



SUPREME COURT OF CANADA

CITATION: R. v. Esseghaier, 2021 SCC 9

**APPEAL HEARD AND
JUDGMENT RENDERED:**

October 7, 2020

REASONS FOR JUDGMENT:

March 5, 2021

DOCKET: 38861

BETWEEN:

Her Majesty The Queen in Right of Canada
Appellant

and

Chiheb Esseghaier and Raed Jaser
Respondents

- and -

**Attorney General of Ontario, Attorney General of
Alberta and Criminal Lawyers' Association
(Ontario)**
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 66)

Moldaver and Brown JJ. (Wagner C.J. and Abella,
Karakatsanis, Côté, Rowe, Martin and Kasirer JJ. concurring)

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R. v. ESSEGHAIER

Her Majesty The Queen in Right of Canada

Appellant

v.

**Chiheb Esseghaier and
Raed Jaser**

Respondents

and

**Attorney General of Ontario,
Attorney General of Alberta and
Criminal Lawyers' Association (Ontario)**

Interveners

Indexed as: R. v. Esseghaier

2021 SCC 9

File No.: 38861.

2020: October 7; 2021: March 5.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin
and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Appeals — Curative proviso — Jury selection process — Accused convicted of terrorism offences — Accused appealing convictions on basis that jury improperly constituted — Court of Appeal overturning convictions and ordering new trial — Court of Appeal holding that jury selection error could not be cured by operation of curative proviso at s. 686(1)(b)(iv) of Criminal Code — Whether curative proviso can be applied to cure procedural errors occurring during jury selection process — Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(b)(iv).

In 2013, E and J were charged with a series of terrorism offences. In light of the seriousness of the allegations and the high-profile nature of the case, the parties agreed that challenges for cause were necessary to ensure the impartiality of the jury. At the time, the *Criminal Code* provided two procedures for trying challenges for cause: rotating triers, the default procedure, and static triers. Prior to the introduction of static triers, it was accepted that trial judges had a common law discretion to order the exclusion of prospective jurors when rotating triers were being used in order to preserve their impartiality.

J sought to use rotating triers and asked the trial judge to exercise his common law discretion to exclude prospective jurors during the challenge for cause process. If his request could not be satisfied, he wanted static triers. The trial judge denied the request. In his view, the introduction of static triers had ousted the common law discretion to order the exclusion of prospective jurors where rotating triers were being used. In any event, he would not have exercised the discretion even if he had it.

To grant the request would be to expose the members of the jury to the potentially partial comments of prospective jurors and, thereby, risk undermining trial fairness. The trial judge therefore made an order to exclude all jurors, both sworn and unsworn, and for the appointment of static triers.

E and J were subsequently convicted and sentenced to life imprisonment. Their ensuing appeal was bifurcated so that the Court of Appeal could first address the jury selection issue. In allowing the appeal and ordering a new trial, the Court of Appeal determined that the trial judge had erred in concluding that the common law discretion did not exist and in alternatively deciding that he should not exercise it. This error could not be saved by the curative proviso in s. 686(1)(b)(iv) of the *Criminal Code* for two reasons: (1) errors affecting the composition of the jury lead to an improperly constituted court, thereby depriving the trial court of jurisdiction over the class of offence (for both E and J); and (2) even if the trial court had jurisdiction, the error caused prejudice to the accused person as a result of its negative effect on the appearance of the fairness of the proceedings and the due administration of justice.

Held: The appeal should be allowed, the convictions restored, and the remaining grounds of appeal remitted to the Court of Appeal.

The jury for both E and J was improperly constituted. The trial judge erred in both his primary and alternative conclusions with respect to J's application. The common law discretion to exclude prospective jurors while using rotating triers existed, and the trial judge's refusal to exercise his discretion was unreasonable. However, the

curative proviso in s. 686(1)(b)(iv) of the *Criminal Code* can be applied to cure the trial judge's error.

The curative proviso in s. 686(1)(b)(iv) can be applied to cure jury selection errors where the "trial court had jurisdiction over the class of offence" and the court of appeal is of the opinion that "the appellant suffered no prejudice" as a result of the error. The phrase "jurisdiction over the class of offence" in s. 686(1)(b)(iv) is to be interpreted in accordance with the jurisdictional provisions established by Parliament in the *Criminal Code*. In combination, ss. 468, 469 and 785 of the *Criminal Code* delineate three classes of offences and the courts' powers to try persons charged with those offences: (1) indictable offences listed in s. 469, which are within the exclusive jurisdiction of the superior court; (2) indictable offences not listed in s. 469, which are within the jurisdiction of both the provincial court and the superior court; and (3) summary conviction offences, which are within the exclusive jurisdiction of the provincial court. The requirement in s. 686(1)(b)(iv) that the "trial court had jurisdiction over the class of offence" refers to these three classes of offences and the jurisdictional capacity of the superior and provincial courts to try them.

