UBC Moot Court Registry

IN THE SUPREME MOOT COURT OF THE UNIVERSITY OF BRITISH COLUMBIA

On appeal from The Supreme Court of Canada

BETWEEN:

CATHIE GAUTHIER

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

APPELLANT'S FACTUM

McCann, Sancho
Other, Name

Counsel for the Appellant

Another, Person
Random, Counsel

Counsel for the Respondent

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Part I—Attribution

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Part II—Statement of Facts

1. The Appellant, Cathie Gauthier, was convicted after trial by jury of three counts of first degree murder. Her appeal to the Québec Court of Appeal was dismissed, as was her appeal to the Supreme Court of Canada. The Appellant appeals from that decision to this Court.

> *R v Gauthier*, 2013 SCC 32 [*Gauthier SCC*].
> *R v Gauthier*, 2011 QCCA 1395 [*Gauthier CA*].

2. On the evening of December 31, 2008, the Appellant's spouse, Marc Laliberté, served poisoned drinks to himself, the Appellant, and the couple's three children. The Appellant alone survived, and was convicted of three counts of first degree murder.

> *Gauthier SCC*, *supra* para 1 at para 2.
> *Gauthier CA*, *supra* para 1 at paras 5-6.

3. **The prosecution theory** was that the Appellant had participated in the offence by planning a murder-suicide pact with her spouse, by purchasing prescription medication four days before her husband ultimately put them in the drinks that killed the children, and by omitting to intervene when her spouse served those drinks. The Crown led evidence of a pact between the Appellant and her spouse through documents: a joint will, her spouse's "life story", and several letters.

Gauthier SCC, *supra* para 1 at para 18, 14.
Gauthier CA, *supra* para 1 at para 41.

4. The defence theory was that the Appellant had not purchased the medication for the purpose of poisoning her children. On the day of the offence, she wrote the documents in a dissociative state, taking dictation from her spouse. She testified that after her spouse left the house, she read the documents referencing the pact, which she did not recall having written, and realized what her spouse intended to do. Upon his return that afternoon, she told him that the plan was "crazy", that they could not do it, and that she would not be a part of it. She further demonstrated her disapproval by ripping up two of the documents related to the plan. The Appellant testified that she understood from her spouse's facial expression that he had abandoned the plan.

Gauthier CA, *supra* para 1 at paras 32, 42-43.
Gauthier SCC, *supra* para 1 at paras 12-14, 17, 57.

5. The Appellant testified that that evening, her spouse served drinks to their family. She had no idea that the drinks were poisoned. Shortly after noticing

that one of the boys had fallen asleep, she became unconscious. She later awoke with her wrist slit and called emergency services. Traces of Oxazepam were detected in the Appellant, and the evidence was consistent with the finding that her spouse had slit her wrist.

Gauthier SCC, *supra* para 1 at paras 13, 15-16.
Gauthier CA, *supra* para 1 at paras 39-40.

6. The trial judge did not put the defence of abandonment to the jury on the basis that it was not available to an individual who aided the principal offender under section 21(1)(b) of the *Criminal Code*. The Québec Court of Appeal upheld the Appellant's conviction, finding that the defence of abandonment should not have been put to the jury because it was incompatible with the defence's primary theory, that she was in a dissociative state.

Criminal Code, R.S.C. 1985, c C-46 s. 21(1) [*Criminal Code*].
Gauthier SCC, *supra* para 1 at paras 19-20.
Gauthier CA, *supra* para 1 at para 49, 71.

7. A majority of the Supreme Court of Canada, in reasons written by Wagner J. (Fish J dissenting), also dismissed the appeal. The Court held that incompatible defences can be put to a jury as long as each defence has an air of reality to it. In considering the defence of abandonment, the Court added a new element to the defence that requires an accused to take reasonable steps to neutralize the effects of her participation or to prevent the offence. The majority found that there was no air of reality to this new version of the defence and denied the Appellant a new trial. Justice Fish, in dissent, disagreed with the addition of

the new element and found that the trial judge had erred in declining to instruct the jury on the defence of abandonment. He would have allowed the appeal and ordered a new trial.

Gauthier SCC, *supra* para 1 at paras 64-65, 106-117.

