NOVA SCOTIA COURT OF APPEAL
Citation: R. v. O'Brien, 2010 NSCA 61

Date: 20100714
Docket: CAC 310964
Registry: Halifax

Between:

Marty David O'Brien

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Fichaud, Beveridge, Farrar, JJ.A.
Appeal Heard:	April 8, 2010, in Halifax, Nova Scotia
Held:	Convictions quashed and a new trial ordered should the Crown in its discretion so choose, per reasons for judgment of Beveridge, J.A., Farrar, J.A. concurring, Fichaud, J.A. dissenting.
Counsel:	Pavel Boubnov, for the appellant Kenneth W. Fiske, Q.C., for the respondent

Reasons for judgment:

INTRODUCTION

[1] On October 11, 2004 a convenience store clerk was robbed by a man wielding a knife and wearing a Halloween mask. A mask, identified as being used by the robber, was found a relatively short distance from the store. A DNA profile was obtained from this mask. Years later, this profile was matched to that of the appellant.

[2] Charges of robbery and related offences were then laid against the appellant. He was tried on April 8 and 9, 2009 by judge alone. The trial judge convicted and subsequently sentenced the appellant to six and a half years' incarceration.

[3] The appellant filed his own Notice of Appeal from conviction and sentence alleging a variety of errors, including non disclosure, incompetent representation, and "inadmissibility of key evidence". Counsel then assumed carriage of the appeal. The sole ground of appeal then sought to be advanced was that the trial judge erred by not giving to the appellant the benefit of a reasonable doubt in reaching the conclusion the mask with the appellant's DNA profile on it was used in the robbery. Counsel acknowledged at the appeal hearing that, in essence, he was arguing the conviction was unreasonable or not supported by the evidence.

[4] Prior to the hearing of the appeal, the Court requested submissions from the parties on a number of issues. They were:

> 1. What is the appropriate test in determining if a verdict is unreasonable or cannot be supported by the evidence where the Crown's case is based on circumstantial evidence?
>
> 2. Even if the trial judge could properly find that the mask was used in the robbery, and it had the appellant's DNA on it, how does this establish that the appellant was the person that robbed the store?
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> 3. The trial judge heard evidence about the criminal record and reputation of the appellant. What was the basis for the judge to hear this evidence, and what impact, if any, does it have on the integrity of the trial?

[5] For reasons that will be developed, in my opinion, with all due respect to the trial judge, he erred in law in failing to ask himself the correct question, and in permitting the introduction of highly prejudicial evidence. In fact, the Crown concedes that the trial judge erred in this latter aspect. It then fell upon the Crown to convince us that the curative proviso set out in s. 686(1)(b)(iii) of the *Criminal Code* should be applied. Despite the Crown's best efforts, I am not persuaded that the error was harmless. I would therefore quash the convictions and order a new trial.

FACTUAL BACKGROUND

[6] Before addressing the issues on this appeal it is necessary to set out the evidence, and the essence of the reasons by the trial judge.

[7] Shortly after 10:00 p.m. on October 11, 2004 a man wearing a blue/black Halloween mask entered the Top of the Hill Convenience Store in Amherst. The sole occupant and employee of the store was Barbara Coates. Video surveillance from the store establishes that the man was wearing blue jeans, white sneakers, a dark- coloured jacket and the Halloween mask. He was armed with a large butcher-style knife with a serrated edge. The whole incident lasted less than one minute. Three hundred and fifteen dollars in cash was taken by the robber from the cash register.

[8] The police were called immediately, and arrived shortly afterwards. Within 100 meters of the store the police found a green Halloween mask. Since this mask did not match the mask shown in the surveillance video, the police believed there may have been two individuals involved in the robbery.

[9] The next day Cpl. Richard Mosher, an R.C.M.P. dog handler, attended the scene with his dog. The dog did not attempt to follow any scent from the convenience store, but simply searched the surrounding neighbourhood for anything with a human scent. A few streets away from the store the dog found a blue/black Halloween mask and a piece of plastic that appeared to be part of a cash register. A short distance away the dog also found a large butcher knife.

[10] The manager of the store positively identified the piece of plastic as a cover from the store's cash register, by virtue of her handwriting on paper taped to it. The clerk testified the police had shown her a picture of two masks and that she had picked one as the mask she had seen during the robbery. Pictures of the two masks were shown to the clerk at trial. She testified that the green one was "out for sure" and the other one was "sort of more grey".

[11] Sgt. William Blakeney was the investigating officer from the Amherst Police Department. He testified that on October 13, 2004 he showed Ms. Coates the pictures of the two masks and she had ruled out the green and black mask and "indicated" the black and blue mask was the one used in the robbery.

[12] Sgt. Blakeney sent the two masks and the knife to the R.C.M.P. to be tested for DNA. He received a report back that no DNA could be found on the knife. DNA was found on the blue/black mask from human biological material from two swabs from the interior surfaces of the mask that are of an unknown male, designated as M1. DNA was also obtained from the interior surfaces of the green/black mask of mixed origin, having originated from at least four individuals, one of whom could be the unknown male designated as M1. No hairs were found on either mask.

[13] Some years later, a warrant was obtained and executed by Sgt. Blakeney to obtain blood samples from the appellant. According to R.C.M.P. Biology Reporting Officer Tricia Saul, the DNA profile from the appellant's blood samples matched the DNA profile of the unknown male designated as M1 – the DNA from the blue/black mask.

[14] During the course of Sgt. Blakeney's direct examination, the Crown attorney at trial elicited, for reasons that remain inexplicable, evidence establishing the appellant to be a person of considerable criminal pedigree. Amongst other things, Sgt. Blakeney was allowed to testify that Marty O'Brien was then lodged at the county jail; O'Brien was thought to have been involved in a number of incidents within Amherst and the county; Blakeney checked later when it became known to him that Marty O'Brien had been convicted in court for a number of offences for which a DNA order was issued; some thirteen months later he went to the Springhill Institution where O'Brien was located; when executing the DNA warrant, still later, he went to the Dorchester Institution.

[15] The trial judge in oral reasons (later reported, 2009 NSSC 194) observed it was not disputed by the parties that all of the essential elements of the offences were proven. The only live issue was identification. Furthermore, he noted there was no direct evidence of identification – it was entirely circumstantial. The judge found that given the video clearly showing the robber wearing a blue and black mask, the knife, and the evidence linking the cash register piece to the store, he was satisfied beyond a reasonable doubt the blue/black mask was associated with the robbery. The only remaining question identified by the trial judge was the mask connected to Mr. O'Brien? He expressed the question, and his answer as follows:

> [8] The question then becomes whether the mask is connected to the accused, to Mr. O'Brien beyond a reasonable doubt, and that depends, as I have indicated, entirely on the DNA evidence. With respect to the DNA ev...and just to make a comment on the mask. The mask I am talking about is the blue mask which appears in the video. It was identified as exhibit number 2 and it was also, that's in the picture, and also physically identified as exhibit number 10. Exhibit number 10 was analyzed, and the remaining issue becomes whether there is an analysis which establishes beyond a reasonable doubt that connects Mr. O'Brien to the mask which was used in the robbery.

[16] After discounting concerns raised by the defence over the continuity of exhibits, the trial judge referred to the opinion of Ms. Saul that the estimated probability of a random match from the Canadian Caucasian population was one in 33 billion, he then concluded:

> [15] So I am satisfied beyond a reasonable doubt in this case that the accused, Mr. O'Brien, Mr. Marty David O'Brien, is the person who committed the robbery referred to in the first count of the indictment. I am also satisfied that he, with intent to commit an indictable offence, had his face covered with the mask, and finally that he had in his possession a weapon, the knife referred to in count number three.
>
> 16] So just to summarize, the DNA evidence establishes the accused's identity as the robber beyond a reasonable doubt, ties him to the blue mask which was found, which I have indicated, based on circumstantial evidence, is clearly the mask that was used in the robbery.

ISSUES

[17] For purposes of analysis there are four issues that need to be addressed:

1. What was the proper role of the DNA evidence?

2. Was, as the appellant suggests, the verdict unreasonable or unsupported by the evidence?

3. Was the evidence of the criminal record and reputation of the appellant admissible, and if so, what was the import of it being heard by the trial judge?

4. What is the appropriate remedy?

ANALYSIS

Role of the DNA Evidence

[18] It is well established that DNA evidence is simply a piece of circumstantial evidence. Like fingerprint evidence, it merely indicates that a person's DNA somehow got where it was found, not that a person committed the crime. (See *R. v. Terciera* (1998), 123 C.C.C. (3d) 1, [1998] O.J. No. 428 (C.A.), aff'd [1999] 3 S.C.R. 866). The Crown acknowledged that the DNA evidence in this case was the equivalent to that of a fingerprint. That is, if accepted, it established that at some point in time, the appellant had handled, or even worn the mask. It did not, without more, establish that the appellant had committed the robbery.

[19] This distinction is illustrated in a number of cases from Ontario. In *R.v. Mars* (2006), 205 C.C.C. (3d) 376, [2006] O.J. No. 472 (C.A.), the appellant had been convicted of a home invasion robbery. Identity was the sole issue. The only evidence connecting the appellant to the robbery was his fingerprint on a pizza box used as part of a ruse to gain entry to the victim's apartment. There was no evidence as to when the print was placed on the box. The court found the verdict to be unreasonable. Doherty J.A., for the court wrote:

> **19** The probative value of fingerprint evidence depends on the totality of the evidence. Fingerprint evidence will almost always afford cogent evidence that the person whose fingerprint is left on the object touched that object. However, the

> ability of the fingerprint evidence to connect an accused to the crime charged will depend on whether there is other evidence capable of establishing that the accused touched the object at the relevant time and place so as to connect the accused to the crime.
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> **20** In this case, the fingerprint evidence clearly established that the appellant had touched the pizza box at some point in time. However, the probative value of the fingerprint evidence on the charges depended upon whether the entirety of the evidence reasonably permitted the inference that the appellant touched the pizza box in connection with the robbery and not at some other time and place. The fingerprint evidence standing alone did not permit any inference as to when the appellant's fingerprint was placed on the pizza box. The reasonableness of the verdicts, therefore, turns on whether the inference that the appellant touched the pizza box in connection with the robbery could reasonably be drawn from the evidence other than the fingerprint evidence itself.

[20] Similarly in *R. v. D.D.T.*, 2009 ONCA 918, the appellant had been convicted of break, enter and theft on the basis of evidence that his fingerprints were found on window panes that had been removed to gain entry to the building. The trial judge was aware the case was circumstantial and had cautioned himself to examine with care the inferences to be drawn from the evidence. Nonetheless, he concluded that the Crown had proved beyond a reasonable doubt that the appellant had made out its case against the accused. The appellant argued the verdict was unreasonable. Epstein J.A. wrote the unanimous reasons for judgment. She set out the test to be applied:

> **13** Here, since the evidence linking the appellant to the crime is entirely circumstantial, the question is whether the trier-of-fact, acting judicially, could be satisfied that the appellant's guilt was the only reasonable conclusion available on the totality of the evidence: *R. v. Charemski*, [1998] 1 S.C.R. 679, at para. 13.
>
> **14** While fingerprint evidence is powerful evidence that the person whose print is on the object touched that object, the connection with the crime will depend on the existence of other evidence capable of establishing that the accused touched the object at the relevant time and place: *R. v. Mars* (2006), 205 C.C.C. (3d) 376 (Ont. C.A.), at para. 19.

[21] She concluded that the Crown's case amounted to nothing more than at some point in time, during or prior to the break in, the appellant had touched the windows. This, in her view, fell short of reliable evidence connecting the appellant to the offence.

[22] However, in *R. v. Samuels*, 2009 ONCA 719, a conviction based principally on the presence of a fingerprint, was upheld. The appellant had been convicted in a home invasion robbery. One of the victims struggled with the intruders, got the upper-hand and chased them out of the house. One of the perpetrators leapt over a car, placing his hand squarely on the hood as he fled. A palm and fingerprint from that car matched those of the appellant. The Crown expert acknowledged that the prints could have been left at some other time. Armstrong J.A., for the court, wrote:

> **17** Some of the other evidence relied upon by the Crown in this case - the in-dock identification of Ms. Gagne and Ms. Roy, the identification evidence of Mr. Solc and the association evidence between the appellant and Mr. Nalasco - did not advance this case in any significant way. However, unlike *Mars*, there is other evidence capable of permitting a reasonable inference that the palm print and fingerprint on the windshield were placed there when one of the invaders fled the scene:
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> (a) The evidence of Mr. Barreira that the last man out of the house ran down the street and leapt over the front of the car;
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> (b) The evidence of Mr. Barreira that the man grabbed the car as he jumped over it;
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> (c) The palm print and fingerprint faced a direction that was consistent with Mr. Barreira's description of the invader's flight path. The opinion of the expert witness that the impressions exhibited movement from the driver's side toward the passenger's side of the car is also consistent with the description of the flight path;
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> (d) The footprint in the mud approaching the car, the fresh dent and the mud on the car are consistent with Mr. Barreira's description of the flight; and
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> (e) The evidence of the owner of the car that it was undamaged before he went to bed on the night of the home invasion.
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> **18** In my view, the above evidence together with the fingerprint evidence are capable of supporting a reasonable inference that it was the appellant who ran from the house at 75 West Avenue North and that he touched the car as he fled from the scene of the crime.

