

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Sekhon, 2014 SCC 15, [2014] 1 S.C.R. 272 | **Date:** 20140220  **Docket:** 35180 |

**Between:**

**Ajitpal Singh Sekhon**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 58)  **Dissenting Reasons:**  (paras. 59 to 99): | Moldaver J. (Abella, Rothstein, Karakatsanis and Wagner JJ. concurring)  LeBel J. (McLachlin C.J. concurring) |

R. *v.* Sekhon, 2014 SCC 15, [2014] 1 S.C.R. 272

Ajitpal Singh Sekhon Appellant

v.

Her Majesty The Queen Respondent

**Indexed as: R. *v.* Sekhon**

2014 SCC 15

File No.: 35180.

2013:  November 8; 2014:  February 20.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for british columbia

*Criminal law — Evidence — Admissibility — Expert evidence — Curative proviso — Accused charged with importation of cocaine and possession for purpose of trafficking — Cocaine found in concealed compartment of truck accused was driving — Accused denying knowledge of presence of cocaine — Police officer testifying he had never encountered blind courier over course of his many investigations — Whether trial judge erred in admitting and relying upon this expert evidence of police officer — If so, whether curative proviso applicable — Criminal Code, R.S.C. 1985, c. C‑46, s. 686(1)(b)(iii).*

S was convicted of importation and possession for the purposes of trafficking of 50 kg of cocaine. The cocaine was seized by border officers who found it hidden in a concealed compartment of a pickup truck S attempted to drive from the United States into Canada. The case against S was entirely circumstantial and the only issue at trial was whether he knew of the cocaine in the truck. S claimed that an acquaintance had asked him to drive the truck and that he had no knowledge of the cocaine. The trial judge rejected S’s testimony in its entirety. The judge found that S knew of the cocaine based on: its amount and value; expert evidence from a police officer pertaining to the customs and habits of drug couriers, including the fact that in his many years’ experience he had never encountered a blind courier; and evidence that S had detached the fob that controlled access to the secret compartment from his key chain before handing the keys to the border officer. The trial judge also relied on additional items of circumstantial evidence that pointed towards S’s guilty knowledge. On appeal, S argued that the trial judge should not have admitted or relied on the expert evidence of the police officer and in particular, that portion of his evidence relating to his own experience with blind couriers. A majority of the Court of Appeal dismissed the appeal.

*Held* (McLachlin C.J. and LeBel J. dissenting): The appeal should be dismissed.

*Per* Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.: The police officer’s evidence relating to his own experience with blind couriers was inadmissible and the trial judge erred in relying upon it. Admission of expert evidence depends on the *Mohan* criteria of relevance, necessity in assisting the trier of fact, absence of any exclusionary rule and a properly qualified expert. It is not enough for a trial judge to simply consider the *Mohan* criteria at the outset of an expert’s testimony and make an initial ruling as to the admissibility of the evidence. The judge must do his or her best to ensure that throughout, the expert’s testimony remains within the proper boundaries of expert evidence. This includes ensuring, so far as possible, that the content of the evidence itself is properly the subject of expert evidence. Where mistakes are made and the testimony strays beyond the proper scope of expert evidence, it is imperative that the trial judge not assign any weight to the inadmissible parts.

In this case, the fact that the police officer had never encountered a blind courier in his many investigations was neither necessary nor relevant to the issue facing the trial judge — whether S knew about the cocaine. The officer’s evidence was not necessary because determining whether S knew about the cocaine was not beyond the knowledge and experience of the judge and was not technical or scientific in nature. Moreover, the guilt or innocence of accused persons that the police officer had encountered in the past was not legally relevant to S’s guilt or innocence. In other words, the officer’s testimony was of no probative value in determining whether S knew about the cocaine and its lack of relevance is sufficient to justify its exclusion.

The inadmissible testimony, however, forms one sentence of a 16‑page judgment that is otherwise flawless. In the judgment, the judge provided a long list of reasons for rejecting S’s testimony. And apart from the one aspect of the expert’s testimony that he should not have considered, the judge provided an equally impressive list of reasons for concluding that S knew about the cocaine.

While the trial judge’s error in this case is not harmless, the evidence of S’s guilt is so overwhelming that a trier of fact would inevitably convict. Hence, the second branch of the curative proviso can be applied to sustain S’s convictions. The fob evidence on its own was devastating. But it did not stand alone; it was part of a web of circumstantial evidence pointing towards S’s guilt. When considering the second branch of the curative proviso in a circumstantial case, it is necessary to look at the whole of the admissible evidence in assessing the strength of the case. It is not the task of an appellate court to parse each item of evidence in search of a possible innocent explanation. If that were so, it would be impossible to ever satisfy the second branch.

*Per* McLachlin C.J. and LeBel J. (dissenting): The police officer’s evidence that in his many investigations he had never encountered a blind courier strayed from what would be admissible expert evidence. His testimony was equivalent to a statement that individuals in S’s position always know about the drugs. It is a short step from such evidence to an inference that S must have known about the cocaine. The evidence effectively amounted to an opinion that S possessed the *mens rea* for the offences with which he was charged, which was the issue in this trial.  Whether it was admissible therefore requires special scrutiny.

Applying the *Mohan* criteria, the expert evidence should not have been admitted. The evidence was not necessary, as it was open to the judge to infer what S knew or did not know. Nor was it relevant. The officer’s opinion invited the judge to find that S knew about the cocaine on the basis that all people driving vehicles containing hidden drugs know about the drugs. In addition to usurping the trial judge’s role in resolving the issue of guilt or innocence, the opinion depended on an unacceptable and unfair inference.

Given the trial judge’s error was not a harmless one that would have no impact on the verdict, this is not an appropriate case for application of the second branch of the curative proviso. The issue in applying the second branch is not whether the trial judge could make the inference he did or whether that inference was determinative of guilt, but whether it was the only rational conclusion. In this case, it was not.

While ordering a new trial places demands on judicial resources, this cannot override S’s right to a fair trial based solely on admissible evidence. The trial judge relied on inadmissible evidence and this was a serious error. If this Court excludes evidence described by the trial judge as one of the foundations of his conclusion that S was guilty, it cannot then hold that the evidence against S was nonetheless overwhelming without engaging in pure speculation. Such a conclusion would contradict what the trial judge himself wrote and would rest on an improper reweighing of the remaining evidence. The curative proviso does not permit this Court to deny a retrial in such circumstances.

**Cases Cited**

By Moldaver J.

**Applied:** *R. v. Mohan*, [1994] 2 S.C.R. 9; **referred to:** *R. v. J.‑L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *R. v. Turner*, [1975] 1 Q.B. 834; *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330; *R. v. Bevan*, [1993] 2 S.C.R. 599; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751; *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505.

By LeBel J. (dissenting)

*R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Joyal* (1990), 55 C.C.C. (3d) 233; *R. v. Ballony‑Reeder*, 2001 BCCA 293, 88 B.C.L.R. (3d) 237; *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115; *R. v. J.‑L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600; *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 686(1)(*b*)(iii).

*Controlled Drugs and Substances Act*, S.C. 1996, c. 19, ss. 5(2), 6(1).

