



SUPREME COURT OF CANADA

CITATION: R. v. Calnen, 2019 SCC 6

APPEAL HEARD: February 12, 2018

JUDGMENT RENDERED: February 1, 2019

DOCKET: 37707

BETWEEN:

Her Majesty The Queen
Appellant

and

Paul Trevor Calnen
Respondent

CORAM: Moldaver, Karakatsanis, Gascon, Rowe and Martin JJ.

REASONS FOR JUDGMENT: Moldaver J. (Gascon and Rowe JJ. concurring)
(paras. 1 to 71)

REASONS DISSENTING IN PART: Martin J.
(paras. 72 to 220)

DISSENTING REASONS: Karakatsanis J.
(paras. 221 to 244)

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R. v. CALNEN

Her Majesty The Queen

Appellant

v.

Paul Trevor Calnen

Respondent

Indexed as: R. v. Calnen

2019 SCC 6

File No.: 37707.

2018: February 12; 2019: February 1.

Present: Moldaver, Karakatsanis, Gascon, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

*Criminal law — Evidence — Admissibility — Circumstantial evidence —
After-the-fact conduct — Accused charged with second degree murder in death of
domestic partner — Evidence of accused's after-the-fact conduct adduced at trial —*

Whether after-the-fact conduct admissible to prove requisite intent for second degree murder.

Criminal law — Charge to jury — After-the-fact conduct — General propensity reasoning — Evidence of accused's discreditable conduct prior to and after victim's death adduced at his trial for murder — Whether trial judge properly instructed jury on use of after-the-fact conduct — Whether trial judge was required to provide limiting instruction against use of general propensity reasoning given evidence of accused's discreditable conduct.

The accused was charged with second degree murder and with indecent interference with human remains in the death of his domestic partner. He pled guilty to the interference charge, and was found guilty of second degree murder by a jury. The murder conviction was set aside by the Court of Appeal and a new trial was ordered on a charge of manslaughter. The majority of the Court of Appeal held that the trial judge had failed to properly instruct the jury on the use of evidence of the accused's after-the-fact conduct, which included evidence that the accused had moved, burned, and disposed of his partner's body, as it related to proof of intent for second degree murder.

Held (Martin J. dissenting in part and Karakatsanis J. dissenting): The appeal should be allowed and the accused's conviction for second degree murder restored.

Per Moldaver, Gascon and Rowe JJ.: There is agreement with Martin J. that the evidence of the accused's after-the-fact conduct was admissible as circumstantial evidence on both the issue of causation and the mental element for second degree murder. However, there is disagreement with Martin J. on the question of whether the trial judge was required to provide a limiting instruction against general propensity reasoning. Although the trial judge could have given such an instruction, the fact that he did not do so does not amount to reversible error. When the trial judge's charge is considered fairly, contextually, and as a whole, the jury was properly equipped to decide the case in the absence of such an instruction.

There is agreement with Martin J.'s articulation of the legal principles governing the admissibility of discreditable conduct evidence and its potential for moral and reasoning prejudice. However, there is disagreement with her application of those principles to the facts of this case. Allegations of non-direction amounting to misdirection must be assessed contextually, in line with the facts and circumstances of the particular case. At trial, the Crown led relevant and admissible evidence of discreditable conduct on the accused's part that was extrinsic to the offence charged and which can be divided temporally into two broad categories: conduct which

preceded the victim's death and conduct which ensued it. This evidence did not pose such an elevated risk of propensity reasoning that the trial judge was required to provide a limiting instruction against general propensity reasoning.

First, the risk that the jury would engage in general propensity reasoning based on the evidence of the accused's after-the-fact conduct was considerably offset by the trial judge's introductory and final jury instructions, which were neutral, fair and balanced. The trial judge's opening instructions and his answer to a question from the jury insulated the jury from reasoning that the accused's guilty plea to indecent interference with the victim's remains meant it was more likely that he committed second degree murder. Furthermore, when the trial judge's final instructions are read fully and fairly, it is clear that he properly equipped the jury to make reasonable inferences from the circumstantial evidence without resorting to specious reasoning or speculation.

Second, experienced defence counsel, well aware of the issue of potential propensity reasoning, did not raise that issue, much less seek a limiting instruction, during the pre-charge conference while vetting the proposed final jury instructions. Defence counsel was in the best position to assess whether, in the concrete reality of the case at hand, a limiting instruction against general propensity reasoning was desirable. His failure to object to the absence of limiting instructions may be taken as an indication that he felt such an instruction would not have been in the accused's

interest and that it was a deliberate tactical decision. These considerations weigh heavily against concluding that the charge was deficient.

Rather than seeking a limiting instruction against general propensity reasoning, the accused adopted a strategy of using the discreditable conduct to bolster the credibility of his exculpatory statement and re-enactment, upon which his defence of accidental death rested. That the defence adopted a deliberate strategy to use the discreditable conduct evidence to its own advantage is an important factor that distinguishes this case from others where the discreditable conduct evidence plays no part in the defence theory and is little more than a breeding ground for the moral and reasoning prejudice about which Martin J. expresses concern. Given the strategy adopted by the defence, a limiting instruction against general propensity reasoning would have risked highlighting the negative impact of the accused's discreditable conduct on his credibility and thereby unravelling his defence — a risk which the defence chose not to take. The defence made a legitimate tactical decision at trial and lost and it must live with the consequences of that decision. The accused had a fair trial. The jury instructions, which both Crown and defence counsel evidently considered to be fair and balanced, properly equipped the jury with the tools they needed to decide the case before it and, in particular, adequately guarded against the risk of general propensity reasoning. That they could have been more fulsome is not the issue. In the circumstances, the principle of finality must prevail.

Per Martin J. (dissenting in part): The after-the-fact conduct evidence in this case was admissible for the purposes of determining both causation and intent and the jury charge was sufficient to explain the uses that could be made of this after-the-fact conduct evidence and the possible general risks that it posed. However, there is disagreement with the majority that the jury instructions adequately guarded against the risk of propensity reasoning. The jury ought to have been warned about the specific risks of prohibited propensity reasoning associated with the after-the-fact conduct, as well as other evidence about the accused's character, conduct and lifestyle. The appeal should therefore be allowed in part. The decision of the Court of Appeal to set aside the accused's second degree murder conviction should be upheld, however, a new trial should be ordered on the charge of second degree murder.

After-the-fact conduct encompasses what the accused both said and did after the offence charged in the indictment was allegedly committed and it is highly context and fact specific. After-the-fact conduct is circumstantial evidence and like other forms of circumstantial evidence, it allows a fact finder to draw particular inferences based on a person's words or actions. A range of inferences may be drawn from the after-the-fact conduct evidence but in order to draw inferences, the decision maker relies on logic, common sense, and experience. It will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them. When evidence is admissible for one purpose, but not for another, the finder of fact, whether judge or jury, needs to be mindful of and respectful of its permissible and

impermissible uses. In such cases, a specific instruction to a jury that certain evidence has a limited use or is of no probative value on a particular issue is required.

After-the-fact conduct evidence may give rise to imprecise reasoning because of its temporal element and may encourage decision makers to jump to questionable conclusions. To meet the general concern that such evidence may be highly ambiguous and susceptible to jury error, the jury must be told to take into account alternative explanations for the accused's behaviour. In this way, jurors are instructed to avoid a mistaken leap from such evidence to a conclusion of guilt when the conduct may be motivated by and attributable to panic, embarrassment, fear of false accusation, or some other innocent explanation. Trial judges should also consider whether any further specific limiting instruction or cautions may be required to counter any of the specific reasoning risks associated with the particular after-the-fact conduct at issue.

There is no legal impediment to using after-the-fact conduct evidence in determining the accused's intent. Whether or not a given instance of after-the-fact conduct has probative value with respect to the accused's level of culpability depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial. What steps were taken, when they were taken, and at what risk may all be factors to consider when assessing the nature of the conduct in a particular case. Finally, when assessing the actions of an accused and the inferences

that may be drawn from the after-the-fact conduct at the admissibility or no probative value stage, the trial judge may take into account the disproportionality between the explanation proffered and the conduct at issue.

It is an error to relegate after-the-fact conduct evidence to a supporting or secondary role and there is a need to maintain the distinction between the threshold admissibility of evidence and the separate issue of whether the Crown has met its ultimate burden of establishing guilt of the accused beyond a reasonable doubt. The test for the admission of evidence is first focused on relevance and the tendency of the evidence to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence. It is at the end of the case, when all the evidence has been heard, that the fact finder is required to determine how much, if any, weight they will place on this evidence, how it fits with other evidence, and whether, based on the totality of the evidence, the Crown has proved the charges beyond a reasonable doubt. The absence of supporting physical evidence does not, as a general rule, make the inference sought speculative. If the totality of the evidence satisfies the chain of reasoning for a particular inference, then that inference is available — regardless of whether supporting physical evidence is part of the evidentiary record.

The mere existence of two or more plausible explanations for given after-the-fact conduct does not make that conduct equally consistent with those

explanations such that a proffered inference may lose its probative force. The fact that multiple explanations can be produced for after-the-fact conduct does not automatically mean that that conduct is equally consistent with multiple offences — it simply means that alternative explanations exist and are arguable. As long as the evidence is more capable of supporting the inference sought than the alternative inferences, then it is up to the fact finder, after considering all explanations, to determine what, if any, inference is accepted, and the weight, if any, to be provided to a piece of circumstantial evidence.

Here, the nature of the conduct (the accused's successful destruction of the deceased's body and with it any evidence of her injuries), its relationship to the evidentiary record (which includes evidence of a relationship fraught with discord, including violence and threats of suicide), and the issues raised at trial (the Crown's theory that the accused destroyed the body to hide the nature and extent of the injuries) indicate that the evidence was relevant to the accused's level of culpability. The after-the-fact conduct evidence makes the proposition — that the accused intended to cause the deceased bodily harm knowing that it was likely to cause her death and was reckless as to whether death ensued — more likely than that proposition would be in the absence of this evidence. It was open to the trial judge to determine that the accused's attempts to conceal and destroy the deceased's body were out of all proportion to either the claim that this was an accidental death and/or to the offence of manslaughter. The relevant, reasonable and rational inference that

the jury could draw regarding the accused's level of culpability, on the basis of the after-the-fact conduct evidence, is that the accused concealed and destroyed the deceased's body in order to conceal the nature and extent of her injuries and the degree of force required to inflict them. His successful destruction of this evidence is out of all proportion to the explanation put forward of an accident and could support the inference that the accused sought to conceal this evidence and to hide not only the existence of a crime, but its extent.