To limit the proviso's application to cases where the jury was properly constituted would be plainly inconsistent with the purpose of s. 686(1)(b)(iv), which is to expand the remedial powers of the courts of appeal to engage with jurisdictional errors and assess any prejudice that may have flowed from them. To achieve its purpose, Parliament intended the proviso to be flatly inapplicable only where the trial

court was not statutorily empowered to try the class of offence, or where the accused had suffered prejudice. Accordingly, for the purposes of the proviso, “jurisdiction” is concerned only with the trial court’s capacity to deal with the subject-matter of the charge, as it is only a lack of subject-matter jurisdiction that deprives the court *ab initio* of all jurisdiction. It is not concerned with the timing of the procedural error, nor with its consequences for the appellant’s trial. Such inquiries into the nature and consequence of the error are best left to the prejudice analysis. If an appeal court is satisfied that the trial court had jurisdiction over the class of offence of which the appellant was convicted, the proviso inquiry turns to the second requirement: whether the appellant “suffered no prejudice”. In the context of applying s. 686(1)(b)(iv) to a procedural error in jury selection, the prejudice inquiry is focused solely upon the risk of depriving accused persons of their right, under s. 11(d) of the *Canadian Charter of Rights and Freedoms*, to a fair trial by an independent and impartial jury. Where the appellant is able to show that a procedural error led to an improperly constituted jury, the onus shifts to the Crown to show, on a balance of probabilities, that the appellant was not deprived of their right to a fair trial by an independent and impartial jury and, consequently, suffered no prejudice.

In this case, both statutory requirements in s. 686(1)(b)(iv) are met. The trial court had jurisdiction over the class of offence, as the offences at issue were indictable and the Ontario Superior Court of Justice has jurisdiction over all indictable offences. There was also no prejudice to either E or J. Although the use of static triers was incorrect in the circumstances, it was one of the two legally sanctioned procedures

for trying challenges for cause at the time of the trial. Further, the risk of juror tainting was removed, as both the sworn and unsworn jurors were excluded from the courtroom. The actual implementation of the procedure by both the trial judge and the static triers was also handled with the requisite care and attention to ensure that the fair trial rights of E and J were protected. A reasonable person would perceive E and J to have received a fair trial before an independent and impartial jury. While E and J did not receive the exact trial they wanted, the law does not demand perfect justice, but fundamentally fair justice. This is what they received.

Cases Cited

Overruled: *R. v. Bain* (1989), 31 O.A.C. 357; **considered:** *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; **referred to:** *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *R. v. Riley* (2009), 247 C.C.C. (3d) 517; *R. v. Sandham* (2009), 248 C.C.C. (3d) 46; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78; *R. v. Grant*, 2016 ONCA 639, 342 C.C.C. (3d) 514; *R. v. Husbands*, 2017 ONCA 607, 353 C.C.C. (3d) 317; *R. v. Noureddine*, 2015 ONCA 770, 128 O.R. (3d) 23; *R. v. W.V.*, 2007 ONCA 546; *R. v. Cloutier* (1988), 43 C.C.C. (3d) 35; *R. v. Bain*, [1992] 1 S.C.R. 91; *R. v. Primeau*, [2000] R.J.Q. 696; *R. v. C.N.* (1991), 52 Q.A.C. 53, rev'd [1992] 3 S.C.R. 471; *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47; *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777; *R. v. Latimer*, [1997] 1 S.C.R. 217; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543.

Statutes and Regulations Cited

An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments), S.C. 2008, c. 18, s. 26.

An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, S.C. 2019, c. 25, s. 272.

Canadian Charter of Rights and Freedoms, s. 11(d).

Criminal Code, R.S.C. 1985, c. C-46, Part II.1, ss. 83.18(1), 83.2, 248, 465(1)(a), (c), 468, 469, 536, 536.1, 640(1), 686(1)(b)(iii), (iv), 785.

Criminal Law Amendment Act, 1985, R.S.C. 1985, c. 27 (1st Supp.), s. 145(1).

Supreme Court Act, R.S.C. 1985, c. S-26, s. 46.1.

APPEAL from a judgment of the Ontario Court of Appeal (Rouleau, Hourigan and Zarnett JJ.A.), 2019 ONCA 672, 57 C.R. (7th) 388, [2019] O.J. No. 4373 (QL), 2019 CarswellOnt 13667 (WL Can.), setting aside the convictions of the accused for terrorism offences and ordering a new trial. Appeal allowed.

Kevin Wilson and Amber Pashuk, for the appellant.

Erin Dann and Sarah Weinberger, for the respondent Chiheb Esseghaier.

Megan Savard and Riaz Sayani, for the respondent Raed Jaser.

Michael Perlin, for the intervener the Attorney General of Ontario.

Andrew Barg, for the intervener the Attorney General of Alberta.

Nathan Gorham, for the intervener the Criminal Lawyers' Association
(Ontario)

The reasons for judgment of the Court were delivered by

MOLDAVER AND BROWN JJ. —

I. Overview

[1] In 1985, Parliament enacted s. 686(1)(b)(iv) of the *Criminal Code*, R.S.C. 1985, c. C-46, to allow courts of appeal to uphold a conviction where, despite a procedural irregularity at trial, the “trial court had jurisdiction over the class of offence” and the court of appeal was of the opinion that “the appellant suffered no prejudice” as a result of the error (*Criminal Law Amendment Act, 1985*, R.S.C. 1985, c. 27 (1st Supp.), s. 145(1)).

[2] In *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, this Court explained that Parliament’s aim in enacting s. 686(1)(b)(iv) was to broaden the powers of appellate courts to cure certain procedural errors that had formerly been viewed as incurable as a result of their effect on the “jurisdiction” of the court (paras. 13 and 16). The purpose of the provision was to move from characterizing such jurisdictional errors as automatically fatal to a conviction, toward a process by which appellate courts could

uphold a conviction where, despite the procedural error, the accused person had suffered no prejudice (paras. 16 and 18).

[3] At issue in this appeal is whether the curative proviso in s. 686(1)(b)(iv) can be applied to cure procedural errors that occur during the jury selection process.

