R. *v.* Hinse, [1995] 4 S.C.R. 597

**Réjean Hinse** *Applicant*

*v.*

**Her Majesty The Queen** *Respondent*

**Indexed as:  R. *v.* Hinse**

File No.:  24320.

1995:  October 2; 1995:  November 30.

Present:  Lamer C.J. and La Forest, L'Heureux‑Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

application for reconsideration of an order refusing leave to appeal

*Practice ‑‑ Supreme Court of Canada ‑‑ Application for reconsideration of order refusing leave to appeal from Court of Appeal's judgment ‑‑ Policy governing such applications ‑‑ Unique question of jurisdiction raised by application ‑‑ Whether application for reconsideration should be allowed ‑‑ Rules of the Supreme Court of Canada, SOR/83‑74, Rules 7, 51(12)*.

*Appeal ‑‑ Supreme Court of Canada ‑‑ Jurisdiction ‑‑ Accused appealing conviction for armed robbery 27 years later on basis of fresh evidence ‑‑ Court of Appeal allowing accused's appeal and setting aside his conviction but entering stay of proceedings for abuse of process instead of ordering new trial or acquittal ‑‑ Whether Supreme Court has jurisdiction to entertain application for leave to appeal from Court of Appeal's order entering stay of proceedings ‑‑ Supreme Court Act, R.S.C., 1985, c. S‑26, s. 40(1) ‑‑ Criminal Code, R.S.C., 1985, c. C‑46, s. 686(8).*

The applicant was convicted of armed robbery in 1964. The Quebec Court of Appeal allowed his appeal and set aside his conviction in 1994 on the basis of fresh evidence. However, instead of directing a verdict of acquittal or ordering a new trial pursuant to s. 686(2) of the *Criminal Code*, the Court of Appeal invoked its inherent authority and entered a stay of proceedings for abuse of process. Although successful in the result, the applicant, perceiving that he had been deprived of the opportunity to obtain a judicial pronouncement of innocence through a directed verdict of acquittal, or alternatively, through the granting of a new trial, sought leave to appeal the order imposing the stay to this Court. His application for leave was denied. The applicant then filed an application for reconsideration of the order refusing leave. The sole issue in this case is whether an accused may seek review in this Court of an appellate court order directing a stay of proceedings rendered in the context of a larger judgment setting aside an accused’s conviction.

*Held* (L'Heureux‑Dubé J. dissenting): The application for reconsideration of the order refusing leave to appeal should be allowed and leave to appeal should be granted.

*Per* Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The Court does not normally reconsider its decisions regarding leave to appeal. This judicial policy is well enshrined in Rule 51(12) of the Supreme Court Rules, which provides that "[t]here shall be no re‑hearing on an application for leave or a motion". Given the large number of leave applications processed annually, it is simply not feasible for this Court to second‑guess its initial determinations of leave regularly without significantly undermining its indispensable role as a general court of appeal for the better administration of the laws of Canada. Notwithstanding the strict language of Rule 51(12), however, this Court may, in exceptional cases, direct a hearing to reconsider a decision made on an application for leave by virtue of its residual authority under Rule 7. Circumstances warranting reconsideration will be exceedingly rare. Given the exceptional and unique question of jurisdiction which came to light in the course of this application, this Court should exercise its discretion under Rule 7 to hear the present application.

The question of jurisdiction arises in this case because the Court of Appeal allowed the applicant's appeal and set aside his conviction for an indictable offence. Under the *Criminal Code*, an accused's right to appeal a conviction to this Court for an indictable offence is limited to cases where the accused's conviction at trial is affirmed by the court of appeal rather than set aside. The applicant has thus no right to appeal the order of a stay of proceedings under the procedural regime set out in the *Code*. He may, however, seek leave to appeal this particular order under s. 40(1) of the *Supreme Court Act*. Such an appeal is not prohibited by the language of either s. 674 of the *Code* or s. 40(3) of the Act.

A trial court has the power to suspend a course of abusive proceedings which offend the community's sense of fair play, and an appellate court also possesses an analogous power to direct a stay of proceedings. Although a court of appeal's power to order a stay of proceedings for abuse of process traces its origins to the common law, when the court of appeal imposes such a stay it is necessarily engaged in an exercise of its residual order power under s. 686(8) of the *Criminal Code* to "make any order . . . that justice requires". The statutory form of this judicial power does not alter the substantive constraints imposed on the exercise of the power by the common law. Unlike orders for an acquittal or for a new trial under s. 686(2) of the *Code*, which are inextricably linked to the resolution of the merits of an appeal, an order under s. 686(8) is by nature ancillary to the underlying judgment rendered by the court. The court's s. 686(8) power is often exercised with regard to considerations that are well removed from the issue of the accused's innocence or culpability and may even be exercised independently of a prior order under s. 686(2). Given the inherently supplementary and remedial nature of an order imposed under s. 686(8), such an order does not represent a functionally integral part of a "judgment . . . setting aside or affirming a conviction" within a purposive interpretation of s. 40(3) and the definition of "judgment" in s. 2 of the *Supreme Court Act*. Rather, an order rendered under s. 686(8) represents a separate, divisible judicial act from which the accused or the Crown may independently seek leave to appeal under s. 40(1).

Such an interpretation is in accordance with sound judicial policy. When a court of appeal allows an accused's appeal and enters an order for an acquittal or for a new trial under s. 686(2) of the *Code*, it is necessarily entering an order in furtherance of its underlying judgment. But when a court of appeal enters an order under s. 686(8), there is a risk that it may enter an order which is at direct variance with its underlying judgment. Given this troubling concern, a more generous interpretation of s. 40(1) (and a correspondingly more narrow interpretation of s. 40(3)) should be adopted, thereby facilitating this Court's supervisory role in ensuring the underlying consistency of appellate court orders rendered under the procedural regime of the *Criminal Code*. An accused or the Crown ought to be permitted to seek leave to appeal the legality of an order rendered under s. 686(8) independently as a "final or other judgment . . . of the highest court of final resort in a province" under this Court’s general jurisdiction under s. 40(1) of the *Supreme Court Act.*

Accordingly, the applicant may seek leave to appeal the legality of the stay of proceedings for abuse of process entered by the Court of Appeal notwithstanding the fact that the court allowed his original appeal and set aside his conviction. Since the application for reconsideration raises a genuine and serious question of law of sufficient public importance to warrant review by this Court, this application should be allowed and leave to appeal granted. It is unnecessary to offer any further comment on the legality and constitutionality of the stay of proceedings. Consistent with the Court's established practice of refusing to elaborate justifications for granting or denying leave to appeal, any potential discussion of substantive issues raised by this case should be postponed until the Court is seized with the merits of the appeal.

*Per* L'Heureux‑Dubé J. (dissenting): It was agreed with the majority that a court of appeal may render orders which are ancillary and of supplemental character to its judgment under s. 686(8) of the *Criminal Code* and this Court has jurisdiction to entertain an application for leave to appeal from such an order under s. 40(1) of the *Supreme Court Act*. Similar to orders in *Kienapple* or entrapment situations, orders directing a stay of proceedings, as in this case, can be entered by appellate courts.

The application for reconsideration of this Court's order refusing leave to appeal should be dismissed. The Court of Appeal held that ordering a new trial would constitute an abuse of process and entered a stay of proceedings. It is well-settled law that courts can order a stay of proceedings. Whether or not the Court of Appeal was right in exercising its discretion in this way in this case, the exercise by provincial appellate courts of their discretionary power to enter a stay of proceedings does not raise a genuine and serious question of law of sufficient "public importance" to warrant granting leave to appeal.