Trial judges bear the ultimate responsibility for the content, accuracy and fairness of the jury charge, but both Crown and Defence counsel are obliged to assist the trial judge and identify what in their opinion is problematic with the judge's instructions to the jury. Jury charges do not have to adhere to prescriptive formulas — it is the substance of the charge that matters. There is agreement with the majority that the jury charge in this case adequately guarded against the risks that are generally associated with after-the-fact conduct evidence. The jury instructions adequately differentiated between using the after-the-fact conduct evidence in relation to causation and intent.

This case, however, would be very close to the line when it came to determining whether the Crown met its ultimate burden of establishing each constituent element of second degree murder beyond a reasonable doubt. There was no evidence as to the cause of death other than the accused's statement and his

after-the-fact conduct. The case was based on circumstantial evidence and the jury was asked to engage in inferential reasoning and there were reasonable inferences other than murder which could be drawn from the evidence. Further, the fine line between innocence and guilt was reflected in the fact that not only were the judges divided on the main legal issues, but the accused was discharged at a preliminary inquiry.

In admitting the contested after-the-fact conduct evidence, the trial judge correctly decided that the probative value of the evidence outweighed its prejudicial effects. However, the conclusion that the evidence was more probative than prejudicial did not negate the trial judge's responsibility to meet and address any specific propensity prejudice of that evidence in the jury charge. Clear instructions to the jury about the uses that they could and could not make of the discreditable conduct evidence were essential. The after-the-fact conduct evidence, while admissible for the purposes of causation and intent, bore all the hallmarks of propensity evidence that could, absent proper limiting instructions, import both moral prejudice and reasoning into the jury's analysis. The nature of the accused's after-the-fact conduct was likely to elicit a strong emotional reaction in the jurors. Burning the deceased's body was morally and viscerally repugnant. The disturbing nature of the conduct was made clear to the jury. The nature of the evidence, while admissible, ushered in a significant risk that the accused would be convicted of second degree murder not because the jury had concluded beyond a reasonable doubt

that he had killed the deceased, but because his after-the-fact conduct had convinced the jurors that he was the sort of person who would kill. There was the further risk of reasoning prejudice. As the jurors assessed whether the totality of the evidence established causation and intent beyond a reasonable doubt, they were likely to be experiencing the precise mix of revulsion and condemnation that could deflect them from a rational and dispassionate analysis of the evidence. Without an express limiting instruction, jurors cannot be expected to know that at the same time that they are being told to use common sense, they are in fact prohibited from engaging in what many jurors may also see as just another form of common sense reasoning: propensity reasoning. The reason judges caution against propensity reasoning is precisely because this form of thinking is recognized as being so intuitive and powerful. In this instance, the jurors could not have understood the potentially poisonous nature of propensity evidence, and the manner in which the law has circumscribed its use, without an express instruction on the issue.

The failure of the trial judge to provide a limiting instruction on propensity reasoning is best seen here as an error of law under s. 686(1)(a)(ii) of the *Criminal Code*. There is an undeniable connection between the allegation of an unreasonable verdict and an error of law, because the error of law meant the jury was not properly instructed and was not, therefore, equipped to reach a reasonable verdict. Given that this was an error of law, the Crown would be able to rely on the curative proviso if the legal error was harmless or if the evidence against the accused was so

overwhelming that a trier of fact would inevitably convict. In this case, however, the legal error was not harmless. Even though a jury charge does not have to be perfect, and this was a single omission in a comprehensive charge, the trial judge's failure to provide a limiting instruction on propensity resulted in a jury that was not properly instructed to assess the key piece of evidence supporting the Crown's theory of guilt. Further, the evidence was not such that the jury would inevitably convict on second degree murder. It was open to the jury to conclude that the evidence did not establish any criminal culpability. A verdict of not guilty, or guilty on manslaughter, rather than murder, was also possible in this case. The reasonableness of any verdict of second degree murder could only be assessed if jurors knew they could not reason that because the accused destroyed the deceased's body in the manner that he did, he was the type of person who would have murdered her. The trial judge's instructions were not correct in law on this point and the remedy is not an acquittal, but a new trial.

There is disagreement with the majority that Defence counsel's failure to request a limiting instruction against general propensity reasoning at the pre-charge conference may reasonably be taken as an indication that Defence counsel considered the charge to be satisfactory and that a limiting instruction would not be in his client's interests. Great caution needs to be used when speculating about why counsel acted in a particular manner at trial. Whether the Defence counsel's decisions were tactical or not, a lawyer's position on the appropriate parameters of a jury charge, driven by

tactical considerations, cannot change the law that a jury that engages in propensity reasoning is a jury that is not acting judicially.

Lastly, the principle of finality does not come into play in the manner framed by the majority. This is not a case in which the Defence made a legitimate tactical decision at trial and lost. Rather, this is a case in which regardless of the Defence counsel's tactical decisions, the jury was not properly instructed and was therefore unable to reach a reasonable verdict. At stake was nothing less than the accused's right to a fair trial based on lawful reasoning. Where an individual is at risk of wrongful conviction, the principle of trial fairness outweighs that of finality as it is a fundamental principle of justice, protected by the *Canadian Charter of Rights and Freedoms*, that the innocent must not be convicted. In the case at bar, the jury was presented with highly prejudicial conduct evidence and was not adequately instructed on the prohibited uses of that evidence. The risk that the jury engaged in propensity reasoning is real and directly undermined the accused's right to be presumed innocent until proven guilty. In such circumstances, the principle of finality cannot, and does not, supersede the accused's right to a fair trial.

Per Karakatsanis J. (dissenting): There is agreement with the general principles set out by Martin J. regarding the admissibility of after-the-fact conduct, but there is disagreement with Martin J. and the majority on the application of those principles to the evidence in this case. The evidence in this case was not probative of

intent for murder and a directed verdict of acquittal should have been granted. The appeal should be dismissed.

Evidence of after-the-fact conduct is not fundamentally different from other types of circumstantial evidence and may be used to demonstrate culpability. In certain circumstances, it may also be used to ground an inference with respect to an accused's degree of culpability; that is, whether the accused had the *mens rea* required for a given offence. However, its relevance and probative value must be assessed on a case-by-case basis. Whether or not after-the-fact conduct is probative with respect to an accused's intent for a specific offence depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised. To be relevant, such evidence must have some tendency to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence. However, if conduct could be equally explained by or equally consistent with two or more offences, it is not probative with respect to determining guilt as between the offences. Admissibility of evidence as to the state of the accused's mind at the time of the offence turns on whether the after-the-fact conduct is capable of being more consistent with intent for murder than with manslaughter. It falls to the jury to determine whether the conduct was or was not equally consistent with murder and manslaughter beyond a reasonable doubt, if they can do so based on common sense, experience and logic, rather than bare speculation. However, a trial judge does not usurp a jury's function, by determining that the

conduct could not, in the circumstances of the case, assist in differentiating between second degree murder and manslaughter, and is thus inadmissible as evidence of the specific intent required for second degree murder.

In this case, the accused's destruction of the deceased's body was inadmissible as evidence of intent for second degree murder. While the accused's conduct in destroying the body is relevant to the issue of whether he unlawfully caused the deceased's death and was admissible for that purpose, it cannot assist in distinguishing between manslaughter and second degree murder. The evidence here did not yield any information about the extent of the injuries. Without evidence to that effect, an inference regarding *mens rea* is grounded on speculation about what the evidence might have revealed about the injuries. There is no logical connection linking the after-the-fact conduct evidence in this case to an intent for second degree murder that does not equally speak to the possibility of manslaughter. It flies in the face of logic to suggest that a person would only go to great lengths to cover up an intentional homicide, but not an unintentional one. Further, the evidence relating to motive and animus here cannot assist the jury in finding that the after-the-fact conduct makes it more likely the accused had the intent for second degree murder rather than manslaughter, because it is equally supportive of both.

There is agreement with Martin J. that the failure to provide instructions warning the jury of the dangers of propensity reasoning requires a new trial in this

case. Because the after-the-fact conduct evidence was admissible to show culpable homicide but not prove second degree murder, the jury required strong direction as to the limitations of its use. The evidence relating to the relationship between the accused and the deceased and to the circumstances surrounding the day of the deceased's death did not provide any evidence upon which a reasonable jury, properly instructed, could find the accused guilty of second degree murder.

Cases Cited

By Moldaver J.

Referred to: *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433; *R. v. White*, [1998] 2 S.C.R. 72; *R. v. W. (D.)*, [1991] 1 S.C.R. 742; *R. v. Kociuk*, 2011 MBCA 85, 278 C.C.C. (3d) 1; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *R. v. R.T.H.*, 2007 NSCA 18, 251 N.S.R. (2d) 236; *Thériault v. The Queen*, [1981] 1 S.C.R. 336; *R. v. Polimac*, 2010 ONCA 346, 254 C.C.C. (3d) 359, leave to appeal refused, [2010] 3 S.C.R. vi; *R. v. Minor*, 2013 ONCA 557, 303 C.C.C. (3d) 382; *R. v. T. (J.A.)*, 2012 ONCA 177, 288 C.C.C. (3d) 1; *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908; *R. v. Mariani*, 2007 ONCA 329, 220 C.C.C. (3d) 74; *R. v. Smith*, 2007 ABCA 237, 225 C.C.C. (3d) 278; *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716; *R. v. Sheriffe*,

2015 ONCA 880, 333 C.C.C. (3d) 330; *R. v. Malik*, 2005 CanLII 15453; *R. v. Bukmeier* (1998), 103 B.C.A.C. 303; *R. v. F. (J.)*, 2011 ONCA 220, 105 O.R. (3d) 161, aff'd 2013 SCC 12, [2013] 1 S.C.R. 565; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402; *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328.

