COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Allred, 2026 ONCA 258
DATE: 20260410
DOCKET: COA-24-CR-0066

Fairburn A.C.J.O., Wilson and Rahman JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Damien Allred

Appellant

Alexander Ostroff, for the appellant

Dana Achtemichuk, for the respondent

Heard: September 9, 2025

On appeal from the conviction entered by Justice Suhail A.Q. Akhtar of the Superior Court of Justice, sitting with a jury, on November 25, 2022.

Fairburn A.C.J.O.:

A. OVERVIEW

[1] A video recording from August 8, 2020, just after 5:15 p.m., shows Teresa Santos getting off an elevator on the eighth floor of the apartment building where

she lived alone. Three days later, her brutalized body was discovered in her apartment.

[2] The appellant lived just a few apartments down from Ms. Santos. He was charged with second degree murder. As will become clear in these reasons, there was an overwhelming case against him. The jury returned a verdict of guilty. He was sentenced to life imprisonment with a 17-year period of parole ineligibility.

[3] This is an appeal from conviction alone.[1] The appellant advances only one ground of appeal, specifically that the trial judge erred in dismissing his application to sit at counsel table. In advancing that ground of appeal, the appellant submits that the trial judge erred in:

- imposing a "presumption" that an accused must sit in the prisoner's box, contrary to this court's decision in *R. v. A.C.*, 2018 ONCA 333, 360 C.C.C. (3d) 540, at para. 37;
- concluding that the accused's placement in the prisoner's box does not result in any stigma that cannot be addressed by jury instructions and, in doing so, failing to engage with case law that takes the opposite view;

[1] Although the appellant filed a notice of appeal against sentence as well, the sentence appeal was not pursued.

- finding that the accused, "most importantly", must always be visible to the jury;
- relying on "inherent" security concerns when an accused sits at counsel table rather than assessing them in the particular circumstances of the case; and
- failing to consider that client-counsel communications could be hampered by placing the appellant in the prisoner's box.

[4] The appellant contends that any prejudice arising from his placement in the prisoner's box could have had an impact on the jury's perception of him and their deliberations.

[5] I would dismiss the appeal. Although my analysis differs in some respects from that of the trial judge, I am satisfied that his ultimate conclusion was reasonable.

1. Background

[6] The brutality of this murder is hard to comprehend and the reason for it even harder.

[7] Ms. Santos was 75 years old at the time of her murder. She lived by herself in unit 801 of an apartment building in Toronto.

[8] The appellant lived in the same building as Ms. Santos, just a few apartments away from her. He occupied unit 809 with his pregnant wife and three children.

[9] On August 8, 2020, at around 5:15 p.m., Ms. Santos went to the lobby, using her walker, to pick up her mail. She is seen on video taking the elevator down to the ground floor and then returning to the eighth floor. The video captures her emerging from the elevator on the eighth floor just after 5:15 p.m. There are no further reported sightings of her after that.

[10] Twenty-five seconds after Ms. Santos emerged from the elevator, another elevator arrived at the eighth floor, but the video shows that no one entered. It was the Crown theory at trial that the appellant likely summoned that elevator but, for whatever reason, chose not to get on it after encountering Ms. Santos in the hallway.

[11] Eighteen minutes after Ms. Santos was last seen exiting the elevator on the eighth floor, the appellant is seen getting onto the elevator on that floor. The video from his 5:33 p.m. elevator ride to the lobby shows him with wet hair (as if it had just been washed), wearing different clothing than he had been wearing 30 minutes earlier, and no shoes. The video also shows that he had scratches on the back of his left arm.

[12] From that point on, the appellant, who had been going up and down the elevator throughout the day to make trips to the dumpster, made nine more trips, throwing items into the dumpster at the front of the apartment building. All this was captured on video.

[13] On August 11, 2020, three days after the last reported sighting of Ms. Santos, one of her neighbours noticed a strong odour coming from her apartment. The neighbour summoned the building superintendent. A grisly discovery awaited: Ms. Santos's decomposing body lay in the entryway of her apartment.

[14] The killer had stabbed her through the back of her mouth, severing her brainstem. Ms. Santos had also sustained multiple broken ribs, a dislocated jaw and had multiple teeth dislodged. She had a pillow placed over her face that had been stomped on at least twice, which caused fractures to her ribs and backbone.

