

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Gauthier, 2013 SCC 32, [2013] 2 S.C.R. 403 | **Date:** 20130607**Docket:** 34444 |

**Between:**

**Cathie Gauthier**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Attorney General of Ontario**

Intervener

**Official English Translation:** Reasons of Wagner J.

**Coram:** LeBel, Fish, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**(paras. 1 to 65)**Dissenting Reasons:**(paras. 66 to 107) | Wagner J. (LeBel, Abella, Rothstein, Moldaver and Karakatsanis JJ. concurring)Fish J. |

R. *v.* Gauthier, 2013 SCC 32, [2013] 2 S.C.R. 403

Cathie Gauthier Appellant

v.

Her Majesty The Queen Respondent

and

Attorney General of Ontario Intervener

**Indexed as: R. *v.* Gauthier**

2013 SCC 32

File No.: 34444.

2012:  December 13; 2013:  June 7.

Present: LeBel, Fish, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for quebec

 *Criminal law — Defences — Charge to jury — Defences that are incompatible in theory — Accused charged with being party, together with her spouse, to murder of their three children — Alternative defence that accused had abandoned common intention to kill children — Whether it was appropriate to exclude defence of abandonment from defences put to jury on basis that it was incompatible with defence’s principal theory, absence of mens rea.*

 *Criminal law — Defences — Abandonment — Participation in crime — Accused charged with being party, together with her spouse, to murder of their three children — Alternative defence that accused had abandoned common intention to kill children — Essential elements of defence of abandonment in context of forms of participation in crime provided for in s. 21(1) and s. 21(2) of Criminal Code — Whether defence of abandonment raised by accused met air of reality test.*

 G was charged with being a party, together with her spouse, L, to the murder of their three children at the dawn of the year 2009. According to the Crown’s theory, G was a party to the murder in planning it as part of a murder‑suicide pact and in supplying the murder weapon. She did not act to prevent the children from being poisoned with drinks served by her spouse, which contained Gravol and oxazepam. Thus, she aided L to kill the children. At her jury trial, G submitted in her defence that she had not bought the medication to poison her children, that she was in a dissociative state on December 31, 2008 when she wrote some incriminating documents, and that this state meant she could not have formed the specific intent to commit the murders. In the alternative, should her argument based on the absence of *mens rea* be rejected, she claimed to have abandoned the common purpose of killing the children and to have clearly communicated her intention to do so to her spouse. The jury found G guilty of the first degree murder of her three children. The Court of Appeal upheld the guilty verdict, concluding that the trial judge had not erred in refusing to put the defence of abandonment to the jury, since it was incompatible with the defence’s principal theory.

 *Held* (Fish J. dissenting): The appeal should be dismissed.

 *Per* LeBel, Abella, Rothstein, Moldaver, Karakatsanis and WagnerJJ.: There is no cardinal rule against putting to a jury an alternative defence that is at first glanceincompatible with the primary defence. The issue is not whether such a defence is compatible or incompatible with the primary defence, but whether it meets the air of reality test. In any case, the trial judge must determine whether the alternative defence has a sufficient factual foundation, that is, whether a properly instructed jury acting reasonably could accept the defence if it believed the evidence to be true.

 The defence of abandonment must be submitted to the jury only if there is evidence in the record that is reasonably capable of supporting the necessary inferences in respect of each of the elements of this defence. The defence can be raised by an accused who is a party to an offence on the basis that he or she did or omitted to do anything for the purpose of aiding any person to commit the offence, or abetted any person in committing it (s. 21(1) of the *Criminal Code*), or on the basis that he or she had formed with other persons an intention to carry out an unlawful purpose and to assist each other therein and that an offence was committed in carrying out the common purpose (s. 21(2) of the *Criminal Code*), if the evidence shows (1) that there was an intention to abandon or withdraw from the unlawful purpose; (2) that there was timely communication of this abandonment or withdrawal from the person in question to those who wished to continue; (3) that the communication served unequivocal notice upon those who wished to continue; and (4) that the accused took, in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps in the circumstances either to neutralize or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence. There will be circumstances in which timely and unequivocal communication by the accused of his or her intention to abandon the unlawful purpose will be considered sufficient to neutralize the effects of his or her participation in the crime. But there will be other circumstances, primarily where a person has aided in the commission of the offence, in which it is hard to see how timely communication to the principal offender of the person’s intention to withdraw from the unlawful purpose will on its own be considered reasonable and sufficient.

 In this case, G’s evidence that she communicated her withdrawal from the deadly plan and that her communication was timely and unequivocal is insufficient. The only relevant passage from her testimony is one in which she used the plural pronoun “we” (using the French pronoun “*on*” as an equivalent for the plural “*nous*”) in saying “I told Marc we couldn’t [do that]”. But even if it were assumed that this evidence would be sufficient for a jury to reasonably conclude that G had communicated her intention to withdraw from the plan and that her communication was timely and unequivocal, that communication would not on its own have sufficed, in the circumstances of this case, for the judge to put the defence of abandonment to the jury. G did more than merely promise to take part in the murder‑suicide pact. She supplied her spouse with the intoxicants he used to cause the children’s deaths. She therefore had to do more either to neutralize the effects of her participation or to prevent the commission of the offence. For example, she could have hidden or destroyed the medication she had purchased, remained watchful and taken the children to a safe place for the evening, insisted that her spouse give her verbal confirmation of what he intended to do, or simply called the authorities. The record did not therefore contain evidence upon which a properly instructed jury acting reasonably could have found that G had abandoned the common unlawful purpose, and could accordingly have acquitted her, if it believed the evidence to be true. The defence of abandonment therefore did not meet the air of reality test, and the trial judge was not required to put the defence to the jury.

 *Per* Fish J. (dissenting): Canadian courts have for more than 70 years held that the defence of abandonment comprises only two essential elements: (i) change of intention; and (ii) where practical and reasonable, timely and unequivocal notice of withdrawal.  This test has been repeatedly and consistently applied in prosecutions under s. 21(1) and s. 21(2) of the *Criminal Code* alike. The defence of abandonment does not require that the accused take steps to neutralize prior participation in the criminal enterprise or to prevent the commission of the offence. While such evidence may strengthen a defence of abandonment, failure to take neutralizing or preventative steps is not fatal.

 In light of the state of the law universally accepted in Canada at the time of G’s trial, it would be fundamentally unfair at this stage to fault her for failing to demonstrate anything more than a change of intention, plus timely and unequivocal notice of withdrawal from the murder‑suicide pact. Since G’s testimony provided some evidence on these two essential elements, there was an air of reality to the defence. The trial judge therefore erred by withholding the defence of abandonment from the jury. Incompatibility between G’s defence of abandonment and her primary defence should not be relied upon to deprive the accused of a defence for which an air of reality has been established.

