

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** R. *v.* Grant, 2015 SCC 9, [2015] 1 S.C.R. 475 | **Date:** 20150305  **Docket:** 35664 |

Between:

Her Majesty The Queen

Appellant

and

Mark Edward Grant

Respondent

**Coram:** Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

|  |  |
| --- | --- |
| **Reasons for Judgment:**  (paras. 1 to 65) | Karakatsanis J. (Abella, Rothstein, Cromwell, Moldaver, Wagner and Gascon JJ. concurring) |

r. *v.* grant, 2015 SCC 9, [2015] 1 S.C.R. 475

Her Majesty The Queen Appellant

v.

Mark Edward Grant Respondent

**Indexed as: R. *v.* Grant**

2015 SCC 9

File No.: 35664.

2014: November 14; 2015: March 5.

Present: Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

on appeal from the court of appeal for manitoba

*Criminal law — Defences — Evidence — Admissibility — Unknown third party suspect — Accused denied involvement in abduction-murder case — Accused sought to adduce evidence at trial that unknown third party suspect involved in similar alleged abduction which accused could not have committed — Trial judge found on balance of probabilities that alleged abduction had not happened and refused to admit evidence — Appropriate framework for determining admissibility of defence-led evidence concerning unknown third party suspect — To what extent framework requires trial judge to assess and weigh evidence of unknown third party suspect.*

In 2007, G was charged with the first degree murder of D, a notorious cold-case, on the basis of newly-tested DNA evidence. G denied any involvement in the murder, and sought to adduce evidence to suggest that, based on the *modus operandi* and other physical evidence, D’s abductor had also abducted W while G was in custody.

Having found that the same legal test applied to the admissibility of known third party suspect evidence and unknown third party suspect evidence, the trial judge concluded on a balance of probabilities that the alleged abduction of W had not happened. He refused to admit the evidence. G was convicted of second degree murder by the jury. The Manitoba Court of Appeal concluded that G should have been permitted to lead the evidence, allowed his appeal and ordered a new trial.

*Held*: The appeal should be dismissed.

While the tests governing known third party suspect evidence and similar fact evidence may provide useful insights into the underlying concerns and principles, they should not be stretched beyond the particular circumstances that they were designed to address. Instead, first principles governing the admissibility of evidence properly balance the competing interests that arise when the defence seeks to lead evidence of an unknown third party suspect.

Defence-led evidence is admissible where (1) the evidence is relevant to a fact in issue, and (2) the probative value of the evidence is not substantially outweighed by its prejudicial effects. The trial judge must therefore first determine whether the evidence is logically relevant to an available defence. Where the defence’s theory is that an unknown third party committed the indicted crime, this factual foundation will be established by a sufficient connection between the crime for which the accused is charged and the allegedly similar incident(s) suggesting that the crimes were committed by the same person, coupled with evidence that the accused could not have committed the other offence. Once a sufficient connection is shown, the evidence will be admissible unless its prejudicial effects substantially outweigh its probative value. This assessment is inherently individualized, and is capable of responding to various levels and forms of prejudice. It does not require the accused to satisfy a higher admissibility threshold or require the trial judge to engage in an enhanced evaluation of the evidence. The trial judge may not invade the province of the jury and determine the strength of the evidence.

In this case, the trial judge erred in law in treating the evidence relating to the alleged abduction of W as known third party suspect evidence and in requiring G to establish on a balance of probabilities that the alleged abduction of W took place. These errors entitled the Court of Appeal to conduct its own assessment of the evidence. It was entitled to conclude that there was evidence upon which the jury could find that the alleged crime against W had occurred and, having regard to the similarities, that it had been committed by the same person who killed D. The evidence that G could not have committed the offence against W and the evidence of similarities between the two offences would have provided some evidence capable of giving the unknown third party suspect defence an air of reality. While an appellate court is entitled to step into the shoes of the trial judge if the record permits, in this case, the Court of Appeal was not in the position to assess and weigh the extent of the probative value and the extent of prejudicial effect of the unknown third party suspect evidence. The trial judge’s legal errors were clearly not minor, and do not attract the application of the curative proviso in s. 686(1)(*b*)(iii) of the *Criminal Code*. The verdict would not necessarily have been the same had the trial judge applied the correct principles in determining the test for the admissibility of this defence evidence. As this case must be re-tried in any event, the balancing of the probative value and the prejudicial effect of the evidence is best left for the trial judge.