**Cases Cited**

By Lamer C.J.

**Referred to:** *R. v. Stolar*, [1988] 1 S.C.R. 480; *Reekie v. Messervey*, [1990] 1 S.C.R. 219; *Johnson v. The Queen*, [1994] 3 S.C.R. viii; *R. v. Barnes*, [1991] 1 S.C.R. 449; *R. v. MacKenzie*, [1993] 1 S.C.R. 212; *R. v. Laba*, [1994] 3 S.C.R. 965; *Meddoui v. The Queen*, [1991] 3 S.C.R. ix; *R. v. Finta*, [1994] 1 S.C.R. 701; *R. v. Keegstra*, [1995] 2 S.C.R. 381; *R. v. O'Connor* (1994), 89 C.C.C. (3d) 109; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. Young* (1984), 40 C.R. (3d) 289; *R. v. Keyowski*, [1988] 1 S.C.R. 657; *R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Scott*, [1990] 3 S.C.R. 979; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. E. (L.)* (1994), 94 C.C.C. (3d) 228; *R. v. B. (A.J.)* (1994), 90 C.C.C. (3d) 210, rev'd [1995] 2 S.C.R. 413; *R. v. Zurlo* (1990), 57 C.C.C. (3d) 407; *Hill v. The Queen*, [1977] 1 S.C.R. 827; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Provo*, [1989] 2 S.C.R. 3; *Elliott v. The Queen*, [1978] 2 S.C.R. 393; *Kienapple v. The Queen*, [1975] 1 S.C.R. 729; *Terlecki v. The Queen*, [1985] 2 S.C.R. 483; *R. v. Sullivan*, [1991] 1 S.C.R. 489; *R. v. Wade* (1994), 29 C.R. (4th) 327, rev'd [1995] 2 S.C.R. 737.

By L'Heureux‑Dubé J. (dissenting)

*R. v. Terlecki* (1983), 4 C.C.C. (3d) 522, aff'd [1985] 2 S.C.R. 483; *R. v. Provo*, [1989] 2 S.C.R. 3; *R. v. Sullivan*, [1991] 1 S.C.R. 489; *R. v. Barnes*, [1991] 1 S.C.R. 449; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. Keyowski*, [1988] 1 S.C.R. 657; *R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Scott*, [1990] 3 S.C.R. 979; *R. v. Power*, [1994] 1 S.C.R. 601.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 7, 24(1).

*Criminal Code*, R.S.C., 1985, c. C‑46, ss. 674, 683(3), 686(1)(*a*) [am. 1991, c. 43, s. 9 (Sch., item 8)], (2), (4) [am. c. 27 (1st Supp.), s. 145], (8), 691 [am. c. 34 (3rd Supp.), s. 10; 1991, c. 43, s. 9 (Sch., item 9)], 693(1) [am. c. 27 (1st Supp.), s. 146; am. c. 34 (3rd Supp.), s. 12].

*Criminal Code*, S.C. 1953‑54, c. 51, s. 288(*d*) [now R.S.C., 1985, c. C‑46, s. 343(*d*)].

*Rules of the Supreme Court of Canada*, SOR/83‑74, Rules 7, 29(1) [rep. & sub. SOR/93‑488, s. 2], 51(12).

*Supreme Court Act*, R.S.C., 1985, c. S‑26, ss. 2 "judgment", 40(1) [rep. & sub. 1990, c. 8, s. 37], (3).

**Authors Cited**

Jacob, I. H. "The Inherent Jurisdiction of the Court" (1970), 23 *Current Legal Problems* 23.

APPLICATION for reconsideration of an order of the Supreme Court of Canada, [1995] 1 S.C.R. viii, refusing leave to appeal from a judgment of the Quebec Court of Appeal (1994), 64 Q.A.C. 53, setting aside the accused's conviction for armed robbery and ordering a stay of proceedings. Application allowed and leave to appeal granted, L'Heureux‑Dubé J. dissenting.

*Jean‑François Longtin* and *Josée Ferrari*, for the applicant.

*Pierre Sauvé*, for the respondent.

The judgment of Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ. was delivered by

Lamer C.J. --

I. Introduction

This is an application for reconsideration of an order of this Court refusing leave to appeal. The applicant, Réjean Hinse, was convicted of armed robbery over 30 years ago. In 1991, on the presentation of fresh evidence, the Quebec Court of Appeal allowed his appeal and set aside his conviction. However, instead of directing a verdict of acquittal or ordering a new trial, the Court of Appeal invoked its inherent authority and entered a stay of proceedings for abuse of process. The applicant, perceiving that he had been denied a clear judicial pronouncement of his innocence, sought leave to appeal the legality and constitutionality of the stay. His initial request for leave was denied, and he promptly filed an application for reconsideration. Given the serious and exceptional question of jurisdiction presented by this application, we convened an oral hearing to consider the application and directed the parties to limit their argument to the threshold question of this Court's jurisdiction. Accordingly, the sole issue presented by these proceedings concerns whether or not an accused may seek review in this Court of a discrete order entered by a court of appeal in the context of a larger judgment setting aside an accused’s conviction.

II. Factual and Procedural Background

On the evening of December 14, 1961, five armed individuals forced their way into a private home in Mont-Laurier, beating and robbing Mr. and Mrs. Henriot Grenier. A short time afterwards, through a casual encounter, the victims identified the applicant as one of the armed perpetrators. In a subsequent police line-up, the victims confirmed their identification of the applicant. On September 23, 1964, on the basis of this identification and other circumstantial evidence, Judge Omer Côté of the Court of Sessions of the Peace found the applicant guilty of armed robbery under s. 288(*d*) of the *Criminal Code*, S.C. 1953-54, c. 51 (now s. 343(*d*) of the *Criminal Code*, R.S.C., 1985, c. C-46) and sentenced him to 15 years imprisonment. After approximately five years in prison, the applicant was released on parole. During the period of his incarceration up to the present day, the applicant has consistently maintained his innocence.

In June 1991, the Quebec Court of Appeal granted the applicant’s motion to extend the operative limitation periods for appeal. In November of the same year, the court granted the applicant’s motion to submit fresh evidence which challenged the reliability of the original line-up identification and the veracity of the surrounding circumstantial evidence. On the basis of this new body of evidence, the Quebec Court of Appeal allowed the appeal and set aside the applicant’s conviction under s. 686(1)(*a*) of the *Criminal Code*. Applying the standard set out by this Court in *R.* *v.* *Stolar*, [1988] 1 S.C.R. 480, the Court of Appeal held that the original conviction could not be maintained in light of the fresh evidence presented by the applicant. Steinberg J.A., speaking for the court, turned to the question of the appropriate disposition for the case. The strict wording of s. 686(2) of the *Criminal Code* appeared to present the court with only two options: the entry of a verdict of acquittal or the order of a new trial. Steinberg J.A., however, rejected both alternatives. To begin, he concluded that a verdict of acquittal was not warranted given the remaining evidence submitted at trial which had not been impugned on appeal. Furthermore, he held that a new trial was also not appropriate given the immense lapse of time since the original conviction. But Steinberg J.A. ruled that the binary structure of s. 686(2) did not exhaust his inherent powers to dispose of the case. More specifically, he held that he had the authority to direct a stay of proceedings pursuant to a number of recent Supreme Court precedents. As he wrote:

The Supreme Court of Canada has recognized that despite the wording of Section 686 of the Criminal Code, there remains vested in a court of appeal a residual power to order a stay of proceedings in the most exceptional circumstances. *R.* v. *Jewitt*, [1985] 2 S.C.R. 128; *R.* v. *Mack*, [1988] 2 S.C.R. 903; *R.* v. *Conway*, [1989] 1 S.C.R. 1659; *R.* v. *Power* [[1994] 1 S.C.R. 601]. [Parallel citations omitted.] The circumstances outlined render this one of those exceptional cases which justifies the use of the residual power of this court to order a stay of proceedings.