[4] In April 2013, the respondents, Chiheb Esseghaier and Raed Jaser, were charged with a series of terrorism offences under the *Criminal Code*. In light of the seriousness of the allegations and the high-profile nature of the case, the parties agreed that challenges for cause were necessary to ensure the impartiality of the jury.

[5] At the time, the *Criminal Code* provided two procedures for trying challenges for cause — rotating triers and static triers. Mr. Jaser wanted rotating triers. He also wanted the trial judge to exercise his common law discretion to exclude prospective jurors from the courtroom during the challenge for cause process. If his request could not be satisfied, he wanted static triers.

[6] The trial judge refused Mr. Jaser's request, concluding that trial judges no longer had the authority to exclude unsworn jurors where the rotating triers process was being used. In any event, he would not have exercised the discretion even if he had it. To grant Mr. Jaser's request would be to expose the sworn jurors — members of the jury — to the potentially partial comments of prospective jurors and, thereby, risk undermining trial fairness. The trial judge thus imposed static triers in accordance with Mr. Jaser's alternate position. Mr. Esseghaier, who rejected the authority of the

Criminal Code in its entirety, made no submissions as to the appropriate procedure for trying the challenges for cause.

[7] Mr. Esseghaier and Mr. Jaser were subsequently convicted and sentenced to life imprisonment. They appealed on a number of grounds, including whether the trial judge had erred in denying Mr. Jaser's request for rotating triers. Prior to the hearing, however, it was decided to bifurcate the appeal and have the court address the jury selection issue first.

[8] On the basis of the jury selection issue, the Court of Appeal for Ontario overturned the convictions and directed a new trial (2019 ONCA 672, 57 C.R. (7th) 388). In the court's opinion, the trial judge retained the common law authority to grant Mr. Jaser's request, and he should have exercised it. The imposition of static triers against Mr. Jaser's wishes meant that the jury — and thus the court — had been improperly constituted. The convictions could not stand, and the error could not be cured by the operation of the curative proviso in s. 686(1)(b)(iv).

[9] The Crown obtained leave to appeal to this Court. After hearing oral argument, the Court allowed the appeal with reasons to follow. These are those reasons.

[10] In our view, the curative proviso in s. 686(1)(b)(iv) can be applied to cure jury selection errors. And, as we will explain, the proviso can cure the particular error in this case, as both statutory requirements in s. 686(1)(b)(iv) are met: (1) the trial court had jurisdiction over the class of offence, as the offences at issue were indictable and

the Ontario Superior Court of Justice has jurisdiction over all indictable offences; and (2) there was no prejudice to either Mr. Esseghaier or Mr. Jaser. The procedure used, though technically incorrect, was one of two alternatives by which Parliament sought to ensure that an accused person's right to a fair trial by an independent and impartial jury was protected. While Mr. Esseghaier and Mr. Jaser did not receive the specific jury selection process they wanted, our law does not demand procedurally perfect justice, but fundamentally fair justice (*R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 193). This is what they received.

II. Background

[11] On April 22, 2013, Mr. Esseghaier and Mr. Jaser were arrested and charged with various terrorism offences under Part II.1 of the *Criminal Code*. Specifically, both men were charged with conspiracy to damage transportation infrastructure with intent to endanger safety for the benefit of a terrorist group (ss. 83.2, 248 and 465(1)(c)), conspiracy to commit murder for the benefit of a terrorist group (ss. 83.2 and 465(1)(a)), and two counts each of participating in or contributing to the activity of a terrorist group (s. 83.18(1)). Mr. Esseghaier was also charged with a further count of participating in or contributing to the activity of a terrorist group.

[12] In substance, the various charges alleged that Mr. Esseghaier and Mr. Jaser were members of a terrorist group planning a series of "plots" designed to kill people. The primary plot, the "train plot", was to derail a VIA passenger train traveling between

Toronto and New York, with the ultimate aim of killing the passengers. An alternate plot, the “sniper plot”, was to use a rifle to assassinate prominent persons.

[13] The joint trial began on January 23, 2015. By then, the trial judge had heard a series of pre-trial motions, two of which are relevant to this appeal.

[14] First, on March 14, 2014, after it had become clear that Mr. Esseghaier would likely be self-represented, the Crown moved for the appointment of *amicus curiae*. The trial judge granted this motion, finding that there were “specific and exceptional circumstances” that justified the appointment of *amicus* in a limited role (2014 ONSC 2277, at para. 41 (CanLII), quoting *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 47 and 115).

[15] Secondly, on December 9, 2014, the trial judge heard a joint motion from the Crown and Mr. Jaser on issues related to jury selection. In light of the high public profile of the case and the “climate where public concerns about terrorism offences and Islamic extremism ha[d] become pronounced”, the parties agreed that challenges for cause were necessary and appropriate to ensure the impartiality of the jury (2014 ONSC 7528, at para. 8 (CanLII)). The precise method for determining the challenges for cause, however, remained at issue.

[16] As we have already noted (at para. 5), the *Criminal Code* provided at the time two methods for trying challenges for cause — rotating triers and static triers. Rotating triers involved two random members of the jury panel serving as triers until

the first jury member was chosen. The first juror would then replace one of the triers (who would be excused) and assume the role of trying whether the next prospective juror was impartial. This rotational pattern would continue until the full petit jury was selected.

[17] In 2008, Parliament introduced a second procedure for determining challenges for cause — static triers. This procedure involved the appointment of two persons who, instead of rotating, would decide all challenges themselves until the entire petit jury had been sworn in, after which they would not themselves become members of the jury.