**Cases Cited**

**Applied:** *R. v. Seaboyer*,[1991] 2 S.C.R. 577; **distinguished:** *R. v. Handy*,2002 SCC 56, [2002] 2 S.C.R. 908; **referred to:** *R. v. Grandinetti*, 2005 SCC 5, [2005] 1 S.C.R. 27; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433; *Sweitzer v. The Queen*, [1982] 1 S.C.R. 949; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33; *R. v. Arcangioli*, [1994] 1 S.C.R. 129; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *McMillan v. The Queen*, [1977] 2 S.C.R. 824, aff’g (1975), 7 O.R. (2d) 750; *State v. Scheidell*, 227 Wis.2d 285 (1999); *United States v. Stevens*, 935 F.2d 1380 (1991); *Wiley v. State*, 74 S.W.3d 399 (2002); *United States v. McVeigh*, 153 F.3d 1166 (1998); *Caldwell v. State*, 356 S.W.3d 42 (2011); *Davis v. State*, 413 S.W.3d 816 (2013); *R. v. Arp*, [1998] 3 S.C.R. 339; *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717; *R. v. Scopelliti* (1981), 34 O.R. (2d) 524; *R. v. Pollock* (2004), 187 C.C.C. (3d) 213; *R. v. Kendall* (1987), 35 C.C.C. (3d) 105; *R. v. Sims* (1994), 28 C.R. (4th) 231; *R. v. Hamilton*, 2003 BCCA 490, 180 C.C.C. (3d) 80; *R. v. Brousseau*, 2006 QCCA 858; *State v. Sullivan*, 216 Wis.2d 768 (1998); *R. v. Murphy*, 2012 ONCA 573, 295 O.A.C. 281; *R. v. Underwood*, 2002 ABCA 310, 170 C.C.C. (3d) 500; *R. v. Clarke* (1998), 129 C.C.C. (3d) 1; *R. v. Jackson*, 2013 ONCA 632, 301 C.C.C. (3d) 358, aff’d 2014 SCC 30, [2014] 1 S.C.R. 672; *R. v. C. (T.)* (2004), 189 C.C.C. (3d) 473; *R. v. Humaid* (2006), 37 C.R. (6th) 347; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544; *R. v. Buzizi*, 2013 SCC 27, [2013] 2 S.C.R. 248; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *R. v. Morin*, [1988]2 S.C.R. 345.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 278.1 to 278.91, 686(1)(*b*)(iii).

*Criminal Justice Act 2003* (U.K.), 2003, c. 44, s. 100(1)(b), (3)(c), (d).

**Authors Cited**

*Cross on Evidence*, 9th Australian ed. by John D. Heydon. Chatswood, N.S.W.: LexisNexis Butterworths, 2013.

*Phipson on Evidence*, 18th ed. by Hodge M. Malek et al. London: Sweet & Maxwell, 2013.

APPEAL from a judgment of the Manitoba Court of Appeal (Chartier C.J.M. and Monnin and Hamilton JJ.A.), 2013 MBCA 95, 299 Man. R. (2d) 202, 590 W.A.C. 202, 302 C.C.C. (3d) 491, [2014] 2 W.W.R. 239, [2013] M.J. No. 322 (QL), 2013 CarswellMan 525 (WL Can.), setting aside a conviction for second degree murder entered by Joyal A.C.J. and ordering a new trial. Appeal dismissed.

*Amiram Kotler* and *Rekha Malaviya*, for the appellant.

*Saul B. Simmonds*, *Vanessa Hébert* and *Laura Robinson*, for the respondent.

