

**SUPREME COURT OF CANADA**

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| **Citation:** R. ***v.*** Prokofiew, 2012 SCC 49, [2012] 2 S.C.R. 639 | **Date:** 20121012**Docket:** 33754 |

**Between:**

**Ewaryst Prokofiew**

Appellant

and

**Her Majesty the Queen**

Respondent

- and -

**Attorney General of Canada, Attorney General of Quebec, Criminal Lawyers’ Association of Ontario and Canadian Civil Liberties Association**

Interveners

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

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| **Reasons for Judgment:**(paras. 1 to 36)**Dissenting Reasons:** (paras. 37 to 114): | Moldaver J. (Deschamps, Abella, Rothstein and Karakatsanis JJ. concurring)Fish J. (McLachlin C.J. and LeBel and Cromwell JJ. concurring) |

R. *v.* Prokofiew, 2012 SCC 49, [2012] 2 S.C.R. 639

Ewaryst Prokofiew *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada, Attorney General

of Quebec, Criminal Lawyers’ Association of

Ontario and Canadian Civil Liberties Association *Interveners*

**Indexed as: R. *v.* Prokofiew**

2012 SCC 49

File No.: 33754.

2011:  November 8; 2012:  October 12.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for ontario

 *Criminal law — Evidence — Failure to testify — Charge to jury — Accused did not testify but incriminated by co‑accused’s testimony — Co‑accused’s counsel inviting jury to infer accused’s guilt from failure to testify — Trial judge refrained from giving remedial instruction to jury about accused’s right to silence — Whether trial judge prohibited by Canada Evidence Act from affirming right to silence — Whether failure to give explicit remedial instruction constituted error — If so, whether curative proviso applicable — Canada Evidence Act, s. 4(6) — Criminal Code, s. 686(1)(b)(iii).*

 *Criminal law — Evidence — Hearsay — Whether trial judge’s erroneous admission of hearsay evidence sufficiently serious to preclude application of curative proviso — Criminal Code, s. 686(1)(b)(iii).*

 The Crown alleged that P and his co‑accused, S, participated in a fraudulent scheme involving the fictitious sale of heavy equipment to generate harmonized sales tax that was then not remitted to the federal government as required. The fraudulent nature of the scheme was never challenged. The involvement of P and S in the scheme was also conceded. The question for the jury was whether either or both accused were aware of the fraudulent nature of the scheme. P did not testify, but was incriminated by S’s testimony. In his closing address, S’s counsel invited the jury to infer P’s guilt from P’s failure to testify. The trial judge refrained from giving a remedial instruction to the jury about P’s right to silence. P was convicted and sentenced and his appeal was dismissed.

 *Held* (McLachlin C.J. and LeBel, Fish and Cromwell JJ. dissenting): The appeal should be dismissed.

 *Per* Deschamps, Abella, Rothstein, Moldaver and KarakatsanisJJ.: Section 4(6) of the *Canada Evidence Act* does not prohibit a trial judge from affirming an accused’s right to silence. Conversely, the trial judge need not affirm the accused’s right in every case, only where there is a realistic concern that the jury may place evidential value on an accused’s decision not to testify. In such a case, the trial judge should make it clear to the jury that an accused’s silence is not evidence and that it cannot be used as a makeweight for the Crown in deciding whether the Crown has proved its case.

 In assessing the credibility and reliability of evidence upon which the Crown can and does rely, a jury is entitled to take into account, among other things, the fact that the evidence stands uncontradicted, if that is the case, and the jury may be so instructed. The fact that evidence is uncontradicted does not mean that the jury must accept it and an instruction to that effect should also be given.

 In this case, S’s counsel could have relied on the fact that his client had testified to argue that S was innocent and had “nothing to hide”. Moreover, he could have emphasized that S’s testimony stood uncontradicted and that the jury could consider this in assessing whether they believed his evidence or whether it left them in a state of reasonable doubt. What S’s counsel could not do is mislead the jury on a matter of law. He could not invite the jury to use P’s silence at trial as evidence, much less evidence of guilt.

 While counsel’s comment should not have been made, the judge would not have allowed the trial to proceed if he truly believed that the comment had irretrievably compromised P’s fair trial rights. He only allowed it to proceed — with the acquiescence of P’s counsel who did not move for severance — on the belief that he could disabuse the jury of the notion that P’s silence at trial could be used as evidence of his guilt. Although an explicit remedial instruction from the trial judge would have been preferable, his jury charge, when considered as a whole, was adequate. The jury would have understood that the Crown could prove P’s guilt only on the evidence and, as P’s silence at trial did not constitute evidence, it could not be used to prove his guilt.

 As for the hearsay evidence, the trial judge’s error in admitting it was harmless and there is no realistic possibility that the verdict would have been different had the error not been made. The trial judge had warned the jury that this evidence should be approached with caution and other items of confirmatory evidence were available to the jury. Accordingly, this is a case where the curative proviso of s. 686(1)(*b*)(iii) of the *Criminal Code* can safely be applied to uphold P’s conviction.

 *Per* McLachlin C.J. and LeBel, Fish and Cromwell JJ. (dissenting): The trial judge erred in failing to instruct the jury that no adverse inference could be drawn from P’s silence. Whenever there is a significant risk ― as the trial judge found in this case ― that the jury will otherwise treat the accused’s silence as evidence of guilt, an appropriate remedial direction ought to be given to the jury. That was not done here.

 Standard instructions on the definition of evidence, the presumption of innocence, the Crown’s burden of proof and the reasonable doubt standard will not suffice. That is particularly true where, as here, counsel for one accused has suggested unmistakably to the jury that the guilt of a co‑accused may be inferred from that person’s failure to testify.

 As a matter of principle, there is no reason why counsel whose client has testified cannot refer to that fact and suggest this indicates the client is innocent and has “nothing to hide”. Counsel may certainly emphasize as well that the client’s testimony stands uncontradicted, even when the client asserts his or her own innocence and imputes guilt to the co-accused. The right to make full answer and defence is not constrained by the unfavourable impact its effective exercise may have on others in jeopardy of conviction. However, it is not absolute and cannot be exercised with total disregard for the constitutional rights of a co‑accused, including that person’s right not to have his or her silence treated as evidence of guilt.