Part III—Argument

A. Overview

8. This appeal raises the question of whether a woman who withdraws from a murder-suicide pact with her spouse and believes that he has also withdrawn should nonetheless be convicted of murder when he carries through with the offence on his own. The Appellant's primary position is that the Supreme Court of Canada erred in reformulating the defence of abandonment so as to require that a party take reasonable steps to neutralize previous assistance or to prevent the commission of the offence. However, even if this court accepts this new element, it should not be applied retrospectively to the Appellant.

B. Argument

9. It is well settled that the interpretation of a defence and whether there is an air of reality to support it being considered by a jury are both questions of law, reviewable on a standard of correctness. In concluding that the defence of

abandonment lacked an air of reality and refusing to grant the appellant a new trial, the majority of the Supreme Court of Canada erred in three respects:

I. by adding a new element to the defence of abandonment;

II. by retrospectively applying the new defence to the facts of this case without giving the appellant a chance to address the new requirement; and

III. by incorrectly applying the air of reality test to both the old and new elements of the defence.

C. The majority of the Supreme Court of Canada erred in adding a new element to the defence of abandonment

10. Prior to the present case, the defence of abandonment required a party to have a change of intention and to communicate her withdrawal in a timely and unequivocal manner. The majority of the Court below added an element that requires an individual to take reasonable steps to neutralize previous assistance or to prevent the offence. This element exceeds the purpose of the defence of abandonment and could lead to the conviction of individuals for offences of which they are not sufficiently culpable. The Appellant's case demonstrates this danger, and requires this Court to consider whether it is justifiable to convict someone of murder when that person has communicated her withdrawal, and in this case understood that the offence was not going to happen.

Gauthier SCC, *supra* para 1 at para 78.

11. The test for abandonment as formulated by the majority makes neutralizing steps a separate element, yet also recognizes that it should not always be a requirement. The majority held that such steps may not be required in situations where the element is met by timely and unequivocal notice of withdrawal. This is uncertain. Surely a common law defence should provide certainty to govern people's conduct.

Gauthier SCC, *supra* para 1 at para 51.

12. For both these reasons, reasonable neutralizing steps should only be an evidentiary factor that a jury should consider, along with all the other evidence, in determining whether the accused actually did change her intention and communicate her withdrawal in a timely and unequivocal manner. These are the only essential elements of the defence.

13. To understand the problems created by the new requirement to take reasonable neutralizing steps, it is necessary to consider the nature of party liability and the crucial role that the defence of abandonment plays in relation to it.

(1) Party liability

14. Section 21(1) of the *Criminal Code* provides that 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. This case does not raise the issue of party liability under section 21(2) (which deals offences committed pursuant to a common unlawful purpose). A party who aids or abets an offence is generally guilty of the same offence as the principal—the person who actually commits the offence. The difference between aiding and personally committing an offence becomes legally irrelevant.

> *Criminal Code*, *supra* para 6 at s 21(1).
> *R v Thatcher*, [1987] 1 SCR 652 at para 80.

15. To be convicted as an aider or abettor, the accused must not only assist the principal, but must also intend to assist the principal. Therefore, providing material aid to another person—for instance, supplying a weapon that is subsequently used in an offence—will not in itself lead to criminal liability as a party. The aid must be provided for the purpose of aiding the principal's subsequent offence. Support and knowledge of the principal's intent is essential to the crime of aiding and abetting.

> *R v Morgan*, [1993] OJ No 653 (Ont CA) at para 17.
> V Gordon Rose, *Parties to an Offence* (Toronto: Carswell, 1982) at 12.

16. An accused cannot be convicted of aiding or abetting unless an offence is actually committed. Aiding is not in itself an offence. A party's liability for acts of assistance does not crystallize until the offence has been committed. Until that time, a party is free to abandon her participation in the offence.

> Don Stuart, *Canadian Criminal Law: a Treatise* (Scarborough: Carswell, 2011) at 66 [*Stuart*].
> **???** [*Manson*].

(2) The defense of abandonment until this case

17. The defence of abandonment provides the avenue by which a party to an offence can change her intention and withdraw her participation without criminal liability, even if others continue and complete the offence. The defence is an important means of reducing crime by encouraging those involved in criminal activity to desist, leaving only the morally culpable to be punished. The premise upon which the defence of abandonment is based is that a party who has assisted the principal now tells him: "Let it be known, if you go then you go alone."