((1994), 64 Q.A.C. 53, at p. 60.)

Accordingly, Steinberg J.A. vacated the applicant’s conviction, and entered a stay of proceedings rather than directing a verdict of acquittal or granting a new trial. As an aside, it should be noted that Steinberg J.A. appeared to locate his power to impose a stay of proceedings for abuse of process at common law. Steinberg J.A. made no finding of a constitutional abuse of process contrary to the "principles of fundamental justice" which triggered his remedial powers to impose a stay of proceedings under s. 24(1) of the *Canadian Charter of Rights and Freedoms*.

In October 1994, the applicant filed an application for leave to appeal to this Court challenging the legality and constitutionality of the stay. More specifically, he sought leave to appeal on the following grounds:

[translation]

A- First Question

1-Having allowed the appeal and set aside the conviction of the applicant for the reason that: “The fresh evidence as well as the various irregularities which occurred are more than sufficient to justify allowing the appeal under [s.] 686(1)(a) of the Criminal Code”, and having ruled to the effect that “Special circumstances militate against proceeding with a new trial in this case”, did the Court of Appeal commit an error of law in ordering a stay of proceedings instead of entering a verdict of acquittal in accordance with s. 686(2)(a) Cr. C.?

2-In the circumstances of this case, did the stay of proceedings as opposed to an acquittal constitute a violation of the applicant’s fundamental rights guaranteed under s. 7 of the Canadian Charter of Rights and Freedoms?

B- Second Question

Having admitted the body of fresh evidence presented under the aegis of s. 683 Cr. C. and having concluded that this fresh evidence was more than sufficient to allow the appeal under s. 686(1)(a) Cr. C., did the Court of Appeal commit an error of law in failing to acquit the applicant pursuant to s. 686(2)(a) Cr. C. on the basis of the criterion of s. 686(1)(a)(i) Cr. C., on the ground that, in light of the evidence *as a whole*, the trier of fact, properly instructed, could not have reasonably found the accused guilty beyond a reasonable doubt? [Emphasis in original.]

The applicant’s initial request for leave to appeal was denied by this Court: *Hinse v. The Queen*, [1995] 1 S.C.R. viii. He subsequently filed an application for reconsideration of the order refusing leave. This Court convened an oral hearing to address the issue, and directed the parties to limit their arguments to the threshold question of jurisdiction. The application was heard by this Court on October 2, 1995, and we reserved judgment.

III. Relevant Statutory Provisions

*Criminal Code*, R.S.C., 1985, c. C-46

**674.** No proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offences.

**686.** ...

(2) Where a court of appeal allows an appeal under paragraph (1)(*a*), it shall quash the conviction and

(*a*) direct a judgment or verdict of acquittal to be entered; or

(*b*) order a new trial.

...

(4) Where an appeal is from an acquittal, the court of appeal may

(*a*) dismiss the appeal; or

(*b*) allow the appeal, set aside the verdict and

(i) order a new trial, or

(ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

...

(8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

**691.** (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(*a*) on any question of law on which a judge of the court of appeal dissents; or

(*b*) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

(2) A person

(*a*) who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal, or

(*b*) who is tried jointly with a person referred to in paragraph (*a*) and is convicted and whose conviction is sustained by the court of appeal,

may appeal to the Supreme Court of Canada on a question of law.

**693.** (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under section 675 or dismisses an appeal taken pursuant to paragraph 676(1)(*a*), (*b*) or (*c*) or subsection 676(3), the Attorney General may appeal to the Supreme Court of Canada

(*a*) on any question of law on which a judge of the court of appeal dissents; or

(*b*) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

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

**2.** ...

"judgment", when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof....

**40.** (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

...

(3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

*Rules of the Supreme Court of Canada*, SOR/83-74

7. Whenever these Rules contain no provision for exercising any right, any procedure that is specified by the Court, a Judge or the Registrar and that is not inconsistent with these Rules or the Act may be adopted.

29. (1) A respondent who seeks to set aside or vary the whole or any part of the disposition of the judgment appealed from shall apply for leave to cross-appeal....

51. ...

(12) There shall be no re-hearing on an application for leave or a motion.

IV. Analysis

This application raises an important jurisdictional question concerning this Court’s authority to entertain appeals from orders entered by a court of appeal under its residual power of s. 686(8) of the *Criminal Code*. However, at the outset, I have a number of comments concerning the nature of the applicant's motion. More specifically, given that this case represents a rare instance where this Court has chosen to hear argument and write reasons in relation to an application for reconsideration of an order refusing leave to appeal, it would be appropriate to clarify this Court's long-standing policy governing the treatment of such applications.

A. *The Application for Reconsideration of an Order Refusing Leave*

This Court does not normally make a habit of reconsidering its decisions regarding leave to appeal. The ability to grant or deny leave represents the sole means by which this Court is able to exert discretionary control over its docket. In order to ensure that this Court enjoys complete flexibility in allocating its scarce judicial resources towards cases of true public importance, as a sound rule of practice, we generally do not convene oral hearings on applications for leave, nor do we produce written reasons for our grants and denials of leave. The same practical considerations govern our treatment of applications for reconsideration of orders granting or refusing leave. Given the hundreds of leave applications processed by this Court on an annual basis, it is simply not feasible for this Court to regularly second-guess its initial determinations of leave without significantly undermining this Court’s indispensable role as a general court of appeal for the better administration of the laws of Canada. This judicial policy is well enshrined in Rule 51(12) of the *Rules of the Supreme Court of Canada*, which provides that "[t]here shall be no re-hearing on an application for leave or a motion."

However, as with all rules of practice, Rule 51(12) must occasionally yield to circumstance. In exceptional cases, this Court may direct a hearing to reconsider the merits of an initial order refusing leave. For the same policy rationale addressed above, in order to allow this Court the widest degree of flexibility in controlling access to its docket, we have not barred ourselves from revisiting an original decision on leave in the appropriate case. As such, notwithstanding the strict language of Rule 51(12), we have interpreted our residual authority under Rule 7 of the Rules to authorize the Court to reconsider a decision made on an application for leave. See *Reekie* *v.* *Messervey*, [1990] 1 S.C.R. 219, at pp. 222-23. We have also interpreted Rule 7 to permit this Court, to reconsider and quash a previous ruling on leave on its own motion. See *Johnson* *v.* *The Queen*, [1994] 3 S.C.R. viii. But while this Court is not precluded from revisiting its original rulings on leave, for the policy reasons outlined above, circumstances warranting reconsideration will be exceedingly rare. For all intents and purposes, litigants before this Court should consider a grant or denial of leave to appeal as a final and binding statement on whether their case raises a question of law of sufficient public importance to merit review by this nation’s highest court of appeal.

In this instance, given the exceptional and unique question of jurisdiction which came to light in the course of this application, we chose to exercise our discretion under Rule 7 to hear the applicant’s motion for reconsideration of our initial order denying leave.