[18] Even after the 2008 amendments, rotating triers remained the default procedure. The static triers procedure would be applied only where the accused person sought the exclusion of all sworn and unsworn (prospective) jurors, and where the trial judge agreed that exclusion was “necessary to preserve the impartiality of the jurors” (*An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)*, S.C. 2008, c. 18, s. 26).¹

[19] An additional wrinkle is that, prior to the 2008 amendments, it was accepted that trial judges had a common law discretion to order the exclusion of prospective jurors when rotating triers were being used. This discretion was exercised

¹ As of September 19, 2019, challenges for cause are now tried exclusively by the trial judge pursuant to s. 640(1) of the *Criminal Code (An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts)*, S.C. 2019, c. 25, s. 272).

where necessary to preserve the impartiality of prospective jurors by ensuring that they did not hear the questions put to, or answers given by, other prospective jurors. After the 2008 amendments, however, a live question arose in Ontario — as seen in contrasting lines of authority at the Superior Court of Justice (see, e.g., *R. v. Riley* (2009), 247 C.C.C. (3d) 517; *R. v. Sandham* (2009), 248 C.C.C. (3d) 46) — as to whether the introduction of static triers had removed trial judges’ ability to use their discretion to exclude prospective jurors where rotating triers were being used (the theory being that exclusion could now occur only through the static triers process).

[20] At the motion hearing, Mr. Jaser sought to use the default method of rotating triers. He also asked the trial judge to exercise his common law discretion to exclude prospective jurors during the challenge for cause process. There was, as Mr. Jaser saw it, “important” value in having members of the jury involved in one another’s selection (A.R., vol. III, at p. 51). Excluding prospective jurors would “ensure their convenience” and “ensure that they [we]ren’t exposed to the process in terms of the challenge for cause ahead of time and be able to tailor answers” (p. 51). While recognizing that having the sworn jurors stay in the courtroom ran the risk of tainting, he saw this as a risk worth taking in order to have the jury “participate in the process” (p. 53). If, however, the common law discretion was unavailable — or if it was available but the trial judge declined to exercise it — Mr. Jaser indicated that he would move for static triers.

[21] Mr. Esseghaier expressed no view regarding the procedure for deciding challenges for cause, exclusion of jurors, or Mr. Jaser's motion. *Amicus* was not present at the hearing.

III. Decisions Below

A. *Ontario Superior Court of Justice (Code J.), 2014 ONSC 7528*

[22] The trial judge denied Mr. Jaser's request. In his view, the introduction of static triers had ousted the common law discretion to order the exclusion of prospective jurors as a means of preserving impartiality where rotating triers were being used. As juror impartiality was the fundamental reason for the need to exclude prospective jurors in this case, the common law discretion no longer existed (paras. 41-42). He thus accepted Mr. Jaser's alternative position, agreeing that a static triers process was appropriate (para. 43).

[23] The trial judge added that, if he were wrong about the effect of the 2008 amendments, such that the common law discretion to exclude prospective jurors still existed for rotating triers where impartiality was the issue, he would nevertheless not exercise that discretion (para. 45). In his view, an order protecting only prospective jurors from tainting, but not the sworn jurors, would be an "improper" exercise of his discretion (at para. 45), as it would not "fulfil the judicial function of administering justice . . . in an . . . effective manner" (para. 46, quoting *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24). In particular, "it would be wrong to make such a

limited and ineffective common law order, when a full and effective statutory remedy was readily available, pursuant to s. 640(2.1)” (para. 46).

[24] The trial judge therefore made an order to exclude all jurors, both sworn and unsworn, and for the appointment of static triers.

B. *Interim Proceedings (Trial, Sentencing, and Bifurcation)*

[25] After a two-month trial, the jury returned verdicts convicting Mr. Esseghaier on all counts and Mr. Jaser on all counts but one. Both were sentenced to life imprisonment with parole ineligibility set at 10 years from the date of their arrest.

[26] Mr. Esseghaier and Mr. Jaser appealed their convictions and sentences. Prior to the appeal hearing, however, Mr. Jaser and *amicus* brought a motion for a bifurcated hearing, in which the jury selection issue could be heard and determined in advance of the other grounds of appeal. The case management judge granted the request, noting that the record was sufficient to allow the jury selection ground to be argued separately, and that success could result in the quashing of the convictions (Bifurcation Ruling, reproduced in A.R., vol. II, at pp. 85-86). He therefore directed that it be argued in advance of the main appeal (p. 86).

C. *Court of Appeal for Ontario (Rouleau, Hourigan, and Zarnett JJ.A.), 2019 ONCA 672, 57 C.R. (7th) 388*

[27] In light of the decision to bifurcate, the only issue before the Court of Appeal was whether the trial judge had erred in denying Mr. Jaser's request for rotating triers with prospective jurors excluded and, if so, whether that error could be cured by application of the curative proviso in s. 686(1)(b)(iv) of the *Criminal Code*.

[28] In allowing the appeal and ordering a new trial, the Court of Appeal determined that the trial judge had erred in concluding that the common law discretion did not exist (paras. 9 and 27, citing *R. v. Grant*, 2016 ONCA 639, 342 C.C.C. (3d) 514, at paras. 34, 37 and 39; *R. v. Husbands*, 2017 ONCA 607, 353 C.C.C. (3d) 317, at paras. 35-36). The trial judge had also erred in alternatively deciding that he should not exercise his discretion, even if he had it. The trial judge had denied Mr. Jaser's request on the basis that the statutory process he was electing — rotating triers — was incompatible with the need to preserve the impartiality of the jury in a case where there was a significant risk of tainting. This reasoning effectively rendered the common law discretion, as well as the very process of rotating triers, unavailable. As Mr. Jaser had not sought static triers, the risk of tainting was inevitable. Mr. Jaser's request was intended to reduce that risk (paras. 54-56).