Gauthier SCC, *supra* para 1 at para 40.
Manson, *supra* para 16 at p 101.

18. The method of abandonment, accepted in Canada for over 70 years since *R v Whitehouse*, is a change of intention and 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." (emphasis added) This passage makes clear that the defence of abandonment is designed to sever criminal liability despite prior assistance, as long as withdrawal occurs while there is still time for the principal to avoid the offence as well. If this is done, the party's prior assistance becomes legally irrelevant.

R v Whitehouse, [1940] BCJ No 46 (CA) at 425.
Gauthier SCC, *supra* para 1 at para 78.
Henderson v The King, [1948] SCR 226.
R v Kirkness, [1990] 3 SCR 74.

R v Miller, [1976] SCJ No 91.
R v Bird, 2009 SCC 60 [*Bird-SCC*].

(3) The majority made a substantive change to the defence of abandonment that is contrary to its purpose

19. In addition to the original requirements of change of intention and timely and unequivocal communication, the majority of the Court below added a new element to the defence of abandonment:

> (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.
>
> *Gauthier SCC*, *supra* para 1 at para 50.

20. This is a significant substantive change to the defence. The analysis in Canadian cases until now has turned on whether there was timely and unequivocal communication of abandonment:

- *R v Bird*, 2009 ABCA 45, rev'd in *Bird-SCC*, *supra* para 18 — The Supreme Court of Canada affirmed the dissent of Costigan JA, who held that a female accused who had helped lure the victim and her friend to a golf course, where the victim was sexually assaulted and killed, did not meet the requirements for abandonment. Her communication to the principal that she was taking the victim's friend to the car because she "doesn't

need to see this" was insufficient evidence of either a change of intention or timely and unequivocal communication.

- *R v Ball*, 2011 BCCA 11 — In a case involving two accused in a joint assault, Ryan JA ruled that abandonment was not timely because the fatal injury had already occurred.

- *Fournier v R*, 2002 NBCA 71 [*Fournier*] — The defence of abandonment was put to the jury and failed in a case in which the accused had arranged for the killing for hire of her husband, and then left a voicemail less than two hours before the offence saying only "cancel."

21. The new element of the defence shifts the focus away from the party's intention to abandon and her communication of withdrawal—the factors at the heart of the accused's moral culpability—and now requires her to take positive steps to influence the course of future events, over which she ultimately has little control.

22. Communicating to the principal that "if you go, then you go alone"—and in the present case, that "you must not go at all"—should certainly be legally sufficient for the defence of abandonment because the abandoning party has severed her connection with the principal prior to liability crystallizing. To require her to "do more" is contrary to the purpose of the defence of abandonment, which identifies circumstances in which an accused can no longer justifiably be held responsible for the acts of others.

Manson, *supra* para 16 at p 88.

23. The present case is a particularly clear example of circumstances in which neutralizing steps should not be required. Believing that she had successfully dissuaded her spouse from completing a murder-suicide pact, the Appellant not only withdrew her support, but believed she had prevented the commission of the offence. Given the circumstances as she understood them, her failure to take further steps cannot be a basis for imposing criminal liability for first degree murder.

24. The position that timely and unequivocal communication is sufficient to raise the defence of abandonment is consistent with English authorities, which provide that reasonable steps to prevent the offence, while relevant, are not required.

R v O'Flaherty, [2004] EWCA Crim 526 (BAILII) at para 60 [*O'Flaherty*].
Otway v R, [2011] EWCA Crim 3 (BAILII) at para 32.

25. Reasonable neutralizing or preventative steps can be evidence to support the inference that an accused intended to abandon the offence, and that the communication of withdrawal was unequivocal, but they must not be requirements in their own right. They are superfluous to the purposes and principles of the defence, just as would be a requirement to seek medical attention for someone after striking them in self-defence: it may be desirable from a policy standpoint, but it is not relevant to the essence of the defence. A defence should not have elements added to it for policy reasons or out of a fear that the defence is too

easy to raise if doing so undermines the principles of criminal liability.

