



**SUPREME COURT OF CANADA**

**CITATION:** R. v. R.V., 2021 SCC  
10

**APPEAL HEARD:** November 13, 2020  
**JUDGMENT RENDERED:** March 12, 2021  
**DOCKET:** 38854

**BETWEEN:**

**Her Majesty The Queen**  
Appellant

and

**R.V.**  
Respondent

- and -

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

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

**REASONS FOR JUDGMENT:** Moldaver J. (Wagner C.J. and Abella, Karakatsanis, Côté,  
(paras. 1 to 80) Rowe and Martin JJ. concurring)

**REASONS DISSENTING IN PART:** Brown J. (Kasirer J. concurring)  
(paras. 81 to 103)

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R. v. R.V.

**Her Majesty The Queen**

*Appellant*

v.

**R.V.**

*Respondent*

and

**Attorney General of Alberta and  
Criminal Lawyers' Association of Ontario**

*Interveners*

**Indexed as: R. v. R.V.**

**2021 SCC 10**

File No.: 38854.

2020: November 13; 2021: March 12.

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 — Unreasonable verdict — Inconsistent verdicts — Charge to jury — Accused convicted by jury of sexual interference and invitation to sexual touching while acquitted of sexual assault — All three offences arising from same conduct involving one complainant — Appeal by accused against verdicts of guilt and cross-appeal by Crown against verdict of acquittal — Whether legal error in jury instructions can reconcile apparently inconsistent verdicts — Appropriate remedy — Criminal Code, R.S.C. 1985, c. C-46, s. 686(4), (8).*

V was charged with historical sexual offences against a single complainant and tried before a judge and jury. The jury convicted him of sexual interference and invitation to sexual touching. The same jury acquitted him of sexual assault based on the same evidence. V appealed his convictions, asserting that they were inconsistent with his sexual assault acquittal and therefore unreasonable. The Crown cross-appealed V's acquittal, maintaining that the charge to the jury was so unnecessarily confusing that it amounted to an error in law and that the apparent inconsistency in the verdicts could be explained by the erroneous jury instructions, such that the guilty verdicts could not be considered unreasonable.

A majority of the Court of Appeal held that there was no legal error in the jury instructions and that the convictions for sexual interference and invitation to sexual touching were unreasonable, as they were inconsistent with the acquittal on the sexual assault charge. The majority quashed V's convictions and substituted verdicts of acquittal, and upheld the acquittal on the sexual assault charge. The minority found

legal error in the jury instructions and would have ordered a new trial on all three charges.

*Held* (Brown and Kasirer JJ. dissenting in part): The appeal should be allowed.

*Per* Wagner C.J. and Abella, **Moldaver**, Karakatsanis, Côté, Rowe and Martin JJ.: The trial judge misdirected the jury on the charge of sexual assault. This legal error was material to the acquittal, did not impact on the convictions, and reconciles the apparent inconsistency in the verdicts. As the verdicts are not actually inconsistent, the convictions are not unreasonable on the basis of inconsistency. V's convictions should therefore be restored. The acquittal on the charge of sexual assault should be set aside and in the circumstances of this case, a stay of proceedings should be entered on that charge.

In an appeal alleging inconsistent verdicts rendered by a jury, the ultimate inquiry for appellate courts is whether the verdicts are actually inconsistent and therefore unreasonable. The Crown can seek to reconcile apparently inconsistent verdicts on the basis that they were the result of a legal error in the jury instructions. Where the Crown attempts to reconcile apparently inconsistent verdicts on the basis of a legal error, it must satisfy the appellate court to a high degree of certainty that there was a legal error in the jury instructions and that the error: (1) had a material bearing on the acquittal; (2) was immaterial to the conviction; and (3) reconciles the inconsistency by showing that the jury did not find the accused both guilty and not

guilty of the same conduct. If these elements are satisfied, the verdicts are not actually inconsistent. In assessing whether the Crown has satisfied its burden, the appellate court must not engage in improper speculation about what the jury did and did not do. It must be able to retrace the reasoning of the jury with a sufficiently high degree of certainty to exclude all other reasonable explanations for how the jury rendered its verdicts.

If the appellate court cannot conclude with a high degree of certainty that the legal error did not taint the conviction, setting aside the acquittal will require a retrial on all charges. When the court can isolate the legal error to the acquittal, that charge should be the only one sent back for a new trial and the conviction should stand.

In some circumstances, the appropriate remedy may be to enter a stay of proceedings on the charge for which the accused was acquitted in application of a court of appeal's residual power under s. 686(8) of the *Criminal Code*. For an appellate court to issue a stay of proceedings under s. 686(8), three requirements must be met: first, the court must have exercised one of the triggering powers conferred under s. 686(2), (4), (6) or (7); second, the order issued must be ancillary to the triggering power; and third, the order must be one that justice requires.

In this case, the trial judge misdirected the jury on the charge of sexual assault by leaving the jury with the mistaken impression that the element of "force" required for sexual assault was different than the element of "touching" required for sexual interference and invitation to sexual touching. This legal error led the jury to

return a verdict of acquittal on the sexual assault charge. It did not affect the convictions and the trial judge's instructions on sexual interference and invitation to sexual touching were legally correct. Further, the legal error reconciles the apparent inconsistency by explaining how the jury could have rendered its verdicts without finding V both guilty and not guilty of the same conduct. The jury found V guilty of sexual touching, hence the convictions, and not guilty of applying force beyond touching to the complainant in circumstances of a sexual nature, hence the acquittal. Those two findings are not inconsistent and V's convictions should be restored. As for the acquittal on the sexual assault charge, it must be set aside. The circumstances of this case justify the Court entering a stay of proceeding on that charge rather than ordering a retrial.

*Per Brown and Kasirer JJ. (dissenting in part):* There is agreement with the majority that the verdicts in this case are inconsistent. There is also agreement that the jury was misdirected, and that the misdirection amounted to legal error that might reasonably be thought to have had a material bearing on the acquittal. However, the only available remedy in response to the Crown appeal in the present case is the order of a new trial. To avoid putting V in jeopardy for something for which he was convicted, a new trial on all three charges is necessary.

In specifying, in s. 686(4)(b)(i) of the *Criminal Code*, a new trial as the sole remedy where the Crown successfully appeals from a verdict of acquittal by a jury, Parliament did not care about the degrees of certainty at the reviewing court; rather,

what Parliament thought significant is that the absence of reasons for judgment by a jury means a reviewing court can never be certain what was in the minds of the jury. Retracing a jury's reasoning, irrespective of the reviewing court's degree of certainty, is a type of review that: (1) Parliament has precluded; (2) the Court has never sanctioned; and (3) is, as a practical matter, impossible.

The majority's finding in the present case that the legal error reconciles the apparent inconsistency is manifestly at odds with the reasoning of the Court in *R. v. J.F.*, 2008 SCC 60, [2008] 3 R.C.S. 215, which could not be any clearer: the existence of a legal error does not reconcile inconsistent verdicts. The majority's framework is an invitation to routine speculation into the reasoning process of the jury. It will invite confirmation bias, and does not discourage the Crown from over-charging or drafting confusing indictments; if anything, it does the opposite, by eliminating any consequences.

Appellate courts operate within certain statutory constraints when deciding a Crown appeal from an acquittal by a jury and, following s. 686(4) of the *Criminal Code*, may either dismiss the appeal, or allow the appeal, set aside the verdict, and order a new trial. While s. 686(8) empowers an appellate court to make an additional order under s. 686(4), the majority is making an alternative order by entering a stay of proceedings. Issuing an order that is tantamount to a finding of not guilty is totally inconsistent with the majority's underlying judgment that affirms V's guilt of the very same criminal conduct. The majority's difficulty in ordering a new trial on the sexual

assault charge is that they also wish to restore V's convictions, which are plainly inconsistent with the acquittal. Avoiding this difficulty is precisely why the appropriate disposition in these circumstances is a new trial on all charges.

## Cases Cited

By Moldaver J.