 In this case, the absence of a remedial direction is sufficient to require a new trial.  Moreover, that error was exacerbated by the erroneous admission of hearsay evidence. On any view of the matter, neither of the errors committed by the trial judge can be characterized as trivial.  In these circumstances, the Crown has not satisfied its onerous burden in invoking the curative proviso*.*

**Cases Cited**

By Fish J. (dissenting)

 *R. v. Noble*, [1997] 1 S.C.R. 874; *R. v. Crawford*, [1995] 1 S.C.R. 858; *McConnell v. The Queen*, [1968] S.C.R. 802; *Avon v. The Queen*, [1971] S.C.R. 650; *R. v. Biladeau* (2008), 93 O.R. (3d) 365; *R. v. Assoun*, 2006 NSCA 47, 244 N.S.R. (2d) 96; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. Potvin*, [1989] 1 S.C.R. 525; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Naglik* (1991), 3 O.R. (3d) 385, rev’d [1993] 3 S.C.R. 122; *R. v. Pollock* (2004), 188 O.A.C. 37; *R. v. Oliver* (2005), 194 O.A.C. 284; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751; *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505; *Vetrovec v. The Queen*,[1982] 1 S.C.R. 811; *R. v. Bevan*, [1993] 2 S.C.R. 599; *R. v. Kehler*, 2004 SCC 11, [2004] 1 S.C.R. 328; *R. v. Brooks* (1998), 41 O.R. (3d) 661.

**Statutes and Regulations Cited**

*Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 4(6).

*Canadian Charter of Rights and Freedoms.*

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 16, 591(3)(*b*), 686(1)(*b*)(iii).

 APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Feldman, MacPherson, Blair and Juriansz JJ.A.), 2010 ONCA 423, 100 O.R. (3d) 401, 256 C.C.C. (3d) 355, 264 O.A.C. 174, 77 C.R. (6th) 52, [2010] G.S.T.C. 87, 2010 G.T.C. 1044, [2010] O.J. No. 2498 (QL), 2010 CarswellOnt 3899, upholding the convictions for fraud entered by Corbett J., [2005] G.S.T.C. 135, [2005] O.J. No. 1824 (QL), 2005 CarswellOnt 3201. Appeal dismissed, McLachlin C.J. and LeBel, Fish and Cromwell JJ. dissenting.

 *Russell Silverstein* and *Ingrid Grant*, for the appellant.

 *Jennifer M. Woollcombe* and *Ivan S. Bloom*, *Q.C.*, for the respondent.

 *James C. Martin* and *Richard Kramer*, for the intervener the Attorney General of Canada.

 *Sylvain Leboeuf* and *Gilles Laporte*, for the intervener the Attorney General of Quebec.

 *P. Andras Schreck* and *Lucy Saunders*, for the intervener the Criminal Lawyers’ Association of Ontario.

 *Frank Addario*, *Gerald Chan* and *Nader R. Hasan*, for the intervener the Canadian Civil Liberties Association.

 The judgment of Deschamps, Abella, Rothstein, Moldaver and Karakatsanis JJ. was delivered by

1. Moldaver J. — The issue in this case is whether a trial judge is prohibited by s. 4(6) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (“*CEA*”), from affirming an accused’s right to silence. At trial, the Crown alleged that Mr. Prokofiew and his co-accused, Mr. Solty, participated in a fraudulent scheme involving the fictitious sale of heavy equipment to generate harmonized sales tax that was then not remitted to the federal government as required. The fraudulent nature of the scheme was never challenged. The involvement of Messrs. Prokofiew and Solty in the scheme was also conceded. The question for the jury was whether either or both accused were aware of the fraudulent nature of the scheme. Mr. Prokofiew did not testify, but was incriminated by Mr. Solty’s testimony. In his closing address, Mr. Solty’s counsel invited the jury to infer Mr. Prokofiew’s guilt from the latter’s failure to testify. The trial judge refrained from giving a remedial instruction to the jury about Mr. Prokofiew’s right to silence. Mr. Prokofiew was convicted and sentenced ([2005] G.S.T.C. 135) and his appeal was dismissed by Doherty J.A. on behalf of a unanimous five-person panel of the Ontario Court of Appeal (2010 ONCA 423, 100 O.R. (3d) 401). Largely for the reasons given by Doherty J.A., I would dismiss Mr. Prokofiew’s further appeal to this Court.
2. I have had the benefit of reading the reasons of my colleague Justice Fish and I agree with much of his analysis. Where I disagree with him is in the result. I will explain our disagreement and why the appeal should be dismissed, but before doing so, I will address the matters on which my colleague and I agree — albeit with some additional observations.

I. Matters of Agreement

1. My colleague and I agree that s. 4(6) of the *CEA* does not prohibit a trial judge from affirming an accused’s right to silence. In so concluding, I should not be taken — nor do I understand my colleague to suggest — that such an instruction must be given in every case where an accused exercises his or her right to remain silent at trial. Rather, it will be for the trial judge, in the exercise of his or her discretion, to provide such an instruction where there is a realistic concern that the jury may place evidential value on an accused’s decision not to testify.
2. In cases where the jury is given an instruction on the accused’s right to remain silent at trial, the trial judge should, in explaining the right, make it clear to the jury that an accused’s silence is not evidence and that it cannot be used as a makeweight for the Crown in deciding whether the Crown has proved its case. In other words, if, after considering the whole of the evidence, the jury is not satisfied that the charge against the accused has been proven beyond a reasonable doubt, the jury cannot look to the accused’s silence to remove that doubt and give the Crown’s case the boost it needs to push it over the line.
3. The case at hand provides an example of a situation where such an instruction would be warranted — cut-throat defences where one accused testifies and points the finger at the other, while the other exercises his right not to testify. My colleague and I agree that, in summing up to the jury, Mr. Solty’s counsel could have relied on the fact that his client had testified to argue that Mr. Solty was innocent and had “nothing to hide”. Moreover, he could have emphasized that Mr. Solty’s testimony stood uncontradicted and that the jury could consider this in assessing whether they believed his evidence or whether it left them in a state of reasonable doubt.
4. What Mr. Solty’s counsel could not do is mislead the jury on a matter of law. He could not invite the jury to use Mr. Prokofiew’s silence at trial as evidence, much less evidence of guilt.
5. In cases where there is a risk of counsel misleading the jury on a co-accused’s right to remain silent at trial, trial judges would do well to spell out the governing principles and ensure that counsel’s remarks conform to those principles. That way, the potential harm can be prevented from occurring, thereby sparing the need for a remedial instruction.
6. In the context of the charge as a whole, I think it might be helpful to explain how a jury may use a lack of contradictory evidence in deciding whether the Crown has proved its case beyond a reasonable doubt.
7. Apart from a few notable exceptions — such as when an accused raises the defence of not criminally responsible on account of a mental disorder under s. 16 of the *Criminal Code*, R.S.C. 1985, c. C-46 — in every criminal trial, juries are instructed that an accused has no obligation to prove anything. The onus of proof rests upon the Crown from beginning to end and it never shifts.
8. Juries are also told that in deciding whether the Crown has proved its case to the criminal standard, they are to look to the whole of the evidence — and, having done so, they may only convict if they are satisfied, on the basis of evidence they find to be both credible and reliable, that the Crown has established the accused’s guilt beyond a reasonable doubt. In coming to that conclusion, a jury may not use an accused’s silence at trial as evidence, much less evidence of guilt, and, where appropriate, the jury should be so instructed.
9. That said, in assessing the credibility and reliability of evidence upon which the Crown can and does rely, a jury is entitled to take into account, among other things, the fact that the evidence stands uncontradicted, if that is the case — and the jury may be so instructed. Of course, the fact that evidence is uncontradicted does not mean that the jury must accept it, and an instruction to that effect should be given.

