

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Sarrazin, 2011 SCC 54, [2011] 3 S.C.R. 505 | **Date:** 20111104**Docket:** 33917 |

**Between:**

**Her Majesty The Queen**

Appellant

and

**Robert Sarrazin and Darlind Jean**

Respondents

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**(paras. 1 to 41)**Dissenting Reasons:**(paras. 42 to 60) | Binnie J. (McLachlin C.J. and LeBel, Fish, Abella and Charron JJ. concurring)Cromwell J. (Deschamps and Rothstein JJ. concurring) |

R. *v.* Sarrazin, 2011 SCC 54, [2011] 3 S.C.R. 505

Her Majesty The Queen *Appellant*

v.

Robert Sarrazin and Darlind Jean *Respondents*

**Indexed as: R. *v.* Sarrazin**

2011 SCC 54

File No.: 33917.

2011:  April 18; 2011:  November 4.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for ontario

 *Criminal law — Charge to jury — Included offences — Attempted murder — Accused charged with second degree murder — Whether potential verdict of attempted murder should have been left with jury.*

 *Criminal law — Appeals — Powers of Court of Appeal — Application of curative proviso — Whether requirements for application of proviso should be relaxed — Whether proviso applies in this case — If so, whether conviction can be upheld pursuant to curative proviso — Criminal Code, R.S.C. 1985, c. C‑46, s. 686(1)(b)(iii).*

 N was shot in the forearm and the abdomen and suffered life‑threatening injuries, particularly to his liver. N was released from the hospital and was expected to make a full recovery. Five days later, he died as a result of a blood clot. In the autopsy, trace amounts of cocaine were detected in his blood, indicating cocaine consumption within 30 to 45 minutes of death. Expert testimony indicated that N might have died from complications arising from the ingested cocaine. At trial, the defence argued that a reasonable doubt had been raised as to whether the victim’s death was or was not related to the shooting — even if the evidence showed the accused intended to kill the victim, there was a reasonable doubt on the medical evidence that they in fact caused the victim’s death. The accused argued that the correct verdict in law to give such a finding (if it were made by the jury) would be to acquit the accused of murder, but convict them of attempted murder. The trial judge declined to put the option of attempted murder to the jury, and the accused were convicted of second degree murder. The majority of the Court of Appeal ordered a new trial by concluding that the trial judge’s failure to afford the jury an opportunity to consider returning a verdict on an included offence, where that verdict was reasonably available, constituted a reversible error. The minority found that the trial judge’s error was harmless in the circumstances of this case and would have applied the curative proviso on the basis that the jury was equipped with all the tools it needed to give the matter of causation careful consideration.

 *Held* (Deschamps, Rothstein and Cromwell JJ. dissenting): The appeal should be dismissed.

 *Per* McLachlin C.J. and Binnie, LeBel, Fish, Abella and Charron JJ.: The need to prove causation is common to both murder and manslaughter. The Crown must establish beyond a reasonable doubt that the shooting significantly contributed to the victim’s death. If the evidence of the Crown pathologist left the members of the jury with a doubt on that account, then at most the accused could be convicted of an attempt to murder. If that view were taken by the jury (and of course we do not know what its members thought), the appropriate verdict (attempted murder) was not one of the options left open to them to consider. The accused had a right to the verdict of a properly instructed jury, and appellate courts must exercise prudence so as not to trespass on that fundamental right.

 The dissenting judge in the Court of Appeal urged adoption of a more “holistic” approach to s. 686(1)(*b*)(iii) by lightening of the Crown’s burden from a requirement to demonstrate an “overwhelming” case against the accused to the lesser standard of a “very strong” case, and to allow appellate courts to tolerate errors of law that while not “insignificant” are nevertheless “highly unlikely to have affected the result”.

 However, there is a significant difference between a legal error that can be confidently dismissed as “harmless”, and an assessment that while the error is prejudicial, it is not (in the after‑the‑fact view of the appellate court) so prejudicial as to have affected the outcome. Such delicate assessments are foreign to the purpose of the curative proviso which is to avoid a retrial that would be superfluous and unnecessary but to set high the Crown’s burden of establishing those prerequisites. The same can be said for the other branch of the curative proviso. As a result, the burden of the Crown to demonstrate an “overwhelming” case or a “harmless” error of law should not be relaxed.

 The trial judge’s error in failing to put to the jury the option of a lawful verdict that matched the theory of the defence and that was open to the jury on the evidence cannot be dismissed as “harmless” because it is impossible to be certain that if this had been done, and notwithstanding the correct instruction on murder, the verdict might not have been different. This is not a case where the triviality of the error itself or the lack of prejudice by a more serious error can justify the application of the curative proviso. A failure to instruct on a viable alternative verdict falls into neither category. Accordingly, in the circumstances of the present case, it is not open to the appellate court to apply the curative proviso to remedy the trial judge’s error in his instruction to the jury.

