# PRE-TRIAL

## THE CHARGING STANDARD:

Crown must discharge standard, determine 2 tests:

**(1) Evidentiary test** = **substantial likelihood of conviction**, considering: (a) what material evidence is likely going to be admissible; (b) weight likely given to it; (c) likelihood of viable (not speculative) defences will succeed

*exceptional circumstances may not require evidentiary test (then is reasonable prospect of conviction)

**(2) Public interest test**: case-by-case analysis, consider nature of crime and the nature of the accused (age, intelligence, mental health etc.)

### CHALLENGING CHARGE APPROVAL

**Crown in quasi-judicial role; judges cannot review easily** (*Nixon*)

*Nixon* – Crown repudiated on agreement. A argued AOP.

Prosecutorial discretion [incl bring prosecution, enter stay, accept plea, withdraw, take control of priv pros] is ***only*** subject to review for **abuse of process** (engaged under **s.7**) *see below*

*Reyat* – terrorist attacks, argues indictment was AOP and contrary to double jeopardy – sought disclosure of internal Crown documents. Will only allow disclosure of these documents if A meets test (*see* disclosure)

## ABUSE OF PROCESS – merged under **s.7** in *O'Connor* (FA&D)

*A has **evidentiary threshold** if alleging AOP that shows ***reasonable basis***, then onus shifts to Crown to tell court about circumstances and reasons (ultimate burden remains with A)

Then, AOP (violation of **s.7**) must be proved on a **BOP**.

(1) Conduct affecting the fairness of the trial = **actual prejudice** [does not require misconduct] → breach of FA&D

(2) Conduct that contravenes fundamental notions of justice and thus undermines the integrity of the judicial process [does not require prejudice] – undermine's soc's expectations of fairness

Proof of misconduct, improper motive, bad faith (*Nixon*)

**REMEDY → see 24(1)**

## THE INDICTMENT

**Crown must prove all essential elements** (except date & place – s.601(4.1))**, including particularizations, BARD** bc of FA&D *(Saunders)*

*R(G)* – A acquitted of incest; Crown argued that based on evidence was guilty of sex-assault, argued they were included offences BUT lack of consent was not part of charge or what Crown proved. **A must be given notice of the charge they must meet**.

s.581(3) provides that an information must provide sufficient detail of the charge the accused must meet (so A can identify transaction)

EXCEPTIONS to particularization: *all subject to prejudice

**(1) SURPLUSAGE** – element is not essential to constitute the offence (*JBM*)

**(2) NOTICE OF HIGHER PENALTY** (*Moore* – incl handgun in particulars)

**(3) SHOPPING LIST** (*Millington* – 10 particularized allegations of false statements under 1 count). **Not necessary for Crown to prove each allegation if under 1 count → can convict if Crown proves 1 BARD.**

**AMENDMENTS** (*Harris*)

**s.601 gives Crown the power to amend the charge, s.686(1)(b)** gives appeal court ability to amend charge

Court considers (4) matters disclosed by evidence in prelim & at trial, circumstances of case, whether A has been prejudiced, whether amendment can be made without injustice. → **A must argue that they have been prejudiced** (greater presumption of prejudice: later in proceedings, greater the amendment)

*Harris* – charged w/ poss of prohibited weapon but was *restricted*. A knew error existed. **No prejudice when A was deprived of an argument they hoped to make (pre-trial strategic decisions** (voir dire, judge or jury) **does not lead to prejudice** even though cannot go back and do voir dire.

*Irwin* – Fight in the bar, A did not intentionally apply force. Crown wants to switch offence charged *on appeal*. **Broad amendment powers** under 683(1)(g) → **only limit is prejudice**. Here, no prejudice – would have conducted defence same.