**Authors Cited**

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McCormick, Charles Tilford. *McCormick on Evidence*, 3rd ed. by Edward W. Cleary. St. Paul, Minn.: West Publishing Co., 1984.

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J. and Newbury and Lowry JJ.A.), 2012 BCCA 512, 331 B.C.A.C. 170, 565 W.A.C. 170, [2012] B.C.J. No. 2675 (QL), 2012 CarswellBC 4005, affirming the accused’s convictions for importation and possession of cocaine for the purposes of trafficking. Appeal dismissed, McLachlin C.J. and LeBel J. dissenting.

*Eric V. Gottardi* and *Kathleen M. Bradley*, for the appellant.

*Martha M. Devlin*, *Q.C.*, and *Chris Greenwood*, for the respondent.

The judgment of Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. was delivered by

Moldaver J. —

1. Introduction
2. On January 25, 2005, the appellant, Ajitpal Singh Sekhon, was charged with unlawfully importing cocaine and unlawfully possessing cocaine for the purpose of trafficking. He was arrested when he attempted to cross the border from Washington State into British Columbia. The key issue at trial was whether Mr. Sekhon knew about the cocaine that was secreted in the pickup truck he was driving. The trial judge found that he did. He based his decision in part on the testimony of an expert police witness who testified about the customs and practices of the drug trade. One aspect of the expert’s evidence strayed beyond the proper scope of expert testimony. As such, it was inadmissible and should not have been relied on by the trial judge.
3. The flawed testimony upon which the trial judge relied forms one sentence of a 16-page judgment that is otherwise flawless. In particular, the trial judge provided a long list of reasons for disbelieving the appellant and rejecting his testimony as incredible. And apart from the one aspect of the expert’s evidence that he should not have considered, the trial judge provided an equally impressive list of reasons for concluding that the appellant was aware of the cocaine secreted in the pickup truck.
4. In the end, the only issue of concern is whether the curative provisoins. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46, can be applied to sustain the convictions. I believe it can. While the error relating to the flawed expert testimony cannot be swept aside as harmless, the evidence establishing the appellant’s guilty knowledge — and thus his guilt — is overwhelming. Hence, the second branch of the curative provisocan safely be applied to sustain the convictions.
5. Because this case turns on the application of the second branch of the curative proviso, I find it necessary to review the evidence and the trial judge’s findings of fact in some detail.
6. Facts
7. On January 25, 2005, shortly after 4:30 p.m., Mr. Sekhon attempted to drive a pickup truck across the border from Washington State into British Columbia. He was the sole occupant of the truck.
8. The customs officer at the primary inspection booth noted that Mr. Sekhon appeared tense and was gripping the steering wheel. When asked about the purpose of his trip, he told the customs officer that he had been delivering cheques to workers at a farm. He was unable to produce any receipts or pay stubs to support his stated purpose for travel.
9. The customs officer referred Mr. Sekhon for a secondary examination. Mr. Sekhon was told to park the vehicle in a secondary parking area and go to the customs office.
10. At the customs office, Mr. Sekhon was asked for the keys to the pickup truck. He complied and turned them over to the customs officer.
11. Mr. Sekhon began to pace nervously around the customs office. At one point, he attempted to leave the building but was directed to return. Meanwhile, customs officers undertook an inspection of the truck. This led to the discovery of packages of a white powdery substance, believed to be cocaine, hidden in a concealed compartment.
12. After the white powdery substance was discovered, Mr. Sekhon was informed that he was being detained. He was advised of his rights and asked to empty his pockets. Among the items produced were a key fob on a chain, a cellular phone, and an envelope.
13. The cellular phone began ringing and continued to ring for the duration of the time that it was in the possession of the customs officers.
14. Mr. Sekhon indicated that the key fob was his and that it was for the truck.
15. The envelope bore the name “Westhall Properties Ltd.”. On the envelope were the following handwritten notations: “Combo lock 34-11-20, time enterphone 204, Parking 284, locker 185” (A.R., vol. V, at p. 82).
16. Mr. Sekhon was then arrested and escorted to a detention cell in the customs building. He was once again advised of his rights and chose to speak to a lawyer over the phone. After this phone call, a customs officer went to check on Mr. Sekhon. He noticed a wet, partially chewed-up piece of green paper on the floor of Mr. Sekhon’s cell. When asked about the paper, Mr. Sekhon told the customs officer that he had retrieved it from the commercial counter in the customs office. Upon being confronted with the fact that there was no green paper in that area, Mr. Sekhon said it had come from the truck.
17. Further examination of the hidden compartment of the truck revealed the presence of 50 bricks of cocaine, each weighing one kilogram. The hidden compartment was equipped with a hydraulic jack mechanism enabling the compartment to be opened and closed. The key fob recovered from Mr. Sekhon had been engineered to open and close the compartment if the correct buttons were pressed in a particular sequence.
18. Mr. Sekhon was charged with unlawfully importing cocaine into Canada contrary to s. 6(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and with unlawfully possessing cocaine for the purpose of trafficking contrary to s. 5(2) of that Act.
19. Proceedings Below
20. Judge Dohm, of the Provincial Court of British Columbia, presided over Mr. Sekhon’s trial. The sole issue at trial was whether the Crown could prove beyond a reasonable doubt that Mr. Sekhon had the requisite *mens rea* for the two offences charged, that is, knowledge of the cocaine.
    1. Crown Evidence
21. The Crown called a police officer, Sgt. Arsenault, to give expert evidence regarding the customs and practices of the drug trade. Specifically, Sgt. Arsenault’s evidence was to focus on chains of distribution, distribution routes, means of transportation, methods of concealment, packaging, value, cost and profit margins. Sgt. Arsenault had been a police officer for 33 years and had been involved in approximately 1,000 cases involving the importation of cocaine. His qualifications as an expert witness were admitted.
22. Sgt. Arsenault testified at length about the customs of the cocaine trade. He valued the amount of cocaine found in the pickup truck to be worth between $1,500,000 and $1,750,000 at the wholesale level. He explained that the recruitment of a drug courier takes time and that an organization will not typically entrust a first-time courier with a large shipment. Instead, the courier’s reliability will be tested with smaller shipments. He testified that it was significant that Mr. Sekhon had been given a fob that could open the hidden compartment; the fact that he “actually [ha]d hands-on access to the shipment itself” showed that he had “a lot more trust . . . within the group” (A.R., vol. III, at p. 151).
23. Towards the end of his examination-in-chief, the following exchange occurred between Crown counsel and Sgt. Arsenault:

Q Officer, you described earlier that you’ve been involved in approximately 1,000 investigations involving the importation of cocaine over your 33-year career?

A That is correct, Your Honour, yes.[[1]](#footnote-1)

Q In approximately how many of those investigations were you able to determine that the person importing the cocaine did not know about the commodity that they were importing?

A I have never encountered it, personally.

Q Have you ever heard of a -- the use of a blind courier or a courier who doesn’t know about the commodity that he is driving?

A I -- I’ve certainly heard that argument being raised on -- on occasion, primarily in court, not during my investigations. [Footnote added; A.R., vol. III, at p. 144.]