II. Is a New Trial Required?

A. *Failure to Instruct the Jury on the Appellant’s Right to Silence*

1. In the course of his closing address to the jury, which covered 23 pages of transcript, counsel for Mr. Solty incorporated the following rhetorical question into his remarks: “Did [Mr. Prokofiew] have something to hide or did he simply have no response that could help him since there is no point in trying to contradict the truth?” (A.R., vol. V, at p. 17). That comment was improper in that it implicitly invited the jury to treat Mr. Prokofiew’s silence at trial as evidence of guilt. It should not have been made.
2. I note that the trial judge took umbrage at the remarks made by Mr. Solty’s counsel. Initially, he stated that he would provide the jury with a strong remedial instruction. The following day, in an oral ruling delivered moments before he commenced his charge, the trial judge ruled that he was constrained by s. 4(6) of the *CEA* from giving the jury an explicit remedial instruction. In the same ruling, he remarked that there was a “significant risk” the jury would infer guilt from Mr. Prokofiew’s silence, if he did not “give a proper charge to the jury” (A.R., vol. I, at p. 7).
3. Despite his strong language, I consider it significant that neither the trial judge, on his own motion, nor counsel who was acting for Mr. Prokofiew at the time, raised the prospect of severance. The option of severing Mr. Prokofiew’s trial from Mr. Solty’s was clearly open if the trial judge believed that severance was warranted in the interests of justice: *Criminal Code*, s. 591(3)(*b*) — and it would have solved the problem if, as Mr. Prokofiew now argues and my colleague accepts, the risk identified by the trial judge was so great that it could not be overcome by instructions tailored to address, albeit indirectly, the erroneous message conveyed by Mr. Solty’s counsel. Presumably, Mr. Prokofiew’s trial counsel ascribed to the view that the judge’s instructions to the jury would suffice, and thus refrained from moving for severance. I prefer to view the matter that way, rather than to treat his failure to move for severance as a tactical decision designed to preserve a ground of appeal should things go badly at trial.
4. As for the trial judge, I cannot accept that he would have allowed the trial against Mr. Prokofiew to proceed if he truly believed that the impugned remarks had irretrievably compromised Mr. Prokofiew’s fair trial rights. On the contrary, I am satisfied that he proceeded — with the acquiescence of Mr. Prokofiew’s trial counsel — on the belief that he could disabuse the jury of the notion that Mr. Prokofiew’s silence at trial could be used as evidence of his guilt. And that, in my view, is precisely what the trial judge proceeded to do.
5. My colleague states that the trial judge’s instructions “left [the jury] to determine for themselves, with no assistance from the judge, the evidentiary and legal effect of Mr. Prokofiew’s failure to testify at trial” (para. 87). He further contends that, absent an explicit instruction from the trial judge, “[w]e have no basis for supposing that the jury understood . . . which [of the two] counsel had stated the law correctly” (para. 89). With respect, I do not share his view that the jury was left on its own without guidance, relegated in the end to choose, presumably as a matter of guesswork, which of the two counsel had accurately stated the law.
6. First, the jury was told by the trial judge that he (the trial judge) was supreme in the law and that they must take the law from him. The jury was also told that if they had questions, they were to put the questions in writing and the trial judge would answer them in open court.
7. In view of those instructions, I believe that if the jury had been faced with the quandary my colleague poses — as to which of the two counsel, who had made “diametrically opposite submissions on a fundamental principle of law” (para. 88), they should believe — they would have asked the trial judge for clarification. I do not accept that they would have left the matter to guesswork or any other form of conduct that would indicate that the jury was being untrue to its oath.
8. As it is, the jury did not ask a question about the two “diametrically opposite submissions”. That leads to a second area of disagreement with my colleague. It relates to the instructions the jury received and whether those instructions, though not explicit, were sufficient to overcome the risk that the trial judge had flagged — that the jury would use Mr. Prokofiew’s silence at trial as evidence of guilt.
9. As indicated, my colleague maintains that the jury received no assistance from the trial judge in this regard. They were “left free”, he maintains, “to treat Mr. Prokofiew’s failure to testify as evidence of his guilt and to convict him, at least in part, for that reason” (para. 92). With respect, I disagree. I prefer instead Doherty J.A.’s analysis of the instructions, and his conclusion that, considered in their entirety, the jury would have understood that the Crown could prove Mr. Prokofiew’s guilt only on the evidence, that his silence at trial did not constitute evidence, and that it could therefore not be used to infer guilt.
10. As Doherty J.A. points out, the trial judge made it clear to the jury that the Crown carried the burden of proof throughout the proceedings and that there was no obligation on the part of Mr. Prokofiew to present evidence or prove anything. The trial judge also emphasized that the jury was to base its verdict on the evidence given during the trial and nothing else. Importantly, he defined “evidence” as being “[o]nly things that are admitted, the exhibits and the things witnesses say in testimony before you” (A.R., vol. V, at p. 143). Like Doherty J.A., I believe the jury would have understood from this that Mr. Prokofiew’s silence did not constitute evidence, and, as such, it could not be used in determining his guilt.
11. My colleague points out that the trial judge did not give an explicit instruction to the jury about the impropriety of using Mr. Prokofiew’s silence at trial as evidence of guilt. I agree. However, I do not agree that the jury received no assistance from the trial judge on the matter. On the contrary, I am satisfied that the trial judge implicitly endorsed the remarks Mr. Prokofiew’s counsel made in direct response to the improper remarks made by Mr. Solty’s counsel. At the very least, the trial judge went a long way in that direction.
12. In response to the impugned remarks, counsel for Mr. Prokofiew juxtaposed other jurisdictions in the world where accused persons were required to disprove their guilt with the situation in Canada:

 That is not, thankfully, the way things are done here in Canada. We have the luxury and we have the thankfulness that we have a system that requires the State to prove our guilt before a conviction or a finding of guilt can be entered.