26. The ease with which a defence may be raised must not be confused with the ease with which it may succeed. A jury is expected to weigh the evidence and come to a reasonable finding. Additional requirements should not be added to a defence out of a fear that a jury might wrongly acquit an accused on the basis of a weak defence.

27. The requirements of the defence are already difficult to satisfy. Communication that is non-existent, equivocal or too late has provided a consistent, predictable basis on which Canadian courts have been able to identify meritless claims of abandonment.

Stuart, *supra* para 16 at p 674.
Fournier, *supra* para 20 at para 22.
R v Leslie, 2012 BCSC 683 at paras 558–561.
R v PK, 2005 ABPC 10 at para 15.

(4) The new element of abandonment creates uncertainty in the law and should be left to the jury

Regardless of the form of participation, if there is evidence of an intention to abandon and timely and unequivocal communication of withdrawal, the sufficiency of withdrawal is a question for the jury. The new element added by the majority in the Court below more accurately identifies an evidentiary component to the question of whether an offender has abandoned participation.

Even the majority recognized that an accused will not always have to satisfy the new requirement. Although the majority does not acknowledge it, one such circumstance might be in the context of a violent spousal relationship, where to take reasonable steps would put a potential accused in harm's way.

Gauthier SCC, *supra* para 1 at para 51.

28. As a result, when and how a lack of evidence of reasonable neutralizing steps will prevent the defence of abandonment from having an air of reality is ambiguous. The majority indicates that where a person has aided, it will be difficult for timely and unequivocal communication, without more, to meet the test. Judging by the majority's application of the test to the Appellant, the position would appear to be that acts of assistance will generally require positive acts of intervention, and that this can be assessed with reference to hypothetical steps the accused might have taken, given the form of her participation.

Gauthier SCC, *supra* para 1 at para 51, 63.

29. Whether the communication said to constitute withdrawal satisfies the reasonable neutralization requirement should itself be a question for the jury. This is particularly true where that communication is a countermand or an attempt to dissuade—as in the present case—or where the party has an honest and reasonable belief that she has prevented the offence, as is the case in other common law jurisdictions. Recognizing that there are many circumstances in which communication may satisfy the reasonable neutralization requirement even for aiders is more consistent with one of the important purposes of the defence

of abandonment: "to compel the principal to reconsider the objective in time to abandon it."

> *O'Flaherty*, *supra* para 24 at para 60.
> *R v Croxford*, [2011] VSCA 433 (AustLII) at para 52.
> *White v Ridley*, [1978] HCA 38 (AustLII) at 351, Gibbs J, 361, Jacobs J.
> *R v Duong*, [2011] SASCFC 100 (AustLII) at para 203.
> *Huynh v The Queen*, [2013] HCA 6 (AustLII).
> *Manson*, *supra* para 16 at p 101.

30. The Appellant's case illustrates that the question of whether communication alone could reasonably have been sufficient cannot be divorced from the factual circumstances because it is—and should be—highly contingent on other facts. Making neutralizing steps a separate element that can be met by timely and unequivocal communication of withdrawal, but only in certain circumstances, means that only some accused will face this additional evidentiary hurdle. This renders the availability of the defence uncertain.

D. The majority erred in applying the reformulated defence of abandonment retrospectively to the Appellant

31. If this Court holds that the defence of abandonment now requires that an accused take reasonable steps to neutralize previous assistance or to prevent the commission of the offence, this change should not be applied retrospectively to the Appellant. Given the universally accepted understanding of the defence of abandonment at the time of the Appellant's offence and trial, it would be fundamentally unfair to hold her criminally liable for failing to demonstrate a

requirement that was not, at the time, part of the defence.

Gauthier SCC, *supra* para 1 at paras 95-96, Fish J.

32. In considering whether the trial judge and Court of Appeal erred in declining to put the defence of abandonment to the jury, it is not appropriate to reformulate the law in a more stringent way and then ask, "Was there an air of reality to this new version of the defence?" Doing so is fundamentally unfair to the Appellant in two ways.

33. First, it denies the Appellant the defence that should have been available to her at her first trial. If the trial judge had not mistakenly held that the defence was unavailable in the context of s. 21(1)(b), the Appellant would have been able to raise the original defence of abandonment. The majority should have granted the Appellant a new trial so that she could raise the defence that was incorrectly denied her—the defence of abandonment as it had been recognized in Canada for over 70 years.