This brief exchange contains the problematic evidence that is central to this appeal. It comprises but a few lines of Sgt. Arsenault’s 34 pages of testimony. I shall refer to it as the “Impugned Testimony”.

* 1. Defence Evidence

1. The defence called two witnesses — Mr. Sekhon himself and Mr. Sekhon’s nephew, Mr. Grewal.
2. Mr. Sekhon presented the following version of events. On the day of his arrest, he said that he had been working on one of his family farms in Abbotsford. At some point in the afternoon, Mr. Grewal came to pick him up. Mr. Grewal asked Mr. Sekhon if he would accompany Mr. Grewal to Washington State to deliver employee pay cheques and to check on some pruning. While in Washington State, Mr. Sekhon received a phone call from his friend Chris, who was shopping at a nearby mall, and they agreed to meet at the mall for lunch. On the way to the mall, Mr. Grewal received a telephone call asking him to return to one of the farms in Canada. Mr. Grewal left Mr. Sekhon at the mall because he knew that Mr. Sekhon would be able to get back to Canada. Over lunch, Chris told Mr. Sekhon that he had left his pickup truck in the area the night before. He had been drinking and received a ride home to British Columbia with friends. Since he had come back to the U.S. that day in another vehicle, Chris asked Mr. Sekhon to drive his truck back to Canada for him. Mr. Sekhon agreed and Chris gave him a key attached to a fob. Chris showed Mr. Sekhon how to use the fob to lock and unlock the truck and activate the truck alarm.
3. Mr. Sekhon and Chris drove to the border crossing in two separate vehicles. Mr. Sekhon testified that after his release from custody, he attempted to find Chris but was unsuccessful. He maintained that, even though he had known Chris for two years, he did not know Chris’s last name and only had his cell phone number, which had been disconnected.
4. Mr. Sekhon testified that he did not know that there was cocaine in the truck, and that he had no reason to be suspicious of Chris’s request.
5. Mr. Grewal corroborated most of Mr. Sekhon’s testimony up to the point of dropping Mr. Sekhon off at the mall.
   1. Reasons of the Trial Judge
      1. The Trial Judge’s View of Mr. Sekhon’s Evidence
6. The trial judge found numerous difficulties with the version of events presented by Mr. Sekhon. He discussed at length no less than 12 deficiencies inherent in his story. Some of the more glaring of these are reviewed below.
7. First, the trial judge found that it made “no sense” (A.R., vol. I, at p. 18) that Chris would have left a vehicle containing $1.5 million worth of cocaine parked overnight on a city street while he went out drinking with friends. Moreover, it would be “completely illogical” (p. 19) for Chris to drive to Washington State the following day without having a firm plan, before leaving B.C., as to how the extra vehicle would be returned to Canada.
8. Second, the trial judge observed that importing 50 kg of cocaine is clearly a risky venture and that Chris would logically want to take steps to reduce the risk if in fact he had chosen to use a blind courier. Yet if Mr. Sekhon were asked at the border whether anyone had given him anything to bring back into Canada — the question being a common one — the truthful response would have been “the truck” (A.R., vol. I, at p. 20). The fact that Mr. Sekhon did not even know Chris’s last name would likely have resulted in a referral for a secondary inspection and increased the risk that the cocaine would be found. The trial judge found it unlikely that Chris would use Mr. Sekhon as a blind courier without providing him with more information about the truck, including the name of its owner.
9. Third, the trial judge noted that, according to Mr. Sekhon’s testimony, when Chris gave the truck keys to Mr. Sekhon, they were attached to the fob’s chain (A.R., vol. I, at p. 22). The keys were connected to this chain by a clasp that was not prone to open accidentally. Manual manipulation was required to separate the keys from the chain. Significantly, there was no fob attached to the keys that Mr. Sekhon provided to the customs officer — the fob was only revealed later when Mr. Sekhon was asked to empty his pockets. The trial judge conducted a thorough review of the circumstances surrounding the fob and concluded, based on all the evidence, that Mr. Sekhon had manually separated the key from the fob after turning off the ignition in the secondary inspection area. Based on Mr. Sekhon’s version of the events, there would have been no reason for doing so. If, on the other hand, Mr. Sekhon knew about the hidden compartment, he would logically want to distance the fob, which controlled access to the hidden compartment, from the truck.
10. Fourth, the trial judge rejected Mr. Sekhon’s explanation as to why, at the time of his arrest, he was in possession of the envelope on which a lock combination was handwritten. Mr. Sekhon testified that the information related to a condominium unit he had been interested in renting. The trial judge found that it was “completely unbelievable” (A.R., vol. I, at p. 23) that information about the combination for a locker at that unit would be provided to a person who had only expressed an interest in renting. The trial judge found it reasonable to conclude that the information related to a storage locker, and noted that the cocaine would likely need to be stored in Canada. The trial judge also pointed out that the envelope was not in Mr. Sekhon’s wallet, but in the pocket of his farm clothes. On Mr. Sekhon’s version of the events, there was no logical reason for having the envelope in his possession at the time of his arrest. It made no sense that he would have put this envelope in his farm clothes; nor did it make any sense that he would have been wearing his farm clothes when he viewed the condominium unit.
11. Fifth, the trial judge identified “glaring inconsistencies” (A.R., vol. I, at p. 24) between what Mr. Sekhon told the customs officers and what he testified to in court. For example, when Mr. Sekhon was initially asked by the customs officer whether he had any receipts or pay stubs available to support his stated purpose of travel to the U.S., Mr. Sekhon said he had given them to his accountant. The trial judge pointed out that “[i]n court, there was no mention of any accountant, nor could there be, because it was Mr. Grewal and not the accused who dealt with the cheques and the workers” (p. 25). Another example highlighted by the trial judge was the fact that Mr. Sekhon told a second customs officer that he took the cheques to his friend’s uncle at the Arco gas station in Linden. The trial judge noted that “[t]he accused’s court testimony could not logically include a friend’s uncle and there was no mention of any Arco gas station” (*ibid.*). The trial judge found that this was not simply an ordinary case of nerves that an average person might experience at a border crossing. He noted that some of the inconsistent statements were made before the cocaine was found and that it was “difficult to understand” how a true blind courier could be so nervous at the border that he would misspeak to the extent of the inconsistencies in question (*ibid.*).
12. Sixth, the trial judge addressed the fact that Mr. Sekhon chewed up a piece of green paper while he was in the detention cell at the immigration office. He found that Mr. Sekhon’s explanation regarding the origin of the paper was “simply unbelievable, as is the accused’s suggestion that he chewed the paper because it was a habit he had at the time” (A.R., vol. I, at p. 26). On this point, the trial judge found that it was “not unreasonable to conclude that he chewed it up because it contained some potentially incriminating writing” (p. 33).
13. In the end, it is abundantly clear that the trial judge disbelieved Mr. Sekhon’s explanation as to how he came to be driving a truck, containing 50 kg of cocaine, across the border. His reasons are replete with observations that Mr. Sekhon’s version of events made “no sense”, that it was “illogical”, “difficult to accept”, “difficult to comprehend”, “incredible”, “not at all convincing”, “not credible”, “completely unbelievable” and contained “glaring inconsistencies” (A.R., vol. I, at pp. 18, 19, 23, 24, 26 and 27). As stated earlier, he pinpointed and discussed at length no less than 12 problems with the evidence given by Mr. Sekhon. He concluded that there were “far too many coincidences in the accused’s evidence to make his version of events plausible” (p. 27) and that “the likelihood that all these coincidences happened within this limited time frame is so remote as to render the accused’s evidence unbelievable. These coincidences present as created to fit the evidence” (p. 28).
    * 1. The Trial Judge’s View of the Crown’s Case
14. The trial judge completed his assessment of Mr. Sekhon’s testimony as follows:

The net effect of these difficulties is that I do not believe the evidence presented by the accused, nor does it raise any reasonable doubt as to the accused’s guilt on the two charges, and specifically his knowledge of the cocaine in the truck’s hidden compartment. [A.R., vol. I, at p. 29]

1. The trial judge then went on to discuss the Crown’s evidence. He found three pieces of circumstantial evidence to be “very significant” (A.R., vol. I, at p. 30). First was the value of cocaine involved. He concluded, in accordance with Sgt. Arsenault’s testimony, that the owners of such a significant amount of cocaine would want a trusted and reliable individual handling the shipment, and “[w]ith that proven reliability and trust naturally comes some knowledge” (*ibid.*).
2. The second significant piece of evidence also came from Sgt. Arsenault’s testimony, as follows:

I conclude [Sgt. Arsenault] was a fair, unbiased witness. I accept his evidence. Included therein is his opinion that individuals tasked with importing controlled substances in amounts of this size would be part of a larger, closely-knit organization and they would know what commodity they were importing, as that would be factored into the fee they had negotiated. Sgt. Arsenault also testified that in the thousand or more cocaine-importing investigations he has been involved in he has never encountered a blind courier, that being a person who does not know the nature or existence of the commodity being moved from one location to another. [Emphasis added; A.R., vol. I, at pp. 30-31.]

The last sentence of this passage references the Impugned Testimony.

1. The third piece of evidence that the trial judge found to be significant was the fob. As mentioned earlier, the trial judge made a finding of fact that the fob and the ignition key were connected by the chain until Mr. Sekhon turned off the ignition in the secondary inspection area. Prior to this point, there was no opportunity and no rational reason for separating them. The trial judge concluded that Mr. Sekhon separated the two in an attempt to distance the fob from the truck because he knew that the fob controlled access to the hidden compartment. Mr. Sekhon takes no issue with that finding.
2. In addition to these three significant pieces of evidence, the trial judge noted other circumstantial evidence that also supported his finding that Mr. Sekhon knew about the cocaine: the incessant ringing of Mr. Sekhon’s cell phone at a time when others within the organization would be wanting to know whether the drugs had crossed the border, the writing on the envelope that Mr. Sekhon had in his possession at the time he was arrested, Mr. Sekhon’s excessively nervous behaviour in the customs office, the fact that Mr. Sekhon chewed up the piece of green paper while in the detention cell, and the fact that Mr. Sekhon told a number of lies to the customs officers.
3. In the result, Mr. Sekhon was convicted of importing cocaine and possession of cocaine for the purpose of trafficking.
   1. British Columbia Court of Appeal, 2012 BCCA 512, 331 B.C.A.C. 170
4. On appeal, Mr. Sekhon took issue with Sgt. Arsenault’s testimony. He maintained that it was neither relevant nor necessary and that its prejudicial effect outweighed its probative value.
5. The majority of the B.C. Court of Appeal disagreed. Newbury J.A., in dissent, viewed the matter differently. While she accepted that the bulk of Sgt. Arsenault’s evidence was properly admissible, she found that the Impugned Testimony did not fall within this category. In her view, it was “purely anecdotal evidence, not amenable to cross-examination in any real sense, from an officer who was not in a position to determine as a matter of fact whether in all [of the approximately] 1,000 cases he had investigated, the courier had been ‘blind’ or not” (para. 26). Moreover, she held that the evidence “provided no assistance to the Court as to whether the accused had known what he was transporting”, but rather “tended to short-circuit that inquiry” (*ibid.* (emphasis in original)). She provided strong words of caution in regards to such expert testimony:

I see little difference between this situation and a police officer with experience in domestic disputes being permitted to testify that in all his or her experience, no such dispute has ever involved self-defence; or an officer experienced in investigating murder being permitted to testify that in all the cases he or she has investigated, the accused intended the death of his or her victim.

Anecdotal evidence of this kind is just that — anecdotal. It does not speak to the particular facts before the Court, but has the superficial attractiveness of seeming to show that the probabilities are very much in the Crown’s favour, and of coming from the mouth of an “expert”. If it can be said to be relevant to the case of a particular accused, it is also highly prejudicial. [paras. 26-27]

Newbury J.A. concluded that the Impugned Testimony “should not have been relied upon by the trial judge in reaching his verdict” (para. 25). She would have allowed the appeal and ordered a new trial.

1. Issues
2. At issue is whether the trial judge improperly admitted and relied upon the Impugned Testimony. If the trial judge so erred, the remaining question is whether the curative proviso in s. 686(1)(*b*)(iii) of the *Criminal Code* can be applied to sustain the convictions.
3. Analysis
   1. Requirements for Expert Opinion Evidence
4. As set out *R. v. Mohan*,[1994] 2 S.C.R. 9, at pp. 20-25, and affirmed in *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, and *R. v. D.D.*,2000 SCC 43, [2000] 2 S.C.R. 275, the admission of expert evidence depends on the following criteria: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert.
5. With respect to the “relevance” criterion, *Mohan* states that the judge must conduct a cost-benefit analysis to determine “whether its value is worth what it costs” (p. 21, quoting *McCormick on Evidence* (3rd ed. 1984), at p. 544). The cost-benefit analysis requires the judge to balance the probative value of the evidence against its prejudicial effect (*Mohan*, at p. 21).
6. As for the “necessity” criterion, *Mohan* holds that “[i]f on the proven facts a judge or jury can form their own conclusions without help, then the opinion of [an] expert is unnecessary” (p. 23, quoting Lawton L.J. in *R. v. Turner*, [1975] 1 Q.B. 834, at p. 841). The Court went on to note that the concern “inherent in the application of this criterion [is] that experts not be permitted to usurp the functions of the trier of fact” (p. 24).
7. Given the concerns about the impact expert evidence can have on a trial — including the possibility that experts may usurp the role of the trier of fact — trial judges must be vigilant in monitoring and enforcing the proper scope of expert evidence. While these concerns are perhaps more pronounced in jury trials, all trial judges — including those in judge-alone trials — have an ongoing duty to ensure that expert evidence remains within its proper scope. It is not enough to simply consider the *Mohan* criteria at the outset of the expert’s testimony and make an initial ruling as to the admissibility of the evidence. The trial judge must do his or her best to ensure that, throughout the expert’s testimony, the testimony remains within the proper boundaries of expert evidence. As noted by Doherty J.A. in *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 62:

The admissibility inquiry is not conducted in a vacuum. Before deciding admissibility, a trial judge must determine the nature and scope of the proposed expert evidence. In doing so, the trial judge sets not only the boundaries of the proposed expert evidence but also, if necessary, the language in which the expert’s opinion may be proffered so as to minimize any potential harm to the trial process. A cautious delineation of the scope of the proposed expert evidence and strict adherence to those boundaries, if the evidence is admitted, are essential. The case law demonstrates that overreaching by expert witnesses is probably the most common fault leading to reversals on appeal . . . . [Emphasis added; citations omitted.]