By Martin J. (dissenting in part)

United States of America v. Shephard, [1977] 2 S.C.R. 1067; *R. v. Peavoy* (1997), 117 C.C.C. (3d) 226; *R. v. Mujku*, 2011 ONCA 64, 226 C.R.R. (2d) 234; *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760; *R. v. Rowbotham*, [1994] 2 S.C.R. 463; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433; *R. v. Arp*, [1998] 3 S.C.R. 339; *R. v. White*, [1998] 2 S.C.R. 72; *R. v. Smith*, 2016 ONCA 25, 333 C.C.C. (3d) 534; *R. v. Allen*, 2009 ABCA 341, 324 D.L.R. (4th) 580; *R. v. Arcangioli*, [1994] 1 S.C.R. 129; *R. v. Jackson*, 2016 ONCA 736, 33 C.R. (7th) 130; *R. v. Angelis*, 2013 ONCA 70, 296 C.C.C. (3d) 143; *R. v. Teske* (2005), 32 C.R. (6th) 103; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26; *R. v. Cooper*, [1993] 1 S.C.R. 146; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3; *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Lifchus*, [1997] 3 S.C.R. 320; *Harrison's Trial* (1692), 12 How. St. Tr. 833; *R. v. Handy*, 2002 SCC 56, [2002] 2

S.C.R. 908; *R. v. D. (L.E.)* (1987), 20 B.C.L.R. (2d) 384; *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697; *R. v. Burns*, [1994] 1 S.C.R. 656; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720; *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909; *R. v. O'Brien*, 2011 SCC 29, [2011] 2 S.C.R. 485; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *Thériault v. The Queen*, [1981] 1 S.C.R. 336; *R. v. Chambers*, [1990] 2 S.C.R. 1293; *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581; *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198; *R. v. MacLeod*, 2014 NSCA 63, 346 N.S.R. (2d) 222; *R. v. R.T.H.*, 2007 NSCA 18, 251 N.S.R. (2d) 236; *R. v. Smith*, 2007 ABCA 237, 77 Alta. L.R. (4th) 327; *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *McMartin v. The Queen*, [1964] S.C.R. 484; *R. v. Wong*, 2018 SCC 25; *R. v. Leipert*, [1997] 1 S.C.R. 281; *R. v. Mills*, [1999] 3 S.C.R. 668.

By Karakatsanis J. (dissenting)

R. v. Creighton, [1993] 3 S.C.R. 3; *R. v. White*, [1998] 2 S.C.R. 72; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433; *R. v. Arcangioli*, [1994] 1 S.C.R. 129; *R.*

v. Rodgeron, 2015 SCC 38, [2015] 2 S.C.R. 760; *R. v. Teske* (2005), 32 C.R. (6th) 103.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11(d).

Criminal Code, R.S.C. 1985, c. C-46, ss. 182(b), 235, 548(1), 686(1)(a)(i), (ii), (b)(iii).

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Paciocco, David M. “Simply Complex: Applying the Law of ‘Post-Offence Conduct’ Evidence” (2016), 63 *Crim. L.Q.* 275.

Tanovich, David M. “*Angelis*: Inductive Reasoning, Post-Offence Conduct and Intimate Femicide” (2013), 99 C.R. (6th) 338.

APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J. and Scanlan and Bourgeois JJ.A.), 2017 NSCA 49, 358 C.C.C. (3d) 362, [2017] N.S.J. No. 232 (QL), 2017 CarswellNS 825 (WL Can.), setting aside the accused’s conviction for second degree murder and ordering a new trial. Appeal allowed, Martin J. dissenting in part and Karakatsanis J. dissenting.

Jennifer A. MacLellan, Q.C., and *Kenneth W. F. Fiske, Q.C.*, for the appellant.

Peter Planetta, for the respondent.

The judgment of Moldaver, Gascon and Rowe JJ. was delivered by

MOLDAVER J. —

[1] I have had the benefit of reading the reasons of my colleague Justice Martin. In her reasons, my colleague provides a thorough and comprehensive review of the facts, and I see no need to replicate her work.

[2] Furthermore, I agree with Justice Martin, for the reasons she has given, that the evidence of Mr. Calnen's after-the-fact conduct was admissible as circumstantial evidence on both the issue of causation and the mental element for second degree murder. Accordingly, I also agree with my colleague that it is unnecessary to address the directed verdict issue.

[3] My colleague takes the position that it was essential for the trial judge to provide a limiting instruction against general propensity reasoning — namely, the reasoning that because Mr. Calnen was a person of bad character who engaged in disreputable and morally repugnant conduct, he was more likely to have committed

the crime charged. His failure to provide such a limiting instruction, in her view, renders the jury's verdict of second degree murder suspect and warrants a new trial.

[4] As a preliminary matter, I am of the view that the alleged error upon which my colleague would order a new trial is properly characterized as an alleged error of law under s. 686(1)(a)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46, as opposed to an unreasonable verdict under s. 686(1)(a)(i). The distinction is an important one from the Crown's perspective because in an appropriate case where the error comes within s. 686(1)(a)(ii), the Crown would be able to rely on the curative proviso under s. 686(1)(b)(iii) — something it could not do if the case truly involved an unreasonable verdict as contemplated under s. 686(1)(a)(i). To be clear, however, this is not a case where the Crown needed to rely on the curative proviso because, as I will explain, there was no legal error that required its use.

[5] On the question of whether the trial judge was required to provide a limiting instruction against general propensity reasoning, I must respectfully part ways with my colleague. In my view, although the trial judge could have given such an instruction, the fact that he did not do so does not amount to reversible error. Put simply, this is not a case of a non-direction amounting to misdirection.

[6] When the trial judge's charge is considered fairly, contextually, and as a whole, I am satisfied that the jury was properly equipped to decide the case in the

absence of a limiting instruction against general propensity reasoning. And I am not alone in this. Experienced defence counsel at trial seemed to be of the same view. Were it otherwise, I would have expected him to seek the kind of limiting instruction which my colleague now says was both obvious and crucial — and to have forcefully objected had the trial judge not capitulated. And yet, as we shall see, defence counsel did neither, despite being acutely aware, as my colleague points out, of the emotive and discreditable evidence which, in her view, “very likely” caused the jury to reach a verdict on second degree murder that was irreparably tainted by moral and reasoning prejudice: Martin J.’s reasons, at para. 191.

[7] With respect, for reasons that follow, I do not share my colleague’s concerns. Accordingly, I would allow the appeal and restore Mr. Calnen’s conviction for second degree murder.

I. Standard of Review

[8] An appellate court undertakes a functional approach in reviewing a jury charge, asking whether the charge as a whole enabled the trier of fact to decide the case according to the law and the evidence: *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 49; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 32. As Bastarache J. wrote in *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 30:

The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case.

[9] In short, the test is whether the jury was properly, not perfectly, instructed: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 62. At the end of the day, the overriding question is whether the jury was properly equipped to decide the case absent a limiting instruction against general propensity reasoning.

II. Analysis

[10] I agree with my colleague's articulation of the legal principles governing the admissibility of discreditable conduct evidence and its potential for moral and reasoning prejudice. However, for reasons I will develop, I respectfully disagree with her application of those principles to the facts of this case.

[11] Allegations of non-direction amounting to misdirection must be assessed contextually, in line with the facts and circumstances of the particular case. At trial, the Crown led relevant and admissible evidence of discreditable conduct on Mr. Calnen's part that was extrinsic to the offence charged. That evidence can be divided temporally into two broad categories.

[12] First, the Crown adduced discreditable conduct evidence from the period *preceding* Ms. Jordan's death. There was evidence that Mr. Calnen habitually used crack cocaine. Further, he apparently had an open and sexually adventurous relationship with Ms. Jordan, in which he encouraged her to perform sex work out of his basement. Also, she once texted a friend, Mr. Weeks, that Mr. Calnen "put his hands on [her]".

[13] Second, the Crown led discreditable conduct evidence of Mr. Calnen's conduct *after* Ms. Jordan's death, including evidence that he moved and then burned Ms. Jordan's body while high on crack cocaine and made other attempts to cover up her death, including lying to the police about her disappearance.

[14] Mr. Calnen challenged the admissibility of much of this evidence at trial and again on appeal. Defence counsel argued that Mr. Calnen's police statement and re-enactment, in which he admitted to burning Ms. Jordan's body in a drug-fueled panic and lying to various people including the police, was involuntary and lacked probative value. The defence submitted that Ms. Jordan's text message conversation with Mr. Weeks was inadmissible hearsay, unreliable and incapable of proving motive. Despite these submissions, the trial judge and the Court of Appeal held that most of the disputed evidence was admissible. Furthermore, for the reasons given by my colleague, I am satisfied that the evidence of Mr. Calnen's after-the-fact conduct

was admissible as circumstantial evidence on both the issue of causation and the mental element for second degree murder.

[15] The question remains: Did the relevant and admissible discreditable conduct evidence pose such an elevated risk of propensity reasoning that the trial judge was required to provide a limiting instruction against general propensity reasoning and that his failure to do so amounted to reversible error? My answer to that question proceeds in two parts.

[16] First, the risk that the jury would engage in general propensity reasoning based on the evidence of Mr. Calnen's after-the-fact conduct was considerably offset by the trial judge's introductory and final jury instructions, which were neutral, fair and balanced.

[17] Second, experienced defence counsel, well aware of the issue of potential propensity reasoning, did not raise that issue, much less seek a limiting instruction, during the pre-charge conference while vetting the proposed final jury instructions. In short, he signed off on the trial judge's charge knowing full well that it did not contain the kind of limiting instruction that my colleague now says was both obvious and crucial — and indeed fatal to sustaining Mr. Calnen's conviction for second degree murder.

[18] In these circumstances, I consider it fair to ask: Why did defence counsel not raise the issue of general propensity reasoning with the trial judge and seek a limiting instruction of the kind that my colleague now says was essential? The answer, as I will explain, is that in all likelihood defence counsel made a deliberate and conscious tactical decision to marshal the discreditable conduct evidence in an attempt to bolster the truthfulness of Mr. Calnen's out-of-court statement and re-enactment, upon which his defence rested. In these circumstances, while it would have been open to the trial judge to provide a limiting instruction against impermissible propensity reasoning, such an instruction would have had the potential to undermine Mr. Calnen's credibility and thereby undercut his defence.

[19] I will address these features in turn.

A. *Neutral, Fair and Balanced After-the-Fact Conduct Instructions*

[20] For reasons that follow, I am satisfied that the trial judge's introductory instructions on the significance of Mr. Calnen's guilty plea to indecent interference with Ms. Jordan's remains, and his final instructions on Mr. Calnen's after-the-fact conduct, were neutral, fair and balanced. Read as a whole, the jury instructions sufficiently protected against the risk of moral and reasoning prejudice from the evidence of Mr. Calnen's after-the-fact conduct.

(1) Introductory Instructions and a Question From the Jury

[21] At the outset of the trial, Mr. Calnen pleaded guilty to indecently interfering with Ms. Jordan's remains by burning her body. In his opening instructions, the trial judge noted that Mr. Calnen's guilty plea to indecent interference with Ms. Jordan's remains could not be permitted to water down the presumption of innocence, stressing that "Mr. Calnen starts the trial with a clean slate" and that "[i]t is Crown counsel who must prove guilt beyond a reasonable doubt, not Mr. Calnen who must prove his innocence": A.R., vol. III, at p. 683.