B. *Jurisdiction*

(1) General Principles

The question of jurisdiction arises in this case because the Quebec Court of Appeal allowed the applicant’s appeal and set aside the applicant’s conviction for an indictable offence. Under such circumstances, the Crown is free to appeal the decision of the Court of Appeal, either by leave or as of right based on a dissent, under s. 693(1) of the *Criminal Code*. But in this instance, it is the accused who is seeking to review the ruling of the Court of Appeal. More specifically, while the applicant was successful in the result he obtained before that court, he seeks to appeal the particular order entered by the Court of Appeal. The applicant was presumably pleased that his original conviction was set aside. However, as I understand his motivations, he is seeking to challenge the stay of proceedings imposed by the court because he feels he has been improperly deprived of the opportunity to obtain a judicial pronouncement of innocence through a directed verdict of acquittal, or alternatively, through the granting of a new trial.

However, the *Criminal Code* does not expressly provide for any avenue of appeal for an accused who has secured a favourable result before the highest court of last resort of a province. An accused’s right to appeal a conviction to the Supreme Court of Canada under the procedural regime for indictable offences is limited to cases where the accused’s conviction was affirmed rather than set aside on appeal. As s. 691(1) of the *Code* reads:

**691.** (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(*a*) on any question of law in which a judge of the court of appeal dissents; or

(*b*) on any question of law, if leave to appeal is granted by the Supreme Court of Canada. [Emphasis added.]

Furthermore, in the past, this Court has held quite consistently in the context of Crown appeals under s. 693(1)(*b*), that once the Crown has secured a favourable result before a provincial court of appeal, it may not seek leave to appeal the particular order of the court of appeal entered under s. 686(4)(*b*) (i.e., the order of a new trial as opposed to the entry of verdict of guilty). In *R.* *v.* *Barnes*, [1991] 1 S.C.R. 449,the accused was convicted, but the trial judge entered a stay of proceedings for entrapment. The Court of Appeal allowed the Crown’s appeal on the finding of entrapment, set aside the stay, and ordered a new trial. Upon the accused’s appeal to this Court, the Crown sought an order dismissing the appeal and entering a conviction. Speaking for the majority of the Court, I held that this Court lacked jurisdiction to vary the Court of Appeal’s order at the prosecution’s request in the absence of a Crown appeal, and more importantly, that the Crown had no underlying right of appeal under s. 693(1)(*b*). As I wrote (at p. 466):

The Crown is not given by statute the ability to appeal to this Court a decision which allowed its appeal from an acquittal or judicial stay of proceedings, but which gave the Crown less than what had been requested. As a result, there is no statutory provision which would allow the Crown to appeal from the Court of Appeal’s judgment. Absent a statutory right of appeal, there is no right of appeal. [Emphasis in original.]

I further held, at p. 465, that the Crown had no right to seek leave to appeal the order of a new trial by virtue of s. 40(3) of the *Supreme Court Act*. The principle of *Barnes* was subsequently affirmed and applied in *R.* *v.* *MacKenzie*, [1993] 1 S.C.R. 212. As La Forest J. elaborated in *MacKenzie*, at pp. 228-29:

The problem for the Crown in this case is that the Court of Appeal allowed the Crown’s appeal, albeit on a different issue than that which the Crown sought to pursue in this Court. The Crown’s overall success in the court below precluded any further appeal, or cross-appeal, to this Court.

...

As in *Barnes,* a court of appeal has allowed a Crown appeal, thereby precluding any appeal, or cross-appeal, by the Crown to this Court. The subdivision of a case on appeal into discrete grounds does not assist the Crown in this regard: an unfavourable ruling by a court of appeal on one point of law is overtaken by the Crown’s success on other grounds. [Emphasis in original.]

See, also, *R.* *v.* *Laba*, [1994] 3 S.C.R. 965, at pp. 978-81, where I reiterated that this Court has no jurisdiction under s. 693(1)(*b*) of the *Code* or s. 40(1) of the *Supreme Court Act* to entertain an appeal by the Crown of the particular order or reasons entered by a court of appeal where the prosecution’s underlying appeal was allowed before that court.

Along similar lines, we have held that an accused has no right to appeal the order of a court of appeal directing a new trial under s. 686(2)(*b*) where the accused was ultimately successful in the result before that court. In *Meddoui v. The Queen*, [1991] 3 S.C.R. ix, the accused sought leave to appeal a ruling of the Alberta Court of Appeal setting aside his original conviction, but which entered a new trial as opposed to a verdict of acquittal under s. 686(2)(*b*). This Court denied leave for want of jurisdiction, since the text of s. 691(1) limits an accused’s right to appeal in indictable cases to circumstances where the court of appeal below affirmed an accused’s conviction or set aside an acquittal. As well, the text of s. 40(3) precludes an accused from appealing such an order of a new trial through resort to this Court's general jurisdiction under s. 40(1) of the *Supreme Court Act*. See *R. v. Keegstra*, [1995] 2 S.C.R. 381, at pp. 399-400.

(2) Submissions

On the basis of these authorities, the Attorney General of Quebec argues that the applicant Hinse does not enjoy any right to appeal a discrete order of the Quebec Court of Appeal directing a stay of proceedings after having obtained a favourable result on appeal (i.e., his conviction was set aside). Furthermore, the Attorney General contends that the applicant is precluded from seeking leave pursuant to this Court’s general jurisdiction under s. 40(1) of the *Supreme Court Act*, since s. 40(3) expressly excludes jurisdiction over the "judgment of any court ...setting aside or affirming a conviction ...of an indictable offence”.

The applicant offers two arguments in favour of this Court’s jurisdiction. First, the applicant argues that since he is raising a constitutional objection to the stay of proceedings, this Court has jurisdiction to independently address the constitutional question under s. 40(1) under the “dual proceedings” framework articulated in *Laba*, *supra*, at pp. 981-84. The “dual proceedings” approach, it will be recalled, permits the Crown or the accused to independently seek leave to appeal on constitutional questions which arise in the context of a criminal case, even when no appeal would otherwise be available by virtue of the appeal provisions of the *Criminal Code* and s. 40(3) of the *Supreme Court Act*. See, e.g., *R.* *v.* *Finta*, [1994] 1 S.C.R. 701, and *Keegstra*, *supra*, at pp. 390-96. While the "dual proceedings" analysis was originally conceived as a means of appealing "ruling[s]" by a provincial court of appeal "on the constitutionality of a *Criminal Code* provision" (*Keegstra*, at p. 392), the applicant argues that the approach is equally applicable as a means of appealing an act or order of a provincial court of appeal which itself raises a constitutional question. Second, the applicant contends that Rule 29 of the *Rules of the Supreme Court of Canada* explicitly anticipates an avenue for the appeal of an order of a final court of appeal of a province. While the respondent cross-appeals under Rule 29 must have an independent statutory foundation (*Keegstra*, at p. 403), the applicant argues that Rule 29 at least contemplates the existence of some statutory appeal mechanism for seeking “to set aside or vary the whole or any part of the disposition of the judgment appealed from”.

Since I am of the view that this Court has jurisdiction to hear this appeal on alternative grounds, it is unnecessary for me to dispose of the merits of the applicant’s two arguments for the existence of jurisdiction.