1. The trial judge must both ensure that an expert stays within the proper bounds of his or her expertise and that the content of the evidence itself is properly the subject of expert evidence.
2. It is foreseeable that mistakes will be made and that, as happened in the instant case, testimony that strays beyond the proper scope of the expert evidence will be given. It is also foreseeable that defence counsel may fail to object to the testimony at the time the problematic statements are made. In a jury trial, once the statements have been made, it may be somewhat more difficult to address the problem — but a remedial instruction advising the jury to disabuse their minds of the inadmissible evidence will generally suffice. Judges, on the other hand, are accustomed to disabusing their minds of inadmissible evidence. It goes without saying that where the expert evidence strays beyond its proper scope, it is imperative that the trial judge not assign any weight to the inadmissible parts.
   1. Application to This Case
3. In my view, the trial judge erred in relying upon the Impugned Testimony. The fact that Sgt. Arsenault did not personally encounter a blind courier over the course of his investigations is neither relevant nor necessary, within the meaning ascribed to those terms by this Court in *Mohan*, to the issue facing the trial judge — namely, whether Mr. Sekhon himself had knowledge of the drugs. The Impugned Testimony, though perhaps logically relevant, was not legally relevant because the guilt or innocence of accused persons that Sgt. Arsenault had encountered in the past is legally irrelevant to the guilt or innocence of Mr. Sekhon (see *Mohan*, at pp. 20-21). In other words, the Impugned Testimony was of no probative value in determining whether *Mr. Sekhon* knew about the cocaine in the hidden compartment. It is trite to say that a fundamental tenet of our criminal justice system is that the guilt of an accused cannot be determined by reference to the guilt of other, unrelated accused persons. Moreover, the Impugned Testimony was not necessary because determining whether Mr. Sekhon knew about the drugs is not beyond the knowledge and experience of the judge, and it is certainly not a matter that is technical or scientific in nature.
4. The lack of relevance or probative value is, in my view, sufficient to justify the exclusion of the Impugned Testimony. However, it is worth noting the prejudicial effect that such evidence may have on a trial. I agree with Newbury J.A. to the extent that she found little to no difference between the Impugned Testimony in this case and a homicide investigator being permitted to testify that in all of the cases she or he has worked on, the accused intended the death of his or her victim. Nor do I see a difference between the Impugned Testimony and a stolen goods investigator testifying that he or she has never seen a case of innocent possession of stolen property, or an experienced fraud investigator testifying that he or she has never seen a case where a senior manager was not aware of fraudulent conduct occurring within the company (A.F., at para. 60). The inherent danger of admitting such evidence is obvious — as Newbury J.A. pointed out:

Anecdotal evidence of this kind is just that — anecdotal. It does not speak to the particular facts before the Court, but has the superficial attractiveness of seeming to show that the probabilities are very much in the Crown’s favour, and of coming from the mouth of an “expert”. If it can be said to be relevant to the case of a particular accused, it is also highly prejudicial. [para. 27]

This type of anecdotal evidence would appear to require the accused to somehow prove that, regardless of a particular expert’s past experience, the accused’s situation is different. Such a result is contrary to another fundamental tenet of our criminal justice system — that it is *the Crown* that bears the burden of proving the *mens rea* of an offence beyond a reasonable doubt. As the appellant points out, “such evidence would logically trigger a defence need to call evidence to refute such opinions, such as a retired investigator who did experience an innocent person in similar circumstances, or a witness who could testify that he or she was in the same circumstances of the accused and was innocent” (A.F., at para. 61). At that point, the trial would become a battle of experts — and a completely irrelevant battle at that.

1. For these reasons, I conclude that the Impugned Testimony was inadmissible.
   1. The Curative Proviso Is Appropriate in These Circumstances
2. Section 686(1)(*b*)(iii) of the *Criminal Code*, known as the curative proviso, states:

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

(*a*) may allow the appeal where it is of the opinion that

. . .

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

. . .

(*b*) may dismiss the appeal where

. . .

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; . . .

1. As this Court has repeatedly asserted, the curative proviso can only be applied where there is no “reasonable possibility that the verdict would have been different had the error . . . not been made” (*R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617, aff’d in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 28). Flowing from this principle, this Court affirmed in *Khan* that there are two situations where the use of s. 686(1)(*b*)(iii) is appropriate: (1) where the error is harmless or trivial; or (2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict (paras. 29-31).
2. In my view, this case falls squarely within the latter category. As the trial judge ably demonstrated, Mr. Sekhon’s evidence is a contrivance from beginning to end and need not be considered. With his evidence off the table, had the Impugned Testimony been excluded, the remaining admissible evidence pointing towards Mr. Sekhon’s guilt is overwhelming. I have reviewed this evidence earlier and need not repeat it. Suffice it to say that the circumstantial evidence bearing on Mr. Sekhon’s knowledge can lead to only one rational conclusion — that Mr. Sekhon was aware of the cocaine secreted in the truck.
3. The fob evidence on its own was devastating. As noted earlier, Mr. Sekhon himself testified that when he was given the fob, it was attached to the ignition key. As the trial judge noted, correctly in my view, “[t]he only logical conclusion to be drawn from [Mr. Sekhon’s deliberate act of separating the fob from the keys] is that the accused did this to distance the fob from the truck because he knew that the fob controlled access to the hidden compartment which he would not want discovered” (A.R., vol. I, at p. 31). Standing alone, that finding was all but conclusive of Mr. Sekhon’s guilt.
4. But of course, it does not stand alone. It is part of a web of circumstantial evidence enveloping Mr. Sekhon from which he cannot escape. In this regard, it is important to note that when considering the second branch of the proviso in the context of a circumstantial case, it is necessary to look at the whole of the admissible evidence in assessing the strength of the case. It is not the task of an appellate court to parse each item of evidence in search of a possible innocent explanation. If that were so, it would be virtually impossible to ever satisfy the second branch of the proviso in a circumstantial case.
5. In conclusion, the thoughts expressed by Binnie J. in *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 46, and restated in *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, at para. 24, are in my view, apposite to the case at hand:

Ordering a new trial raises significant issues for the administration of justice and the proper allocation of resources. Where the evidence against an accused is powerful and there is no realistic possibility that a new trial would produce a different verdict, it is manifestly in the public interest to avoid the cost and delay of further proceedings. Parliament has so provided.