[22] On the second day of trial, in a note to the trial judge, the jury queried whether it could consider Mr. Calnen's guilty plea "either during its daily discussions or in reaching its final verdict": A.R., vol. III, at p. 936. The trial judge told the jury to "put Mr. Calnen's guilty plea . . . out of [their] minds" because they required "all of the evidence" before coming to their decision at the end of trial: A.R., vol. III, at pp. 947-48. The Crown and the defence endorsed the trial judge's response.

[23] In proceeding this way, the trial judge insulated the jury from reasoning that Mr. Calnen's guilty plea to indecent interference with Ms. Jordan's remains meant it was more likely that he committed second degree murder. This feature of the record militates against a conclusion that the instructions were inadequate — a

conclusion that is strengthened when one considers the trial judge's final instructions, which I will describe below.

(2) The Final Instructions

[24] My colleague observes that there were many other rational inferences available from the circumstantial evidence in this case and the jury was therefore being “asked to engage in inferential reasoning”, increasing the risk that they would draw a forbidden inference based on impermissible propensity reasoning: Martin J.’s reasons, at paras. 167-174. Indeed, she goes so far as to say that it is “very likely” the jury did just that in arriving at its verdict on second degree murder and that this irreparably tainted the outcome: para. 191. With respect, I disagree. When the trial judge’s final instructions are read fully and fairly, it becomes clear that the trial judge properly equipped the jury to make reasonable inferences from the circumstantial evidence without resorting to specious reasoning or speculation.

[25] The record reveals that the trial judge was alive to the “substantial risk of jury error” from after-the-fact conduct evidence and the temptation to “jump too quickly from evidence of post-offence conduct to an inference of guilt” without proper consideration of alternate explanations: *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 23, citing *R. v. White*, [1998] 2 S.C.R. 72, at para. 57. The trial judge’s detailed limiting instructions on after-the-fact conduct evidence and his

caution against drawing speculative inferences from circumstantial evidence are significant factors when assessing the risk that the jury would engage in general propensity reasoning.

[26] Several portions of the jury charge guarded against the risk of general propensity reasoning. As detailed below, these included the instructions on the risks associated with circumstantial after-the-fact conduct evidence, how to assess circumstantial evidence against the criminal standard of proof, how to draw reasonable inferences in a circumstantial case, the parties' theories and inferences sought, and the principles articulated by this Court in *R. v. W.(D.)*, [1991] 1 S.C.R. 742.

[27] The trial judge told the jury to leave the after-the-fact conduct evidence, in particular Mr. Calnen's burning of Ms. Jordan's body, "somewhat at large, until the final stage of putting all the evidence together and seeing if it proves the case beyond a reasonable doubt": A.R., vol. I, at pp. 134 and 163-64. The jury was repeatedly told to keep an "open mind" (A.R., vol. I, at pp. 72, 76 and 173); to use reason, logic, common sense and experience; and to render their verdict without "sympathy, prejudice or fear": A.R., vol. I, at p. 67.

[28] The trial judge also explained the difference between direct and circumstantial evidence. He instructed the jury that before drawing an inference about

Mr. Calnen's state of mind based on the latter type of evidence, "you must examine all of the evidence, and only if, after examining all the evidence, you are satisfied the inference is proper to draw, can you then draw the inference": A.R., vol. I, at p. 140. He added that "[i]n order to find Paul Trevor Calnen guilty on the basis of circumstantial evidence, you must be satisfied beyond a reasonable doubt that his guilt is the only rational conclusion or inference that can be drawn from the whole of the evidence": A.R., vol. I, at p. 83. Thus, the jury was correctly instructed that proof "beyond a reasonable doubt" meant that a conviction could rest on circumstantial evidence only if they were satisfied there was no rational inference inconsistent with guilt.

[29] To that end, the jury was told repeatedly to consider potential innocent explanations for Mr. Calnen's after-the-fact conduct, and the trial judge provided detailed examples to consider. He explained the competing inferences available from Mr. Calnen's after-the-fact conduct and situated that evidence in the context of the parties' theories. He further clarified that after-the-fact conduct was merely circumstantial evidence — that is, evidence capable of giving rise to various reasonable inferences when considered in light of the evidence as a whole — that may or may not assist the jury. Further, and crucially, he cautioned that the evidence of Mr. Calnen burning Ms. Jordan's body could not, by itself, satisfy the standard of proof beyond a reasonable doubt; it was only a piece of circumstantial evidence to be considered with the whole.

[30] Furthermore, owing to Mr. Calnen's exculpatory police statement and videotaped re-enactment of Ms. Jordan's fall down the stairs, the trial judge articulated the principles from *W.(D.)* not once, but twice in the charge.

[31] Against this backdrop, I have no trouble concluding that the jury understood the legal issues in this case, how the evidence related to those issues and the competing inferences available from the evidence. The jury would have considered the various potential explanations for Mr. Calnen's after-the-fact conduct and would have drawn reasonable inferences from the whole of the evidence.

[32] While my colleague stresses that the trial judge expressed his intention to address the prejudice of Mr. Calnen's after-the-fact conduct in his jury charge, the foregoing analysis reveals that, in fact, he did: see Martin J.'s reasons, at paras. 201-3. Not only that, but evidently he did so to the satisfaction of defence counsel, who did not object. As I explain below, this failure to object was in all likelihood tied to a defence strategy to use Mr. Calnen's discreditable conduct to its own advantage while at the same time avoiding a potentially damaging instruction on Mr. Calnen's credibility. I turn to those two factors now — the failure to object and the defence strategy. Each plays a central role in my conclusion that a limiting instruction against general propensity reasoning was not necessary in this case.

B. *Vetting the Charge and the Failure to Object on the Basis That a Limiting Instruction Was Required*

[33] As my colleague notes, the parties were alive to the issue of general propensity reasoning at trial. Indeed, defence counsel raised this issue on three occasions in which he sought to have various pieces of evidence excluded. And yet, when the time came to vet the charge at the pre-charge conference, he chose not to raise the issue of general propensity reasoning, much less seek a limiting instruction on it.

[34] Defence counsel first raised the issue of moral prejudice during a *voir dire* concerning the admissibility of Mr. Calnen's police statement and re-enactment. The defence argued that Mr. Calnen's after-the-fact conduct "paint[ed] him in a bad light": A.R., vol. III, at p. 704. In his reasons for admitting parts of Mr. Calnen's statement and his entire re-enactment, the trial judge noted that he would be seeking counsel's input in the pre-charge conference in order to craft appropriate final instructions on how after-the-fact conduct should be treated.

[35] The issue arose a second time during the Crown's direct examination of Mr. Weeks, when the defence objected to anticipated testimony that Mr. Calnen had forcibly removed a woman from his house. The trial judge agreed that the proposed evidence was inadmissible due to the risk of propensity reasoning, and the jury did not hear it.

[36] The subject surfaced a third time when the defence submitted that Ms. Jordan's "[h]e put his hands on me" text message to Mr. Weeks was inadmissible because it posed the risk of forbidden propensity reasoning. The Crown argued that it was admissible evidence of animus and Ms. Jordan's state of mind. The trial judge admitted all of Ms. Jordan's text messages and gave a mid-trial hearsay instruction approved by the Crown and the defence. In that instruction, the trial judge reminded the jury to scrutinize the text messages, asking whether Mr. Weeks may have been mistaken about their meaning.

[37] Against this backdrop, defence counsel's failure to raise the risk of general propensity reasoning at the pre-charge conference cannot be explained by the possibility that he simply overlooked the issue. To the contrary, the issue was squarely in his mind, as demonstrated on three separate occasions. Counsel was in the best position to assess whether, in the concrete reality of the case at hand, a limiting instruction against general propensity reasoning was desirable. He did not request such an instruction and maintained only one objection to the final charge, submitting that Mr. Calnen's after-the-fact conduct was not probative of the mental element for second degree murder.

[38] In my respectful view, defence counsel's failure to object to the absence of a limiting instruction against general propensity reasoning of the kind my colleague now says was essential speaks not only to "the overall satisfactoriness of

the jury charge on this issue”, but also to “the gravity of any omissions in the eyes of defence counsel”; it may further be taken as an indication that defence counsel felt such an instruction would not have been in his client’s interests: *R. v. Kociuk*, 2011 MBCA 85, 278 C.C.C. (3d) 1, at para. 86, cited with approval by Rothstein J. in *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 66; see also *R. v. R.T.H.*, 2007 NSCA 18, 251 N.S.R. (2d) 236, at paras. 98-99, per Cromwell J.A. (as he then was). As Bastarache J. explained in *Daley*, at para. 58:

. . . it is expected of counsel that they will assist the trial judge and identify what in their opinion is problematic with the judge’s instructions to the jury. While not decisive, failure of counsel to object is a factor in appellate review. The failure to register a complaint about the aspect of the charge that later becomes the ground for the appeal may be indicative of the seriousness of the alleged violation. See *Jacquard*, at para. 38: “In my opinion, defence counsel’s failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection.”

(See also *Thériault v. The Queen*, [1981] 1 S.C.R. 336, at pp. 343-44, where Dickson J. (as he then was) wrote: “Although by no means determinative, it is not irrelevant that counsel for the accused did not comment, at the conclusion of the charge, upon the failure of the trial judge to direct the attention of the jury to the evidence”)

[39] Similarly, in *R. v. Polimac*, 2010 ONCA 346, 254 C.C.C. (3d) 359, at para. 96, leave to appeal refused, [2010] 3 S.C.R. vi, Doherty J.A. stressed that

counsel's vetting and endorsement of the jury charge is a significant factor in assessing whether the jury was properly instructed:

Counsel's duty to assist the court in fulfilling its obligation to properly instruct the jury, referred to by Fish J. in *R. v. Khela*, [2009] 1 S.C.R. 104 at para. 49, 238 C.C.C. (3d) 489, takes on added significance where counsel has been given a full copy of the proposed instructions and an ample opportunity to vet them, and has engaged in a detailed pre-trial dialogue with the trial judge. In those circumstances, counsel's position at trial becomes very important when evaluating complaints, raised for the first time on appeal, that matters crucial to the defence were not properly addressed by the trial judge in her instructions. [Emphasis added.]

