

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Mayuran, 2012 SCC 31, [2012] 2 S.C.R. 162 | **Date:** 20120628**Docket:** 34526 |

**Between:**

**Her Majesty The Queen**

Appellant

and

**Suganthini Mayuran**

Respondent

**Coram:** LeBel, Deschamps, Fish, Abella, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**(paras. 1 to 51) | Abella J. (LeBel, Deschamps, Fish, Cromwell, Moldaver and Karakatsanis JJ. concurring) |

R. *v.* Mayuran, 2012 SCC 31, [2012] 2 S.C.R. 162

Her Majesty The Queen *Appellant*

v.

Suganthini Mayuran *Respondent*

**Indexed as: R. *v.* Mayuran**

2012 SCC 31

File No.: 34526.

2012:  April 19; 2012:  June 28.

Present: LeBel, Deschamps, Fish, Abella, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for quebec

 *Criminal law — Defences — Provocation — Accused convicted of second degree murder — Whether defence of provocation should have been put to jury — Whether objective element of provocation had an air of reality — Whether trial judge committing errors in instructions to jury — If so, whether curative proviso applicable.*

 The accused was convicted of second degree murder in the death of her sister‑in‑law who had been stabbed 45 times. Two members of the accused’s family testified that the accused confessed to killing the victim because the victim had ridiculed her about her learning ability and her level of education. The accused denied having committed or having confessed to the murder, and offered an account of the day’s events that conflicted with the rest of the family’s testimony. The family’s story was corroborated by an independent witness, by receipts and by cellular phone records. The accused’s clothing was found in a bucket of bloody water in the bathroom, her blood was mixed with the blood of the victim on the blade of a knife said to be the murder weapon, her DNA was on the knife’s handle, and cuts she suffered were said to be consistent with an injury caused while stabbing someone. On appeal, a majority of the Quebec Court of Appeal set aside the conviction and ordered a new trial. In its view, the trial judge ought to have put the defence of provocation to the jury based on the accused’s alleged confession to killing the victim because she had been ridiculed by her. The dissenting judge found that there was no air of reality to the defence of provocation on the facts of the case.

 *Held*: The appeal should be allowed. The conviction is restored.

 The defence of provocation requires that there be a wrongful act or insult of such a nature that it is sufficient to deprive an ordinary person of the power of self‑control and that the accused act on that insult before there was time for her passion to cool. In order to satisfy the objective element of the defence, the evidence must be capable of giving rise to a reasonable doubt that an ordinary person in the accused’s circumstances would be deprived of the power of self‑control when hearing insults about his or her level of education. Based on the record, a properly instructed jury could not conclude that an ordinary person in the accused’s circumstances would be deprived of self‑control when “scolded” about her level of education to such a degree that she would stab the person 45 times in a responsive rage. It has no air of reality. As a result, there was no duty on the trial judge to instruct the jury on the defence of provocation.

 The curative proviso can be applied in two situations: where the error is harmless or so minor that it could not have had any impact on the verdict; and where, even if the error is not minor, the evidence against the accused is so overwhelming that any other verdict would have been impossible to obtain. The trial judge’s instruction to the jury in this case contained several errors, but most were minor and could not possibly have affected the verdict. And while the trial judge’s error on the use of the accused’s confession was not harmless, the case against her was overwhelming. As a result, the curative proviso applies.

**Cases Cited**

 **Referred to:** *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350; *R. v. Thibert*, [1996] 1 S.C.R. 37; *R. v. Hill*, [1986] 1 S.C.R. 313; *Lewis v. The Queen*, [1979] 2 S.C.R. 821; *Colpitts v. The Queen*, [1965] S.C.R. 739; *R. v. White* (1996), 29 O.R. (3d) 577, aff’d [1998] 2 S.C.R. 72; *R. v. Gunning*, 2005 SCC 27, [2005] 1 S.C.R. 627; *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42; *R. v. Fleet* (1997), 120 C.C.C. (3d) 457; *R. v. MacKenzie*, [1993] 1 S.C.R. 212; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Rojas*, 2008 SCC 56, [2008] 3 S.C.R. 111; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26; *R. v. Jacquard*, [1997] 1 S.C.R. 314.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 232.