1. Disposition
2. For these reasons, I would dismiss the appeal.

The reasons of McLachlin C.J. and LeBel J. were delivered by

LeBel J. (dissenting) —

1. Overview
2. Ajitpal Singh Sekhon appeals from convictions for unlawfully importing cocaine into Canada and unlawfully possessing cocaine for the purpose of trafficking. The appellant was stopped at a border crossing between the United States and Canada, and the vehicle he was driving had a hidden compartment in which 50 kg of cocaine was found. The sole issue at trial was whether the appellant knew the cocaine was there. The appellant’s defence was that he had been asked to drive the vehicle over the border for an acquaintance and had not known about the cocaine.
3. To rebut this defence, the Crown called an experienced RCMP investigator to give expert evidence on the customs of the drug trade. In his evidence, this officer stated that he had never encountered a case involving a “blind courier”, that is, a person who transported cocaine without knowing what it was, or that it existed (A.R., vol. III, at p. 144).
4. I agree with my colleague Moldaver J. that the Crown’s expert witness should not have been permitted to give opinion evidence concerning the guilt of other individuals he had investigated for drug importation. And the trial judge should not have relied on the comments in question in assessing the Crown’s case against the appellant. Given the nature and the impact of these errors, I do not agree that this is an appropriate case for applying the curative proviso: *Criminal Code*, R.S.C. 1985, c. C-46, s. 686(1)(*b*)(iii). The Crown’s case against the appellant was circumstantial, the errors of law were very serious, and I do not believe the evidence would inevitably have resulted in a verdict of guilt despite these errors. I would order a new trial.
5. Background Facts
6. On January 25, 2005, the appellant drove a pickup truck to the Aldergrove border crossing between British Columbia and Washington State. A search of the truck by customs officers uncovered 50 kg of cocaine hidden in a concealed compartment beneath the truck bed.
7. The appellant testified at trial that he had driven to Washington earlier that day with his nephew Mike Grewal. Mr. Grewal had to return to Canada, but the appellant stayed behind in Washington and met with a school acquaintance from British Columbia named Chris. Chris told the appellant he had left his truck in Washington the previous evening because he was too drunk to drive it home and that he had now driven back to Washington to retrieve it. According to the appellant, Chris asked him to drive the truck back to Canada but did not tell him that there were drugs in it. Mr. Grewal also testified and he corroborated the appellant’s evidence up to the point of his own return to Canada.
8. The Crown called an RCMP officer, Sgt. Vincent Joseph Arsenault. Sgt. Arsenault was qualified, with the consent of defence counsel, as an expert on the importation of cocaine into the Lower Mainland of British Columbia by vehicle and on foot, and on the trafficking and possession of cocaine in that part of British Columbia, including distribution routes, chain of distribution, means of transportation, methods of concealment, packaging, values, cost and profit margins, usage patterns and rates of consumption.
9. Sgt. Arsenault expressed the opinion that individuals who imported controlled substances would be part of a close-knit criminal organization and that they would negotiate a fee based on the volume of drugs being transported. He stated that he had participated in over 1,000 investigations into cocaine importing and that none of them had involved a “blind courier”.
10. The appellant was convicted. His appeal was dismissed by the British Columbia Court of Appeal, with Newbury J.A. dissenting. He appeals to this Court as of right.
11. Judgments
    1. Provincial Court
12. The only issue at trial was whether the appellant knew the cocaine was in the truck. Judge Dohm rejected the appellant’s evidence and held that it did not raise a reasonable doubt.
13. The Crown’s case was circumstantial. After finding that the appellant was not credible, Judge Dohm turned to the Crown’s case, highlighting three key pieces of evidence: (i) the amount of cocaine involved, which suggested that a known and trusted courier would have been used; (ii) Sgt. Arsenault’s evidence that an individual trusted with large amounts of cocaine would be part of a closely knit organization, that his or her fee would be negotiated on the basis of the amount being transported, and that in over 1,000 cases, he had never encountered a “blind courier”; and (iii) the appellant’s possession of an electronic key fob that he must have detached from the ignition key before handing the key to the customs officer, which suggested that he knew the fob controlled access to the hidden compartment and did not want the compartment to be discovered. The judge also found support for his conclusions in some other pieces of evidence, including the fact that the appellant’s cell phone rang at the time of his arrest, certain information written on an envelope and his nervous behaviour in the customs office (A.R., vol. I, at pp. 31-32). Judge Dohm accordingly found the accused guilty.
    1. Court of Appeal, 2012 BCCA 512, 331 B.C.A.C. 170
14. Lowry J.A., with Finch C.J.B.C. concurring, dismissed the appeal. Lowry J.A. noted that Sgt. Arsenault had many years’ experience in the investigation of drug trafficking and had participated in some 1,000 cocaine importing cases. He was qualified as an expert, and his status as such had not been challenged.
15. On the admissibility of Sgt. Arsenault’s evidence and the weight it should be given, Lowry J.A. noted that defence counsel had not objected to it at trial. The evidence was necessary and relevant to the issue of *mens rea*, and the trial judge’s reliance on it was well reasoned and was not inconsistent with the purpose for which it had been adduced without objection.
16. The appellant had also challenged Judge Dohm’s reliance on the evidence with respect to the key fob, arguing that the judge had placed too much weight on it and had engaged in speculative reasoning. Lowry J.A. found no error in the trial judge’s reliance on this evidence. The issue is not raised in this Court.
17. Newbury J.A., dissenting, found that Sgt. Arsenault’s evidence should have been excluded. She noted that defence counsel had conceded that Sgt. Arsenault’s evidence met the criteria laid down in *R. v. Mohan*, [1994] 2 S.C.R. 9, but had also stated that such evidence can tend to become anecdotal and to stray into inference drawing. Newbury J.A. concluded that the officer’s evidence that blind couriers are not used was objectionable and should have been excluded or, at least, not relied on by the trial judge in reaching his verdict. She stated that this was not “custom of the trade” evidence, but was purely anecdotal and not amenable to cross-examination in any meaningful sense (para. 26). Further, she noted that it “tended to short-circuit” the *mens rea* inquiry and essentially allowed the Crown to have its theory of the case come from the mouth of an expert witness (*ibid.*).
18. Issues
    1. Legitimate Scope of a Police Officer’s Expert Evidence on the Drug Trade
19. In argument before us, the appellant did not challenge the use of a police officer’s expert evidence as such. A substantial body of case law supports the admission of evidence from experienced police officers on such subjects as the organization of the illegal drug trade, methods of transporting and selling drugs, methods for avoiding the detection of drugs, and drug jargon: *R. v. Joyal* (1990), 55 C.C.C. (3d) 233 (Que. C.A.); *R. v. Ballony-Reeder*, 2001 BCCA 293, 88 B.C.L.R. (3d) 237; *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115.
20. Although the admissibility of expert evidence must be assessed by the trial judge on a case-by-case basis, I am satisfied that Judge Dohm made no error in principle in finding that the expert evidence of experienced drug investigators is capable of satisfying the criteria — relevance, necessity, absence of any exclusionary rule, and a properly qualified expert — identified in *Mohan*. The customs of the illegal drug trade will generally be relevant to the matters at issue in drug trials. Such customs are likely to be outside the knowledge of the trier of fact, so evidence about them will be necessary to assist him or her in assessing the other evidence that has been adduced. Moreover, it is open to a trial judge to conclude that a police officer is qualified to give expert evidence on the basis of the officer’s experience and training in the investigation of drug-related crimes.
21. At the same time, this Court has repeatedly cautioned that expert evidence must not be allowed to usurp the role of the trier of fact. The trier of fact, whether a judge or a jury, is responsible for deciding the questions in issue at trial. Judges must be especially cautious where the testimony of police expert witnesses is concerned, as such evidence could amount to nothing more than the Crown’s theory of the case cloaked with an aura of expertise. The courts have clearly recognized the risk that expert evidence could usurp the role of the trier of fact in the assessment of credibility, and even in the decision on the ultimate issue of guilt or innocence. I see no reason to believe that this danger is less real where the evidence is given by a state agent like a police officer rather than by a scientific expert.
22. The *Mohan* requirement of necessity is the primary safeguard against the inappropriate proliferation of expert evidence. But even where the expert’s evidence is broadly necessary, as in this case, it should be assessedwith special scrutiny as it approaches the “ultimate issue”: *Mohan*, at p. 24; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 37. The decision to qualify an expert witness does not end the need for scrutiny of the expert’s evidence. A properly qualified expert could stray into expressing inadmissible opinions about the guilt of an accused, and the trial judge must ensure that the expert’s testimony stays within the proper boundaries of such evidence and maintain the integrity and independence of his or her own fact-finding function as regards the credibility of witnesses and the guilt or innocence of the accused.
    1. Application of These Principles to Sgt. Arsenault’s Evidence
23. Sgt. Arsenault was qualified as an expert, without being challenged, on the basis of his extensive experience and training, and most of his evidence was unobjectionable. He described the general background of cocaine importation schemes, including manufacturing sources and distribution chains, the primary importation routes, and points of entry into British Columbia from the United States. He noted that importers commonly use off-road, four-wheel-drive vehicles to transport cocaine over land and that the cocaine is usually packaged in one-kilogram bricks when brought into Canada. He also explained typical methods of concealment, including the use of sophisticated hidden compartments. He described common methods of payment for cocaine shipments, the reasons why drug couriers are used, and common practices in their recruitment. He talked about the instructions that would typically be given to a drug courier, including the development of cover stories, and stated that the courier’s fee is typically negotiated with reference to the nature and size of the shipment. Sgt. Arsenault described the risks associated with cross-border transportation of cocaine, and in particular the risk of losing a shipment either because it is detected by the authorities or because it is stolen by a rival group. The appellant’s trial counsel did not object to any of this evidence, and it was not challenged on appeal.
24. At issue in this appeal is the following exchange between Crown counsel and Sgt. Arsenault (A.R., vol. III, at p. 144):