**IF J DID NOT FIND BARD PARTICULARS → ERROR OF LAW → REVERSIBLE?**

## INCLUDED OFFENCES

(1) Explicitly included offences at s.662 (incl: **attempts** s.660)

If attempt charged but full offence proven, jury may convict of attempt or J can direct A indicted for complete (s.661); **If count is divisible and only part is proved, can convict** (s.662);

(2) Must commit lesser to be convicted of greater: *R(G)* → sexual assault not included in incest. **To be included must be present every single time**

(3) Particulars give notice for lesser offence (that not charged with): ex. Attempted murder can be put on notice for assault causing bodily harm.

## MULTIPLE COUNTS IN AN INDICTMENT - KIENAPPLE

If A has been convicted of multiple counts that overlap →J can ask for a **Kienapple submission**

*Heaney* – A argues cannot be convicted of both uttering threats & criminal harassment. **Kienapple requires both**:

(1) Factual nexus: *do they apply to the same conduct?* consider: remoteness, proximity of events in time & space, intervening events, common objective

(2) Legal nexus: *are there any additional/distinguishing elements?* **Think about essential elements of both offences.** Look at the transaction.

**4 keys**: (i) where unequal gravity, fine if lesser charge doesn't have elements greater doesn't; (ii) where element of one offence is particularization of same element in another; (iii) where more than 1 method, embodied in more than 1 offence, to prove a single criminal act; (iv) where Parlia has deemed element to be satisfied on proof of another element

**Kienapple will NOT bar multiple convictions when:** offences were designed to protect different societal interests; concern violence against different Vs; offences proscribe different consequences

**→ REMEDY: CONDITIONALLY STAY LESSER CHARGE**

## BAIL

**s.11(e)** → right to "reasonable bail" ($ quantum and conditions), and right not to be denied bail without "just cause" (*St-Cloud*)

s.515(5) Presume that A will be released (**onus on Crown to prove legitimate reason to detain on BOP)**; reverse onus: 469 offences & (6) shopping list (when A has reverse onus, has to **discharge all three grounds on BOP**)

s.679 – pending appeal, can get bail

**GROUNDS:** 3 grounds are distinct (*St-Cloud*)

s.515(10)(a) **PRIMARY:** *detention necessary to ensure attendance in court*: failed attend before, ties to area, family, criminal background, employment, whether evaded prior to arrest (*Parsons*), surety, health concerns (*St-Cloud*)

(b) **SECONDARY**: *necessary for safety of public, likelihood A will reoffend or interfere with administration of justice* (*St-Cloud*): particular circumstances of A → criminal record, employment, support system, surety, NOT general characteristics of that type of offender, nature of the crime itself (*Parsons*)

(c) **TERTIARY**: *necessary to maintain confidence in admin. of justice w/ regard to: (i) strength of Crown's case* (consider quality of evidence, defences raised) *(ii) gravity of offence* (assessed objectively based on max/min sentence)*; (iii) circumstances surrounding offence*** (violent/hateful/gang/terrorism/agg+mitt factors)*; (iv) lengthy prison term* (assessed objectively) ***not exhaustive*→ age, record, physical/mental condition, membership criminal org, status of V, impact on society, *may* take into account late trial (*St-Cloud*)

→ **Even if 4 factors under tertiary favour, not automatic** *(St-Cloud)*

**Deny bail under (c) if a reasonable member of the community would be satisfied that denial is necessary to maintain confidence in the administration of justice** (*St-Cloud*)

**ABILITY TO REVIEW** (*St-Cloud*)

s.520 gives A right to apply for J to review interim detention
s.521 gives Crown right to apply for review of release order

**Scope:** if **erred in law**, if decision was inappropriate bc J gave **excessive weight** to 1 factor, insufficient weight to another (NOT just that would have weighed differently), evidence shows **material and relevant change in case**

- *Palmer* criteria to be considered "new" [modified]: (1) if evidence existed before, must have a legitimate and reasonable reason why wasn't tendered (2) evidence must be relevant (NOT to a material issue, broad); (3) evidence must be credible (=**reasonably capable of belief**); (4) reasonable to think it could have affected balancing exercise *these are guidelines only (*St-Cloud*) → if meets criteria, J can repeat weighing as if initial decision maker

*Parsons* – detained on 1, 2, 3 grounds. Has new evidence: serious medical problems, has surety. **A has burden of showing why order should be varied/vacated**. **Reviewing judges may consider additional info**.