 *Per* Deschamps, Rothstein and Cromwell JJ. (dissenting): The issue is not whether the evidence of guilt was “overwhelming”, nor is the Court’s task here to try to predict what effect a particular line of argument might have had on the jury’s assessment of a witness’s credibility. The issue is whether there was any reasonable possibility that the error could have had any impact on the verdict. Failure to provide instructions on attempted murder would only have been relevant if the jury had a doubt about causation. The trial judge, by everyone’s agreement, flawlessly directed the jury on the offence of murder, including the requirement that the shooting caused the deceased’s death. The trial judge provided the jury with a decision tree which clearly indicated, as had the judge’s instructions, that in order to convict, the jury must unanimously be of the view that the Crown had proved causation beyond a reasonable doubt. The jury deliberated for five days. They asked no questions about causation. They returned a verdict of guilty of second degree murder against both accused. The jury’s verdict of guilty of second degree murder necessarily reflected the jury’s finding, beyond a reasonable doubt, that the shooting had indeed caused the victim’s death. That is the only conclusion with respect to causation that is consistent with the jury’s verdict. Appellate courts should not speculate at the jury’s expense and impute to jurors a subconscious failure to fulfill their sworn duty. Nor should they simply assert that the trial judge’s omitted instruction to the jury gave rise to an injustice. Therefore, the Crown has discharged its burden to show that if the legal error here — the failure to instruct on attempted murder — had not been made, the result would inevitably have been the same.

**Cases Cited**

By Binnie J.

 **Referred to:** *R. v. Poole* (1997), 91 B.C.A.C. 279; *R. v. Creighton*, [1993] 3 S.C.R. 3; *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Haughton*, [1994] 3 S.C.R. 516; *Gilbert v. The Queen*, [2000] HCA 15, 201 C.L.R. 414; *R. v. Jackson*, [1993] 4 S.C.R. 573.

By Cromwell J. (dissenting)

 *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. Jackson*, [1993] 4 S.C.R. 573; *Gilbert v. The Queen*, [2000] HCA 15, 201 C.L.R. 414; *Bullard v. The Queen*, [1957] A.C. 635; *R. v. Coutts*, [2006] UKHL 39, [2006] 4 All E.R. 353; *R. v. Maxwell* (1990), 91 Cr. App. R. 61.

**Statutes and Regulations Cited**

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

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 229(*a*), 660 to 662, 686(1)(*a*)(ii), (*b*)(iii).

 APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Moldaver and Epstein JJ.A.), 2010 ONCA 577, 268 O.A.C. 200, 259 C.C.C. (3d) 293, 79 C.R. (6th) 151, [2010] O.J. No. 3748 (QL), 2010 CarswellOnt 6646, setting aside the accused’s convictions for second degree murder and ordering a new trial. Appeal dismissed, Deschamps, Rothstein and Cromwell JJ. dissenting.

 *James K. Stewart*, for the appellant.

 *Russell Silverstein* and *Ingrid Grant*, for the respondent Robert Sarrazin.

 *Philip Campbell* and *Howard L. Krongold*, for the respondent Darlind Jean.

 The judgment of McLachlin C.J. and Binnie, LeBel, Fish, Abella and Charron JJ. was delivered by

1. Binnie J. — The respondents were convicted by a jury of second degree murder. They contend, and the Crown now concedes, that the trial judge failed to instruct the members of the jury on the full range of verdicts reasonably open to them on the law and the evidence. Even if the evidence showed that they *intended* to kill the victim, the respondents say, there was a reasonable doubt on the medical evidence that they in fact *caused* the victim’s death. He might have died from complications arising from cocaine ingested minutes before death. The Ontario Court of Appeal agreed unanimously on this view of events that a verdict of *attempted* murder was open to the jury, but the trial judge did not leave it with that option. In these circumstances, the accused would ordinarily be entitled to a new trial. However, s. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”), the “curative proviso”, permits an appellate court to uphold a jury’s verdict notwithstanding a trial judge’s error of law, *provided* it is satisfied that no substantial wrong or miscarriage of justice has occurred.
2. The question raised by the present appeal is whether this Court should relax the requirements for the application of the proviso, and whether, relaxed or not, the proviso applies in this case to deny the respondents the new trial ordered by the Ontario Court of Appeal.
3. For the reasons that follow, I agree with the majority opinion in the Ontario Court of Appeal. The rules governing the application of s. 686(1)(*b*)(iii) should not be relaxed. In my view, the proviso has no application in the circumstances of this case. As a result, the Crown’s appeal should be dismissed.