 G testified that she told L his plan did not make sense and he “could not do it”. She also told him that she did not want to be a part of it. She demonstrated her disapproval of the murder‑suicide pact by tearing up two documents: a last will and testament written by her and a story of L’s life containing references to the pact. She was convinced by his facial expression that the murder‑suicide pact was off. This testimony provides some evidence that G no longer intended to participate in the murder‑suicide pact and that she provided timely and unequivocal notice of this change of intention to the principal offender. That the evidence could have left the jury with a reasonable doubt as to G’s guilt is all that was required. It was for the jury to determine whether G’s words and conduct were believable and sufficient to demonstrate timely and unequivocal notice of withdrawal.

 G is entitled to a fresh trial, where the jury will not be wrongly prevented from considering on its merits her defence of abandonment, however weak and unpromising this Court might believe it to be.

**Cases Cited**

By Wagner J.

 **Considered:** *Wu v. The King*, [1934] S.C.R. 609; *R. v. Whitehouse* (1940), 55 B.C.R. 420; **referred to:** *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *R. v. Caron* (1998), 126 C.C.C. (3d) 84; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Faid*, [1983] 1 S.C.R. 265; *Miller v. The Queen*, [1977] 2 S.C.R. 680; *Henderson v. The King*, [1948] S.C.R. 226; *R. v. Kirkness*, [1990] 3 S.C.R. 74; *R. v. Bird*, 2009 SCC 60, [2009] 3 S.C.R. 638; *R. v. Fournier*, 2007 QCCA 1822 (CanLII).

By Fish J. (dissenting)

 *R. v. Whitehouse* (1940), 55 B.C.R. 420; *Henderson v. The King*, [1948] S.C.R. 226; *R. v. de Tonnancourt* (1956), 115 C.C.C. 154; *R. v. Merrifield*, 1977 CarswellOnt 1806; *Miller v. The Queen*, [1977] 2 S.C.R. 680; *R. v. Wagner* (1978), 8 B.C.L.R. 258; *R. v. Joyce* (1978), 42 C.C.C. (2d) 141; *R. v. Kirkness*, [1990] 3 S.C.R. 74; *R. v. Johanson* (1995), 166 A.R. 60; *R. v. Fournier*, 2002 NBCA 71, 252 N.B.R. (2d) 256; *R. v. McKercher*, [2002] O.J. No. 5859 (QL); *R. v. Forknall*, 2003 BCCA 43, 176 B.C.A.C. 284; *R. v. Lacoursière* (2002), 7 C.R. (6th) 117; *R. v. P.K.*, 2006 ABCA 299, 397 A.R. 318; *R. v. S.R.B.*, 2009 ABCA 45, 448 A.R. 124, rev’d 2009 SCC 60, [2009] 3 S.C.R. 638 (*sub nom.* *R. v. Bird*); *R. v. Ball*, 2011 BCCA 11, 298 B.C.A.C. 166; *R. v. Leslie*, 2012 BCSC 683 (CanLII); *R. v. O’Flaherty*, [2004] EWCA Crim 526, [2004] 2 Cr. App. R. 20 (p. 315); *R. v.* *Otway*, [2011] EWCA Crim 3 (BAILII); *R. v. Fournier*, 2007 QCCA 1822 (CanLII); *R. v. Edwards*, 2001 BCSC 275 (CanLII); *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 21.

**Authors Cited**

Campbell, Mark. “Turning Back the Clock: Aiders and the Defence of Abandonment” (2010), 14 *Can. Crim. L.R.* 1.

Manson, Allan. “Re‑codifying Attempts, Parties, and Abandoned Intentions” (1989), 14 *Queen’s L.J.* 85.

Smith, John C. Commentary on *R. v. Mitchell*, [1999] *Crim. L.R.* 497.

Stuart, Don. *Canadian Criminal Law: A Treatise*, 6th ed. Scarborough, Ont.: Carswell, 2011.

 APPEAL from a judgment of the Quebec Court of Appeal (Rochette, Morin and Bouchard JJ.A.), 2011 QCCA 1395 (CanLII), SOQUIJ AZ-50774324, [2011] J.Q. no 9850 (QL), 2011 CarswellQue 7766, upholding the accused’s convictions for first degree murder. Appeal dismissed, Fish J. dissenting.

 *René Duval*, for the appellant.

 *Sonia Rouleau*, *Régis Boisvert* and *Mélanie Paré*, for the respondent.

 *Grace Choi* and *Christine Bartlett‑Hughes*, for the intervener.

 English version of the judgment of LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. delivered by

 Wagner J. —

I. Overview

1. Under Canadian law, individuals who intend to commit crimes may change their minds and avoid criminal liability by abandoning that intention. This appeal concerns, first of all, the circumstances in which a trial judge may put seemingly incompatible defences to a jury. Another question it raises is in what circumstances the trial judge must put the defence of abandonment to the jury in the context of the form of participation in a crime provided for in s. 21(1) of the *Criminal Code*, R.S.C. 1985, c. C‑46.
2. The appellant, Cathie Gauthier, was charged with being a party, together with her spouse, to the murder of their three children at the dawn of the year 2009. On October 24 of that same year, upon completion of a trial by judge and jury, she was convicted on all three counts of first degree murder.
3. She submits that the trial judge erred in deciding not to put to the jury the defence of abandonment of the common intention to kill the children. For reasons that differ from those of the Court of Appeal, I find that the judge did not err in doing so, and I would dismiss the appeal.