 In this situation, this is the situation why Mr. Prokofiew does not have to call evidence, and this is why Mr. Prokofiew did not call evidence. [A.R., vol. V, at p. 27]

1. In his instructions to the jury, the trial judge picked up on this theme and endorsed it as follows:

 Mr. Solty and Mr. Prokofiew do not have to present evidence or prove anything in this case. In particular, they do not have to prove that they are innocent of the crimes charged [*sic*]. From start to finish, it is the Crown that must prove guilt beyond a reasonable doubt. It is Crown counsel who must prove Mr. Solty’s guilt and/or Mr. Prokofiew’s guilt beyond a reasonable doubt, not Mr. Prokofiew or Mr. Solty who must prove their innocence. [A.R., vol. V, at p. 133]

Doherty J.A. observed that this jury instruction “tied the presumption of innocence into the burden of proof in a manner that spoke almost directly to the irrelevance of the appellant’s failure to testify” (para. 49). I agree.

1. In the face of an instruction that effectively endorsed the remarks of Mr. Prokofiew’s counsel on the very issue of concern, I fail to see how it can be said that the trial judge left the jury to cast about on its own, with free rein to treat Mr. Prokofiew’s failure to testify as evidence of his guilt and to convict him, at least in part, for that reason.
2. In sum, while I agree that an explicit remedial instruction from the trial judge would have been preferable — and would have been warranted in these circumstances — I am satisfied that the instructions that were given in the instant case, when considered as a whole, were adequate. Like Doherty J.A., I am confident that the jury would have understood, in the context of the entirety of the instructions, that the Crown could prove Mr. Prokofiew’s guilt only on the evidence and, as Mr. Prokofiew’s silence at trial did not constitute evidence, it could not be used to prove his guilt. However, I do not fault the trial judge for concluding — wrongly but understandably — that he was prohibited by s. 4(6) of the *CEA* from making any reference at all to Mr. Prokofiew’s failure to testify. My colleague has addressed that matter and it should not pose a problem in future cases.

B. *Failure to Exclude Inadmissible Hearsay Evidence*

1. The trial judge improperly admitted various cheque stubs and a deposit book into evidence. Crown counsel at trial alleged that the stubs and deposit book recorded cash payments to Mr. Prokofiew from Discount Sales, one of the commercial vehicles of the fraud. Defence counsel at trial disputed that the “E” to which the documents referred was his client, Ewaryst “Eddie” Prokofiew. In my opinion, the trial judge’s error was minor and the verdict would inevitably have been the same had he not made it.
2. My colleague, however, maintains that the admission of the impugned documents was sufficiently serious to preclude the application of the curative proviso in s. 686(1)(*b*)(iii) of the *Criminal Code*. He points out that the Crown’s case against Mr. Prokofiew rested almost entirely on the evidence of two disreputable witnesses, Messrs. Solty and Tulloch (the latter being a co-accused who had pled guilty before the trial of Messrs. Solty and Prokofiew and had since become a Crown witness). The jury was told to proceed with caution and to look for confirmatory evidence before acting on their testimony to convict Mr. Prokofiew. Depending on their assessment of the cheque stubs and deposit book, the jury was instructed that those items could constitute confirmatory evidence of Mr. Tulloch’s testimony, which in turn would bear on the jury’s evaluation of Mr. Solty’s credibility. Hence, according to my colleague, the error was not harmless, because the jury “may [have relied] on the impugned evidence to take a small but critical first step in a chain of deductions leading to a finding of guilt” (para. 111).
3. As indicated, I take a different view of the error. In my view, it was minor and the verdict would inevitably have been the same had it not been made.
4. Importantly, the impugned documents did not stand alone. Other documentary items existed that lent support to the testimony of Messrs. Solty and Tulloch. These items included:

• sixteen invoices written by Mr. Prokofiew that set out the structure of the various fraudulent transactions;

• financial records confirming Mr. Tulloch’s evidence that Mr. Prokofiew used Discount Sales to funnel portions of Mr. Tulloch’s share of the illicit proceeds into purchases of a motorcycle and a boat for Mr. Tulloch;

• the Articles of Incorporation for Discount Sales showed Mr. Prokofiew’s home address as the address for the first director; and

• a document listed John O’Meara, Mr. Prokofiew’s father-in-law, as the first director of Discount Sales.

1. In respect of John O’Meara’s directorship, his widow testified that he had nothing to do with the operation of the business. She further testified that her husband had no significant assets when he passed away.
2. The various documentary items that I have listed, in conjunction with the testimony of Mrs. O’Meara, provided the jury with ample confirmatory evidence. The jury was entitled to rely on that evidence to restore its faith in Messrs. Solty and Tulloch and to act on their evidence to convict Mr. Prokofiew.
3. Apart from the significant body of confirmatory evidence that existed over and above the impugned cheque stubs and deposit book, it is worth noting, for the purposes of assessing the seriousness of the error, that the trial judge cautioned the jury in strong terms that the cheque stubs were hearsay evidence and that it was not possible to cross-examine the person who had written the entries on them. He further told the jury that the stubs were “of dubious reliability” and that the jury “should approach them with great caution” (A.R., vol. V, at p. 162). After reviewing the factors that the jury might wish to consider in deciding what use to make of the cheque stubs, if any, the trial judge completed his remarks with a second strong warning. He reminded the jury that “[n]o witness [had] testified as to these cheque stubs” after reiterating the need to “approach [them] with caution” (A.R., vol. V, at p. 165).
4. In the face of those instructions and the other items of confirmatory evidence available to the jury, I cannot accept that the admission of the cheque stubs and deposit book amounted to a significant error. The error, in my view, was harmless in its overall effect — and I have no doubt that the verdict would have been the same had it not been made. Accordingly, this is a case where the curative proviso can safely be applied to uphold the conviction.

III. Conclusion

1. Taking into account the entirety of the trial judge’s instructions, I am satisfied that the jury would have understood that Mr. Prokofiew’s silence at trial could not be used as evidence of his guilt. As for the trial judge’s error in admitting the hearsay evidence, in my view, the error was harmless and there is no realistic possibility that the verdict would have been different had it not been made.
2. Accordingly, I would dismiss the appeal.