 APPEAL from a judgment of the Quebec Court of Appeal (Beauregard, Rochon and Duval Hesler JJ.A.), 2011 QCCA 1823, [2011] J.Q. no 13938 (QL), 2011 CarswellQue 10626, setting aside the accused’s conviction for second degree murder and ordering a new trial. Appeal allowed.

 *Louis Bouthillier* and *Alexandre Boucher*, for the appellant.

 *Martin Latour* and *Maude Pagé‑Arpin*, for the respondent.

 The judgment of the Court was delivered by

1. Abella J. — Suganthini Mayuran (Suganthini) immigrated to Canada from Sri Lanka in 2004. She had married Mayuran Thangarajah (Mayuran) in an arranged marriage earlier that year. When she arrived in Canada, she moved into an apartment in Montréal with her husband, his father, his mother, his younger sister, his brother Manchutan and Manchutan’s wife Dayani.
2. On December 3, 2004, Suganthini was arrested for the murder of her sister-in-law Dayani. Dayani had been stabbed 45 times.
3. The Crown’s case at the jury trial was that Suganthini was alone in the apartment with Dayani at the time of death and therefore had the exclusive opportunity to commit the offence. The Crown relied on the testimony of the Thangarajah family to establish its case, supported by independent evidence corroborating their story and linking Suganthini to the murder.
4. Various members of the family testified. Their collective evidence can be summarized as follows. Mayuran’s father left to go to temple at 7:30 that morning, while Mayuran, his mother, and his brother went to the family-owned and operated convenience store in Laval. Mayuran’s brother and mother shopped for supplies, leaving Mayuran in charge of the store. When they finished shopping, the brother was left at the store, while Mayuran and his mother returned to Montréal. The younger sister said that she left the apartment at 10 or 10:30 a.m. to attend a private class with a tutor, leaving only Suganthini and her sister-in-law Dayani in the apartment.
5. Several pieces of evidence corroborated the family’s story: a delivery person saw Mayuran’s brother Manchutan in the family store at 10:30 a.m. and again at 11:30 a.m.; there were receipts confirming the shopping trip the mother and Mayuran’s brother had taken, including a receipt from Loblaws in Laval shortly after 10 a.m.; and cellular phone records confirmed that the brother received a phone call in Laval at 10:52 a.m. All of these supported their account, which left Suganthini alone with her sister-in-law Dayani in the apartment until some time after 11:30 a.m.
6. At around 11 or 11:30 a.m. on December 3, 2004, Suganthini called her father-in-law at the temple saying that a thief had entered the apartment and hurt Dayani. The father-in-law then called Dayani’s husband, who was at the store. He also asked a member of the temple to contact the police, then returned home. When the father-in-law arrived at the apartment, he buzzed the intercom but received no answer. He then tried calling the house from a nearby store, but again got no answer. When a neighbour finally let him into the building, he entered the apartment and heard Suganthini crying in the locked master bedroom. She directed him to another bedroom where Dayani was lying on the floor. The father-in-law called 911. The police arrived before he finished his call.
7. Of particular relevance to this appeal, Suganthini’s husband Mayuran and her mother-in-law testified that while Suganthini was in prison, she confessed to the murder in several telephone conversations with them. She told them she killed Dayani because Dayani had ridiculed her about her learning ability and her level of education. They said that a few phone calls later, however, Suganthini denied having killed Dayani. Her newer version was that she had been threatened by the real murderer, whose name she would not reveal.
8. The police arrived at around noon. They found Suganthini crying and with a cut on her hand. She told them that the murder had been committed by a thief who had entered the ground floor apartment through the kitchen. Though the kitchen door was open, there were no tracks in the fresh snow leading to it. Some of Suganthini’s clothing — a skirt and T-shirt — was found in a bucket of bloody water in the bathroom.
9. Luc Simoncelli, a doctor who arrived on the scene slightly after noon, testified that the time of death was shortly before his arrival, though he acknowledged that the wounds could have been inflicted as much as two hours earlier.
10. An autopsy found 45 stab wounds in Dayani’s body. The pathologist, Dr. André Lauzon, testified that given their lack of depth, the wounds had likely been inflicted by a knife with a broken tip. A knife with a broken tip was in fact found at the scene, and François Julien, the DNA expert called by the Crown, testified that he found both Dayani’s and Suganthini’s blood on the blade of the knife. Only Suganthini’s DNA was found on the handle. Dr. Lauzon also said that the cuts Suganthini received on her hand were consistent with an injury that could have been caused by stabbing someone.
11. Suganthini’s defence at trial was that she was not the person who killed Dayani. She testified that she woke up at 9 a.m. and saw the younger sister leaving the apartment before 9:30 a.m. At about 9:45 a.m., she said she heard her brother-in-law Manchutan and his wife Dayani arguing intensely. She went to their bedroom, where she said she saw Manchutan with a knife pointed towards Dayani. When she entered the bedroom, Manchutan looked at her and said: “Did you know that she has cheated on me? Did you know that the baby in her womb is - - the father of the child is Mayuran [Suganthini’s husband].”
12. Suganthini said that she tried to “snatch” the knife from him, which resulted in a cut to her hand. Manchutan pushed her out of the room, at which point she locked herself inside her mother-in-law’s bedroom. She said that Manchutan later yelled at her through the door, telling her never to disclose the day’s events, and to tell anyone who asked that a robber had broken into the house. After an indeterminate period, Suganthini left the bedroom, saw Dayani bleeding on the floor of her own bedroom and called her father-in-law.
13. Suganthini denied having confessed to the murder in the prison telephone calls. She said that she had tried to tell her mother-in-law the truth about the argument she saw between Dayani and her husband, but her mother-in-law had hung up the phone. Her evidence about the bloody clothing was that she put it into the bucket because it had been soiled during menstruation overnight.
14. Suganthini was convicted of second degree murder.
15. On appeal, a majority in the Quebec Court of Appeal set aside the conviction and ordered a new trial. In its view, the trial judge ought to have put the defence of provocation to the jury based on the alleged telephone conversations from prison whereby Suganthini confessed to killing Dayani because she had been ridiculed by her.
16. The Court of Appeal also identified four other errors in the jury instruction, but applied the curative proviso because these errors “could have had [no] impact on the verdict in light of the evidence”.
17. In the dissent that gives rise to this “as of right” appeal, Rochon J.A. agreed with the application of the proviso, but found that there was no air of reality to the defence of provocation on the facts of this case. I agree with his conclusion.