II. Facts

1. The facts of this case reveal a set of circumstances, as dramatic as they were tragic, that engendered the despair that ultimately led to the murder of three young children.
2. Before I discuss the questions of law raised by this appeal, a brief review of the facts is therefore in order.
3. The appellant met Marc Laliberté in 2000 and decided to move in with him in Chibougamau with her daughter Joëlle from a previous union. The couple had two other children: Marc‑Ange, born in 2001, and Louis‑Philippe, born in 2004. They moved to Amos in 2002. Misfortune seemed to dog the family. The appellant was sexually assaulted, and this caused her considerable emotional distress as a result of which she was unable to leave the family home for very long. Marc Laliberté lost his mother and fell into a deep depression. Hoping for better luck, the family left Amos for Saguenay, where Kathie Ouellet, a childhood friend of the appellant’s, lived. Marc Laliberté sold the family home and quit his job, and the family settled into their new surroundings. However, their new life got off to a rough start.
4. Once in Saguenay, Marc Laliberté had difficulty finding a stable job and resigned himself to receiving employment insurance benefits. Meanwhile, the appellant was unable to hold on to the few short‑term jobs she was able to find. In short, the couple encountered ever greater financial difficulties, and were forced to make an assignment in bankruptcy in October 2008.
5. The holiday season was drawing near. On Christmas Eve, despite their bad luck, the couple decided to give the children the chance to enjoy this “festive” period. Marc Laliberté refused to pay the rent for December, and used the money so saved to buy numerous gifts for the children and for friends.
6. On December 27, 2008, the appellant renewed her and her spouse’s prescriptions for oxazepam, a soporific drug used to treat anxiety attacks, giving false reasons for doing so early. She told the pharmacist that her spouse was going through a difficult period and that they were about to go on a trip. While at the drug store, she also purchased some children’s Gravol.  That same day, the family went to Normandin to visit members of Marc Laliberté’s family for a few hours.
7. On December 28, 2008, the appellant sent an e‑mail message entitled [translation] “a miracle, please” to the Fondation maman Dion in which, after recounting the family’s difficulties, she asked for help. She wrote: “. . . I would like a miracle for Dec. 31, 2008”.
8. The evening of December 29, she visited her friend Kathie Ouellet and told her that she did not know what she would do with her children if her spouse was not there. The next day, the appellant gave her nicest clothes to Ms. Ouellet.
9. On December 31, according to the appellant, her spouse spent the morning working on the computer, and he turned the screen off every time she came near. Around noon, he joined her in the kitchen. He told her that he had made a decision and that the whole family would be leaving together. He then dictated some documents to her that she wrote down like a robot, she said, after which she had no memory of what was in them. Marc Laliberté then left the house. According to the appellant, it was then that she noticed some papers left on the kitchen counter, and after reading them, she realized what was going on. When her spouse returned in the afternoon, she told him she did not agree with the murder‑suicide pact, and she tore up the documents. She claimed to have understood from the expression on her spouse’s face that he had resigned himself to abandoning the dark plan.
10. The appellant testified that the rest of the day was uneventful. That evening, as planned, the family sat down in front of the television to watch a movie together. Marc Laliberté prepared some drinks and popcorn for all the family. Shortly after that, the appellant noticed that one of the boys had fallen asleep, and then she too fell asleep.  She said she had not suspected that their drinks had been poisoned.
11. The physical evidence that was filed included two torn‑up documents that had been found in the garbage can: a handwritten joint will, in the appellant’s hand, and a document prepared on the computer by Marc Laliberté in which he told his life’s story. Another copy of the will, typed out and signed by both spouses, was found on the kitchen island. Three handwritten letters from Cathie Gauthier to her friend Kathie Ouellet, to her biological mother and to her last employer completed the evidence. All these letters mentioned that the couple had decided together to end their and their children’s lives. Some empty medicine bottles, as well as the prescriptions for oxazepam and the drug store’s sales slip dated December 27, 2008, were also found in the kitchen.
12. During the evening of January 1, 2009, the appellant called the emergency services number, asked for an ambulance and told the operator that her left wrist was slit, saying that [translation] “it was a pact, my husband killed our three children”, and adding that “we told ourselves we wouldn’t start 2009, but . . .”.
13. When first responders arrived on the scene, they found the appellant with an injured wrist and pronounced her spouse and their three children dead. The evidence shows that the children were poisoned with Gravol and oxazepam. Traces of oxazepam were also detected in the appellant, whose left wrist had allegedly been slit by her spouse, Marc Laliberté.

III. Trial by Judge and Jury

1. At her jury trial, the appellant submitted in her defence that she had not bought the medication to poison her children, that she was in a dissociative state on December 31, 2008 when she wrote the incriminating documents, and that this state meant she could not have formed the specific intent to commit the murders. In the alternative, should her argument based on the absence of *mens rea* be rejected, she claimed to have abandoned the common purpose of killing the children and to have clearly communicated her intention to do so to her spouse.
2. The Crown’s theory was based on the proposition that the appellant was a party, together with her spouse, to the murder of her three children in that they planned it together as part of a murder‑suicide pact and in that she supplied the murder weapon. She did not act on December 31, 2008 to prevent the children from being poisoned with the drinks containing the medication. Thus, she aided Marc Laliberté to kill the children.
3. In his final instructions, the trial judge told the jury that three possible verdicts were open to it: first degree murder, second degree murder or acquittal.  On whether it was appropriate to put the defence of abandonment of the common purpose to the jury, the judge pointed out to counsel, in the jury’s absence, that when the defence of abandonment has come before Canadian courts, it has been in the context of the form of participation in a crime provided for in s. 21(2) of the *Criminal Code*, and he questioned the availability of this defence in the context of s. 21(1). Although he mentioned the defence of abandonment in summarizing the argument of counsel for the appellant for the jury, the judge did not put this alternative defence to the jury. After three days of deliberations, the jury found the appellant guilty of the first degree murder of her three children.
4. Cathie Gauthier appealed that decision to the Court of Appeal, which upheld the guilty verdict. Bouchard J.A. concluded that the trial judge had not erred in refusing to put the defence of abandonment to the jury. In his view, an alternative defence that is incompatible with the defence’s principal theory cannot be put to the jury (2011 QCCA 1395 (CanLII)).

IV. Relevant Provisions

1. Section 21 of the *Criminal Code* reads as follows:

 **21.** (1) [Parties to offence] Every one is a party to an offence who

 (*a*) actually commits it;

 (*b*) does or omits to do anything for the purpose of aiding any person to commit it; or

 (*c*) abets any person in committing it.

 (2) [Common intention] Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

V. Issues

1. There are two main issues in this appeal.  First, was it appropriate to exclude the defence of abandonment from the defences put to the jury on the basis that it was incompatible with the defence’s principal theory, the absence of *mens rea*? If not, did the defence of abandonment meet the air of reality test? For the reasons that follow, I find that the answer to both these questions is no.

VI. Analysis

A*. Was It Appropriate to Exclude the Alternative Defence of Abandonment From the Defences Put to the Jury Solely Because It Was Theoretically Incompatible With the Defence’s Principal Theory?*

 1. When It Is Appropriate to Put a Defence to the Jury

1. It is well established that any defence with an air of reality should go to the jury (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 51). This Court has held that a defence meets the air of reality test if 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. 82).
2. The reason why the trial judge is required to screen the defences that can be put to the jury should be borne in mind. This requirement is essentially rooted in a concern not to confuse jurors by putting to them a defence that lacks an evidential foundation. This premise gives rise to two principles: On the one hand, a trial judge must put to the jury all defences that arise on the facts, regardless of whether they have been specifically raised by the accused. On the other hand, the judge must withhold from the jury any defences that lack an air of reality.
3. The burden on the accused is merely evidential.  If the trial judge properly applies the relevant principles, he or she must identify the evidence that is most favourable to the accused and assume it to be true, regardless of whether it was adduced or mentioned by the accused. The judge must not enquire into whether the witnesses are credible or assess the probative value of this evidence. If each element of a defence is supported by direct evidence or may reasonably be inferred from circumstantial evidence, the judge must put this defence to the jury.