**PUBLICATION BANS**

**s.517:** if A applies for one, JP or PCJ ***must*** order one that applies to all evidence and info produced at bail hearing (*Toronto Star*) – infringe FOE reasonable.

**TERMS OF BAIL & RE-ARREST**

*Manasseri* – A told not to contact W, V etc. Saw Dr @ gas station – told her to keep convo private. **Crown has onus to prove A contravened recognizance**. s.524 allows judge to issue warrant for arrest if reasonable grounds to believe: (i) A has violated or is about to violate form of release; (ii) has committed an indictable offence. THEN **A has burden of showing why detention is not justified under 515(10)**. Held: detention justified.

**COUNSEL – LEGAL AID**

**To get legal aid must have** (1) possibility of going to jail/lose means of making a living; (2) income requirement

*Tremblay* – sought stay under 24(1). Was originally approved for legal aid, coverage didn't cover entire trial – then was denied bc of seasonal work. **Rowbotham application**: state-funded counsel be provided if A establishes on **BOP**: (1) does not have means to retain lawyer; (2) representation is essential to fair trial [consider: seriousness of charge, length, complexity, A's ability to participate effectively. Remedy: conditional stay until lawyer.

**MUST show real likelihood/high probability that fair trial will not occur**

## DISCLOSURE

*Stinchcombe* – Crown must disclose to defence any material or information in its possession, regardless of whether it attends to adduce it, inculpatory or exculpatory Question is **whether reasonable possibility info will be useful to A** (*Baxter*) (w/limited exceptions: privilege, timing). Obligation is ***ongoing***. Cannot withhold to prevent A from tailoring defence.

*McNeil* – **disclosure obligations survive trial**. A learned W (PO) had internal discipline & crim charges. A sought production of documents related to misconduct. (obligation to disclose automatically). **All state authorities are not single, indivisible Crown for purposes of disclosure but info that Crown is put on notice of, cannot simply ignore.**

**POLICE ARE FIRST PARTIES** (disclosure w/o prompting)**.** Incl: misconduct records if related investigation or reasonably impacts case.

If not, use: ***O'Connor* for 3rd party disclosure**: Serves subpoena on 3P, submits application that show records are likely relevant → (i) if TJ satisfied that record is likely relevant may order production for **court's** inspection [burden on A]; (ii) TJ determines whether/to what extent production should be ordered (**if relevant → comes in**; considers: necessity, probative value, nature of privacy, discriminatory/bias, prejudice. Can dedact.

*Mills* – higher standard for 3rd party disclosure for sexual assault Cs.

*Reyat* – sought documents relating to exercise of prosecutorial discretion (laying/approving charges); **Production of internal documents will only be ordered if A establishes that there is a very real and substantial possibility of bad faith/improper motive** (*Murrin*)

**REMEDY – 24(1)** exclusion, new trial, stay

*Baxter* – timing of disclosure of W declarations. Decisions to delay/not-disclose are reviewable by TJ. Doesn't have to be mala fides to find prejudice (consider during remedy stage). Held: violated **s.7** new trial. **STAY SHOULD ONLY BE ENTERED IN THE CLEAREST OF CASES.**

*Nixon* → **STAY** is only granted for violation of AOP (s.7?) when: (1) prejudice caused is manifested, perpetuated or aggravated by conduct of trial or outcome and (2) no other remedy is reasonably capable of removing that prejudice

*Bjelland* – **Failure to disclose does not in and of itself violate s.7** → generally have to show prejudice to FA&D. adjourn & disclosure enough to remedy prejudice.