On the basis of the foregoing authorities, I am in agreement with the respondent that the applicant has no right to appeal the imposition of the stay under the procedural regime set out in the *Criminal Code*. But I am not equally convinced that the applicant is prohibited from seeking leave to appeal the stay of proceedings issued by the Court of Appeal under this Court’s general jurisdiction under s. 40(1) of the *Supreme Court Act*. More specifically, I do not believe that such an appeal is prohibited by the language of either s. 40(3) of Act or s. 674 of the *Code*. While s. 40(3) clearly precludes an accused or the Crown from seeking leave with regard to an order of a new trial in accordance with the principle of *Barnes*, *MacKenzie* and *Meddoui*, I do not think that the language of s. 40(3) necessarily prohibits an accused or the Crown from appealing an order of a stay of proceedings for abuse of process.

(3) The Nature of an Order for a Stay of Proceedings for Abuse of Process

As a preface to my discussion of this Court's jurisdiction, it is necessary to draw a preliminary distinction between the legal foundation of a court of appeal's power to direct a new trial in response to a successful appeal by the accused and a court of appeal's power to direct a stay of proceedings for abuse of process. Needless to say, I am reluctant to engage in an extensive discussion of the origins, nature and limits of a court's power to suspend abusive and vexatious criminal proceedings given the narrow focus of this application. Rather, such a comprehensive examination (if necessary) ought to occur during our consideration of the full merits of this appeal, following proper written and oral argument on the issue. Furthermore, it is unnecessary to delve into any discussion of the relationship between the power of a court to order a stay of proceedings for abuse of process at common law or by statute, and the power of a court to order a stay of proceedings for abuse of process under ss. 7 and 24 of the *Charter*. See, e.g., *R.* *v.* *O'Connor* (1994), 89 C.C.C. (3d) 109 (B.C.C.A.). Nonetheless, I am required to engage in a brief examination of the source of a court of appeal's power to suspend criminal proceedings whether at common law or by statute, as this legal foundation of the court's power necessarily impacts my discussion of the more immediate question of this Court's jurisdiction under s. 40(1) of the *Supreme Court Act*.

Once a court of appeal has allowed an accused's appeal and set aside his or her conviction, the court is empowered by s. 686(2) of the *Code* to enter one of two orders: an order for a directed verdict of acquittal, or an order for a new trial. The statutory provision is set out as follows:

**686.** ...

(2) Where a court of appeal allows an appeal under paragraph (1)(*a*), it shall quash the conviction and

(*a*) direct a judgment or verdict of acquittal to be entered; or

(*b*) order a new trial.

However, notwithstanding the apparently exhaustive language of this provision, it seems clear from recent decisions of this Court that a court of appeal may also direct a stay of proceedings for abuse of process as an alternative to these two orders under the appropriate circumstances.

To begin, it is now well established that a trial court has the power to suspend a course of abusive criminal proceedings which offend the community's sense of fair play. In *R.* *v.* *Jewitt*, [1985] 2 S.C.R. 128, at pp. 136-37, citing *R.* *v.* *Young* (1984), 40 C.R. (3d) 289 (Ont. C.A.), at p. 329, this Court acknowledged that "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". We noted in *Jewitt*, at p. 131, that the origin of this power derives from the inherent authority of a court of common law to control and discipline an abuse of its processes. As I. H. Jacob has argued in the seminal article, "The Inherent Jurisdiction of the Court" (1970), 23 *Current Legal Problems* 23, at p. 27:

[T]he essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.

This Court has subsequently affirmed the inherent authority of a trial court judge to stay criminal proceedings for an abuse of process in a number of cases. See, e.g., *R.* *v.* *Keyowski*, [1988] 1 S.C.R. 657, at pp. 658-59; *R.* *v.* *Mack*, [1988] 2 S.C.R. 903, at p. 941; *R.* *v.* *Conway*, [1989] 1 S.C.R. 1659, at p. 1667; and *R. v.* *Scott*, [1990] 3 S.C.R. 979, at pp. 992-93.

More recently, we have indicated that an appellate court possesses an analogous power to direct a stay of proceedings. In *R.* *v.* *Power*, [1994] 1 S.C.R. 601, the Newfoundland Court of Appeal refused to allow the Crown's appeal of a directed verdict of acquittal for impaired driving, notwithstanding the presence of a reversible error, on the ground that the Crown's appeal amounted to an abuse of process (at trial, the Crown had declined the opportunity to present further evidence of impairment once the prosecution's breathalyser evidence had been excluded). L'Heureux-Dubé J. held for a 4-to-3 majority of this Court that there was no abuse of process on the facts, and that accordingly the Court of Appeal enjoyed no discretion beyond s. 686(4) of the *Code* to order a stay of proceedings. In so doing, however, she clearly implied, at p. 620, that a provincial court of appeal could order such a stay for vexatious and abusive proceedings under the appropriate circumstances:

...I am of the view that s. 686(4) of the *Criminal Code* does not confer a court of appeal any discretion, however limited, beyond the general power to control its process in case of abuse. [Emphasis added.]

In his dissenting reasons, Sopinka J. endorsed the same proposition but in much more explicit terms. As he stated, at p. 644:

The Court of Appeal has, apart from the discretion defined in *Vézeau*, the power to correct an abuse of process.... While the more usual exercise of this power occurs in review of the decision of the trial judge with respect to an abuse of process that occurred at trial, exceptionally it may be exercised by the Court of Appeal in first instance where the abuse occurs during the appeal proceedings. See *R. v. Potvin*, [1993] 2 S.C.R. 880, at pp. 915-16.

In light of these passages, both the Ontario and Newfoundland Courts of Appeal have since interpreted *Power* as an affirmation of an appellate court's power to suspend proceedings to prevent an abuse of process. See *R. v. E. (L.)* (1994), 94 C.C.C. (3d) 228 (Ont. C.A.), at p. 249, and *R. v. B. (A.J.)* (1994), 90 C.C.C. (3d) 210 (Nfld. C.A.), at p. 232. (The latter case was reversed by this Court, [1995] 2 S.C.R. 413, for reasons unrelated to the appellate court's imposition of a stay of proceedings.) But while the majority in *Power* suggested in general terms, at p. 612, that the existence of such an appellate power to enter a stay of proceedings lay within an appellate court's "inherent and residual discretion", the majority refrained from elaborating the precise legal source of authority for such a discretionary power, whether at common law or under the broad statutory order powers of a court of appeal under the *Criminal Code*.

In my view, when a court of appeal enters an order to suspend criminal proceedings which violate "the community's sense of fair play and decency", it is necessarily engaged in an exercise of its residual order power under s. 686(8) of the *Criminal Code*. The wording of the residual order provision is set out as follows:

**686.** ...

(8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

The power of an appellate court to impose a stay of criminal proceedings, similar to a trial court, derives its origin from the inherent jurisdiction of a superior court of record at common law. But given the breadth of the language of the residual order provision, I believe that the concrete exercise of that inherent power necessarily manifests itself through the statutory font of s. 686(8). When a court of appeal invokes its power to suspend a vexatious or oppressive course of criminal proceeding in the course of allowing or dismissing an appeal, in my view, it is clearly engaged in rendering an order "that justice requires". While the power of a court of appeal to order a stay of proceedings for abuse of process traces its origins to the common law, the actual exercise of that authority inevitably carries a statutory gloss by virtue of s. 686(8) of the *Criminal Code*. Accordingly, in the few reported cases where provincial courts of appeal have suspended criminal proceedings for an apparent abuse of process, such courts have located their authority under the residual order provisions of the *Code*. See, e.g., *B. (A.J.)*, *supra*, at pp. 232-33, and *R. v. Zurlo* (1990), 57 C.C.C. (3d) 407 (Que. C.A.), at pp. 420-21. The statutory form of this judicial power, needless to say, does not alter the substantive constraints imposed on the exercise of the power by the common law. In other words, notwithstanding the broad remedial language of s. 686(8), both trial and appellate courts may only impose a stay of proceedings for abuse of process in accordance with the principles and limits we have set out in *Jewitt*, *Keyowski*, *Mack*, *Conway*, and *Scott*.