 2. Alternative Defences That Are Incompatible With the Defence’s Principal Theory

1. The Court of Appeal concluded, on the basis that the alternative defence of abandonment was incompatible with the appellant’s principal theory, that the trial judge did not have to put this defence to the jury:

 [translation] In my opinion, the judge was right not to draw the jury’s attention to this defence. I note that, according to the appellant, there was no suicide pact or planning, and she was in a dissociative state when her spouse told her of his plan for all of them to leave together. She could not therefore be allowed, if she were not believed, to change her story and maintain that she had pulled out of a plan whose existence she had been denying from the start.  Taking part in a suicide pact and then pulling out of it is in itself plausible. However, that is not what the appellant is arguing. Rather, she is denying the very existence of such a pact and then claiming that she can pull out of it if she is not believed. The judge did not have to put to the jury this alternative defence that is incompatible with the appellant’s principal theory . . . . [para. 71]

1. The Crown takes a more nuanced position, arguing that, because the effect of the appellant’s primary defence — which was essentially based on a total absence of *mens rea* — was that the defence of abandonment lacked any factual foundation and could not therefore apply, this alternative defence did not meet the air of reality test:

 [translation] Refusing to take part in a plan and abandoning a plan are defences that are logically incompatible with one another. If, throughout the trial, the appellant denies intending to kill her children, how can she, if she is not believed in this regard, change her position and say that she withdrew from a plan whose existence she has previously denied? The defence of abandonment of a common purpose necessarily implies a recognition of having been a party to that common purpose, which the appellant has always denied. [R.F., at para. 57]

1. In this case, I agree with the Court of Appeal, although for different reasons, that the defence of abandonment should not have been put to the jury. Let me explain this.
2. In *Wu v. The King*, [1934] S.C.R. 609, which was mentioned in *R. v. Caron* (1998), 126 C.C.C. (3d) 84 (Que. C.A.), a case the Court of Appeal cited with approval, this Court stated that a judge does not have a duty to put to the jury an alternative defence whose factual foundation is incompatible with the defence’s principal theory. In *Wu*, the accused, after having raised only an alibi defence at trial, argued on appeal that the trial judge had erred in not putting to the jury the alternative defences of self‑defence and provocation. Lamont J. made the following comments:

 The rule, therefore, that an accused person at trial is entitled to have the jury pass upon all his alternative defences is limited to the defences of which a foundation of fact appears in the record. Even then the rule, in my opinion, is not without exception, and one exception is, that it has no application where the accused, by the defence which he sets up at the trial, has negatived the alternative defence for which he afterwards seeks a new trial.

. . .

 . . . The defence that the accused was in Victoria at the time of the shooting was not only inconsistent with, but it negatived the defence now sought to be set up.  Under these circumstances I fail to see how any duty could rest on the trial judge to instruct the jury to consider an alternative defence which the accused, by the defence he did set up, declared had no foundation in fact. [p. 617]

1. With respect, *Wu* does not stand for the proposition that a judge does not have a duty to put to the jury an alternative defence that is theoretically incompatible with the defence’s principal theory. Rather, it reaffirms the cardinal rule that the trial judge need not — indeed must not — put to the jury a defence in respect of which there is no evidence in the record that would be sufficient, if it existed and if it were believed to be true, for a jury acting reasonably to accept the defence. This is clear from the comments of Lamont J. on this point, which read in full as follows:

 There is no doubt that in the trial court an accused person is ordinarily entitled to rely upon all alternative defences for which a foundation of fact appears in the record, and, in my opinion, it makes no difference whether the evidence which forms that foundation has been given by the witnesses for the Crown or for the accused, or otherwise. What is essential is, that the record contains evidence which, if accepted by the jury, would constitute a valid defence to the charge laid. Where such evidence appears it is the duty of the trial judge to call the attention of the jury to that evidence and instruct them in reference thereto. The only evidence appearing in the record upon which even an argument could be founded that the accused shot in self defence is that of Irwin and Bodner that, prior to the shooting, the complainant was running after the accused and his companion, waving his arms and shouting in Oriental.  What he was saying we do not know. If it were material to the defence to prove that the words amounted to provocation, the onus was upon the accused to prove what the words were. On any event provocation, which would reduce murder to manslaughter, is not a defence to the charge as laid. Shooting in self defence would constitute a valid defence provided the accused brings himself within sections 53 and 54 of the Criminal Code. It is justifiable to repel an unprovoked attack if the force used by the accused is not meant to cause death or grievous bodily harm and is not more than is necessary for the purpose of self defence. It is justified, even if it does cause death or grievous bodily harm, if it is done under reasonable apprehension of death or grievous bodily harm to himself, and if he believes, on reasonable grounds, that it is necessary for his own preservation. There is no evidence in the record from which a jury could reasonably infer that the accused when he shot the complainant did so under a reasonable apprehension of death or bodily harm to himself, or that he reasonably believed that he could not otherwise save himself from bodily injury. [Emphasis added; pp. 616‑17.]

1. The passage from *Wu* quoted in the Court of Appeal’s reasons, at para. 71, in support of the proposition that the trial judge is not required to put to the jury an alternative defence that is incompatible with the primary defence is merely an *obiter dictum* that could be a source of confusion and should not be relied on. An accused might, for example, raise an alibi defence and testify that he or she was not in the city where the crime was committed at the relevant time, whereas certain Crown witnesses say that the accused was at the scene of the crime but was highly intoxicated. Even though the defences of alibi and of self‑induced intoxication are incompatible in theory, the trial judge should, in my view, put both of them to the jury if they both meet the air of reality test.
2. More recently, in *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, this Court clarified the principle that if two defences are theoretically incompatible, they can nevertheless be put to the jury so long as they both meet the air of reality test. Although Fish J. pointed out that it is dangerous to put theoretically incompatible defences to a jury, he saw no error in the trial judge’s decision to put to the jury, in addition to the primary defence of automatism, the alternative defence of self‑defence the accused wished to raise. Regarding the incompatibility of the two defences, Fish J. wrote the following, at para. 10:

 . . . the particular defences in issue here — automatism and self‑defence — are, as the Crown suggested on the hearing of this appeal, incompatible in theory, though perhaps not always in practice. That is because self‑defence implies deliberate conduct that is at odds with the fundamental premise of automatism, a state of dissociative, involuntary conduct.