**EXCLUSION OF EVIDENCE** only available under 24(1) when:

(a**) fairness of trial process** (FA&D) where prejudice* **cannot be remedied by less intrusive remedy**; OR

*Onus on A; Prejudice must be material/not trivial; ~~prelim. inquiries~~

(b) **compromises the integrity of justice system** [deliberate crown misconduct]. (*Bjelland*)

## SEVERANCE

s.598 – cannot join offence other than murder to charge of murder unless raise out of same transaction or A consents.

s.591 – subject to above, any number of counts may be joined, but (3) may sever, if order to sever during trial (4) jury discharged from giving verdict

*Suzack* – P&S advanced cutthroat defences. S was examined: propensity. P's counsel's statement to j was inflammatory. S wanted severance. Presumption that As charged with joint commission of crime tried together **s.591(3) gives J broad discretion to direct severance where "interests of justice require"**. An accused right to fair trial does not entitled A to exact same trial as if tried alone. When limiting instructions can be used → should. → no severance

*MacEwan* – jointly charged, but roles distinct. Wants to compel Co-A as witness. **Where A seeks severance by arguing FA&D bc prejudice if co-A can't testify, 2 factors to address: (i) reasonable possibility co-A will testify? (ii) If yes, reasonable possibility evidence could affect verdict favourable to A? → severance**

*Last* – 2 sex-assaults; raise diff legal issues(ID/consent), risk of propensity reasoning, moral prejudice, possibility j would engage in credibility bolstering, **can overcome severe prejudice, but here: little benefit → severance.**

**FACTORS**: general prejudice to accused (moral + reasoning); legal and factual nexus between counts; complexity of evidence; whether A intends to testify on 1 count, not another (threshold: subjective intention must be objectively justifiable); possibility of inconsistent verdicts; desire to avoid multiplicity of proceedings; use of similar fact evidence at trial; length of trial wrt evidence to be called; potential prejudice to A (right to be tried in reasonable time); existence of cut-throat defences (*Last*)

## RULINGS

If seeking constitutional remedy, s.8 of the *Constitutional Questions Act* requires notice to be served **at least 14 days before day of argument unless court authorizes shorter notice.** Notice must include: the law, the right or freedom alleged to be infringed or denied, particulars necessary to show the point to be argued. All other notice is CL → **reasonable notice.**

*Sipes* – **Judges have inherent jurisdiction to control own process → can make directions to ensure fair trial and efficient process.** Incl: limits on oral submissions, direct submissions to be in writing, direct manner of voir dire (oral, other form), direct the order that evidence is called, when notice of arguments should me made. **Notice must state w/ sufficient particularity issues to be argued (incl case citations).**

*Vukelich* – A is not always entitled to a voir dire. The inherent jurisdiction of the court means that the TJ has discretion to refuse a voir dire, or limit its scope. **Applications need to have a reasonable chance of success for a voir dire to be held (otherwise other party can Vukelich it).**

More likely: ss.7, 8 (warrants); less likely: ss.10(b), 8 (searches of persons)

*Bains* – A wanted to argue violation s.7 (AOP) through disclosure (IDed CIs). J did not allow A to make submissions that there was reasonable chance of success bc even if allegations made out → not AOP. Affirmed Vukelich.

# POWERS OF SEARCH AND ARREST

**s.8** (search & seizure) **s.9** (arbitrary detention)

s.495: PO may arrest w/o warrant: I who has committed, PO reasonably believes committed, or is about to commit IO; someone who is committing an offence.

### GROUNDS FOR **ARREST**

*Amare* – Arbitrary arrest = unlawful arrest (*Grant*), will be arbitrary if PO does not have **reasonable and probable grounds to believe subject has committed, is committing or is about to commit an offence**. This requires compelling and credible information and consider the totality of the circumstances. Reviewing court only considers circumstances *know to officers*. **PO must have subjective belief, and that belief must be justified on an objective measure of a reasonable person standing in shoes of officer)**; is about probabilities (less than BOP)

*Juan* – "reasonable person" expected to have knowledge & experience of the PO who is being scrutinized.