I. Facts

1. The victim, Apaid Noël, and the respondents were members of rival Haitian gangs in Montreal with a long history of violent acts against each other. In the early hours of February 19, 1998, the respondents Robert Sarrazin and Darlind Jean confronted Noël outside an Ottawa night club. One of the respondents was overheard to say [translation] “You’re going to die tonight”. Sarrazin and Jean then left. They returned five minutes later. Sarrazin had armed himself with a sawed-off shotgun. After another brief verbal scuffle, Sarrazin pointed the weapon at Noël and fired the shotgun just as Noël reached out for it, shooting him in the forearm. As Jean and another person urged him to kill Noël, Sarrazin discharged the barrel into Noël’s abdomen and fled. Noël collapsed and was rushed to hospital. The gunshot wound to his abdomen caused life-threatening injuries, particularly to his liver. Skilful surgical intervention and medical care saved his life, at least for a short time.
2. Although Noël’s post-operative progress was somewhat uneven, by March 13, 1998, he was doing well enough to be released from the hospital. Dr. Joel Freeman, his surgeon, expected that Noël would make a full recovery. Five days later, for reasons that are not entirely clear, he suddenly collapsed and died of a pulmonary thromboembolism (blood clot) that blocked the flow of blood to his lungs. Dr. Freeman described the death as a “freakish” medical happening. In the autopsy, trace amounts of cocaine were detected in Noël’s blood. This presence of the drug indicated cocaine consumption within 30 to 45 minutes of death.
3. Expert testimony indicated that the blood clot was probably related to the injuries sustained in the shooting, but, given that cocaine could cause hypercoagulability (propensity to develop blood clots), the pathologist called by the Crown refused at trial to rule out the possibility that the clot was *entirely* the result of the victim’s consumption of cocaine. On cross-examination, Dr. Brian Johnston testified:

 **Q.** Okay. So, given that we had a young man here with a clot, the source of which you could not determine definitively, you’re not really able to rule out cocaine as having caused the clot to form, right?

 **A.** I guess that is true, yes.

 **Q.** Because, although -- it’s a little difficult in Mr. Noël’s case because he’s had these injuries, he’s had surgery, and then a month later he’s deceased. It would be clearer if he’d had these injuries, had surgery, and a month later he walked out and was hit by a bus. We’d be able to say, you know, there’s no relationship.

 **A.** Correct.

 **Q**. Here it is possible that his ingestion of cocaine is just like getting hit by that bus. The clot may have no relationship to any of the surgery or any of the injuries.

 **A.** It’s possible. I wouldn’t think it’d be likely, but it’s possible. [Emphasis added; A.R., vol. VIII, at p. 61.]

When pressed further, the pathologist added:

 **Q.** So, you would agree that it is an issue in this particular case as to whether cocaine or the injury to the liver was the, I suppose the cause of the clot, you’d agree it’s an issue about which reasonable pathologists could disagree.

 **A.** Correct. [A.R., vol. VIII, at p. 78]

1. The defence declined to call its own expert evidence on the causation issue but relied entirely on the comments of the Crown pathologist, which it said raised a reasonable doubt as to whether the victim’s death was or was not related to the shooting.

II. Relevant Enactments (“The Curative Proviso”)

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

 **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

 (*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 . . . .

III. Judicial History

A. *Ontario Superior Court of Justice*

1. The respondents were initially tried in 2000, found guilty of second degree murder and sentenced to life imprisonment without eligibility for parole for 18 years. Identity was the principal issue in that first trial. Causation was not an issue. In April 2005, the Ontario Court of Appeal ordered a new trial primarily on the basis that the trial judge had made errors in his ruling on the admissibility of certain evidence (75 O.R. (3d) 485).
2. At the second trial (from which the present appeal is taken), the respondents again argued that the Crown had failed to prove that they were the individuals who had participated in the shooting. In addition, however, they now contended that the shooting of Apaid Noël on February 19, 1998 did not cause his death. In effect, they argued that even if the accused *intended* to kill the victim, they had not succeeded. The correct verdict in law to give such a finding (if it were made by the jury) would have been to acquit the respondents of murder, but convict them of attempted murder.
3. In pre-charge discussions, the trial judge expressed some uncertainty over whether a verdict of attempted murder was available as an included offence, but said that he would instruct the jury on that offence if all counsel agreed that he should do so. The defence requested such an instruction. After some debate about the state of the law, Crown counsel took the position that no such verdict was available because of the wording of s. 662(3) *Cr. C.* as interpreted in *R. v. Poole* (1997), 91 B.C.A.C. 279. Accordingly, the trial judge declined to put attempted murder to the jury, but expressed to counsel serious concerns about the potential consequences of a decision not to do so:

 What I was saying is that obviously if it turns out that attempt[ed] murder is an included offence, notwithstanding my opinion . . ., that will be a fatal error.

. . .

 . . . If the Court of Appeal does not [agree with me], then there’s a fatal error because obviously . . . it should have been left. So, that’s where we are. [A.R., vol. XII, at pp. 21 and 22]

1. After deliberating for five days, the jury convicted both respondents of second degree murder. They were sentenced to life imprisonment without eligibility for parole for 18 years.
2. The respondents have been in custody since their arrests in late February and early March 1998, respectively — a period of over 13 years.