1. Nevertheless, the Court had held in *R. v. Faid*, [1983] 1 S.C.R. 265, that the trial judge had not erred in refusing to put the defence of provocation to the jury as an alternative to the primary defence of self‑defence. Although it is true that these two defences are incompatible in theory — self‑defence involves reasoned conduct, whereas provocation, on the contrary, presupposes a temporary loss of self‑control — it is important to point out that the refusal was not based on this incompatibility. Rather, the Court found that there was no evidence in the record to support the argument that the accused had acted in the heat of passion. That case was not therefore one in which the effect of the primary defence was to deprive the alternative defence of the support of evidence that was actually in the record. In *Faid*, the defence of provocation quite simply did not meet the air of reality test, because there was no evidence related to its elements. *Faid* is one illustration of the principle that any defence with an air of reality should be put to the jury.
2. In conclusion, there is no cardinal rule against putting to a jury an alternative defence that is at first glanceincompatible with the primary defence. The issue is not whether such a defence is compatible or incompatible with the primary defence, but whether it meets the air of reality test. In any case, the trial judge must determine whether the alternative defence has a sufficient factual foundation, that is, whether a properly instructed jury acting reasonably could accept the defence if it believed the evidence to be true.

B. *If the Defence of Abandonment Was Not Incompatible With the Principal Theory, Did It Meet the Air of Reality Test?*

 1. Essential Elements of the Defence of Abandonment

1. The defence of abandonment had to be submitted to the jury only if there was evidence in the record that was reasonably capable of supporting the necessary inferences in respect of each of the elements of this defence. That being said, it is necessary to begin by identifying the essential elements of the defence.
2. In Canadian law, the defence of abandonment, which has rarely been raised, was first referred to in *R. v. Whitehouse* (1940), 55 B.C.R. 420 (C.A.). That case concerned the application of the defence in the specific context of the offence of participation in a crime provided for in s. 21(2) of the *Criminal Code*.
3. In that context, the relevant test — which was subsequently endorsed in *Miller v. The Queen*, [1977] 2 S.C.R. 680, *Henderson v. The King*,[1948] S.C.R. 226, and *R. v. Kirkness*,[1990] 3 S.C.R. 74 — was laid down as follows in *Whitehouse*, at p. 425:

 I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is “timely communication” must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw. The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences.

1. Thus, it was held that a defence of abandonment has three essential elements: (1) there must be an intention to abandon or withdraw from the unlawful purpose, (2) there must be timely communication of this abandonment or withdrawal from the person in question to those who wish to continue, and (3) the notice so communicated to those who continue to participate in the common purpose must be unequivocal.
2. This appeal raises the issue of the application of the defence of abandonment in the context of the form of participation in a crime provided for in s. 21(1) of the *Criminal Code*.
3. The reasons for recognizing the defence of abandonment in Canadian law bear repeating. There are two policy reasons in criminal law for making this defence available to parties to offences. First, there is a need to ensure that only morally culpable persons are punished; second, there is a benefit to society in encouraging individuals involved in criminal activities to withdraw from those activities and report them.
4. This Court implicitly acknowledged that the defence of abandonment applies in the context of s. 21(1) in *R. v. Bird*, 2009 SCC 60, [2009] 3 S.C.R. 638, in which it found that this defence did not meet the air of reality test in the case of an accused who had aided in the commission of a crime (see also *R. v. Fournier*, 2007 QCCA 1822 (CanLII)). However, since the Court found that the defence did not have an air of reality in that case, it did not on that occasion rule on the content of the defence in the specific context of the form of participation in a crime provided for in s. 21(1) of the *Criminal Code*.
5. It is well established that the scope of the defence of abandonment varies from case to case, depending on the circumstances (see the above‑quoted passage from *Whitehouse*, at p. 425). In *Kirkness*, Wilson J. expressed the opinion that the content of the defence of abandonment depends on the type of offence and on the degree and form of participation of the accused. She endorsed, at p. 115, the following comment by Professor Manson:

 Looking at the defence of abandoned intention in respect of parties, the key issues relate to the quality of withdrawal from the original plan and whether more is required to exculpate. These questions take on different significance depending on the form of accomplice liability in issue and the particular circumstances of a given case.

(A. Manson, “Re‑codifying Attempts, Parties, and Abandoned Intentions” (1989), 14 *Queen’s L.J.* 85, at p. 95)

1. Wilson J. also noted that there is a difference between the forms of participation in a crime provided for in s. 21(1) and s. 21(2), respectively, of the *Criminal Code*:

 It is my view that since aiders and abettors have been treated differently from common intenders by Parliament, some difference between these two subsections must be recognized.

(*Kirkness*, at p. 116)

1. Section 21(2) of the *Criminal Code* provides that a person who forms an intention to carry out an unlawful purpose in common with other persons is a party to an incidental offence committed by one of those other persons to the same extent as the person who actually committed it. This result derives from the first person’s promise to devote physical and intellectual resources to the achievement of the common unlawful purpose. The person’s liability in respect of the incidental offence therefore stems from his or her decision to participate in carrying out the unlawful purpose and to contribute resources needed to achieve it.
2. In such a context, an intention to withdraw from the common purpose will — if a timely and unequivocal communication of this intention is addressed to the co‑conspirators who persist in carrying out the unlawful purpose — be sufficient for the defence of abandonment to succeed. Communicating the intention to abandon the common purpose reduces the resources available to carry out the unlawful purpose and in so doing cancels out the effects of the participation of the withdrawing or abandoning person.
3. The situation is very different in the context of the form of participation in a crime provided for in s. 21(1) of the *Criminal Code*. Aiders and abettors generally do much more than promise their support in carrying out an unlawful purpose in the future. They perform concrete acts to aid the principal offender to commit the offence or to abet him or her in committing it. Their criminal liability and their moral culpability are proportional to these acts and stem from the fact that they have performed them. Thus, merely communicating in unequivocal terms their intention to cease participating in the commission of the offence will not be enough “to break the chain of causation and responsibility”, to repeat the words of Sloan J. from *Whitehouse*.
4. Where a person’s participation in a crime is more than a simple promise to carry out a common unlawful purpose — where, for example, the person is a party to the offence within the meaning of s. 21(1) of the *Criminal Code* — requiring an unequivocal communication of the intention to cease participating in the commission of the offence (the *Whitehouse* test) means that the accused must show that he or she took reasonable steps to neutralize the effects of his or her participation. As one author explains, using a colourful image to make his point, the intention to withdraw must be accompanied by acts that are likely to cancel out the effects of the acts that have already been performed to aid or abet the offender:

 Once the arrow is in the air, it is no use wishing to have never let it go — “Please God, let it miss!” The archer is guilty of homicide when the arrow gets the victim through the heart.  The withdrawer, it is true, does not merely change his mind: he withdraws — but is that relevant if the withdrawal has no more effect on subsequent events than the archer’s repentance? [Emphasis added.]