[23] As noted earlier, the Crown concedes that the role of DNA evidence is no different than that of a fingerprint. Such evidence can of course be used to support other evidence that an accused committed the offence charged. In *R. v. Mayers*, [2007] O.J. No. 3260 (Sup. Ct.), the victim could neither positively identify or exclude the accused as her assailant when shown a photo-array, although he did match her physical description. The accused's DNA was located on a headband ripped from the assailant's head during the struggle. Byrant J., reasoned:

> **72** I find that the accused's hair, as proven by the DNA analysis, was found on the headband that was worn by the assailant during the assault. Defence counsel posited several possible scenarios or explanations for the accused's hair being attached to the headband. A secondary transfer might occur if a hair from the accused's head was transferred to an object (e.g. a chair) and was further transferred from the object to a third party's head who committed the assault while wearing the headband. Another possible explanation was the accused's hair was transferred directly from the accused to a third party who then put on the headband and committed the assault. Another possible explanation was that that the accused wore the headband on a previous occasion and another person wore the same headband during the robbery. The first two hypotheses lacked a factual foundation in the evidence. There was some basis on the third scenario because two or more person's DNA were found on the fabric of the headband. Thus, there was some evidence that more than one person had worn this headband.
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> **73** There was cogent evidence that the complainant ripped the assailant's hair and the headband with force. She had the assailant's hair in her hand after the struggle and the headband was torn apart. Thus, there was an evidential foundation that the accused's hair was pulled out together with the headband during the struggle. The complainant's uncontradicted evidence provided a logical and a sound explanation for the presence of the accused's hair attached to the headband.
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> **74** The general identification evidence of age, gender, height and skin colour of the accused, the distinguishing features of the skin condition (exhibit 13) and the spacing between the facial hair together with the cornrow hairstyle normally worn by the accused, is cogent evidence that the accused was the perpetrator when considered together with the DNA evidence. The DNA evidence and the eyewitness identification corroborate each other. The combined eyewitness identification and the DNA evidence increase the probative value of the identification evidence (*R. v. Partillo*, 17 C.R. (6th) 362 (O.C.A.) at paras. 44-47). It would be extremely improbable that a third party with general physical characteristics of age, height and colour with a cornrow hairstyle and with the

> same distinguishing features of skin condition and facial hair as the accused would by chance wear a headband with the accused's hair in the growing stage attached to a headband during the commission of the assault.

[24] Evidence of DNA on items found at the scene of crimes has been relied on in a number of cases to support an inference that the accused participated in the offence. (See the review by C. Hill J. in *R. v. Foster*, [2008] O.J. No. 827.) It is clear that proof that DNA was found on items associated with a crime is not the end of the inquiry – the next step, and the crucial one, is whether the trier of fact can then draw the inference that the accused was a party to the offences charged. The Crown here concedes that the fact DNA was found on the blue/black mask does not, on its own, establish the appellant's culpability.

[25] The presence of the appellant's DNA on the mask is equivalent to a fingerprint. The Crown's expert testified that only small amounts of DNA are sufficient, and can be present for years. In addition, the thrust of the Crown's expert evidence was that DNA can be transferred or deposited by handling.

[26] Here the trial judge found the blue/black mask to be the one used in the robbery. He then found that the Crown had proved the appellant's DNA to be on the mask. It bears repeating his reasoning process and conclusion:

> **[15]** So I am satisfied beyond a reasonable doubt in this case that the accused, Mr. O'Brien, Mr. Marty David O'Brien, is the person who committed the robbery referred to in the first count of the indictment. I am also satisfied that he, with intent to commit an indictable offence, had his face covered with the mask, and finally that he had in his possession a weapon, the knife referred to in count number three.
>
> **[16]** So just to summarize, the DNA evidence establishes the accused's identity as the robber beyond a reasonable doubt, ties him to the mask which was found, which I have indicated, based on circumstantial evidence, is clearly the mask that was used in the robbery.

[27] His reasoning process can be summarized as: the mask was worn by a person who robbed the store. The accused at some point handled or wore the mask. Ergo, he robbed the store. With all due respect, the trial judge needed to ask himself a further question: in light of the evidence, and bearing in mind the obligation of the Crown to prove beyond a reasonable doubt the identity of the

accused as the robber, can I draw the inference that the accused was the person who robbed the store? By not asking this question, the trial judge failed to consider if there was any other explanation for the presence of the appellant's DNA on the mask along with other factors such as the presence or absence of other evidence on the issue of identity. There is no indication in the trial record that the appellant matched the description of the robber given by Ms. Coates, or as revealed on the tape. Fingerprints found on the piece of the cash register did not match those of the appellant. Although I note the trial judge observed that he was unable to say the robber was not wearing gloves, Coates did not say he was.

[28] In any event, I need not consider in isolation the effect of the failure to ask the appropriate question in light of my conclusion concerning the clearly inadmissible evidence heard by the trial judge.

Unreasonable verdict

[29] The appellant advanced his argument on unreasonable verdict on the narrow basis that the trial judge's conclusion that blue/black mask was worn by the robber was a fact that had to be proven beyond a reasonable doubt, and that the evidence did not support such a finding. This was based on a submission that the evidence of the store clerk with respect to the blue-black mask was a form of identification evidence, and there was no established foundation for Ms. Coates to make the identification. In particular, the appellant argued there were no distinguishing features of the mask; Coates had a very limited opportunity to observe, and only then, under traumatic conditions; and she was only shown two masks to pick from.

[30] It is now trite law that as a general proposition the standard of reasonable doubt does not apply to individual pieces of evidence (see *Morin v. R.* (1988), 44 C.C.C. (3d) 193 (S.C.C.); [1988] 2 S.C.R. 345). But of course, if facts essential to a finding of guilt are still doubtful, this should produce a doubt in the mind of the trier of fact that guilt has been proved beyond a reasonable doubt.

[31] There are a number of problems with the submission of the appellant. In my opinion, it is doubtful that proof beyond a reasonable doubt is the proper burden to apply to this issue (see *R. v. MacLellan*, 2008 ONCA 204). Even assuming it was the appropriate standard, the reasons by the trial judge clearly demonstrate that he in fact applied it to this issue. Furthermore, the attack on the identification

evidence of Ms. Coates of the mask ignores the fact her testimony was not the only evidence relevant to the conclusion that the blue/black mask was the one used in the robbery.

[32] The trial judge said "I am satisfied that the circumstantial evidence is strong and sufficient to prove beyond a reasonable doubt that there is a connection between the blue mask and the robbery of the convenience store at Top of the Hill on the previous evening" (para. 6). Although the exchange between the Crown and Ms. Coates was somewhat confusing, this was not the only evidence on this issue. The trial judge had the advantage of seeing the mask and comparing it to the video footage from the store's security camera. The mask was found close to a butcher style knife that was similar to the one described by Ms. Coates, and depicted in the video. The mask was also close to a piece of the cash register, positively identified by the store manager as being from the store. In these circumstances, the conclusion by the trial judge that the blue/black mask found was the one used in the robbery was clearly supported by the evidence and is in no way unreasonable.

[33] If the appellant is now contending that the overall verdict is unreasonable, I am unable to agree. As already noted, the case against the appellant was entirely circumstantial. Cromwell J.A., as he then was, in *R. v. Barrett*, 2004 NSCA 38, (2004), 222 N.S.R. (2d) 182, addressed the appropriate approach in cases of circumstantial evidence as follows:

> [15] This Court may allow an appeal in indictable offences like these if of the opinion that "... the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.": s. 686(1)(a)(i). In applying this section, the Court is to answer the question of whether the verdict is one that a properly instructed jury (or trial judge), acting judicially, could reasonably have rendered: **Corbett v. The Queen**, [1975] 2 S.C.R. 275 at 282; **R. v. Yebes**, [1987] 2 S.C.R. 168 at 185; **R. v. Biniaris**, [2000] 1 S.C.R. 381 at para. 36.
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> [16] The appellate court must recognize and give effect to the advantages which the trier of fact has in assessing and weighing the evidence at trial. Recognizing this appellate disadvantage, the reviewing court must not act as if it were the "thirteenth juror" or give effect to its own feelings of unease about the conviction absent an articulable basis for a finding of unreasonableness. The question is not what the Court of Appeal would have done had it been the trial court, but what a jury or judge, properly directed and acting judicially, could reasonably do: **Biniaris** at paras. 38 - 40.

[17] However, the reviewing Court must go beyond merely satisfying itself that there is at least some evidence in the record, however scant, to support a conviction. While not substituting its opinion for that of the trial court, the court of appeal must “... re-examine and to some extent reweigh and consider the effect of the evidence.”: **Yebes** at 186. As Arbour, J. put it in **Biniaris** at para. 36, this requires the appellate court "... to review, analyse and, within the limits of appellate disadvantage, weigh the evidence..." so as to examine the weight which the evidence could reasonably bear.

[18] In this case, the evidence of the appellant's guilt in relation to the extortion and aggravated assault charges is entirely circumstantial. The question arises, therefore, of how the reasonable verdict test is to be applied in light of the requirement that where evidence is entirely circumstantial, the accused's guilt must be the only rational conclusion to be drawn from the circumstantial evidence.

[19] **Yebes**, a leading case on the reasonable verdict test on appellate review, was a case of circumstantial evidence. One of the points argued before the Supreme Court of Canada was that the Court of Appeal had failed to apply the correct test in reviewing the reasonableness of a conviction where the evidence against the appellant was entirely circumstantial. Responding to this submission, McIntrye, J. for the Court stated that in applying the unreasonable verdict test, the appellate court must re-examine and to some extent reweigh and consider the effect of the evidence. This process, he said, will be the same whether the case is based on circumstantial or direct evidence. However, he pointed out that the Court of Appeal had “... rejected all rational inferences offering an alternative to the conclusion of guilt” and that it was “... therefore clear that the law was correctly understood and applied.”: at 186. In **Yebes**, the Court acknowledged that evidence of motive and opportunity alone could not meet this standard unless the evidence reasonably supported the conclusion of exclusive opportunity: see 186-190.

[20] I would conclude that while the test for whether a verdict is reasonable is the same in all cases, where the Crown's case is entirely circumstantial, the reasonableness of the verdict must be assessed in light of the requirement that circumstantial evidence be consistent with guilt and inconsistent with innocence: see **Yebes** at page 185 where this formulation was said to be the equivalent of the requirement that the circumstantial evidence be inconsistent with any rational conclusion other than guilt. This was summed up by Low, J.A. in **R. v. Dhillon** (2001), 158 C.C.C. (3d) 353 (B.C.C.A.). At para 102, he stated that where the Crown's case is entirely circumstantial, the appellate court applying the unreasonable verdict test must determine “... whether a properly instructed jury,

> acting judicially, could have reasonably concluded that the only rational conclusion to be reached from the whole of the evidence is that the appellant ..." was guilty.

[34] In *R.v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190 Justice Charron, writing for herself and three other justices, reaffirmed the test for an unreasonable verdict from *R.v. Yebes*, [1987] 2 S.C.R. 168 and *R.v. Biniaris*, [2000] 1 S.C.R. 381. She emphasized that the appeal court's task is to assess the verdict, not the process used to reach the verdict. *Beaudry* was a case that was determined by credibility findings by the trial judge. The conclusion by Charron, J. is summed up as follows:

> 4 As I will explain, the verdict of the Court of Québec judge is reasonable and it is supported by a perfectly plausible interpretation of the evidence. With respect, I believe that Chamberland J.A.'s analysis of the evidence is incompatible with the role of an appellate court in reviewing whether a verdict is unreasonable. In the instant case, the trial judge made no error of law. It is apparent from the record that there was evidence to support each element of the offence. The resolution of the determinative issue turned on the credibility of the accused. The trial judge was in the best position to assess the credibility of the witnesses and to determine whether the evidence left room for a reasonable doubt. I would therefore dismiss the appeal.

[35] Justice Fish wrote for himself and three other justices. He dissented in result. He also disagreed with Charron, J.'s statement of the appropriate test to determine if a verdict rendered by a judge alone is unreasonable. With respect to the test, Fish, J. reasoned that given the governing provision of the *Criminal Code*, and recent jurisprudence in non jury cases, appellate courts may find a verdict to be unreasonable even where the verdict was available on the record. He wrote:

> [97] In Justice Charron's view, a verdict based on unreasonable reasons is not unreasonable if there is evidence upon which another trier of fact could have reached the same conclusion by a different and proper route. With respect, I do not share that view. No one should stand convicted on the strength of manifestly bad reasons – reasons that are illogical on their face, or contrary to the evidence – on the ground that another judge (who never did and never will try the case) could *but might not necessarily* have reached the same conclusion for *other reasons*. A verdict that was reached illogically or irrationally is hardly made reasonable by the fact that another judge could reasonably have convicted *or acquitted* the accused. I think it preferable by far, where there is evidence capable of supporting

> a conviction, to order a new trial so that a fresh and proper determination can be made by a real and not hypothetical "other judge". [emphasis in original]

[36] In Justice Fish's view, there was evidence tending to show that the accused did not intend, as he had testified, to obstruct justice. This evidence was neither contradicted by other evidence nor rejected by the trial judge. Fish J., concluded that there was evidence upon which a trier of fact could reasonably find the appellant guilty as charged, but the appellant was entitled to a decision that was supported by reasons upon which the verdict was said to be found (para. 115).

[37] Binnie J. agreed with Justice Charron that the appeal should be dismissed, but appeared to agree with the suggestion by Justice Fish that the traditional view of focussing on the reasonableness of the verdict, without regard to the quality of the reasons, was problematic. In particular, he agreed that findings of fact essential to the verdict that are demonstrably incompatible with evidence, neither contradicted by other evidence, nor rejected by the trial judge, would produce a verdict lacking in legitimacy and hence "unreasonable" (para. 79).

[38] Fichaud J.A., in *R.v. Abourached*, 2007 NSCA 109 reviewed *Beaudry*. He concluded that the touch of Binnie J.'s concurrence established Justice Fish's broader scope for review as one of the effective standards (para. 27). Since then this Court has repeatedly referred to both approaches to assess allegations that a verdict is unreasonable on appeal from trials by judge alone. For example in *R. v. Matthews*, 2008 NSCA 34, [2008] N.S.J. No. 150, the task to be undertaken was, in those circumstances, described as follows:

> [13] On an appeal where it is alleged that the verdict is unreasonable, our role is to determine whether the findings essential to the decision are demonstrably incompatible with evidence that is neither contradicted by other evidence nor rejected by the trial judge and whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. See: the analysis of **R. v. Beaudry**, [2007] 1 S.C.R. 190 in **R. v. Abourached**, 2007 NSCA 109, ¶ 24 - 29.

[39] Here, there were no contested factual findings based on credibility of witnesses. For reasons already set out, the inference drawn by the trial judge that the blue/black mask was used in the robbery was not unreasonable. Although the Crown's case cannot be described as overwhelming, I am not persuaded that a reasonable jury, properly instructed, could not reasonably conclude that the appellant was the robber. Nonetheless, like Justice Fish, I am troubled that a

verdict that might have been upheld based on a proper reasoning process, and untainted by inadmissible evidence, can be left to stand because there was evidence capable of supporting a conviction. I need not base my decision on this issue.