[40] Finally, in *R. v. Minor*, 2013 ONCA 557, 303 C.C.C. (3d) 382, at para. 89, in the context of a complaint that the trial judge failed to adequately review the evidence for the jury, Strathy J.A. emphasized that defence counsel's failure to object to the charge was a factor to be considered when assessing the adequacy of the charge, adding that "counsel may have made a tactical decision not to request further instructions out of concern that in so doing the judge might re-emphasize damaging evidence."

[41] With these principles in mind, in the circumstances of the present case, defence counsel's failure to object on the basis that the trial judge was required to provide a limiting instruction against general propensity reasoning may reasonably be taken as an indication that the defence considered the charge to be satisfactory and that a limiting instruction would not be in his client's interests. Indeed, the record in

this case strongly supports a finding that in all likelihood, defence counsel's silence on the matter was no accident — it was instead a deliberate tactical decision.

C. *Indicia of a Tactical Decision*

[42] The evidence of Mr. Calnen's extrinsic discreditable conduct was relevant and admissible. If the defence had requested a limiting instruction, it would have included three main components: *R. v. T. (J.A.)*, 2012 ONCA 177, 288 C.C.C. (3d) 1, at para. 53. First, it would have identified the extrinsic discreditable conduct evidence. Second, it would have articulated the *forbidden* use of that evidence — namely, drawing an inference based on general propensity reasoning. Third, and importantly, it would also have identified the *permissible* uses of that evidence, which in this case would have included its use in assessing Mr. Calnen's credibility and, by extension, whether his police statement and re-enactment could be believed.

[43] As I will explain, in light of the parties' respective theories and treatment of the evidence, any limiting instruction against general propensity reasoning might well have accrued to Mr. Calnen's detriment. This consideration weighs heavily against concluding that the charge was deficient.

(1) The Parties' Theories

[44] A proper understanding of the respective theories of the defence and the Crown is crucial to determining whether the defence likely made a tactical decision not to request a limiting instruction. Where, as here, the issue is whether the trial judge committed reversible error in not providing a limiting instruction against general propensity reasoning, two principles come to the fore. First, the Crown is not entitled to “ease its burden” by stigmatizing the accused: *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 72. Thus, the Crown’s reliance on general propensity reasoning would be an important factor on appeal: see, e.g., *R. v. Mariani*, 2007 ONCA 329, 220 C.C.C. (3d) 74, at para. 85. Second, the court should consider whether the accused attempted to benefit from the discreditable conduct evidence by weaving it prominently into the defence theory: see, e.g., *R. v. Smith*, 2007 ABCA 237, 225 C.C.C. (3d) 278, at para. 27.

(a) *Crown’s Theory*

[45] The Crown’s theory was as follows. Mr. Calnen and Ms. Jordan were in a serious relationship which came to a sudden and violent end when Ms. Jordan announced she was finally leaving him and tried to steal his valuables. In a state of rage, Mr. Calnen killed her. At first, he tried to make it seem as though she had simply run off. The police then launched a homicide investigation, thereby raising the stakes. Mr. Calnen then made a calculated decision to burn Ms. Jordan’s body, thereby destroying the only evidence capable of establishing the cause of her death.

Mr. Calnen's story about how Ms. Jordan died in an accident after falling down the stairs was, according to the Crown, incredible. Mr. Calnen lied to the police and Ms. Jordan's friends and family in the wake of her disappearance, disclaiming any knowledge of her whereabouts. He buttressed his story by sending a misleading text message to Mr. Weeks from her cellphone. He also minimized the significance of his relationship with Ms. Jordan.

(b) *Defence Theory*

[46] The defence theory was that Mr. Calnen's account of Ms. Jordan's accidental fall down the stairs should be believed. Mr. Calnen's defence of accident hinged on the truthfulness of his police statement and videotaped re-enactment. The defence highlighted the physical evidence tending to corroborate Mr. Calnen's narrative, including the steps he took to burn Ms. Jordan's body. The crucial question for the jury was his motivation for doing so.

[47] Mr. Calnen was, in the defence's submission, in an open relationship with Ms. Jordan. He was neither jealous nor possessive. Ms. Jordan was angry, verbally abusive and harboured animosity against Mr. Calnen. Mr. Calnen, by contrast, was more sad than angry at her wanting to leave him. She chased him around the house, threw a bottle of pop at him, then took a swing at him that caused her to lose her balance and fall down the stairs. High on crack cocaine, Mr. Calnen made the initial

mistake of moving her body, setting in motion a chain of events in which he took increasingly desperate measures to cover up her death. Mr. Calnen initially misled Ms. Jordan's mother and the authorities because he did not trust that anyone would believe it was an accident. Each subsequent step was fueled by further crack cocaine consumption and growing panic at failed attempts to conceal and then destroy her body.

(2) The Parties' Treatment of the Evidence

[48] As indicated, the defence attempted to bolster Mr. Calnen's police statement and re-enactment by marshalling the discreditable conduct evidence in his favour. Mr. Calnen's crack cocaine use explained his irrational decisions to move and then burn Ms. Jordan's body. His open and sexually adventurous relationship with Ms. Jordan demonstrated his lack of possessiveness or jealousy, despite her decision to leave him. The physical evidence of burning Ms. Jordan's body corroborated what he described to the police in his statement and re-enactment.

[49] The Crown, for its part, emphasized the very narrow relevance of Mr. Calnen's attempts to burn Ms. Jordan's body and the circumstantial evidence which pointed to a tumultuous breakup.

(a) *Burning of Ms. Jordan's Body*

[50] There is no indication in the record of a defence application to sever the charge of interference with human remains from the indictment to facilitate Mr. Calnen's guilty plea. Hence, it would appear the defence decided, as a strategic matter, that the jury *should* learn that Mr. Calnen took responsibility for burning Ms. Jordan's body.

[51] Mr. Calnen's defence of accident depended on the truthfulness of his exculpatory statement. The defence submitted that Mr. Calnen's willingness to take responsibility for his actions made that statement more believable. The defence knew that the Crown was relying on the burning of Ms. Jordan's body, along with evidence of Mr. Calnen's animosity towards her, as the crux of its case. The defence methodically highlighted the physical evidence, including the steps Mr. Calnen took to burn Ms. Jordan's body, to corroborate his narrative.

[52] The Crown, for its part, did not invite the jury to engage in propensity reasoning based on Mr. Calnen's guilty plea. To the contrary, Crown counsel exhorted the jury to keep the guilty plea separate and not to use it in respect of the murder charge, stressing that "it's important that you don't take the fact that he pled guilty to one charge and apply it to this [murder charge]. He remains innocent of this charge till we fully prove he's guilty of it": A.R., vol. III, at p. 2191.

[53] The chain of inferences that the Crown urged upon the jury was straightforward: Mr. Calnen took a series of calculated and extreme risks to obliterate any evidence of how Ms. Jordan died, and he did so because her cause of death would have revealed that he murdered her.

(b) Use of Crack Cocaine

[54] The Crown's theory hinged on the notion that Mr. Calnen was calculating and rational, calmly weighing the risks of each attempt to conceal and destroy evidence. The Crown minimized Mr. Calnen's drug use, relying on Mr. Weeks's observation that Mr. Calnen handled the effects of crack cocaine well.

[55] By contrast, the defence sought to paint Mr. Calnen as a heavy crack cocaine user incapable of making rational decisions.

[56] In sum, the defence looked to amplify the significance of his drug use, while the Crown argued it was immaterial.

(c) Open Relationship and Ms. Jordan's Sex Work

[57] The Crown sought to show that Mr. Calnen cared deeply about Ms. Jordan and could not stand the thought of her leaving him. The Crown submitted that Mr. Calnen's statement to police that he was not in a real relationship with Ms.

Jordan — “the sex is good” and “she’s only a hooker” — was an insincere attempt to distance himself from her disappearance: A.R., vol. III, at p. 2220.

[58] By contrast, the defence argued that Mr. Calnen and Ms. Jordan had an open and sexually adventurous relationship, incompatible with feelings of possessiveness, jealousy and animosity. The defence emphasized the unconventional nature of the relationship, whereas the Crown downplayed that evidence.

(d) *Ms. Jordan’s “He Put His Hands on Me” Text*

[59] As indicated, Ms. Jordan sent a text message to Mr. Weeks which said that Mr. Calnen “put his hands on [her].” There was no suggestion at trial, however, that she had disclosed any abuse to her mother or her other friends. To the contrary, her mother held Mr. Calnen in high esteem, perceiving him to be “a stable man” and “a good influence”: A.R., vol. III, at p. 1327. Mr. Calnen and Ms. Jordan would often stay over at her parents’ home. The trial judge gave mid-trial and final limiting instructions, asking the jury to consider whether Mr. Weeks misinterpreted Ms. Jordan’s hearsay text messages.

[60] In its final address, the Crown made no reference to the “[h]e put his hands on me” text and did not argue from propensity. The defence argued that Ms. Jordan emotionally manipulated Mr. Weeks with the “[h]e put his hands on me” text

so that he would help her to steal Mr. Calnen's property and move out of his basement. This was a major theme of Mr. Weeks' cross-examination. According to Mr. Weeks, in his visits to their home, he had never witnessed violence or jealousy between Mr. Calnen and Ms. Jordan.

(3) Tactical Considerations

[61] In light of the parties' treatment of the evidence, there are two aspects to the tactical bargain that the defence appears to have made.

[62] First, the defence used the discreditable conduct evidence — Mr. Calnen's crack cocaine use, the nature of his open relationship with Ms. Jordan, and the corroborative physical evidence that he burned Ms. Jordan's body — to bolster the truthfulness of Mr. Calnen's exculpatory statement and re-enactment: see, e.g., *Smith*, at paras. 27-29.

[63] Second, the defence would have realized that a limiting instruction against general propensity reasoning risked highlighting the negative impact of Mr. Calnen's discreditable conduct on his credibility. It was within the ambit of defence counsel's tactical discretion to attempt to avoid such an instruction with a view to bolstering Mr. Calnen's narrative. The absence of the proposed limiting instruction meant, in effect, that the jury was not informed, anywhere in the charge, that Mr.

Calnen's discreditable conduct could be used to undermine his credibility and, by extension, the trustworthiness of his exculpatory statement and re-enactment, notwithstanding the fact that, as I will explain, it would have been open to the jury to use the evidence for these purposes.