B. *Ontario Court of Appeal, 2010 ONCA 577, 268 O.A.C. 200 (Doherty, Moldaver and Epstein JJ.A.)*

1. The Court of Appeal was unanimous in upholding the availability in these circumstances of a verdict of attempted murder. The court divided on whether the verdict could nevertheless be upheld under s. 686(1)(*b*)(iii) *Cr. C.* Doherty J.A., and Epstein J.A. concurring, concluded that the trial judge’s failure to instruct the jury that a finding of attempted murder was a possible verdict constituted an error of law which could not be saved by the curative proviso. The prosecution, he held, “cannot automatically rely on factual findings implicit in the jury’s verdict” of second degree murder but must demonstrate

 that there is no reasonable possibility that the verdict on the main charge was influenced by the misdirection or non-direction with respect to potential liability for an included offence. On this analysis, the failure to afford a jury an opportunity to consider returning a verdict on an included offence, where that verdict is reasonably available, will in most circumstances constitute reversible error unless the Crown can show that it had an overwhelming case on the main charge. [para. 87]

In Doherty J.A.’s view, a new trial was necessary because

 [m]anslaughter instructions directed at a possible doubt regarding the mental state required for murder do not allay my concern that the jury’s finding of fact on the distinct question of causation may have been influenced by an instruction that a reasonable doubt regarding causation should lead to the appellants’ outright acquittal. [para. 95]

1. Moldaver J.A. (as he then was), though dissenting in the result, agreed with Doherty J.A. that the trial judge’s failure to leave attempted murder with the jury constituted an error of law. However, he would have applied the curative proviso and dismissed the appeal, not on the basis of an overwhelming case against the accused, but rather on the basis that the trial judge’s error was harmless in the circumstances of this case. In his view, the causation issue had been canvassed with the jury in depth by the Crown and defence counsel. The trial judge’s charge to the jury on causation was exemplary. The jury was equipped with all the tools it needed to give the matter of causation careful consideration. If any of the jurors were troubled by the issue of causation, but considered it unpalatable to let the respondents go free, a compromise verdict (i.e. manslaughter or a hung jury) would have been expected. In the words of Moldaver J.A., it is “unreasonable, if not unfathomable, to think that a jury in those circumstances would render a verdict of murder, which would not only have been unresponsive to the [jury’s] concern, but a dramatic betrayal of it” (para. 156).
2. Further, in a footnote intended for the attention of this Court, Moldaver J.A. invited a relaxation of the present rules governing the prerequisites for the application of the curative proviso:

 With respect, this is perhaps an area that the Supreme Court of Canada may wish to re-visit in view of the present-day complexity of the criminal law, the ever-increasing length of criminal trials, the practical difficulties involved in re-trying cases many years after the event, the added burden that lengthy re-trials place on an already overburdened justice system, the right of victims to closure, the interests of finality and the public’s overall confidence in the administration of justice. Perhaps in light of these modern-day realities, a more holistic approach to the application of the proviso would be preferable to the existing “pigeon-hole” model so that the proviso could be applied where an appellate court is satisfied that the evidence of guilt is very strong, although not quite overwhelming, *and* the legal error or errors, though not insignificant, are highly unlikely to have affected the result. [Underlining added; para. 107, footnote 13.]

In any event, whether or not the rules governing s. 686(1)(*b*)(iii) *Cr. C.* are to be relaxed, Moldaver J.A. would have applied it and upheld the convictions.

IV. Analysis

1. The trial of these respondents boiled down to three issues — identification, intent and causation. Identification was resolved conclusively against them by the jury verdict and no more needs to be said about it. The jury must also have rejected any theory of accident and concluded that the respondents acted with murderous intent, that is to say that they either intended the death of Noël, or meant to cause him bodily harm which they knew would likely cause death and were reckless as to whether or not death resulted (s. 229(*a*) *Cr. C.*).
2. Manslaughter occupies a different niche in the law of homicide. It does not require murderous intent. It requires only an objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act. Foreseeability of the risk of death is not required (*R. v. Creighton*, [1993] 3 S.C.R. 3).
3. The jury must have concluded that the appropriate way to characterize the respondents’ intent was murder, not manslaughter.

A. *The Causation Dilemma*

1. The need to prove causation is common to both murder and manslaughter. The Crown must establish beyond a reasonable doubt that the shooting significantly contributed to Noël’s death (*R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488, at para. 72). If the evidence of the Crown pathologist left the members of the jury with a doubt on that account, then at most the respondents could be convicted of an *attempt* to murder — an attempt foiled by the skill of the surgeon, Dr. Freeman. If that view were taken by the jury (and of course we do not know what its members thought), the appropriate verdict (attempted murder) was not one of the options given to them. Instead, the Crown took the position that the jury should be told to acquit the respondents if it had a reasonable doubt on the question of causation, a prospect which the jury may well have found disturbing. It was also wrong in law. As Arbour J. had pointed out in *Nette*, where “causation was not proven, a proper verdict might be attempted murder” (para. 47).
2. On the Crown’s view that attempted murder is not an included offence to murder, it would follow that if the jury had acquitted the respondents of murder, the Crown could have proceeded at a subsequent trial on a charge of attempted murder. The contrary view, that attempted murder *is* an included offence, is supported by Doherty J.A.’s meticulous analysis of the relevant *Criminal Code* provisions (ss. 660 to 662) and related case law. He concluded that “[t]he community as a whole and the participants in a criminal proceeding, be they accused, witness, juror, or investigator, are best served by a process that allows all issues to be resolved in a single trial” (para. 59). I cannot improve on his analysis and I will not repeat it. I note that Moldaver J.A. agreed that the potential verdict of attempted murder should have been left with the jury and that it was an error of law not to do so.