Analysis

1. The primary issue in this appeal is whether the Court of Appeal erred in concluding that there was a sufficient evidentiary foundation for the defence of provocation to have been put to the jury notwithstanding that it was not raised by the defence at trial.
2. The defence of provocation is set out in s. 232 of the *Criminal* *Code*:

 **232.** (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

 (2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.

 (3) For the purposes of this section, the questions

 (*a*) whether a particular wrongful act or insult amounted to provocation, and

 (*b*) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

 are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

1. This Court has held that a defence should only be put to the jury if it has an “air of reality” (*R. v. Cinous*, [2002] 2 S.C.R. 3, at para. 50). The air of reality test imposes two duties on the trial judge: to “put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused”; and “to keep from the jury defences lacking an evidential foundation” (*Cinous*, at para. 51). Whether a defence arises on the evidence of the accused or of the Crown, the trial judge must put the defence to the jury if it has an air of reality (*Cinous*, at para. 53; *R. v. Osolin*, [1993] 4 S.C.R. 595).
2. In determining whether a defence has an air of reality, there must be an examination into the sufficiency of the evidence. It is not enough for there to be “some evidence” supporting the defence (*Cinous*, at para. 83). The test is “whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true” (*Cinous*, at para. 65). For defences that rely on indirect evidence or defences like provocation that include an objective reasonableness component, the trial judge must examine the “field of factual inferences” that can reasonably be drawn from the evidence (*Cinous*,at para. 91).
3. The relationship between the air of reality and the defence of provocation was recently considered by this Court in *R. v.* *Tran*, [2010] 3 S.C.R. 350, where Charron J. explained that

