

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Khodayar, 2026 ONCA 349

DATE: 20260515

DOCKET: COA-23-CR-1051

Gillese, Sossin and Monahan JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Mohammad Khodayar

Appellant

Jolene Hansell, for the appellant

Katie Doherty, for the respondent

Heard: January 22, 2026

On appeal from the conviction entered by Justice Jacqueline Loignon of the Ontario Court of Justice on August 28, 2023.

Gillese J.A.:

i. Overview

[1] Jeffery Dondji was charged with first degree murder in the shooting death of Mohammed Hassan. The appellant, Mohammad Khodayar, is an alleged associate of Mr. Dondji. He was said to have driven Mr. Dondji to and from the

location where the homicide took place. The appellant was subpoenaed to testify at Mr. Dondji's preliminary inquiry.

[2] The appellant attended court in response to the subpoena. He was affirmed, took the stand, and answered initial questions regarding his age, residence, and work experience. However, he refused to answer any substantive questions relating to the offence. He was given repeated opportunities, over several days, to consult counsel and consider the potential consequences of not answering questions. He nonetheless continued to refuse to answer questions put to him.

[3] On December 20, 2021, the appellant was charged with intentionally attempting to obstruct, pervert, or defeat the course of justice contrary to s. 139(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, arising from his refusal to answer questions at the preliminary inquiry.

[4] At his trial on the obstruct justice charge, the Crown and defence counsel differed on whether the transcripts of the appellant's testimony at Mr. Donji's preliminary inquiry (the "Transcripts") should be admitted. The Crown argued the Transcripts were admissible evidence; it relied on *R. v. Schertzer*, 2015 ONCA 259, 333 O.A.C. 308, leave to appeal refused, [2015] S.C.C.A. No. 242. The appellant, relying on *R. v. Seecharran*, 2016 ONSC 7642, brought an application to exclude the Transcripts, on the ground their admission violated his rights under s. 13 of the *Canadian Charter of Rights and Freedoms*.

[5] The application judge followed *Schertzer* and concluded that the Transcripts were not protected by s. 13. Accordingly, she dismissed the *Charter* application, admitted the Transcripts, and convicted the appellant of attempting to obstruct justice.

[6] The appellant appeals against conviction. He submits the trial judge erred in failing to follow *Seecharan* and in admitting the Transcripts.

[7] For the reasons that follow, I would dismiss the appeal.

ii. The Relevant Law

[8] Section 13 of the *Charter* and the *Schertzer* and *Seecharan* decisions are key to deciding this appeal. Accordingly, I will first set out s. 13 and describe its purpose, and then summarize the key determinations made in both of those cases.

Section 13 of the *Charter*

[9] Section 13 enshrines the right against testimonial self-incrimination. It reads as follows:

A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for giving of contradictory evidence.

[10] I will refer to the last phrase in s. 13, which excepts from its operation “a prosecution for perjury or for giving of contradictory evidence”, as the “s. 13 Exceptions”.

[11] The purpose of s. 13 is to protect individuals from being indirectly compelled to incriminate themselves: *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 22, citing *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 358 and *R. v. Kuldip*, [1990] 3 S.C.R. 618, at p. 629. The rationale underlying s. 13 is referred to as the “*quid pro quo*”: the witness is offered protection in exchange for truthful incriminating testimony: *R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433, at para. 21; *Schertzer*, at para. 39.

[12] The “*quid*” refers to “incriminating evidence” the witness gave at a proceeding in which the witness could not refuse to answer. The “*quo*” is the state’s side of the bargain. In return for having compelled a witness to testify, to the extent the witness provided incriminating evidence, the state undertakes it will not use that evidence to incriminate the witness in any other proceeding, except a prosecution for perjury or for the giving of contradictory evidence: *R. v. Nedelcu*, 2012 SCC 59, [2012] 3 S.C.R. 311, at paras. 6-7. Whether the evidence is incriminating is to be determined at the time of the subsequent proceeding, not the original proceeding in which the evidence was provided: *Nedelcu*, at paras. 8-9, 16-17.

[13] Section 13 ensures that a witness is able to provide “full and frank” testimony without worrying about the state’s ability to make use of that evidence to later incriminate them: *Nedelcu*, at paras. 39-41.

Schertzer

[14] Mssrs. Pang and Chiu were arrested for possession of heroin. Five members of the Toronto Police Service drug squad (the “appellants”), led by Schertzer, were involved in their arrest. The appellants were charged with attempting to obstruct justice. The charge alleged that the appellants attempted to obstruct justice by “making false or misleading entries in their memo books, and/or by lying to the court in their testimony”. All of the appellants, except for Schertzer, testified at the Pang preliminary inquiry. The central issue at the obstruct justice trial was the timing of the appellants’ search of the apartment. The Crown alleged that the appellants searched the apartment before the search warrant physically arrived, but the appellants maintained they did not search the apartment until after it had arrived.