B. *Should the Rules Governing the Curative Proviso Be Relaxed?*

1. The statutory power of an appellate court to uphold the convictions of an accused person notwithstanding “a wrong decision on a question of law” at trial evidences Parliament’s recognition of the public interest in avoiding the cost and delay of retrials where a properly instructed jury at a retrial would inevitably reach the same verdict. This assessment is necessarily somewhat speculative, as no one really knows what the *actual* jury would have done if its members had been properly presented with all of the verdicts that might reasonably have arisen on the evidence. Of course, no one *can* know, since members of the jury cannot be questioned after the trial.
2. The respondents had a right to the verdict of a properly instructed jury, and appellate courts must exercise prudence so as not to trespass on that fundamental right.
3. Having said that, the public policy concerns expressed by Moldaver J.A. in footnote 13, set out above, are of course very real. The respondents have already been tried twice and convicted twice. If there is to be a third trial, it will require the participants to put to the test their recollection of fleeting events 13 or more years previously. As was said in *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751:

 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. [para. 46]

The emphasis, necessarily, is on the words “no realistic possibility that a new trial would produce a different verdict”. Section 686(1)(*b*)(iii) *Cr. C.* explicitly manifests Parliament’s concern about the risk of a “substantial wrong or miscarriage of justice” and that concern is central to any proper approach to the interpretation of the section.

1. In more recent cases, the Court has given greater precision to the interpretation of s. 686(1)(*b*)(iii) *Cr. C.* by generally limiting its application to cases where the evidence against an accused is *overwhelming* or where it can be safely said that the legal error was *harmless* because it could have had no impact on the verdict: *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at paras. 28-31; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at paras. 34-36. The Crown does not argue that the proviso should be applied because the evidence against the accused was overwhelming. To succeed, therefore, it must establish that the legal error of the trial judge was harmless.
2. Moldaver J.A. refers to this Court’s refinement as a “‘pigeon-hole’ model”, and urges adoption of a more “holistic” approach, i.e. looking at the thrust of s. 686(1)(*b*)(iii) *Cr. C.* taken as a whole rather than analyzed in terms of component branches. This, he suggests, should be accompanied by a lightening of the Crown’s burden from a requirement to demonstrate an “overwhelming” case against the accused to the lesser standard of a “very strong” case, and to allow appellate courts to tolerate errors of law that while not “insignificant” are nevertheless “highly unlikely to have affected the result”. The message is that we have too many retrials and something should be done about it.
3. I accept that retrials will often impose a serious burden both on the witnesses and the public purse, as well as the courts generally, and that the outcome of a retrial will often be the same as the original trial. However, I respectfully do not agree that the burden on the Crown to avoid a retrial should be watered down. An individual charged with a serious offence (i.e. punishable by imprisonment for five years or more) has the right to a trial by jury (*Canadian Charter of Rights and Freedoms*, s. 11(*f*)), and is ordinarily entitled to the verdict of a properly instructed jury. Experience has shown that in a case of overwhelming evidence or harmless error, the courts can safely proceed on the basis that “there is no realistic possibility that a new trial would produce a different verdict” (*Jolivet*, at para. 46). Otherwise, the law should follow its course and a new trial result.
4. It seems to me that there is a significant difference between an error of law that can be confidently dismissed as “harmless”, and an assessment that while the error is prejudicial, it is not (in the after-the-fact view of the appellate court) *so* prejudicial as to have affected the outcome. Such delicate assessments are foreign to the purpose of the curative proviso which is to avoid a retrial that would be superfluous and unnecessary but to set high the Crown’s burden of establishing those prerequisites. The same can be said for the other branch of the curative proviso. As a result, the burden of the Crown to demonstrate an “overwhelming” case or a “harmless” error of law should not be relaxed.

C. *Should a New Trial Be Ordered in This Case?*

1. The judges in the court below were unanimous in concluding that the prosecution’s case for second degree murder was not “overwhelming”. I agree with that conclusion. Where the learned judges differed was whether the error was harmless.
2. Moldaver J.A. was of the view that a new trial was unnecessary, but he nevertheless acknowledged that “[t]he governing principle is that the curative proviso will generally not be available in cases where an included offence (or in this case, a lesser offence) is not left with the jury and the jury convicts of a more serious offence” (para. 137 (emphasis added)). In his view, however, the decision in *R. v. Haughton*, [1994] 3 S.C.R. 516, where the issue was the subjective foresight of the victim’s death, allows an appellate court in some circumstances to apply the curative proviso on the basis of factual findings implicit in a murder conviction where the jury is instructed on an included offence but the instruction is tainted by legal error.
3. Whether or not implicit findings of fact can be relied on for this purpose in such a case will depend on the circumstances, as Moldaver J.A. acknowledges (para. 165). It may be possible in the case of some errors of law to “trace their effect on the verdict and ensure that they made no difference” (*Khan*, at para. 30), but I do not believe it can be done in this case. The errors referred to by the Court in *Khan* referred to cases where the “triviality of the error itself, or the lack of prejudice caused by a more serious error of law”, attracted the application of the curative proviso (*ibid.*). A failure to instruct on a viable alternative verdict falls into neither category. I agree with Doherty J.A. that “failure to afford a jury an opportunity to consider returning a verdict on an included offence, where that verdict is reasonably available, will in most circumstances constitute reversible error” (para. 87). In my view, that general rule should apply here, and the Crown’s argument to the contrary should be rejected not because of a concern that “the palatability of a potential verdict [of acquittal] may have played a role in the jury’s decision” (Moldaver J.A., at para. 162), but because the jury was never presented with the option of delivering a verdict (attempted murder) that matched an important branch of the theory of the defence.
4. The defence *did* secure significant admissions in the cross-examination of the pathologist called by the Crown, Dr. Brian Johnston, who actually performed the autopsy on the victim. He did not rule out cocaine as the sole cause of death, and he agreed that on the issue of the cause of death “reasonable pathologists could disagree” as to whether death was caused by the gunshot wound or by the effects of cocaine (A.R., vol. VIII, at p. 78).
5. While Dr. Joel Freeman, the surgeon who operated on Noël after the shooting, was clearly of the view that death resulted from the injuries inflicted by the gunshot, he described the death as wholly unexpected:

 **Q.** . . . [Y]ou said you’d never seen someone die from a fatal pulmonary embolism in the circumstances that existed in this case, right? That kind of circumstance?

 **A.** That’s right.

 **Q.** In fact, it would be fair to say in your mind it’s really, sort of, a freak situation that anything like this could have happened to him?

 **A.** That’s correct. [A.R., vol. IX, at p. 184]

Dr. Freeman did not participate in the autopsy.

1. Those admissions *did* lay an evidentiary foundation for the conclusion that even if murderous intent were found to have existed, there remained a reasonable doubt on the issue of causation.
2. It is true, as Moldaver J.A. emphasized, that in the end, the jury *did* deliver a verdict of second degree murder. However, it is not enough to say that it was open to the jury to come to a compromise verdict of manslaughter.
3. Such a verdict would be quite wrong if, in the jury’s view, the respondents acted with murderous intent, and the troubling issue was whether Noël’s death was caused by their conduct. As Callinan J. observed in *Gilbert v. The Queen*, [2000] HCA 15, 201 C.L.R. 414, “It is contrary to human experience that in situations in which a choice of decisions may be made, what is chosen will be unaffected by the variety of the choices offered, particularly when, as here, a particular choice was not the only or inevitable choice” (para. 101). In the present case, although the jury had the option of a verdict of manslaughter or no verdict at all, they were not provided with the choice of attempted murder which would have corresponded with an important defence argument.
4. A related point arose in *R. v. Jackson*, [1993] 4 S.C.R. 573. After a trial involving a charge of first degree murder against two individuals, the trial judge set out a number of plausible scenarios, but in none of them was it suggested that one of the accused (Davy) might only be guilty of manslaughter. The jury returned a verdict of second degree murder against him. Having concluded that failure to leave manslaughter with the jury was an error, McLachlin J. (as she then was), for the majority of the Court, declined to apply the curative proviso because

 I am not satisfied that it is clear that a jury, properly instructed, would necessarily have returned a verdict of second degree murder against Davy. He was entitled to have the verdict of manslaughter clearly put to the jury. We cannot be certain that if this had been done, and notwithstanding the correct instruction on murder, that the verdict might not have been different. This is, consequently, not a proper case for the application of s. 686(1)(*b*)(iii). [pp. 593-94]

1. In the present case, counsel for the defence *did* request that the jury charge include an instruction on “attempted murder” — which would have been open to the jury to accept on the evidence. Though the trial judge was willing to do so initially, he declined to do so following the Crown’s objection.
2. I do not think the trial judge’s error in failing to put to the jury the option of a lawful verdict that matched the theory of the defence and that was open to the jury on the evidence can be dismissed as “harmless” because, in the language of *Jackson*, “[w]e cannot be certain that if this had been done, and notwithstanding the correct instruction on murder, that the verdict might not have been different” (pp. 593-94). In the circumstances of the present case, it is not open to the appellate court to apply the curative proviso to remedy this mistake.
3. The trial judge himself commented, as mentioned, that “if it turns out that attempt[ed] murder is an included offence, notwithstanding my opinion . . ., that will be a fatal error” (A.R., vol. XII, at p. 21). I believe that the trial judge was correct in that observation.