**Considered:** *R. v. Pittiman*, 2006 SCC 9, [2006] 1 S.C.R. 381; *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215; **referred to:** *R. v. S.L.*, 2013 ONCA 176, 303 O.A.C. 103; *R. v. K.D.M.*, 2017 ONCA 510; *R. v. Tyler*, 2015 ONCA 599; *R. v. Tremblay*, 2016 ABCA 30, 612 A.R. 147; *R. v. L.B.C.*, 2019 ABCA 505, 383 C.C.C. (3d) 331; *R. v. J.D.C.*, 2018 NSCA 5; *R. v. McShannock* (1980), 55 C.C.C. (2d) 53; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104; *R. v. Illes*, 2008 SCC 57, [2008] 3 S.C.R. 134; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *R. v. Hay*, 2013 SCC 61, [2013] 3 S.C.R. 694; *R. v. Plein*, 2018 ONCA 748, 365 C.C.C. (3d) 437; *R. v. Chase*, [1987] 2 S.C.R. 293; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Barton*, 2017 ABCA 216, 55 Alta. L.R. (6th) 1, aff'd 2019 SCC 33; *R. v. Cuerrier*, [1998] 2 S.C.R. 371; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3; *R. v. Rodgeron*, 2015 SCC 38, [2015] 2 S.C.R. 760; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Haughton* (1992), 11 O.R. (3d) 621, aff'd [1994] 3 S.C.R. 516; *R. v. Thomas*, [1998] 3 S.C.R. 535; *R. v. Hinse*, [1995] 4 S.C.R. 597; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Provo*, [1989] 2 S.C.R. 3; *Terlecki v. The Queen*, [1985] 2 S.C.R.

483; *R. v. Warsing*, [1998] 3 S.C.R. 579; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509; *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. Kalanj*, [1989] 1 S.C.R. 1594; *R. v. Puskas*, [1998] 1 S.C.R. 1207; *Kienapple v. The Queen*, [1975] 1 S.C.R. 729.

By Brown J. (dissenting in part)

*R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215; *R. v. Pan*, 2001 SCC 42, [2001] 2 S.C.R. 344; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Pittiman*, 2006 SCC 9, [2006] 1 S.C.R. 381; *R. v. Plein*, 2018 ONCA 748, 365 C.C.C. (3d) 437; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509; *R. v. Hinse*, [1995] 4 S.C.R. 597; *R. v. Thomas*, [1998] 3 S.C.R. 535; *R. v. Hebert*, [1996] 2 S.C.R. 272; *R. v. Rodgeron*, 2015 SCC 38, [2015] 2 S.C.R. 760.

### **Statutes and Regulations Cited**

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

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 151, 152, 265(1), (2), 271, 649, 675, 676, 686, 695(1).

### **Authors Cited**

Watt, David. *Watt's Manual of Criminal Jury Instructions*, 2nd ed. Toronto: Carswell, 2015.

APPEAL from a judgment of the Ontario Court of Appeal (Strathy C.J.O. and Rouleau, Pardu, Miller and Trotter JJ.A.), 2019 ONCA 664, 147 O.R. (3d) 657, 379 C.C.C. (3d) 219, [2019] O.J. No. 4355 (QL), 2019 CarswellOnt 13561 (WL Can.), quashing the convictions on the charges of sexual interference and invitation to sexual touching and entering verdicts of acquittal, and upholding the acquittal on the charge of sexual assault. Appeal allowed, Brown and Kasirer JJ. dissenting in part.

*Christopher Webb and Hatim Kheir*, for the appellant.

*Philip Campbell and Neill Fitzmaurice*, for the respondent.

*Joanne Dartana, Q.C.*, for the intervener the Attorney General of Alberta.

*Michael Dineen*, for the intervener the Criminal Lawyers' Association of Ontario.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Martin JJ. was delivered by

MOLDAVER J. —

## I. Overview

[1] A jury renders inconsistent verdicts when it finds an accused both guilty and not guilty of the same conduct. The respondent, R.V., alleges that happened here. R.V. was charged with historical sexual offences against a single complainant. He was tried before a judge and jury. The jury convicted him of sexual interference under s. 151 of the *Criminal Code*, R.S.C. 1985, c. C-46, and invitation to sexual touching under s. 152. The same jury acquitted him of sexual assault under s. 271 based on the same evidence.

[2] R.V. appealed his convictions to the Court of Appeal for Ontario, asserting that they were inconsistent with his sexual assault acquittal and therefore unreasonable. The Crown cross-appealed R.V.'s acquittal, maintaining that the charge to the jury was so unnecessarily confusing that it amounted to an error in law. The Crown argued that despite what it characterized as conflicting authorities from both the Supreme Court of Canada and the Court of Appeal for Ontario concerning the impact of erroneous jury instructions on the inconsistent verdicts inquiry, the apparent inconsistency in the verdicts rendered by the jury in the present case could be explained by the erroneous jury instructions, such that the guilty verdicts could not be considered unreasonable.

[3] Writing for the majority, Strathy C.J.O. disagreed with the Crown that there are conflicting Supreme Court of Canada authorities on inconsistent verdicts. The majority agreed, however, that it was necessary to clarify the Court of Appeal's own jurisprudence on the role of jury instructions in inconsistent verdict cases. In so doing,

the majority overturned its prior decisions in *R. v. S.L.*, 2013 ONCA 176, 303 O.A.C. 103; *R. v. K.D.M.*, 2017 ONCA 510; and *R. v. Tyler*, 2015 ONCA 599 — and, by implication, disagreed with the approach taken in other provinces (see, e.g., *R. v. Tremblay*, 2016 ABCA 30, 612 A.R. 147; *R. v. L.B.C.*, 2019 ABCA 505, 383 C.C.C. (3d) 331; *R. v. J.D.C.*, 2018 NSCA 5). In the result, the majority held that there was no legal error in the jury instructions and that the convictions for sexual interference and invitation to sexual touching were unreasonable, as they were inconsistent with R.V.’s acquittal on the sexual assault charge. The majority quashed R.V.’s convictions and substituted verdicts of acquittal. Justice Rouleau dissented on whether the jury instructions amounted to an error of law and on the appropriate remedy. The Crown now appeals to this Court. It asks that R.V.’s convictions be restored and that his acquittal be set aside.

[4] This case provides us with an opportunity to clarify the approach to be followed when verdicts are alleged to be inconsistent. While the basic principles underlying inconsistent verdicts have been established by this Court, we have yet to explicitly consider the impact of legally erroneous jury instructions on the inconsistent verdicts inquiry. In doing so here, I seek to achieve a just balance between judicial integrity and fairness to the accused, while respecting the role of juries in our justice system.

[5] As I will explain, the Crown can seek to reconcile apparently inconsistent verdicts by showing, to a high degree of certainty, that the acquittal was the product of

a legal error in the jury instructions, that the legal error did not impact the conviction, and that the error reconciles the inconsistency by showing that the jury did not find the accused both guilty and not guilty of the same conduct. If the Crown discharges its burden, appellate intervention on the conviction is not warranted because the verdicts are not actually inconsistent and thus not unreasonable on the basis of inconsistency.

[6] For the reasons that follow, in the present case, I am respectfully of the view that the trial judge misdirected the jury on the charge of sexual assault by leaving the jury with the mistaken impression that the element of “force” required for sexual assault was different than the element of “touching” required for sexual interference and invitation to sexual touching. In particular, the failure to instruct the jury in clear terms that the “force” required to establish sexual assault was one and the same as the “touching” required to establish the other two offences constituted non-direction amounting to misdirection. The effect of this error on the apparently inconsistent verdicts is significant. A review of the charge to the jury as a whole enables me to conclude, with a high degree of certainty, that the error was material to the acquittal. Equally, I am satisfied that the error did not impact on the convictions; rather, it reconciles the apparent inconsistency in the verdicts. Accordingly, the verdicts are not actually inconsistent and the convictions are not unreasonable on the basis of inconsistency.

[7] In the result, I would allow the appeal and restore the convictions. I would also set aside the acquittal and, as I will explain, enter a stay of proceedings on the charge of sexual assault.

## II. Background and Proceedings Below

[8] R.V. was charged with historical sexual offences against the complainant, who was the daughter of R.V.'s partner at the time of the alleged offences. The charges, spanning 1995 to 2003, included sexual assault, sexual interference and invitation to sexual touching.

### A. *Ontario Superior Court of Justice (Vallee J., Sitting With a Jury)*

[9] R.V.'s trial lasted two days. The complainant was the only witness. She testified to multiple incidents of sexual abuse committed by R.V. when she was between the ages of 7 and 13. According to her evidence, R.V.:

- Grabbed her hand and moved it to touch his penis;
- Touched her breast over her clothing;
- Touched her vagina over her clothing;
- Held her hand and used it to masturbate himself;

- Laid underneath her while he was unclothed and she was clothed, simulating intercourse and ejaculating on his stomach;
- Laid underneath her while he was clothed and she was unclothed, simulating intercourse; and
- Touched her head and pushed it down towards his penis.

[10] The Crown presented no other evidence at trial. The defence maintained that the complainant's evidence was inconsistent and therefore not sufficiently credible to support a finding of guilt beyond a reasonable doubt. The defence also asserted that she was motivated to fabricate her evidence.