[15] The appellants were convicted. They appealed against conviction to this court. Their first ground of appeal was that the trial judge erred in leaving courtroom testimony as a possible mode of committing the attempt to obstruct justice charge, thereby violating s. 13 of the *Charter*.

[16] Justice Benotto, writing for this court in *Schertzer*, rejected this submission. She explained that: (1) s.13 was not engaged because the testimony itself was the *actus reus* of the offence; and (2) since the evidence was not truthful, there was no *quid pro quo* as envisaged by the s.13 jurisprudence: at para. 33. She added that “a witness does not have immunity for lying under oath”: at para. 41.

Seecharran

[17] In *Seecharran*, the applicant was awaiting trial on two indictments: in one, he was charged with first degree murder and in the other, he was charged with attempt to obstruct justice.

[18] On the murder charge, it was alleged that the applicant killed Edwin Villon by shooting him in the head. Karla Garcia Woltke, the applicant's mother, was charged with the same murder for having allegedly aided or abetted her son. The alleged motive for the killing was that Mr. Villon had assaulted Ms. Woltke and the applicant killed him as an act of revenge. The applicant admitted firing the fatal shot so the only issue for the murder trial was whether the applicant had the requisite *mens rea*.

[19] The Crown proceeded separately against the applicant and Ms. Woltke. Each was called as a witness against the other, at separate preliminary inquiries. Ms. Woltke incriminated her son and he was committed for trial. After the applicant was sworn or affirmed as a witness at Ms. Woltke's preliminary inquiry, he refused to testify and incriminate his mother.¹ However, he did answer one question in which he identified Ms. Woltke as his mother.

[20] On the obstruct justice charge, the alleged offence was the wilful attempt to obstruct the court of justice by not providing material evidence at Ms. Woltke's

¹ As the application judge noted at para. 6 of *Seecharan*, the record was unclear as to whether the applicant was sworn or affirmed.

preliminary inquiry. The Crown sought to tender the transcript from Ms. Woltke's preliminary inquiry (the "Woltke PI Transcript"), arguing that it proved the *actus reus* of the offence, namely, "not providing material evidence". The applicant applied to have the Woltke PI Transcript excluded on the basis that, among other things, its admission was a violation of s. 13.

[21] The application judge found the Woltke PI Transcript to be "incriminating evidence" within the meaning of s. 13 because the Crown sought to use it to prove the *actus reus* of the obstruct justice offence: at para. 33. He stated that *Schertzer* stands for the proposition the s. 13 Exemptions broadly mean "proceedings related to offences in the nature of giving a false statement under oath": at para. 39. However, he concluded that because the applicant refused to give evidence, he had not given a false statement under oath and, therefore, the Woltke PI Transcript was not exempted from the operation of s. 13 of the *Charter*: at para. 40. Accordingly, he found the Woltke PI Transcript inadmissible at the applicant's obstruct justice trial.

iii. The Grounds of Appeal

[22] The appellant raises two grounds of appeal. He submits:

1. the application judge erred in failing to apply the principle of horizontal *stare decisis* which required her to follow *Seecharran*; and

2. the application judge erred in admitting the Transcripts contrary to s. 13 of the *Charter*.

Issue 1 No error in following *Schertzer*, rather than *Seecharran*

[23] The appellant makes two submissions on this ground of appeal.

[24] First, he submits that the principle of horizontal *stare decisis* required the application judge to follow the decision in *Seecharan*. Accordingly, he contends, the application judge was bound to find that the Transcripts of the appellant's refusals to answer questions at the preliminary inquiry were "incriminating evidence" for the purposes of s. 13 of the *Charter* and, because it did not constitute false testimony, it was protected by s. 13 and inadmissible at his trial for obstruct justice.

[25] Second, he submits the application judge erred because she declined to follow *Seecharran* only because she did not agree with its legal conclusion regarding the protections afforded by s. 13. Relying on *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460, the appellant says that is impermissible. He points to paras. 73-79 of *Sullivan*, in which the Supreme Court states that the principle of horizontal *stare decisis* prevents trial courts from departing from binding decisions of a court of coordinate jurisdiction unless: (1) the rationale of an earlier decision has been undermined by subsequent appellate decisions; (2) the earlier decision

was rendered through carelessness or inadvertence; or (3) the earlier decision was not fully considered.

Analysis

[26] I reject the appellant's first submission for this simple reason: the doctrine of vertical *stare decisis* governed the application judge, not the doctrine of horizontal *stare decisis*. Consequently, the application judge was correct to follow *Schertzer*, rather than *Seecharran*.

[27] The doctrine of *stare decisis* provides certainty, stability, and predictability to the functioning of the legal system and ensures those who come before the courts are subject to similar rules: *Sullivan*, at para. 66; *Stamford Kiwanis Non-Profit Homes Inc. v. Municipal Property Assessment Corporation*, 2025 ONCA 450, at para. 35; *David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161 (Ont. C.A.), 255 D.L.R. (4th) 633, at para. 119.