*Pope* – Argued lack og (s.495). More closely observ. show p&s of drugs, less repetitive conduct required to meet standard. No tip, no info connecting to drugs, no unusual activity, no visual of X: violate s. 9→ violates s.8

### GROUNDS FOR **INVESTIGATIVE DETENTION**

*Mann* – **to comply with s.9 requires reasonable grounds to suspect** (obj + subj) that the individual is connected to a particular crime and detention is necessary.

## WARRANTLESS SEARCHES

*Hunter* – Party seeking to justify warrantless search has to rebut **presumption of unreasonableness**.

Presumption stands until Crown establishes on BOP:

(1) authorized by law; (2) search is reasonable; (3) manner in which the search was carried out was also reasonable (*Collins*)

*Mann* – Pat-down, felt soft items, found marij. When **PO has reasonable grounds to believe safety is at risk, *may* engage in protective pat-down search** (for safety). NOT PERMITTED: discovery of evidence

*Fearon* – To be considered reasonable, SIA must: (1) be founded on a lawful arrest; (2) truly incidental to the arrest (***some reasonable basis*** to further a valid public purpose, subj + obj); (3) conducted reasonably

FOR CELL PHONES: + Scope of search must be tailored to the purpose for which it is conducted + if for discovery of evidence, only valid when investigation would be stymied or significantly hampered + PO must take notes of what they examined etc.

## WARRANTS

*Hunter* - Warrant authorization must be neutral/impartial and must have **reasonable and probable grounds** to believe that an offence has been committed and **that evidence will be found** at the place of search is the minimum standard for authorizing search and seizure

**CHALLENGING A WARRANT:**

Test for whether search warrant properly issued (*Garofoli*): whether material filed in ITO, as amplified on review, ***could*** support the issuance of a warrant (evidence of fraud, misconduct, etc. are relevant, but just to determine whether there is a **continuing basis to support a warrant**). (*Wilson*)

- Crown can correct **minor errors** that were made in good faith, but cannot bolster areas A did not raise
- Even if warrant meets this test, can argue AOP (for residual category)

# CLASS OF OFFENCES

SUMMARY: must be brought w/i 6 months of offence; max 6 month sentence.

INDICTABLE: no limitation period

HYBRID: Can proceed either route. s.34(1)(a) assumed indictable unless Crown elects to proceed summarily (*Dudley*); Once proceeds summarily, no longer deemed indictable (*Trueman*).

*Dudley* – charged w/ 2 hybrid os. Was sworn > 6 mos → defene moved to dismiss as nullity. Crown sought to re-elect by indict. **If limitation date has passed, A can give consent to proceed summarily *any time before verdict* (c, in, uneq).** If no consent → if summary offence: statute barred; if **hybrid → Invalid election does not invalidate an information→ mistrial, then can proceed by indictment bc initial election/sub proceedings nullity** (subject to abuse of process → use *Reyat* to get memos). Crown cannot appeal acquittal.

## APPLICABLE TIME

**Law prosecuted under is law in force at time of offence** (*Dineley*)

**Applicable law for procedure is law in force at time of *trial*** (*Dineley*)

*UNLESS* affects:

**(1) substantive rights** (ex. burden increased? Engages presumption of innocence → constitutional rights are nec substantive) or

**(2) require evidence that A had no reason to gather under former law**

→ then applicable law is @ time of offence (*Dineley*)

# THE TRIAL

## ROLE OF THE TRIAL JUDGE

Remember: **inherent jurisdiction** (*Sipes*)

*Gunning* – J must decide Q of law and instruct jury, can review evidence as relates to issues and give opinions on Q of fact, but **jury is the sole arbiter of facts** (presumption of innocence, right to trial by jury (**s.11(f)**); TJ can be involved in fact finding for: (1) directed verdict; (2) air of reality of defences. **TJ cannot instruct j that elements have been proven or direct jury to convict ever.**

*Krieger* – **Judge cannot direct jury to find A guilty even if overwhelming evidence of guilt**. Juries are not entitled as a matter of right to refuse to apply the law, but have the power to do so.