 [f]or the defence to succeed, the jury must have a reasonable doubt about whether each of the elements of provocation was present. This necessarily requires that there be a sufficient evidential basis in respect of each component of the defence before it is left to the jury: the evidence must be reasonably capable of supporting the inferences necessary to make out the defence before there is an air of reality to the defence . . . . [para. 41]

1. There are two elements to the defence of provocation: an objective and a subjective one. The two components were described in *R. v. Thibert*, [1996] 1 S.C.R. 37:

 First, there must be a wrongful act or insult of such a nature that it is sufficient to deprive an ordinary person of the power of self-control as the objective element. Second, the subjective element requires that the accused act upon that insult on the sudden and before there was time for his passion to cool. [Emphasis deleted; para. 4.]

(See also *Tran*, at para. 23.)

The objective element of the defence requires that “(1) there must be a wrongful act or insult; and (2) the wrongful act or insult must be sufficient to deprive an ordinary person of the power of self-control” (*Tran*, at para. 25).

1. In order for the defence of provocation to have an air of reality in this case, the evidence must be capable of giving rise to a reasonable doubt that an ordinary person in Suganthini’s circumstances would be deprived of the power of self-control when hearing insults about his or her level of education. In my respectful opinion, that conclusion is simply untenable.
2. The majority in the Court of Appeal found that the defence of provocation had an air of reality based on the alleged prison conversation in which Suganthini confessed that she killed Dayani because she had made fun of her. The fact that there were 45 stab wounds, the court concluded, supported the inference that the murder had “occurred in the heat of passion caused by sudden provocation”. But, the majority did not in any way address whether the objective element of the defence was met.
3. This Court has repeatedly reinforced the importance of the objective element. As Dickson C.J. said in *R. v. Hill*, [1986] 1 S.C.R. 313, “We seek to encourage conduct that complies with certain societal standards of reasonableness and responsibility. In doing this, the law quite logically employs the objective standard of the reasonable person” (pp. 324-25), whom he defined as someone having “a normal temperament and level of self-control”, and as not being “exceptionally excitable, pugnacious or in a state of drunkenness” (p. 331).
4. Dickson C.J. acknowledged that “particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test of provocation”, including features “such as sex, age, or race” (*Hill*, at p. 331; see also *Thibert*, at para. 14). But he emphasized that these characteristics are only relevant to the extent that they help determine how an *ordinary* person would react in the circumstances. As Charron J. warned in *Tran*:

 Personal circumstances may be relevant to determining whether the accused was in fact provoked — the subjective element of the defence — but they do not shift the ordinary person standard to suit the individual accused. In other words, *there is an important distinction between contextualizing the objective standard, which is necessary and proper, and individualizing it, which only serves to defeat its purpose*.[Emphasis added; para. 35.]

1. In arguing that provocation should have been put to the jury, the defence relied on evidence from Suganthini’s husband Mayuran about the prison conversation between him and Suganthini to support the air of reality to the defence:

 A. . . . At that moment, we asked her what happened and she said that out of her anger, she did like that and then, far from myself, *I asked her why she did like that and she answered that she was learning more than me and I was very angry*. It was because of that, I did like that and after a while, the phone call, it was automatically there was a cut.

. . .

 A. [My mother] was the one who asked her what happened. I was there at that moment and she said what happened and at that moment, when we asked her, she said like that and she said that *she did like that because she was angry* and after she spoke, my mother, with her and I, myself, I asked her for my side, why she did like that and she answered the same way that she did like that.

. . .

 A. . . . I asked her . . . what happened, she told me in truth actually, I did it. Then, when I asked her why she did it, *she gave me a reason that she was telling her that she was more educated than me*.