Character Evidence

[40] There is no shortage of authority, old and modern, that emphasize the principle the Crown is not entitled to lead evidence tending to show the accused is a person of bad character. Furthermore, such evidence is inadmissible, not because it is irrelevant – but because of its unfair prejudicial effect. This has been eloquently expressed by a number of eminent jurists. Willes J. in *R. v. Rowton* (1865), 169 E.R. 1497 (C.C.A) wrote (p. 1506):

> I entirely agree with the Lord Chief Justice of England, that it is a mistake to suppose that, because the prisoner only can raise the question of character, it is therefore a collateral issue. It is not. Such evidence is admissible, because it renders it less probable that what the prosecution has averred is true. It is strictly relevant to the issue; but it is not admissible upon the part of the prosecution, because, as my Brother Martin says, if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by shewing that when a boy at school the prisoner had robbed an orchard, and so on through the whole of his life; and the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted on that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity; because, although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice in the other ninety-nine.

[41] Justice Jackson of the United States Supreme Court, in delivering the opinion of the Court in *Michelson v. United States*, 69 S.Ct. 213, expressed it as follows:

> [1-6] Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be

> persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

[42] In *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977) the court viewed the rule as being derived from the presumption of innocence and "concomitant of the presumption of innocence".

[43] In my opinion, the law in Canada is no different. *McWilliams' Canadian Criminal Evidence*, 4th ed. (Aurora, Ont.: Canada Law Book, 2005), summarizes it this way:

> **9.30.10 Character to Prove Conduct**
>
> It is a fundamental principle of the common law that the prosecution is not entitled to prove the guilt of the accused by relying on evidence of their general bad character. An accused person is not on trial for being a bad person. Thus, character evidence whose *only* purpose is to show that the accused is the type of person likely to have committed or is capable of committing the offence is inadmissible. While relevant, evidence of bad character is excluded on policy grounds rooted in trial fairness concerns. The rule is intimately tied to the presumption of innocence and aspects of it undoubtedly find protection under s. 7 of the Charter.

[44] As already described earlier, the Crown at trial adduced considerable evidence demonstrating the criminal pedigree of the appellant. Mr. Fiske, with his usual candour and fairness, concedes there was no basis for this evidence to have been legitimately adduced before the trial judge. He acknowledges it was an error of law for the trial judge to have permitted this evidence to be heard despite the absence of an objection by the defence. Instead he submits the appellant suffered no prejudice. In other words, this court should uphold the verdict by application of the s. 686(1)(b)(iii) proviso.

REMEDY

[45] The powers given to an appellate court are set out in s. 686 of the *Criminal Code*. The relevant portions are:

> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;
>
> (b) may dismiss the appeal where
>
> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
>
> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (*a*),
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; or
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

[46] In *R. v. West*, 2010 NSCA 16, this Court described the general scope of this power as follows:

> [185] Where an appellant establishes that there has been an error in law, the court may nonetheless dismiss the appeal and uphold the conviction if it is satisfied that

> no substantial wrong or miscarriage of justice occurred. This is frequently referred to as the curative proviso. To invoke the proviso and uphold a conviction, the court must be satisfied there is no reasonable possibility that the verdict would have been different without the error (**R. v. Bevan**, [1993] 2 S.C.R. 599; **R. v. John**, [1985] 2 S.C.R. 476; **R. v. Wildman**, [1984] 2 S.C.R. 311). This result can be arrived at if either the court is satisfied that the error was one that had no impact on the verdict – a true harmless error, or where there are one or more serious errors, but the evidence is so overwhelming that a conviction would be the inevitable result.

[47] The Supreme Court of Canada certainly has had occasion to consider the application of the proviso where, in the course of a jury trial, inadmissible evidence was led, or where evidence was admissible for one purpose, but no, or insufficient, limiting instruction was given by the trial judge. In *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, [1993] S.C.J. No. 21, evidence of the appellant's bad character was admitted. This evidence showed him to be a man with a propensity for violence. The Court concluded it was properly admitted to rebut the defence of innocent association and to demonstrate the system of violent control the appellant had over the family, and why the abuse was allowed to occur without complaint. No instruction was given to the jury about the limits for which they could use this evidence. Majority judgments, allowing the appeal and ordering a new trial, were given by Lamer C.J. and Iacobucci J., with Sopinka J. concurring in both. Iacobucci J. also agreed with the reasons of the Chief Justice. With respect to the test, Lamer C.J., wrote at pp. 704-705:

> **The law is clear that in order to decide that, notwithstanding the judgment of the trial court could be set aside on the basis of a wrong decision on a question of law, there was no substantial wrong or miscarriage of justice, the appellate court must be satisfied by the Crown that the verdict at trial would necessarily have been the same if the error had not been committed** (see, e.g. *Colpitts v. The Queen*, [1965] S.C.R. 739, at p. 744, cited with approval by Lamer J. (as he then was) for the Court in *Wildman v. The Queen*, [1984] 2 S.C.R. 311, at p. 328).
>
> As Cartwright J. noted in *Colpitts*, the discharge of this burden by the Crown is a condition precedent to the right of the appellate court to apply the terms of the subsection, but the court is not bound to apply the subsection merely because this onus is discharged. Moreover, as he further pointed out, there is a danger that if appellate courts resort too readily to the proviso, "the judges would in truth be substituted for the jury, the verdict would become theirs and theirs alone, and would be arrived at upon a perusal of the evidence without any

> opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords" (see Cartwright J. in *Colpitts, supra*, at p. 744).
>
> Unless used with great circumspection, the provisions of s. 686(1)(*b*)(iii) of the *Code* would effectively deprive accused persons of the right to have their guilt or innocence determined by a properly instructed jury of their peers. [emphasis added]

[48] Iacobucci J. expressed the following approach (p. 737):

> **Section 686(1)(b)(iii) of the *Criminal Code*, is for use in exceptional cases only, as this Court has emphasized in two recent cases. In *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, Sopinka J. held for the majority, at p. 916, that s. 686(1)(*b*)(iii) can only be invoked where "the evidence is so overwhelming that a trier of fact would inevitably convict".** In *R. v. Broyles*, [1991] 3 S.C.R. 595, the Court emphasized, at p. 620, "[t]he appropriate standard for the application of s. 686(1)(*b*)(iii) is an onerous one". ... [emphasis added]

[49] More recent is the decision of the Court in *R. v. Van*, 2009 SCC 22. The accused was convicted of attempted murder and other offences. It was the theory of the defence that a jealous husband or loan sharks had carried out the vicious attack on the victim. The appellant alleged the police had performed a shoddy investigation and had prematurely focused their attention on him. The lead investigator gave evidence that constituted hearsay. Included was his belief in the guilt of the accused. No limiting instruction was given to the jury on the permissible and impermissible uses for this evidence. The defence did not object to the evidence being led, nor to the trial judge's charge to the jury. The Court, by a 5 to 4 plurality, applied the proviso to uphold the conviction. However, there was no dispute as to the applicable principles. LeBel J., for the majority wrote:

> [36] An appellate court can also uphold a conviction under s. 686(1)(*b*)(iii) in the event of an error that was *not* minor and that *cannot* be said to have caused no prejudice to the accused, if the case against the accused was so overwhelming that a reasonable and properly instructed jury would inevitably have convicted (*Khan*, at para. 31). The ability to uphold a conviction in the face of a serious error at trial was aptly expressed by Sopinka J. in *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, who wrote that "depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction" (p. 916, affirmed in *Khan*, at para. 31). The high standard of an invariable or inevitable conviction is understandable, given the difficult task for

> an appellate court of evaluating the strength of the Crown's case retroactively, without the benefit of hearing the witnesses' testimony and experiencing the trial as it unfolded (*Trochym*, at para. 82). It is thus necessary to afford any possible measure of doubt concerning the strength of the Crown's case to the benefit of the accused person. The rationale for upholding a conviction in these circumstances is persuasive; in the words of Binnie J. in *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 46:
>
> > Where the evidence against an accused is powerful and there is no realistic possibility that a new trial would produce a different verdict, it is manifestly in the public interest to avoid the cost and delay of further proceedings. Parliament has so provided.
>
> This reasoning was echoed in my concurring reasons in *Khan* (at para. 90). Thus, an appellate court is justified in refusing to allow an appeal against a conviction in the event of minor errors that could not possibly have affected the verdict and more serious errors that were committed in the face of an overwhelming case against the accused, since the underlying question is always whether the verdict would have been the same if the error had not been committed: *R. v. Bevan*, [1993] 2 S.C.R. 599.

[50] This Court, in *R. v. Assoun*, 2006 NSCA 47, emphasized that in assessing the curative proviso it is necessary to consider the cumulative effect of the errors. The court referred to and adopted the following statement by Justice Doherty in *R. v. Klymchuk* (2005), 203 C.C.C. (3d) 341:

> **48** Section 686(1)(b)(iii) eliminates the need for a new trial despite a legal error at the first trial where a new trial is not necessary to ensure the proper administration of criminal justice. If the legal error casts no doubt on the reliability of the verdict, or the essential fairness of the trial, justice is not served by a new trial. Where the essential fairness of the trial is not undermined by the legal error, s. 686(1)(b)(iii) can only be applied to dismiss an appeal where the appellate court is satisfied, based on a review of the entirety of the trial record, that there is no reasonable possibility that the verdict would have been different had the legal error not been made: R v. Bevan (1993), 82 C.C.C. (3d) 310 (S.C.C.) at 328-329.
>
> **49 Where the error lies in the improper admission of evidence, that error will be harmless within the meaning of s. 686(1)(b) (iii) if the improperly admitted evidence was so insignificant that it could not have affected the verdict, or if the Crown's case apart from the improperly received evidence can be characterized as so overwhelming as to render a conviction almost**

> **inevitable:** R. v. Khan (2001), 160 C.C.C. (3d) 1 (S.C.C.), at paras. 26, 31. If an appellate court finds legal error, it cannot pre-empt an accused's right to a trial according to law by an appellate evaluation of the appropriate or even likely verdict: R. v. S. (P.L.) (1991), 64 C.C.C. (3d) 193 (S.C.C.) at 199; R. v. C. (W.B.) (2000), 142 C.C.C. (3d) 490 (Ont. C.A.) at 513, aff'd (2001), 153 C.C.C. (3d) 575 (S.C.C.). [emphasis added]

[51] Now the Crown argues that this was not a jury trial. Trial judges are presumed to know the law, and further, there is no indication in the trial judge's reasons that he relied on the improper evidence. Before considering what difference there may be in how the proviso can be applied where the error occurs in a trial by judge alone, it would be useful to set out with more particularity what the evidence was that was adduced, and its context.

[52] There is no hint of any attack by the defence on the integrity of the investigation, nor to the legitimacy of the DNA warrant. Nonetheless, the Crown led the following evidence (pp. 216-219):

> Q. Okay. All right. Where was I here? So what steps did you take after the DNA items were sent off to Halifax? What happened next?
>
> A. Once the DNA samples were sent to Halifax, obviously, there's a waiting period and whatever they do, and **I made a patrol to the county jail where Marty O'Brien ... at the time** when I talked to Mr. Farrow, there was a red car, according to him, that was seen in the area that left the area at a fast speed and it was right where we had found the mask and the other exhibits. So just at this particular time in 2004 in October there was ... **Marty O'Brien was thought to be involved in a number of incidences within Amherst and within the county**, and he had access to a red car. At the time, it was my thought ... there was no indication by the people ... Mr. Farrow that they could identify the car other than it was a red vehicle that took off. It was my thought at the time, and as a suspect, that Marty O'Brien, at that time, was a suspect who may be in that car. He might have been driving the car. He had access to a car that ... of that same colour and description.
>
> Q. Yes.
>
> A. **So I went to the county jail, and I spoke to Marty O'Brien** with regards to his being involved and he denied any involvement in it whatsoever. So I ... after this, I checked ... **later on it became known that Marty O'Brien was convicted in court for a number of offences and a DNA order was issued to**

be taken on Marty O'Brien. So I continued to monitor DNA orders. Once they are taken and they are sent to Ottawa ...

Q. Yeah?

A. ... they register ... they're registered with the DNA databank, and in order for police departments to determine whether a person's DNA has been entered in the databank ... and then it's sent to the Ident. section, which enters ... makes an entry into anybody that's convicted of an offence, and their DNA is at the DNA databank. When you run this person with regards to previous offences ...

Q. Yeah.

A. ... there's a ... a bar comes up and it says, "known DNA sample."

Q. Okay.

A. "Known DNA offender."

Q. Yes.

A. And I kept checking knowing that Marty O'Brien's DNA was taken, and it should be on the DNA databank. I kept checking CPIC, kept checking CPIC a number of times. Kept checking, I kept checking, and there was no indication that his DNA had made it to the CPIC. So I kept checking, and I checked with Oxford Detachment and then I got a copy of a DNA order that shows that the order from Marty O'Brien had been executed approximately ... I would say 13 months later, if memory serves me right.

From the 23rd of December, I believe, in ‘05 Marty ... there was a DNA order issued against Marty, and approximately 13 months later the DNA order ... or the indication that the DNA was ... had been received with regards to Marty O'Brien was on CPIC.

Q. Okay.

A. So as a result of that, **I was down to the Springhill Institution on another matter, and once again, I spoke to Marty with regards to his possible involvement**, and again, he denied any involvement.

Q. Okay.

A. Sometime later I received a letter from Trisha Saul indicating that as a result of Marty O'Brien's DNA entry into the databank that a hit had been received with regards to the items sent for DNA testing, that there was a DNA sample found in one of the items sent away, and the DNA testing matched that of Marty O'Brien.

Q. Okay. So when you found that out, what did that cause you to do?

A. I then had to prepare a warrant for a DNA order from Marty O'Brien.

[53] After Sgt. Blakeney explained he had obtained a DNA warrant, the Crown elicited even more details that demonstrated the appellant to have then become an inmate at the Dorchester penitentiary (pp. 219-220):

A. I presented an Information to Obtain a DNA sample from Marty O'Brien, with the order ... the warrant being granted. **As a result of the warrant being granted and knowing that Marty O'Brien was then an inmate in Dorchester Institution...**

Q. Yes?

A. ...I went to court in Moncton and I had an endorsement signed by the judge in Moncton prior to taking his DNA sample. I had the ... a warrant endorsed, or the endorsement signed by a judge in Moncton.