Q Officer, you described earlier that you’ve been involved in approximately 1,000 investigations involving the importation of cocaine over your 33-year career?

A That is correct, Your Honour, yes.

Q In approximately how many of those investigations were you able to determine that the person importing the cocaine did not know about the commodity that they were importing?

A I have never encountered it, personally.

Q Have you ever heard of a -- the use of a blind courier or a courier who doesn’t know about the commodity that he is driving?

A I -- I’ve certainly heard that argument being raised on -- on occasion, primarily in court, not during my investigations.

1. In my view, Sgt. Arsenault’s evidence that he had never, in over 1,000 investigations, personally encountered a blind courier and that he had never heard of one outside of a courtroom strayed from what would be admissible expert evidence. This testimony was equivalent to a statement that individuals in the appellant’s position always know about the drugs. It is a short step from such evidence to an inference that the appellant must have known about the cocaine. Sgt. Arsenault’s evidence effectively amounted to an opinion that the accused possessed the requisite *mens rea* for the offence with which he was charged, which was the ultimate issue in this trial. Whether it was admissible therefore requires special scrutiny.
2. Applying the *Mohan* criteria, I conclude that this line of questioning should not have been permitted. The evidence was not necessary, as it was open to the trier of fact to draw the necessary inference concerning what the appellant knew or did not know. Nor was it relevant. Sgt. Arsenault’s opinion invited the trier of fact to find that the appellant knew about the cocaine on the basis that all people driving vehicles containing hidden drugs know about the drugs. This appeared relevant only because it depended on an improper inference. Sgt. Arsenault’s opinion that other individuals he has encountered in his investigations knew they were transporting illegal drugs does not logically establish that this accused possessed the *mens rea* for the offences with which he was charged. In addition to usurping the court’s role in resolving the issue of guilt or innocence, the opinion depended on an unacceptable and unfair inference.
   1. Should the Curative Proviso Be Applied?
3. Sgt. Arsenault’s evidence concerning his lack of personal experience with blind couriers should not have been admitted. Regardless of the fact that counsel did not object to the questions, the trial judge erred in law in admitting this evidence. He compounded this error by expressly relying on it in convicting the appellant. He wrote this in his reasons:

Sgt. Arsenault also testified that in the thousand or more cocaine-importing investigations he has been involved in he has never encountered a blind courier, that being a person who does not know the nature or existence of the commodity being moved from one location to another. [A.R., vol. I, at pp. 30-31]

1. All that remains is to determine whether the error occasioned a substantial wrong or miscarriage of justice, or whether s. 686(1)(*b*)(iii) of the *Criminal Code*, known as the curative proviso, should be applied to affirm the appellant’s convictions:

**686.** (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

. . .

(*b*) may dismiss the appeal where

. . .

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, . . .

1. I respectfully disagree with my colleague’s position. This is not an appropriate case for application of the proviso.
2. The proviso applies in two situations. The first is where the error is so minor or harmless that it could not have had a serious impact on the verdict. The second is where, although a serious error has been made, the evidence is nevertheless so overwhelming that no other verdict would have been possible (*R. v. Sarrazin*, 2011 SCC 54,[2011] 3 S.C.R. 505, at para. 25; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34).
3. In the instant case, the Crown rightly concedes that the error was not a harmless or minor one that would have no impact on the verdict. The admission of improper evidence in this case cannot be considered “an error that is harmless on its face or in its effect” (*Van*, at para. 35). Sgt. Arsenault’s evidence was a key piece of the Crown’s case, and his statement that he had never encountered a blind courier was specifically relied on by the trial judge in convicting the appellant (A.R., vol. I, at pp. 30-31). The evidence of experts, like that of all witnesses, often contains comments or observations that are inconsistent with the rules of evidence. In this case, however, the impugned observations were not unprompted or unanticipated. Crown counsel clearly directed Sgt. Arsenault’s evidence toward this prejudicial and inadmissible topic. This could not have helped but increase its impact, as the trial judge’s reasons show.
4. If the curative proviso is to be applied, therefore, it can only be on the basis that “the case against the accused was so overwhelming that a reasonable and properly instructed jury would inevitably have convicted” (*Van*, at para. 36; see also P. Béliveau and M. Vauclair, *Traité général de preuve et de procédure pénales* (20th ed. 2013), at pp. 1294‑95; *Sarrazin*,at para. 25). Where this criterion is met, denying the accused the benefit of a retrial will be justified, because there is no realistic possibility of any result other than conviction. The standard of this branch of the test is a high one, as Deschamps J. explained in *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, at para. 82:

This standard should not be equated with the ordinary standard in a criminal trial of proof beyond a reasonable doubt. The application of the proviso to serious errors reflects a higher standard appropriate to appellate review. The standard applied by an appellate court, namely that the evidence against an accused is so overwhelming that conviction is inevitable or would invariably result, is a substantially higher one than the requirement that the Crown prove its case “beyond a reasonable doubt” at trial. This higher standard reflects the fact that it is difficult for an appellate court, in particular when considering a jury trial, since no detailed findings of fact will have been made, to consider retroactively the effect that, for example, excluding certain evidence could reasonably have had on the outcome.