[15] There was a single issue at trial: who killed Ms. Santos? The Crown proved the "who" by leading video evidence, which showed the appellant's appearance and movements, and a good deal of forensic evidence. The Crown's case was notably based on the following:

- The appellant's DNA was found under Ms. Santos's fingernails. As noted, the video of his elevator ride, 18 minutes after Ms. Santos was last seen exiting the elevator, shows significant scratching on the

appellant's back left arm. That scratching is not present in the videos from earlier in the day.

- Only minutes before Ms. Santos is last seen exiting the elevator, the appellant is seen on video wearing black Puma slides, a type of sandal. Bloody footwear impressions made from "Puma Cool Cat slides" were found inside Ms. Santos's apartment and in the hallway outside of her unit.

- An expert in trace evidence and footwear identification opined that footwear impressions consistent with size 12 Puma Cool Cat slides went from Ms. Santos's apartment toward the appellant's apartment. Somewhere between units 807 and 808, the assailant removed the Puma slides and began walking barefoot.

- An expert in foot morphology testified that there was a bloody barefoot impression in the hallway that appears to have been made by the appellant.

- There was no evidence of blood past unit 809, where the appellant lived.

[16] As I said at the beginning, this was an overwhelming Crown case.

B. THE TRIAL

1. Instructions and challenge for cause

[17] This was a jury trial.

[18] Prior to the jury selection, the jury panel was instructed that “the proper administration of justice requires jurors to approach their task with an open mind” and to “decide cases in an unbiased and impartial manner” based on the evidence. The panel was also instructed on the risk of unconscious bias and the need to “cleanse” their reasoning of any biases or prejudice. They were encouraged to “use the gravity, the solemnity and the safeguards of the trial process” to assist them in confronting any potential conscious or unconscious biases, and to set them aside.

[19] During the jury selection, there was a race-based challenge for cause to determine whether potential jurors had any racial biases against Black men of Caribbean descent that could affect their ability to consider the evidence objectively and decide the case fairly. In the context of that challenge, the jurors were reminded to think about those biases since they “may not even be aware that” they held such bias.

[20] At the outset of the trial, the jury was instructed on the presumption of innocence and the burden of proof. They were instructed that prejudice and bias had no place in their deliberations and that they were to decide the case based only on the evidence led and the trial judge’s instructions.

[21] In the charge to the jury, the jury was again instructed on the presumption of innocence, the burden of proof, and the need to eschew any prejudice. The concept of reasonable doubt was properly defined. The charge focussed the jury's attention on the evidence that was available for the jury's consideration: "Only the exhibits, what the witnesses say, and any facts the Crown and defence admit are evidence."

[22] The appellant's trial counsel did not request any instruction to warn against drawing a negative inference from the appellant's placement in the courtroom, and none was given.

[23] On appeal, the appellant does not challenge the contents of any of the jury instructions.

2. Application to sit at counsel table

[24] The appellant was an in-custody accused. He brought a pre-trial application to sit at counsel table, relying on two main submissions.

[25] First, he argued that he was not a security concern or a flight risk in a courtroom context. In addition to the murder charge, the appellant had outstanding charges for uttering threats and criminal harassment in relation to another resident at the same apartment building where Ms. Santos was murdered. He was also facing an assault charge arising from an assault of another inmate while he was in

custody awaiting trial. He argued that this all created only a “minimal” security concern in the courtroom context.

[26] Second, he argued that his fair trial interests weighed in favour of allowing him to sit at counsel table. Requiring him to sit in the prisoner’s box would make it more difficult for him to communicate with counsel. He also raised a concern about stigma – an issue he raises again on appeal. And, relatedly, he argued that requiring him to sit in the prisoner’s box would come with additional stigma as a Black man of Caribbean descent charged with a violent crime – an argument he does not renew on appeal.

[27] The Crown filed a legal brief to assist the court with the legal principles to take into account, but took no position on the outcome of the application.

[28] The trial judge dismissed the application.