[11] At the end of the trial, the trial judge instructed the jury on each of the offences separately, in the words provided by the pattern instructions in *Watt's Manual of Criminal Jury Instructions* (2nd ed. 2015). The same evidence went to all three charges.

[12] On the sexual assault charge, the trial judge instructed the jury that R.V. could be found guilty if they were satisfied that the Crown proved beyond a reasonable doubt that R.V. intentionally applied force to the complainant and that the force took place in circumstances of a sexual nature (A.R., at p. 161). Because the complainant was under the age of 16 at the time of the alleged incidents, consent was not an issue. If the jury was not satisfied that the force occurred in circumstances of a sexual nature,

the trial judge instructed them that the result would be to find R.V. not guilty of sexual assault, but guilty of assault (*ibid.*).

[13] Turning to the sexual interference charge, the trial judge instructed the jury that R.V. could be found guilty if the jury was satisfied that the complainant was under 16 years old at the time, that R.V. touched the complainant and that the touching was for a sexual purpose (pp. 162-63).

[14] On the invitation to sexual touching charge, the trial judge instructed that R.V. could be found guilty if the jury was satisfied that the complainant was under 16 years old at the time, that R.V. invited the complainant to touch his body, and that the touching that R.V. invited was for a sexual purpose (p. 166).

[15] The jury was not given a written copy of the instructions to bring to the jury room. Instead, the trial judge provided the jury with a verdict sheet, which listed the following verdicts that the jury could reach:

Count No. 1 — Not guilty of sexual assault; guilty  
Count No. 2 — Not guilty of sexual interference; guilty  
Count No. 3 — Not guilty of invitation to sexual touching; guilty [p. 174]

[16] The trial judge also provided the jury with a decision tree for each charge. The decision tree for sexual assault listed “Not Guilty of Sexual Assault but Guilty of Assault” as an available verdict (p. 223).

[17] After approximately one hour of deliberation, the jury sent the following question to the trial judge regarding the available sexual assault verdicts:

On the decision tree for count one, sexual assault versus the verdict sheet. There are only two choices to make on the verdict sheet, whereas the decision tree provides for three verdicts. Number one, guilty of sexual assault. Number two, not guilty of sexual assault but guilty of assault. Number three, not guilty. What do we do? Juror Number Five. [p. 184]

[18] To resolve the discrepancy between the verdict sheet and the decision tree for sexual assault, the trial judge provided the jury with a new verdict sheet containing the following amendment:

Count No. 1  
Not guilty of sexual assault  
Not guilty of sexual assault but guilty of assault  
Guilty of sexual assault [Emphasis added; p. 236.]

[19] The jury returned verdicts of guilty on the charges of sexual interference and invitation to sexual touching, and not guilty on the charge of sexual assault.

B. *Court of Appeal for Ontario (2019 ONCA 664, 147 O.R. (3d) 657) (Strathy C.J.O., Rouleau, Pardu, Miller and Trotter J.J.A.)*

[20] The Court of Appeal unanimously agreed that R.V.'s convictions were inconsistent with the acquittal and could not stand. The court, however, divided on the appropriate disposition of the Crown's cross-appeal and the remedy for R.V.'s appeal from his convictions.

[21] After canvassing the inconsistent verdicts jurisprudence, the majority (Strathy C.J.O. and Pardu and Trotter JJ.A.) held that if R.V. was found guilty of sexual interference and invitation to sexual touching, he was necessarily guilty of sexual assault: the touching required for the two convictions satisfied the legal definition of force for sexual assault. Having identified this inconsistency, the majority stated that the remaining issues were: (1) whether the allegedly confusing instruction on sexual assault could explain the inconsistency; (2) whether the Crown's cross-appeal could resolve the inconsistency; and if not, (3) whether a new trial could be ordered in the face of the acquittal.

[22] As to the first issue, the majority found that the allegedly confusing instruction on sexual assault could not reconcile the verdicts because the cause of the inconsistent verdicts was a matter of pure speculation. Indeed, the concern about improper speculation led the majority to conclude that confusing instructions, even those amounting to a legal error, can never reconcile inconsistent verdicts as a matter of law.

[23] Regarding the second issue, the majority found that the Crown's cross-appeal could not succeed because the trial judge gave legally correct instructions. The trial judge expressly told the jury twice that any physical contact, even a gentle touch, could amount to the "force" necessary for sexual assault. She also linked "force" with "touching" in various places in her instructions. Since the Crown could not demonstrate an error of law, the majority held that the acquittal had to stand.

[24] Given that the acquittal had to stand, the majority found that ordering a new trial on the convictions would invite the jury to return verdicts inconsistent with the acquittal, which would give rise to a claim of issue estoppel. Accordingly, they set aside the convictions and directed verdicts of acquittal to be entered on the sexual interference and invitation to sexual touching charges.

[25] In dissent, the minority (Rouleau and Miller JJ.A.) agreed to allow R.V.'s appeal on the claim of inconsistent verdicts but would have also allowed the Crown's cross-appeal on the basis of legally erroneous jury instructions. Specifically, in considering the entire context, it was reasonable to conclude that the jury would not have understood that mere "touching" constituted the "force" necessary to make out the offence of sexual assault. Given the structure of the charge to the jury, which consisted of an explanation of one count after another in isolation, the jury needed to be told how the three offences related to each other. The trial judge's failure to provide this clarification amounted to an error of law that caused the jury to acquit R.V. on the sexual assault charge.

[26] As to the appropriate remedy, the minority stated that where both the conviction and the acquittal are appealed, and the inconsistency in the verdicts is explained by an error of law in the jury instructions, the appropriate remedy is to order a new trial on all the charges.

### III. Issues

[27] I would restate the main issues in this appeal as follows:

- (1) Can a legal error in jury instructions reconcile apparently inconsistent verdicts?
- (2) What is the appropriate disposition of an inconsistent verdicts appeal where there is an error of law in the jury instructions?
- (3) Were the verdicts rendered by the jury in R.V.'s case inconsistent?

### IV. Analysis

#### A. *Inconsistent Verdicts*

[28] The *Criminal Code* does not expressly identify inconsistent verdicts as a ground for setting aside a conviction. For an appellate court to interfere with a conviction on the ground that it is inconsistent with an acquittal, the court must find that the guilty verdict is unreasonable (*R. v. Pittiman*, 2006 SCC 9, [2006] 1 S.C.R. 381, at para. 6, citing *Criminal Code*, s. 686(1)(a)(i)). The accused bears the burden of establishing that a verdict is unreasonable (*Pittiman*, at para. 6).

[29] In an appeal involving inconsistent verdicts, the applicable test to determine whether a verdict of a jury is unreasonable is: “Are the verdicts irreconcilable such that no reasonable jury, properly instructed, could possibly have rendered them on the evidence?” (*Pittiman*, at para. 10). Put another way, a conviction is unreasonable and must be set aside where the verdicts cannot be reconciled on any rational or logical basis and no properly instructed jury, acting reasonably, could have rendered the verdicts it did based on the evidence (*R. v. McShannock* (1980), 55 C.C.C. (2d) 53 (Ont. C.A.), at p. 56; *Pittiman*, at paras. 6-7).

[30] When verdicts cannot be reconciled and a jury that was properly instructed returns a conviction that is not supportable on the evidence presented at trial, the only available inference is that the jury acted unreasonably in arriving at the conviction (*R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 39). The jury may have reached a compromised verdict, misunderstood the evidence, or nullified by choosing to not apply the law — any of those paths to inconsistent verdicts reflects unreasonableness. In such cases, the conviction itself is unreasonable and appellate intervention is warranted.

[31] The ultimate inquiry for appellate courts then is whether the verdicts are actually inconsistent. Apparently inconsistent verdicts can be reconciled on the basis that the offences themselves are “temporally distinct, or are qualitatively different, or dependent on the credibility of different complainants or witnesses” (*Pittiman*, at para. 8). If verdicts are reconciled to reveal a theory on which the jury could have

returned the verdicts without acting unreasonably, the verdicts are consistent and appellate intervention is not warranted.

[32] In my view, there are also cases, such as the one at hand, where the Crown can reconcile apparently inconsistent verdicts on the basis that they were the result of a legal error in the jury instructions. For such cases, I propose the following approach.

(1) Analytical Framework

[33] Where the Crown attempts to rebut an apparent inconsistency on the basis of a legal error, the burden shifts from the accused to the Crown. That burden is heavy. The Crown must satisfy the court to a high degree of certainty that there was a legal error in the jury instructions and that the error:

- (1) had a material bearing on the acquittal;
- (2) was immaterial to the conviction; and
- (3) reconciles the inconsistency by showing that the jury did not find the accused both guilty and not guilty of the same conduct.

