SCC File No.: 40780

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

B E T W E E N:

TAMMY MARION BOUVETTE

APPELLANT
(Appellant)

- and -

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

- and -

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. In the last few decades, starting with the exposure of Donald Marshall Jr.'s wrongful conviction in 1983, it has been increasingly recognized that our criminal justice system is human and therefore fallible.[1] As Commissioner Kaufman said in the *Morin Inquiry*, "The case of Guy Paul Morin is not an aberration."[2] This Court has acknowledged this to be so in a number of decisions. In 1997 in *Lifchus*, this Court said:

> The Marshall, Morin, and Milgaard cases serve as a constant reminder that our system, with all its protections for the accused, can still make tragic errors.[3]

In *United States v. Burns*, this Court said:

> Legal systems have to live with the possibility of error. … In recent years, aided by advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent. The instances in Canada are few, but if capital punishment had been carried out, the result could have been the killing by the government of innocent individuals. The names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case.[4]

2. There may be arguments about what makes a wrongful conviction, but certainly a large number have now been exposed in Canada, whether through the ministerial review process or through extension of time applications to appeal courts based on fresh evidence. In 2023, Professor Roach of the University of Toronto published a book, "Wrongfully Convicted", in which he cataloged known wrongful convictions in Canada.[5] Professor Roach also has, with others, compiled the *Canadian Registry of Wrongful Convictions*.[6] The number presently stands at 91

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[1] *R.* v. *Marshall* [1983] N.S.J. No 322 (N.S.C.A.). See Lord Justice Rose's comments in *R.* v. *Mattan* [1998] EWJ No. 4668 at page 5.

[2] Honourable Fred Kaufman, "Conclusion": *Commission on Proceedings involving Guy Paul Morin*, Ontario Ministry of the Attorney General: 1998 at p. 1.

[3] *R v Lifchus,* [1997] 3 S.C.R. 320 at para 13.

[4] *United States v Burns*, [2001] 1 SCR 283 at para 1. See also *R v Starr,* [2000] 2 SCR 144 at para. 200; *R v McClure,* [2001] 1 SCR 445 at para. 40; *R v Burke,* [2002] 2 SCR 857 at para. 93; *R v Trochym*, [2007] 1 SCR 239 at para. 1; *R v Hart,* [2014] 2 SCR 544 at para. 6; *R v CP*, [2021] SCR 679 at paras. 59-60

[5] Kent Roach, *Wrongfully Convicted,* (Toronto: Simon & Schuster Canada, 2023).

[6] "The Canadian Registry of Wrongful Convictions", online:

wrongful convictions in Canada. Behind every wrongful conviction there is a human being who is looking for legal redemption. For them, it is not enough if their conviction is quashed in a court of appeal and charges are stayed or withdrawn at the re-trial. They deserve and want the stigma of their convictions extinguished by an acquittal and, even better, an exoneration in open court.

3. The case of David Milgaard exemplifies this. His 1970 wrongful conviction for murder was overturned by this Court in 1992. However, the Court stated that it was neither satisfied beyond a reasonable doubt nor on the preponderance of evidence that he was innocent of the murder; instead it quashed the conviction and directed a new trial, observing that there was some evidence which, if accepted by a jury, could implicate him in the murder of Gail Miller.[7] Two days later, his charges were stayed in the Saskatchewan Court of Queen's Bench.[8] For David Milgaard, this was an unsatisfactory conclusion to his prosecution. He persevered and, more than five years later, proved his innocence through post-conviction DNA testing, and simultaneously proved who the real culprit was. David Milgaard, now deceased, proved his innocence but ironically this was never established in a court of law.

4. *Innocence Canada*, as an intervener, takes no view of the facts of the Appellant's case but asks this Court to take this opportunity to set the boundaries for when an acquittal should be entered in wrongful conviction cases and submits that the power to enter an acquittal should be broader than it appears to be under existing jurisprudence.

PART II – QUESTIONS IN ISSUE

5. *Innocence Canada* as an intervener submits that the appellate courts should be allowed a broad discretion to enter acquittals at appeals in wrongful conviction cases. In particular, *Innocence Canada* submits that;

Home – CRWC https://www.wrongfulconvictions.ca/.

[7] *Reference re Milgaard (Can.)*, [1992] 1 SCR 866. See also *R v Hinse,* [1997] 1 SCR 3.