The reasons of McLachlin C.J. and LeBel, Fish and Cromwell JJ. were delivered by

 Fish J. (dissenting) —

I

1. At the conclusion of their joint trial before judge and jury, Ewaryst Prokofiew and Peter Solty were both convicted of fraud and conspiracy to defraud the Government of Canada of $3.25 million ([2005] G.S.T.C. 135).
2. Mr. Prokofiew did not testify. Mr. Solty did, proclaiming his innocence and incriminating Mr. Prokofiew.
3. In his closing address to the jury, Mr. Solty’s counsel implied that Mr. Prokofiew’s silence indicated that he had something to hide. There is no dispute as to the significance of counsel’s words: The Crown concedes in its factum that “counsel for Mr. Solty suggested [to the jury] that [Mr. Prokofiew] *had not testified because he was guilty of the alleged offences*” (R.F., at para. 2 (emphasis added)).
4. The trial judge recognized that no such inference was permitted and he wanted to make this clear to the jury. He concluded there was a “significant risk” that the jury might otherwise, as suggested by Mr. Solty’s counsel, infer from Mr. Prokofiew’s silence that he was guilty as charged (A.R., vol. I, at p. 7).
5. In response to defence counsel’s request for a “strong [remedial] direction”, the trial judge replied: “You can count on it” (A.R., vol. V, at p. 92).
6. “[T]here are few rights more fundamental than the right to remain silent”, the judge added, “and it must be made clear to the jury . . . that they may not consider Mr. Prokofiew’s silence . . . as indicative of guilt when they come to considering his guilt or innocence” (A.R., vol. V, at p. 92).
7. After considering two decisions of this Court, however, the trial judge held — wrongly but understandably, as we shall see — that he was prohibited by s. 4(6) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, from making any reference at all to Mr. Prokofiew’s failure to testify. He therefore refrained from giving the remedial instruction that he had earlier thought necessary to prevent the jury from drawing the impermissible inference they had been invited to draw by Mr. Solty’s counsel.
8. The Court of Appeal for Ontario, correctly in my view, held that s. 4(6) prohibits comments *prejudicial to the accused —* but not the remedial instruction requested by defence counsel and contemplated by the judge (2010 ONCA 423, 100 O.R. (3d) 401). The Court of Appeal held as well, again correctly, that the trial judge had erred in admitting hearsay evidence. It is undisputed in this Court that the hearsay evidence was inadmissible and ought to have been excluded.
9. The Court of Appeal nonetheless dismissed Mr. Prokofiew’s appeal on the ground that both errors were harmless. With respect, I am of a different view. For the reasons that follow, I would quash Mr. Prokofiew’s conviction, allow the appeal and order a new trial.

II

1. Having concluded that a new trial should be had, I shall refer to the facts only to the extent necessary to explain my conclusion.
2. Mr. Prokofiew and Mr. Solty were alleged by the Crown to have participated knowingly in a fraudulent scheme involving the sale of non-existent “heavy equipment” between the Maritimes and Ontario. Harmonized Sales Tax (HST) was collected on these fictitious sales but never remitted to the government. In all, the perpetrators of the scheme defrauded the Government of Canada of more than three million dollars.
3. It was uncontested at trial that the scheme was fraudulent and that Mr. Prokofiew and Mr. Solty had both participated in it. The only live issue was whether they were aware of its fraudulent nature.
4. Mr. Solty testified that he was an innocent participant. He was induced, he said, to participate in the fraud by Mr. Prokofiew, who orchestrated the scheme.
5. Mr. Prokofiew did not testify.
6. In his address to the jury, counsel for Mr. Solty contrasted in the following terms Mr. Prokofiew’s silence with Mr. Solty’s decision to testify:

 It’s clear that Mr. Solty never ran and [n]ever tried to hide from his involvement in this case. . . . And when it came to his turn to tell his side of the story, he did not, like Ewaryst Prokofiew, shirk from that challenge. And why did he do all this? Especially when there was absent no obligation for him to do anything? Because, I suggest, he had nothing to hide. Because he’s innocent. Innocent people don’t make themselves scarce when the troubles begin. They stand up with their friends and colleagues and try and deal with the problem. I suggest to you that at every turn, Peter Solty acted in a manner that is consistent with an innocent person.

. . .

Lastly, Peter Solty took the stand and told his story, warts and all. Ewaryst Prokofiew did not. Mr. Solty accused him of massive monetary fraud, and backed up that accusation with the hand-written invoices and other documentation that he provided to the police. What was Mr. Prokofiew’s response? Ask yourself why Ewaryst Prokofiew did not testify. Did he have something to hide or did he simply have no response that could help him since there is no point in trying to contradict the truth? [A.R., vol. V, at pp. 10-11 and 16-17]

1. The trial judge was concerned that these comments could undermine Mr. Prokofiew’s right to a fair trial. As earlier mentioned, he felt there was a “significant risk” that the jury would infer that Mr. Prokofiew’s silence could be taken as evidence of guilt, in contravention of *R. v. Noble*,[1997] 1 S.C.R. 874 (A.R., vol. I, at p. 7). It was therefore necessary, said the judge, to make clear to the jury that no such inference was permitted — “that they may not consider Mr. Prokofiew’s silence . . . as indicative of [his] guilt” (A.R., vol. V, at p. 92).
2. However, after hearing submissions and reviewing *Noble* and *R. v. Crawford*, [1995] 1 S.C.R. 858, the trial judge concluded that s. 4(6) of the *Canada Evidence Act* precluded him from commenting *in any way* on an accused’s silence at trial. He therefore made no reference in his jury instructions to Mr. Prokofiew’s failure to testify.
3. The Court of Appeal agreed with the trial judge that Sopinka J. did state in *Noble* and *Crawford* that s. 4(6) prohibits any mention of the accused’s failure to testify. However, Doherty J.A., speaking for a unanimous Court, found that Justice Sopinka’s statements to this effect in both *Noble* and *Crawford* were *obiter dicta*.
4. Justice Doherty recognized that lower courts should presume that *obiter dicta* of the Supreme Court are binding upon them (para. 21). And he then proceeded to explain, persuasively and with care, why that presumption was inapplicable in this instance.
5. Justice Doherty first noted that the impugned *obiter dicta* were plainly inconsistent with the *ratio decidendi* of decisions predating *Crawford* and *Noble —* in particular, *McConnell v. The Queen*, [1968] S.C.R. 802, and *Avon v. The Queen*, [1971] S.C.R. 650.
6. One reason for treating *obiter* as binding is to preserve and promote certainty in the law. Yet to do so here would have the opposite effect. It would disregard precedent that was not questioned in *Crawford*, *Noble* or subsequent decisions of the Supreme Court — and, indeed, applied recently and consistently at the appellate level in Ontario, and elsewhere in Canada (para. 29, citing, *inter alia*, *R. v. Biladeau* (2008), 93 O.R. (3d) 365 (C.A.), at para. 20, and *R. v. Assoun*, 2006 NSCA 47, 244 N.S.R. (2d) 96, at paras. 285-88).
7. Justice Doherty noted as well that the comments in *Crawford* and *Noble* relied on by the judge in this case were not only tangential (para. 36), but entirely inconsistent with the “constitutional vision” articulated in *Noble* itself (para. 39).
8. The Court of Appeal therefore concluded that the trial judge had misconstrued s. 4(6) of the *Canada Evidence Act* and could properly have instructed the jury not to draw an adverse inference from Mr. Prokofiew’s silence. The court recognized that “no one knows for sure what the jury used or did not use”, but found that the absence of a remedial instruction would only be fatal where the “appellant shows a real risk that his silence was misused” (para. 42).
9. The Court of Appeal concluded that Mr. Prokofiew had not discharged this burden. Relying on the judge’s charge as a whole, and more particularly on passages to which I shall later refer, the court was satisfied that the absence of a specific remedial instruction did not amount to reviewable error in this case.
10. A second ground of appeal raised by Mr. Prokofiew in the Court of Appeal was likewise dismissed. It concerned the admission by the trial judge of hearsay documents that, according to the Crown, implicated Mr. Prokofiew in the fraud. The Crown conceded before the Court of Appeal that this evidence was inadmissible and should therefore have been excluded.
11. Justice Doherty described the inadmissible hearsay as nothing more than “a small brick in a very large wall built by the evidence offered by the Crown against the appellant” (para. 57). And he concluded that the second error, like the first, was not fatal, since “the rest of the evidence presented an overwhelming case” (para. 57).
12. In the result, the Court of Appeal found that the erroneous admission of the hearsay evidence “caused no substantial wrong or miscarriage of justice” (para. 54), applied the curative *proviso* of s. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46, and dismissed Mr. Prokofiew’s appeal.