1. The Court has constantly refused to lower this standard, even upon being invited to do so, as it was in *Sarrazin*.In that case, it strongly reaffirmed the need to safeguard the integrity of the criminal justice system (paras. 25-26). The language of the curative proviso reflects Parliament’s concern to prevent the risk of a substantial wrong or miscarriage of justice. The high standard the Court has set reflects this purpose.
2. The error in *Trochym* occurred in the context of a jury trial, but even in a case involving a trial by judge alone, an appellate court must acknowledge that it is difficult to speculate on what effect exclusion of the evidence might have had on the judge’s findings of fact. This is especially true in cases such as the one at bar in which the evidence is circumstantial.
3. I cannot say with certainty that the result in this case would have been the same without Sgt. Arsenault’s evidence. Judge Dohm rejected the appellant’s evidence in its entirety and found that it did not raise a reasonable doubt. His reasons accordingly focused on whether the Crown’s evidence was sufficient to prove the appellant’s guilt beyond a reasonable doubt. This Court must do the same, applying the higher standard of an inevitable verdict.
4. The trial judge in this case gave well-articulated reasons. They underline the importance he attributed to Sgt. Arsenault’s testimony. He referred to three “very significant pieces of evidence” in his decision to convict the appellant (A.R., vol. I, at p. 30). The first of these was the amount of cocaine involved. He found it unlikely that the owners of the cocaine would have taken the risk of using a blind courier to transport it into Canada. The second was Sgt. Arsenault’s evidence, and in particular his testimony that he had never encountered a blind courier in over 1,000 investigations involving cocaine importing (pp. 30-31). The third key piece of evidence in the Crown’s case related to the appellant’s possession of the key fob.
5. I have already concluded that the trial judge erred in making use of the second of these pieces of evidence. As to the first one, although the value of the cocaine might support an inference that the drugs would not have been entrusted to a stranger, that is not the only conclusion that could be drawn from it.
6. Turning to the third piece of evidence, when the appellant was detained, he was in possession of the key fob. This fob was identified at trial as a remote control for a “Clifford” alarm system installed on the truck. According to the evidence of Det. Shawn Robson, it could be used to lock and unlock the vehicle’s doors, and to arm and disarm the alarm system (A.R., vol. III, at p. 122). If the buttons on the fob were pressed in a specific sequence, the compartment between the bed and the frame of the truck in which the cocaine was found would open.
7. When the appellant was initially detained, he handed the ignition key over to the customs officers. He produced the fob only when subsequently asked to empty his pockets. At that time, he immediately admitted that it was for the truck. The trial judge found that the fob and the ignition key “obviously go together” and that they had been attached by a chain until the appellant detached them when he turned off the ignition in the secondary inspection area (A.R., vol. I, at p. 31). He concluded that the appellant detached the key from the fob at that time in an attempt to hide the fob or conceal its connection with the truck, because he knew the fob opened the compartment.
8. In the Court of Appeal, the appellant challenged the trial judge’s use of the evidence about the fob, arguing that the judge had placed too much weight on it and had engaged in speculative reasoning with respect to it. The Court of Appeal dismissed this argument, and the point was not raised in this Court. Moldaver J. finds that this inference was open to the trial judge and that it was essentially conclusive of guilt (para. 55).
9. In my view, however, the issue in applying the curative proviso is not whether the trial judge could make the inference he did or whether that inference was determinative of guilt, but whether it was the only rational conclusion. I agree that the trial judge did not err in using this evidence as he did, but this was not the only conclusion supported by the evidence with respect to the fob. The appellant testified that the key and the fob had been attached when he received them from Chris, and the trial judge found that he had detached the key from the fob moments before handing the key over to the secondary inspection officer. But it does not inevitably follow that the judge’s finding of guilt depended primarily on these additional inferences as to when and how the fob came to be detached from the key. There was no evidence on these points, and the trial judge could just as well have drawn no inference from the fact that the appellant had not produced the fob immediately. Moreover, it is simply not possible for an appellate court to say that the judge’s assessment of this evidence was not affected by his reliance on the inadmissible evidence that blind couriers are never used. I cannot accept that the conclusion drawn by the trial judge was inevitable or that this evidence was therefore determinative of the appellant’s guilt.
10. There was of course other evidence capable of supporting a verdict of guilt, including a chewed-up piece of paper, the envelope mentioned above and the appellant’s ringing cell phone. As with the key fob, although the trial judge was entitled to draw the inferences he did from each of these pieces of evidence, each such inference undeniably involved some speculation. There was no evidence concerning the identity of the person who called the appellant’s cell phone, nor was there evidence with respect to the meaning of the information written on the envelope. Again, this evidence was capable of supporting a finding of guilt beyond a reasonable doubt, but in my view it would not inevitably lead to such a finding.
11. At the same time, there was also evidence favourable to the accused. For instance, he was not the registered owner of the truck and there was no evidence that he had ever previously been in possession of the truck. Furthermore, Sgt. Arsenault testified that drug couriers typically do not have criminal records, but the appellant did in fact have a prior conviction for dangerous driving.
12. I agree that ordering a new trial places demands on judicial resources, but, with respect, this cannot override the appellant’s right to a fair trial based solely on admissible evidence. The trial judge relied expressly on inadmissible evidence, and I cannot untangle his other inferences unfavourable to the appellant from his acceptance of that evidence, as he attached great importance to it. As we have seen, this was a serious error. If this Court excludes evidence described by the trial judge as one of the foundations of his conclusion that the appellant was guilty, it cannot then hold that the evidence against the appellant was nonetheless overwhelming without engaging in pure speculation. Such a conclusion would contradict what the trial judge himself wrote and would rest on an improper reweighing of the remaining evidence. With respect, the curative proviso does not permit this Court to deny a retrial in such circumstances.
13. Conclusion
14. For these reasons, I cannot agree that no substantial injustice would result from affirming the convictions. I would accordingly allow the appeal and order a new trial.

*Appeal dismissed,* McLachlin C.J. *and* LeBel J. *dissenting.*

Solicitors for the appellant:  Peck and Company, Vancouver.

Solicitor for the respondent:  Attorney General of Canada, Vancouver.

1. The reference to “Your Honour” appears to be a mistake. The record indicates that Sgt. Arsenault was responding to Crown counsel’s question. [↑](#footnote-ref-1)