[8] Kevin Green, "Will you stop typing?': Five decades after being wrongly convicted, Milgaard reflects on the idea of Canadian justice" (30 January 2020) online (CTV News): https://calgary.ctvnews.ca/will-you-stop-typing-five-decades-after-being-wrongly-convicted-milgaard-reflects-on-the-idea-of-canadian-justice-1.4791067.

(a) An acquittal should be entered on appeal in a wrongful conviction case if it can be shown that there is a reasonable possibility of an acquittal based on a reasonable doubt at a retrial.

(b) If the wrongful conviction resulted from state misconduct including non-disclosure, this should form a basis by itself for entering an acquittal on appeal in an appropriate case.

PART III – STATEMENT OF ARGUMENT

1. What Makes a Wrongful Conviction?

6. There is no universally accepted definition of what constitutes a wrongful conviction. Part XXI.1 of the *Criminal Code* is entitled *Applications for Ministerial Review – Miscarriages of Justice* and empowers the Minister to grant a remedy to an applicant if "satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred."[9] Bill C-40, whose short title is the *Miscarriage of Justice Review Commission Act (David and Joyce Milgaard's Law*), has, at the time of writing this factum, passed third reading. If enacted, it will establish an independent body to be called the *Miscarriage of Justice Review Commission* which will have the power to direct a new trial or refer a case to the Court of Appeal, "if the Commission has reasonable grounds to conclude that a miscarriage of justice may have occurred and considers that it is in the interests of justice to do so".[10]

7. Wrongful convictions will generally include convictions that survived the original appellate process where the correctness of the conviction has been undermined by fresh evidence, or, to engage s. 696.4(a) of the *Criminal Code*, "new matters of significance" have been uncovered. The new evidence may come in the form of evidence unavailable at trial, or in the form of evidence available at trial but not disclosed. Sometimes the evidence has been uncovered for and during the ministerial review process. For those cases where no original appeal was brought, the Appellant Tammy Bouvette's case being one of these, an application for an extension of time to appeal is an

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[9] *Criminal Code*, RSC, 1985 c C-46, s 696(3)(a).
[10] Bill C-40, *An Act to amend the Criminal Code, to make consequential amendments to other Acts and to repeal a regulation (miscarriage of justice reviews)*, 2024, cl 696.2(2).

appellate replicate of the ministerial review process. A case with a long history that comes back to a court years later with new evidence sufficient to overturn it, can reasonably be described as a wrongful conviction.

8. However, some of Canada's most notorious wrongful convictions were overturned in the original appellate process. Three of these were included in the five cases cited by this Court in the opening paragraph of the judgment of *United States v Burns*.[11] The cases of Thomas Sophonow, Guy Paul Morin, and Gregory Parsons were all caught during the original appellate process. In these cases, it can best be said that "you know one when you see one". However a wrongful conviction comes to an eventual resolution, the "lens of judicial experience"[12] can often identify it as such.

2. When Should an Acquittal be Entered on Appeal in the Case of a Wrongful Conviction

9. Section 686(2) of the *Criminal Code* provides no guidance as to when an acquittal should be entered on appeal. This means that appeal courts can set their own guidelines, and there is good reason why they should be different in cases of wrongful conviction. In such cases, the subject of the conviction, the majority of which have been for the most serious crimes, will likely have served substantial prison time or may be on life parole. He/she will have been asserting innocence for all that time, no mean feat as this can impact the relationship with fellow inmates, employees of the institution where the subject is held, and undermine the obtaining of parole.[13] David Milgaard would likely have been released a decade earlier if he had admitted his guilt after his conviction.

10. It is rare that a new trial is pursued by the Crown in cases where convictions have been overturned through the ministerial review process, or its appellate court equivalent, and a new trial has been ordered. In most cases, the Crown has withdrawn the charges or stayed the proceedings in the trial court leaving the wrongly convicted person in limbo of the type experienced by Mr.

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[11] *United States v Burns*, [2001] 1 SCR 283 at para. 1.
[12] *R v Biniaris*, [2000] 1 SCR 381 at para. 40.
[13] Rachel Barsky & Adam J. E. Blanchard, "Preventing Parole: The Effect of Innocence Claims on Parole Eligibility" (2018). Presented by the Criminal Defence Advocacy Society (CDAS). Kent Roach, "The Wrongful Conviction of Indigenous People in Australia and Canada" (2015) 17 Flinders L J 203 at p. 23. Jeremy Greenberg, "When One Innocent Suffers: Phillip James Tallio and Wrongful Convictions of Indigenous Youth" 67 (2020) 477 at pp. 512-513.