V. Disposition

1. I would dismiss the appeal.

 The reasons of Deschamps, Rothstein and Cromwell JJ. were delivered by

1. Cromwell J. (dissenting) — I agree with my colleague Binnie J., for the reasons he sets out, that attempted murder was an offence which ought to have been left to the jury and that we should not “water down” our approach to applying the proviso as proposed by Moldaver J.A. (as he then was) dissenting in the Court of Appeal. However, I respectfully disagree with my colleague on the application of the proviso in the circumstances of this case. No one questions that the trial judge gave the jury complete and accurate instructions on causation. The jury’s verdict necessarily means that they were persuaded beyond a reasonable doubt that the gunshots caused the deceased’s death. The admitted error was failing to provide instructions on attempted murder. Those instructions would only have been relevant if the jury had a doubt about causation, which, as their verdict unambiguously attests, they did not. In those circumstances, in my respectful opinion, the error clearly had no impact on the verdict. I would allow the appeal and restore the convictions entered at trial.
2. The trial judge, by everyone’s agreement, flawlessly directed the jury on the offence of murder, including the requirement that the shooting caused the deceased’s death. The trial judge provided the jury with a decision tree which clearly indicated, as had the judge’s instructions, that in order to convict, the jury must unanimously be of the view that the Crown had proved causation beyond a reasonable doubt (A.R., vol. XV, at p. 157). The jury deliberated for five days. They asked no questions about causation. They returned a verdict of guilty of second degree murder against both respondents. The jury’s verdict of guilty of second degree murder necessarily reflected the jury’s finding, beyond a reasonable doubt, that the shooting had indeed caused the deceased’s death. That is the only conclusion with respect to causation that is consistent with the jury’s verdict.
3. I accept that the trial judge erred in law by failing to instruct the jury about the possible verdict of attempted murder. It was fairly available on the evidence. The Crown has not pressed the rather technical argument that ultimately persuaded the trial judge that he could not leave that option with the jury. The question is whether the Crown has discharged its burden to show that this error, which is not a minor one viewed in the abstract, in fact had no impact on the verdict: *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 30.
4. As noted, it is not suggested that the jury was misdirected on the issue of causation or reasonable doubt or anything else for that matter. In the event that the jury had not been persuaded beyond a reasonable doubt on the issue of causation, attempted murder would have been a possible verdict for them to consider. However, the jury’s verdict is inconsistent with that possibility. In my respectful view, the trial judge’s failure to give directions on the offence of attempted murder could not possibly have had any effect on the outcome of this trial, and it may safely be said that this omission occasioned no substantial wrong or miscarriage of justice.
5. The jury’s findings may be considered in assessing the impact of an error. Of course, care must be taken in doing so. Findings that might have been influenced by an error cannot be relied on, for example. However, it is clearly the case that the jury’s findings, to the extent that they could not have been affected by any error, may be considered and given weight in assessing whether the error could possibly have affected the result.
6. *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, is an example. There, the Crown had indicated an intention to call a witness and then had failed to do so. The trial judge erred by refusing to allow defence counsel to comment on this in his closing address to the jury. The Court applied the proviso. The conviction, the Court reasoned, showed that the jury must have accepted one witness’s uncorroborated evidence. It followed that depriving defence counsel of the right to comment on the omitted witness could not reasonably be thought to have affected the result. Thus, in applying the proviso in that case, the Court looked to the conclusions necessarily reached by the jury as reflected in their verdict and used those conclusions to assess whether there was any reasonable possibility that the verdict would have been different had the error not been made.
7. The present case, in my view, is an even stronger one for following this approach. We are not here engaged, as the Court was in *Jolivet*, in trying to predict what effect a particular line of argument might have had on the jury’s assessment of a witness’s credibility. Here, the task of assessing the impact of the error is much more straightforward: the failure to instruct on attempted murder could have had no effect, given that a properly instructed jury found that causation had been proved beyond a reasonable doubt. Proof of causation made the instructions on attempted murder legally and factually irrelevant to the jury’s deliberations. I would add that there was nothing that emerged during the jury’s deliberations to detract from this view. The jury deliberated for five days and asked some questions, but they did not raise any question about causation.
8. Wrong instructions or the omission of required instructions may have an impact on a jury’s other findings and, as I noted earlier, that will make it inappropriate to rely on those findings in applying the proviso. *R. v. Jackson*, [1993] 4 S.C.R. 573, is an example. The trial judge erred by not telling the jury that the accused Davy could be found guilty of manslaughter as a party to the offence even if they convicted his co-accused Jackson of murder. The trial judge in fact instructed the jury that “[a]ll parties to the offence are equally guilty” and expressed the view that it was “unlikely” that Davy could be guilty of manslaughter (pp. 588 and 590). Thus, the trial judge not only failed to tell the jury that Davy could be guilty of manslaughter even if they found Jackson guilty of murder, but, in addition, the judge’s instructions could well have led the jury to believe the opposite. These instructions tainted Davy’s conviction for murder. In those circumstances, it was not an answer to the erroneous instructions to say that the jury had convicted Davy of murder. They had been misdirected on that offence by the judge’s instructions that all parties to the offence are equally guilty (pp. 592-93). The error could not therefore be treated as harmless with respect to the conviction for murder.