Q. Right.

A. From there, I went to ... ended up going to the west ... or the Dorchester Institution.

Q. Yes?

A. And I met with Marty.

[54] Defence counsel seemed unaware that this kind of evidence was impermissible. In fact, after the trial judge had allowed the Crown to adduce this evidence, the following occurred in cross-examination (AB p. 234):

Q. Okay. Now in your testimony you briefly stated that you knew Mr. O'Brien to be known as an offender and that's why you sort of steered in his direction in terms of this particular incident.

> A. **I've known Marty O'Brien and he's known me for years. I don't know, maybe 10 or maybe 15, 20 years, and I know his ... I don't know everything he does, but I know his criminal background, and it was common knowledge within our office and within the RCMP detachment in Amherst that Marty O'Brien was an active criminal who was traveling Amherst ... Cumberland County area, and we were aware that Marty was involved in these activities,** and in talking to...

[55] It seems beyond any doubt that had this evidence been heard in a jury trial the proviso, even if available, would not be appropriate. Does it make a difference that the trial was by judge alone? The answer is sometimes yes, and no. In my opinion, where the trial judge who has heard inadmissible prejudicial evidence, disabuses herself from the evidence, or the reviewing court is satisfied that the impugned evidence played no part in the reasons that led to conviction, and there was no impact on trial fairness, the proviso may be relied upon. Let me explain.

[56] The general principles surrounding the application of the proviso where the trial was by judge alone are the same. An oft quoted statement of the proper approach is that of Sopinka J. in *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, [1991] S.C.J. No. 37, a judge alone case, where he said (p. 916):

> **On the other hand, if the Court of Appeal finds an error of law with the result that the accused has not had a trial in which the legal rules have been observed, then the accused is entitled to an acquittal or a new trial in accordance with the law.** The latter result will obtain if there is legally admissible evidence on which a conviction could reasonably be based. The court cannot substitute its opinion for that of the trial court that the evidence proves guilt beyond a reasonable doubt because the accused is entitled to that decision from a trial judge or jury who have all the advantages that have been so often conceded to belong to the trier of fact. If the Court of Appeal were to make that decision the accused would be deprived of a trial to which he or she is entitled, first, by reason of the abortive initial trial and second by the Court of Appeal. There is, however, an exception to this rule in a case in which the evidence is so overwhelming that a trier of fact would inevitably convict. In such circumstances, depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction. These limitations on the powers of the Court of Appeal are the result of the combined effect of s. 686(1)(*a*)(ii), (*b*)(ii) and (iii) and s. 686(2). By virtue of s. 686(1)(*b*)(ii) the Court of Appeal cannot dismiss the appeal if it has found an error of law unless the curative provision embodied in s. 686(1)(*b*)(iii) applies. If

> the appeal is not dismissed it must be allowed, and pursuant to the provisions of s. 686(2) either an acquittal or a new trial must be ordered.

[57] In *R. v. Leaney*, [1989] 2 S.C.R. 393, [1989] S.C.J. No. 90, the trial judge made two errors in admitting evidence. He used the evidence from a second count, a break-in, as similar fact evidence on a robbery count; and he permitted opinion evidence from five police officers who identified the appellant on a videotape of the offence. Four of the officers had no acquaintance with the appellant and hence were in no better position than the trial judge to determine who was depicted on the tape. The fifth officer had known one of the accused since childhood but had not been qualified to give opinion evidence. However, the trial judge in his reasons explained that he had, independently of police opinion evidence, arrived at his conclusion as to the identity of the offender on the tape. The majority of the Court split in result on the appeals by the two appellants, but not with respect to the appropriate approach. Lamer J., as he then was, dissenting in part, wrote (pp. 405-6):

> Furthermore, the trial judge made it clear that he had arrived at his conclusion irrespective of what the sergeant or the others had to say. While no doubt is cast on the sincerity of the judge's assertion, one might argue that the circumstances cast doubt on its accuracy or at least on the appearances thereof. We constantly ask jurors to disregard what they know through reading the papers or viewing telecasts of the news; we tell them to disregard certain answers given by witnesses; we tell them that while certain evidence may be used for one purpose, we will trust them not to use it for another. I do not see why judges cannot be trusted for same. In fact, our judges hold *voir dires* on confessions and sometimes reject them on grounds that in no way cast doubt on their accuracy; they are expected to and are accepted as being capable of deciding innocence or guilt without using their knowledge of the accused's admission of guilt in the rejected confession. So, if Plomp Prov. Ct. J. says that he identified Leaney on the video independently and without the aid of the identification of Sergeant Cessford, I am satisfied that there has not been any substantial wrong or miscarriage of justice, nor appearance thereof. I would therefore uphold Leaney's conviction for the break and enter.

[58] MacLachlin J., as she then was, (L'Heureux-Dubé and Sopinka JJ. concurring) expressed a similar approach (p. 415):

> Given the trial judge's clear statement that he arrived at his conclusion as to identity independently of the evidence of the police officers, their evidence assumes the character of mere surplusage, which does not vitiate the judge's

> conclusion that Leaney was one of persons shown on the video screen. To put it another way, the judge, properly instructing himself, concluded beyond a reasonable doubt that Leaney participated in the break-in. The fact that the judge had before him inadmissible evidence does not impair that independent conclusion, if he did not rely on the inadmissible evidence in reaching it.

[59] In *R. v. Rahm*, 2006 ABCA 111, [2006] A.J. No. 380, the appellant argued that the trial judge, sitting alone, had erred in admitting bad character evidence adduced by the Crown during direct examination of a Crown witness. Conrad J.A., for the Court, dismissed the appeal since the trial judge was aware of the inadmissibility of such evidence. He wrote:

> **13** We are troubled by the prosecutor's persistent line of questions relating to bad character but, in the end, we are satisfied that no miscarriage of justice resulted from the introduction of this character evidence. This was not a jury case. **During the course of the trial, the trial judge made it clear that he understood that bad character was not admissible where character had not been placed in issue.**
>
> **14** The appellant concedes that the trial judge stopped further questioning on bad character evidence, but that there is a real issue as to whether the trial judge relied upon the pornography evidence as going to propensity. Counsel says that while a trial judge need not say, in every case, that he disabuses himself of the evidence, she argues that here the trial judge should have done so. That is because he questioned the homeowner, clarifying her evidence relating to the pornographic sites. In addition, he mentioned the homeowner's evidence, without stating that he had understood this evidence was bad character evidence which he would not be relying upon.
>
> **15** We acknowledge that the trial judge did reference the pornographic evidence in his review of the facts. But we are not satisfied that impacted his decision. His decision was based entirely upon his finding the complainant to be a very credible witness. Thus, ground three also fails.

Similarly, see *R. v. Lowe*, 2009 BCCA 338 at para. 64.

[60] In light of these principles, I am not satisfied that the Crown has met its burden under s. 686(1)(b)(iii). The Crown does not suggest this is a case where although the error is serious, the result would inevitably be the same. It simply contends the appellant suffered no prejudice, and relies on the absence in the trial judge's reasons to any explicit reliance on the bad character evidence. Certainly if

the trial judge had disabused himself of this evidence, either in his reasons, or arrived at his conclusion by expressly relying on evidence untainted by the impugned evidence, or otherwise made it plain that the impugned evidence could play no part in the process, I might be inclined to take a different view. But none of these factors are present.

[61] The trial judge did make reference to submissions made by the defence about problems with the Crown's case. He said this:

> [17] Just to make a couple of comments on the submission on behalf of the accused. There was a submission made that the video did not show the cash register cover being removed. I am unable to determine from the video. I acknowledge, I have considered that comment by Ms. Franklin, **but the evidence is overwhelming that the accused is the person who committed the robbery**, and I cannot determine from the video whether he removed part of the cash register at this time, nor can I determine whether he was wearing gloves. So there is not, those points do not raise a reasonable doubt in my mind, in view of all the other evidence which clearly establishes the accused's guilt beyond a reasonable doubt. So for those reasons, I find that Mr. O'Brien is guilty with respect to the three counts in the indictment before the court dated January 30th, 2009.

[62] As emphasized, the trial judge referred to the evidence as being "overwhelming that the accused is the person who committed the robbery" and that the points raised by the defence do not raise a reasonable doubt "in view of all the other evidence which clearly established the accused's guilt beyond a reasonable doubt". The difficulty is trying to ascertain what evidence the trial judge is referring to. Is it the evidence of the remote probability of 1 in 33 billion that the match was from some other member of the Canadian Caucasian population? Or was it in light of the evidence that the police had numerous complaints about the appellant in a red car, and was a criminal offender – known by the police to be "involved in these activities"?

[63] Aside from the DNA evidence, in my opinion, the Crown presented little else by way of admissible evidence. Certainly nothing that could be described as overwhelming. The Crown did lead evidence from Audrey Farrow that at generally the same time as the robbery a red car was seen leaving the general area where the mask and other items were subsequently found.

[64] They also had evidence that on December 15, 2003, some 10 months prior, the appellant had been given a ticket for driving his former girlfriend's car. His former girlfriend testified that she owned a red car, and during their relationship the appellant had "access" to her car. She said the relationship was from March 2003 to October 2004. She did not say she still had a relationship with the appellant as of October 11, 2004 or that he had access to her car as of that date.

[65] Ms. Farrow was shown pictures of the car that belonged to the appellant's former girlfriend. Farrow did not identify this car as the one she saw, or provide any features about it. The only thing she could say was the car she saw was red. She did not even say it was the same or close to the same colour of red. This evidence was hardly compelling. Indeed the trial judge made no mention of it.

[66] The appellant was entitled to a fair trial based on properly admissible evidence. The trial judge had an obligation to ensure he only heard properly admissible evidence. Usually a trial judge's task is facilitated by counsel for the parties, who know the issues to be litigated and the evidence that is planned to be adduced. The trial judge did not get any assistance from either counsel.

[67] For reasons that remain inexplicable, defence counsel did not object to the highly prejudicial evidence. However, it is equally inexplicable why the Crown would even attempt, in these circumstances, to elicit this evidence. All Sgt. Blakeney had to say was that he obtained and executed a DNA warrant. It certainly raises the spectre of the Crown deliberately painting the appellant as the likely culprit.

[68] As detailed above, the inadmissible evidence was no mere inadvertent slip. It went on for some pages in the transcript. It included evidence that the appellant was known to the police to be involved in the very type of offence before the court. There is no suggestion anywhere that the trial judge was alive to the fact that he could not use this evidence in deciding whether to draw the inference that the appellant was the person who had robbed the store.

[69] In my opinion, once the trial judge concluded that the blue/black mask was used in the robbery and the appellant's DNA was present on that mask, the highly prejudicial evidence made the drawing of the inference that the appellant was the

robber virtually inevitable. In light of that evidence, any other conclusion would have been unreasonable.

[70] The error by the trial judge was not simply about some minor bit of hearsay but was, in my opinion, and with all due respect to the trial judge, an error that impacted on trial fairness. The dangers of propensity evidence are real, even if diminished where the trial is by judge alone. It bears re-visiting the importance of the exclusionary rule. Doherty J.A. in *R. v. Suzack* (2000) 141 C.C.C. (3d) 449, [2000] O.J. No. 100 wrote:

> **116** I cannot accept the Crown's submission. It is a fundamental tenet of our criminal justice system that criminal culpability depends on the Crown's ability to prove beyond a reasonable doubt that the accused committed the specific act alleged in the indictment. It has been established for over 100 years that the Crown cannot make its case by showing that the accused engaged in misconduct other than that alleged against him for the purpose of showing that the accused was the type of person who would commit the crime alleged. *Makin v. The Attorney General for New South Wales*, [1894] A.C. 57 at 65 (P.C.). Propensity evidence and the reasoning that it invites imperil this fundamental tenet by inviting conviction based on the kind of person the accused is shown to be or based on acts other than those alleged against the accused: *R. v. D.(L. E.)* (1989), 50 C.C.C. (3d) 142 at 161-162 (S.C.C.). I would not discard a rule that is so central to an accused's right to a fair trial to further a co-accused's right to make full answer and defence.

[71] In *R. v. Handy*, 2002 SCC 56, Binnie J., for the Court wrote:

> 39 It is, of course, common human experience that people generally act consistently with their known character. We make everyday judgments about the reliability or honesty of particular individuals based on what we know of their track record. If the jurors in this case had been the respondent's inquisitive neighbours, instead of sitting in judgment in a court of law, they would undoubtedly have wanted to know everything about his character and related activities. His ex-wife's anecdotal evidence would have been of great interest. Perhaps too great, as pointed out by Sopinka J. in *B. (C.R.), supra*, at p. 744:
>
> > The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character. Particularly with juries there would be a strong inclination to conclude that a thief has stolen, a violent man has assaulted and a

> pedophile has engaged in pedophilic acts. Yet the policy of the law is wholly against this process of reasoning.
>
> 40 The policy of the law recognizes the difficulty of containing the effects of such information which, once dropped like poison in the juror's ear, "swift as quicksilver it courses through the natural gates and alleys of the body": *Hamlet*, Act I, Scene v, ll. 66-67.
>
> ...
>
> 139 It is frequently mentioned that "prejudice" in this context is not the risk of conviction. It is, more properly, the risk of an unfocussed trial and a *wrongful* conviction. The forbidden chain of reasoning is to infer guilt from *general* disposition or propensity. The evidence, if believed, shows that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather than proof, thereby undermining the presumption of innocence enshrined in ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

[72] Where admission of highly prejudicial evidence impacts on trial fairness, or the appearance of such, I have grave doubts that the proviso is even available to be invoked. However, this issue was not argued before us. I have therefore proceeded on the basis that the proviso is available to be applied, but in my opinion, for the reasons set out, the Crown has not satisfied its burden to trigger the invocation of this exceptional remedy.

[73] I have now had the privilege of reading my colleague, Justice Fichaud's reasons. I note there are no differences between us as to the facts, the appropriate disposition of the appellant's argument that the verdict was unreasonable, and the inappropriate admission of bad character evidence. We differ in but two respects, the application of the proviso under s. 686(3) and the trial judge's announced path to conviction.

[74] As to the latter, Justice Fichaud says this issue is to be addressed under the ground the verdict is unreasonable. With all due respect, the failure by a trial judge to ask himself the correct question in the path of his reasoning to conviction, in my opinion, raises a question of law. The Crown conceded as much.