[29] In his written ruling, he referred to the two long lines of authority that have emerged on this issue, with some judges granting applications to sit at counsel table and others dismissing those applications. He then went on to review two decisions that, in his view, exemplified opposite sides of the issue: *R. v. Gervais* (2001), 49 C.R. (5th) 177 (Ont. S.C.), *per* A. Campbell J., as supporting the accused remaining in the prisoner’s box, and *R. v. Douse*, 2022 ONSC 3163, *per* Schreck J., as supporting the accused being at counsel table. The trial judge expressed a preference for the “*Gervais* line of cases”.

[30] The trial judge disagreed that the prisoner's box is a form of restraint. For him, regardless of where an in-custody accused is seated in the courtroom, the accused is not free to move about and therefore is under restraint.

[31] Further, the trial judge rejected the suggestion that being seated in the prisoner's box creates stigma or prejudice infringing the presumption of innocence. He emphasized the role of jury instructions, especially instructions about the presumption of innocence. They are, in the trial judge's view, sufficient to dispel any prejudice that may exist.

[32] As for security concerns, the trial judge rejected the suggestion that the Crown must prove specific security concerns before the accused can be required to stay in the prisoner's box. To the contrary, he found that there are inherent security concerns when an accused is permitted to sit at counsel table. As a result, it may be necessary to have more officers around the accused to ensure proper security in the courtroom. The trial judge added that these additional measures can create more prejudice to the accused, a factor that would "certainly apply in this case."

[33] Finally, the trial judge observed, "most importantly", that members of the jury needed to be able to see the accused clearly, to ensure that the focus of the trial remained on the accused. The trial judge noted that if the appellant were to sit at counsel table, "the entire jury would be unable to observe [the appellant] given the

fact that he would be either fully or partially obscured by courtroom equipment, lecterns, and counsel." In contrast, the prisoner's box was "fully within the jury's sightline."

C. ANALYSIS

1. The configuration of Ontario courtrooms

[34] The Superior Court of Justice sits in more than 50 locations throughout the province. Not every courtroom is the same, but they have somewhat similar configurations to accommodate the various participants in the trial. Those participants include the trial judge, court staff, defence counsel, Crown counsel, jurors, witnesses and, of course, the accused.

[35] Generally, the judge is at the front of the courtroom. The court staff, including the registrar and court reporter, are very close by. So too is the witness "box" from where witnesses testify. The jurors also sit close by, typically in a jury "box". And counsel are seated at tables facing the judge. All are in close proximity.

[36] So where is the accused?

[37] Again, most courtrooms have a "box" where the accused sits. Not all boxes are the same, with some made out of wood, some made out of glass or plexiglass, some just a bar and so on. Whatever its design, the box is a spot reserved for the accused. Finally, there is generally a bar behind which the public are seated.

[38] It is within this configured and confined space that the serious work of a criminal trial takes place.

2. A call for guidance

[39] In Ontario, there has been a vigorous debate, for well over two decades, about where the accused should sit in the courtroom – in the prisoner's box or at (or near) counsel table – and the factors that should be taken into account when deciding that issue.

[40] This does not appear to be a source of significant debate elsewhere in Canada. The comparatively small number of cases on this issue outside of Ontario suggests it has not required so much time and attention in other Canadian jurisdictions.

[41] Interestingly, the Superior Court of Québec recently changed its rules of practice on this issue. Previously, the rule provided that an accused "shall remain in the prisoners' dock throughout the trial unless authorized by the judge to sit elsewhere in the court room" (emphasis added): *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002*, r. 9 (SI/2002-46). In June 2025, the rule was changed. The new rule removes judicial discretion, and now

simply states that “[t]he accused must remain in the dock, throughout the trial”: *Rules of the Superior Court of Quebec in Criminal Matters*, r. 15.[2]

[42] The Ontario Superior Court of Justice has spent countless hours hearing and deciding applications by accused to be permitted to sit outside the prisoner’s box. These applications are sometimes allowed and sometimes denied. Examples of applications allowed include: *R. v. Wills*, 2006 CanLII 31909 (Ont. S.C.); *R. v. M.T.*, 2009 CanLII 43426 (Ont. S.C.); *R. v. Davis*, 2011 ONSC 5567; *R. v. Liard and Lasota*, 2013 ONSC 5457; and *R. v. Lewis*, 2024 ONSC 5261. Examples of applications denied include: *R. v. Vickerson*, 2006 CanLII 2409 (Ont. S.C.); *R. v. Minoose*, 2010 ONSC 6129, 81 C.R. (6th) 191; *R. v. Barrett*, 2017 ONSC 3867; *R. v. Bush*, 2017 ONSC 6171; and *R. v. Mohiadin*, 2023 ONSC 1890. To be sure, these are just random examples. There are many more published decisions from both the Superior Court of Justice in Ontario, as well as the Ontario Court of Justice, that pertain to this issue. And, as would be expected, many rulings involving this issue are never published. The point is that a great deal of court time and judicial resources are taken up on this question in Ontario: where should the accused sit during the trial?