9. I acknowledge that there is authority from the highest courts of Australia and the United Kingdom to the effect that failure to instruct on manslaughter will almost always be fatal to a conviction for murder, even when the instructions on the offence of murder were impeccable: see, e.g., *Gilbert v. The Queen*, [2000] HCA 15, 201 C.L.R. 414; *Bullard v. The Queen*, [1957] A.C. 635 (P.C.); *R. v. Coutts*, [2006] UKHL 39, [2006] 4 All E.R. 353. This Court has on at least one occasion referred with approval to this approach: *Jackson*, at p. 593. However, my respectful view is that the reasoning underlying this approach is inconsistent and faulty and should not be followed, especially when the issue before the jury does not involve the difficult distinction between the mental states for murder and manslaughter.
10. To begin, while the results of this line of authority are consistent, the reasoning underlying it is not. One explanation as to why the jury’s finding should not be given weight is that “a jury room might not be a place of undeviating intellectual and logical rigour”: *Gilbert*, *per* Callinan J.,at para. 96. Thus, absent knowledge about the possibility of conviction for a lesser offence, the jury may have convicted “out of a reluctance to see the defendant get clean away with what, on any view, was disgraceful conduct”: *R. v. Maxwell* (1990), 91 Cr. App. R. 61 (H.L.), at p. 68. As Moldaver J.A. put it in his dissenting reasons in the present case, “the palatability of a potential verdict may have played a role in the jury’s decision”: 2010 ONCA 577, 268 O.A.C. 200, at para. 162.
11. Doherty J.A., writing for a majority of the Court of Appeal in the present case, adopted a version of this reasoning. He held that the error was significant because “a jury’s fact-finding on a specific issue such as causation could be subconsciously influenced by what it is told about the legal consequences of that fact-finding” (para. 94 (emphasis added)). This seems to me to be, in essence, the point that the jury might be reluctant to see the accused “get clean away”. While Doherty J.A. did “not suggest that the jury was in fact influenced by what it was told about the consequences of its fact-finding on the causation issue”, he maintained that “there is sufficient uncertainty as to whether the jury’s fact-finding on the question of causation was tainted by the non-direction on attempted murder” (para. 96).
12. Respectfully, this is an elegantly understated way of expressing what to me is an unacceptable proposition: appellate courts should assume that a jury might relax the standard of proof of causation because the alternative would be to let the accused walk. I cannot agree, on such speculative grounds, to set aside a jury verdict of 12 citizens who are presumed to have honoured their oath and who received impeccable legal instructions on the very issue in contention.
13. If this reasoning is accepted, where might the risk of this sort of “subconscious” influence stop? Perhaps it could “taint” the jury’s consideration of the issue of identification. After all, if the jury were not sure beyond a reasonable doubt that the respondents were the perpetrators, a horrible crime might go unpunished. Perhaps the jury “subconsciously” allowed that to influence their assessment of the identification evidence. Might it have “tainted” the jury’s consideration of the accomplice’s role? Did it colour their consideration of the question of intention? This sort of speculation at the jury’s expense has no basis in fact and necessarily imputes to the jurors — and all 12 of them at that — a “subconscious” failure to fulfill their sworn duty.
14. A second approach taken in these authorities is simply to assert that the trial judge’s failure to give legal instructions on an available lesser, alternative verdict that should have been left with the jury is an injustice: see, e.g., *Coutts*, *per* Lord Hutton, at paras. 56 and 61. This approach is not based on an assumption that the jury may have chosen perhaps subconsciously to ignore the instructions they were given in order to avoid an unpalatable verdict. Respectfully, however, this second line of reasoning is simply the assertion of a conclusion that the omitted instruction gave rise to an injustice. It does not explain why the jury’s unambiguous finding, which, as a matter of law and logic, is untainted by error, cannot be relied on to show, in the particular circumstances, that the omission or misdirection was harmless.
15. In my respectful view, this sort of reasoning rests on either speculation at the jury’s expense or the simple assertion of a conclusion.
16. I also am of the view that there is a risk of extending this line of cases which, for the most part, dealt with murder convictions where manslaughter was a live possibility on the evidence at trial but was not left with the jury or was left in an erroneous way. In such cases, there will often be at least some articulable basis to think that a proper charge on manslaughter might have helped the jury to understand the rather subtle but important differences between the mental elements of that offence and murder. Of course, in this case, it cannot be suggested (and was not) that a proper charge on attempted murder could have assisted the jury’s comprehension of the law of causation. Nothing about the legal elements of the offence of attempted murder could possibly have assisted the jury’s understanding of the requirement that the Crown establish causation beyond a reasonable doubt.
17. One is therefore left with the speculative chance of some “subconscious” effect prompted by the jury’s supposed reluctance to acquit the respondents or the simple assertion that failure to give the omitted instruction generally constitutes an injustice. I respectfully cannot accept either approach. The first relies on speculation that in my respectful view is wrong in law, wrong as a matter of policy and insufficiently respectful of the jury’s efforts over five days of deliberations to reach a true verdict. The second approach in these authorities in my respectful view is unsupported by logic or principle.
18. In short, my view is that the Crown has discharged its burden to show that if the legal error here — the failure to instruct on attempted murder — had not been made, the result would inevitably have been the same. The issue is not whether the evidence of guilt was “overwhelming”. It was not. The issue is whether there was any reasonable possibility that the error could have had any impact on the verdict. The jury’s verdict in the circumstances of this case shows that there was not.
19. I would allow the appeal and restore the jury’s verdicts at trial.

 *Appeal dismissed,* Deschamps*,* Rothstein *and* Cromwell JJ. *dissenting.*

 Solicitor for the appellant:  Attorney General of Ontario, Toronto.

 Solicitors for the respondent Robert Sarrazin:  Russell Silverstein & Associate, Toronto.

 Solicitors for the respondent Darlind Jean:  Lockyer Campbell Posner, Toronto.