[29] This error — the denial of Mr. Jaser's application to exclude unsworn jurors with rotating triers — could not be saved by the curative proviso, for two reasons: (1) errors affecting the composition of the jury lead to an improperly constituted court, thereby depriving the trial court of jurisdiction over the class of offence (for both Mr. Esseghaier and Mr. Jaser) (at paras. 70 and 75-77, citing *R. v. Nouredine*, 2015

ONCA 770, 128 O.R. (3d) 23, at paras. 52-53 and 61; see also *R. v. W.V.*, 2007 ONCA 546, at para. 26 (CanLII)); and (2) even if the trial court had jurisdiction, the error caused prejudice to the accused person as a result of its negative effect on the appearance of the fairness of the proceedings and the due administration of justice (para. 71, citing *Noureddine*, at para. 64).

IV. Issues

[30] This appeal presents three issues:

- (1) Did the Court of Appeal err in finding that the jury was improperly constituted?
- (2) If the jury was improperly constituted, did the Court of Appeal err in finding that the error could not be cured by the curative proviso in s. 686(1)(b)(iv) of the *Criminal Code*?
- (3) If the appeal is allowed, what is the appropriate remedy?

V. Analysis

A. *The Jury Was Improperly Constituted*

[31] We agree with the Court of Appeal that the jury for both Mr. Esseghaier and Mr. Jaser was improperly constituted. The trial judge erred in both his primary and alternative conclusions with respect to Mr. Jaser's application.

[32] With respect to the trial judge's primary finding, it was not disputed before us that the trial judge erred in concluding that the introduction of static triers in 2008 ousted the common law discretion to exclude prospective jurors while using rotating triers. The discretion existed.

[33] Turning to the trial judge's alternative conclusion — that even if the discretion existed, he would not have exercised it — we agree with the Court of Appeal that the trial judge's refusal to exercise his discretion was unreasonable. In light of Mr. Jaser's desire to use rotating triers, the risk of tainting was inevitable. He accepted that risk, but wanted it reduced through the exercise of the common law discretion to exclude prospective jurors. While the trial judge may have thought this unwise, there was no basis for him to refuse the request. In our respectful view, he erred in doing so.

[34] As a result of the error, the jury was improperly constituted for Mr. Jaser, as it was incorrectly selected by static triers instead of rotating triers with prospective jurors excluded. The jury was also improperly constituted for Mr. Esseghaier, as he was improperly denied his right to rotating triers, the default procedure under the *Criminal Code*.

B. *The Curative Proviso in Section 686(1)(b)(iv) of the Criminal Code*

[35] Section 686(1)(b)(iv) of the *Criminal Code* states the following:

686 (1) On the hearing of an appeal against a conviction . . . the court of appeal

. . .

(b) may dismiss the appeal where

. . .

(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;

[36] This appeal calls upon this Court to clarify the meaning of the phrase “jurisdiction over the class of offence” in s. 686(1)(b)(iv) and to consider whether Mr. Esseghaier and Mr. Jaser “suffered no prejudice” such that the curative proviso may be applied in this case.

[37] We turn first to the issue of jurisdiction.

(1) Jurisdiction Over the Class of Offence

[38] The phrase “jurisdiction over the class of offence” is not defined in the *Criminal Code* and its meaning has not yet been fully explored by this Court. The first steps to understanding its meaning, however, were taken by Arbour J. in *Khan*.

[39] In reviewing the legislative history of s. 686(1)(b)(iv), Arbour J. explained that, at the time of the proviso's enactment, criminal procedure was replete with jurisdictional complexities that restricted the capacity of appellate courts to uphold convictions despite an absence of prejudice to the accused person (paras. 11-16). In introducing the proviso, Parliament's purpose was to "expan[d] the remedial powers of courts of appeal" to cure these serious procedural irregularities that had previously been deemed fatal to a conviction (para. 11). In order to give proper effect to this purpose, Arbour J. adopted the analysis of the Court of Appeal for Ontario in *R. v. Cloutier* (1988), 43 C.C.C. (3d) 35, in which "jurisdiction over the class of offence" was taken to refer to the capacity of the trial court to deal with the "subject-matter of the charge" at issue (p. 47). This approach had been adopted nine years earlier by Gonthier J., in dissent, in *R. v. Bain*, [1992] 1 S.C.R. 91. With its scope conceptualized in this way, the proviso would have broad application, enabling appellate courts to engage with jurisdictional errors and determine whether they had caused any prejudice to the appellant.

[40] We agree with this approach. We would, however, take this opportunity to expand on *Khan's* discussion of the proviso's scope in order to give greater clarity to the meaning of the phrase "jurisdiction over the class of offence". In our view, its meaning is properly understood in light of the jurisdictional provisions in the *Criminal Code*.

[41] The *Criminal Code* contains three provisions stating the jurisdiction of courts to try specific classes of offences — ss. 468, 469 and 785:

468 Every superior court of criminal jurisdiction has jurisdiction to try any indictable offence.

469 Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than [treason, intimidating Parliament or a legislature, inciting to mutiny, seditious offences, piracy, piratical acts, murder, accessory after the fact to high treason or treason or murder, bribery by the holder of a judicial office, an offence under ss. 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, attempting to commit treason, intimidating Parliament or a legislature, inciting to mutiny, seditious offences, piracy, or piratical acts, and conspiracy to commit treason, intimidating Parliament or a legislature, inciting to mutiny, seditious offences, piracy, piratical acts, or murder].