[64] As the majority of the Court of Appeal noted, the evidence of Mr. Calnen's after-the-fact conduct was admissible on the question of his credibility. Evidence of extrinsic discreditable conduct that is otherwise relevant and admissible with respect to an issue in the case may be used to assess the accused's overall credibility. In *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716, at para. 70, Cory J. laid to rest any doubt about this common sense proposition:

To require a jury to compartmentalize its thinking even further than this would be artificial and unnecessarily convoluted. It is a matter of common sense that evidence of bad character may reflect badly on the accused's credibility, and that the jury can use it as a factor in determining if the accused is likely to be telling the truth. This is not the same thing as suggesting that the accused is guilty because she is a bad person, or may have a disposition to commit the type of crime for which she is charged.

(See also *R. v. Sheriffe*, 2015 ONCA 880, 333 C.C.C. (3d) 330, at para. 70.)¹

[65] This general principle holds true of discreditable conduct that occurred after the fact: *Jaw*, at para. 39. Had the trial judge given the limiting instruction that

¹ I note that the accused in *G. (S.G.)* testified. However, nothing in Cory J.'s reasons limits the principles he articulated to an accused's in-court testimony, as opposed to an out-of-court statement and videotaped re-enactment of the kind at issue here. Nor do I see any reason to distinguish *G. (S.G.)* on that basis: see, e.g., *R. v. Malik*, 2005 CanLII 15453, at paras. 7-11.

my colleague now says was essential, the charge would necessarily have included a damaging instruction on Mr. Calnen's credibility flowing from the discreditable conduct evidence. This, in turn, could well have shaken the foundation of his defence, which hinged on the jury's assessment of the truthfulness of his statement to the police and the videotaped re-enactment. In this regard, while my colleague takes the view that such an instruction would have been discretionary, I respectfully disagree. I say this because Crown counsel would unquestionably have insisted on such an instruction so as to level the playing field.

[66] Relatedly, my colleague emphasizes that Crown counsel could have requested such an instruction on credibility at any time and clearly chose not to do so: see Martin J.'s reasons, at para. 209. However, the reality is that while Crown counsel evidently considered the charge given by the trial judge to be fair and balanced, there is no reason to assume Crown counsel would have felt the same way had the charge included a limiting instruction against general propensity reasoning. Had such a limiting instruction been added to the charge, the natural consequence would have been Crown counsel's legitimate insistence on an instruction on credibility, which would have gone hand in hand with the limiting instruction against general propensity reasoning. In the absence of the latter instruction, it is not at all surprising that the Crown saw no need to insist on the former.

(4) Conclusion on the Indicia of a Tactical Decision

[67] In light of all the circumstances, including defence counsel's failure to ask the trial judge for a limiting instruction and the absence of any suggestion that defence counsel was ineffective, much less incompetent, the record strongly supports the conclusion that defence counsel made a tactical decision to avoid highlighting the discreditable conduct evidence. This weighs heavily against finding that the jury charge was inadequate: see, e.g., *R. v. Bukmeier* (1998), 103 B.C.A.C. 303, at para. 37; *R. v. F. (J.)*, 2011 ONCA 220, 105 O.R. (3d) 161, at paras. 57-59, aff'd on other grounds, 2013 SCC 12, [2013] 1 S.C.R. 565. Moreover, it is not for this Court to pass judgment on the merits of defence counsel's tactical decision, particularly in the absence of an allegation by Mr. Calnen that his trial counsel failed to assist him effectively: *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at paras. 33-35.

III. Summary and Conclusion

[68] At trial, as I have explained, Mr. Calnen did not seek a limiting instruction against general propensity reasoning. Rather, he adopted a strategy of using the discreditable conduct to bolster the credibility of his statement and re-enactment, upon which his defence of accidental death rested. That the defence adopted a deliberate strategy to use the discreditable conduct evidence to its own advantage is an important factor that distinguishes this case from others where the discreditable conduct evidence plays no part in the defence theory and is little more than a breeding ground for the moral and reasoning prejudice about which my

colleague expresses concern. Given the strategy adopted by the defence, a limiting instruction against general propensity reasoning would have risked highlighting the negative impact of Mr. Calnen's discreditable conduct on his credibility and thereby unravelling his defence — a risk which the defence chose not to take.

[69] Despite my colleague's rejection of that thesis, respectfully, I see no other reasonable explanation for defence counsel's failure to seek the kind of limiting instruction which my colleague now says was both obvious and crucial — and indeed fatal to sustaining Mr. Calnen's conviction for second degree murder.

[70] This Court has stated that the principle of finality is “essential to the integrity of the criminal process”: *G.D.B.*, at para. 19, citing *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at p. 411, per Doherty J.A.; *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 130. It has also stated, as my colleague rightly points out, that the due diligence criterion for the admission of fresh evidence on appeal, which exists to ensure finality, “must yield where its rigid application might lead to a miscarriage of justice”: *G.D.B.*, at para. 19. But here, in my respectful view, there is simply no basis on which to conclude that the application of the finality principle might lead to a miscarriage of justice. As I see it, the defence made a legitimate tactical decision at trial and lost. With respect, it must live with the consequences of that decision. Mr. Calnen had a fair trial. The jury instructions, which both Crown and defence counsel evidently considered to be fair and balanced, properly equipped the

jury to decide the case before it and, in particular, adequately guarded against the risk of general propensity reasoning. That they could have been more fulsome is not the issue. In the circumstances, I am of the view that the principle of finality must prevail.

[71] For these reasons, I would allow the Crown's appeal and restore Mr. Calnen's conviction for second degree murder.

The following are the reasons delivered by

MARTIN J. —

[72] This appeal concerns the inferences that can logically — and legally — be supported by certain after-the-fact conduct evidence. Is it open to the jury to infer the requisite intent for second degree murder from the accused's successive steps to reduce a human body to ash? In my view, on these facts, the answer is yes.

I. Facts

[73] Paul Trevor Calnen was charged with second degree murder and indecent interference with human remains in the death of Reita Louise Jordan, his domestic partner. He was tried by a judge and jury. At the outset of the trial, he pled guilty to the interference charge. The jury found him guilty of second degree murder.

[74] Mr. Calnen, then 50, and Ms. Jordan, 35, had been in a relationship for about two years, and they had been living together in Mr. Calnen's home in Hammonds Plains, Nova Scotia. Ms. Jordan was reported missing on March 28, 2013. After her mother and sister contacted the police, the police commenced a missing person investigation. Mr. Calnen was first interviewed on April 5, 2013 and he told the police that he had last seen Ms. Jordan when he left their home for work on the morning of March 18, 2013.

[75] With the passage of time, the police found no trace of Ms. Jordan. The missing person investigation became a homicide investigation.

[76] The police suspected Mr. Calnen of murder and he was arrested on June 17, 2013. Near the end of his questioning on June 18, the police brought Ms. Jordan's mother into the interview. She embraced Mr. Calnen and begged for information about her daughter. Mr. Calnen began talking. He described how Ms. Jordan died, and explained what he did with her body both immediately after her death and subsequently. His statement to the police was entirely exculpatory on the second degree murder charge: he claimed that Ms. Jordan's death was an accident, and that it did not involve or result from any force on his part.

[77] In describing the circumstances of her death, Mr. Calnen claimed that Ms. Jordan died on March 18, in his presence, in the home they shared. He explained

that when he returned home from work that day, Ms. Jordan had her bags packed at the front door and was leaving. Ms. Jordan asked about his contact with another woman and they argued. Mr. Calnen discovered that she had taken his laptop and his gold ring, and “[t]hat kind of got [him] pissed off”: A.R., vol. II, at p. 695. However, he later claimed to have no knowledge of various texts between Ms. Jordan and a male friend, Mr. Wade Weeks, discussing plans to steal Mr. Calnen’s vehicle and other property.

[78] According to Mr. Calnen, Ms. Jordan demanded that he call a taxi for her, and that he give her money. She became physically aggressive and threatened to trash the house. She kicked some furniture and threw a bottle of pop at him, which he avoided.

[79] Mr. Calnen told the police that he then moved to the front door, and Ms. Jordan followed. With her back to the stairs, she attempted to punch him. He ducked, and the momentum of her swing caused her to fall down the stairs. He tried to resuscitate her, to no avail. He thought she must have hit her head and said that no blood came from her head. Mr. Calnen also conducted a re-enactment for the police on June 18 concerning what he said occurred at the home.

[80] Mr. Calnen said that he panicked. He had used crack cocaine on the way home, and he used it again after Ms. Jordan died. He moved her body from the

bottom of the stairs to the top of the stairs. He claimed that he wrapped her body in a blanket and put her body and her belongings in his truck. He drove around for a while, first into town and then to Peggy's Cove, and then he eventually hid her body near a logging road in the woods close to Ingramport. He went through her bags to make sure she did not have anything else of his. Then, either at that time or the next day, he burned her belongings, including her cell phone, about a thousand feet away from the body on the same logging road.

[81] After work the next day, he went back to the same woods near Ingramport. When he saw that Ms. Jordan's elbow was visible from the logging road, he dragged her further into the woods and covered her body with spruce boughs. He took the metal items that would not burn, like her earrings, perfume bottle, and cell phone parts, and "tossed it wherever" further into the woods: A.R., vol. II, at p. 717.

[82] On April 11, the police told Mr. Calnen that the missing person inquiry had become a homicide investigation. Mr. Calnen said that on April 12, he purchased drugs, retrieved Ms. Jordan's body from the first logging road, and transported it in his truck to a remote logging road in Pleasant Valley. He got stuck and obtained road side assistance. Mr. Calnen then went down a third logging road, where he gathered branches and trees, built a large fire and burned Ms. Jordan's remains. While he was doing this, the police telephoned him and sought a meeting. Mr. Calnen told them that he was at a plumbing job elsewhere. At this point, Mr. Calnen put out that fire and

placed the remaining portion of Ms. Jordan's body — the torso — into a canvas bag. He then drove home with this canvas bag in the closed back compartment of his truck.

[83] On April 13, Mr. Calnen met the police at his home, where they executed a search warrant. He later claimed that Ms. Jordan's torso was in his truck when he met the police at his home. On that day, the police took extensive photographs of the house. They conducted a room by room search, and looked for blood stains using a white light and forensic laser. The police testified that after a thorough review, they found nothing of forensic value in the home. They did, however, report a sticky substance on the television and the floor, which was not blood.

[84] Sometime later — either on the night of April 14 or 19 — Mr. Calnen finished burning Ms. Jordan's remains in the fire pit behind his home. He put her ashes in a bucket, drove to a lake near the Jordan family cottage, and placed her ashes near the diving rock. The next night he took the parts of her that were not consumed in the fire and used a boat to put these further remains in the same lake. He told the police that he put her remains in the lake because that is what he and Ms. Jordan had discussed previously about what they each wanted done with their respective remains.