34. Second, applying the air of reality test to the new version of the defence, at the appeal stage, denies the Appellant a trial on the defence of abandonment on the basis of a requirement that she never had an opportunity to address. If, as the majority held, there is no evidence on the record to establish an air of reality to the new element of neutralizing steps, this is at least in part because the Appellant's testimony was never directed to this requirement at trial. Even if the new version of the defence is to be applied retrospectively to the Appellant, it must only be at her new trial.

35. The retrospective application of criminal law that is detrimental to an accused is contrary to the values embodied in the *Canadian Charter of Rights and Freedoms*. Section 11(g) of the *Charter* protects the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian law. The value expressed in this section must apply to the situation of judge-made law removing or limiting a defence that existed at the time of the accused's act. Limiting a defence is functionally equivalent to expanding an offence, and could lead to a person being found guilty on account of an act or omission that would not have constituted an offence at the time when it was committed. In the present case, the Appellant's omission of neutralizing steps leads to criminal liability, which would not necessarily have been the case prior to the majority's reformulation of the defence.

> *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11 s. 11(g).
> *Stuart*, *supra* para 16 at p 37.

36. Furthermore, the rule of law includes a presumption against retrospective effect, which must apply to all laws in Canada. While judge-made law may have been excluded from this fundamental principle in the past, this exclusion was due to the historical view that judges merely declared existing law rather than created new laws. This view is almost universally accepted as outmoded and wrong, and is belied by the majority's significant alteration of the defence of abandonment in this case. It should make no difference whether a change to a criminal law is made by Parliament or by the courts if the practical effect is

the same—the retrospective application of criminal law that expands criminal liability, in violation of the rule of law principle.

Stuart, *supra* para 16 at p 9.

37. The presumption against retrospectivity applies to judge-made law and to defences. As stated in *R v Bernard*, "[r]espect for the principle of certainty and the institutional limits imposed upon the law-making function of the courts *should constrain the Court from overruling a prior decision where the effect would be to expand criminal liability.*" In *R v Dineley*, the Court found that eliminating the common law "*Carter* defence" could not have retrospective effect: "The fact that new legislation *has an effect on the content or existence of a defence* . . . is an indication that substantive rights are affected. I cannot accept the approach . . . according to which legislation that *alters the evidentiary content of a defence* applies retrospectively."

R v Bernard, [1988] 2 SCR 833 at para 55 (emphasis added).
R v Dineley, 2012 SCC 58 at para 16 (emphasis added).

38. In the present case, the majority's reformulation of the defence of abandonment changed the content of the defence, overruled the longstanding authority on the defence, and had the effect of expanding criminal liability. Prior to this change, the Appellant would not have been found criminally liable for failing to take neutralizing or preventative steps, as long as she met the other requirements of the defence. Therefore, the new version of the defence should not apply retrospectively to the Appellant.

E. The majority erred in not finding an air of reality to the defence of abandonment

39. This section omitted.

F. The failure to put the defence of abandonment to the jury is a reversible error

40. The majority's failure to put the defence to the jury is an error of law pursuant to section 686(1)(a)(ii) of the Code. The curative proviso (s. 686(1)(b)(iii)) should not apply in this case because there is a "reasonable possibility that the verdict would have been different had the error ... not been made". In other words, had the defence of abandonment been put to the jury, the Appellant reasonably could have been acquitted.

Criminal Code, *supra* para 6 at s 686(1)(a)(ii), 686(1)(b)(iii).
R v Cinous, 2002 SCC 29 at para 55.
R v Khan, 2001 SCC 86 at para 28.

G. Conclusion

41. The Appellant has never had the merits of her defence of abandonment considered by a trier of fact. Instead, she was denied a new trial through the retrospective application of a newly formulated defence on which she never had an opportunity to present evidence. The Appellant respectfully submits that

there is an evidentiary foundation for the defence of abandonment that must be put to a jury.

Part IV—Nature of the Order Sought

42. The Appellant requests that this Honourable Court allow this appeal and order a new trial for the Appellant.

All of Which is Respectfully Submitted.

McCann, Sancho	Other, Name
Counsel for the appellant	Counsel for the appellant

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