...

785 . . . *summary conviction court* means a person who has jurisdiction in the territorial division where the subject-matter of the proceedings is alleged to have arisen and who

- (a) is given jurisdiction over the proceedings by the enactment under which the proceedings are taken,
- (b) is a justice or provincial court judge, where the enactment under which the proceedings are taken does not expressly give jurisdiction to any person or class of persons, or
- (c) is a provincial court judge, where the enactment under which the proceedings are taken gives jurisdiction in respect thereof to two or more justices;

[42] In combination, these provisions delineate three classes of offences and the courts' powers to try persons charged with those offences: (1) indictable offences listed in s. 469 of the *Criminal Code*, which are within the exclusive jurisdiction of the superior court; (2) indictable offences not listed in s. 469, which are within the

jurisdiction of both the provincial court and the superior court; and (3) summary conviction offences, which are within the exclusive jurisdiction of the provincial court. In our view, the requirement in s. 686(1)(b)(iv) that the “trial court had jurisdiction over the class of offence” refers to these three classes of offences and the jurisdictional capacity of the superior and provincial courts to try them.

[43] Beyond the connection between the language of the proviso and the jurisdictional provisions in the *Criminal Code*, interpreting the phrase “jurisdiction over the class of offence” in accordance with those jurisdictional provisions aligns with this Court’s prior guidance as to the purpose and intent of s. 686(1)(b)(iv). As noted above, in *Khan*, Arbour J. explained that s. 686(1)(b)(iv) was “enacted in the face of a body of case law that was becoming increasingly technical and complex and which had restricted considerably the possibility for appellate courts to conclude that an error at trial” did not require setting aside the verdict (para. 16). In this context, the introduction of this provision was meant to put an end to the notion that “procedural errors having caused a loss of jurisdiction in the trial courts could not be cured, even on appeal” (para. 12). No longer was a loss of jurisdiction to be seen as automatically fatal to a conviction. Rather, appellate courts were to be able to cure errors where the appellant had suffered no prejudice, save *only* where the trial court lacked jurisdiction over the class of offence.

[44] Mr. Esseghaier and Mr. Jaser argue, however, that simply interpreting “jurisdiction over the class of offence” in line with the jurisdictional provisions cannot

be correct. Even, they say, where the trial court was empowered by Parliament to try the offences at issue, that court can be said to have had “jurisdiction” only where it was properly constituted. As the proviso applies only to save a *loss* of jurisdiction, it cannot apply where the court had never obtained jurisdiction. In the context of errors occurring during the jury selection process, therefore, the proviso cannot apply because the jury — and therefore the court — was improperly constituted and, consequently, lacked jurisdiction to try any class of offence (R.F. (Essegbaier), at paras. 67-70; R.F. (Jaser), at paras. 64-68). Put differently, they submit that a trial court’s “jurisdiction over the class of offence” is contingent on the successful application of certain procedural safeguards, such as an accused person’s election and choice as to which procedure should be used to try challenges for cause. Their argument on this point echoes the approach adopted by the Court of Appeal in this case, following its line of authority originally established in *Noureddine* and *W.V.* (see above, at para. 29).

[45] The origin of this line of argument can be found in the Court of Appeal for Ontario’s reasons in *R. v. Bain* (1989), 31 O.A.C. 357. In that case, the trial judge went outside the bounds of the *Criminal Code* and effectively legislated a jury selection process which precluded the Crown from exercising its stand aside power, and which restricted both the Crown and defence to their four peremptory challenges. According to the Court of Appeal, such a procedural error could not be cured by means of the proviso: if the jury selection process fails to comply with the provisions of the *Criminal Code*, “the court never obtains jurisdiction to proceed to trial” (para. 6). The issue with such errors is not whether they result in a *loss* of jurisdiction, but rather “whether . . .

the court was properly constituted in the first place” (para. 6). On appeal to this Court, the majority dispensed with the case on other grounds and did not address the potential application of s. 686(1)(b)(iv). Writing in dissent, however, Gonthier J. agreed with the Court of Appeal — the proviso could not cure the error because “[i]f the jury is not constituted according to the rules, the court exists no more than if the judge had been unlawfully appointed” (p. 136). It is on the basis of this restrictive approach to the proviso that the Court of Appeal for Ontario — and now the respondents on appeal — reasoned that, where an error in jury selection renders the jury improperly constituted, the trial court will never have obtained jurisdiction and the proviso will thus be inapplicable (*Noureddine*, at paras. 50-53 and 61).

[46] We disagree. To limit the proviso’s application to cases where the jury was properly constituted would be plainly inconsistent with the purpose of s. 686(1)(b)(iv), which is to “expan[d] the remedial powers of courts of appeal” to engage with jurisdictional errors and assess any prejudice that may have flowed from them. Accepting the respondents’ submissions would be to permit the kind of unnecessary complexity that was rife prior to the enactment of the provision. Indeed, in *Khan*, Arbour J. noted that, among the various jurisdictional errors contributing to the problem were “irregularities in jury selection” (para. 14). The correct approach, as outlined above, is to interpret the proviso’s scope in line with the jurisdictional provisions in the *Criminal Code*. To achieve its purpose, Parliament intended the proviso to be flatly inapplicable only where the trial court was not statutorily empowered to try the class of offence, or where the accused had suffered prejudice.