The judgment of the Court was delivered by

Karakatsanis J. —

1. Introduction
2. In 2007, the respondent, Mark Edward Grant, was charged with the first degree murder of Candace Derksen, a notorious cold-case murder that occurred in Winnipeg, Manitoba, almost 23 years earlier. The Crown’s case depended substantially on the recent analysis of small quantities of DNA found at the scene of the crime. Mr. Grant challenged the DNA evidence and sought to lead evidence suggesting that an unknown third party suspect had committed the crime. The trial judge refused to admit the evidence of an allegedly similar offence committed within months of the Derksen murder, while Mr. Grant was in custody on an unrelated matter.[[1]](#footnote-1) Mr. Grant was subsequently convicted of second degree murder by the jury. The Manitoba Court of Appeal concluded that Mr. Grant should have been permitted to lead the evidence. It allowed his conviction appeal and ordered a new trial.
3. The issues before this Court are the appropriate framework for determining the admissibility of defence-led evidence concerning an unknown third party suspect, and to what extent this framework requires the trial judge to assess and weigh the evidence.
4. Obviously, the identification of an accused as the perpetrator of the crime charged is essential to establishing criminal liability. The burden to prove beyond a reasonable doubt that the person before the court is the guilty party rests squarely on the Crown. In accordance with the presumption of innocence, the accused is never required to prove her innocence. An accused person’s *Charter-*protected right to make full answer and defence entitles her to challenge the Crown’s case and lead evidence to raise a reasonable doubt about whether the accused committed the crime.
5. However, the accused’s rights are not the only interests at stake. The integrity of the administration of justice requires that the proceedings stay focused on the indicted crime and not devolve into trials within a trial about matters that may not be sufficiently connected to the case. Such tangents risk causing delays, confusion and distractions that undermine the trial’s truth-seeking function. This risk is especially heightened where the defence seeks to introduce other alleged suspects or crimes into the trial.
6. The parties agree that balancing these interests requires the trial judge to evaluate the probative value of defence-led evidence of an unknown third party suspect against the elevated risks it poses to the integrity of the trial, but disagree about what this evaluation entails. The appellant the Manitoba Prosecution Service (the Crown) says that the trial judge must apply the stringent admissibility tests developed for known third party suspect and similar fact evidence. The defence maintains that these tests place an unfair burden on the accused and that the general rules of admissibility adequately address the issues of relevance, probative value and prejudicial effects.
7. In my view, it is not helpful to slot evidence concerning an unknown third party suspect into categories that were not designed to accommodate it. While the tests governing known third party suspect evidence and similar fact evidence may provide useful insights into the underlying concerns and principles, they should not be stretched beyond the particular circumstances that they were designed to address.
8. Instead, first principles governing the admissibility of evidence properly balance the competing interests that arise when the defence seeks to lead evidence of an unknown third party suspect. In such cases, the defence must first establish the logical relevance of the evidence. This may be done by demonstrating a sufficient connection ― or similarity ― between the crime charged and another crime the accused could not possibly have committed to support the logical inference that the same person committed both crimes. Once this threshold is met, the evidence will be admissible unless its prejudicial effects substantially outweigh its probative value (*R. v. Seaboyer*, [1991] 2 S.C.R. 577).
9. In this case, I conclude that the trial judge erred in evaluating and assessing the credibility of the unknown third party suspect evidence on a balance of probabilities. I agree with the Court of Appeal that a new trial is required.
10. Facts
11. Candace Derksen, a 13-year-old girl, went missing after leaving school on Friday, November 30, 1984. Her body was discovered tied up in a shed in an industrial yard on January 17, 1985. She had died of hypothermia resulting from exposure.
12. In May 2007, Mr. Grant was arrested and charged with first degree murder on the basis of newly tested DNA evidence.
13. Mr. Grant denied any involvement in the abduction-murder, and sought to adduce evidence of the alleged involvement of an unknown third party suspect. That evidence related to the alleged abduction of a 12-year-old girl (P.W.) after she left school on Friday, September 6, 1985, at a time when Mr. Grant was in custody. Mr. Grant argued that the *modus operandi* and other physical evidence indicated that the same person had abducted both Candace Derksen and P.W.
    1. Manitoba Court of Queen’s Bench
14. In reviewing the applicable legal framework, Joyal A.C.J.Q.B. concluded that the legal test set out in *R. v. Grandinetti*, 2005 SCC 5, [2005] 1 S.C.R. 27, applies equally to admissibility of both unknown third party suspect evidence and known third party suspect evidence. Thus, evidence of an unknown third party suspect could be “admitted only after some threshold evidence ha[d] been demonstrated respecting a link between the third party, known or unknown, and the crime before the court” (trial transcript, A.R., vol. III, at p. 48). The trial judge also referred to this Court’s jurisprudence for similar fact evidence and, specifically, to *R. v. Handy*,2002 SCC 56, [2002] 2 S.C.R. 908.
15. After reviewing the documentary and testimonial evidence adduced on the *voir dire*, the trial judge found that he was “not, even on a balance of probabilities, able to conclude that the alleged offence [against P.W.] happened” (A.R., vol. I, at pp. 8-9). As a result, he found there could be no unknown third party suspect and thus “no useable similarities” (p. 9). The trial judge concluded that the evidence was not sufficiently probative to justify the impact its admission would have on the length and complexity of the trial, and ordered that the defence not make any reference to the P.W. incident.
    1. Manitoba Court of Appeal, 2013 MBCA 95, 299 Man. R. (2d) 202
16. Before the Manitoba Court of Appeal, Mr. Grant appealed his conviction and brought a motion to adduce fresh evidence relating to DNA analysis and juror bias. After rejecting several grounds relating to the conviction, Monnin J.A., writing for the court, held that the trial judge erred in not allowing Mr. Grant to lead evidence relating to an alleged unknown third party suspect (paras. 9-10, 78).
17. The Court of Appeal concluded that the trial judge made factual and credibility findings that “he was not entitled to make” in determining admissibility and that he relied “almost exclusively on the *viva voce* evidence of P.W. to the exclusion of all of the other evidence before him, including P.W.’s two prior statements” (para. 68). The trial judge erred in applying the balance of probabilities standard to determine whether the P.W. incident occurred; he should have instead applied the *Seaboyer* test that broadly governs the admissibility of defence-led evidence (paras. 73-74). Furthermore, in determining whether the defence theory had an air of reality, all that was required was “some evidence” that could leave a jury with a reasonable doubt as to the accused’s guilt (para. 68).
18. The Court of Appeal characterized the evidence tendered in this case as “more akin to similar-fact evidence” than to known third party suspect evidence (para. 72). However, the court concluded that the test applicable to Crown-led similar fact evidence does not apply when such evidence is advanced by an accused; rather, defence-led similar fact evidence is admissible unless its prejudicial effects substantially outweigh its probative value, in accordance with *Seaboyer*.
19. The Court of Appeal concluded that the evidence pertaining to the P.W. incident was “very relevant” and “pointed to the possibility that the same person who killed Candace Derksen abducted P.W., if the jury so found that to have occurred” (para. 70). As Mr. Grant was in custody at the time of the P.W. incident, this evidence “could provide the basis upon which a reasonable, properly instructed jury could acquit” (*ibid.*). The court concluded that, since the prejudicial effects of the evidence did not substantially outweigh its probative value, Mr. Grant should have been permitted to place the evidence of the P.W. incident before the jury (para. 78). The court notedthat this evidence was also relevant in assessing the evidence of the defence DNA expert that excluded Mr. Grant as a suspect. The accused was denied his opportunity to make full answer, and this legal error was sufficient to set aside the conviction and order a new trial.
20. Analysis
    1. Principles Governing the Admission of Defence Evidence in Criminal Proceedings
21. The truth-seeking function of the trial creates a starting premise that all relevant evidence is admissible (*R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *R. v. Corbett*, [1988] 1 S.C.R. 670). Evidence is logically relevant where it has any tendency to prove or disprove a fact in issue (*Corbett*, at p. 715).
22. However, not all relevant evidence is admissible. The trial judge must also balance the probative value of the evidence against the prejudicial effects of its admission (*R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433; *Corbett*; *Sweitzer v. The Queen*, [1982] 1 S.C.R. 949; *Seaboyer*; *R. v. Harrer*, [1995] 3 S.C.R. 562). Evidence led by the Crown will be excluded where its prejudicial effects outweigh its probative value (*Seaboyer*). The presumption of the accused’s innocence leads us to strike a different balance where defence-led evidence is concerned. As this Court explained in *Seaboyer*, “the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law” (p. 611; see also *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33; *R. v. Arcangioli*, [1994] 1 S.C.R. 129).
23. In order for the judge to put a defence to the jury, the accused must point to evidence on the record that gives the defence an air of reality (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3). The trial judge must determine whether there is some evidence that is “reasonably capable of supporting the inferences required for the defence to succeed” (*ibid.*, at para. 83). The air of reality test applies to all defences, and acts as a threshold to ensure that “fanciful or far-fetched” defences are not put before the trier of fact (para. 84). When applying this test, the trial judge must take the evidence to be true and must not assess credibility or make other findings of fact (para. 54).
24. These principles are distinct, but may be interrelated. In most cases, where the defence evidence relates to the facts underlying the offence charged, the logical relevance and the admissibility of the evidence will be obvious. However, where the evidence refers to a factual matrix beyond the offence charged, its relevance to a fact in issue or an available defence may be less clear. In such circumstances, the gate-keeping role of the trial judge may require her to determine whether the evidence is logically relevant and connected to a defence that has an air of reality. For example, while the degree of similarity may be logically relevant to whether the same person committed the offence, it will not relate to a fact in issue at trial unless the defence has an air of reality. In this case, the unknown third party suspect defence will not have an air of reality unless there is evidence that the accused could not have committed the other offence. Thus, logical relevance will sometimes be assessed with reference to whether the defence for which the evidence is tendered is available. That said, the air of reality test set out in *Cinous* does not displace the *Seaboyer* admissibility test. The air of reality test and the *Seaboyer* admissibility test remain two distinct inquiries.
25. These principles are firmly established in this Court’s jurisprudence and are not generally challenged by the parties to this appeal. Instead, the dispute concerns their proper application to evidence concerning an unknown third party suspect.
26. The Crown argues that a modified version of *Seaboyer* must be applied, incorporating aspects of the tests governing similar fact and known third party suspect evidence. I disagree. As I discuss below, these tests are designed to respond to the particular risks and benefits presented by particular types of evidence. Where evidence does not fit within these categories ― where it does not present these specific risks and benefits ― its admission is governed directly by the general principles of admissibility set out in *Corbett* and *Seaboyer*.
    1. The Known Third Party Suspect Test Does Not Provide the Proper Template for Determining the Relevance of Unknown Third Party Suspect Evidence
27. In order for evidence relating to a known third party suspect to have any probative value, the evidence must show a sufficient connection between the third person and the crime for which the accused is charged (*Grandinetti*, at para. 47; *McMillan v. The Queen*, [1977] 2 S.C.R. 824). The defence points to such evidence to raise a reasonable doubt that someone else committed the crime in question. Evidence that this third person had the motive, the means, or the propensity to commit the crime will often establish this sufficient connection.
28. As this Court recognized in *McMillan*, the sufficient connection test is nothing more than an elaboration of the logical relevance analysis applied in the particular context of allegations that another, known individual committed the crime (pp. 828-29). Abella J. affirmed this point in *Grandinetti*, where she wrote:

The requirement that there be a sufficient connection between the third party and the crime is essential. Without this link, the third party evidence is neither relevant nor probative. The evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation. [para. 47]

Without a sufficient connection between the third party and the crime, the evidence of a known third party suspect is simply not logically relevant.

1. There is no principled reason to require that the connection be established by evidence relating directly to the third party where that individual is unknown. Such an articulation of the test ― designed, for example, to capture the motive, propensity or opportunity of a known third party to commit the crime ― would place an unrealistic burden on the accused. How could an accused establish the motive, propensity or opportunity of an unknown individual? (See, on this point, *State v. Scheidell*, 227 Wis.2d 285 (1999), at paras. 24-27.)
2. Where the third party’s identity is unknown, the nature of the connection must reflect a different factual matrix. In such circumstances, the sufficient connection ― to anchor the relevance and probative value of the evidence ― generally arises from similarities between the crime charged and another crime that the accused could not possibly have committed.
3. This focus on the similarities between the offences is not a formulation of a new, categorical test. Rather, it reflects the principles underlying *Grandinetti* which play out differently in different factual contexts. Like known third party suspect evidence, “in the absence of some nexus with the alleged offence”, unknown third party suspect evidence will constitute mere speculation (*R. v. McMillan* (1975), 7 O.R. (2d) 750 (C.A.), at p. 758, aff’d [1977] 2 S.C.R. 824). Unless the circumstances and similarities to the other offence are sufficient to suggest that the same individual committed both crimes, unknown third party suspect evidence will not be logically relevant.
4. This is consistent with the approaches taken by other common law jurisdictions in assessing defence-led evidence of similar acts.[[2]](#footnote-2)
5. A finding of logical relevance does not end the admissibility inquiry. Even the *Grandinetti* sufficient connection test speaks only to the probative value side of the *Seaboyer* equation. Once the relevance threshold is met, the trial judge must still be satisfied that the probative value of the evidence tendered by the defence is not substantially outweighed by its prejudicial effects.
   1. The Admissibility Test for Crown-led Similar Fact Evidence Does Not Apply to Defence-led Evidence of the Similar Acts of a Non-accused
6. Similar fact evidence is, most commonly, evidence of the accused’s prior bad acts led by the Crown. Such evidence is presumptively inadmissible, as its highly prejudicial effects generally outweigh its probative value (*R. v. Arp*, [1998] 3 S.C.R. 339; *Handy*). As this Court noted in *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717, at p. 732, putting evidence of the accused’s “prior immoral or illegal acts” before the jury inevitably results in a “heavy prejudice” to the accused. The presumptive inadmissibility of this evidence is tied to both the moral aspect of this prejudice ― the danger that the trier of fact will wrongfully convict the accused simply to condemn her for her prior bad acts ― and the reasoning aspect of this prejudice ― the danger that the trier of fact will become distracted by the similar bad act evidence and accord it more weight than it merits (*Handy*, at paras. 139-47). Exceptionally, similar fact evidence will be admitted where, based on the similarity of the alleged acts, the Crown “satisf[ies] the trial judge on a balance of probabilities that . . . the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception” (*Handy*, at para. 55). Where the Crown leads similar fact evidence to establish the *identity of the perpetrator*, the Crown must satisfy the trial judge that, on a balance of probabilities, “the same person committed the alleged similar acts” (*Arp*, at para. 48).
7. In addition to applying the *Grandinetti* test for known third party suspects, the trial judge in the present case applied a “balance of probabilities” threshold test to determine whether the P.W. incident actually occurred. In so doing, he referred to the admissibility test for Crown-led similar fact evidence, as set out in *Handy*. The Court of Appeal found that the evidence in question was “akin to similar-fact evidence”, but noted that, because this is defence-led evidence, *Seaboyer*, not *Handy*,governs its admissibility (paras. 73-74).
8. This conclusion is consistent with the approach taken by Canadian appellate courts where evidence of a non-accused’s similar acts is sought to be introduced. Appellate courts faced with this issue have consistently found that such evidence is not governed by the test applicable to evidence of an accused’s similar acts (see, for example, *R. v. Scopelliti* (1981), 34 O.R. (2d) 524 (C.A.); *R. v. Pollock* (2004), 187 C.C.C. (3d) 213 (Ont. C.A.), at para. 104; *R. v. Kendall* (1987), 35 C.C.C. (3d) 105 (Ont. C.A.); *R. v. Sims* (1994), 28 C.R. (4th) 231 (B.C.C.A.); *R. v. Hamilton*, 2003 BCCA 490, 180 C.C.C. (3d) 80; *R. v. Brousseau*, 2006 QCCA 858).
9. Defence-led evidence concerning an unknown third party suspect is only similar fact evidence in the sense that its probative value is derived from the similarity between the incidents where it is impossible for the accused to have committed the uncharged offence. An onus requiring proof on a balance of probabilities is *not* consistent with the lower evidential burden of the accused to put a defence in issue by adducing sufficient evidence “upon which a properly instructed jury acting reasonably could acquit” (*Cinous*, at para. 49). Rendering such defence-led evidence presumptively inadmissible would effectively impose a persuasive burden on the accused to prove her innocence. As this Court noted in *Seaboyer*, the test governing defence-led evidence must be accountable to “the fundamental tenet of our judicial system that an innocent person must not be convicted” (p. 611).
10. Moreover, unknown third party suspect evidence does not risk causing moral prejudice to the accused. Such evidence is intended to be exculpatory when raised by an accused, as it was in this case. Although the evidence engages some of the same reasoning prejudice concerns as does evidence of the prior bad acts of the accused (*Arp*, at para. 40; *Handy*, at para. 37), this prejudice can be addressed directly under *Seaboyer*.
11. To conclude, the balance of probabilities test governing the admissibility of similar fact evidence does not apply to unknown third party suspect evidence proffered by the accused. The similarity of the acts goes to the relevance of the evidence, but imposing the onus of the *Handy* test on the accused is neither consistent with the presumption of innocence nor necessary to protect the accused from moral prejudice. Any reasoning prejudice or risks to the integrity of the trial process engaged by this evidence are better addressed directly within the *Seaboyer* framework.
    1. The Seaboyer Test Applies to the Admission of Unknown Third Party Suspect Evidence