[34] If the court can find that these elements are satisfied with a high degree of certainty, the verdicts are not actually inconsistent. Instead, the legal error caused the

jury to convict the accused either on different evidence or a different element than it believed was necessary for the charge on which it acquitted the accused. Any apparent inconsistency in the verdicts is thus reconciled, as the jury did not find the accused both guilty and not guilty of the same conduct. It follows that the jury did not act unreasonably in rendering their verdicts.

[35] In assessing whether the Crown has satisfied its burden, the court must not engage in improper speculation about what the jury did and did not do. The appellate court must be able to retrace the reasoning of the jury with a sufficiently high degree of certainty to exclude all other reasonable explanations for how the jury rendered its verdicts. If it can, any concern about speculation falls away.

[36] This approach respects the ordinary deference afforded to the presumed reasonableness of the jury by asking “whether the [apparently inconsistent verdicts] are supportable on any theory of the evidence consistent with the legal instructions given by the trial judge” (*Pittiman*, at para. 7). Where the conviction is supported by the evidence, as is always required, and the verdicts are not actually inconsistent, the jury’s entering of a conviction against the accused is not unreasonable and the conviction appeal should be dismissed. A jury does not act improperly by relying on a trial judge’s legal error. Put another way, the appellate court simply concludes that the jury acted reasonably based on the evidence and instructions before it. The conviction is thus reasonable and appellate intervention is not warranted.

[37] I pause here to note that my colleague, Brown J., disagrees with the reconciliation framework I have proposed on the basis that our jurisprudence and the appeals scheme enacted in s. 686(4) of the *Criminal Code* preclude an appellate court from inquiring into the jury's reasons for arriving at a verdict (Brown J.'s reasons, at paras. 82-85). Yet that is not what s. 686(4) says, nor is it what Parliament intended. Indeed, our jurisprudence shows that although appellate courts cannot engage in improper speculation, they regularly consider the impact of jury instructions on a jury's verdict. For instance, reviewing a Crown appeal from a jury's verdict of acquittal on the basis of a legal error at trial requires considering whether the error likely affected the verdict (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at paras. 14-17); reviewing a jury's verdict of guilty in light of legally erroneous jury instructions can require assessing whether the error was harmless in that it could not reasonably be expected to have changed the jury's verdict (*Criminal Code*, s. 686(1)(b)(iii); see, e.g., *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at paras. 59-60; *R. v. Illes*, 2008 SCC 57, [2008] 3 S.C.R. 134, at paras. 21-23); and fresh evidence applications ask whether the fresh evidence could reasonably be expected to have affected the jury's verdict (*Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775; see also *R. v. Hay*, 2013 SCC 61, [2013] 3 S.C.R. 694, at paras. 70-75). Each of these commonplace appellate matters requires a reviewing court to consider what the jury may have been thinking and whether they might reasonably have changed their minds if the trial had unfolded differently. Indeed, my colleague is content to engage in that consideration himself as he concludes that the misdirection in the present case "might reasonably be thought to

have had a material bearing on the acquittal” (para. 103). The framework I have proposed calls for nothing more.

[38] Further, and with respect to my colleague, what I have said is meant to supplement — not change — the law as set out in *Pittiman*; nor is it intended to change the law in *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, which restated the principles in *Pittiman* as follows: “. . . verdicts are deemed inconsistent — and therefore unreasonable as a matter of law — if no properly instructed jury could reasonably have returned them both . . .” (para. 23). In the instant case, the Court of Appeal interpreted this formulation to mean that appellate courts reviewing verdicts for inconsistency should not look at jury instructions in assessing reasonableness. With respect, *Pittiman* and *J.F.* should not be read in this manner. In *J.F.*, this Court was not establishing a rule of law that jury instructions must be presumed correct. In fact, it could not have been doing so: the question of whether the verdicts are supportable on any theory of the evidence necessarily involves considering which elements the jury was instructed on (*Pittiman*, at para. 7). As explained, such considerations are routine. If *Pittiman* and *J.F.* required departing from this principle, the Court would have said so explicitly. It did not.

[39] *J.F.* was a case in which the jury instructions did not disclose a clear error permitting the appellate court to retrace the jury’s reasoning with any degree of certainty. Since the Court could not determine why the jury returned the different verdicts, it declined to uphold the conviction on the basis that the legal error could

reconcile the verdicts (para. 21). *J.F.*'s approach remains appropriate where the appellate court cannot conclude with a high degree of certainty that the legal error caused the inconsistent verdicts. If, however, a court is able to reach that conclusion, no issue of improper speculation arises. To the contrary, impugning the verdicts of the jury when the appellate court knows the error belongs to the trial judge would damage the legal process. As Paciocco J.A. explained in *R. v. Plein*, 2018 ONCA 748, 365 C.C.C. (3d) 437, "it is not an appropriate outcome to deem a demonstrably reasonable conviction to be unreasonable because of an inconsistent acquittal that is grounded in a clear legal error" (para. 42). While *Plein* was a judge alone trial, the principle is applicable in a trial by judge and jury so long as the reviewing court is able to retrace the jury's reasoning to the high degree of certainty required.

[40] Further, the reconciliation framework I have proposed addresses the apprehensions that led the Court in *J.F.* to caution, in *obiter*, against legitimizing a conviction based on an error of law. Nothing I have said suggests that an error of law in the instructions to the jury necessarily makes improper verdicts proper or inconsistent verdicts consistent (see *J.F.*, at para. 23). An appellate court that has found a legal error material to the acquittal must go on to determine the impact of that error on the conviction. If the error can be isolated to the acquittal, it is not the error itself that reconciles the verdicts, but rather the further determination that the error did not affect the conviction. That conclusion is consistent with *J.F.*

(2) Remedy

[41] On finding that a legal error shows that apparently inconsistent verdicts are not actually inconsistent, the appropriate remedy depends on whether the Crown has cross-appealed the acquittal. I turn to this issue now.

(a) *Crown Cross-Appeal*

[42] In cases where the Crown has cross-appealed, the acquittal must be set aside if the Crown succeeds in proving that it was based on an error of law “which might reasonably be thought . . . to have had a material bearing on the acquittal” (*Graveline*, at para. 14). The next question is what should follow from setting aside that acquittal.

[43] For the most part, the *Criminal Code* provides the answer. Section 686(4)(b) of the *Code* instructs appellate courts allowing an appeal from an acquittal entered by a jury to order a new trial. Generally, all interconnected charges should be returned for retrial (*Pittiman*, at para. 14). In line with the test I have outlined, it may well be difficult for the appellate court to isolate the error to the acquittal, and a conviction cannot stand if it arises from an error of law. Unless the appellate court can conclude with a high degree of certainty that the legal error did not taint the conviction, setting aside the acquittal on a charge interconnected with a conviction will require retrial on all charges.

[44] Where an appellate court can isolate the legal error to the acquittal, that charge should be the only one sent back for a new trial and the conviction should stand. The error did not taint the conviction, so it should remain in place unless, of course, the conviction is found to be unreasonable on a ground other than inconsistency. If a retrial is sought, it should only proceed on the charge for which the accused was acquitted. However, a retrial on the acquittal charge may raise *res judicata* concerns, such as the plea of *autrefois convict* or a s. 11(h) *Canadian Charter of Rights and Freedoms* application. Those claims may well be available to the accused upon a retrial, yet the possibility of such claims does not preclude an appellate court from ordering a retrial (*Criminal Code*, s. 686(4)). If, prior to a retrial, an accused chooses to raise any of these issues, that is their prerogative — I certainly do not foreclose the accused from doing so. However, granting a special plea of *autrefois convict* or a s. 11(h) *Charter* application is discretionary, something for first instance judges to determine based on the circumstances before them. As such, I decline to decide whether these claims would preclude a retrial in *all* circumstances.

[45] That said, when an appellate court is satisfied that the acquittal is the product of a legal error and cannot stand, the most appropriate remedy, depending on the circumstances, may be to enter a stay of proceedings rather than sending the matter back for a retrial (*Criminal Code*, s. 686(8)).

(b) *Absence of a Crown Cross-Appeal*

[46] The parties disagree about what happens when the Crown has not cross-appealed but nonetheless asserts that a legal error reconciles apparently inconsistent verdicts.

[47] Here, as indicated, the Crown cross-appealed R.V.'s acquittal on the sexual assault charge. Accordingly, the issue of whether the Crown must cross-appeal where it seeks to reconcile apparently inconsistent verdicts on the basis of erroneous jury instructions is not before us. Nor indeed has that issue ever been squarely before this Court.