 Q. Who was telling that?

 A. Suganthini told me that *she was sort of ridiculing her about her level of education*.

 Q. Who was ridiculing her?

. . .

 A. Dayani.

. . .

 A. The moment when I spoke to her, I asked her why she did like that and she said that she was the one who did that and then *I asked her why and she said about the studies and it was because of that argument, she was angry and she said she did with a anger*. [Emphasis added.]

1. The defence also pointed to the evidence from Suganthini’s mother-in-law:

 A. I asked her what happened, why did she do it.

 Q. What did Suganthini answer?

 A. Suganthini said: I have done it. And when I asked her why did you do it, *she said she scolded at, she reproached me and that’s why I did it*.

 Q. Did she say anything else?

 A. I told her: Okay, she scolded at you but why didn’t you just leave the place, go out of the apartment if she had provoked you?

 Q. What did she answer?

 A. She said: *She scolded at me and that’s why I did it*.

. . .

 A. *She said she reproached me and that’s why she did it*. [Emphasis added.]

1. In addition, Suganthini argued that her particular circumstances were relevant in assessing her reaction, including the fact that she was a new immigrant who was attempting to integrate into the community as quickly as possible, which heightened her sensitivity to insults relating to her level of education and ability to learn. These considerations, however, while relevant, do not transform her conduct into an act that an ordinary person would have committed. As Charron J. noted in *Tran*, this would “individualize” the objective element of the test and defeat its purpose.
2. Based on this record, a properly instructed jury could not conclude that an ordinary person in Suganthini’s circumstances would be deprived of self-control when “scolded” about her level of education to such a degree that she would stab the person 45 times in a responsive rage. This, it seems to me, has absolutely no air of reality. There was, as a result, no duty on the trial judge to instruct the jury on the defence of provocation.
3. The four remaining errors identified by the Court of Appeal relate to the charge to the jury. Like the Court of Appeal, I would apply the curative proviso.
4. The Court of Appeal found that the trial judge erred in the instruction on motive. The jury was told that they could take into account Suganthini’s potential motive for murder, namely “that [Dayani] was growling, reproaching her, humiliating her and ridiculing her”, in coming to their conclusion. The Court of Appeal found that the trial judge should also have told the jury to consider Manchutan’s motive, as alleged by Suganthini, that his wife was pregnant with Suganthini’s husband’s child.
5. Dickson J. commented in *Lewis v. The Queen*, [1979] 2 S.C.R. 821, that trial judges are to provide a balanced jury instruction on the issue of motive in order “to give the jury matters of evidence *essential* in arriving at a just conclusion” (p. 837 (emphasis added), citing *Colpitts v. The Queen*, [1965] S.C.R. 739, at p. 752; see also *R. v. White* (1996), 29 O.R. (3d) 577 (C.A.), at pp. 607-8, aff’d [1998] 2 S.C.R. 72). The Crown’s case, however, was grounded in Suganthini’s exclusive opportunity to commit the offence, not motive. While it would have been preferable if the trial judge had reminded the jury about Suganthini’s evidence, the failure to do so in this case was relatively minor given the marginal role of motive in the Crown’s case.
6. The Court of Appeal also found the following comment by the trial judge about Suganthini’s fatigue to have been an error:

 [translation] You can also take into consideration the testimony of the accused when she said that she measures 5 feet and weighs 90 pounds, about the same weight as the victim. She said several times, after the incidents in the house, at the hospital and at the police station, that she was very tired. *We could think that a person weighing 90 pounds, who has just stabbed another person 45 times and killed them, would be very tired*. [Emphasis added.]

1. The issue of a judge’s right to express an opinion on the evidence was discussed by Charron J. in *R. v. Gunning*, [2005] 1 S.C.R. 627, where she stated:

 It is perhaps trite but nonetheless fundamental law that on a jury trial, it is for the judge to decide all questions of law and to direct the jury accordingly; but the jury, who must take its direction on the law from the judge, is the sole arbiter on the facts. The judge also has the duty, insofar as it is necessary, to assist the jury by reviewing the evidence as it relates to the issues in the case. *The judge is also entitled to give an opinion on a question of fact and express it as strongly as the circumstances permit, so long as it is made clear to the jury that the opinion is given as advice and not direction*.