Milgaard until his DNA exoneration. Because the Crown's decision as to how to procced in the trial court is discretionary, it is virtually impossible to challenge it. There was a successful challenge in the Gregory Parsons case; the Crown originally stayed the proceedings on his murder charge after DNA results proved a third party, eventually identified as Brian Doyle, had murdered Parson's mother. An application was brought in the Supreme Court of Newfoundland and Labrador to set aside the stay as an abuse of the Crown's discretion and, on its return date, the Director of Public Prosecutions agreed to set aside the stay, offered no evidence and Parsons was acquitted.[14] A similar effort was made in *Phillion* but it failed; 38 years after his conviction for non-capital murder, a conviction founded on non-disclosure of material evidence, Romeo Phillion had to accept that he would never get his acquittal.[15]

11. The unreasonable verdict test is not a fair test for an acquittal in the case of a wrongful conviction. It is a legal test and it is not *per se* concerned with ideas of factual innocence. One foundation of the unreasonable verdict test is the *Yebes* case which itself is now known to have been a wrongful conviction for the murder of his two adopted children. The unreasonable verdict test simply does not capture the cases of possible or likely innocence - it may in one case but not in another. Above all, it is a test rarely met, perhaps because the Crown will rarely prosecute a case which cannot pass such a low threshold as that laid down in the *Yebes*/*Biniaris*[16] decisions.

12. In *Truscott*, it was clear that if nothing else, the passage of time foreclosed the possibility of a retrial. The appellant argued that after admission of the fresh evidence, an acquittal at a new trial would be the only reasonable result. The Ontario Court of Appeal, after noting that the appeal was "outside the norm" and "far from a routine appeal", held that the residual discretion in s.

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[14] Allison Lawlor, "Wrongly convicted man wins $650,000 redress" (1 March 2002), online (The Globe and Mail): https://www.theglobeandmail.com/news/national/wrongly-convicted-man-wins-650000-redress/article25292739/.

[15] *R v Phillion* (2010), 256 CCC (3d) 63 (Ont S.C.J.)

[16] *R v Yebes,* [1987] 2 SCR 168. Jana G. Pruden, "Thomas Yebes always said he didn't kill his two sons. Nearly four decades later, the courts finally agree" (20 February 2021) online (The Globe and Mail): https://www.theglobeandmail.com/canada/article-the-yebes-test-one-mans-37-year-journey-from-wrongful-conviction-to/. *R v Biniaris,* [2000] 1 SCR 381.

686(2) is sufficiently broad to permit resort to a more vigorous review of the evidentiary record in cases where required by the interests of justice. The Court of Appeal said:

> In our view, the appellant should be entitled to an acquittal if we conclude, based on all of the information now available, that it is clearly more probable than not that the appellant would be acquitted at a hypothetical new trial.[17]

This approach was considered in the Appellant's case, and has been considered and/or followed in other cases by courts of appeal in New Brunswick,[18] Alberta,[19] Manitoba,[20] British Columbia,[21] and Ontario.[22]

13. The *Truscott* threshold for an acquittal in an appeal outside the norm has never been considered by this Court. It sets a new standard not previously known to our law. It is a high standard and, in *Innocence Canada's* submission, unnecessarily so. Often the passage of time since the wrongful conviction will prevent the subject of a wrongful conviction establishing that "it is clearly more probable than not" that he would be acquitted at a hypothetical new trial. It should be sufficient for an acquittal in a wrongful conviction case if it can be shown that there would be a reasonable possibility of an acquittal based on reasonable doubt at a re-trial. If this had been the test, it is likely Romeo Phillion would have been acquitted in the Court of Appeal[23]. The same may go for the Appellant, Tammy Bouvette.