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[2] In French, the new rule reads: “L’accusé doit, pendant la durée du procès, demeurer au banc des accusés.”

[43] The issue has also attracted academic commentary.[3] As well, it was raised in the report of the Commission on Proceedings Involving Guy Paul Morin, although the report did not explain the basis for its recommendation that "[a]bsent the existence of a proven security risk, persons charged with a criminal offence should be entitled, at their option, to be seated with their counsel, rather than in the prisoner's dock."[4]

[44] It is fair to say that, for some time, the Superior Court has been asking this court to provide guidance. Fifteen years ago now, Corbett J. made this call for clarity and guidance:

> I would suggest, with respect, that our trial court has pretty much exhausted this debate without resolving it. Appellate guidance would reduce, substantially, the number of times this issue is raised at trial, and would provide trial courts with a clear starting position, something that now turns on the personal preferences of trial judges.
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> For obvious reasons, this issue is not likely to emerge as a compelling ground of appeal. If, as a result, appellate guidance is not forthcoming, perhaps this is a matter that could be addressed expressly in the criminal rules.

Liard, at paras. 188-9.

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[3] See e.g., David Tait, "Glass Cages in the Dock?: Presenting the Defendant to the Jury" (2011) 86 Chicago-Kent L. Rev. 467; Raneta Lawson Mack, "Of Docks and Shackles: A Comparative Examination of Courtroom Control and the Rights of the Accused" (2019) 9 Wake Forest J.L. & Pol'y 311; and Michael A. Johnston, "Dock Block: The Case for Eliminating the Prisoner's Dock" (2020) 68 Crim. L.Q. 479.

[4] *The Commission on Proceedings Involving Guy Paul Morin: Report* (Chair: The Honourable Fred Kaufman), vol. 2 (Toronto: Ontario Ministry of the Attorney General, 1998), at p. 1165.

[45] More recently, Schreck J. repeated Corbett J.'s call for guidance in *Douse*, at para. 53. As Schreck J. put it, decisions going back over two decades suggest that "different members of [the Superior Court] take dramatically different approaches, with the result being that where an accused sits during his or her trial depends largely on which judge is assigned to the trial." He noted that this gives rise to an impression of "arbitrariness", which undermines the administration of justice.

[46] I agree with Corbett and Schreck JJ. In my view, it is appropriate to provide additional guidance in the hope that it will reduce the amount of court time spent arguing about the position of the accused in the courtroom.[5]

[47] Accordingly, I will clarify the legal framework to be applied when an in-custody accused is being tried, including by a judge and jury, and requests to sit outside the prisoner's box.

3. Legal framework

[48] I start by acknowledging that a trial judge's decision on where an accused should sit is a discretionary one: *R. v. Lalande* (1999), 138 C.C.C. (3d) 441 (Ont. C.A.), at para. 19. Accordingly, that decision is entitled to deference, absent a legal error.

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[5] In *R. v. Ahmad*, 2010 ONSC 1777, the judge noted that "the time taken on this issue add[ed] up to more than a day": at para. 9.

a. The legal presumption for in-custody accused

[49] It seems to me that the divergent lines of authority when it comes to this issue are generated by a few factors that are deserving of clarification.

[50] The first relates to the idea that, although the prisoner's box is the "default placement" for the accused, there is "no presumption" that the accused will sit there. This idea can be traced to this court's decision in *A.C.*, where this court held that "[i]n every case, the accused's placement must permit him to make full answer and defence, but the issue is to be assessed on a case-by-case basis, having regard to the interests of a fair trial and courtroom security in the particular circumstances of the case": at para. 37, citing *Lalande*. Hourigan J.A. explained that "[w]hile the default placement of an accused on trial is in the prisoner's box, there is no presumption in this regard" (emphasis added): at para. 37.