. . .

 . . . it is never the function of the judge in a jury trial to assess the evidence and make a determination that the Crown has proven one or more of the essential elements of the offence and to direct the jury accordingly. It does not matter how obvious the judge may believe the answer to be. Nor does it matter that the judge may be of the view that any other conclusion would be perverse. *The trial judge may give an opinion on the matter when it is warranted, but never a direction*. [Emphasis added; paras. 27 and 31.]

1. In *Gunning*, the trial judge had told the jury how to decide an essential element of the offence. This case is very different. The trial judge used qualified language which did no more than suggest an inference that could potentially be drawn from the evidence. Ideally, the trial judge should not have speculated to the jury about what may have caused Suganthini’s fatigue. But the statement does not rise to the level of a “direction” to the jury on how it should decide any element of the offence, and it was accompanied by several instructions to the jury to the effect that they were the ultimate arbiters of the facts. Any error, as a result, was minor.
2. The Court of Appeal also said that the trial judge erred because since this case was essentially based on circumstantial evidence, a specific instruction was required, telling the jury that it could only convict if it was satisfied that the *only* “reasonable inference” to be drawn from that evidence was that Suganthini was guilty. However this Court explained in *R. v. Griffin*, [2009] 2 S.C.R. 42, that “[w]e have long departed from any legal requirement for a ‘special instruction’ on circumstantial evidence”. What is important is that in cases that rely entirely on circumstantial evidence, the jury is made aware of how they can use that evidence to establish guilt beyond a reasonable doubt. The trial judge in this case explained to the jury the nature of circumstantial evidence, the inferences that can properly be drawn from that evidence, and the burden of proof beyond reasonable doubt. In my view, the instruction satisfied the test in *Griffin* (see also *R. v. Fleet* (1997), 120 C.C.C. (3d) 457 (Ont. C.A.), at para. 20, cited in *Griffin*, at para. 33).
3. The final error was the trial judge’s instruction to the jury dealing with the alleged prison confession. The Court of Appeal found that since Suganthini had contested the truth of these statements, the trial judge should have given an instruction to the jury telling them that they had to be convinced beyond a reasonable doubt that Suganthini had in fact made the statements confessing to the murder before considering them along with the rest of the evidence to determine if she was guilty.
4. After reviewing the confession evidence, the trial judge told the jury to “use [their] common sense” in deciding whether Suganthini had made the statements:

 If you decide that the accused made a statement that may help her in her defence or if you cannot decide whether she made it, *you will consider that statement along with the rest of the evidence in deciding whether you have a reasonable doubt about the accused’s guilt*.

 You may give anything you find the accused said as much or as little importance as you think it deserves in deciding this case. It is for you to say. *Anything you find the accused said, however, is only part of the evidence of this case. You should consider it along with and in the same way as well all the other evidence*. [Emphasis added.]

1. At the Court of Appeal and before this Court, the Crown conceded that this instruction was an error. The error stems from this Court’s decision in *R. v. MacKenzie*, [1993] 1 S.C.R. 212. As a general rule, the evidence in a case should be considered as a whole in determining whether there is a reasonable doubt as to guilt (*R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Rojas*, [2008] 3 S.C.R. 111, at para. 43). But *MacKenzie* held that, “on important items of evidence the jury may require guidance on how to approach its task”. As a result,

 . . . where a statement by an accused at trial is entirely at odds with a previous out-of-court statement by the accused, and the jury believes the statement at trial, or is left in reasonable doubt that it is true, then the jury must reject the out-of-court statement; the accused must be given the benefit of the doubt.  In arriving at that conclusion, the jury should, of course, give consideration to the evidence as a whole. [p. 239]