[75] I do not suggest that DNA evidence can only play a role of corroboration of other evidence, nor did I cite *R. v. Mars, supra,* for that proposition. In my

opinion, what *Mars*, and a host of other cases stand for, is that the probative value of fingerprint evidence (and equivalent evidence) depends on the totality of the evidence. I did not suggest that in the circumstances of this case a trial judge could not, based on the DNA evidence, reasonably draw the inference that the appellant was the robber.

[76] The Court raised on its own motion concern over the fact that the trial judge only wrestled with the issue whether he could draw the inference that the blue-black mask was the one used in the robbery. The judge did not even consider the next necessary question in the reasoning process to conviction – should he draw the inference, in light of all of the evidence, and the Crown's burden of proof, that the appellant was the robber.

[77] With respect to the appropriate test for the proviso, my colleague appropriately refers to *R. v. Van, supra*, where LeBel J. summarized the test (para. 36):

> ...Thus, an appellate court is justified in refusing to allow an appeal against a conviction in the event of minor errors that could not possibly have affected the verdict and more serious errors that were committed in the face of an overwhelming case against the accused, since the underlying question is always whether the verdict would have been the same if the error had not been committed...

[78] Justice Fichaud suggests the admission of the bad character evidence was not a serious error. I respectfully disagree for a number of reasons. Justice Fichaud comments that Crown counsel did not mention it in summation. This is correct. However, the appellant's trial counsel (not counsel on appeal) did submit to the trial judge: "Just because Marty O'Brien is a known offender to a police officer, and he has access to a red car, doesn't make that the red car".

[79] My colleague examines the trial judge's reasons to try to determine if the evidence about the appellant's criminal past had any effect on the verdict. With respect, that is not the test: the test is: ***could it have had*** an impact on the verdict? The burden is on the Crown to demonstrate that it could not. If this burden is not met, the proviso can then only be invoked if the Crown's case is so strong that a trier of fact would inevitably convict. As noted earlier, the Crown does not argue that is the case here, nor does my colleague suggest this.

[80] I agree that in judge alone trials it is perfectly appropriate to examine the reasons of the judge to try to assess whether or not the impugned prejudicial evidence could have had an impact. There are a host of cases that demonstrate that even where a trial judge has not referred to the troublesome evidence, or even disabused himself of it, the proviso should not be invoked to save the conviction.

[81] In *R. v. Potvin* (1944), 81 C.C.C. 299 (Ont. C.A.), [1944] 3 D.L.R. 293, [1944] O.J. No. 155, the appellant was tried by judge alone. During the cross-examination of a defence witness, the Crown asked questions that demonstrated that the appellant had a prior record. The case depended on the trial judge drawing inferences. There was no suggestion in the report of the case that the trial judge referred to the impermissible evidence. Nonetheless, the conviction was quashed. Robertson C.J.O. wrote the unanimous reasons for judgment. He said:

> 3 During the course of the cross-examination of a witness called for the defence questions were asked by the Crown Attorney with respect to other criminal proceedings that had been taken against the Appellant on certain prior occasions. It is true that it is as not definitely said that the Appellant had been previously convicted, but it was said that he had been in gaol, and that he bad been placed in custody three times. **In my opinion it was distinctly improper to ask these questions and to adduce this evidence. They had no relevance to the charge upon which the Appellant was then being tried, and the information placed in this manner before the Magistrate was of a character likely to prejudice him against Appellant. In fact it is difficult to conceive of any other reason why the questions were asked.**

[82] In *R. v. Northey*, [1948] S.C.R. 135 the appellants were convicted in a judge alone trial. Inadmissible evidence was introduced. No mention of it was made by the trial judge in his reasons. After the British Columbia Court of Appeal ruled some of the evidence to be inadmissible, the trial judge purported to file a report under then s. 1020 of the *Criminal Code* (now s. 682 (1)) in which he wrote that the evidence played no part in his reasons for conviction. In addition, the British Columbia Court noted that the Crown had requested the trial judge deal with the offences without considering the impugned evidence ([1947] 4 D.L.R. 774, [1947] B.C.J. No. 10, para. 72).

[83] Nonetheless, the Supreme Court overturned the convictions and ordered a new trial. Taschereau J., as he then was, wrote:

> The principles enunciated in the above cases must be applied and govern the present case. Illegal evidence of a very damaging character was admitted at the trial, which was highly prejudicial to the accused. It is quite problematical to value all the effects of the admission of this illegal evidence, but it may safely be said, I think, that it may have seriously affected the cross-examination of the Crown witnesses, held out other evidence, and possibly changed the whole strategy of the defence. **It may also, and this is quite natural and understandable, have seriously influenced the learned trial judge, in the reaching of his conclusions, as it would have undoubtedly impressed unfavourably upon the minds of twelve jurors.**

[84] Similarly, in *R. v. Hanlon* (1958), 122 C.C.C. 384, [1958] N.J. No. 1, the Newfoundland Court of Appeal refused to invoke the proviso where an incriminating statement, and improper cross-examination had occurred, impacting on the character of the appellant. The trial judge's report said that without the statement he was satisfied the charge had been proved. Walsh C.J. wrote reasons, concurred in by Dunfield and Winter JJ. He described the correct approach as follows:

> 16 The accused had a right to have his guilt or innocence determined by the court on evidence properly admissible at his trial. The question before this Court, then, is whether or not the accused has had a trial upon proper evidence. It is clear that he has not had such a trial in this case, and under s. 592 (1) (a) of The Criminal Code the appeal should be allowed, unless the Court is of the opinion that no substantial wrong or miscarriage of justice has occurred, when the Court may dismiss the appeal under s. 592(1) (b). The case of *Northey v. The King*, 5 C.R. 386, [1948] S.C.R. 135, 91 C.C.C. 193, [1948] 3 D.L.R. 145, 3 Abr. Con. (2nd) 993, is similar to this case in that inadmissible evidence was received in a case tried by a judge without a jury. In that case it was held that the onus upon the Crown to satisfy the court that there would, without doubt, have been a conviction, had the illegal evidence been excluded, had not been discharged. The principle to be applied is dealt with in several other cases, including *Allen v. The King* (1911), 44 S.C.R. 331, 18 C.C.C. 1, 13 Can. Abr. 1522; *Stirland v. Director of Public Prosecutions*, [1944] A.C. 315 (a decision of the House of Lords); *Schmidt v. The King*, [1945] S.C.R. 438, 83 C.C.C. 207, [1945] 2 D.L.R. 598, 3 Abr. Con. (2nd) 991; *Boucher v. The Queen*, 20 C.R. 1, [1955] S.C.R. 16, 110 C.C.C. 263, 3 Abr. Con. (2nd) 999.

[85] In *R. v. Friesen* (1977), 9 A.R. 361, Kerans J., as he then was, refused to apply the proviso on appeal from a impaired driving conviction. Without objection,

the Crown led evidence that the appellant had provided one sample of his breath which produced a reading of 240 mg of alcohol in 100 ml of blood. Kerans J. wrote (p. 363):

> ...evidence of this sort, like evidence of a previous conviction, is potentially highly prejudicial to an accused because, whether or not it is admissible and whatever significance in law it has, it cannot help but have some effect against the accused on a trier of fact, particularly a judge sitting alone with a long experience...".

[86] The reasons of the trial judge contained no disclaimer nor any reference to the evidence. Kerans J., reasoned (p. 364):

> I am unable to say, therefore, with certainty that the learned trial judge directed his mind to the question now before me. The possibility of error exists and it cannot, therefore, be said with certainty that justice was done.
>
> To me the prejudicial effect of the evidence in question if not ignored is so great that if there is any possibility it was relied upon there was a substantial miscarriage of justice.

[87] In *Parent v. The King* (1947), 4 C.R. 127 (Que.K.B. App.) the Court, sitting in a panel of five, quashed a conviction and ordered a new trial. The appellant had been convicted of attempting to obstruct justice by dissuading witnesses from testifying. The trial was by judge alone. The Crown sought to introduce in rebuttal depositions made by its witnesses at the earlier hearing. The defence objected, but decision on the objection was reserved by the trial judge. The trial judge did not ever rule on the legality of the rebuttal evidence. In his reasons, the trial judge said he did not take the evidence into account. The Court was unanimous in quashing the conviction. The main judgment was written by Marchand J., who concluded (p. 146):

> Because there was in the trial of appellant admission of illegal evidence, because this evidences remains there, because our Court must quash the conviction, the benefit of the doubt regarding the substantial wrong that this illegality may have caused having to be given to the appellant, **and the assurance of the learned judge of first instance that he took no account of the evidence illegally admitted being insufficient to satisfy me of the impossibility of creating in his mind impressions that the Crown in offering it wished to produce,** I conclude that I must allow the appeal and order that the appellant undergo a new trial...

[88] These principles have also been applied by this Court. In *R. v. Ross* (1985), 72 N.S.R. (2d) 381 the appellant had been convicted by a Provincial Court Judge of perjury. The allegation stemmed from evidence she had given at a trial before Hall Co. Ct. J., (as he then was). In the course of proving the charge, the Crown tendered the transcript of the evidence she had given in the County Court. Included in the transcript were comments by Hall Co. Ct. J. that he was satisfied she was lying and "so far I think you probably have committed perjury." Jones J.A. gave the unanimous reasons for judgment. He observed that the comments by the County Court Judge were not admissible in the provincial court trial and were highly prejudicial.

[89] No summary is set out of the trial judge's reasons, but Jones J.A. noted that the trial judge expressly stated during the perjury trial he would not take the comments into account. At the sentence hearing the trial judge mentioned that Hall Co. Ct. J. had felt the same way as he had. This was sufficient to cause Jones J.A. to conclude the Court could not safely say that the impugned comments did not influence the trial judge, although he had intended to exclude them from his deliberations.

[90] In *R. v. Thorne* (1988), 82 N.S.R. (2d) 442 (S.C.A.D.) the appellant had been convicted of theft in a trial by judge alone before Palmeter Co. Ct. J. (as he then was). The Crown called a polygraph operator, Sgt. Peter Woolridge of the R.C.M.P. He had administered a polygraph test followed by conversation with the appellant in which the Crown was to argue constituted incriminating comments. The exact content, and import of the comments were in dispute. There was no issue as to the voluntary nature of the statements made by the appellant to Sgt. Woolridge. A *voir dire* was specifically waived.

[91] Instead of getting to the meat of the conversation between the appellant and Sgt. Woolridge, the Crown led evidence as to the procedure followed by Sgt. Woolridge in conducting the polygraph test. This included Sgt. Woolridge's recounting of having read the charts and then telling the appellant that "he wasn't telling me the complete truth today". The trial judge had earlier clarified with the Crown that it was not attempting to get into evidence "the results of the polygraph or anything of that nature".

[92] The trial judge's reasons made no reference to the polygraph results. On the content, and import of the appellant's alleged statements to Sgt. Woolridge, Palmeter Co. Ct. J. said (para. 14):

> With regard to the evidence of Sergeant Woolridge and the evidence of the accused there were certain statements placed before the court. Now, I do not know whether those statements are exculpatory or not. There were some questions, there were some answers given. In my opinion, those answers could be capable of any number of interpretations however, I do not have the slightest doubt in accepting the evidence of Sergeant Woolridge over the evidence of Mr. Thorne. I think Sergeant Woolridge asked those questions and I believe Mr. Thorne gave those answers but what those answers mean I am not prepared to say at this particular time. One of the problems we have in statements is where everything said by the parties is not written out. We always seem to get into this confusion. However, I do not think the matter has that much bearing on my own decision, but I make that comment that I do accept the evidence of Sergeant Woolridge.

[93] Macdonald J.A., writing for the Court, found that the polygraph evidence should not have been heard, as it prejudiced the character and credibility of the appellant. He was unable to say to what extent, if any the result was influenced by the impugned evidence of Sgt. Woolridge. He concluded:

> [26] The inadmissible evidence of Sgt. Woolridge may have consciously or unconsciously affected or influenced the decision of Chief Judge Palmeter on the issue of credibility and therefore on the ultimate issue of guilt or innocence. For such reason it is my opinion that the verdict cannot stand. I would not invoke the curative provisions of Code s. 613(1)(b) (iii) because I am not persuaded that had the inadmissible evidence not been received the verdict would necessarily have been the same.

[94] As these cases demonstrate, even where a trial judge has disavowed reliance on inadmissible evidence, if that evidence is highly prejudicial, an appellate court must be cautious about applying the proviso. Here the evidence was clearly inadmissible. Not only was most of it comprised of hearsay and opinion of Sgt. Blakeney, it was also near the apex of prejudicial. It demonstrated that the accused had a propensity to be involved in criminal activities, including the very allegation for which he was being tried. In the words of LeBel J., in *Handy*, evidence that demonstrates the accused's involvement in other criminal conduct can undermine the presumption of innocence, enshrined in ss. 7 and 11(d) of the *Canadian*

Charter of Rights and Freedoms. As I outlined earlier, even if the proviso is available in these circumstances, the verdict can only be upheld if the appeal court is satisfied the trial judge disabused himself from that evidence or was otherwise aware that it could not be considered. Here there is absolutely no indication that this occurred.

[95] My colleague writes that he is satisfied that the trial judge distanced the improper testimony from his analysis of identification (para. 139) and there is nothing in the reasons of the trial judge suggesting that the improper character evidence supported the finding of identification. With respect, this approach reverses the burden by requiring the appellant to demonstrate that the highly prejudicial evidence had an actual impact on the verdict. The burden is on the Crown to demonstrate that the impugned prejudicial evidence could not have consciously or unconsciously influenced the decision of the trial judge. This, in my opinion, they have failed to do.

CONCLUSION

[96] The verdict by the trial judge was not unreasonable, but the trial judge erred in permitting extensive bad character evidence. The trial judge was required to draw two inferences. The first was whether the blue/black mask with the appellant's DNA profile on it was used in the robbery. The second was whether the evidence was sufficient to satisfy him beyond a reasonable doubt that the appellant committed the robbery. Having heard copious evidence that the appellant was a criminal, known to the police to be involved in "these activities", the second inference became a foregone conclusion. The admission of the highly prejudicial evidence, in these circumstances, requires the conviction to be quashed. Since the Crown has not satisfied me that the proviso should be applied, the appellant is entitled to either an order for a new trial or an acquittal. Although the Crown's case was not overwhelming, I cannot say that a reasonable trier of fact, properly instructed could not reasonably conclude that the appellant was the offender. Hence, the convictions are quashed and a new trial is ordered, should the Crown in its discretion so choose.