# BIAS OF THE TRIER OF FACT

## JURIES

**s.11(d)** – presumed innocent…public hearing by **independent and impartial tribunal**

s.634(1) juror may be challenged peremptory; (2) # of challenges depends on charge

s.683(1)(b) **challenges for cause** → to invoke this provision, J will ask for submissions, then ask juror(s) Qs. Types of prejudice: (1) **interest**: direct stake; (2) **specific**: attitudes about case; (3) **generic**: stereotypical attitudes (V, W, nature of crime); (4) **conformity**: community expect. (*Williams*)

Can affect way jurors assess credibility, reasonable doubt, criminal propensity

*Williams* – widespread racism against IND. **JURORS ARE PRESUMED IMPARTIAL – party seeking to challenge must raise concerns which displace presumption before able to challenge.**

STAGE 1: Whether challenge will be permitted

- Is there a **realistic potential for existence of partiality?** (*is there reason to believe that jury pool may contain people who are prejudiced and they might not be capable of setting aside belief?)*
- Do not need specific links to trial (can be general bias)
- Can meet this stage by showing: (i) evidence of bias; (ii) judicial notice (requires: notorious facts not in dispute, facts capable of immediate and accurate demonstration by resorting to accessible sources)

STAGE 2: *Will* TOF be able to act impartially? (how it will play out in trial)

- TJ may permit challenges for cause to determine: (1) whether juror is racially prejudiced in way that could affect partiality; (2) if so, whether capable of setting aside prejudice

## JUDGES ALONE

*Yukon Francophone School Board* – **would an informed person, viewing matter realistically and practically, conclude real likelihood or probability of bias? Would they think decision maker (consciously or unconsciously) would not decide fairly?**

- Ensure fairness and *appearance* of fairness
- **Consider totality of circumstances, relatively high burden**

Judges may intervene in adversarial debate (can interrupt, ask Qs, etc.) but cannot take quasi-counsel role.

**May rely on background and experience** in fulfilling role **–** question is whether they have an **OPEN MIND** to persuasion.

## CLOSING ADDRESSES

*Rose* – challenges s.651(1) and (3) which say if A examines no witnesses, addresses jury last, otherwise Crown addresses jury last.

**s.7 does not entitle A to procedures *most favourable.*** Must be fair in sense that A can defend against and answer Crown's case.

→ to show that FA&D is infringed, must show that unfairness is created

FA&D includes: (1) right of accused to have "case to meet" before answering Crown's case by adducing evidence (satisfied after Crown has called all evidence); (2) defend against state's efforts to achieve conviction-

→ not impacted by whether A addresses 1st or last. **If Crown makes submissions that are misleading/unsupported, TJ can: (i) issue curative instructions; (ii) allow limited reply** (if instructions are insufficient, only in clearest of cases). Based on ***inherent jurisdiction***.

## UNREASONABLE DELAY (s.11(b))

*Jordan* – total delay: 49.5 mos. S.7 impacted, previous framework unpredictable, doesn't prevent. New framework: prejudice does not play explicit role, presumed to be prejudiced if exceed ceiling (absence of prejudice does not turn unreasonable time into reasonable one)

**Presumptive ceiling**: (process built in)

Prov Ct: 18 mos

Superior Ct (or cases going to Prov Ct after prelim): 30 months

**Step 1: Calculate total delay**

(1) Periods of delay waived by D (implicit/explicit; in, c, uneq)

(2) Conduct of D (direct causes, does not count actions that legitimately respond to charge)

**Step 2: Above or Below?**

ABOVE: Presumptively unreasonable. **Crown must rebut presumption** through presence of **exceptional circumstances** that lie outside Crown's control bc:

- (1) Reasonably unforeseen or reasonably unavoidable ***and***
- (2) Crown could not reasonably remedy delays once they arose (must show took steps to remedy)
  - *generally*: (i) discrete events (emergencies, unforeseen) [deduct from total delay those which could not be mitigated]; (ii) particularly complex cases (because nature of *evidence* or *issues*, NOT seriousness of crime), must go **beyond Crown's control**.

