder. Since one cannot know whether the jury convicted based on her instructions regarding transferred intent or her instructions regarding planned and deliberate murder, the curative proviso found in s. 686(1)(b)(iii) cannot be utilized. A new trial must be ordered.
>
> [5] <u>The failure to disclose to counsel two notes sent by the jury to the judge adds to the conclusion that a new trial is required in this case.</u>
>
> (Underlining mine)

[69] As noted earlier, I believe the features in **Halliday**, supra, are much closer to those encountered by Mr. Seymour in this case. The same court, albeit different panels, decided both **Halliday** and **Fontaine**. The court in **Fontaine** distinguished

that which had occurred in **Halliday**. In doing so it appears to me that in **Fontaine**, Steel, J.A. was very concerned with the sequence and variety of notes from the jury and in particular, the proximity of such notes, to the ultimate release of the two jurors on account of ill health, especially in light of the contents of the notes in that case. It is also apparent that in **Halliday** no prejudice was seen to have occurred to the accused, whereas in **Fontaine** the panel held that it was at least arguable that actual prejudice had been suffered. On these matters Steel, J.A. observed:

> [68] However, in this case, it is arguable that there was actual prejudice. The notes indicated the jury could not reach an agreement and that one juror appeared to be in a minority. The second note also inquired, in a different handwriting, whether one juror could speak to the judge. The next day, two jurors were excused by the trial judge for medical reasons, without input from counsel. While counsel could not have known from the note in which direction the hold-out juror leaned, they may or may not have decided to make submissions with regard to excusing the jurors. Inquiries might have been made as to how long the jurors needed to recover or as to the nature of the illness. Without knowledge of the contents of the notes, they did not have the choice of considering their options.
>
> . . .
>
> [70] One can understand the sensitivity of the trial judge to the privacy of the juror with respect to health matters. It is also true that the jurors were brought into court and looked obviously ill. Counsel, although not invited to offer submissions, could have volunteered to do so. However, what is troubling in this case is the close juxtaposition of the failure to disclose the jury notes with the subsequent release of the two ill jurors.
>
> . . .
>
> [73] Applying these comments to the instant case, it is obvious that there was at least one hold-out in the deliberations. For the trial judge to then exclude two jurors (with the possibility that one was the hold-out) as she did, and in the absence of counsel's knowledge of the contents of the two notes, affected the vital interests of the accused to his prejudice.
>
> (Underlining mine)

[70] In my opinion the sequential nature of the various notes from the jury, the manner in which they were written, their contents, and their “juxtaposition” with the ultimate release of two jurors on account of illness are all especially unique, and led to the court’s conclusion in **Fontaine** that it was not an appropriate case for the application of the curative provisions of s. 686.

[71] **Halliday**, on the other hand, was a very different case and as I have already indicated, mirrors this situation much more closely. In **Halliday** the accused was convicted of sexual assault and sentenced to a term of imprisonment of five years. In his appeal from conviction, among other grounds, he alleged error on the part of the trial judge in failing to disclose in open court in the presence of the accused and his counsel, the contents of a note received from the jury who had then been deliberating for some time: “We vote 6 guilty, vote 6 not guilty.” After canvassing the authorities Scott, C.J.M. (Lyon, J.A. concurring; O’Sullivan, J.A. dissenting not on this point, but rather on the trial judge’s exhortation) dismissed the appeal and observed at pp. 492 - 493:

> In my opinion the error in this case, for error it was, was a procedural error as defined in s. 686(1)(b)(iv), and hence the curative provision applies in the absence of prejudice to the accused.
>
> The question therefore becomes: "Was there prejudice to the accused in the circumstances of this case?" The accused argues that there was prejudice because he was deprived of the opportunity to respond in any meaningful way to the communication which appeared to indicate a significant, if not insurmountable, measure of deadlock between the jurors. (Counsel for the accused did not demur when the trial judge disclosed that he had received a note from the jury, but not its contents.) Had the terms of the note been disclosed, then counsel at most would have been able to submit to the judge that the jury should be discharged in light of what appeared to be a deadlock. This at best would have resulted in a new trial, not an acquittal. Furthermore, it is inconceivable that an experienced trial judge would have acceded to such a request in the absence of an appropriate exhortation to the jury to attempt to resolve the deadlock. Experience dictates that in many instances juries which appear to be at an impasse can resolve their differences following a careful exhortation from the judge while remaining true to their oath as jurors. Indeed, this is precisely what occurred in this case. This being so, the apparent prejudice to the accused becomes illusory.