[48] Having regard to the bedrock principle of our adversarial system that where an accused makes an argument, the Crown is entitled to rebut it, there is a viable argument that the Crown need not cross-appeal to rebut an inconsistent verdict allegation raised by an accused. That said, I recognize that there are tenable arguments to the contrary, relating to the integrity of the legal process and the legitimacy of verdicts. In the end, I consider it prudent to leave the issue outstanding until it comes squarely before us.

#### B. *Application to the Facts*

[49] In the present case, R.V. appealed his sexual interference and invitation to sexual touching convictions on the basis that they were inconsistent with his sexual assault acquittal. The Crown conceded that the verdicts were apparently inconsistent, but cross-appealed from the acquittal on the basis that the verdicts were not actually

inconsistent since they could be reconciled by the erroneous jury instructions. Specifically, the Crown's position was that the instructions mistakenly led the jury to believe that the element of "force" required to make out the offence of sexual assault was different than the element of "touching" required to make out the offences of sexual interference and invitation to sexual touching.

[50] I agree that the verdicts rendered by the jury are inconsistent on their face. Given that the three charges have near identical elements and were based on the same evidence at trial, the jury should have either convicted or acquitted R.V. of all three charges. Guided by the approach I have proposed, I must now decide whether there was a legal error in the jury instructions and if so, whether it reconciles the apparent inconsistency. If the inconsistency can be reconciled, the verdicts are not actually inconsistent and therefore not unreasonable on the basis of inconsistency. If the inconsistency cannot be reconciled, the verdicts rendered by the jury here will necessarily be unreasonable as a matter of law.

(1) The Legal Error

[51] Sections 151, 152 and 271 of the *Criminal Code* use different terms to describe similar acts. Sexual interference under s. 151 requires proof of touching, and invitation to sexual touching under s. 152 requires proof that the accused counselled, invited or incited the complainant to touch. Sexual assault, for its part, is not defined under s. 271. Instead, sexual assault is a s. 265(1) assault made applicable to sexual circumstances by s. 265(2). A person commits a sexual assault by applying force

intentionally to another person, directly or indirectly, in circumstances of a sexual nature (*Criminal Code*, s. 265(1)(a); *R. v. Chase*, [1987] 2 S.C.R. 293, at p. 302; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 24).

[52] The word “force” is commonly understood to mean physical strength, “violence, compulsion, or constraint exerted upon or against a person” (*R. v. Barton*, 2017 ABCA 216, 55 Alta. L.R. (6th) 1, at para. 202, aff’d 2019 SCC 33, citing *Merriam-Webster Dictionary* (online)). However, as a legal term of art, the element of force has been interpreted to include any form of touching (*R. v. Cuerrier*, [1998] 2 S.C.R. 371, at para. 10; *Ewanchuk*, at paras. 23-25; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 23). Put simply, although the words “touch” or “touching” and “force” are distinct, in some circumstances, including those that apply here, they mean the same thing in law.

[53] Many cases demonstrate that instructions on the law of sexual assault when an accused is also charged with sexual interference or invitation to sexual touching is a source of bewilderment and confusion for juries (see, e.g., *Tremblay*; *L.B.C.*; *J.D.C.*; *S.L.*; *K.D.M.*). The question in the present case is whether the jury was correctly instructed on the relationship between the elements of force and touching.

[54] Viewed in isolation, parts of the trial judge’s instruction on sexual assault indicate that any form of touching could amount to force. Specifically, she stated that “[f]orce includes any physical contact, even a gentle touch” (A.R., at p. 154) —

wording that the Court of Appeal for Ontario endorsed in *S.L.* Nevertheless, as this Court stated in *Barton*, at para. 54:

When considering arguments of alleged misdirection, the appellate court must review the charge as a whole from a functional perspective, asking whether the jury was properly, not perfectly, equipped to decide the case, keeping in mind that it is the substance of the charge, not adherence to a set formula, that matters . . . . [Emphasis added.]

[55] Having regard to the jury charge as a whole and its substance, I am satisfied that the trial judge misdirected the jury on the charge of sexual assault by leaving the jury with the mistaken impression that the element of “force” required for sexual assault was different than the element of “touching” required for sexual interference and invitation to sexual touching. With respect, this error was one of non-direction amounting to misdirection.

[56] In instructing the jury on the sexual assault offence, the trial judge stated that the elements were:

- i. That [R.V.] intentionally applied force to [the complainant];
- ii. That the force that [R.V.] intentionally applied took place in circumstances of a sexual nature. [Emphasis added.]

(A.R., at p. 153)

[57] In her summary at the end of the sexual assault instruction, she stated:

If you are satisfied beyond a reasonable doubt that [R.V.] intentionally applied force to [the complainant] in circumstances of a sexual nature, you must find [R.V.] guilty of sexual assault. [Emphasis added; p. 161.]

[58] After her instructions relating to sexual assault, the trial judge gave instructions on sexual interference and on invitation to sexual touching. In her explanation for sexual interference, she stated that the elements were that the complainant was under 16 years old at the time, that R.V. “touched” the complainant and that the “touching” was for a sexual purpose (p. 162). She then provided the following definition of “touching”:

The contact may be direct, for example, touching with a hand or other body part, or indirect, for example, touching with an object. Force is not required but accidental touching is not enough. [Emphasis added; p. 164.]

[59] In her explanation for invitation to sexual touching, the trial judge stated that the elements were that the complainant was under 16 years old, that R.V. invited the complainant to “touch” his body and that the “touching” that R.V. invited was for a sexual purpose (p. 166). She then provided the following definition of “touching”:

The proposed touching must involve intentional physical contact with any part of a person’s body. Force is not required but accidental touching is not enough. [Emphasis added; p. 168.]

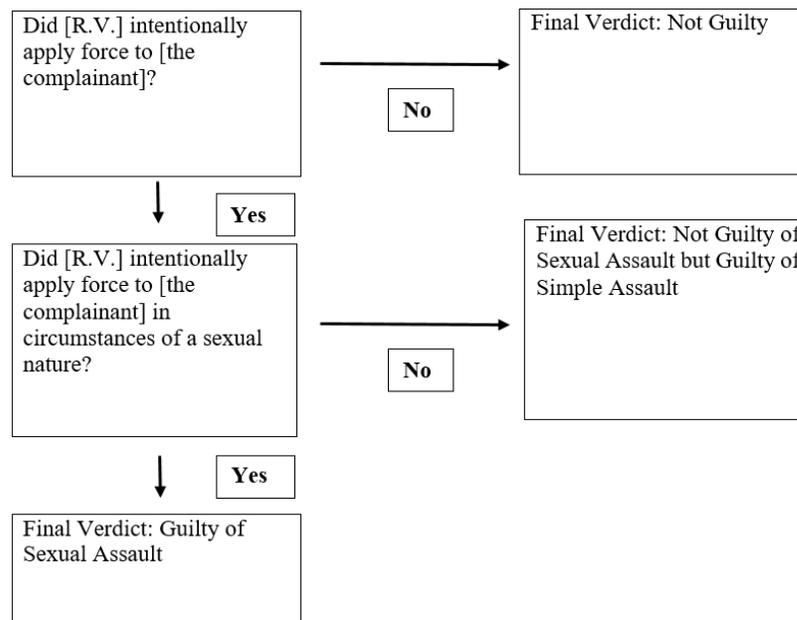
[60] In my respectful view, given the way the instructions were organized — an explanation of one count after another — the trial judge needed to instruct the jury on how the three offences related to each other. She should have either clarified the relationship between the elements of touching and force, or simply used the word “touching” to describe all three offences. Alternatively, since the trial judge chose not to provide a copy of the charge, she could have indicated on the decision tree that force

and touching were, in effect, interchangeable terms. Without any of these clarifications, I am satisfied that the trial judge's non-direction amounted to misdirection.

[61] This misdirection was compounded by the trial judge's further error in leaving simple assault as an available verdict to the jury. In her instructions, she stated:

If you are not satisfied beyond a reasonable doubt that [R.V.] intentionally applied force to [the complainant] in circumstances of a sexual nature, you must find [R.V.] not guilty of sexual assault, but guilty of assault. [Emphasis added; p. 161.]

[62] Not only did the trial judge instruct the jury on simple assault, she also included simple assault as an available verdict on the decision tree on sexual assault:



(A.R., at p. 223)

[63] Rather than correcting this error when the jury sent a question about the discrepancy between the decision tree on sexual assault and the verdict sheet, the trial judge deepened the error by adding simple assault to the verdict sheet. The inclusion of simple assault in the decision tree and verdict sheet emphasized the difference between the use of the word “force” for sexual assault and the use of “touching” for the other two offences. Further, the decision tree repeatedly identified the requisite conduct for sexual and simple assault as “force”.