[85] Mr. Calnen stated: “. . . I've been on drugs like it's nobody's business and -- but I did not kill her” (A.R., vol. II, at p. 703).

[86] The investigators found the burn site in Ingramsport and physical items of a personal nature like a frame, perfume bottle, lipstick, and belt buckle, which appeared to have been burnt. Police divers also found unidentifiable bone fragments in the lake — fragments which also appeared to have been burnt. Further investigations at the home where Ms. Jordan died were conducted subsequently, in June. At that time, the police found no signs of blood or clean-up activities and no visible impact areas or damage in the area of the stairwell, either to the drywall, gyproc, or railings.

[87] The evidence at trial also included text messages, which suggested a disintegrating relationship between Mr. Calnen and Ms. Jordan; allegations in a text from Ms. Jordan's phone of Mr. Calnen's abusive behaviour towards Ms. Jordan; and plans by Ms. Jordan to leave Mr. Calnen and steal his property with the help of Mr. Weeks. On the day she died, text messages indicated that Mr. Calnen and Ms. Jordan were fighting and Mr. Calnen threatened suicide. Ms. Jordan's mother testified that Ms. Jordan wanted to move home prior to her death, but there was insufficient room for her.

[88] Mr. Calnen was arrested on June 17, 2013, and charged with second degree murder, contrary to s. 235 of the *Criminal Code*, R.S.C. 1985, c. C-46, and indecent interference with Ms. Jordan's remains, contrary to s. 182(b) of the *Criminal Code*. At trial, he pled guilty to indecent interference.

[89] In relation to the charge of second degree murder, the Crown was required to establish that Mr. Calnen caused Ms. Jordan's death, and that he did so intentionally or that he intended to cause her bodily harm that he knew was likely to cause her death and was reckless as to whether death ensued. Mr. Calnen has argued throughout that the Crown has failed to prove causation and intent: in essence, he claims that he did not cause or intend Ms. Jordan's death, that her death was an accident, and that there is no unlawful act for which he bears any responsibility.

[90] No admissibility concerns were raised regarding certain aspects of Mr. Calnen's after-the-fact conduct, such as failing to call emergency services when Ms. Jordan died, telling the police and others that she had left him and their home alive, sending messages from her phone after her death to others saying that she had gone into the city, burning her possessions to create the impression that she had left him, and calling a third party after her death to ask whether Ms. Jordan was with that person.

[91] The contested after-the-fact conduct concerns Mr. Calnen's actions in relation to Ms. Jordan's body and his destruction of evidence. The use of this after-the-fact conduct was a live issue from the outset of the case and throughout the trial. There was, and continues to be, a division on whether this after-the-fact conduct could be used as evidence of Mr. Calnen's intent. It is this issue we must resolve.

II. Decisions Below

A. *Decision on Committal — 2014 NSPC 17*

[92] Following the preliminary inquiry, Derrick J. of the Provincial Court discharged Mr. Calnen of the charge of second degree murder and the included charge of manslaughter, pursuant to s. 548(1) of the *Criminal Code*. He was committed on the interference charge. Derrick J. looked at the whole of the Crown’s case and considered whether there was “any evidence upon which a reasonable jury properly instructed could return a verdict of guilty”: see *United States of America v. Shephard*, [1977] 2 S.C.R. 1067.

[93] As the Crown’s case was circumstantial in nature, Derrick J. engaged in a limited weighing of the evidence in order to assess whether it was “reasonably capable of supporting the inferences that the Crown asks the jury to draw”: para. 15 (CanLII). The Crown’s case at this stage was comprised of a number of elements: testimony from three witnesses (the lead homicide investigator; Mr. Wade Weeks, a friend of the deceased; and the forensic IDENT investigator), a booklet of photographs taken by the forensic IDENT investigator, phone records, and Mr. Calnen’s June 18 statement to the police. The question was whether this evidence, if believed, could reasonably support guilt beyond a reasonable doubt.

[94] Ultimately, Derrick J. determined that there was no evidence upon which a reasonable, properly instructed jury could return a verdict of guilt with respect to two essential elements of second degree murder: causation and the requisite mental state. This decision turned largely on her conclusion that Mr. Calnen's after-the-fact conduct could not be used to support the inference that he intended to kill Ms. Jordan. Quoting Ontario Court of Appeal cases *R. v. Peavoy* (1997), 117 C.C.C. (3d) 226 and *R. v. Mujku*, 2011 ONCA 64, 226 C.R.R. (2d) 234 — but without the benefit of this Court's decision in *R. v. Rodgeron*, 2015 SCC 38, [2015] 2 S.C.R. 760 — Derrick J. stated that it was well established that after-the-fact conduct could not be used to determine the level of culpability, and more specifically that it could not be used to determine what the accused's state of mind was at the time of the participation in any unlawful act that caused death.

[95] After considering the entirety of the evidence, she concluded that no reasonable inference could be drawn that Mr. Calnen had animus toward Ms. Jordan or intended to kill her. All the evidence was capable of showing was that Mr. Calnen did not want anyone to suspect that Ms. Jordan was dead — it was “pure speculation” that he hid and disposed of her body in order to hide the fact that he killed her by an unlawful act: para. 95.

[96] After Derrick J. discharged Mr. Calnen on the charge of murder and the included charge of manslaughter, the Crown elected to proceed by way of a direct indictment.

B. *Decision on Motion for a Directed Verdict of Acquittal — 2015 NSSC 331, 368 N.S.R. (2d) 129*

[97] At trial, there were multiple *voir dire*s on various aspects of the evidence, many of which touched on Mr. Calnen's contested after-the-fact conduct. The trial judge first determined that Mr. Calnen's statements to the police were voluntary (2015 NSSC 291, 366 N.S.R. (2d) 71). A second *voir dire* concerned which portions of the police interviews should be before the jury, the focus being on prejudice and probative value. Defence counsel also sought the exclusion of portions of Mr. Calnen's statement on the basis that it was a misuse of after-the-fact conduct evidence. The trial judge determined that at this early stage of the proceeding, and absent hearing evidence at trial, he would admit the final part of the statement and the re-enactment statement, but he put counsel on notice that he would be seeking their input with respect to the crafting of the instructions on after-the-fact conduct (2015 NSSC 318, 368 N.S.R. (2d) 93).

[98] The Crown's case against Mr. Calnen was entirely circumstantial. At trial, evidence was adduced through lay and expert witnesses. The Crown attempted to establish animus and motive through text messages sent by Ms. Jordan. Some

showed indifference toward Mr. Calnen, as well as plans to leave him and to steal his property. Mr. Wade Weeks testified that Ms. Jordan sent him text messages indicating that Mr. Calnen had “put his hands on her”, and that she thought she might not be safe: para. 27. Mr. Calnen’s statement indicated that he and Ms. Jordan were fighting on the day she died. Some of Mr. Calnen’s messages to her were also in evidence, including his threats of suicide. It was Mr. Calnen’s after-the-fact conduct evidence, however, that the Crown submitted supported the strongest inferences about his guilt.

[99] At the close of trial, Mr. Calnen brought a motion for a directed verdict of acquittal. The trial judge dismissed the motion, finding that there was sufficient evidence such that a reasonable jury, properly instructed, could find Mr. Calnen guilty: see *R. v. Rowbotham*, [1994] 2 S.C.R. 463. The trial judge relied on *Rodgerson* and allowed the after-the-fact conduct as evidence of intent, stating: “. . . I am particularly mindful of the testimony of Wade Weeks and Donna Jordan, along with Reita Jordan’s te[x]ts and the statements of Mr. Calnen which have been placed in evidence before the jury”: para. 39. The trial judge determined that if the jury accepted parts of this evidence, it would be “more than sufficient” to establish the requisite intent for second degree murder: para. 39.

[100] The jury convicted Mr. Calnen of second degree murder.

C. *Decision of the Court of Appeal — 2017 NSCA 49, 358 C.C.C. (3d) 362*

[101] Mr. Calnen advanced seven grounds of appeal. The majority at the Court of Appeal held that the trial judge had failed to properly instruct the jury on the use of after-the-fact conduct evidence as it relates to proof of intent for second degree murder. They were of the view that as there was no evidence contradicting Mr. Calnen's story, the issue was whether evidence of after-the-fact conduct, alone, could prove that Mr. Calnen had the requisite intent.

[102] The majority found that, on the facts of this case, the after-the-fact conduct evidence was not relevant and had no probative value for distinguishing between intent for murder and manslaughter. The jury should have been instructed that this evidence could not assist the jury in determining Mr. Calnen's level of culpability. The majority concluded that it would have been "safer" to allow the defence's motion for a directed verdict and take second degree murder away from the jury. Mr. Calnen's conviction for second degree murder was therefore set aside and a new trial was ordered on the charge of manslaughter only.

[103] MacDonald C.J., in dissent, determined that after-the-fact conduct can be relevant not only to establish the commission of an offence, but also to determine the degree of culpability. In this case, the trial judge understood — and explained — the uses that could be made of the after-the-fact conduct evidence. MacDonald C.J. found

that there was sufficient circumstantial evidence to put second degree murder to the jury.

III. Issues

[104] The Crown appealed. Four basic issues divide the parties. They are:

1. Was the contested after-the-fact conduct evidence admissible to prove the requisite intent for second degree murder?
2. Should the trial judge have granted Mr. Calnen's application for a directed verdict?
3. Did the trial judge properly instruct the jury?
4. Was the jury verdict unreasonable?

[105] I conclude the trial judge was correct to admit this after-the-fact conduct evidence, and to instruct the jury that it could be used as evidence for the purposes of determining both causation and intent for second degree murder. There is no need to address the issue of the directed verdict. Further, the jury charge was sufficient to explain the uses that could be made of this after-the-fact conduct evidence and the

possible general risks that it posed. However, in response to the parties' arguments on unreasonable verdict, I have reached the conclusion that the jury ought to have been warned about the specific risks of prohibited propensity reasoning associated with this after-the-fact conduct, as well as other evidence about Mr. Calnen's character, conduct and lifestyle. The absence of a limiting instruction on propensity was a serious error of law necessitating a new trial.

IV. Was the Contested After-the-Fact Conduct Evidence Admissible to Prove the Requisite Intent for Second Degree Murder?

A. *General Principles*

[106] After-the-fact conduct encompasses what the accused both said and did after the offence charged in the indictment was allegedly committed. It covers a large range of possible circumstances, and its content and contours are confined only by the limits of human experience. After-the-fact conduct may also arise in respect of all types of criminal offences and in different legal settings: for example, in cases in which the accused pleads not guilty, admits all or part of an offence, admits some of the offences charged, and/or asserts a defence, excuse, or justification. It is this potential breadth, variety, and mix of considerations that lies at the heart of the much repeated observation that the proper legal treatment of after-the-fact conduct is highly context and fact specific.