Beveridge, J.A.

Farrar, J.A.

Dissenting reasons:

[97] A judge convicted Mr. O'Brien of robbery, disguise with intent and possession of a weapon, contrary to ss. 344, 351(2) and 88 of the *Criminal Code*. The robbery was captured on the store's security video. On the video, the robber wore a blue and black mask. The verdict turned on identification. There was no direct evidence implicating Mr. O'Brien. But the next day a blue and black mask was found in the vicinity, near both a knife similar to that used in the robbery and a component from the store's cash register. The inside of the mask had Mr. O'Brien's DNA and no other DNA or identifying material. The judge relied on the DNA to convict Mr. O'Brien. He sentenced Mr. O'Brien to six years, six months imprisonment.

[98] The police officer's direct testimony explaining how he obtained Mr. O'Brien's DNA included improper character evidence concerning Mr. O'Brien's prior criminal activity.

[99] Mr. O'Brien appeals his convictions and seeks leave to appeal his sentence.

Background

[100] On Monday, October 11, 2004, Barbara Coates was working at Top of the Hill Variety Store on Church Street in Amherst. Shortly after 10 PM someone entered the store wearing a Halloween mask and holding a large knife. The voice was male. He demanded money. Ms. Coates opened the cash register and backed away. The man scooped bills from the cash register and fled. Ms. Coates pushed the panic button, and the police came. The store's security camera captured the events.

[101] Later that evening Sgt. Robert MacPherson, one of the responding officers, found a green and black Halloween mask on the ground next to the curb on a nearby street. Sgt. MacPherson returned to the store and watched the security tape. The green and black mask did not match that worn by the robber on the video.

[102] Cpl. Richard Mosher is an RCMP dog handler. The morning after the robbery, Cpl. Mosher and his service dog searched the neighbourhood and the dog

found a blue and black Halloween mask and a plastic cover for a cash register among some trees. The dog found a large butcher knife nearby, similar to the one on the store's video of the robbery. Ms. Coates was shown photos of the masks. She said the blue and black mask was that worn by the robber. She said the green and black mask, found by Sgt. MacPherson the night before, was not the one. Donna Adelaide, the store's manager, identified the plastic cover as belonging to the store's cash register.

[103] The masks were tested for DNA. The interior surface of the blue and black mask showed a single profile, of an unknown male. The green and black mask showed mixed profiles, consistent with origins from four individuals.

[104] Amherst police officer Sgt. William Blakeney suspected Mr. O'Brien. In late 2005, a forensic DNA analysis order was issued to obtain Mr. O'Brien's DNA. The DNA expert testified that the lone profile on the blue and black mask matched Mr. O'Brien's DNA.

[105] Mr. O'Brien was charged with robbery, wearing a mask, and possession of a weapon (knife), contrary to ss. 344, 351(2) and 88 respectively of the *Code*. On April 8 and 9, 2009, he was tried in the Supreme Court of Nova Scotia before Justice John Murphy, without a jury. The Crown called nine witnesses, including Ms. Coates, Ms. Adelaide, Sgt. MacPherson, Cpl. Mosher, Sgt. Blakeney and a DNA expert Trisha Saul. The Crown's exhibits included the store's security videotape, the two masks, the knife and the plastic cover from the cash register. Mr. O'Brien did not testify and the defence called no evidence.

[106] Sgt. Blakeney's direct testimony, explaining how he obtained Mr. O'Brien's DNA for comparison to that on the mask, repeatedly recited that Mr. O'Brien was an inmate and had been convicted of offences in the past. The defence had not raised Mr. O'Brien's character as an issue. The defence neither objected nor asked that the evidence be limited to a narrative purpose, and the judge made no comment concerning improper character evidence.

[107] The judge convicted Mr. O'Brien of all three counts (2009 NSSC 194). After hearing sentencing submissions, he sentenced Mr. O'Brien to imprisonment for six years and six months for the robbery, two years concurrent for the mask count, and three years concurrent for possession of the knife (2009 NSSC 195).

Mr. O'Brien already was serving a sentence for other offences. The judge ordered that the six years, six months be consecutive to the prior sentence. Later I will discuss the judge's reasons for conviction and sentence.

[108] Under s. 675(1) of the *Code*, Mr. O'Brien appeals his convictions and seeks leave to appeal his sentence.

Issues

[109] Mr. O'Brien's factum describes his ground of appeal against the convictions:

> The learned trial Judge erred both in law and in facts by not giving the Appellant the benefit of the reasonable doubt by linking the piece of evidence being a blue and black Halloween mask with the Appellant's DNA profile on it to the robbery;

At the hearing in the Court of Appeal, Mr. O'Brien's counsel agreed that, for the purpose of the Court of Appeal's powers under s. 686(1)(a) of the *Code*, the submission against the convictions is that the verdict was unreasonable. Mr. O'Brien also appeals on the ground that the judge "erred in law by imposing a sentence that was unreasonable and demonstrably unfit." In argument, the sentence appeal focussed on the totality principle.

[110] Before the hearing, at the request of the panel, the clerk of the Court of Appeal wrote to counsel to request that counsel be prepared to answer the following questions:

> 1. What is the appropriate test in determining if a verdict is unreasonable or cannot be supported by the evidence where the crown's case is based on circumstantial evidence?
>
> 2. Even if the trial judge could properly find that the mask was used in the robbery, and it had the appellant's DNA on it, how does this establish that the appellant was the person that robbed the store?
>
> 3. The trial judge heard evidence about the criminal record and reputation of the appellant (Appeal Book pp 216-8). What was the basis for the judge to hear this evidence, and what impact, if any, does it have on the integrity of the trial?

In my view, the first and second questions in this letter relate to whether the verdict was unreasonable under s. 686(1)(a)(i) of the *Code*. The third relates to the character evidence from Sgt. Blakeney.

[111] Accordingly, I will discuss three issues: (1) unreasonable verdict; (2) improper character evidence and the proviso in s. 686(1)(b)(iii); (3) the sentence appeal.

First Issue- Unreasonable Verdict

[112] Since *R. v. Beaudry*, [2007] 1 SCR 190, this court has applied two tests to determine whether a verdict by a judge alone is unreasonable.

[113] The traditional test from *R. v. Yebes*, [1987] 2 S.C.R. 168 and *R. v. Biniaris*, [2000] 1 S.C.R. 381 is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. In *R. v. Barrett*, 2004 NSCA 38, ¶ 19, Justice Cromwell approved the statement that, "where the Crown's case is entirely circumstantial, the appellate court applying the unreasonable verdict test must determine . . . whether a properly instructed jury, acting judicially, could have reasonably concluded that the only rational conclusion to be reached from the whole of the evidence is that the appellant was guilty".

[114] In *Beaudry*, Justice Fish, dissenting on the result, said (¶ 98) that, on appeal from a decision of a judge without a jury, the traditional test should be reformulated:

> But where reasons do exist, a verdict cannot be reasonable within the meaning of s. 686(1)(a)(i) if it is made to rest on findings of fact that are demonstrably incompatible, as in this case, with evidence that is neither contradicted by other evidence nor rejected by the judge.

Justice Fish wrote for five justices on this point, four who dissented in the result and a fifth, Justice Binnie, who (¶ 79) agreed with Justice Fish's test but concurred with the majority on the result.

[115] Since *Beaudry*, this court has taken the approach that either the *Yebes/Biniaris* test or Justice Fish's test would establish the unreasonableness of a verdict by a judge alone: see *R. v. Abourached*, 2007 NSCA 109, ¶ 24-29, and

recently *R. v. West*, 2010 NSCA 16, ¶ 290, *R. v. Bishop*, 2009 NSCA 32, ¶ 6, *R. v. Kagan*, 2009 NSCA 43, ¶ 13, *R. v. R.S.D.L.* 2009 NSCA 74, ¶ 21, among others.

[116] At the hearing in the Court of Appeal, Mr. O'Brien's counsel acknowledged that the DNA evidence established a sufficient link between Mr. O'Brien and the mask. His argument was that there was insufficient connection between the mask and the robbery.

[117] The judge saw the mask and could compare it to the mask that appeared on the store's security video. He found that "the video clearly shows someone wearing a blue mask, or the blue and black mask." The mask was found near a knife that resembled the one used in the robbery. The mask was found near a piece of the cash register, identified as taken from the store. The defence called no evidence and nothing in the Crown's evidence supported any other explanation for the proximity between the mask and the robbery-related items.

[118] Mr. O'Brien's submission that the verdict is unreasonable because there is insufficient connection between the mask and the robbery, in my respectful view, should fail. The submission does not satisfy either Justice Fish's test from *Beaudry* or the *Yebes*/*Biniaris* test. There is no demonstrably inconsistent evidence. A properly instructed jury acting judicially could connect the mask to the robbery and determine that the only rational conclusion was that the robber wore that mask during the robbery.

[119] My colleague Justice Beveridge analyzes the question "What was the proper role of the DNA evidence?", concerning the identification of Mr. O'Brien, independently of whether there was an unreasonable verdict. I respectfully disagree with this separation of issues. There is no discrete legal issue raised on this appeal involving the DNA evidence. Rather the point is whether the judge gave the DNA evidence excessive probative value in the judge's identification of Mr. O'Brien as the culprit. This point is subsumed in the issue of whether the ultimate verdict is unreasonable. In *R. v. Mars*, [2006] O.J. No. 472 (C.A.) and *R. v. D.D.T.*, 2009 ONCA 918, cited by my colleague, the Ontario Court of Appeal considered whether the convictions, based on identification through fingerprint evidence, were unreasonable.

[120] My colleague agrees that the verdict was not unreasonable, but says, in discussing the DNA evidence, that the judge failed to ask the question - "can I draw the inference that the accused was the person who robbed the store?"

[121] With respect, the judge answered that question. He said:

> [13] . . . I am satisfied, based on the evidence of Ms. Saul, and based on her reports, that the DNA evidence establishes that the accused, Mr. O'Brien, was the person who committed the robbery on October the 11th, 2004.

[122] In answering that question, the judge chose to draw the inference of identification based on the DNA evidence. That is not asking the wrong question. Rather the issue is whether the judge either erred in law, or reached an unreasonable verdict by relying on the DNA evidence to identify Mr. O'Brien.

[123] I do not read *Mars* as establishing a rule of law that DNA evidence cannot suffice, without corroboration, for identification. Identification is an issue of fact that depends, as Justice Doherty said in *Mars* (¶ 19), on "the totality of the evidence". That evidence will vary from case to case. Similarly *R. v. Foster*, [2008] O.J. No. 827, cited by my colleague, lists (¶ 44) a number of cases where DNA evidence figured prominently, to differing degrees in the circumstances of each case, for identification. The issue is whether, given the evidence of the circumstances here, Justice Murphy's factual assessment transgressed the standard by which the Court of Appeal assesses the verdict's reasonableness.

[124] Before analyzing that issue, I will first reiterate the evidential context. Mr. O'Brien's DNA, and nobody else's DNA or identifying material, was inside the mask that had been worn by the robber some twelve hours earlier. That mask was found near both the knife used in the robbery and a plastic cover from the store's cash register. Nothing emanating from the Crown's evidence, or the cross-examination of the Crown's witnesses, suggests any alternative theory to explain how Mr. O'Brien's DNA may have arrived on the mask worn by the robber. The defence offered no evidence. Subject to the single item I will discuss next, the record of evidence is devoid of support for an alternative explanation.

[125] Mr. O'Brien's counsel points to an exchange from the cross-examination of the Crown's DNA expert, Ms. Saul:

Q. Okay. Thank you. Okay. Now this morning you made a couple of comments with respect to ... with your knowledge of DNA, things that would affect the collection of DNA, such as rough surfaces, time weather, whatever. Is it safe to say that DNA is not going to be left on every item touched by a person?

A. It's possible that a transfer may not occur in ...

Q. Those are my questions.

Ms. Saul's earlier testimony was:

Q. Okay, and are there any services [*sic*-surfaces] which are more likely or are better for retaining DNA or bodily parts that are ... what's the best type of material to retain that?

A. I know studies have shown ... well, again, it depends on if somebody's handling an object and the surface is a bit rough and porous, it might be more inclined to transfer material, handling an object such as that over a smooth surface.

Q. Okay. So just as a comparison, perhaps using objects in this case. The handle of a knife blade as opposed to the inside of a mask, would there be any ... what would the comparative merits of those two things be as far as DNA collection?

A. It's a little bit difficult to speak to because there's a number of things that could affect the transfer. For example, like, on a knife, if depending on, perhaps, the length of time ... I know studies have shown that some people naturally slough more skin cells than others. If a person's hand is sweaty, it might be more inclined to transfer material than if it's just cool and dry.

Q. So it's variable and ...

A. It's ... yeah.

Q. All right.

A. It's variable.

Counsel cites this as evidence that someone else may have committed the robbery and left no DNA.

[126] I disagree that Ms. Saul's answer supports a conclusion that the verdict is unreasonable.

[127] In *R. v. Torrie* (1967), 3 C.C.C. 303 (O.C.A.), at p. 306, Justice Evans said:

> **9** With the greatest respect, I am of the opinion that the learned trial Judge misapplied the rule in Hodge's Case (1838), 2 Lewin 227, 168 E.R. 1136, as to circumstantial evidence in that he based his finding of reasonable doubt on non-existent evidence. In R. v. McIver, [1965] 1 O.R. 306 at p. 309, [1965] 1 C.C.C. 210 at p. 214, McRuer, C.J.H.C., said:
>
> > The rule (in Hodge's Case) makes it clear that the case is to be decided on the facts, that is, the facts proved in evidence, and the conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts. No conclusion can be a rational conclusion that is not founded on evidence. Such a conclusion would be a speculative, imaginative conclusion, not a rational one.
>
> This statement was approved on appeal to this Court [1965] 2 O.R. 475, [1965] 4 C.C.C. 182, 45 C.R. 401, and an appeal therefrom to the Supreme Court of Canada was dismissed [1966] S.C.R. 254, [1966] 2 C.C.C. 289, 48 C.R. 4.
>
> **10** I recognize that the onus of proof must rest with the Crown to establish the guilt of the accused beyond a reasonable doubt, but I do not understand this proposition to mean that the Crown must negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused.