> In my opinion, this is precisely the kind of case to which the curative provision of s. 686(1)(b)(iv) was intended to apply. The appeal on this ground is, accordingly, dismissed.

[72] I respectfully agree with Chief Justice Scott's reasoning and would apply it to this case. In his factum, counsel for Mr. Seymour argued "had the appellant herein known that only two jurors were dissenting, any exhortation by the trial judge would have been vigorously opposed." It is difficult to understand this submission. Had the contents of the jury note been disclosed, counsel for Mr. Seymour would have had five options: object to the trial judge's plans to exhort the jury; agree to it; seek a mistrial on the basis that the jury was "deadlocked;" make suggestions as to what ought to be said in the exhortation; or say nothing.

[73] I cannot understand how - if he knew that the jury was split 10:2 in favour of conviction - that the appellant would then have strongly protested any exhortation of the jury. I fail to see the basis for such a protest. Obviously the trial judge was obliged to say something to the jury and could not simply ignore their note. Furthermore, as in **Halliday**, **supra**, it is equally "inconceivable" to me that the trial judge would have agreed to any request from the appellant to order a mistrial and discharge the jury, in the absence of an appropriate exhortation to attempt to resolve the deadlock, especially in light of the fact that at that point they had only been deliberating for a few hours.

[74] Neither am I persuaded that being made aware that the jury was at that point split 10:2 favoring conviction, would have prompted the appellant to urge upon the trial judge any different form of brief exhortation than that which he told the jurors.

[75] I find it telling that in both his written submissions and in oral argument the appellant was only able to point to a single portion of the judge's comments as "objectionable", acknowledging that Scanlan, J. made every effort to provide a balanced exhortation.

[76] Mr. Seymour's counsel does not suggest that the language used by the trial judge in his brief exhortation was so coercive as to constitute an explicit

interference with the jury's freedom to deliberate. Rather, the appellant's submission is confined to the single sentence wherein the trial judge reminded them of the oath they had taken "to give a true verdict based on the evidence." This reference to their oath, it is argued, may have caused the jurors to feel somewhat "pressured" by the judge, somehow overemphasizing the sanctity of the proceedings, such that they might have been driven to the conclusion that they <u>had</u> to bring in a verdict or that they <u>had</u> to be unanimous. I see no merit to the appellant's submission. For the reasons already given, no such "pressure" can be fairly inferred from the remarks, particularly when it is followed only a few passages later by the very clear instruction that this might well be a case where it would not be possible for them to reach a unanimous verdict, and that such a result would in no way reflect negatively on the jurors in exercising their responsibilities.

[77] In order to evaluate the appellant's complaint it would be helpful to reproduce the trial judge's exhortation in its entirety:

> Members of the jury, as I just indicated, I understand that you're having difficulty reaching a unanimous verdict. At this stage of the trial, there are limits on what I may say to you, because my remarks may have a greater impact on your verdict than any other instruction.
>
> <u>While it is not mandatory that you reach a unanimous verdict, it is obviously desirable. You took an oath to give a true verdict based on the evidence. You must do your utmost to live up to that oath</u>.
>
> The law gives me the discretion to discharge you from returning a verdict. I can do so whenever it appears that further deliberations would be futile. However, the law says that I should not exercise this power lightly or too quickly. Often juries are able to reach agreement if they're given more time.
>
> In saying this, I'm not trying to persuade you to change your minds. Rather, I encourage you to present your own views of the evidence to your fellow jurors, and ensure that everyone's opinion receives your consideration.
>
> If you've formed an opinion about the proper verdict, I ask you to still keep an open mind and carefully consider your colleagues' point of view. Your