But while an appellate court's power to direct a stay of criminal proceedings ought to be properly understood as an exercise of its authority to enter an order under s. 686(8) of the *Code*, an order under s. 686(8) nonetheless represents a fundamentally distinct judicial order from an order for a new trial in accordance with s. 686(2)(*b*) within the structure of the appeals regime of the *Criminal Code*. As such, I do not believe that both types of orders are necessarily jointly excluded from this Court's general jurisdiction to grant leave by virtue of s. 40(3) of the *Supreme Court Act*.

(4) Appeals of Orders Issued under Section 686(8) of the *Code*

Section 40(1) of the *Supreme Court Act* vests this Court with a comprehensive jurisdiction to hear appeals by leave on questions of federal and provincial law. In criminal matters involving indictable offences, however, this Court’s general jurisdiction is subject to the limitations stipulated in both s. 674 of the *Criminal Code* and s. 40(3) of the Act. The two provisions read as follows:

**674.** No proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offences.

**40.** ...

(3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

The meaning of “judgment” in s. 40(3), it should be noted, is defined in s. 2 of the *Supreme Court Act* so as to include particular orders and decrees related to a judgment. Section 2 reads as follows:

**2.** ...

"judgment", when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof....

While s. 674 would appear to place a strict limit on the exercise of this Court’s general jurisdiction under s. 40(1) “in respect of indictable offences”, we have consistently held in light of the legislative history and purpose of both the *Criminal Code* and the *Supreme Court Act* that s. 40(1) “confers some jurisdiction in criminal matters beyond that existing under the *Criminal Code*” (*Hill v. The Queen*, [1977] 1 S.C.R. 827, at p. 850). See also *R.* *v.* *Gardiner*, [1982] 2 S.C.R. 368, at p. 400; *Dagenais* *v.* *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 858-59. More recently, we have indicated that the operative limit on this Court’s general jurisdiction over criminal matters ought to be found in the language of s. 40(3) of the Act as opposed to s. 674 of the *Code*, as s. 40(3) represents the Parliament’s most recent expression of intent on the scope of this Court’s appellate jurisdiction. As I emphasized in *Dagenais*, *supra*, at pp. 859-60, the relevant boundary for interpreting this Court’s jurisdiction to consider a third party appeal of a publication ban issued in relation to a criminal proceedings lies within the words of s. 40(3):

Section 40 of the *Supreme Court Act* contains its own limiting provision in s. 40(3). That subsection excludes the granting of leave under s. 40(1) from a judgment “acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence”. However, s. 40(3) does not prevent this Court from granting leave under s. 40(1) to consider questions of criminal law not excluded by s. 40(3) such as those arising in the sentencing process as in *Gardiner* ... and those arising from the provisions in the *Criminal Code* authorizing the review of the parole eligibility date for those convicted of high treason and first or second degree murder as in *R.* *v.* *Vaillancourt* (1990), 76 C.C.C. (3d) 384 (S.C.C.), and *R.* *v.* *Swietlinski*, [1994] 3 S.C.R. 481.

For these reasons, I find that s. 674 of the *Criminal Code* does not limit our jurisdiction to grant leave in cases such as this under s. 40(1) of the *Supreme Court Act*. [Emphasis added.]

Thus, the appropriate inquiry in this instance is whether or not the applicant's application is excluded by the joint operation of s. 2 and s. 40(3) of the Act. More specifically, we must determine whether or not the order issued by the Quebec Court of Appeal represents a necessary component of a "judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence".

As I held in *Barnes*, when a court of appeal allows a Crown appeal and directs an order for a new trial (as opposed to a verdict of guilty) pursuant to its statutory power under s. 686(4)(*a*)(i) of the *Code*, the court is quite clearly rendering an order which constitutes an essential part of a "judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence". And as this Court implicitly held in *Meddoui*, when a court of appeal allows an accused’s appeal and directs an analogous order for a new trial (as opposed to a verdict of acquittal) pursuant to its statutory power under s. 686(2)(*b*), the court is similarly rendering an order which falls within the ambit of the jurisdictional exclusion clause of s. 40(3) of the *Supreme Court Act*. In both circumstances, the court is issuing an order which is integrally related to its underlying ruling allowing the Crown’s or the accused’s appeal. Both provisions vest a court of appeal with the power to direct a particular form of disposition which is inextricably linked to the resolution of the merits of the appeal. For instance, in the case of a successful appeal by the accused, once the court has allowed appeal, the text of s. 686(2) directs the court to quash the conviction and enter one of two orders for the disposition of the appeal. Accordingly, given the close functional nexus between a judgment of court allowing an appeal and an order of a new trial under the current structure of the *Criminal Code*, we have held that an order under s. 686(2)(*b*) (and equally an order under s. 686(4)(*b*)(i)) constitutes an essential part of a "judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence".

However, in my view, when a court of appeal exercises its power to impose an order under s. 686(8), it is not rendering an order which constitutes an integral part of a “judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence”. Rather, as I shall endeavour to explain, the court is imposing an order which is by nature ancillary to the underlying judgment rendered by the court. As such, I am of the view that in accordance with a purposive interpretation of ss. 2 and 40(3), an accused or the Crown is entitled to seek leave to appeal a s. 686(8) order under this Court’s general jurisdiction as defined in s. 40(1) of *Supreme Court Act*.

To begin, it would be instructive to review the nature of an order under s. 686(8). The text of the subsection endows a court of appeal with broad remedial power to enter "any order, in addition, that justice requires". In *R.* *v.* *Provo*, [1989] 2 S.C.R. 3, at p. 20, Wilson J., speaking for the Court, underlined the independent, supplemental nature of a court’s power under the legislative predecessor of the provision:

There is, in my respectful view, no reasonable alternative to a broad reading of the Court of Appeal’s ancillary jurisdiction under s. 613(8) given its broad wording and remedial purpose. The section gives the Court of Appeal a broad supplementary power to make any order that justice requires when it exercises its appellate powers under the enumerated subsections of s. 613. [Emphasis added.]

For instance, under s. 686(8), as part of the ordering of a new trial, a court of appeal may amend a count of the indictment. See *Elliott* *v.* *The Queen*, [1978] 2 S.C.R. 393, at p. 432. In a multiple conviction situation which attracts the rule of *Kienapple* *v. The Queen*, [1975] 1 S.C.R. 729, where a court of appeal sets aside the conviction of an accused for an offence, a court of appeal may order the dissolution of the conditional stay imposed on a lesser included offence under the residual order power. See *Terlecki v. The Queen*, [1985] 2 S.C.R. 483, at pp. 483-84; and *Provo*, *supra*, at pp. 18-21. But as I noted for a majority in *R.* *v.* *Sullivan*, [1991] 1 S.C.R. 489, at p. 505, such an exercise of s. 686(8) would not extend "[o]utside of a *Kienapple* situation". Or, as an alternative to the order of a new trial or the entry of an acquittal, a court of appeal may enter a stay of criminal proceedings for abuse of process under certain limited circumstances. See *Power*, *supra*, at pp. 615 and 618.