1. A specific instruction of this kind is not required in every case where there is conflicting evidence about the accused’s out-of-court statements. A *MacKenzie* instruction is only required where “the credibility of [the] conflicting statements go[es] directly to the ultimate issue in dispute” and the jury’s decision to accept one statement “amount[s] to choosing between the two competing theories of the case” (*White* (S.C.C.), at para. 52). There is no reason to give a specific instruction where the conflicting statements “are not individually crucial to the determination of the ultimate issue” (para. 53).
2. If the jury believed the evidence about Suganthini’s prison confession beyond a reasonable doubt, then it would necessarily have found her guilty of murder. As a result, in accordance with *MacKenzie*,the trial judge should have instructed the jury that considering the evidence as a whole, if they believed Suganthini’s testimony at trial, or if they were left with reasonable doubt that she had confessed, they must reject the out-of-court statement. The failure to do so was an error.
3. This brings us to considering whether the curative proviso applies.
4. The curative proviso can be applied in two situations: where the error is so harmless or minor that it could not have had any impact on the verdict; and where, even if the error is not minor, the evidence against the accused is so overwhelming that any other verdict would have been impossible to obtain (*R. v. Van*, [2009] 1 S.C.R. 716, at para. 34; *R. v. Trochym*, [2007] 1 S.C.R. 239, at para. 81; *R. v. Khan*, [2001] 3 S.C.R. 823, at para. 26).
5. The defence had not objected at trial to any of the errors it raised on appeal, a fact that, while not determinative, “merit[s] consideration by the reviewing court” as an indication that the error was “neither serious nor significant” (*R. v. Jaw*, [2009] 3 S.C.R. 26, at para. 44; *Van*, at para. 43; *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 38).
6. Most of the errors were minor and could not possibly have affected the verdict. The *MacKenzie* error was more serious, but I am satisfied that it was not fatal because the Crown’s case against Suganthini was overwhelming. The Crown advanced a narrative that was largely based on the testimony of the Thangarajah family, which placed Suganthini alone in the apartment with Dayani at the critical moment, a version that was corroborated by testimony and physical evidence. Suganthini admitted to being in the apartment, but advanced a wholly contradictory version of the day’s events, which positioned her as the only witness to Dayani’s murder by Dayani’s husband Manchutan.
7. According to Suganthini, Dayani and her husband were fighting at 9:45 a.m. and the murder happened at roughly 10 a.m. On the Thangarajah family’s evidence, Dayani’s husband left in the morning with Mayuran and his mother to go to Laval and only returned to the apartment later in the day, well after his father had returned. The family’s story, which made it impossible for the brother to be at the apartment during the murder, was corroborated by a witness who saw him at the store, by receipts and by cellular phone records.
8. More critically, the evidence as a whole entirely undermined Suganthini’s version of the events. Her initial story was that a thief had come into the apartment through the kitchen door — despite the absence of tracks in the snow — and that she had cut her hand by having it caught in a door. At trial, she changed her story, and attributed the original fabrication to the brother-in-law’s threats. Yet her clothing was found in a bucket of bloody water in the bathroom, her blood was mixed with the blood of the victim on the blade of the knife, her DNA was on the handle, and her cuts were said to be consistent with an injury caused while stabbing someone. There was, on the other hand, no physical evidence linking Dayani’s husband to the offence.
9. The trial judge gave a proper *W. (D.)* instruction, telling the jury that if Suganthini’s testimony or the evidence as a whole left them with reasonable doubt as to her guilt, they must acquit. By convicting Suganthini of second degree murder, the jury clearly rejected her evidence and accepted the version put forward by the Crown beyond a reasonable doubt. Even if we were to entirely ignore the confession evidence, the rest of the evidence in this case so severely undermined Suganthini’s story and bolstered that of the Thangarajah family, that there is no realistic possibility that the verdict would have been different if the jury were differently instructed.
10. I would allow the appeal and restore the conviction.

 *Appeal allowed.*

 Solicitor for the appellant:  Poursuites criminelles et pénales du Québec, Montréal.

 Solicitors for the respondent:  Labelle, Boudrault, Côté et Associés, Montréal.