> verdict must be based on the evidence and my instructions. Do not allow yourselves to be influenced by outside considerations.
>
> The essence of the jury system is the process of jurors reasoning together by exchange of views. You're expected to pool your views of the evidence and listen carefully to one another. There must be some give and take in the exchange of your opinions. But you should not treat your own genuinely-held views of the evidence as if they are of minor importance just for the sake of reaching a verdict.
>
> <u>This case may be one of those occasions in which it's not possible for you to reach a unanimous verdict. That will not reflect badly upon you, providing you made an honest effort to judge the case to the best of your abilities.</u>
>
> <u>I can only ask you to give it one more try. This is a time to re-examine the evidence and my instructions, to listen to each other, carefully consider the various positions of your fellow jurors, by reasoning together to see if you can agree on a unanimous verdict.</u>
>
> If there is anything else I can help you with, please let me know. And I'm going to ask you to retire to the jury room. I want to speak to counsel. And then I understand, because of the conditions in the jury room, that you want to come back in here and continue deliberations. I understand as well that lunch is ordered. So once we've discussed with counsel, we'll let you know back in here and we'll clear out. Okay, thank you very much.
>
> (Underlining mine)

[78] As can be seen, counsel for the appellant only objects to three lines in the judge's exhortation:

> While it is not mandatory that you reach a unanimous verdict, it is obviously desirable. You took an oath to give a true verdict based on the evidence. You must do your utmost to live up to that oath.

The appellant's complaint is that by directing the jurors' attention to their oath, the trial judge perhaps inadvertently applied what might be described as moral suasion

or pressure that went beyond the bounds of what is acceptable in such situations. I respectfully disagree.

[79] Reading the judge's brief exhortation as a whole satisfies me that it was balanced, complete and responsive to the jury's note. Reference to the oath they had taken cannot be seen as a compulsion to render a unanimous verdict, especially in light of the fact that only a few moments later the trial judge reminded the jurors:

> This case may be one of those occasions in which it's not possible for you to reach a unanimous verdict. That will not reflect badly upon you, providing you made an honest effort to judge the case to the best of your abilities.
>
> I can only ask you to give it one more try. This is a time to re-examine the evidence and my instructions, to listen to each other, carefully consider the various positions of your fellow jurors, by reasoning together to see if you can agree on a unanimous verdict.

[80] There is nothing in the record to indicate that the jury was confused by these instructions or that they needed any further assistance during the course of their deliberations. After deliberating for an additional three hours they returned with their verdicts.

[81] In summary, I believe it was an error for the trial judge to fail to disclose to counsel the contents of this jury note. However, in my opinion the mistake was a procedural error as defined in s. 686(1)(b)(iv) such that the curative provision applies in the absence of prejudice to the accused. I can find no such prejudice to Mr. Seymour in this case. There is nothing here to suggest that this jury was hopelessly deadlocked or that the results of their "formal vote" had led to an insurmountable impasse. A clear and brief exhortation was called for in the circumstances. I cannot conceive that had the terms of the note been disclosed, counsel for Mr. Seymour might have successfully urged upon the trial judge any form of exhortation that would have been materially different than the one he gave. Considering the amount of time they had been deliberating (excluding the hours spent listening to a replay of evidence) it would be fanciful to suggest that appellant's counsel could have persuaded the trial judge to declare a mistrial and

discharge the jury on account of the "deadlock". In any event, such a course of action would only have resulted in a new trial and not an acquittal. The suggestion therefore that the appellant was prejudiced does not hold up to careful scrutiny. On this point, the remarks of Chief Justice Scott in **Halliday** at p. 492 are especially apt:

> ... Experience dictates that in many instances juries which appear to be at an impasse can resolve their differences following a careful exhortation from the judge while remaining true to their oath as jurors. Indeed, this is precisely what occurred in this case. This being so, the apparent prejudice to the accused becomes illusory.