[47] We therefore depart from the approach espoused by the respondents and the Court of Appeal on the scope of the jurisdictional inquiry under s. 686(1)(b)(iv). For the purposes of the proviso, “jurisdiction” is concerned only with the trial court’s capacity to deal with the “subject-matter of the charge”, as it is only a lack of subject-matter jurisdiction (“*ratione materiae*”) that [TRANSLATION] “deprive[s] the court *ab initio* of all jurisdiction” (*R. v. Primeau*, [2000] R.J.Q. 696 (C.A.), at para. 31; see also *R. v. C.N.* (1991), 52 Q.A.C. 53, at para. 38, per Brossard J.A., dissenting, rev’d substantially for the reasons of Brossard J.A., [1992] 3 S.C.R. 471). To this end, the jurisdictional question under s. 686(1)(b)(iv) is directed solely to the trial court’s capacity to try the relevant class of offence, as defined by Parliament. It is not concerned with the timing of the procedural error, nor with its consequences for the appellant’s trial. Such inquiries into the nature and consequence of the error, including whether it was one of application of the rules of the *Criminal Code* or an error arising from the application of judicially legislated rules, are best left to the prejudice analysis.

[48] In summary, the phrase “jurisdiction over the class of offence” is to be interpreted in accordance with the jurisdictional provisions established by Parliament in the *Criminal Code*. Jurisdiction can therefore be understood as follows:

- (1) Where the appellant was convicted of an indictable offence listed in s. 469, the jurisdictional requirement will be met only where the trial court was the superior court.

- (2) Where the appellant was convicted of an indictable offence not listed in s. 469, the jurisdictional requirement will be met where the trial took place in either the provincial court or superior court.²
- (3) Where the appellant was convicted of a summary conviction offence, the jurisdictional requirement will be met only where the trial court was the provincial court.

Hybrid offences will fall into categories (2) or (3) once the Crown has made a valid decision as to how to proceed.

[49] In this case, Mr. Esseghaier and Mr. Jaser were both tried and convicted under ss. 83.18(1), 83.2, and 465(1)(a) of the *Criminal Code*. Mr. Esseghaier was further convicted under ss. 248 and 465(1)(c). An offence under s. 465(1)(a) — conspiracy to commit murder — is considered a s. 469 offence pursuant to s. 469(e). Only the superior court has jurisdiction to try such an offence. The remaining offences are indictable offences not listed in s. 469, meaning that, for the purposes of the proviso in s. 686(1)(b)(iv), they can be tried in either the provincial or superior court. In this case, all the convictions were rendered by a trial court of the superior court. The trial

² Under the proviso, therefore, election errors (e.g., where an accused person elects to be tried in the provincial court but is mistakenly tried in the superior court, or where an accused person elects to be tried by a judge and jury and is mistakenly tried by a judge alone (ss. 536 and 536.1)) will not automatically lead to a new trial. Whether the error can be cured will depend on whether the accused suffered any prejudice.

court thus had “jurisdiction over the class of offence” of which Mr. Esseghaier and Mr. Jaser were convicted. The proviso can apply, absent prejudice.

(2) Mr. Esseghaier and Mr. Jaser Suffered No Prejudice

[50] If an appeal court is satisfied that the trial court had jurisdiction over the class of offence of which the appellant was convicted, the proviso inquiry turns to the second requirement — whether the appellant “suffered no prejudice”.

[51] In *Khan*, Arbour J. stated that, under s. 686(1)(b)(iv), “an analysis of prejudice must be undertaken, in accordance with the principles set out in s. 686(1)(b)(iii)” (para. 18 (emphasis added)). With respect, it is not clear to us precisely what was meant by analysing prejudice “in accordance with the principles set out in s. 686(1)(b)(iii)”. While s. 686(1)(b)(iv) allows an appellate court to cure a procedural irregularity at trial where “the appellant suffered no prejudice thereby”, s. 686(1)(b)(iii) applies to instances where the trial judge erred on a question of law but where the appellate court is of the opinion that such error occasioned “no substantial wrong or miscarriage of justice”. In other words, these two subparagraphs each state a distinct test for curing a distinct kind of error.

[52] In the result, we have concerns about how, if it is indeed possible, s. 686(1)(b)(iv) can be applied “in accordance with the principles set out in s. 686(1)(b)(iii)”, as Parliament is presumed to use language carefully, such that different words are to be taken as imparting a different meaning (*Marche v. Halifax*

Insurance Co., 2005 SCC 6, [2005] 1 S.C.R. 47, at para. 95, per Bastarache J., dissenting, but not on this point, citing R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 162-66). That being so, we query whether a stricter standard might be required under s. 686(1)(b)(iv).

[53] In this case, however, it is not necessary for us to definitively resolve this puzzle since, on either approach, the Crown has satisfied its burden in this case as, in our view, there is clearly no prejudice to Mr. Esseghaier or Mr. Jaser for two reasons: (1) the static triers procedure used, though incorrect, was enacted by Parliament specifically for the purpose of ensuring a fair trial by an independent and impartial jury; and (2) both the trial judge and static triers performed their duties with the requisite care and attention to protect Mr. Esseghaier and Mr. Jaser's rights under the *Canadian Charter of Rights and Freedoms*. It follows that no substantial wrong or miscarriage of justice has occurred.