[51] Many trial judges, including the trial judge in this case, have understood the "default placement but no presumption" rule from *A.C.* to apply to all criminal cases, without regard to whether the accused is in custody or not. In my view, this is wrong because *A.C.* must be read in its proper context.

[52] Unlike this case, *A.C.* involved an accused who was out on bail during his trial and yet was told to be seated in the prisoner's box when he arrived at court each day: *A.C.*, at para. 30.

[53] Notably, the only other case from this court that has addressed where an accused should sit in the courtroom is *Lalande*. Like *A.C.*, *Lalande* also involved an accused who was not detained during his trial and yet was required to sit in the prisoner's box for the duration of his trial.

[54] In my view, both *A.C.* and *Lalande* must be read in the context of an accused who is not detained.[6] When an accused is not in custody, it makes sense to say there is no "presumption" – only a "default" – that the accused sit in the prisoner's box. Among other things, the fact that the accused is not detained will typically signal that they have been deemed not to be a risk to the safety of others.

[55] The situation is different when it comes to accused who are detained. Although I accept that there may be different reasons for detaining someone on trial, the fact of their detention means that they are not at liberty to come and go on their own. Rather, they are part of a tightly controlled system that must prioritize the safety and security of all. Accused who are detained are escorted from custody to the courthouse every day. They are then escorted to and from the courtroom all day long. And then they are escorted back to custody at the end of the day. And the next day it all starts over again.

[56] In my view, it is appropriate against that context to presume that the in-custody accused will sit in the prisoner's box. This is consistent with what *A.C.*

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[6] I hasten to add that, even in the context of accused who were not detained in *A.C.* and *Lalande,* this court found no reversible error in requiring them to sit in the prisoner's box.

describes as the “default” – the practical reality that an accused will sit in the prisoner’s box unless they bring a successful application to sit elsewhere. And, more importantly, it will provide a clear legal starting point. Without a presumption on these applications, a trial judge faced with making a discretionary, contextual decision must weigh a variety of considerations – including considerations that may pull in competing directions – without any legal starting point to anchor the analysis. Imposing a presumption in cases of this nature allows for analytical rigour, placing the onus on the detained accused to establish why he should be permitted to sit somewhere other than in the box designated for him.

[57] Based upon the foregoing, I do not accept the appellant’s argument that the trial judge erred by adopting the *Gervais* line of analysis, specifically by applying a presumption in favour of the prisoner’s box. In my view, although the trial judge could have applied such a presumption, he did not go that far.

[58] I now turn to various factors that may come into play in deciding whether the presumption is displaced.

b. Any stigma is mitigated by jury instructions

[59] A key issue that arises repeatedly in the case law is whether and to what degree sitting in the prisoner’s box risks stigmatizing the accused and undermining trial fairness.

[60] The appellant submits that the trial judge erred in finding that sitting in the prisoner's box "does not create a stigma or any other form of prejudice that infringes the presumption of innocence." According to the appellant, the very fact that many judges think the prisoner's box carries a suggestion of guilt means that at least some jurors will hold similar views: *Douse*, at paras. 31-32.

[61] It is true that several jurists have expressed the view that there is a risk that being seated in the prisoner's box will have a prejudicial effect on juries: see e.g., *M.T.*, at para. 9; *R. v. Smith*, 2007 CanLII 24094 (Ont. S.C.), at para. 24; *R. v. Young*, 2018 ONSC 1564, at para. 12; *Davis*, at para. 27; *R. v. Ramanathan*, [2009] O.J. No. 6233 (S.C.), at paras. 9-12; and *R. v. S.S.*, [1997] O.J. No. 250, at paras. 17-20. Indeed, some have gone so far as to conclude that there is a "substantial risk" that being seated in the prisoner's box could have a prejudicial effect on jurors: *Douse*, at para. 30.

[62] Other equally respected jurists have expressed the opposite view that no stigma is associated with the placement of the accused in the prisoner's box and, therefore, no prejudice can arise from that placement. In the event there could be such prejudice, jury instructions can adequately fend it off: see e.g., *Wills*, at para. 33; *R. v. Isaac*, 2020 ONSC 7243, at para. 9; *R. v. McKenzie*, 2018 ONSC 2817, at para. 11; *R. v. Ranhotra*, 2018 ONSC 2407, at para. 22; and *R. v. Heyden*, [1998] O.J. No. 6253 (Gen. Div.), at para. 7.