(J. C. Smith, Commentary on *R. v. Mitchell*, [1999] *Crim. L.R.* 497)

1. In the Quebec Court of Appeal’s judgment in *Fournier*, the accused was convicted of the first degree murder of her husband because she had hired a contract killer to murder him, had promised and later paid financial consideration to the killer, and had provided the killer with the necessary details of time and place and with information needed to identify the target. Because of the numerous acts that had been performed to aid in the commission of the murder, communicating an intention to withdraw by merely leaving the message [translation] “cancel” on the killer’s answering device was found to be insufficient to exculpate the accused. The acts of abandonment were not proportional to the acts performed in support of the commission of the offence.
2. For all these reasons, I would reformulate as follows the test already established in *Whitehouse* and *Kirkness* for determining whether the defence of abandonment applies, in order to adapt it specifically to the various degrees and forms of participation in crimes.
3. One who is a party to an offence on the basis that he or she did or omitted to do anything for the purpose of aiding any person to commit the offence, or abetted any person in committing it (s. 21(1) of the *Criminal Code*), or on the basis that he or she had formed with other persons an intention to carry out an unlawful purpose and to assist each other therein and that an offence was committed in carrying out the common purpose (s. 21(2) of the *Criminal Code*), may raise the defence of abandonment if the evidence shows

(1) that there was an intention to abandon or withdraw from the unlawful purpose;

(2) that there was timely communication of this abandonment or withdrawal from the person in question to those who wished to continue;

(3) that the communication served unequivocal notice upon those who wished to continue; and

(4) that the accused took, in a manner proportional to his or her participation in the commission of the planned offence, reasonable steps in the circumstances either to neutralize or otherwise cancel out the effects of his or her participation or to prevent the commission of the offence.

1. I recognize that there will be circumstances, even where the accused is a party within the meaning of s. 21(1) of the *Criminal Code*, in which timely and unequivocal communication by the accused of his or her intention to abandon the unlawful purpose will be considered sufficient to neutralize the effects of his or her participation in the crime. But there will be other circumstances, primarily where a person has aided in the commission of the offence, in which it is hard to see how timely communication to the principal offender of the person’s intention to withdraw from the unlawful purpose will on its own be considered reasonable, and sufficient to meet the test set out in the preceding paragraph.
2. In conclusion, and more specifically in the context of s. 21(1) of the *Criminal Code*, the defence of abandonment should be put to the jury only if there is evidence in the record that is capable of supporting a finding that a person who was initially a party to the carrying out of an unlawful purpose subsequently took reasonable steps in the circumstances either to neutralize the effects of his or her participation or to prevent the commission of the offence.

 2. Application to the Case at Bar

1. In the case at bar, the defence of abandonment did not have an air of reality.
2. The evidence showed that the appellant had written several documents, including some incriminating letters that were evidence of the couple’s intention to end their and their children’s lives. The couple explained in the letters how they planned to kill the children and take their own lives: by intoxication using a soporific drug. It was the appellant who purchased the medication that caused the children’s deaths.
3. What evidence could therefore have justified the trial judge’s putting the defence of abandonment to the jury?
4. The evidence is incomplete, to say the least.
5. The only evidence comes from the appellant’s testimony that, in the afternoon of December 31, 2008, she had notified her spouse that she had changed her mind and no longer intended to participate in the common purpose:

 [translation] I noticed some papers he’d left lying around. I, I realized what was happening. I didn’t want that. When Marc came back, I, I told him it was crazy, what he was telling me. I ripped up the papers. [A.R., at p. 834]

On cross‑examination, she made the following statement:

 [translation] When I saw the papers and looked at what was written on them, I said that’s crazy. And I told Marc we couldn’t . . .

. . .

 I told Marc he couldn’t do that, that I didn’t want to be part of it. [Emphasis added; A.R., at p. 910.]

1. The appellant also testified that the expression on her spouse’s face had convinced her that he too had abandoned the sinister plan:

 [translation] But I gathered from his face that he was getting the message, too, and that it was all right. [A.R., at p. 913]

1. Counsel for the appellant argues that, in light of this evidence, the trial judge had sufficient reasons to put the defence of abandonment to the jury. I find this argument wanting.
2. In my view, the appellant’s evidence that she communicated her withdrawal from the deadly plan and that her communication was timely and unequivocal is insufficient for the purposes of the air of reality test. To meet that test, it is not enough to simply identify “some evidence” or “any evidence”; the evidence must be “reasonably capable of supporting the inferences required for the defence to succeed” (*Cinous*, at paras. 82‑83).
3. The only relevant passage from the appellant’s testimony is the one in which she used the plural pronoun “we” (using the French pronoun “*on*” as an equivalent for the plural “*nous*”) in saying “I told Marc we couldn’t [do that]”. This passage stands alone in the appellant’s principal narrative to the effect that she never agreed to the murder‑suicide pact, that she wrote the incriminating letters while in a dissociative state and that she told her spouse she disagreed with what he was planning to do as soon as she realized what it was.
4. Nevertheless, even if it were assumed that the evidence the appellant relies upon would be sufficient for a jury to reasonably conclude that she had communicated her intention to withdraw from the plan and that her communication was timely and unequivocal, that communication would not on its own have sufficed, in the circumstances of this case, for the judge to put the defence of abandonment to the jury.
5. The appellant did more than merely promise to take part in the murder‑suicide pact. She supplied her spouse with the intoxicants he used to cause the children’s deaths. She therefore had to do more either to neutralize the effects of her participation or to prevent the commission of the offence. For example, she could have hidden or destroyed the medication she had purchased, remained watchful and taken the children to a safe place for the evening, insisted that her spouse give her verbal confirmation of what he intended to do, or simply called the authorities.
6. I conclude that the record did not contain evidence upon which a properly instructed jury acting reasonably could have found that the appellant had abandoned the common unlawful purpose, and could accordingly have acquitted her, if it believed the evidence to be true. The defence of abandonment therefore did not meet the air of reality test, and the trial judge was not required to put the defence to the jury.