The Supreme Court of Canada and this court have adopted Justice Evans' comments: *Wild v. The Queen*, [1971] S.C.R. 101, at pp. 110-11; *R. v. Bagshaw*, [1972] S.C.R. 2, at pp. 7-8; *R. v. Halliday* (1975), 12 N.S.R. (2d) 1 (C.A.), ¶ 20; *R. v. Burns* (1975), 13 N.S.R. (2d) 127 (C.A.), ¶ 22; *R. v. Villeneuve* (1979), 30 N.S.R. (2d) 326 (C.A.), ¶ 12; *R. v. Johnson* (1995), 141 N.S.R. (2d) 133 (C.A,), at ¶ 112; *R. v. Taylor*, 2008 NSCA 5, ¶ 38-39. In *Wild*, p. 116, Justice Martland distinguished "a conjectural possibility, arising from those facts, and a rational conclusion arising from the whole of the evidence". See also *Bagshaw*, p. 8.

[128] There is no evidence here of a condition that would inhibit the transference of the robber's DNA. There is not even a conjectural suggestion of an alternative hypothesis how Mr. O'Brien's DNA arrived on the mask worn by the robber.

[129] With that context for the judge's finding, in my view, under the *Yebes/Biniaris* test, a properly instructed jury acting judicially could accept that the only rational conclusion was that Mr. O'Brien's DNA identified him as the culprit. Under Justice Fish's test from *Beaudry*, the identification of Mr. O'Brien from the DNA is not demonstrably incompatible with other evidence.

[130] I would dismiss Mr. O'Brien's ground of appeal respecting the reasonableness of the verdict.

Second Issue- Character Evidence and s. 686(1)(b)(iii)

[131] My colleague's reasons quote the full passages from the Crown's direct examination of Sgt. Blakeney. In short, when asked what steps were taken after the DNA samples from the masks were sent for testing, Sgt. Blakeney replied that (1) he suspected Mr. O'Brien, (2) interviewed Mr. O'Brien in the county jail, (3) learned that there was a DNA order against Mr. O'Brien from Mr. O'Brien's involvement in other offences, (4) visited Mr. O'Brien again in the Springhill jail, then, (5) "knowing that Marty O'Brien was then an inmate in Dorchester Institution", went to Moncton to have a judge endorse the warrant for a DNA sample, and finally (6) went to Dorchester penitentiary to meet Mr. O'Brien. Defence counsel (not Mr. O'Brien's appeal counsel) cross-examined by reiterating to Sgt. Blakeney "...you knew Mr. O'Brien to be known as an offender", to which Sgt. Blakeney obligingly replied "...I know his criminal background, and it was common knowledge within our office and within the RCMP detachment in Amherst that Marty O'Brien was an active criminal".

[132] The defence had not made Mr. O'Brien's character an issue. Nobody objected about propensity evidence, or asked that Sgt. Blakeney's testimony be limited to a narrative purpose. The judge said nothing about it. The Crown did not mention the character evidence in its closing submission before the verdict. Mr. O'Brien did not raise it as a ground of appeal in his notice of appeal or factum.

[133] Before the hearing of the appeal, the clerk of the court, at the panel's request, wrote to counsel and asked that they be prepared to address the issue of character evidence. At the hearing, the Crown acknowledged that the evidence was improper, and waived any concern about Mr. O'Brien's failure to object at trial or to raise the point in his notice of appeal. The Crown acknowledged that the judge erred in law by neither excluding the character evidence nor qualifying its purpose. The Crown submitted, however, that there was no substantial wrong or miscarriage of justice and that the Court should apply the proviso in s. 686(1)(b)(iii) of the *Code*.

[134] I agree with Justice Beveridge that the judge erred in law, notwithstanding the defence's failure to object. Sgt. Blakeney could narrate how he proceeded with the DNA investigation: *McWilliams' Canadian Criminal Evidence*, 4th ed., ¶ 9:30.20.10.1, pp. 9-21 and 9-22. But a narrative that he simply obtained Mr. O'Brien's DNA by warrant would have done nicely. Sgt. Blakeney's gratuitous repetition that Mr. O'Brien was an inmate and had committed other offences crossed the line. The Crown should not have elicited that evidence. The defence should have objected. The judge should have intervened. The only issue is whether the proviso in s. 686(1)(b)(iii) applies.

[135] In *R. v. Khan*, [2001] 3 S.C.R. 823, Justice Arbour for the majority reviewed the principles governing the application of the proviso in s. 686(1)(b)(iii):

> 26 Most of the case law dealing with the nature of the error of law contemplated by s. 686(1)(a)(ii) arises in the context of the curative proviso which brings about an assessment of the nature and the seriousness of the error. There are essentially two classes of errors which have been identified by reviewing courts and which have led to a proper application of the proviso. The first category is that of so-called "harmless errors", or errors of a minor nature having no impact on the verdict. The second category encompasses serious errors which would justify a new trial, but for the fact that the evidence adduced was seen as so overwhelming that the reviewing court concludes that there was no substantial wrong or miscarriage of justice.
>
> 27 In every case, if the reviewing court concludes that the error, whether procedural or substantive, led to a denial of a fair trial, the court may properly characterize the matter as one where there was a miscarriage of justice. In that case, no remedial provision is available and the appeal must be allowed. I will now examine these propositions in more detail.

28 This Court has enunciated on numerous occasions the proper test for the application of the curative proviso (see *Colpitts v. The Queen*, [1965] S.C.R. 739; *Wildman v. The Queen*, [1984] 2 S.C.R. 311; R. v. B. (F.F.), [1993] 1 S.C.R. 697; *R. v. Bevan*, [1993] 2 S.C.R. 599). It can only be applied where there is no "reasonable possibility that the verdict would have been different had the error ... not been made" (*Bevan*, *supra*, at p. 617).

29 The jurisprudence reveals that the proviso will generally be applied, in accordance with the above principles, in two types of situations. A. W. Mewett has described the two possible approaches in "No Substantial Miscarriage of Justice", in A. N. Doob and E. L. Greenspan, eds., *Perspectives in Criminal Law* (1985), 81, at p. 94:

> What we see are again two fundamentally different views of the application of the proviso. One view proceeds on the basis of asking whether, absent the error or wrongly admitted evidence, the rest of the evidence is so overwhelming as to make the outcome of a retrial a virtual certainty; the other of asking whether, ignoring the rest of the evidence, the jury might have been influenced by the error or the wrongly admitted evidence.

On the one hand, appellate courts will maintain a conviction in spite of the errors of law where such errors were either minor in themselves or had no effect on the verdict and caused no prejudice to the accused. This accords with the original purpose of the section, as described early on by Taschereau J., writing for the majority of this Court, in *Chibok v. The Queen* (1956), 24 C.R. 354, at p. 359:

> It would indeed be a shocking impediment to the proper administration of criminal justice, if criminals were allowed to go free because of a trivial error in law or of an oversight of no material consequence. [Emphasis in *Khan*]

As stated by Lamer C.J., for the Court, in *R. v. Tran*, [1994] 2 S.C.R. 951, at p. 1008, "[s]ection 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."

30 The case law is replete with examples of situations where either the triviality of the error itself, or the lack of prejudice caused by a more serious error of law, justified the application of the curative proviso (see *R. v. Jolivet*, [2000] 1 S.C.R. 751, 2000 SCC 29; *R. v. Stone*, [1999] 2 S.C.R. 290; *R. v. Ménard*, [1998] 2 S.C.R. 109; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Rockey*, [1996] 3 S.C.R. 829; *R. v. MacGillivray*, [1995] 1 S.C.R. 890; *R. v. Haughton*, [1994] 3 S.C.R.

516; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Gunn v. The Queen*, [1974] S.C.R. 273; *Chibok, supra*; *R. v. Klatt* (1994), 94 C.C.C. (3d) 147 (Alta. C.A.); *R. v. Wong* (1992), 12 B.C.A.C. 211). In all those cases, the appellate courts were convinced that the error could have had no effect on the verdict. Because of the nature of the errors and of the issues with respect to which they were made, it was possible to trace their effect on the verdict and ensure that they made no difference. Generally, the errors concerned evidence that was insignificant to the determination of guilt or innocence (*Gunn, supra*; *Wong, supra*; *United Nurses, supra*; *Klatt, supra*) or benefited the accused by imposing a more onerous standard on the Crown (*MacGillivray, supra*; *Haughton, supra*). Errors in the charge to the jury respecting a very minor aspect of the case that could not have had any effect on the outcome or concerning issues that the jury was otherwise necessarily aware of were also cured by the application of the proviso (*Jacquard, supra*; *Jolivet, supra*; *Ménard, supra*; *Chibok, supra*). Similarly, in some cases the errors concerned preliminary findings that would nevertheless, as a matter of law, inevitably have resulted in the same finding made by the trial judge (*Rockey, supra*; *Stone, supra*).

31 In addition to cases where only a minor error or an error with minor effects is committed, there is another class of situations in which s. 686(1)(b)(iii) may be applied. This was described in the case of *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, at p. 916, where, after stating the rule that an accused is entitled to a new trial or an acquittal if errors of law are made, Sopinka J. wrote:

> There is, however, an exception to this rule in a case in which the evidence is so overwhelming that a trier of fact would inevitably convict. In such circumstances, depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction.

Therefore, it is possible to apply the curative proviso even in cases where errors are not minor and cannot be said to have had only a minor effect on the trial, but only if it is clear that the evidence pointing to the guilt of the accused is so overwhelming that any other verdict but a conviction would be impossible (see *R. v. Nijjar*, [1998] 1 S.C.R. 320; *Alward v. The Queen*, [1978] 1 S.C.R. 559; *Ambrose v. The Queen*, [1977] 2 S.C.R. 717; *Dufresne v. La Reine*, [1988] R.J.Q. 38 (C.A.); *R. v. Welch* (1980), 5 Sask. R. 175 (C.A.)).

[136] Recently, in *R. v. Van*, [2009] 1 S.C.R. 716, Justice LeBel said:

34 It is worthwhile taking one small step back for a moment to acknowledge that not every error in a criminal trial warrants appellate intervention. Under s. 686(1)(a) of the Criminal Code, an appeal against a conviction may be allowed

> only in the event of an error of law, an unreasonable verdict, or a miscarriage of justice. In this case, it is not disputed that the failure to give a limiting instruction is an error of law that falls within s. 686(1)(a)(ii) and that the appeal could therefore have been allowed. However, it still falls to this Court to determine whether the convictions can be upheld despite the existence of an error, with resort to s. 686(1)(b)(iii) of the Code. Under this provision, a conviction can be upheld providing that the error has not resulted in a substantial wrong or a miscarriage of justice. The Crown bears the burden of showing the appellate court that the provision is applicable, and satisfying the court that the conviction should stand notwithstanding the error. To do so, it must establish that the error of law falls into one of two categories. First, that it is an error so harmless or minor that it could not have had any impact on the verdict. In the second category are serious errors that would otherwise justify a new trial or an acquittal, but for the fact that the evidence against the accused was so overwhelming that any other verdict would have been impossible to obtain: *Khan*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239.

To the same effect: *R. v. Trochym*, [2007] 1 S.C.R. 239, ¶ 81 and 190; *R. v. Charlebois*, [2000] 2 S.C.R. 674, at ¶ 10-11; *R. v. Jaw*, [2009] 3 S.C.R. 26, ¶ 42; *R. v. Ellard*, [2009] 2 S.C.R. 19, ¶ 40; *R. v. West*, 2010 NSCA 16, ¶ 37.

[137] The initial question, then, is whether the error was minor or serious. In my view, this was not a serious error, and the issue is whether the error could have affected the result. The defence did not object to Sgt. Blakeney's evidence and, in fact, reiterated it during cross examination. It was not a ground of appeal. Absence of an objection to improper evidence is an indicator that, in the defence's view, the matter was not serious: *R. v. Daley*, [2007] 3 S.C.R. 523, ¶58; *Jaw*, ¶ 44; *Van*, ¶ 43.

[138] The character evidence was not mentioned in the Crown's argument. A trial judge is experienced in distancing irrelevant evidence, for instance a disallowed confession or similar fact evidence heard in a *voir dire*. As I will discuss, I am satisfied that Justice Murphy distanced the improper testimony from his analysis of identification.

[139] A jury leaves no written reasons, and the appeal court "cannot, of course, peer into the jury room": *R. v. Illes*, [2008] 3 S.C.R. 134, ¶ 22. So the speculative exercise to divine what a jury might have done, but for the error, often means that the Crown cannot satisfy its onus under the proviso: for instance *Illes*, ¶ 22-23.

[140] But the appeal court may peer at a judge's reasons. The reasons are a resource to assist the appeal court's assessment of whether the error affected the verdict. Of course, if the reasons leave room for doubt, then the Crown has not satisfied its onus and the proviso cannot save the conviction. For instance *R. v. Noble*, [1997] 1 S.C.R. 874, ¶ 115-17 and *R. v. S.(P.L.)*, [1991] 1 S.C.R. 909, ¶ 13.

[141] *R. v. Leaney*, [1989] 2 S.C.R. 393 offers guidance on the appeal court's use of the judge's written reasons in the application of the proviso. Justice McLachlin for the majority said:

> 37 Given the trial judge's clear statement that he arrived at his conclusion as to identity independently of the evidence of the police officers, their evidence assumes the character of mere surplusage, which does not vitiate the judge's conclusion that Leaney was one of persons shown on the video screen. To put it another way, the judge, properly instructing himself, concluded beyond a reasonable doubt that Leaney participated in the break-in. The fact that the judge had before him inadmissible evidence does not impair that independent conclusion, if he did not rely on the inadmissible evidence in reaching it.
>
> 38 It was also argued that quite apart from whether Leaney suffered actual prejudice as a result of the reception of the inadmissible evidence, its admission, and particularly the admission of the evidence of the four police officers who testified as to the identity of the persons shown on the video despite no familiarity of the accused, created an appearance of unfairness which amounted to a miscarriage of justice, making s. 613(1)(b)(iii) of the *Criminal Code* inapplicable: see *R. v. Hertrich* (1982), 137 D.L.R. (3d) 400 (Ont. C.A.), per Martin J.A. I cannot accept this submission. There is no appearance of unfairness where the judge expressly arrives at his or her conclusion on the critical issue independently of the inadmissible evidence. Judges often hear evidence which turns out to be inadmissible, for example on *voir dires*. So long as the judge does not consider such evidence in arriving at his or her independent conclusion, no unfairness can be said to arise, nor has there been a miscarriage of justice.