[63] With respect for the contrary view, I agree that even if one were to assume that the accused's placement in a prisoner's box could give rise to stigma, that possible risk would be entirely mitigated by standard jury instructions. To conclude otherwise would be antithetical to the proud tradition of jury trials in this country.

[64] Our system trusts juries with extraordinary responsibilities. They are tasked with deciding the fate of one of their peers. They are expected to apply the law, as given to them by the trial judge, to the facts as they find them. The legal principles they must apply are sometimes simple, but often complex and difficult to navigate.

[65] We have strong faith in juries and for good cause: *R. v. Corbett*, [1998] 1 S.C.R. 670, at pp. 692-3; *R. v. Poitras* (2002), 57 O.R. (3d) 538 (C.A.), at para. 31. As noted in *Corbett*, at pp. 693-4, citing the words of Sir William Holdsworth, juries have "for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense."

[66] Anyone who has been involved in a jury trial, and certainly any judge who has had the privilege of observing a jury at work and charging them at the end of a trial, knows how seriously jurors take their work. From the moment the jury is selected and told that they are now judges and must comport themselves as such, they proudly and bravely take up that task. These extraordinary citizens never cease to impress as they assume and carry out the responsibilities of a judge.

[67] It is inconsistent with the faith we hold in jurors to assume that they will be swayed simply by the location of the accused in the courtroom. After all, they know he is the accused. And they know what he is alleged to have done. And they know that the full weight of the state is engaged in attempting to prove the allegations. They are repeatedly instructed on the presumption of innocence and the fact that it is only overcome on proof beyond a reasonable doubt, proof that is limited to the evidence before them, which evidence is defined for them. They are told to confront their biases, their prejudices and even instructed, as was done in this case, on the need to be aware of unconscious bias. And they know they must stay true to their oath or affirmation. To suggest, against all of that, that jurors will nonetheless be influenced by the fact that an accused is sitting in his designated spot in the courtroom is to suggest that jurors will not follow the instructions given to them.

[68] If it has come to the point where jurors may disregard the most fundamental of instructions given to them – including instructions about the presumption of innocence and burden of proof – and be swayed into finding guilt based upon the accused's position in the courtroom, I would simply say that there are much larger concerns at work. I do not accept it has come to this.

[69] The appellant points to social science research in support of his position: Meredith Rossner, *et al.*, "The Dock on Trial: Courtroom Design and the Presumption of Innocence" (2017) 44 J.L. & Soc'y 317. The authors of this study

hypothesized that the design of the courtroom might impact jurors' perceptions of the accused and, in particular, that the prisoner's box could have a prejudicial effect. To test this hypothesis, study participants participated in a mock trial in Australia. Each mock trial was a 45-minute "terrorist" trial, which appears to have included multiple witnesses, including a defence witness who "raised doubts about the accused's mental state." It was repeated with different groups of participants. The only change in the various presentations of the mock trial was to alter the position of the accused in the courtroom. The accused was placed at the "bar table", in an "open dock" and in a "glass dock."

[70] The authors concluded that "jurors who saw the defendant in the dock … were 1.8 times more likely to view him as guilty than jurors who saw the accused at the bar table": at p. 334.

[71] Although the authors should be commended for conducting a study of this nature, I would not place any reliance on their results given the limitations of the methodology, including the artificiality of the scenario presented – a multi-witness, 45-minute terrorist trial – and the limits on instructions given to the study participants. There is no indication as to whether the recruited participants for this study took an oath or affirmation as jurors or had the seriousness of jury duty explained to them. There is no indication as to whether they were told that they had to decide the case based upon the evidence alone or, even whether they were instructed on what constitutes "evidence". I agree with O'Marra J., who recognized

that "[t]he method used in no way captures the solemnity and dynamics of a real trial": *R. v. J.A.,* 2017 ONSC 2043, at para. 11.

[72] And, as the researchers themselves acknowledged, this is the first experiment on this issue and greater certainty can only come with replication. At this stage, it would appear that no study has replicated the result.