VII. Disposition

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

 The following are the reasons delivered by

 Fish J. (dissenting) —

I

1. Justice Wagner has set out with care and sensitivity the tragic and desperate circumstances that culminated in the murder by the appellant’s husband of their three children and his own virtually contemporaneous suicide.
2. In the wake of that tragedy and despair, the appellant, Cathie Gauthier, now stands convicted of first degree murder. And she has been sentenced to imprisonment for life without eligibility for parole for 25 years.
3. The Crown’s case against Ms. Gauthier is that she and her husband entered a murder-suicide pact that was executed with her help. She testified at trial that she had demonstrated her disapproval of the pact before the children were murdered and had notified her husband of this unwillingness to go through with the plan.
4. Defence counsel urged the trial judge to leave open for the jury’s consideration Ms. Gauthier’s defence of abandonment. The trial judge declined to do so. The Court of Appeal upheld the trial judge on the ground that it was an [translation] “incompatible . . . defence”: 2011 QCCA 1395 (CanLII). Both courts below erred in law in this regard.
5. The Court of Appeal did not consider whether the appellant’s defence of abandonment had an “air of reality” ― that is to say, whether there was any evidence upon which a properly instructed jury might entertain a reasonable doubt on that issue.
6. On the law as it was then understood, the trial judge was bound to put abandonment to the jury if there was evidence that the appellant (a) had changed ― or “abandoned” ― her earlier intention to aid or abet the murder of her children, and (b) had adequately communicated to her husband that she had withdrawn from their pact.
7. This Court has repeatedly held that the defence of abandonment includes *no other essential elements*. And our attention has not been drawn to a single Canadian decision to the contrary, at any level.
8. In my view, there *was* evidence at Ms. Gauthier’s trial upon which a properly instructed jury might well have found that she had abandoned the suicide pact in respect of which she was charged and convicted of murder. Or at least have been left with a reasonable doubt on this issue, which would of course have sufficed to warrant Ms. Gauthier’s acquittal.
9. As a matter of law, the appellant is entitled, in my respectful view, to a fresh trial, where the jury will not be wrongly prevented from considering on its merits Ms. Gauthier’s defence of abandonment, however weak and unpromising we might believe it to be. I am aware of no legal principle that permits us to deprive her of that right.
10. In his thorough and thoughtful reasons, Justice Wagner proposes that we now adopt additional requirements for a valid defence of abandonment where the accused, as in this case, has done something to aid or abet the commission of the offence before satisfying the two established elements of abandonment. As we shall see, there are strong reasons of policy and precedent for resisting the proposed changes.
11. As we shall see as well, I am not persuaded that the modifications we endorse should be made applicable on a retrial of the appellant. But even if we decide that they are, the appellant would at least be entitled to a fair opportunity to satisfy those newly recognized requirements. Her failure to do so at her first trial ― prior to their recognition by this Court or, it seems, by *any* Canadian court ― can hardly deprive Ms. Gauthier of a proper opportunity to do so now.
12. With respect for those who are of a different view, I would therefore allow the appeal, set aside the appellant’s convictions and order a new trial.

II

1. Canadian courts have for more than 70 years held that the defence of abandonment comprises only two essential elements: (i) change of intention; and (ii) where practical and reasonable, timely and unequivocal notice of withdrawal.
2. These requirements emanate from *R. v. Whitehouse* (1940), 55 B.C.R. 420 (C.A.), a decision that has been repeatedly approved and followed by this Court, as I mentioned earlier, and has long been firmly entrenched in Canadian law: see *Henderson v. The King*, [1948] S.C.R. 226, at pp. 236-37; *R. v. de Tonnancourt* (1956), 115 C.C.C. 154 (Man. C.A.), at pp. 176 and 201-3; *R. v. Merrifield*, 1977 CarswellOnt 1806 (C.A.), at para. 3; *Miller v. The Queen*, [1977] 2 S.C.R. 680, at p. 708; *R. v. Wagner* (1978), 8 B.C.L.R. 258 (C.A.), at pp. 260-61; *R. v. Joyce* (1978), 42 C.C.C. (2d) 141 (B.C.C.A.), at p. 150; *R. v. Kirkness*, [1990] 3 S.C.R. 74, at p. 89; *R. v. Johanson* (1995), 166 A.R. 60 (Prov. Ct.), at para. 23; *R. v. Fournier*, 2002 NBCA 71, 252 N.B.R. (2d) 256, at para. 22; *R. v. McKercher*, [2002] O.J. No. 5859 (QL) (Ct. J.), at para. 77; *R. v. Forknall*, 2003 BCCA 43, 176 B.C.A.C. 284, at paras. 51-53; *R. v. Lacoursière* (2002), 7 C.R. (6th) 117 (Que. C.A.), at paras. 25-29; *R. v. P.K.*, 2006 ABCA 299, 397 A.R. 318, at para. 12; *R. v. S.R.B.*, 2009 ABCA 45, 448 A.R. 124, at paras. 10, 19-20 and 24-30, rev’d *R. v. Bird*, 2009 SCC 60, [2009] 3 S.C.R. 638, at para. 1; *R. v. Ball*, 2011 BCCA 11, 298 B.C.A.C. 166, at paras. 44-47; and *R. v. Leslie*, 2012 BCSC 683 (CanLII), at paras. 552-58.
3. Justice Wagner does not suggest that the defence of abandonment, as it stood at the time of Ms. Gauthier’s trial, required anything more than a change of intention, accompanied by timely and unequivocal notice of withdrawal. Rather, my colleague proposes a new and different test.
4. To this end, my colleague distinguishes for present purposes between s. 21(1) and s. 21(2) of the *Criminal Code*, R.S.C. 1985, c. C-46. The former deals with liability for aiding or abetting another in the commission of a specific offence; the latter, with liability for an offence committed by another in carrying out a common unlawful purpose.
5. Justice Wagner would impose additional requirements on the defence of abandonment, particularly with respect to liability under s. 21(1), where the accused would need to adduce evidence that he or she took steps to neutralize any prior contribution to the commission of the offence or, in the alternative, to prevent the commission of the offence.
6. With respect, this approach overlooks the fact that both s. 21(1) and s. 21(2) can involve active participation by the accused: see for example *Henderson* and *Miller*.
7. Moreover, the *Whitehouse* test has been repeatedly and consistently applied in prosecutions under s. 21(1) and s. 21(2) alike.
8. The application of the *Whitehouse* criteria to an aiding and abetting case was endorsed very recently by this Court in 2009, and even more recently by other Canadian courts: *Bird* (affirming Costigan J.A.’s dissent); *Ball*, at paras. 44-47; and *Leslie*, at paras. 552-58.
9. Indeed, *Whitehouse* itself involved parties to an offence who had “aided and abetted in the commission of the crime”: p. 424. They had “performed part, at least, of the tasks assigned to them”: again, at p. 424.
10. It was out of this factual context that the test for abandonment was born. And the court identified only two requirements: the first, change of intention; the second, timely and unequivocal notice of withdrawal ― that is, the accused must clearly communicate to the principal “that if he proceeds upon it he does so without the *further aid and assistance* of those who withdraw”: *Whitehouse*,at p. 425 (emphasis added).
11. As the language of this oft-cited passage makes clear, the *Whitehouse* test for abandonment expressly contemplates prior aid and assistance.
12. Moreover, to suggest that an accused under either subsection of s. 21 must neutralize prior involvement disregards an important rationale of the defence of abandonment, namely, giving the principal offender the opportunity to abandon the criminal objective. As Allan Manson explains in “Re-codifying Attempts, Parties, and Abandoned Intentions” (1989), 14 *Queen’s L.J*. 85, at p. 101:

. . . the premise upon which *Whitehouse* is based: “Let it be known, if you go then you go alone.” Unequivocal withdrawal and the element of timeliness are sufficiently expansive to accommodate abettors and aiders alike because, as in *Becerra* and *Gundy*, the aim is to compel the principal to reconsider the objective in time to abandon it. This, after all, is the preventative rationale for party responsibility. Thus the defence of abandonment as structured in *Whitehouse* can apply with equal fairness and effect to all parties including aiders by interpreting timeliness in relation to the offence and the goal of ultimate abandonment.