[54] The first reason reflects that, in the context of applying s. 686(1)(b)(iv) to a procedural error in jury selection, the prejudice inquiry is focused solely upon the risk of depriving accused persons of their right, under s. 11(d) of the *Charter*, to a fair trial by an independent and impartial jury. Where the appellant is able to show that a procedural error led to an improperly constituted jury, the onus shifts to the Crown to show, on a balance of probabilities, that the appellant was not deprived of their right to a fair trial by an independent and impartial jury and, consequently, suffered no prejudice. Here, we are satisfied that the Crown has discharged that onus. Although the

use of static triers was incorrect in the circumstances, it was one of the two legally sanctioned procedures for trying challenges for cause at the time of the trial. The jury was not selected by a procedure concocted outside of the bounds of the *Criminal Code* (see, e.g., *Bain and W.V.*), but rather by one that Parliament had enacted specifically for the purpose of ensuring a fair trial by an independent and impartial jury. Further, in the particular circumstances of this case — where the risk of juror tainting was palpable — the static triers process removed that risk by having both the sworn and unsworn jurors excluded from the courtroom.

[55] Secondly, the actual implementation of the procedure in this case, by both the trial judge and the static triers, was handled with the requisite care and attention to ensure that the fair trial rights of Mr. Esseghaier and Mr. Jaser were protected. At the motion hearing and in advance of the selection of the triers, the trial judge explained that his intention was to undertake “a really serious vetting of the triers” (A.R., vol. III, at p. 50) to make sure that the two people chosen “would take up th[e] role effectively” (A.R., vol. IV, at p. 83). He indicated that his practice was to ask prospective triers a broad range of questions, including about their “background”, “values”, “experience in multicultural situations” (A.R., vol. III, at p. 50), and about issues “related to the actual questions in the challenge for cause” (A.R., vol. IV, at p. 83). The trial judge followed through with his stated intention. He conducted a thorough vetting of prospective triers, in which he inquired as to their backgrounds, experiences, and ability to be impartial in the particular circumstances at hand. In the course of his vetting process, he excused

three prospective triers. The two individuals he selected were approved by both the Crown and counsel for Mr. Jaser.

[56] The triers also exercised care in discharging their duties. They were properly instructed on their duties by the trial judge. They took their role seriously and, during the process, refused 25 prospective jurors. Midway through the challenges, they were reinstructed at the behest of Crown counsel. Counsel for Mr. Jaser agreed to the reinstruction, but noted that he “ha[dn’t] seen anything that caused [him] concern” (A.R., vol. IV, at p. 195). The triers disagreed at one point with respect to the acceptability of one prospective juror, but eventually agreed to accept her. Though perhaps unusual, this temporary disagreement, without more, is insufficient to raise a concern about improper reasoning or intentional tampering by the triers. Indeed, there is no suggestion that any of the jurors eventually chosen to try the case were partial, and each one was approved by counsel for Mr. Jaser. This was not a case where the behaviour of actors within the trial process raised a concern about misconduct or unfairness to the accused (see, e.g., *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777, where the Crown was alleged to have engaged in an improper vetting of the jury, or *R. v. Latimer*, [1997] 1 S.C.R. 217, where, at the behest of the Crown, the police approached prospective jurors and asked them to complete a questionnaire related to issues pertinent to the case).

[57] We have no doubt that, on the basis of this information, a reasonable person would perceive Mr. Esseghaier and Mr. Jaser to have received a fair trial before an

independent and impartial jury. While Mr. Esseghaier and Mr. Jaser did not receive the exact trial they wanted, our law does not demand perfect justice, but fundamentally fair justice (*O'Connor*, at para. 193). This is what they received. Accordingly, there was no infringement of the right to a fair trial by an independent and impartial jury, no prejudice, and no substantial wrong or miscarriage of justice.

[58] The proviso can cure the error, and we therefore apply it here.

C. *Remedy*

[59] As we would allow the appeal, we must address the issue of remedy.

[60] The Crown asks that the convictions be restored. Mr. Esseghaier asks the Court to exercise its discretion under s. 46.1 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, to remit the outstanding grounds of appeal to the Court of Appeal for determination. In slight variation, Mr. Jaser asks that, if this Court finds that the curative proviso can apply to cure the error, the Court remit the matter to the Court of Appeal to consider the jury selection issue along with the other grounds of appeal. In Mr. Jaser's view, even were this Court to find that the curative proviso can apply, the question of whether it should ultimately be applied in this case cannot be properly determined until the Court of Appeal has assessed the remaining grounds of appeal.

[61] As we have concluded that the trial judge's error can be cured by operation of the curative proviso in s. 686(1)(b)(iv), it follows that the convictions for Mr. Esseghaier and Mr. Jaser must be restored.

[62] As to the question of whether this Court should remit the remaining grounds of appeal back to the Court of Appeal, s. 46.1 of the *Supreme Court Act* states that:

46.1 The Court may, in its discretion, remand any appeal or any part of an appeal to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.

[63] The discretion in s. 46.1 is to be exercised "in the interests of justice" (*Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 68; see also *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 45).

[64] In our view, it is "in the interests of justice" to remand the outstanding grounds of appeal to the Court of Appeal for determination. The remaining grounds were not abandoned; they were simply bifurcated from the issue decided here, and they remain unexamined.

[65] We cannot accept, however, Mr. Jaser's argument that this Court should refrain from applying the proviso in order to allow the Court of Appeal to consider the error alongside any other potential errors to determine whether, on the whole, the proviso should or should not be applied. Part of the reason why the jury selection issue

was bifurcated from the other grounds of appeal was because it could be assessed in isolation and because, if successful, it would be determinative. Our conclusion that the respondents' ground of appeal is unsuccessful stands in isolation, and has no effect on the remaining grounds of appeal, which should now be assessed together as would occur in the normal course of appellate proceedings.

[66] We would, therefore, allow the appeal, restore the convictions, and remit the remaining grounds of appeal to the Court of Appeal.

Appeal allowed.

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