12. In my view, the admissibility of evidence concerning an unknown third party suspect is best determined in accordance with the broader, principled approach to the admission of evidence found in *Seaboyer*. Evaluating the admissibility of this evidence under *Seaboyer*, rather than under disparate tests not designed for its particularities, allows the trial judge to tailor her evaluation and weighing of the probative value and prejudicial effects of the evidence to the specific facts presented. In accordance with *Seaboyer*, once the evidence has been found to be relevant, unknown third party suspect evidence will be admitted unless its prejudicial effects substantially outweigh its probative value.
13. As noted above, there are two components to the *Seaboyer* analysis. First, in applying *Seaboyer*, the trial judge must assess the potential probative value of the evidence. Where the evidence relates to an unknown third party suspect, probative value will depend in part on the strength of the connection or nexus between the two events ― that is, the degree of similarity between the indicted crime and the allegedly similar incident. As the Supreme Court of Wisconsin noted in *Scheidell*, “the greater the similarity, complexity, and distinctiveness of the events, as well as the relative frequency of the event, the stronger the case for admission” (para. 41, citing *State v. Sullivan*, 216 Wis.2d 768 (1998), at para. 54).
14. Second, the *Seaboyer* test is concerned with the potential prejudicial effects of the evidence. Unknown third party suspect evidence, like Crown-led similar fact evidence, poses a particular risk of reasoning prejudice. Introducing evidence of other crimes that are sufficiently similar to the crime charged may risk “the distraction of members of the jury from their proper focus on the charge itself aggravated by the consumption of time” (*Handy*, at para. 144).
15. However, these significant prejudicial effects must nonetheless be evaluated in accordance with the fundamental principles governing criminal proceedings. In giving constitutional protection to the accused’s rights to make full answer and defence and to be presumed innocent until proven guilty, we must accept a certain amount of complexity, length, and distraction from the Crown’s case as a necessary concession to the actualization of those rights. (See, for example, *Scheidell*, at para. 65, per Abrahamson C.J., dissenting in the result.)
16. Contrary to the Crown’s submissions, applying *Seaboyer* does not “mak[e] the test for admissibility turn on whether or not the third party is named” (A.F., at para. 44). Known third party suspect evidence is already subject to the *Seaboyer* admissibility test: do the prejudicial effects substantially outweigh the probative value? (See, for example, *R. v. Murphy*, 2012 ONCA 573, 295 O.A.C. 281 (third party suspect evidence); *R. v. Underwood*, 2002 ABCA 310, 170 C.C.C. (3d) 500(hearsay evidence of a third party suspect).) Indeed, defence-led evidence is generally subject to *Seaboyer* (*Shearing* (defence cross-examination of a complainant); *R. v. Clarke* (1998), 129 C.C.C. (3d) 1 (complainant’s credibility); *R. v. Jackson*, 2013 ONCA 632, 301 C.C.C. (3d) 358, aff’d 2014 SCC 30, [2014] 1 S.C.R. 672 (deceased victim’s criminal convictions); *R. v. C. (T.)* (2004), 189 C.C.C. (3d) 473 (Ont. C.A.) (third party records in the possession of the accused); *Pollock* (character evidence of a co-accused); *R. v. Humaid* (2006), 37 C.R. (6th) 347 (Ont. C.A.) (defence hearsay evidence); *Hamilton* (bad character evidence of the deceased)). Thus, while the principles in *Seaboyer* will always apply, they play out differently in different situations.
17. As this discussion demonstrates, many of the concerns animating the specific tests governing the admissibility of known third party suspect and similar fact evidence are also addressed in the *Seaboyer* analysis. In all cases, the evidence must be beyond mere speculation and conjecture. The value of the evidence must be balanced against the risks posed to the integrity of the trial when a party seeks to expand the ambit of the trial to individuals or events not directly related to the crime indicted.
    1. The Trial Judge’s Role as Evidentiary Gatekeeper and the Seaboyer Test
18. The Crown argues that the trial judge, as gatekeeper, must assess the quality and reliability of evidence as part of the admissibility inquiry. In light of the elevated risks posed by unknown third party suspect evidence, the Crown submits that the Court of Appeal dangerously lowered the threshold for third party suspect evidence by applying the “some evidence” standard articulated in *Cinous*. For the reasons that follow, I do not accept this submission.
19. The trial judge plays a fundamentally important role as evidentiary gatekeeper, tasked with preserving both the right of the accused to make full answer and defence and the integrity of the trial process. To fulfill this mandate, the trial judge engages in a limited weighing of the evidence to ensure that the jury only considers evidence (1) that is relevant to a fact in issue, including an available defence; and (2) whose probative value is not substantially outweighed by its prejudicial effects. These inquiries often overlap. However, the trial judge is not permitted to invade the province of the jury and determine the strength of the evidence (*R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at para. 98).
20. The trial judge must determine whether the evidence is logically relevant to an available defence ― one that can be put to the jury. The air of reality test requires the trial judge, taking the proposed evidence at its greatest strength, to determine whether the record would contain “a sufficient factual foundation for a properly instructed jury to give effect to the defence” (*R. v. Buzizi*, 2013 SCC 27, [2013] 2 S.C.R. 248, at para. 16). Where the defence’s theory is that an unknown third party committed the indicted crime, this factual foundation will be established by a sufficient connection between the crime for which the accused is charged and the allegedly similar incident(s), coupled with the impossibility that the accused committed the other offence.
21. The trial judge must also assess and balance the extent of the probative value and prejudicial effects of the evidence in accordance with *Seaboyer*. Like the air of reality test, the *Seaboyer* admissibility test does not permit the trial judge to decide how much weight to give the evidence or to make findings of fact. Doing so would usurp the role of the jury and would place a persuasive burden on the accused inconsistent with the presumption of innocence.
22. The Crown argues that the substantial prejudice arising from evidence concerning an unknown third party suspect requires a higher threshold for both admissibility and putting the defence to the jury. However, substantial prejudice does not require a higher threshold; it simply weighs heavier in the balance. The *Seaboyer* admissibility test does not presuppose a particular level of prejudice or probative value for certain categories of evidence; instead, it requires a trial judge to conduct the balancing process contextually, based on the particularities of the evidence before her. As an inherently individualized assessment, it is capable of responding to various levels and forms of prejudice. No other test or higher threshold is required to protect the integrity of the trial process.