14. In those wrongful conviction cases where it is shown that the conviction resulted from material non-disclosure at trial, and there is no likelihood of a retrial, the test for an acquittal should be easier to meet. When our safeguards to prevent wrongful convictions are breached, it is essential to provide meaningful redress to those who have suffered as a result. In *Ostrowski,* for example, there was material non-disclosure regarding an unsavoury Crown witness who was essential to the Crown's case. By the time Ostrowski's conviction was quashed, more than 31 years had passed, a new trial was not feasible and Ostrowski had served 23 years of his life sentence in prison. Thus,

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[17] *R v Truscott* (2007), 225 CCC (3d) 321 at paras 246-270, 276, 787 (Ont. C.A.)
[18] *R v Walsh* (2008), 238 CCC (3d) 289 at paras. 57-62 (N.B.C.A.)
[19] *R v DRS* (2013), 293 CCC (3d) 557 at para 19 (Alta. C.A.)
[20] *R v Ostrowski* (2018), 369 CCC (3d) 139 at paras. 30-36, 79. (Man. C.A.)
[21] *R v Dhillon,* [2014] BCJ No 2997 at paras. 26-55. (B.C.C.A.)
[22] *R v Doyle*, 2023 ONCA 427 at para. 15.
[23] *R.* v. *Phillion*, (2009) 241 CCC (3d) 193 (Ont. C.A.).

as a result of state misconduct, Ostrowski, through no fault of his own, could never get a fair trial. In such circumstances, he deserved an acquittal even though the Manitoba Court of Appeal was of the opinion that there remained evidence upon which a jury could reasonably find him guilty.

3. The Stigma for the Wrongly Convicted Person

15. The stigma attached to a conviction can be considerable, the more so if the conviction is for murder, and even more so if the murder has a sexual component to it. For a wrongly convicted person, the stigma probably never disappears completely, but a court-entered acquittal will go a long way towards this. Since it is our criminal justice system, good as it may be but fallible nevertheless, that enabled the wrongful conviction, it is only just that it do all it can to remedy it and remove stigma as much as possible. The stigma left by a wrongful conviction has been well-recognized. In the introduction to his *Morin Inquiry Report,* Commissioner Kaufman wrote "An innocent man was arrested, stigmatized, imprisoned and convicted. The real killer has never been found".[24] The Court of Appeal in *Truscott* acknowledged the stigma that goes with a wrongful conviction, saying that any order other than an acquittal would "remove the stigma of the appellant's conviction, but leave in place the stigma that would accompany being the subject of an unresolved allegation of a crime as serious as this one."[25] The Manitoba Court of Appeal's decision in *Sophonow* to unanimously enter an acquittal was of huge significance for Mr. Sophonow and without it, it is unlikely that the *Sophonow Inquiry* would ever have taken place.[26]

16. In the *Lamer Commission of Inquiry* report, the Commissioner considered the implications of the stay of proceedings entered by the Crown after post-conviction DNA results were obtained in the case of Randy Druken. Faced with the D.P.P.'s submission that the quashing of a conviction in any form results in the return of the presumption of innocence, Commissioner Lamer wrote:

> With respect, this analysis is legally correct but practically unrealistic. For example, a person facing a charge of murder is also presumed innocent but is there not a cloud hanging over such an accused?[27]

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[24] Honourable Fred Kaufman, "Introduction": *The Commission on Proceedings Involving Guy Paul Morin*, Ontario Ministry of the Attorney General: 1998 at p. 1.

[25] *Truscott, supra* at para 265.

[26] *R v Sophonow* (1986), 25 CCC (3d) 415 (Man. C.A.).

[27] Honourable Antonio Lamer, *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken,* Newfoundland and Labrador: 2006 at p. 319.

Informed members of the public know the difference between an acquittal on the one hand, and a stay of proceedings or withdrawal on the other hand, and will attach stigma accordingly.

17. In the *Driskell Commission of Inquiry,* Commissioner LeSage noted that the stay entered by the Crown in Driskell's case after a successful ministerial review "does not accord with my view of best practice or a fair and just result." He wrote:

> When these errors are discovered, many years later, it will often be too late to investigate the facts fully, present reliable evidence about the original events and then arrive at safe findings of fact on a balance of probabilities. In other words, the serious errors that were made in the past can forever destroy the chance of having a fair and accurate trial in the present. An accused who is caught in this dilemma, after a successful s. 696 review, may be innocent but may also be unable to prove it on a balance of probabilities. It would be unfair to leave such an accused with the stigma of a tarnished "not guilty" verdict that would be perceived under such a process to really mean "not proven".
>
> … We rely on fair trials to arrive at safe and accurate verdicts. Where serious mistakes have been made by the Crown or the police in the past, making it no longer possible to conduct a fair trial in the present, the accused has been "wrongly convicted" in the common sense meaning of that term, even though he/she may no longer be able to establish the so called "factual innocence."[28]