I would apply the curative provision of s. 686(1)(b)(iv) to the procedural irregularity that occurred in this case, and would dismiss this ground of appeal.

<u>Third Submission: Was the verdict unreasonable?</u>

[82] Our role as an appellate court in reviewing verdicts for unreasonableness was described in **Corbett v. The Queen** (1974), 14 C.C.C. (2d) 385 at 389 (S.C.C.):

> . . . the question is whether the verdict is unreasonable, not whether it is unjustified. The function of the Court is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered.

[83] In conducting our assessment as to the reasonableness of the jury's verdict we are obliged to review, analyze and within the limits of appellate disadvantage, weigh the evidence. **R. v. Yebes**, [1987] 2 S.C.R. 168; **R. v. Biniaris**, [2000] 1 S.C.R. 381.

[84] In **R. v. R. W.** (1992), 74 C.C.C. (3d) 134 (S.C.C.), Justice McLachlin (as she then was), writing for a unanimous Supreme Court, affirmed that the test set out in **Yebes**, **supra**, applies to verdicts based on findings of credibility. She went on to say at pages 141-42:

> . . . in applying the test the Court of Appeal should show great deference to findings of credibility made at trial. This court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility . . . The trial judge had the advantage, denied to the appellate court, of seeing and hearing the evidence of witnesses.

[85] In this case Mr. Seymour testified. He put forward an alibi. He said his daughter stayed over at his apartment that night, and that after dinner they watched television and went to bed. He denied having anything to do with setting fire to the motel. It is implicit from the verdicts that the jury unanimously rejected the appellant's evidence. The jury had before them extensive forensic and opinion evidence on the basis of which they could have reasonably rendered their verdicts.

[86] While in no way suggesting that there was any onus upon Mr. Seymour to call evidence, it is appropriate to observe that no expert evidence was offered by the defence. Thus there was no alternative theory, based on independent investigation, for the jury to consider as an innocent explanation for the loss, or at least one that might raise a reasonable doubt in their minds as to the strength of the prosecution's case. Consequently the jury was only left to ponder whatever material questions (if any) may have lingered as a result of cross-examination of the Crown's witnesses.

[87] The thrust of the appellant's argument challenging the reasonableness of the jury's verdict, both in his written submissions and oral argument at the hearing, was based on isolated bits of evidence from a few answers elicited on cross-examination. These few answers came in response to questions I would describe as vague, or unfocussed, or purporting to raise nothing more than conjectural possibilities.

[88] First the appellant asks whether it was possible that the fire was caused accidentally by a propane leak being ignited by an electrical spark? It is clear that the Crown witnesses rejected such a scenario. Dale Stewart was qualified to give opinion evidence on the operation of propane appliances. The other Crown experts deferred to Mr. Stewart's expertise regarding the question of whether a propane line had been removed to release propane into the building. Mr. Stewart, the only

expert qualified to give opinion evidence with respect to propane appliances, rejected the possibility that the propane tubing had not been deliberately pulled off (for example, had become disconnected by falling debris). Having inspected the tubing for that very purpose and seeing no damage, he testified that in his opinion it had been deliberately pulled off, rather than having something fall on it and wrench it off. Further, the implausibility of the slow propane leak scenario was dismissed by Mr. Stewart. He said that such an occurrence would not have accounted for the enormous explosion which happened in this case. Neither would the suggestion of a slow leak explain the massive and quickly advancing fire which ensued according to the Crown's experts.

[89] Second, the appellant also postulated that certain of the evidence which was interpreted by the Crown experts as leading to the conclusion that this was a set fire, might be explained by "fire dropping" from the ceilings. Again the appellant's references to certain bits of testimony are highly selective and ignore the evidence of other investigators. For example, fire fighter Brian Farrow, who worked in and about the laundry room, saw no evidence of any fire drops while fighting the fire. He said such drops were only observed once they tore down the ceiling. Similarly Robert Orr, an expert in the identification and examination of fire burn patterns and the cause and origin of fire, referred to the photographic evidence and explained that had the fire burned through the ceiling resulting in "fire dropping", there would then have been a lot more burning of the floor area, and on the hallway walls, than the "very minimal" evidence he observed.