Chief Justice Lamer (dissenting in part) wrote separately:

> 21 Furthermore, the trial judge made it clear that he had arrived at his conclusion irrespective of what the sergeant or the others had to say. While no doubt is cast on the sincerity of the judge's assertion, one might argue that the circumstances cast doubt on its accuracy or at least on the appearances thereof.

> We constantly ask jurors to disregard what they know through reading the papers or viewing telecasts of the news; we tell them to disregard certain answers given by witnesses; we tell them that while certain evidence may be used for one purpose, we will trust them not to use it for another. I do not see why judges cannot be trusted for same. In fact, our judges hold *voir dires* on confessions and sometimes reject them on grounds that in no way cast doubt on their accuracy; they are expected to and are accepted as being capable of deciding innocence or guilt without using their knowledge of the accused's admission of guilt in the rejected confession. So, if Plomp Prov. Ct. J. says that he identified Leaney on the video independently and without the aid of the identification of Sergeant Cessford, I am satisfied that there has not been any substantial wrong or miscarriage of justice, nor appearance thereof. I would therefore uphold Leaney's conviction for the break and enter.

[142] In *R. v. Beals* (1994), 130 N.S.R. (2d) 177 (C.A.), Justice Hallett in this court referred to *Leaney*, then said:

> 45 . . . The learned trial judge found the evidence of Clark and Tran on the key issue of identification to be reliable. Therefore we know the foundation of his conclusion that the appellants were guilty of the Clark and Tran robberies. This eliminates having to speculate as to the basis of the verdict as was the concern of the majority in *R. v. B. (FF), supra*. In that case the majority held that the jury had not been adequately instructed as to the limited use it could make of certain evidence. Not knowing how the jury reached its verdict the Supreme Court of Canada ordered a new trial despite the abundance of evidence pointing to the guilt of the accused. In the appeal we have under consideration we know from his **reasons** that the learned trial **judge** considered the victim's identification of the appellants as the robbers, bolstered by the similar fact evidence and the fact that each of the victims separately identified the same two photos as pictures of the assailants, was reliable.
>
> 46 I am satisfied that a trial judge or jury applying the law correctly to the evidence could not possibly entertain a reasonable doubt as to the guilt of both appellants for the robberies of Clark and Tran. The evidence of guilt was overwhelming and neither appellant testified. I would therefore dismiss the appeal by the application of s. 686(1)(b)(iii) of the *Criminal Code*. There has not been a miscarriage of justice in this case, notwithstanding the learned trial judge's apparent failure to instruct himself correctly on the use of the evidence.
> [Justice Hallett's emphasis]

[143] So it is necessary to examine Justice Murphy's written reasons and determine whether the evidence about Mr. O'Brien's criminal past could have had

any effect on the verdict. To this point, my analysis corresponds to that of my colleague. It is in the interpretation of Justice Murphy's written reasons that I differ with Justice Beveridge.

[144] After quoting the charges, Justice Murphy's decision referred to the store's security video, then said:

> [3] . . . The video shows the money was taken. It shows that the person who took the money had a knife, and it also shows that the person who took the money was wearing a mask. So subject to identification, the other elements of the offence are not in issue.

The rest of the decision deals with the lone issue – identification.

[145] The judge then said "[t]he evidence with respect to identification is circumstantial", and added an admonition:

> [5] . . . there is a long history of authority that recognizes that a court must tread cautiously with respect to eyewitness identification evidence, and that continues with respect to scientific evidence, including DNA evidence, and I'm bearing that in mind in reaching my decision, that there is a high burden on the crown to prove beyond a reasonable doubt, and the court must scrutinize any evidence with respect to identification very carefully.

[146] He referred to the testimony respecting the robber's clothing and vehicle and said:

> [6] . . . There is nothing in the witness' oral testimony, in Ms. Coates' oral testimony, which is conclusive with respect to identification.

[147] The judge found that the blue and black mask was the one worn by the robber. His reasons stated the evidence on which he relied for this finding:

> [6] . . . We then have the circumstantial evidence of a blue mask being found the following morning a short distance from the store, on a route which leads toward the car. We also have the knife and the cash register part found the following day close to the blue mask. I am satisfied that the circumstantial evidence is strong and sufficient to prove beyond a reasonable doubt that there is a connection between the blue mask and the robbery of the convenience store at Top of the Hill on the previous evening.

> [7] Given the fact that the video clearly shows someone wearing a blue mask, or the blue and black mask, it clearly shows the use of a knife, and the evidence from the person who was in charge of the cash at the store, who returned to the store that night, clearly links the cash register part found to the cash register, because her notations and notations of others were on it. I am satisfied that the evidence establishes that the blue mask was associated with the robbery, and I am convinced of that beyond a reasonable doubt.

Sgt. Blakeney's character evidence played no role in this finding.

[148] The judge then narrowed his focus on the identification issue exclusively to the DNA evidence:

> [8] The question then becomes whether the mask is connected to the accused, to Mr. O'Brien beyond a reasonable doubt, and that depends, as I have indicated, entirely on the DNA evidence.

The judge's earlier comment, to which this quotation refers, was:

> [6] . . . The identification issue in this case really boils down to the DNA evidence.

[149] Paragraphs 8 through 14 of the judge's reasons then discuss exclusively the DNA evidence, particularly the report of the Crown's DNA expert Ms. Saul. The judge concludes:

> [13] We now go to the conclusion of the expert, as set out in paragraphs 19 and 20 of the report. I am satisfied, based on the evidence of Ms. Saul, and based on her reports, that the DNA evidence establishes that the accused, Mr. O'Brien, was the person who committed the robbery on October the 11th, 2004. The evidence establishes that his...I have indicated that I am satisfied on the evidence that the mask in question was the mask used in the robbery, and the DNA evidence clearly ties Mr. O'Brien to that mask. The report, exhibit 19, indicates that, in paragraph number 1 under conclusions:
>
> > The DNA typing profiles obtained from human biological material found on areas AA, interior surfaces surrounding eyes, nose, mouth and chin, and AB, remaining interior surfaces, of Exhibit 5 (black and blue mask -) are that of an unknown male individual personally designated "M1".

> [14] And if we go to exhibit 20, the conclusion there, which I accept, I find that the evidence establishes beyond a reasonable doubt that the conclusion in paragraph number 1 of report number 20 is supported, which says as follows:
>
> > The DNA typing profiles obtained from Exhibit 5...(the mask)...**match** that of the known sample... [Ms. Saul's emphasis]
>
> Which was the sample of Mr. O'Brien's DNA which was sent for analysis, referred to as exhibit 9 in report number 20. The report then goes on to conclude:
>
> > The estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population...is 1 in 33 billion.
>
> [15] So I am satisfied beyond a reasonable doubt in this case that the accused, Mr. O'Brien, Mr. Marty David O'Brien, is the person who committed the robbery referred to in the first count of the indictment. I am also satisfied that he, with intent to commit an indictable offence, had his face covered with the mask, and finally that he had in his possession a weapon, the knife referred to in count number three.
>
> [16] So just to summarize, the DNA evidence establishes the accused's identity as the robber beyond a reasonable doubt, ties him to the blue mask which was found, which I have indicated, based on circumstantial evidence, is clearly the mask that was used in the robbery.

[150] The judge's decision says that he relied "entirely on the DNA evidence" to identify Mr. O'Brien. His detailed reasons show that he relied entirely on the DNA evidence. Sgt. Blakeney's propensity evidence played no part in the convictions and "assumes the character of mere surplusage", as did the improper evidence in *Leaney*, ¶ 37.

[151] Justice Beveridge says that I have reversed the burden by requiring Mr. O'Brien to demonstrate that the improper evidence had no impact. With respect, this misconstrues my reasoning. The trial judge's written reasons satisfy me affirmatively that the improper evidence had no impact. This, in my view, satisfies the Crown's burden under the proviso. The judge's words that he relied "entirely on the DNA evidence" to connect Mr. O'Brien to the robbery exclude any imputation to the judge of a veiled line of reasoning sourced in Sgt. Blakeney's problematic testimony. My colleague does not explain how such a veiled line of reasoning can co-exist with the judge's clear statement that he relied "entirely on

the DNA evidence." My colleague says that if the judge had "arrived at his conclusion by expressly relying on evidence untainted by the impugned evidence", he might take a different view of the proviso. By my reading of the decision, that is what the judge did.

[152] Justice Beveridge refers to the concluding paragraph in Justice Murphy's decision:

> [17] Just to make a couple of comments on the submission on behalf of the accused. There was a submission made that the video did not show the cash register cover being removed. I am unable to determine from the video. I acknowledge, I have considered that comment by Ms. Franklin, but the evidence is overwhelming that the accused is the person who committed the robbery, and I cannot determine from the video whether he removed part of the cash register at the time, nor can I determine whether he was wearing gloves. So there is not, those points do not raise a reasonable doubt in my mind, in view of all the other evidence which clearly establishes the accused's guilt beyond a reasonable doubt. So for those reasons, I find that Mr. O'Brien is guilty with respect to the three counts in the indictment before the court dated January 30th, 2009.

This passage refers to a submission by Mr. O'Brien's counsel about the content of the video. The judge's words "the evidence" and "other evidence" mean the evidence other than the video. The words refer to the DNA evidence that exclusively occupied the previous nine paragraphs of the judge's reasons on the identification issue, and to the blue-black mask found next to the robbery-related items, which occupied the two paragraphs before that, as I have outlined. Nothing in the decision suggests, even obliquely, that Sgt. Blakeney's improper character testimony figured in the identification.

[153] In my view, the admission, without qualification for narrative purpose, of Sgt. Blakeney's improper character evidence is an error of law that caused no substantial wrong or miscarriage of justice under s. 686(1)(b)(iii). I would dismiss the appeal against the convictions.

Third Issue- Sentence

[154] The judge sentenced Mr. O'Brien to six years and six months for the robbery, two years concurrent for the mask, and three years concurrent for the

weapon. The sentence was consecutive to the term of imprisonment Mr. O'Brien was already serving for other unrelated offences.

[155] Mr. O'Brien submits that the six years and six months violated the totality principle. The following extract from his factum summarizes the submission:

> 48. The Appellant was serving prisoner at the time charges were laid. On December 12, 2004 the Appellant was convicted of the following offences: impaired driving contrary to s. 253(b) of the Criminal Code of Canada, 2 counts of theft under $5,000 contrary to s. 334(b) of the Criminal Code of Canada, possession of drugs for the purpose of trafficking contrary to s. 5(2) of the Controlled Drugs and Substances Act, 2 counts of break and enter contrary to s. 348(1) of the Criminal Code of Canada, 3 counts of driving while disqualified contrary to s. 259 of the Criminal Code of Canada, and 2 counts of theft contrary to s. 334 of the Criminal Code of Canada. The total sentence imposed was 60 month[s]. On May 15, 2006 the Appellant was convicted of counseling to commit robbery contrary to s. 344 of the Criminal Code of Canada. The sentence imposed was 2 years consecutive to sentence serving.
>
> 49. On April 21, 2009 the Honourable Justice John Murphy imposed a total sentence of 6 and a half years for the offences currently under this appeal, which makes the total period the appellant has to spend in custody thirteen and a half years.
>
> 50. In my respectful submission, as the appellant was serving prisoner at the time of the sentence, the totality principle should have an influence. The appellant was sentenced three times over the past five years. The total time of thirteen and a half years in custody would impose a crushing effect on the appellant.

[156] I am unable to agree.

[157] Mr. O'Brien, wearing a mask and wielding a large knife, robbed a solitary defenseless clerk at night.

[158] The judge's sentencing decision noted (¶ 9) that Mr. O'Brien "has been in constant conflict with the law for approximately 30 years with approximately 70 convictions for various offences, many of them serious, including a previous robbery conviction and break and enter convictions". The judge (¶ 7) properly referred to this record as an aggravating factor.

[159] As to mitigating factors, the judge said:

> [8] Frankly, there are no mitigating circumstances which have been pointed out in this case.

None were pointed out on appeal either.

[160] The sentence was within the range, given the circumstances of the offences and Mr. O'Brien's record. The judge properly referred to the decision of this court in *R. v. Longaphy* (2000), 189 N.S.R. (2d) 102 (C.A.), which said:

> [27] In my view, the sentencing judge erred in concluding that here a penitentiary term of two years or more imprisonment was not appropriate. The considerations to be taken into account when determining sentence for robbery have been reviewed by this court in numerous cases. It has emphasized that the primary consideration in cases of armed robbery must be protection of the public: see, for example, *R. v. Brewer* (1988), 81 N.S.R. (2d) 86 at § 8.

The judge also properly referred to *R. v. Leet* (1989), 88 N.S.R. (2d) 161 (C.A.):

> [14] Robbery is a very serious offence, carrying a maximum punishment of imprisonment for life. The sentencing court is thus left with a very wide discretion as to the penalty in any given case. Rarely is a sentence of less than two years seen for a first offence and terms ranging up to six years are commonly imposed. In the more serious robberies, including those committed in financial institutions and private dwellings, the range has generally been from six to ten years.

[161] At the sentencing, the Crown recommended 9 to 12 years, and the defence recommended 5 to 6 years. The judge's sentence was much closer to the defence's request than to the Crown's.

[162] Section 718.2(c) of the *Code* cites a totality principle respecting consecutive sentences. The sentences for the three offences here were concurrent. So Mr. O'Brien's submission relates to totality between his sentence of six years plus six months here and his existing sentences for prior convictions, to which the sentence here was consecutive. The submission effectively would turn Mr. O'Brien's prior record, for which he was serving time, into a mitigating factor instead of an aggravating factor.

[163] This court recently discussed sentencing totality in *R. v. Adams*, 2010 NSCA 42, ¶ 19-30 and 65-69. I adopt, without repeating, Justice Bateman's statement of principles in *Adams*. Mr. O'Brien's sentence is within the range, given the circumstances and his record, is not unfit, and does not offend any principle of totality under s. 718.2(c) of the *Code* or the authorities.

Conclusion

[164] I would dismiss the appeal against the convictions, and grant leave to appeal but dismiss the appeal against sentence.

Fichaud, J.A.