23. The same is true of the “some evidence” threshold in the air of reality test, which the Crown argues the Court of Appeal erred in applying in this case. This standard does not indirectly lower the threshold for unknown third party suspect evidence. Rather, this standard, when used in conjunction with the requirement for a sufficient connection between the crimes, respects the requirements of *Corbett*, *Seaboyer* and *Cinous*, and properly balances the integrity of the trial process with the accused’s right to make full answer and defence.
24. This conclusion does not, as the Crown submits it would, increase the scope of the Crown’s potential disclosure obligations such that compliance becomes impossible. The Crown continues to be required to disclose all relevant evidence to the defence (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at pp. 336-40). The application of the *Stinchcombe* test obviously depends on the circumstances of each case and each disclosure request.
25. In this case, the disclosure request was based on notes by the lead investigator in the police file on the Derksen murder concerning a similar crime (the P.W. incident) that was “very probably” connected to the Derksen murder (A.R., vol. II, at p. 135). The evidence for which disclosure was sought was clearly relevant.
26. Where the similarities or the temporal or geographic connections between the charged crime and the crime(s) for which disclosure is sought are insufficient, the evidence will not be relevant, and disclosure will not be required. Allowing the defence to establish a sufficient connection with reference to the crimes, rather than to the suspect, does not extend the Crown’s duty of disclosure.
27. Nor does this conclusion jeopardize the Crown’s ability to protect the privacy interests of individuals implicated in unrelated criminal matters or the confidentiality of ongoing investigations. The disclosure test remains one of relevancy, and the legislative measures that restrict disclosure to protect the privacy interests of individuals implicated in criminal matters continue to apply (see, for example, *Criminal Code*, R.S.C. 1985, c. C-46, ss. 278.1 to 278.91; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390). Moreover, the Crown exercises discretion with respect to the manner and timing of disclosure, thus allowing the Crown to delay disclosure to ensure the safety of individuals involved in an ongoing investigation (*Stinchcombe*, at pp. 339-40). This discretionary decision, like all other exercises of Crown discretion in disclosure matters, must be justified on review (*Stinchcombe*, at p. 340).
    1. Summary of Analysis
28. To summarize, any elevated risks of prejudice that arise when an accused seeks to introduce evidence of an unknown third party suspect do not require the accused to satisfy a higher admissibility threshold or require the judge to engage in an enhanced evaluation of the evidence. Existing rules achieve the appropriate balance of maintaining the integrity of the trial process while protecting the right of an accused to make full answer and defence to the charges against her.
29. Thus, defence evidence is admissible where(1) the evidence is relevant to a fact in issue; and (2) the probative value of the evidence is not substantially outweighed by its prejudicial effects. Where the connection between the evidence and a fact in issue at trial is not obvious, the air of reality test may help a trial judge in determining if the evidence tends to prove a defence that may become available. Relevant evidence concerning an unknown third party suspect will only be excluded where its prejudicial effects substantially outweigh its probative value.
    1. Application to the Facts
30. The trial judge erred in law in treating the evidence relating to the P.W. incident as known third party suspect evidence. The connections tying a known third party to the charged crime ― generally motive, opportunity or propensity ― do not fit the context of an unknown third party suspect. He also erred in requiring the accused to establish on a balance of probabilities that the alleged abduction took place. There is no such evidentiary burden on the accused where he seeks to rely on the defence that an unknown third party committed the crime in question. To the extent that the trial judge made findings of probative value and prejudicial effects, those findings are intimately tied to the incorrect balancing tests he used, and thus cannot be relied upon.
31. These errors entitled the Court of Appeal to conduct its own assessment of the evidence (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 31-35). The court considered P.W.’s *viva voce* testimony and her prior statements to the police, which the trial judge had accepted (for the purposes of the *voir dire*) for the truth of their contents, in accordance with *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787. The court also considered other statements that had been admitted on the *voir dire* for the truth of their contents with the Crown’s consent, and other evidence pertaining to the incident, including the police reports noting a possible connection between the P.W. incident and the Derksen murder.
32. The Court of Appeal concluded that the evidence was “very relevant” and that its probative value arose from the marked similarities between the alleged abduction of P.W. and the crime for which Mr. Grant is charged. In each case, the victim was of a similar age. Both victims left school at the same time of day, on the same day of the week, nine months apart. Both were left in unlocked shed-like premises in the same industrial area of Winnipeg, 2.6 kilometres apart. Both victims were found abandoned with their hands and feet tied with similar knots. In neither case was there evidence of physical or sexual assault. The same type of gum wrapper was found at both scenes (although, in the crime charged, it was found in the deceased’s pocket, suggesting it may have been hers).
33. I cannot accept the Crown’s submission that these similarities are insufficient on any test and that the evidence relied upon by the Court of Appeal would not be available at trial. As the Crown cannot resile from its concession that the various statements were admissible for their truth for the purpose of determining admissibility, the Court of Appeal was entitled to rely upon this *voir dire* evidence in assessing its potential probative value.
34. The Court of Appeal was entitled to conclude that there was evidence upon which the jury could find that the subsequent crime had occurred and, having regard to the similarities, that it had been committed by the same person who killed Candace Derksen. In light of the evidence that the accused could not have committed the other offence, there was some evidence capable of giving the unknown third party suspect defence an air of reality.
35. The Court of Appeal applied *Seaboyer* as follows:

It is left to be decided whether this relevant evidence should be excluded because its prejudicial effect substantially outweighed its probative value. In this case, the only prejudicial effect would be the impact this evidence would have had on the trial process in what was an already complicated and lengthy trial. From his reasons, the judge was obviously concerned about this impact. In my view, that concern did not substantially outweigh the probative value. [para. 78]

1. *Seaboyer* requires the court to measure and weigh the extent of probative value and the extent of the prejudicial effect of the evidence. Obviously, this balancing is highly fact driven and best done by the trial judge. The prejudicial effects of this evidence primarily concern the impact on the complexity, focus, and length of the trial process. To some extent, the trial judge can craft a process that will limit these prejudicial effects. However, the trial judge did not address this issue in any detail.
2. While an appellate court is entitled to step into the shoes of the trial judge if the record permits, in this case, the Court of Appeal was not in the position to assess and weigh the extent of the probative value of the unknown third party suspect evidence and the extent of prejudicial effect of this evidence.
3. The trial judge’s legal errors were clearly not minor, and do not attract the application of the curative proviso in s. 686(1)(*b*)(iii) of the *Criminal Code*. The verdict would not necessarily have been the same had the trial judge applied the correct principles in determining the test for the admissibility of this defence evidence (*R. v. Morin*, [1988]2 S.C.R. 345, at p. 374). This case must be re-tried in any event. In these circumstances, the balancing of the *Seaboyer* factors is best left for the trial judge.
4. Before this Court, Mr. Grant also submitted a motion to adduce fresh evidence relating to DNA analysis and juror bias. Because of my finding with respect to the admission of evidence relating to an unknown third party suspect, it is not necessary to deal with that motion.
5. Disposition
6. The appeal is dismissed, and the Manitoba Court of Appeal’s decision to order a new trial is upheld.