[90] The third idea postulated by the appellant is to ask whether this could have been a fire in which no accelerants were used? The appellant argues that because no traces of accelerants were actually found, it should not be possible to conclude that an accelerant had been used to ignite the fire. Such a proposition ignores the fact that accelerants often burn off in a fire, leaving little if any trace. Robert Orr testified to exactly that:

> Q. Because when things burn, they leave traces, don't they?
>
> A. Not - - not necessarily. In some instances, the - - if there was an accelerant used, an accelerant could be burnt off. There may not - - there may or may be enough vapours or stuff left to show up in a test.

[91] The appellant's argument also runs counter to the testimony of Mr. Luce, the RCMP forensic chemist, who testified that fire accelerants can be completely consumed by the fire itself, such that no trace remains can then be detected.

[92] The jury also heard Mr. Orr's testimony concerning several distinct areas of the motel where burn patterns indicated to him that an accelerant had been used. For example, he examined the door shown in photograph 29 of Exhibit 1 where the burning on it indicated that:

> . . . an accelerant of some kind had been splashed on the door and there was burning on that door on the inside of the door. There was no burning at floor level. . . . This splash pattern on this door . . . would almost look as though someone had taken a container of liquid and thrown it on the door. And that burn pattern indicated to me that some type of an accelerant was on there. . . . it burnt away and left a pattern still there. . . . It could be any type of petroleum-based product that would ignite and then just burn off and didn't burn through the door, but the pattern was still on the door.

[93] The appellant's final argument challenging the reasonableness of the jury verdict concerns the materials found by the investigators which they regarded as trailers or wicks. The appellant argues, as he did at trial, that this could all be explained on the basis of linen having been blown down the hallway by the explosion. In support, the appellant references two brief excerpts from the cross-examination of Messrs. Donald Bartlett and Robert Orr. However, the appellant ignores the fact that it was the view of the trial judge that Mr. Orr had not been qualified as an expert to give opinion evidence in this area, following which the record indicates that counsel for the appellant acceded to that point of view and agreed that he would not pursue the matter further.

[94] With respect to Mr. Bartlett, he too was not qualified to give expert opinion evidence on this very specific point. His evidence on this hypothetical postulation consists of two words at the end of a perfunctory exchange as follows:

> Q. Okay. You've indicated the force of the explosion was enough to I'll use the words blow pieces of the door down the hallway.

A. Yes.

Q. Would it be strong enough to blow pieces of linen down the hallway?

A. Oh, absolutely.

In my opinion counsel's question to Mr. Bartlett is so unfocussed as to render his answer virtually meaningless in the specific context of this case. The hypothetical question does not specify any particular location of the linen prior to the explosion, nor does it specify any particular distance that the linen might have been blown by the force of the explosion. Furthermore, the appellant's submission virtually ignores the evidence given by many Crown witnesses who described the orange bed sheets which they uncovered on the hallway floor, running in lengths, and twisted like rope, obviously adding to their expert view that such were fashioned by hand and used as trailers or wicks as a means of spreading the fire. Finally, the appellant's submission fails to address the photographic evidence which shows that the linen room was virtually undisturbed by the explosion and that the linen remained neatly stacked on shelves following the explosion.

[95] In considering the evidence during the course of their deliberations, the jury had before them the statement that RCMP Constable Smith had taken from the appellant in which he said he had awakened at 7:00 a.m., saw that he was low on milk and had gone over to get some from the motel, whereas Constable Hannon searched the appellant's apartment and seized an open two liter jug of milk that was approximately two-thirds full. Mr. Seymour had also told Constable Smith that when he put his key in the door it "went bang" whereas Robert Hanley, the Amherst Fire Safety Officer said he spoke to the appellant on the morning of the fire and that Mr. Seymour told him he "got very close to the building, say four or five feet from the door and that's when it blew."

[96] There was expert evidence from Messrs. Stewart, Bartlett and Orr that this was a man-made, deliberately set fire.