[64] I appreciate that the trial judge relied on pattern instructions. Trial judges understandably rely heavily on such instructions. However, pattern instructions are not a panacea: they must be molded to reflect the intricacies of each case (*R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at paras. 48-50; *R. v. Rodgeron*, 2015 SCC 38, [2015] 2 S.C.R. 760, at paras. 51-52; *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 13). To the extent that pattern instructions are inapplicable to the facts or law at issue, they must be adjusted. In particular, trial judges must be careful to not put verdicts to the jury that do not arise on the evidence (*R. v. Haughton* (1992), 11 O.R. (3d) 621 (C.A.), at p. 625, aff'd [1994] 3 S.C.R. 516). Further, trial judges should avoid relying on pattern instructions that use the word “force” in sexual assault and “touching” in sexual interference and invitation to sexual touching because such instructions encourage confusion and erroneous reasoning. For these reasons, the trial judge’s reliance on pattern instructions was no insulation from legal error.

[65] Based on all of the foregoing, I am able to conclude with a high degree of certainty that the jury did not understand that any form of touching constituted the force required to make out the offence of sexual assault. In the circumstances of this case, it was essential that the jury be disabused of the notion that force is, in law, different from touching. The trial judge did not do so here. Respectfully, this non-direction amounted to a legal error.

(2) The Legal Error Was Material and Isolated to the Acquittal, and It Reconciles the Apparent Inconsistency

[66] The legal error led the jury to return a verdict of acquittal on the sexual assault charge. The jury mistakenly believed that sexual assault, but not the other two charges, required force beyond mere touching. As a result, the jury acquitted R.V. of sexual assault: they were not satisfied beyond a reasonable doubt that he applied force, in the colloquial sense, to the complainant. On the same evidence, they convicted the accused of sexual interference and invitation to sexual touching because they were satisfied that he touched the complainant in circumstances of a sexual nature.

[67] Importantly, retracing the jury's reasoning in this way does not involve speculation or conjecture. The instructions explain exactly how the jury came to their verdict on the sexual assault charge:

If you are not satisfied beyond a reasonable doubt that [R.V.] intentionally applied force to [the complainant], you must find him not guilty. Your deliberations would be over. [Emphasis added.]

(A.R., at p. 159)

[68] This was the only basis upon which the jury could have acquitted R.V. of sexual assault. The jury was instructed by the trial judge and by the decision tree that if they were not satisfied on the second element of sexual assault — whether the force was applied *in circumstances of a sexual nature* — the final verdict would be not guilty of sexual assault but guilty of assault. Since the jury did not find R.V. guilty of simple assault, the rational inference is that they were not satisfied of the force element and acquitted R.V. on that basis.

[69] Further, the legal error was isolated to the acquittal. The trial judge's instructions on sexual interference and invitation to sexual touching were legally correct in that the jury was properly instructed on the essential elements of those offences and on the evidence. The error in the instruction on sexual assault did not colour the instructions on the remaining offences. I can thus conclude, to a high degree of certainty, that the error pertained solely to the sexual assault charge, not to the sexual interference or sexual invitation charges.

[70] Finally, the legal error reconciles the apparent inconsistency in that the jury did not find R.V. both guilty and not guilty of the same conduct. The jury found R.V. guilty of sexual touching. It found him not guilty of applying force, in the colloquial sense, to the complainant in circumstances of a sexual nature. Force beyond touching was lacking, hence the acquittal; mere touching was not lacking, hence the convictions. Those two findings are consistent.

[71] In sum, the framework I have set out is satisfied and accordingly the convictions are not actually inconsistent with the acquittal.

[72] Since I have found that the verdicts are not actually inconsistent, the convictions are not unreasonable on that basis. R.V. does not allege any other basis by which his convictions might be unreasonable, and for good reason: they are supportable on the evidence tendered at trial and consistent with the jury instructions on those two offences. Accordingly, R.V.'s appeal from his convictions should have been dismissed.

(3) The Applicable Remedy

[73] I turn now to the appropriate disposition for the sexual assault charge. As I explained, the ordinary remedy in cases such as this — where the Crown has cross-appealed and reconciled the inconsistent verdicts by isolating an error of law to the acquittal — is to let the conviction stand and send just the acquittal back for retrial. However, the circumstances of this case justify the Court entering a stay of the proceeding rather than ordering a retrial.

[74] Under s. 686(8) of the *Criminal Code*, a court of appeal has the power whenever it exercises “any of the powers conferred by subsection (2), (4), (6) or (7) . . . [to] make any order, in addition, that justice requires”. The *Criminal Code* also vests that power in this Court (s. 695(1)). For an appellate court to issue an order under its s. 686(8) residual power, three requirements must be met (*R. v. Thomas*, [1998] 3 S.C.R. 535). First, the court must have exercised one of the triggering powers conferred

under s. 686(2), (4), (6) or (7). Second, the order issued must be ancillary to the triggering power. Consistent with the provision's "broad remedial purpose", this Court has taken a flexible approach in determining whether the order is "in addition" to the exercise of the triggering power (*R. v. Hinse*, [1995] 4 S.C.R. 597, at para. 30). In particular, the additional order need not directly advance the exercise of the triggering power (*Hinse*, at paras. 31-32; see, e.g., *R. v. Power*, [1994] 1 S.C.R. 601, at pp. 615-18; *R. v. Provo*, [1989] 2 S.C.R. 3, at pp. 19-21; *Terlecki v. The Queen*, [1985] 2 S.C.R. 483, at pp. 483-84). It is enough that the ancillary order not be "at direct variance with the court's underlying judgment" (*Thomas*, at para. 17; see also *R. v. Warsing*, [1998] 3 S.C.R. 579, at paras. 72-74). Third and finally, the order must be one that "justice requires".

[75] Here, the three requirements justify ordering a stay of proceedings on the sexual assault charge. First, the Court's s. 686(8) residual jurisdiction is triggered by allowing the Crown's appeal and setting aside the acquittal under s. 686(4)(b). Section 686(8) provides for residual jurisdiction where the appellate court "exercises any of the powers conferred by subsection . . . (4)". Allowing an appeal and setting aside the verdict of acquittal constitutes one of those powers. It therefore triggers s. 686(8) jurisdiction even without a further order of new trial (*R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509, at para. 39; *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, at para. 22).

[76] Consistent with the second requirement, ordering a stay would be ancillary to the triggering power under s. 686(4). Staying the proceeding would not be at direct variance with the judgment setting aside the acquittal. This Court has previously held that an ancillary order is at direct variance with the underlying judgment when an appellate court sets aside a conviction and orders a retrial limited to entering one of two possible convictions (*Warsing*, at para. 73). Because setting aside a conviction returns the accused to a condition of presumptive innocence, an appellate court does not have jurisdiction under s. 686(8) to set aside a conviction and then deny the jury the option of finding the accused not guilty (*Thomas*, at para. 22). However, staying a proceeding is not at odds with setting aside an acquittal. Setting aside an acquittal, like setting aside a conviction, puts the accused in a position of presumptive innocence. As staying a proceeding is tantamount to a finding of not guilty, it is perfectly consistent with the presumptive innocence that attaches when this Court sets aside the acquittal (*R. v. Jewitt*, [1985] 2 S.C.R. 128, at pp. 147-48; *R. v. Kalanj*, [1989] 1 S.C.R. 1594, at p. 1601; *R. v. Puskas*, [1998] 1 S.C.R. 1207, at para. 1). Ordering a stay is therefore “in addition” to — that is, ancillary to — the power exercised under s. 686(4).

[77] Finally, justice requires a stay of this proceeding. Before the Court of Appeal, the Crown represented that it would not seek to retry the sexual assault charge in the event of a retrial order (para. 179, per Rouleau J.A., dissenting). It has repeated that representation before this Court (transcript, at p. 44). Bearing that in mind, I am satisfied that ordering a retrial on the sexual assault charge would needlessly risk an abuse of process application (see *Jewitt*, at p. 148). It would also bring no benefit to the

administration of justice. Taking those factors together, justice requires a stay rather than sending the charge back for retrial.