Commissioner McCallum noted in his report on the *Milgaard Inquiry* that the Crown stay of proceedings after this Court's decision in 1992 left Mr. Milgaard:

> with a significant stigma which was only lifted five years later with the DNA results and [Larry] Fischer's subsequent conviction. But for them, it might still exist. Without a new trial, he was left without the chance of a not guilty verdict, and there was a strong argument that he was entitled to at least that much. [29]

A stay of proceedings is a less "decisive" result than a withdrawal at a retrial, but neither is as decisive as an acquittal, whether given by a court of appeal or rendered in a trial court.

4. Acquittals on Appeal in Other Jurisdictions

(a) *England, Wales and Northern Ireland*

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[28] Honourable Patrick LeSage, K.C., *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, Manitoba Justice: 2007 at pp. 141-142.

[29] Honourable Justice Edward P. MacCallum, *Commission of the Inquiry Into the Wrongful Conviction of David Milgaard*, Government of Saskatchewan: 2008 at p. 336.

18. Section 2(1) of the *Criminal Appeal Act 1968* allows the Court of Appeal to quash a conviction "if they think that the conviction is unsafe" and, pursuant to s. 7(1), the Court can order a retrial if "it appears to the Court that the interests of justice so require." Section 2(3) of the Act provides:

> An order of the Court of Appeal quashing a conviction shall, except when under section 7 below the appellant is ordered to be retried, operate as a direction to the court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal.

Thus, an acquittal is statutory unless the Court directs a new trial. There is no in-between.

(b) *Scotland*[30]

19. Section 118 of the *Criminal Procedure (Scotland) Act 1995* allows the High Court to quash a conviction and grant authority for the bringing of a "new prosecution" within two months. Pursuant to s. 119(2A)(9), if no new prosecution is brought, the order setting aside the conviction "shall have the effect, for all purposes, of an acquittal." An acquittal, therefore is statutory in these circumstances.[31]

(c) *Australia (New South Wales) and New Zealand*

20. The New South Wales *Criminal Appeal Act 1912* gives the Court of Criminal Appeal the power to quash a conviction (s. 6(1)) and order a new trial (s. 8(1)). Section 6(2) of the Act provides that if no new trial is ordered, "the court shall … quash the conviction and direct a judgment and verdict of acquittal to be entered." Section 230 of New Zealand's *Criminal Procedure Act 2011* provides that the Court of Appeal, in setting aside a conviction, "must also (a) direct that a judgment of acquittal be entered; or (b) direct that a new trial be held."

5. Conclusion

21. How courts resolve wrongful convictions is important to our criminal justice system as a whole. Acquittals bring a finality that withdrawals and stays of proceedings do not. In some cases, courts have seen it as appropriate to apologize on behalf of the administration of justice directly to the victim of a wrongful conviction. This happened in two recent cases in Manitoba and New

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30 James Chalmers et al "A Modern History of the Not Proven Verdict" (2021) 25 Edinburgh L. Rev. at p 151-172.

31 See *McCreight v Her Majesty's Advocate,* [2009] ScotHC HCJAC 69 (01 April 2009).

Brunswick. In the cases of Allan Woodhouse and Brian Anderson, two Indigenous men acquitted of a murder after a ministerial reference of a conviction from 50 years earlier, Chief Justice Joyal of the Manitoba King's Bench Court said after entering the acquittals:

> We cannot permit these types of wrongful convictions to occur in a normalized or inevitable way without the horror and the outrage that they deserve.[32]

The Chief Justice's comments address wrongful convictions at a personal level; acquittals address wrongful convictions at an institutional level and are of great importance to our justice system.

PARTS IV AND V – SUBMISSIONS ON COSTS AND ORDER SOUGHT

22. *Innocence Canada* does not seek costs and asks that no costs be awarded against it. *Innocence Canada* takes no position on the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5TH DAY OF JULY, 2024.

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[32] *R.* v. *Woodhouse*, July 18, 2023, Man. K.B. *unreported.* See also *R v Gillespie*, [2024] NBJ No 2.

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