III

1. *Noble* establishes that a trier of fact may not draw an adverse inference from the accused’s failure to testify and that the accused’s silence at trial may not be treated as evidence of guilt. To do so would violate the presumption of innocence and the right to silence. It would to that extent and for that reason shift the burden of proof to the accused, turning the accused’s constitutional right to silence into a “snare and a delusion” (*Noble*, at para. 72).
2. We are now urged by the Crown to overrule *Noble*. Upon careful consideration of Crown counsel’s full and able argument, and the helpful submissions of all counsel on this issue, I would decline to do so.
3. I see no persuasive reason to overturn *Noble*. *Noble* is a recent and important precedent regarding a fundamental constitutional principle. The Court’s decision in that case is constitutionally mandated and has not proven unworkable in practice. Nothing of significance has occurred since 1997 to cause the Court to reconsider its decision. And it is well established that the Court must exercise particular caution in contemplating the reversal of a precedent where the effect, as here, would be to diminish the protection of the *Canadian Charter of Rights and Freedoms*: *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44.
4. These questions remain: Does s. 4(6) of the *Canada Evidence Act* prohibit *any comment at all* by the trial judge on the failure of the accused to testify ― as the trial judge found in this case? If not, what can trial judges tell juries about the failure of an accused to testify? Was a remedial instruction required in this case? If so, is the absence of a remedial instruction fatal to the verdict?
5. Section 4(6) of the *Canada Evidence Act* provides:

 The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

1. In *Crawford*, Justice Sopinka stated that s. 4(6) “encompasses both comment prejudicial to the accused, as well as a direction that the jury must not draw an unfavourable conclusion from the accused’s failure to testify” (para. 22).
2. And he reiterated this observation in *Noble*:

 Section 4(6), whose validity is not at issue in the present case, prevents a trial judge from commenting on the silence of the accused. The trial judge is therefore prevented from instructing the jury on the impermissibility of using silence to take the case against the accused to one that proves guilt beyond a reasonable doubt. [para. 95]

1. I agree with Justice Doherty that both comments were *obiter dicta*. Section 4(6) was not at issue in either *Crawford* or *Noble*. *Crawford* dealt with what an accused or defence counsel may say in relation to a co-accused’s pre-trial silence, while *Noble* held that an accused’s silence at trial cannot be used as evidence of guilt.
2. In both cases, Justice Sopinka’s references to s. 4(6) merely formed part of his description of the legislative background in describing ancillary issues relating to an accused’s silence. His comments were brief and unnecessary to the result. *Dicta* of this sort may be set aside where, as in this instance, there are good reasons to do so: *Henry*, at para. 57.
3. First, the impugned observations in *Noble* and *Crawford* ignored — indeed, contradicted ― judgments of the Court that explicitly defined and applied s. 4(6) (*McConnell*, at p. 809; *Avon*, at p. 655; *R. v. Potvin*, [1989] 1 S.C.R. 525, at pp. 557-58). These well-established precedents cannot be taken to have been overruled without mention ― *en passant*, as it were — by *obiter* comments in *Crawford* and *Noble*.
4. Second, as *McConnell*, *Avon* and *Potvin* demonstrate, a purposive interpretation of s. 4(6) compels the conclusion that trial judges may inform the jury of the accused’s right to silence and the protection it affords. More specifically, applying *Noble*, trial judges may instruct the jury that, as a matter of law, no adverse inference may be drawn from the failure of the accused to testify.
5. In *McConnell*, the trial judge instructed the jury that there was no onus on an accused to testify and that they should not be influenced in their decision by the accused’s silence at trial (p. 815). In rejecting the contention that the trial judge’s instructions contravened s. 4(5) of the *Canada Evidence Act* (now s. 4(6)), Ritchie J. explained:

 Here the language used by the trial judge to which objection is taken was not so much a “comment” on the failure of the persons charged to testify as a statement of their right to refrain from doing so, and it does not appear to me that it should be taken to have been the intention of Parliament in enacting s. 4(5) of the *Canada Evidence Act* to preclude judges from explaining to juries the law with respect to the rights of accused persons in this regard. . . .

 I think it is to be assumed that the section in question was enacted *for the protection of accused persons against the danger of having their right not to testify presented to the jury in such fashion as to suggest that their silence is being used as a cloak for their guilt.* [Emphasis added; p. 809.]

1. *Avon* dealt with a similar instruction. And the Court again rejected a submission that s. 4(5) (now s. 4(6)) prohibits any mention by the trial judge of the accused’s silence at trial:

 . . . I would say that the language used by [the trial judge] is a “statement” of an accused’s right not to testify, rather than a “comment” on his failure to do so. In my opinion, the instructions complained of cannot be construed as prejudicial to the accused or such as to suggest to the jurors that his silence was used to cloak his guilt. [p. 655]

1. Similarly, in *Potvin*, Wilson J. held that s. 4(5) (now s. 4(6)) must be interpreted in a purposive and not literal manner. Properly understood, it prohibits only statements prejudicial to the accused (pp. 557-58).
2. Quite properly, the Crown has conceded before us that s. 4(6) should be interpreted in accordance with *McConnell*, *Avon* and *Potvin*.
3. In short, s. 4(6) of the *Canada Evidence Act* does not prohibit an affirmation by the trial judge of the accused’s right to silence. And, in appropriate circumstances, an instruction that no adverse inference may be drawn from the silence of the accused at trial is not a prohibited “comment” on the accused’s failure to testify within the meaning of that provision.