*Appeal dismissed.*

Solicitor for the appellant: Attorney General of Manitoba, Winnipeg.

Solicitors for the respondent: Gindin, Wolson, Simmonds, Roitenberg, Winnipeg.

1. Transcript of oral reasons for judgment of the Honourable Associate Chief Justice Joyal (as he then was) of the Court of Queen’s Bench of Manitoba, dated January 19, 2011, A.R., vol. I, at p. 90. [↑](#footnote-ref-1)
2. Australian law requires the defence to show “a sufficient similarity between the two acts as to allow the jury to conclude that there is a real possibility that the same person was involved” (J. D. Heydon, *Cross on Evidence* (9th Aust. 2013), at p. 713). In the United Kingdom, evidence of the bad character of someone other than the defendant is admissible where the similarities give the evidence “substantial probative value” (*Criminal Justice Act 2003* (U.K.), 2003, c. 44, s. 100(1)(b), (3)(c) and (d); H. M. Malek et al., eds., *Phipson on Evidence* (18th ed. 2013), at paras. 22-04, 22-24 to 22-27). Similarly, in the United States, some federal and state jurisprudence holds that defence-led evidence of similar acts will be admissible where it is “sufficiently similar to the crime at bar so that it is relevant” (*United States v. Stevens*, 935 F.2d 1380 (3rd Cir. 1991), at p. 1384; *Scheidell*, at paras. 39-41; *Wiley v. State*, 74 S.W.3d 399 (Tex. Crim. App. 2002), at p. 406; *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998), at p. 1191; *Caldwell v. State*, 356 S.W.3d 42 (Tex. Ct. App. 2011), at p. 47 (citing *Wiley* and *McVeigh*); *Davis v. State*, 413 S.W.3d 816 (Tex. Ct. App. 2013), at p. 833 (citing *Wiley*)). [↑](#footnote-ref-2)