→ If not rebutted: **stay of proceedings**

BELOW: (rare) **Defence has onus of establishing, both, that**:

- (1) took meaningful steps, demonstrated sustained effort to expedite; ***and***
- (2) case took markedly longer than reasonably should have
  - consider: complexity, local considerations, whether Crown took steps to expedite
  - Q of fact for TJ

Cases currently in system: (1) Exceeds: Crown must satisfy court that time is justified bc of reasonable reliance on old law; (2) Below: Defence must show that the case has taken *markedly* more time than was reasonably required (also consider D initiative was not explicitly required before)

## THE APPEAL

Must file notice of appeal within **30 days** of sentencing date (can apply for extension s.678(2))

A has the right to appeal on almost any ground (s.675)

Standard of Review: errors of law → correctness; errors of fact/mixed law and fact → palpable and overriding error (patently unreasonable) (*Grouse*)

s.686(1)(a) Appeal Court *may* allow the appeal when it is of the opinion that:

(i) verdict set aside on ground that it is unreasonable or cannot be supported by the evidence [errors of fact or unreasonably verdict, acquittal]

(ii) wrong decision on question of law [error of law]

(iii) miscarriage of justice [misapprehensions of evidence]

### MISAPPREHENSIONS OF EVIDENCE (s.686(1)(a)(iii))

*Vokurka* citing *Morrisey* – may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence [got evidence wrong], or a failure to give proper effect to evidence [forgot]

**Once error is established, then must show error played an essential part of the reasoning process leading to conviction** (*Shen*) Remedy: new trial

### UNREASONABLE REASONS (ERRORS OF FACT) (s.686(1)(a)(i))

Standard of review: palpable and overriding error (*Grouse*)

*Scuby* – ID was at issue. Finding was patently unreasonable but based on other evidence – could still convict (properly instructed jury could have rendered verdict reasonably) → new trial (**materially contributed to the verdict) BUT** not unreasonable verdict.

*DAR* – TJ draws an inference or makes a finding of fact that is (1) plainly contradicted by the evidence relied on for that purpose by the judge, or (2) demonstrably incompatible with evidence that is not otherwise contradicted or rejected by the trial judge

### ERRORS OF LAW (s.686(1)(a)(ii))

Standard of Review: errors of law → correctness (*Grouse*)

**REVERSIBLE ERROR** (s.686(1)(a)(iii)) curative proviso

**Applies to cases where the evidence against A is overwhelming or it can be safely said that the legal error was harmless bc could not have had an impact on the verdict** (*Sarrazin*)

Two factors to consider: (1) Position of counsel (*Austin*) (2) Strength of the evidence

*Austin* – Counsel's approval of jury instruction are a significant consideration, but the legal error went to the heart of the case – not harmless. Reasonably probable could have led to a different result.

*Sarrazin* – Causation was at issue, TJ did not instruct on attempts. **Curative proviso can only apply where error is harmless, could have had no impact on verdict**.

### REMEDY

s.686(2) Where court of allows appeal under (1)(a) shall quash the conviction and (a) direct a judgment or verdict of **acquittal**; or (b) **order a new trial**

**ACQUITTAL**: Two routes:

(1) Through other errors (add up, once corrected ask: could a properly instructed TOF, acting judicially, reasonably render the verdict?)

*Sinclair* - TJ drawn inference or made a finding of fact essential to the verdict that (1) plainly contradicted by the evidence relied on for that purpose by the judge

(2) No errors, but verdict itself is unreasonable; no TOF could have reasonably rendered it.

*Biniaris* – Test for unreasonable verdict: **Whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered** (if there is *one reasonable route* it is not unreasonable)

- Objective & subjective component – limited re-weighing of evidence
- Disadvantageous position of the appellate court to weigh evidence

*Vokurka* – **Does not become unreasonable bc another inference was available on the evidence**.