IV

1. I turn now to consider whether the trial judge in this case erred in failing to instruct the jury that no adverse inference could be drawn from the appellant’s failure to testify. Unlike the Court of Appeal, and with the greatest of respect, I believe that he did. And I believe as well that this error, though understandable in light of *Crawford* and *Noble*, is fatal to the jury’s verdict.
2. The Court of Appeal recognized that “no one knows for sure what the jury used or did not use”, but found that the absence of a remedial instruction would only be fatal where the “appellant shows a real risk that his silence was misused” (para. 42).
3. In concluding that Mr. Prokofiew had not discharged that burden, the Court of Appeal pointed to various passages of the judge’s charge. Essentially, in the passages considered by the Court of Appeal (paras. 46-48), the trial judge instructed the jury that their verdict must be based on “the evidence put before you, and only on that evidence” (A.R., vol. V, at p. 125); that both Mr. Prokofiew and Mr. Solty were presumed innocent throughout the trial; that they did not have to prove their innocence; and that the presumption of their innocence “is only defeated if and when Crown counsel has satisfied all of you, beyond a reasonable doubt, that either or both Mr. Prokofiew and Mr. Solty are guilty of either or both of the crimes with which they are each charged” (p. 132).
4. Relying on the entirety of the judge’s instructions, and notably on the instructions mentioned, the court was satisfied “that the jury would understand that the Crown could prove the appellant’s guilt based only on the evidence, and that the appellant’s silence at trial ― or indeed, any other non-evidentiary matter ― could not be used to infer the appellant’s guilt” (para. 51).
5. The Court of Appeal also characterized as a “direct response” (para. 44) to the prejudicial comments by counsel for Mr. Solty, the following passages from the closing address of counsel for Mr. Prokofiew:

 Mr. Prokofiew, as [counsel for Mr. Solty] pointed out, chose not to testify in this case. There are many jurisdictions in the world that are, frankly, not as kind as ours; that when a person has an allegation against them, that they have to stand up; you’re alleged to do this; or you prove to us, you tell us why you are not guilty. That is not, thankfully, the way things are done here in Canada. We have the luxury and we have the thankfulness that we have a system that requires the State to prove our guilt before a conviction or a finding of guilt can be entered.

 In this situation, this is the situation why Mr. Prokofiew does not have to call evidence, and this is why Mr. Prokofiew did not call evidence. In the context of [counsel for Mr. Solty’s] statement, well, yes, Mr. Solty testified, but with respect, Mr. Solty had no choice but to testify. He was implicated at every turn of these transactions. He was in transactions up to his neck. And as a result, with respect to him, he had no choice but to take the stand. In response to Mr. Prokofiew, as I will mention in my submission, the evidence comes down to the evidence of Mr. Tulloch, and juxtaposed by the evidence of Peter Solty. With the greatest respect to them, their evidence does not come close to establishing guilt beyond a reasonable doubt in this case. And in the context of what Mr. Solty testified to will simply adjust the position of the evidence of Mr. Tulloch. Nothing more, nothing less. [A.R., vol. V, at pp. 27-28]

1. With respect, unlike the Court of Appeal, I believe these comments by counsel for Mr. Prokofiew lend little curative weight to the absence of a remedial instruction by the trial judge.
2. It is true that “[a]ppellate review of the trial judge’s charge will encompass the addresses of counsel as they may fill gaps left in the charge” (*R. v. Daley*,2007 SCC 53, [2007] 3 S.C.R. 523, at para. 58). However, we are not dealing in this case with a failure by the trial judge to mention evidence that is brought to the jury’s attention by counsel in their closing submissions. Nor are we concerned with uncontested or uncontroversial matters inadvertently omitted from the judge’s charge. Or with any other gap of the kind contemplated by *Daley*.
3. That is not our case. Here, the jurors were faced with *conflicting* comments by counsel that complicated — rather than complemented — the “gap” in the judge’s charge. They were left to determine for themselves, with no assistance from the judge, the evidentiary and legal effect of Mr. Prokofiew’s failure to testify at trial.
4. It is true that the addresses of counsel may in some circumstances adequately complement the judge’s charge. But that cannot be so where counsel for two antagonistic accused make diametrically opposite submissions on a fundamental principle of law, as in this case.
5. We have no basis for supposing that the jury understood, in the absence of an explicit instruction by the judge, which counsel had stated the law correctly. The jury had no informed reason to believe one lawyer rather than the other. The guiding hand of the trial judge was essential — and absent.
6. Most importantly, *neither* the judge’s instructions cited by the Court of Appeal *nor* the comments by counsel for Mr. Prokofiew address the impermissibility of drawing an adverse inference from Mr. Prokofiew’s silence.
7. The essence of the matter is that Mr. Solty’s counsel had invited the jurors to draw the impermissible inference that Mr. Prokofiew was using his silence to “cloak his guilt” (*Avon*, at p. 655). In the Crown’s words, “[he] suggested [to the jury] that [Mr. Prokofiew] had not testified because he was guilty of the alleged offences”(R.F., at para. 2).
8. The impugned comments by Mr. Solty’s counsel, as the trial judge recognized, cried out for an explicit, remedial instruction. They received no remedial instruction at all. I agree with the Court of Appeal that “no one knows for sure what the jury used or did not use” (para. 42). What we do know for sure is that they were left free to treat Mr. Prokofiew’s failure to testify as evidence of his guilt and to convict him, at least in part, for that reason.
9. In my respectful view, this alone is fatal to their verdict.
10. Trial judges must take care to ensure that the right to silence becomes neither a snare nor a delusion (*Noble*, at para. 72). To this end, whenever there is a “significant risk” ― as the trial judge found in this case ― that the jury will otherwise treat the silence of the accused as evidence of guilt, an appropriate remedial direction ought to be given to the jury. That was not done here.
11. Standard instructions on the definition of evidence, the presumption of innocence, the Crown’s burden of proof, and the reasonable doubt standard will not suffice. That is particularly true where, as here, counsel for one accused has suggested unmistakably to the jury that the guilt of a co-accused may be inferred from that person’s failure to testify.