[73] Accordingly, in assessing an accused's request to sit outside the prisoner's box, the trial judge should proceed on the understanding that even if stigma could arise from sitting in the prisoner's box, it will be mitigated by the standard jury instructions given in every criminal trial, namely instructions on the presumption of innocence and the burden of proof. These instructions were given more than once in this case.

[74] As well, nothing precludes a trial judge from providing the jury with an additional instruction to the effect that the accused is seated in the place reserved for him in the courtroom, where accused persons usually sit. Just as jurors sit in a jury box, counsel at counsel table, witnesses in a witness box, and the judge and court staff in their places, so too does the accused have an assigned seat. The jury may also be told not to make any assumptions or draw adverse inferences from where the accused is seated. The instruction could be then tied back into the presumption of innocence and the need to prove guilt beyond a reasonable doubt: *McKenzie*, at para. 12. I note that, in *A.C.*, the jury was instructed not to give the

accused's placement in the courtroom any weight and this court found that "[t]he jury can be trusted to have followed that instruction": at para. 39.

[75] In conclusion, the trial judge made no error in his approach to the issue of stigma. He recognized that any stigma or prejudice that could arise would be dispelled by jury instructions, especially instructions on the presumption of innocence. I agree.

c. The importance of visibility

[76] This brings me to the third alleged error. The appellant submits that the trial judge erred in concluding that the accused must be visible to the members of the jury during the trial. The trial judge is said to have erroneously framed jury visibility as a source of protection for the presumption of innocence and the right to make full answer and defence.

[77] I do not accept that the trial judge erred in expressing concern over the need for the jury to see the accused, although I would have framed the matter differently.

[78] As the trial judge observed, the focus of a trial is on the accused as "the person, presumed innocent, who is facing the prospect of being convicted and [has] the most to lose." That is true in every case. In and of itself, focussing the jury's attention on the accused is not a decisive factor in addressing a request to sit outside the prisoner's box.

[79] That said, visibility of the accused will often be relevant to society's "interest in an effective and truth-seeking adversarial process", which is an element of trial fairness: *R. v. Kahsai*, 2023 SCC 20, at para. 35. Trial fairness is to be considered from both the perspective of the accused and of the community: *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 45. Therefore, trial fairness must not be "confused with the most advantageous trial possible from the accused's point of view": *Harrer*, at para. 45, citing *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362.

[80] In cases where identification is an issue or the accused's appearance otherwise has evidentiary value, visibility cannot be compromised: see e.g., *McKenzie*, at paras. 18-19; *R. v. Mohamud*, 2025 ONSC 5323, at paras. 23-24. In such cases, I do not accept that an accused can be permitted to sit at a location that compromises the clarity that would be achieved if they were sitting in the prisoner's box. If the trier of fact will be asked to compare the accused's appearance to an exhibit in order to determine his identity, the accused must be visible to the jury. No judge presiding as the trier of fact would accept anything less. We should not ask jurors to do so either.

d. Security considerations

[81] The appellant submits that, in assessing security concerns, the trial judge erred in failing to focus on the particular circumstances of the case. This approach is said to have created a presumption against the appellant being permitted to sit at counsel table. The trial judge further erred, says the appellant, in finding that

sitting at counsel table would itself be prejudicial to full answer and defence because the additional security measures would be more prejudicial than being in the prisoner's box.

[82] There is no dispute that security is an important consideration in determining whether it is appropriate for an in-custody accused to sit outside the prisoner's box. Courtroom participants, including the members of the jury, must be protected. A slip in security can result in grave consequences.[7]

[83] The nature and seriousness of security concerns and the means of addressing them will, of course, depend upon the circumstances.

[84] Two factors that may come into play include the accused's prior conduct during court appearances and his record.

[85] Of course, the views of the officers charged with security of the courtroom will assist in assessing security considerations, including any additional measures that should be taken if the accused is permitted to sit outside of the prisoner's box.

[86] Another factor for consideration is the specific layout of the courtroom. I point to what Dambrot J. said in *R. v. Dalzell* (2003), 180 C.C.C. (3d) 319 (Ont. S.C.), as a good example. In that case, he noted the "odd configuration of the courtroom",

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[7] Not only does allowing the accused to sit outside the prisoner's box raise in-court security concerns, it may also raise additional out-of-court security concerns. The searches required before an accused is returned to the institution each day after court may well look different if the accused sits outside the prisoner's box: *Davis*, at para. 19. As noted in *Ahmad*, at para. 9, "many items in the courtroom could be used as weapons of opportunity."

finding that “[i]t would be inappropriate for the jurors to be required to pass directly in front of the accused, separated only by the depth of a table, each time they enter or exit the courtroom”: at para. 6; see also *Ahmad*, at paras. 14-15.