1. Even the most ardent proponents of a more stringent abandonment defence recognize that to require neutralizing or preventative steps would necessitate a change to Canadian law: see M. Campbell, “Turning Back the Clock: Aiders and the Defence of Abandonment” (2010), 14 *Can. Crim. L.R.* 1, at pp. 16-17.
2. Courts in the United Kingdom, approving *Whitehouse*, have concluded that neutralizing or preventative steps are not required to establish abandonment. In *R. v. O’Flaherty*, [2004] EWCA Crim 526, [2004] 2 Cr. App. R. 20 (p. 315), at para. 60, the Court of Appeal acknowledged that whether an accused has done enough “to demonstrate that he or she is withdrawing from the joint enterprise . . . is ultimately a question of fact and degree for the jury”. The jury should account for “the nature of the assistance and encouragement already given and how imminent the infliction of the fatal injury or injuries is, as well as the nature of the action said to constitute withdrawal”. And, the court *explicitly rejected the proposition that effective withdrawal requires reasonable steps to prevent the crime*:

In cases of assistance it has sometimes been suggested that, for there to be an effective withdrawal, reasonable steps must have been taken to prevent the crime. It is clear, however, this is not necessary. [Para. 60; see also para. 61.]

See also *R. v.* *Otway*, [2011] EWCA Crim 3 (BAILII), at para. 32, where the court held that efforts to prevent the crime were relevant but not required for withdrawal.

1. Justice Wagner relies on *R. v. Fournier*, 2007 QCCA 1822 (CanLII),to support his position that mere communication of changed intention should henceforth be insufficient for abandonment in s. 21(1) cases (para. 48 of Justice Wagner’s reasons). However, in *Fournier*, unlike this case, the defence of abandonment was *not* kept from the jury. Indeed, the Court of Appeal held that the trial judge properly instructed the jury that abandonment required timely and unequivocal notice of withdrawal: *Fournier*, at paras. 18-20.
2. I agree with my colleague that the internally repentant archer cannot, having let the arrow fly, seek refuge in the defence of abandonment (para. 47 of Justice Wagner’s reasons). The defence fails in Sir John Smith’s illustration not because preventative or neutralizing steps are required, but rather because notice of withdrawal comes too late, or not at all.
3. These authorities all make clear that the defence of abandonment does not require that the accused take steps to neutralize prior participation in the criminal enterprise or to prevent the commission of the offence. While such evidence may strengthen a defence of abandonment, failure to take neutralizing or preventative steps is not fatal. Thus, for example, in *R. v. Edwards*, 2001 BCSC 275 (CanLII), at para. 186, the accused’s efforts to stop the commission of the offence were treated as evidence that the *Whitehouse* requirements were met ― not as additional requirements of the defence.
4. If we were to accept that the defence of abandonment now requires that an accused take steps to neutralize previous assistance or to prevent the commission of the crime, I am inclined to believe that this change should only be given prospective effect ― at least in this case. As Don Stuart explains in *Canadian Criminal Law: A Treatise* (6th ed. 2011), at p. 9: “It is almost universally accepted that the view that judges merely declare existing law rather than create new law is outmoded and wrong.”
5. But on any view of the matter, in light of the state of the law universally accepted in Canada at the time of the appellant’s trial, it would be fundamentally unfair at this stage to fault the appellant for failing to demonstrate anything more than a change of intention, plus timely and unequivocal notice of withdrawal from the murder-suicide pact. Since the appellant’s testimony provided some evidence on these two essential elements, there was an air of reality to the defence. The trial judge therefore erred by withholding the defence of abandonment from the jury.

III

1. I agree with Justice Wagner that the “incompatibility” between Ms. Gauthier’s defence of abandonment and her primary defence did not justify the trial judge’s decision to prevent the jury from considering them both. And I am therefore content to add only these brief comments on the issue of incompatibility.
2. Incompatibility should not be relied upon to deprive the accused of a defence for which an air of reality has been established, particularly where ― as in this case ― defence counsel has requested that it be included in the judge’s charge: A.R., at pp. 1018 and 1037-38.
3. As Kellock J. stated in *Henderson*: “It is a paramount principle of law that when a defence, however weak it may be, is raised by a person charged, it should be fairly put before the jury”: p. 241. Taschereau J. likewise emphasized the accused’s “fundamental right . . . to have all the features of [the] defence adequately put to the jury”: *Henderson*, at p. 237.

IV

1. For abandonment to be left for the jury, there must be some evidence upon which a properly instructed jury could form a reasonable doubt on the two essential elements of the defence: *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at paras. 2, 49, 52-54 and 83. In my view, the appellant’s testimony satisfied this modest evidentiary threshold.
2. Indeed, there was no suggestion at trial by the Crown― nor finding by the trial judge or the Court of Appeal ― that the defence of abandonment lacked an air of reality.
3. The appellant testified that she told Marc Laliberté his plan did not make sense and he [translation] “could not do it” (“*pouvait pas faire ça*”). She also told him that she did not want to be a part of it. She demonstrated her disapproval of the murder-suicide pact by tearing up two documents: a last will and testament written by the appellant and a story of Marc Laliberté’s life containing references to the pact. She was convinced by his facial expression that the murder-suicide pact was off: A.R., at pp. 834-35 and 910-11.
4. This testimony provides *some* *evidence* that the appellant no longer intended to participate in the murder-suicide pact and that she provided timely and unequivocal notice of this change of intention to the principal offender. That the evidence could have left the jury with a reasonable doubt as to the appellant’s guilt is all that was required.
5. Whether the appellant ultimately “did enough” to communicate timely and unequivocal withdrawal was a question of fact that should have been left for the jury to decide: *P.K.*, at para. 11; *O’Flaherty*, at para. 60; *Cinous*,at paras. 52 and 54.
6. In short, it was for the jury to determine whether the appellant’s words and conduct were believable and sufficient to demonstrate timely and unequivocal notice of withdrawal. As Taschereau J. stated, again in *Henderson*, at p. 237: “The question whether the agreement has been put to an end, must be judged in view of all the circumstances revealed by the evidence, and I have no doubt that it is a question for the jury.”
7. With respect, I feel bound to conclude that the trial judge, by declining to instruct on the defence of abandonment, encroached “on the jury’s traditional function as arbiter of fact”: *Cinous*, at para. 56.

V

1. For the foregoing reasons, I would allow the appeal, set aside the appellant’s convictions, and order a new trial.

 *Appeal dismissed,* Fish J. *dissenting.*

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