[97] There were burn patterns on the floor in various parts of the building and burn patterns on a door in the laundry room that were consistent with the use of some form of a liquid accelerant.

[98] In the hallway leading from the areas where there were burn patterns on the floor and on the door as mentioned, fire investigators found rolls of cloth which they referred to as trailers.

[99] There was a fuel line coming from a propane tank outside the building and leading into a propane water heater in the pub and grill area. This fuel line had been removed from the hot water heater and had released propane into the building. There was no evidence that the propane line from the outside tank had been disconnected accidentally.

[100] A propane explosion in itself would not have accounted for the rapid and roaring fire which followed the explosion. Experts testified that the rapidity and extent of the ensuing fire could be explained by the presence of flammable liquid.

[101] Forensic analysis of the jacket worn by the appellant at the time of the explosion revealed the presence of gasoline. As well, three pieces of an orange fabric that had melted and stuck to the back of the jacket were indistinguishable from the pieces of orange fabric earlier referred to in the evidence as trailers. Forensic analysis also showed the presence of gasoline on both of the appellant's boots. Melted orange fabric was also found on the face of the appellant's watch. The evidence given by the plastic surgeon who examined many photographs showing the appellant's burns certainly provided a basis for the jury to conclude that such injuries were more consistent with someone crouched down attempting to ignite a fire, as opposed to the appellant's evidence that he was standing upright attempting to open a door with a key.

[102] The jury had before them forensic and other evidence upon which they could reasonably have rendered their verdicts. In my opinion the appellant's submissions that the fire in question may have been of accidental origin are implausible when viewed in the context of all of the evidence. However, even if it could be said that the accidental origin theory was not completely devoid of plausibility, this would

not necessarily mean that the jury's verdicts were unreasonable or unsupported by the evidence. In a similar context, Chief Justice Finch indicated in **R. v. Brain** (2003), 172 C.C.C. (3d) 203 (B.C.C.A.) at ¶ 18:

> In my opinion, there was evidence to support the trial judge's conclusion that the appellant knew of the risk of fire in the circumstances described, but persisted in his dangerous conduct in spite of that risk. It is no answer to say, as counsel on this appeal argues, that a verdict of not guilty could also be supported by the evidence. It was open to the judge to infer that the fire occurred accidentally, if that was the view he took of the evidence. He did not take that view. He concluded that the appellant's conduct was reckless, as that term is used in criminal law, and I am not prepared to say that he erred in reaching that conclusion.
>
> (Underlining mine)

[103] The Crown's theory was that in order to obtain the benefits of his insurance proceeds, the appellant gained access to the premises when no one else was there, disconnected the propane lead, splashed accelerant, and fashioned trailers which he then placed in various spots in the basement. The explosion occurred prematurely when the electric hot water heater kicked in or when he was attempting to light a wick, not then realizing the extent of the propane that had leaked into the area. Not surprisingly, the Crown could not "place" the appellant's precise whereabouts at the start of the explosion and fire or establish exactly how he caused the loss to occur. It didn't have to. Prosecuting authorities are not held to a standard of scientific certainty. Their case was based on direct and circumstantial evidence which forensically and otherwise tied Mr. Seymour to the crimes with which he was charged.

[104] The jury reasonably could have concluded that this was a deliberately set fire in which accelerants had been used. If the jury reached that conclusion, this is plainly a case where the appellant had exclusive opportunity to set the fire. The appellant had burns on his body consistent with an incident involving the lighting of an accelerant, and he had traces of accelerant on his person. The appellant's statements with respect to the morning of the fire were somewhat contradictory. With respect to motive, the burned building and contents were covered by an insurance policy in the amount of $650,000.00, with the appellant as the named insured.

[105] After considering all of the evidence, I am satisfied that the verdicts were not unreasonable, nor were they unsupported by the evidence. I would dismiss this third ground of appeal.

[106] For all of these reasons I would dismiss the appeal.

Saunders, J.A.

Concurred in:

Freeman, J.A.

Fichaud, J.A.