## V. Conclusion

[78] It is incumbent upon the Crown as a participant in the justice system to make the trial process less burdensome, not more. The Crown fails in that regard when it proceeds with duplicative counts. Doing so not only increases the length of the trial; it also places a greater burden on trial judges and juries by increasing, as it does, the complexity of jury instructions (*Rodgerson*, at para. 46). Drafting jury instructions is difficult. Trial judges must deal with pressures to ensure the instructions are comprehensive and comprehensible, despite limited resources and time constraints (*Rodgerson*, at para. 50).

[79] Moreover, as the Court of Appeal majority observed, correctly in my view, the Crown proceeding on duplicative counts, in jury trials such as this one, is a recipe for inconsistent verdicts. Such duplication is particularly illogical where, as here, this Court's decision in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, will result in at least one of the charges being stayed at the sentencing stage. The framework I have described outlines a solution to the problem presented by inconsistent verdicts, but the optimal solution would be for the Crown to avoid needless duplication in the first place (*Rodgerson*, at para. 45).

[80] The Crown's appeal is allowed, the Court of Appeal's order is set aside, and R.V.'s convictions are restored. The acquittal on R.V.'s charge of sexual assault is set aside and the proceeding on that charge is stayed, and the matter is remitted to the Court of Appeal for R.V.'s sentence appeal.

The reasons of Brown and Kasirer JJ. were delivered by

BROWN J. —

[81] That the verdicts in this case are inconsistent is not in dispute. What divides us is what to do about it — or, more precisely, what a court *can* and *cannot* do about it. Our jurisprudence and the *Criminal Code*, R.S.C. 1985, c. C-46, compel an inescapable, if unfortunate, result: a new trial on all three charges. My colleagues find such a result unpalatable — *so* unpalatable, that they seek to escape the otherwise inescapable by effectively overruling aspects of the relevant jurisprudence (notably, *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215), and eliding the limits of the *Code* — indeed, re-writing (or, more accurately, *re-legislating*) one of the *Code*'s limits on curial jurisdiction.

[82] Specifically, my colleagues restore the respondent's convictions on the basis that the verdicts are *not inconsistent in the minds of the jury*, and are therefore reasonable. But this ignores that *the inconsistency* of the verdicts is *the very reason* this appeal is before us. Again, there is no dispute that the verdicts are inconsistent. And

yet, the fact of the inconsistency sends my colleagues off on a search to discover why the inconsistency exists. This is possible, they say, because what matters is *not* the actual legal elements of the offences themselves, but *instead* how they were likely understood *in the minds of the jury* — as can best be guessed by the reviewing court. And having pasted together a plausible explanation for why the jury reached inconsistent verdicts, it follows (*ex hypothesi*) that what appear to be inconsistent verdicts are no longer inconsistent: they are reconcilable, by pointing to misdirection.

[83] This, however, ignores the appeals scheme of the *Criminal Code* and the law as it stands, which make clear that it simply does not matter why the inconsistency exists, or whether it can be explained away with a “high degree of certainty” (majority reasons, at para. 33). To explain, the *Code* codifies the common law rule of jury secrecy and provides asymmetrical rights of appeal to a convicted person and the Crown (s. 649 and *R. v. Pan*, 2001 SCC 42, [2001] 2 S.C.R. 344; ss. 675 and 676). These rules inform the remedies available on appeal, which depend on whether an appeal is from a conviction or an acquittal, and whether an appeal is from the verdict of a judge alone or a jury (ss. 686(2) to (4)). To succeed on an appeal from acquittal, the Crown must establish legal error that “might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing” on the verdict (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14). And, of significance here, where the Crown successfully appeals from a verdict of acquittal by a jury, the only available remedy is a new trial (s. 686(4)(b)(i)).

[84] It is plain from this scheme that Parliament’s crafting of the appeals provisions in the *Code* was governed by a fundamental truth about jury trials: we can never know for certain how a jury reached its verdict. A reviewing court can, of course, examine the verdict and the record, including the evidence, the arguments of counsel and the instructions of the trial judge. But a reviewing court cannot inquire into the jury’s reasons for arriving at the verdict (*Pan*, at para. 46). This is why, where the Crown successfully establishes legal error that meets the *Graveline* threshold, a conviction cannot be substituted for the acquittal. Again, Parliament, in specifying a new trial as the *sole* remedy, proceeded on the basis that — unlike in a judge alone trial — a reviewing court can only speculate about why the jury acquitted the accused. As a majority of this Court said in *R. v. Morin*, [1988] 2 S.C.R. 345, at p. 374, it cannot “predict with certainty what happened in the jury room”.

[85] The significance of all of this is as follows: my colleagues think they know the precise effect and extent of the trial judge’s legal error in misdirecting the jury. But while they may *think* they know this (even to the “high degree of certainty” that they claim), and while I may think that my colleagues’ suppositions may well have merit, none of this matters. In crafting the *Code*’s provisions governing appeals from jury verdicts, Parliament did not care about the *degrees* of certainty at the reviewing court. What Parliament thought significant is that the absence of reasons for judgment by a jury means a reviewing court can never be *certain* what was in the minds of the jury. My colleagues undermine that clear legislative intent.

[86] My colleagues' line of reasoning also does violence to *J.F.* They dispute this, saying that *J.F.* (and, for that matter, *R. v. Pittiman*, 2006 SCC 9, [2006] 1 S.C.R. 381) should not be read as precluding the review of jury instructions in assessing the consistency of verdicts. But that is not the issue here, and indeed nobody suggests such a reading. In *Pittiman* and *J.F.*, proper instruction is said to be presumed *for the purposes of determining whether the verdicts are actually legally inconsistent*. This is the basis on which a reviewing court can determine, as here, that a conviction for sexual interference and an acquittal for sexual assault arising out of the same delict are fundamentally inconsistent.

[87] But my colleagues *also* say — and here they *do* run afoul of *J.F.*, their protestations to the contrary notwithstanding — that *J.F.* does not preclude an inquiry into *why* a jury returned inconsistent verdicts, pointing to the absence of a clear error in the jury instructions in that case as explaining why the Court could not embark upon the same inquiry that my colleagues do here. This is a plainly erroneous reading of Fish J.'s reasoning for the Court in that case, where he wrote that “[in any event, as a matter of legal process and the legitimacy of verdicts, I would decline to uphold the respondent's conviction on the ground that it can be reconciled with his acquittal on another count of the same indictment *on the basis of a legal error at trial*” (para. 21 (underlining added)). The insertion of the phrase “in any event” could not be clearer: the existence of a legal error does not reconcile inconsistent verdicts. That is an aspect of *J.F.* which my colleagues, albeit without acknowledging as much, effectively overrule.

[88] The novelty of the framework now developed by my colleagues is revealed in their analogy to the reasoning of Paciocco J.A. in *R. v. Plein*, 2018 ONCA 748, 365 C.C.C. (3d) 437, wherein he held that “close examination of the trial judge’s reasons for judgment and court record [may provide a] rational or logical basis that can reconcile the verdicts” (para. 28 (emphasis added)). But, as his reasons indicate, that was a case in which *a judge, sitting alone*, rendered inconsistent verdicts. At the risk of stating the obvious, this is inapplicable to juries. But my colleagues are undeterred: “. . . so long as the reviewing court is able to retrace the jury’s reasoning to the high degree of certainty required”, the appellate review is akin to considering the reasons of a trial judge (para. 39 (emphasis added)). But retracing *a jury’s* reasoning, irrespective of the “degree of certainty”, is a type of review that: (1) Parliament has precluded; (2) this Court has never sanctioned; and (3) is, as a practical matter, impossible. On that last point — practical impossibility — my colleagues’ framework requires a reviewing court to be able to “exclude all other reasonable explanations for how the jury rendered its verdicts” (para. 35). But of course, that will never be possible. The best they can do is guess. And here, the possibility that the jury could have nullified or compromised (concluding, for example, that two convictions for approximately the same delict were sufficient, and three excessive) is, on my colleagues’ guess, unreasonable, and thus ruled out.

[89] My colleagues respond by stating that commonplace appellate matters “requir[e] a reviewing court to consider . . . whether [jury members] might reasonably have changed their minds if the trial had unfolded differently” (para. 37), and point to

(*inter alia*) the *Graveline* threshold of whether an error might reasonably be thought to have affected the result. This is, of course, true. But that proposition is not what divides us here. Pointing to instances that require reviewing courts to consider whether an error or omission might *reasonably be thought* to have affected the result (and, if so, whether a *new trial* should follow) is a distraction. My colleagues, with respect, are doing something quite different. Specifically, they say that, despite convictions and an acquittal for the same delict, and despite the existence of a legal error at trial, it is possible for them to conclude that the jury *certainly* thought the respondent is guilty. There is a world of difference between an appellate court saying (1) “this error, viewed objectively, may have made a difference to the jury”, and (2) “I know what this jury, viewed subjectively, was thinking”. The latter is unprecedented. Indeed, were this simply the “routine” matter that my colleagues say it is (at para. 38), they would not have to invent a new framework — let alone a new framework that breaks from this Court’s precedent — to do it.