V

1. The judgment of the Ontario Court of Appeal in *R. v. Naglik* (1991), 3 O.R. (3d) 385, rev’d on other grounds, [1993] 3 S.C.R. 122, has been cited as authority for the proposition that counsel may comment on the failure of a co-accused to testify (for example, by the Court of Appeal in this case, at para. 12; see also *Crawford*, at para. 24; *R. v. Pollock* (2004), 188 O.A.C. 37, at para. 149; *R. v. Oliver* (2005), 194 O.A.C. 284, at para. 65).
2. This aspect of the matter has not been fully canvassed in the courts below. And the outcome of this appeal does not turn on whether the Court of Appeal in *Naglik* was correct. I therefore think it sufficient for present purposes to make clear that *Naglik* does not support the proposition that counsel may invite the jury to use a co-accused’s silence at trial as evidence of guilt, as Mr. Solty’s counsel did in this case.
3. First, *Naglik* was decided several years before *Noble*. The Court of Appeal found that the impugned comment by counsel in that case was, at the time, correct in law (see p. 395). Second, in *Naglik* the Court of Appeal went on to say that counsel may not “encourage the jury to speculate or draw unwarranted inferences” (p. 397). What was an unwarranted inference then is an impermissible inference now, in virtue of *Noble*. Third, this Court expressly declined in *Naglik* to determine whether counsel may refer to the failure of a co-accused to testify (p. 137).
4. As a matter of principle, I see no reason why counsel whose client has testified cannot refer to that fact and suggest this indicates the client is innocent and has “nothing to hide”. Counsel may certainly emphasize as well that the client’s testimony stands uncontradicted, even when the client asserts his or her own innocence and imputes guilt to the co-accused.
5. The right to make full answer and defence is not constrained by the unfavourable impact its effective exercise may have on others in jeopardy of conviction. It is, however, not absolute and cannot be exercised with total disregard for the constitutional rights of a co-accused, including that person’s right not to have his or her silence treated as evidence of guilt.

VI

1. It is uncontested that the trial judge erred in law by admitting hearsay evidence that ought to have been excluded.
2. The impugned evidence consisted of cheque stubs and a deposit book. The Crown alleged at trial that the stubs and deposit book recorded cash payments made to Mr. Prokofiew from Discount Sales, one of the commercial vehicles of the fraud. Counsel for Mr. Prokofiew disputed that the “E” to which the documents referred was his client, Ewaryst “Eddie” Prokofiew.
3. While conceding that the hearsay evidence should have been excluded, the Crown submits that its erroneous admission is of negligible significance. As we shall see, I am of a different view.

VII

1. We are urged by the Crown to apply the curative *proviso* of s. 686(1)(*b*)(iii) if we conclude, as I would, that the trial judge erred in law in failing to give the jury the remedial instruction requested by defence counsel and, again, in admitting the hearsay evidence that ought to have been excluded.
2. It is now well established that the *proviso* may only be applied where the Crown satisfies the court that the evidence of the appellant’s guilt is overwhelming or that the trial judge’s errors of law were harmless because there is “no realistic possibility that a new trial would produce a different verdict” (*R. v. Jolivet*,2000 SCC 29, [2000] 1 S.C.R. 751, at para. 46; *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, at paras. 23-24). I am not satisfied that the Crown has discharged its burden in this case.
3. The Court of Appeal held that the case against Mr. Prokofiew was “overwhelming” (para. 57). This conclusion overlooks the fact that the strength of the Crown’s case depends on the credibility of the two witnesses who incriminated Mr. Prokofiew, both disreputable. And it rests on the assumption that neither of the judge’s errors of law has any bearing on their credibility, tainted to begin with.
4. I refer, of course, to the co-accused, Mr. Solty, and to Andrew Tulloch, a Crown witness. Mr. Tulloch had pleaded guilty prior to the trial. They alone asserted that Mr. Prokofiew was the architect of the fraudulent scheme. None of the Crown’s other witnesses had dealt with Mr. Prokofiew directly or were able to attest to his knowing participation in the fraud. Some documentary evidence demonstrated Mr. Prokofiew’s involvement in the transactions. But nothing in the documents or elsewhere — independent of Mr. Solty and Mr. Tulloch’s testimony — showed conclusively that he conducted them with fraudulent intent.
5. It was, of course, open to the jury to consider the testimony of Mr. Solty and Mr. Tulloch credible. Quite properly, however, the trial judge warned the jury against resting its verdict on their uncorroborated evidence. Mr. Tulloch was a *Vetrovec* witness (*Vetrovec v. The Queen*,[1982] 1 S.C.R. 811). The trial judge therefore instructed the jury that it would be “dangerous” to rely on his testimony absent confirmatory evidence (A.R., vol. V, at p. 160). The trial judge also cautioned the jury against relying on Mr. Solty’s evidence when considering the case against Mr. Prokofiew:

 You should consider that testimony of Mr. Solty with particular care, because he may have been more concerned about protecting himself and damaging Mr. Prokofiew than in telling the truth. [A.R., vol. V, at p. 156]

1. In addition, counsel for Mr. Prokofiew suggested at trial that Mr. Solty was motivated by a powerful animus against Mr. Prokofiew: Mr. Solty was aware that Mr. Prokofiew had had an affair with Mr. Solty’s wife.
2. When confronted with tainted witnesses of this sort, triers of fact must act on their evidence with caution (*Vetrovec*; *R. v. Bevan*, [1993] 2 S.C.R. 599; *R. v. Kehler*, 2004 SCC 11, [2004] 1 S.C.R. 328). Accordingly, they will not lightly accept the unsupported assertions of potentially unreliable witnesses where little but the word of those witnesses implicates the accused in the commission of the crime charged (*Kehler*, at para. 17; *Bevan*, at pp. 614-15; *R. v. Brooks* (1998), 41 O.R. (3d) 661 (C.A.), at pp. 694-95).
3. And when such witnesses are central to the Crown’s case, as they were here, corroboration becomes particularly significant. In this regard, an evidential error that might otherwise appear insignificant raises particular concern when it goes to the credibility of potentially unreliable witnesses. Unaware of its erroneous admission, the trier of fact may rely on the impugned evidence to take a small but critical first step in a chain of deductions leading to a finding of guilt.
4. On any view of the matter, neither of the errors committed by the trial judge can be characterized as trivial. As I have already mentioned, the absence of a remedial direction is in my view sufficient to require a new trial. That error was exacerbated by the erroneous admission of hearsay evidence. In his charge to the jury, the trial judge referred to that evidence as tending to corroborate the evidence of Mr. Tulloch (A.R., vol. V, at p. 161). If they found that it did, this would likely bear as well on the jury’s evaluation of the credibility of Mr. Solty, whose evidence, the trial judge said, was in turn corroborated by Mr. Tulloch’s (A.R., vol. V, at p. 161). And the acceptance of their evidence, I repeat, was essential to the Crown’s case against Mr. Prokofiew.
5. In these circumstances, the Crown cannot be said to have satisfied its onerous burden in invoking the curative *proviso* of s. 686(1)(*b*)(iii) of the *Criminal Code.*

VIII

1. For all of these reasons, I would allow the appeal and order a new trial.

 *Appeal dismissed,* McLachlin C.J. *and* LeBel*,* Fish *and* Cromwell JJ. *dissenting.*

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