Of course, this Court has interpreted the meaning of “in addition” in s. 686(8) in a generous manner which reflects the broad remedial purpose underlying the provision. More specifically, we have held that a court of appeal may enter an order under its residual power even if the court of appeal has not previously and independently “exercise[d] any of the powers conferred by subsection (2), (4), (6) or (7)” of s. 686. For instance, in *Elliott, supra*, the Court held that a court of appeal could order the amendment of a count of an indictment “in addition” to the order of a new trial, even though the amendment constituted a legal prerequisite to the granting of a new trial. As Ritchie J. explained for the majority (at pp. 431-32):

In my view when Parliament authorized the Court of Appeal, in the exercise of its power, to order a new trial, to “make any order, in addition, which justice requires” it must be taken as having authorized that Court under those circumstances to make *any additional order* which the ends of justice require whether the order for a new trial is dependent upon the additional order or not. I do not think that the wide powers conferred on the Court of Appeal by s. 613(8) are to be narrowly construed but rather that they are designed to ensure that the requirements of the ends of justice are met, and are to be liberally construed in light of that overriding consideration. [Emphasis in original.]

Similarly, the Court adopted a flexible interpretation of the words "in addition" in *Provo*, *supra*. In that case, Wilson J., speaking for the Court, articulated the proper "conditional stay" procedure that both trial and appellate courts ought to adhere to in administering the rule against multiple convictions set out in *Kienapple*, *supra*. In so doing, at pp. 19-20, she held that a court of appeal has the authority to enter an order under s. 686(8) dissolving the conditional stay of a *Kienappled* offence following a successful appeal of a conviction of the non-*Kienappled* offence, even though such an order is not strictly “in addition” to the order rendered in connection with the non-*Kienappled* offence. More recently, this court implicitly endorsed a broad understanding of the provision in *Power*, *supra*. In that case, this Court implicitly recognized that a court of appeal could enter a stay of proceedings for abuse of process under s. 686(8), even though such a stay would not literally function as an order “in addition” to the order of a verdict of acquittal or a new trial under s. 686(2)(*b*).

But the mere fact that a court of appeal may exercise its power under s. 686(8) of the *Criminal Code* independently of a prior order under s. 686(2)(*b*) does not, in my view, change the fundamentally ancillary and supplemental character of such an order. When an appellate court allows an accused’s appeal and sets aside his or her original conviction, the court’s judgment necessarily triggers the court’s power to enter a verdict of acquittal under s. 686(2)(*a*), or to grant a new trial under s. 686(2)(*b*). The court’s power under s. 686(8), however, is not so inextricably wound up with the fate of the appeal. Indeed, the court’s power under s. 686(8) is often exercised with regard to considerations that are well removed from the issue of the accused’s innocence or culpability. For instance, an order imposing a stay of proceedings will often be motivated by an analysis of whether or not an “abuse of process” occurred which prejudiced the accused.

As such, given the inherently supplementary and remedial nature of an order imposed under s. 686(8), I do not believe that such an order represents a functionally integral part of a “judgment ...setting aside or affirming a conviction” within a purposive interpretation of the meaning of both s. 2 and s. 40(3) of the *Supreme Court Act*. Rather, an order rendered under s. 686(8) represents a separate, divisible judicial act from which the accused or the Crown may independently seek leave to appeal under s. 40(1) of the *Supreme Court Act*.

I believe that such an interpretation is in accordance with sound judicial policy. When a court of appeal allows an accused’s appeal and enters a s. 686(2)(*a*) order directing an acquittal or a s. 686(2)(*b*) order for a new trial, it is necessarily entering an order in furtherance of its underlying judgment. While the accused in the situation of *Meddoui* may not be entirely satisfied with the order of a new trial, the order entered by the court of appeal is at least consistent with the court’s judgment setting aside the original conviction. Accordingly, there is no compelling policy need for subsequent scrutiny of such orders at the Supreme Court level. But a court of appeal’s residual order power under s. 686(8) is not subject to the same rigorous textual constraints as the court’s power under s. 686(2)(*b*). Under its remedial power, a court of appeal may impose “any order” which, in its discretion, “justice requires”. As such, there is a risk that a court of appeal may enter an order under s. 686(8) which is at direct variance with its underlying judgment. A court of appeal may allow an accused’s appeal and enter an acquittal under s. 686(2)(*a*), but then, hypothetically, impose an order for costs against the accused for no apparent reason notwithstanding the language of s. 683(3). Or a court of appeal could conceivably set aside an accused’s conviction, and then impose a stay of proceedings for reasons completely unrelated to any alleged abuse of process, thus transcending the limits upon a court of appeal's discretion which this Court articulated in *Power*, *supra*, at p. 620. In both such circumstances, the relevant discretionary order entered under s. 686(8) would be of questionable legality. More importantly, the discretionary order would be fundamentally incongruous with the court's disposition of the appeal, arguably undermining the accused's success on the merits of her appeal. But if we were to agree with the position of the respondent, such orders would be virtually immune from Supreme Court review; the Crown has no direct and immediate incentive to appeal an order which only affected the accused, and the accused would have no right to appeal by virtue of s. 40(3) of the *Supreme Court Act*.

To illustrate my point, I draw attention to the type of order rendered in *R. v. Wade* (1994), 29 C.R. (4th) 327 (Ont. C.A.). In *Wade*, the accused was charged with second degree murder, and at trial presented a non-insane automatism defence. The accused was nonetheless found guilty by a jury, but the Court of Appeal allowed the accused’s appeal on the ground that the trial judge had failed to instruct the jury as to the possibility of a conviction on the included offence of manslaughter. Doherty J.A. then addressed the question of whether it was appropriate to order a full new trial under s. 686(2)(*b*) given that the jury had rejected the accused’s automatism defence. Concluding that a full new trial would not be appropriate, Doherty J.A., at p. 349, invoked the court’s residual power s. 686(8) to order a new trial limited to a determination “of whether the [accused] was guilty of second degree murder or manslaughter”. The accused appealed the order and the Crown cross-appealed the judgment to this Court. This Court dismissed the accused’s appeal of the s. 686(8) order, but allowed the Crown’s appeal on the grounds that there was no error committed by the trial judge. As such, we accordingly vacated the order entered by Doherty J.A.: *R.* *v.* *Wade*, [1995] 2 S.C.R. 737 (Lamer C.J. and Sopinka J., dissenting). However, for my reasons above, in the absence of our particular resolution of the Crown's cross-appeal, I have no doubt that this Court would have had jurisdiction to consider the accused’s appeal of the legality of the order on its own merits. Assuming without deciding the problematic question of whether a court of appeal has the power under s. 686(8) to direct a new trial on certain limited issues, the policy risk presented by the unsupervised exercise of this power is readily apparent. A court of appeal could effectively undermine an accused’s success on appeal by ordering a new trial only on certain limited issues which are completely unrelated to the accused’s underlying innocence or culpability. The accused’s success in procuring a new trial under s. 686(2)(*b*) would be eviscerated by the court’s “additional order” under s. 686(8). To deny the existence of an appeal to this Court in such an instance would deprive the accused of any mechanism to vindicate his substantive right to a new trial or an acquittal under s. 686(2) following a successful appeal. Given this troubling concern, I am inclined to adopt a more generous interpretation of s. 40(1) (and a correspondingly more narrow interpretation of s. 40(3)) which would facilitate this Court's supervisory role in ensuring the underlying consistency of appellate court orders rendered under the procedural regime of the *Criminal Code*.