[90] My colleagues go further still to avoid being taken as having overruled *J.F.* on this point, insisting that nothing in their analysis “suggests that an error of law in the instructions to the jury necessarily makes improper verdicts proper or inconsistent verdicts consistent” — which would, of course, be contradictory to *J.F.* — because “[i]f the error can be isolated to the acquittal, it is not the error itself that reconciles the verdicts, but rather the further determination that the error did not affect the conviction” (para. 40). But there is simply no meaningful difference between (1) finding that an error reconciles inconsistent verdicts, and (2) finding them reconciled by the

“determination that the error did not affect the conviction”. Under their framework of analysis, an error is found, the jury’s reasoning is (somehow) carefully retraced and reconstructed, and a determination is made that — in the jury’s minds — the offences were different. The error reconciles the inconsistent verdicts.

[91] My colleagues conclude as much here, finding that in this case “the legal error reconciles the apparent inconsistency” (para. 70). This holding is manifestly inconsistent with *J.F.*, where Fish J. wrote that “[i]mproper instructions do not make . . . inconsistent verdicts consistent” (para. 23). It is also at odds with *Pittiman*, where Charron J. offered the following routes to reconcile potentially inconsistent verdicts in the case of a single accused charged with multiple offences: the offences may be “temporally distinct, or . . . qualitatively different, or dependent on the credibility of different complainants or witnesses” (para. 8). I note the omission in Charron J.’s reasons of any reference to considering jury instructions; indeed, it could not have occurred to her to do so, since (until now) verdicts like those in the case at bar were considered *actually* inconsistent, not *potentially* or *apparently* inconsistent.

[92] In restoring the respondent’s convictions, my colleagues say that this will be a rare result. I disagree. The result they reach is an invitation to routine speculation into the reasoning process of the jury, something (again) that the *Criminal Code* — by its provisions regarding Crown appeals from jury verdicts — specifically precludes. It will invite confirmation bias: the verdicts are inconsistent and the jury was misdirected, and so therefore the misdirection must explain away the inconsistency. Just as

importantly, it does not discourage the Crown from over-charging or drafting confusing indictments; if anything, it does the opposite, by eliminating any consequences. None of this is desirable — and yet, by ignoring the clear requirements of this Court’s judgments and the *Criminal Code*, this is precisely what my colleagues’ reasons will achieve.

[93] I turn, then, to the question of the remedy to be given here. Where a convicted person establishes that jury verdicts are unreasonable on the basis of inconsistency, a new trial will usually be the appropriate remedy (*Pittiman*, at para. 14). The only other available remedy is an acquittal (s. 686(2)(a)). Which remedy is appropriate depends entirely on the outcome of the Crown appeal from acquittal.

[94] When deciding a Crown appeal from an acquittal by a jury, an appellate court may either (1) dismiss the appeal, or (2) allow the appeal, set aside the verdict, and order a new trial (s. 686(4)). Where the Crown can establish legal error that might reasonably be thought to have affected the result (*Graveline*, at para. 14), the remedy of a new trial — and the unavailability of a substituted guilty verdict — is consistent with the *Criminal Code*, the common law, and the intention of Parliament.

[95] My colleagues strain to avoid this reality, but it comes down to this: the law provides an answer to the very situation before us. Since *Pittiman* and *J.F.*, the law has not changed. The only thing that has changed is that my colleagues are now presented with a case where they find the law’s operation leads to a result which they

are unable to accept. But their reasoning ignores the legal process and legitimacy of verdicts concerns underlying *J.F.* and *Pittiman*.

[96] My colleagues rely on ss. 686(4)(b) and 686(8) to allow the Crown appeal and enter a stay. While s. 686(8) empowers an appellate court, where exercising the powers under s. 686(4), to “make any order, in addition, that justice requires”, my colleagues depart from the strictures of this provision. My colleagues are not making an *additional* order under s. 686(4), but are instead making an *alternative* order. This is unsanctioned by the *Criminal Code*. In exercising a power not found in s. 686, my colleagues are legislating themselves a discretion that Parliament did not.

[97] It is of course true that in *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509, Fish J. held, in *obiter*, that, with respect to s. 686(4), “an appellate court need not order a new trial or enter a verdict of guilty in order to trigger the application of s. 686(8)” (para. 39). In that case, Fish J. concluded that s. 686(8) authorizes an appellate court to order a *continuation* of a trial, as opposed to a *new* trial. It is also true that s. 686(8) allows an appellate court to enter a stay when an acquittal is set aside but further proceedings would constitute an abuse of process (*R. v. Hinse*, [1995] 4 S.C.R. 597, at paras. 22-23). But s. 686(8) still requires that the order be fundamentally ancillary and supplemental — not *alternative* — and not at direct variance with the underlying judgment (*Hinse*, at para. 31; *R. v. Thomas*, [1998] 3 S.C.R. 535, at para. 17).

[98] My colleagues find that those requirements are met here because a stay is tantamount to a finding of not guilty which, they say, is perfectly consistent with the

position of presumptive innocence to which the respondent is restored following the setting aside of the acquittal. But this fails to account for the majority's underlying judgment in this case, which *also* includes restoring convictions for *the same delict* on the basis that they were untainted by legal error. Issuing an order that is tantamount to a finding of not guilty — and one that purports to restore the presumptive innocence of the respondent — is totally inconsistent with the majority's underlying judgment that affirms the respondent's guilt of the very same criminal conduct.

[99] In entering a stay, my colleagues rely on the assurance of the Crown that it would not proceed with a new trial on the sexual assault charge. This assurance, however, has no legal significance whatsoever. Had the Crown not made this assurance, what would my colleagues have done? In fairness, I acknowledge they attempt to answer this. In a normal case — in which the Crown has appealed an inconsistent acquittal and not made any assurances of not pursuing a new trial, and where a reviewing court can isolate the effects of a legal error to the acquittal and conclude that the conviction is unaffected — my colleagues say the solution should be to send the acquittal back for a retrial, leaving the conviction to stand. They acknowledge that the issue of *res judicata*, including the plea of *autrefois convict* and s. 11(h) of the *Canadian Charter of Rights and Freedoms*, might arise. But with respect, this ignores the problem that my colleagues' framework creates. Where an accused chooses not to plead *autrefois convict* or raise a s. 11(h) challenge (and absent the Crown's assurance that it will not proceed with a new trial), my colleagues' solution places the accused in jeopardy for an offence for which he or she already stands convicted, raising the

prospect of — if a trial actually proceeds — a jury rendering inconsistent verdicts once again.

[100] That said, I am content with my colleagues’ proposal to leave the question of the necessity of a Crown appeal undecided until that issue comes squarely before us.

[101] Appellate courts like ours operate within certain statutory constraints when deciding a Crown appeal from an acquittal by a jury. It is for this reason that, on an appeal from acquittal by a jury, this Court has described the question as merely whether a misdirection “might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal” (*Graveline*, at para. 14). This also explains why Parliament’s chosen remedy, where that threshold is met, is a new trial.

[102] Of course, my colleagues’ difficulty in ordering a new trial on the sexual assault charge is that they also wish to restore the convictions for sexual interference and invitation to sexual touching, which are plainly inconsistent with the acquittal. But avoiding this difficulty is precisely why this Court has previously described the appropriate disposition in these circumstances — that is, where the Crown has appealed from an acquittal on the basis that it is inconsistent with a conviction on another charge — as being a new trial on *all* charges (*Pittiman*, at para. 14; *J.F.*, at paras. 40-41).

[103] That is what is required here. I agree with my colleagues that the jury was misdirected in this case on the basis of the confusing charge, the discrepancy between the decision tree and the verdict sheet, the fact that common assault was said to be an

available verdict, and overreliance on model jury instructions (*R. v. Hebert*, [1996] 2 S.C.R. 272, at para. 8; *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760, at para. 51). I also agree that this misdirection amounted to legal error that might reasonably be thought to have had a material bearing on the acquittal (*Graveline*, at para. 14). It follows that the only available remedy in response to the Crown appeal is the order of a new trial. But to order a new trial on one count and not the others is to put the respondent in jeopardy for something for which he was convicted (and then, following the Court of Appeal for Ontario decision, acquitted). I would therefore allow the appeal in part and order a new trial on all three charges.

*Appeal allowed, BROWN and KASIRER JJ. dissenting in part.*

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