[28] The doctrine functions both vertically and horizontally. Vertical *stare decisis* dictates that higher court determinations are binding on lower courts: *Sullivan*, at para. 59. Without vertical *stare decisis*, "the law would be ever in flux": *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 26. Horizontal *stare decisis*, on the other hand, provides that decisions of coordinate jurisdiction should be followed as a matter of judicial comity: *Sullivan*, at para. 65.

[29] A clear hierarchy exists within the doctrine of *stare decisis*: vertical *stare decisis* binds lower courts in a manner that horizontal *stare decisis* does not. Subject to the exceptions articulated in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 42-45, lower courts must follow the decisions of higher courts. As this court stated in *Black v. Owen*, 2017 ONCA 397, 137 O.R. (3d) 334, at para. 47:

[A] judge of a lower court may not decline to follow a binding precedent of a higher court on the ground that he or she disagrees with it or because, in his or her view, it appears to have been overtaken by subsequent decisions of a lower court in the same jurisdiction.

[30] In this case, the application judge had to determine whether the Transcripts were protected by s. 13 of the *Charter*. *Schertzer* answers that question: s. 13 does not protect testimony where the testimony is itself the *actus reus* of an offence.

[31] As the principle of vertical *stare decisis* applied in the present case, the application judge was required to follow *Schertzer* – which is exactly what she did. Applying the reasoning in *Schertzer*, the application judge found: (1) s. 13 did not protect the Transcripts because the appellant’s testimony (or lack thereof) was the *actus reus* of the obstruct justice offence; and (2) the *quid pro quo* principle was not engaged because the appellant did not provide testimony (i.e. the “*quid*”) and so was not entitled to the “*quo*”. Horizontal *stare decisis* did not apply because a higher court had already decided the legal question in issue. Indeed, it would have

been reversible legal error for the application judge to have applied the principle of horizontal *stare decisis* and followed *Seecharran*.

[32] Having found that vertical *stare decisis* operated in this case, it is not necessary to address the appellant's second submission, namely, whether the application judge erred by declining to follow *Seecharran* simply because she disagreed with its legal conclusion on s. 13 protection.

Issue 2 No error in admitting the Transcripts

[33] The appellant submits the application judge erred in admitting the Transcripts contrary to s. 13. He argues as follows. Section 13 provides that compelled evidence cannot be used to incriminate a witness except in a prosecution for perjury or for giving contradictory evidence. The Transcripts are compelled evidence because the appellant was compelled to testify at the preliminary inquiry. The Crown sought to use evidence of the appellant's refusals to testify (as captured in the Transcripts) to prove the *actus reus* of the obstruct justice offence. Therefore, the Transcripts are incriminating evidence within the scope of s. 13. Because the appellant was not prosecuted for perjury or for the giving of contradictory evidence, the Transcripts fell outside the s. 13 Exceptions and were entitled to s. 13 *Charter* protection. Thus, the application judge erred in admitting them into evidence at the obstruct justice trial.

Analysis

[34] I do not accept this submission because it rests on three erroneous legal propositions.

[35] First, the Transcripts are not “incriminating evidence” as that term is used in s. 13. Rather, the appellant’s refusals to answer questions put to him at the preliminary inquiry were the *actus reus* of a new offence (obstruct justice), committed by the appellant while on the witness stand. As Cameron J.A. explained in *R. v. Staranchuk* (1983), 28 Sask. R. 45 (Sask. C.A), 3 D.L.R. (4th) 574, at para. 4, aff’d [1985] 1 S.C.R. 439, a distinction must be drawn between testimony that requires a witness to discuss “the commission by him, previously, of an offence” and is therefore protected by s. 13, and testimony which is “the very essence of the offence”, or the *actus reus* of a new offence. The latter falls beyond the scope of s. 13’s protection.

[36] Second, because the appellant gave no substantive evidence, the *quid pro quo* rationale that underlies s. 13 did not operate. The appellant gave no “*quid*” because he gave no incriminating evidence within the meaning of s. 13. Consequently, he had no entitlement to the “*quo*” – that is, the protection offered by s. 13.

[37] Third, *Schertzer* is not limited to situations where the witness has provided false evidence, as the appellant contends. Rather, *Schertzer* stands for the

proposition that s. 13 does not apply where the testimony in question amounts to the *actus reus* of the new offence.

[38] Accordingly, in my view, the application judge was correct to apply the legal principles in *Schertzer* and made no error in admitting the Transcripts on the obstruct justice trial.

iv. Disposition

[39] For these reasons, I would dismiss the appeal.

Released: May 15, 2026 “E.E.G.”

“E.E. Gillese J.A.”
“I agree. Sossin J.A.”
“I agree. P.J. Monahan J.A.”