For all the foregoing reasons, I am persuaded that an accused or the Crown ought to be permitted to independently seek leave to appeal the legality of an order rendered under s. 686(8) as a “final or other judgment ...of the highest court of final resort in a province” under this Court’s general jurisdiction under s. 40(1) of the *Supreme Court Act.* Given the inherently ancillary and supplementary nature of an order imposed under s. 686(8), I believe that such an order does not constitute a functionally integral part of a “judgment ...setting aside or affirming a conviction” within a purposive interpretation of the meaning of both s. 2 and s. 40(3) of the *Supreme Court Act*. Accordingly, in this instance, I conclude that the applicant may seek leave to appeal the legality of the stay of proceedings for abuse of process entered by the Quebec Court of Appeal notwithstanding the fact that the Court of Appeal allowed his original appeal and set aside his conviction.

V. Disposition

In addition to finding that this Court has jurisdiction to grant leave to appeal in this instance, I believe that the applicant's application raises a genuine and serious question of law of sufficient public importance to warrant review by this Court. Therefore, I would grant the applicant’s motion for reconsideration of our previous order refusing leave to appeal, and grant leave. Unlike my colleague L'Heureux-Dubé J., however, I respectfully decline to offer any further comment on the legality or constitutionality of the stay of proceedings imposed by Steinberg J.A, and more generally on the question of whether the stay as ordered is "in line with the jurisprudence of this Court" (para. 42). In my view, such comments, however broadly framed and cautiously worded, may unnecessarily colour our consideration of the underlying appeal before counsel have enjoyed a full opportunity to present oral and written submissions before this Court. Rather, out of respect for the integrity of the leave to appeal process, and consistent with our established practice of refusing to elaborate our justifications for granting or denying leave to appeal, I would postpone any potential discussion of the substantive issues raised by this case until this Court has become formally seized with the merits of this appeal.

The following are the reasons delivered by

L'Heureux-Dubé J. (dissenting) -- I have had the opportunity to read the reasons of Lamer C.J. and I agree that appellate courts have jurisdiction to render orders under s. 686(8) of the *Criminal Code*, R.S.C., 1985, c. C-46, and that leave to appeal such orders falls within this Court's general jurisdiction under s. 40(1) of the *Supreme Court Act*, R.S.C., 1985, c. S-26. However, I disagree with the Chief Justice as to his disposition of the application for reconsideration of the application for leave to appeal.

As regards jurisdiction, this Court has had occasions in the past to recognize that orders which are ancillary and of a supplemental character to the judgment rendered by a court of appeal can be appealed to this Court. This was the case in *Kienapple* situations (*R. v. Terlecki* (1983), 4 C.C.C. (3d) 522 (Alta. C.A.), aff'd [1985] 2 S.C.R. 483, *per* Dickson C.J. for the Court; *R. v. Provo*, [1989] 2 S.C.R. 3, at pp. 17-18, *per* Wilson J. for the Court; and *R. v. Sullivan*, [1991] 1 S.C.R. 489, at p. 507, *per* L'Heureux-Dubé J., dissenting) and in entrapment situations (*R. v. Barnes*, [1991] 1 S.C.R. 449, at pp. 476-78, *per* L'Heureux-Dubé J., dissenting in part). The rationale underlying the rule that, absent an appeal of court orders, a court of appeal is powerless to deal with such orders was discussed in *Barnes* where, dissenting in part, I said (at p. 468):

The reasons for such a rule are obvious -- in most circumstances, to proceed otherwise would expose the accused to unfairness and prejudice, due to the lack of notice regarding the scope of the appellate proceedings and the lack of prior warning as to the degree to which the accused has been placed in jeopardy. [Emphasis added.]

It was my view that, similar to *Kienapple* situations, where a stay for entrapment entered at trial is set aside on appeal, the court of appeal has jurisdiction to remit the matter back to the trial judge for entry of convictions, even absent an appeal from the Crown, since no potential prejudice to the accused could result.

The same logic applies where, absent an appeal on the question of a stay of proceedings, an appellate court holds that the actual or potential abuse of process warrants such an order. In such a situation, the accused would not normally be prejudiced or treated unfairly and, as a result, the general rule should not limit appellate courts' jurisdiction to order a stay of proceedings. Consequently, similar to orders in *Kienapple* situations or entrapment situations, orders directing a stay of proceedings, as in the case here, can be entered by courts of appeal pursuant to s. 686(8) of the *Criminal Code* and the parties can seek leave to appeal such orders under s. 40(1) of the *Supreme Court Act*.

On the merits of the leave application *per se*, I disagree with the Chief Justice and I would dismiss the motion for reconsideration for the following reasons.

In its judgment, the Quebec Court of Appeal held that ordering a new trial pursuant to s. 686(2)(*b*) of the *Code* would constitute an abuse of process. Steinberg J.A. stated:

Special circumstances militate against proceeding with a new trial in this case. These include the elapsed time of thirty-three (33) years since the commission of the criminal act, the fact that the principal issue in the trial was the identification of the appellant by the victims, the irregularities in the line-up, the changes that have occurred over the years in the appearance of the appellant and the inevitable weakening in the credibility of the victims attributable to such time passage, the present age of the victims who are in their eighties, and the fact that the appellant served the fifteen year sentence imposed following the original finding of guilt. Proceeding with a second trial of the appellant under these circumstances would *be vexatious and oppressive, would violate the community's sense of fair play and decency* and, therefore, would constitute an abuse of process. [Italics and underlining added.]

((1994), 64 Q.A.C. 53, at p. 60.)

The Court of Appeal's decision is in line with the jurisprudence of this Court that courts, whether at the trial or appellate level, have a discretionary power to order a stay of proceedings for abuse of process: see, for trial courts, *R. v. Jewitt*, [1985] 2 S.C.R. 128, at pp. 136-37; *R. v. Keyowski*, [1988] 1 S.C.R. 657, at pp. 658-59; *R. v. Mack*, [1988] 2 S.C.R. 903, at p. 941; *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667; *R. v. Scott*, [1990] 3 S.C.R. 979, at pp. 992-93; and for courts of appeal, *R. v. Power*, [1994] 1 S.C.R. 601, at pp. 612-15. It is well-settled law that courts can order a stay of proceedings "where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings" (emphasis added) (see *Jewitt*, at pp. 136-37), the precise wording which the Court of Appeal used in the exercise of its discretion in this case.

Whether or not the Court of Appeal was right in exercising its discretion in this way in this particular case -- and I specifically refrain from pronouncing on the merits of the appeal -- I am of the view that the exercise by provincial appellate courts of their discretionary power to enter a stay of proceedings does not raise a genuine and serious question of law of sufficient "public importance" to warrant granting leave to appeal. Evidently, I do not agree with the Chief Justice's characterization of my dissent on the application for leave to appeal.

As a result, although this Court has jurisdiction to entertain an application for leave to appeal from the Court of Appeal's order staying the proceedings, I would dismiss the applicant's motion for reconsideration and confirm our previous decision to refuse leave to appeal to this Court.

*Application for reconsideration allowed and leave to appeal granted*, L'Heureux‑Dubé J. *dissenting.*

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