[87] There may also be instances in which the psychological security and safety of participants in the trial is a relevant consideration. For instance, moving the accused closer to the witness box could interfere in some cases with a vulnerable witness’s ability to give reliable testimony.

[88] This list is not meant to be exhaustive. At the end of the day, the trial judge is tasked with assessing particular security risks and the best way to address them, with a view to ensuring safety in the courtroom, all the while delivering a fair trial.

[89] That takes us back to this case. Here, the trial judge noted security concerns “inherent” to the placement of an accused at counsel table. But he did not end there. He considered the particulars of the case, finding that it would be necessary to have several court officers in proximity to the appellant if he were to sit at counsel table. In the trial judge’s view, that would not be better for the appellant than sitting in the prisoner’s box. That finding is entitled to deference.

e. Communication with counsel or *amicus*

[90] The appellant submits that the trial judge erred in failing to take into account that "requiring an accused to sit in the dock rather than at counsel table does not facilitate their ability to communicate with counsel", which is of practical and psychological importance.

[91] An accused who wishes to communicate with their counsel during a trial may do so during breaks. If the matter is more urgent, the accused may pass a note and, if necessary, counsel may ask for a short break. In certain cases, it may be beneficial for the accused to participate more actively in their defence, which may not be feasible unless they are in close proximity to counsel. In other words, the right to make full answer and defence may necessitate permitting the accused to sit at or near counsel table, with proper security measures in place.

[92] Returning to this case, although the appellant would have preferred to sit closer to counsel, he has not suggested that he was not able to adequately communicate with counsel. In my view, the fact that the trial judge did not expressly address this point in his reasons is of no moment.

4. Summary: legal framework

[93] To summarize, an in-custody accused is presumed to sit in the prisoner's box. Any perceived stigma that could be associated with the accused's assigned place is mitigated by standard jury instructions. Although not necessary, a trial judge may give a more specific instruction regarding the accused's placement in the courtroom.

[94] The imposition of the presumption is not meant to impose an onerous standard, one that is only overcome in exceptional circumstances. There is no need for the accused to demonstrate that his ability to make full answer and defence will be definitively compromised if he is not permitted to sit outside of the box. Nor does he have to demonstrate that his fair trial interests will be irrevocably impacted.

[95] Ultimately, it will be an exercise in discretion by the trial judge to determine, taking into account all relevant considerations, whether there is reason to depart from the presumption that the accused sit in the prisoner's box and, if so, what additional security measures may be appropriate. Undoubtedly, in every case, the accused's placement must permit him to make full answer and defence. At the same time, the safety and security of all justice system participants must be safeguarded. It goes without saying that discretionary decisions are owed deference on appeal.

[96] As for the application to have the accused sit outside of the prisoner’s box, there is no reason that these applications cannot be brought in writing, well in advance of the trial. They should not become make-work projects for already overburdened trial judges.

D. CONCLUSION

[97] I would defer to the trial judge’s decision in this case.

[98] Although my analysis differs in some respects from that of the trial judge, I am satisfied that his ultimate conclusion was reasonable. Any stigma arising from sitting in the prisoner’s box was addressed by the standard jury instructions. Sitting in the prisoner’s box did not interfere with the appellant’s right to make full answer and defence.

[99] What is more, even if the trial judge had committed an error of law in his analysis (which he did not), there would have been no substantial wrong or miscarriage of justice. Had there been an error, it could only be characterized as entirely harmless in that it did not relate to the Crown’s case against the appellant and could not have affected the jury’s deliberations. Moreover, as I explained at the outset, this was an overwhelming Crown case. I do not intend to review it again here. No jury acting reasonably could find otherwise.

[100] I would dismiss the appeal.

Released: “April 10, 2026 JMF”

“Fairburn A.C.J.O.”
“I agree. D.A. Wilson J.A.”
“I agree. M. Rahman J.A.”