(1) Admissibility

[107] As with other types of evidence, evidence of after-the-fact conduct is admissible if it is relevant to a live, material issue in the case, its admission does not offend any other exclusionary rule of evidence, and its probative value exceeds its prejudicial effects.

[108] Relevance involves an inquiry into the logical relationship between the proposed evidence and the fact that it is tendered to establish. The threshold is not high and evidence is relevant if it has “some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence”: *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 36, quoting D.M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at p. 31. In other words, the question is whether a piece of evidence makes a fact more or less likely to be true. Relevance does not require a “minimum probative value”: *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38. As the admissibility of after-the-fact conduct evidence is, “[a]t its heart”, one of relevance, determining the relevance of any piece of after-the-fact conduct evidence is necessarily a case-by-case, “fact-driven exercise”: *White (2011)*, at paras. 22 and 42; see also *R. v. White*, [1998] 2 S.C.R. 72, at para. 26.

[109] To establish materiality, the evidence must be relevant to a *live* issue; if it is not relevant to a live issue, it must be excluded or the jury should be instructed that the evidence is of no probative value: see *White (2011)*, at para. 36.

[110] Trial judges retain the general discretion to exclude relevant evidence when its potential prejudice exceeds its probative force: see *White (2011)*, at para. 31. Counsel for Mr. Calnen sought the exclusion of the after-the-fact conduct evidence in a *voir dire*, on the basis that its prejudice outweighed its probity. The trial judge admitted portions of Mr. Calnen's statement to the police and found that the probative value of the evidence outweighed any prejudicial effect.

[111] After-the-fact conduct is circumstantial evidence. Like other forms of circumstantial evidence, after-the-fact conduct allows a fact finder to draw particular inferences based on a person's words or actions: see *White (1998)*, at para. 21; *White (2011)*, at para. 22; *Peavoy*, at para. 24. This process of inductive reasoning is a cornerstone of the law of evidence, and is used frequently to draw inferences from circumstantial evidence, as well as to assess credibility and to determine the relevance and probative value of evidence: see D. M. Tanovich, "*Angelis: Inductive Reasoning, Post-Offence Conduct and Intimate Femicide*" (2013), 99 C.R. (6th) 338.

[112] In order to draw inferences, the decision maker relies on logic, common sense, and experience. As with all circumstantial evidence, a range of inferences may

be drawn from after-the-fact conduct evidence. The inferences that may be drawn “must be reasonable according to the measuring stick of human experience” and will depend on the nature of the conduct, what is sought to be inferred from the conduct, the parties’ positions, and the totality of the evidence: *R. v. Smith*, 2016 ONCA 25, 333 C.C.C. (3d) 534, at para. 77. That there may be a range of potential inferences does not render the after-the-fact conduct null: see *R. v. Allen*, 2009 ABCA 341, 324 D.L.R. (4th) 580, at para. 68. In most cases, it will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them. “It is for the trier of fact to choose among reasonable inferences available from the evidence of after-the-fact conduct”: *Smith*, at para. 78.

(2) Articulating the Purpose and Use of the Evidence and the Proposed Inferences

[113] In addition to being aware of the general principles, it is important for counsel and trial judges to specifically define the issue, purpose, and use for which such evidence is tendered and to articulate the reasonable and rational inferences which might be drawn from it. This often requires counsel and the court to expressly set out the chain of reasoning that supports the relevance and materiality of such evidence for its intended use. Evidence is to be used only for the particular purpose for which it was admitted. When evidence is admissible for one purpose, but not for another, the finder of fact, whether judge or jury, needs to be mindful of and respectful of its permissible and impermissible uses. In such cases, a specific

instruction to a jury that certain evidence has a limited use or is of no probative value on a particular issue is required.

[114] This case illustrates how admissibility assessments are to be tied to intended uses and do not exist in the abstract. Clearly, Mr. Calnen's actions in relation to Ms. Jordan's body would have been admissible to the charge of interference with human remains, had he not pled guilty to that charge. It was also common ground that his actions were admissible and could be used to rebut the allegation of accident, and to establish causation and an unlawful act for the included offence of manslaughter. The divisive evidentiary issue was whether or not Mr. Calnen's actions to destroy Ms. Jordan's body were relevant and admissible for the purpose of establishing intent to commit second degree murder.

[115] While the focus should be on the intended use of the evidence when determining admissibility and crafting jury instructions, it is also important to expressly state the inferences available to the jury. In *Rodgerson*, this Court made clear that judicial expertise may be required in order to "present the evidence and the available inferences to the jury in a comprehensible form": para. 31. The question in this case was therefore whether, as a matter of logic, common sense, and human experience it was open for the jury, on these facts, to infer Mr. Calnen's mental state at the time of Ms. Jordan's death from what he subsequently did to destroy her body. The inference on intent advanced by the Crown is based on the following chain of

reasoning: Ms. Jordan's body would, if available, reveal how she died. Mr. Calnen took extraordinary steps to destroy Ms. Jordan's body. Therefore, the common sense inference is that Mr. Calnen destroyed the body in order to conceal the nature and extent of her injuries and the degree of force required to inflict them because such may have been evidence of intent. The after-the-fact conduct evidence — the extraordinary steps that Mr. Calnen took to completely destroy Ms. Jordan's body — makes the proposition that Mr. Calnen intended to inflict the requisite type of bodily harm for second degree murder more likely than without this evidence.

(3) Cautions and Limits

[116] Even if admitted for a particular purpose, after-the-fact conduct may pose some unique reasoning risks: see D. M. Paciocco, "Simply Complex: Applying the Law of 'Post-Offence Conduct' Evidence" (2016), 63 *Crim. L.Q.* 275. Conduct that is "after-the-fact", and therefore removed in time from the events giving rise to the charge, carries with it a temporal element that may make it more difficult to draw an appropriate inference. This evidence may also appear more probative than it is, it may be inaccurate, and it may encourage speculation. After-the-fact conduct evidence may thus give rise to imprecise reasoning and may encourage decision makers to jump to questionable conclusions.

[117] To meet the general concern that such evidence may be highly ambiguous and susceptible to jury error, the jury must be told to take into account alternative explanations for the accused's behaviour. In this way, jurors are instructed to avoid a mistaken leap from such evidence to a conclusion of guilt when the conduct may be motivated by and attributable to panic, embarrassment, fear of a false accusation, or some other innocent explanation: see *White (1998)*, at para. 22; *White (2011)*, at paras. 23-25; *R. v. Arcangioli*, [1994] 1 S.C.R. 129, at p. 143.

[118] However, in addition to this general instruction, trial judges should consider whether any further specific limiting instructions or cautions may be required to counter any of the specific reasoning risks associated with the particular after-the-fact conduct at issue. In some cases, courts have recognized that certain types of evidence have other reasoning risks associated with them. For example, additional guidance may be necessary where after-the-fact conduct relates to the accused's demeanour, false alibis or lies put forward by the accused, or the silence or refusal (or, conversely, the readiness) of an accused to take part in an investigation: see *Paciocco*. Individual attention to the actual evidence at issue is necessary because any caution or limiting instruction is also context and fact specific, and needs to be fashioned to meet the specific risks posed by the particular type of after-the-fact conduct at issue in any given case.

B. *After-the-Fact Conduct and Intention*

[119] Contrary to certain suggestions made in the courts below, there is no legal impediment to using after-the-fact conduct evidence in determining the accused's intent. The jurisprudence of this Court is clear: after-the-fact conduct evidence may be relevant to the issue of intent and may be used to distinguish between different levels of culpability (see *White (1998)*, at para. 32; *White (2011)*, at para. 42; *Rodgerson*, at para. 20). Specifically, this Court has said that “[w]hether or not a given instance of post-offence conduct has probative value with respect to the accused’s level of culpability depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial”: *White (2011)*, at para. 42. There is therefore “no *per se* rule declaring post-offence conduct irrelevant to the perpetrator’s state of mind”: *R. v. Jackson*, 2016 ONCA 736, 33 C.R. (7th) 130, at para. 20, per Doherty J.A. As there are also no automatic labels which make certain kinds of after-the-fact conduct always or never relevant to a particular issue, “we must consider all the circumstances of a case to determine whether the post-offence conduct is probative and, if so, what use the jury may properly make of it”: see *R. v. Angelis*, 2013 ONCA 70, 296 C.C.C. (3d) 143, at para. 55.

[120] This Court’s decision in *Arcangioli* does not stand for the proposition that after-the-fact conduct cannot, as a matter of law, be used to establish intent or levels of culpability as between different offences. In that case, the accused fled the scene and admitted only that he punched the victim (common assault), but claimed he did not stab him (aggravated assault). In that context, the Court said that “where an

accused's conduct may be equally explained by reference to consciousness of guilt of two or more offences, and where an accused has admitted culpability in respect of one or more of these offences, a trial judge should instruct a jury that such evidence has no probative value with respect to any particular offence": p. 145.

[121] When grounded in its facts, *Arcangioli* simply established that where an accused has admitted culpability, after-the-fact conduct evidence may, in some cases, be unable to assist the trier of fact in determining the accused's level of culpability as between two offences: see pp. 145-46; *White (1998)*, at para. 23; *White (2011)*, at para. 41; *Angelis*, at para. 53. This Court subsequently tied that finding to when the accused admitted the *actus reus*, saying that a no probative value instruction on intent

is most likely to be warranted where, as in *Arcangioli* itself, the accused has admitted to committing the *actus reus* of a criminal act but has denied a specific level of culpability for that act, or has denied committing some related offence arising from the same operative set of facts. In such cases, the participation of the accused in the culpable event is not at issue; the question to be decided is merely the extent or legal significance of that participation.

(*White (1998)*, at para 28)

[122] However, Justice Rothstein expressed it this way in *White (2011)*, at para. 37:

Arcangioli, and its successor case *White (1998)*, stand for the proposition that a "no probative value" instruction will be required when the

accused's post-offence conduct is "equally explained by" or "equally consistent with" two or more offences (*White (1998)*, at para. 28; *Arcangioli*, at pp. 145 and 147).

[123] Some read this passage to suggest that the reasoning in *Arcangioli* is not limited to cases in which the accused has admitted culpability: see *Paciocco*, at p. 318. I agree. However, relevance is tied directly to the issues raised at trial: *White (2011)*, at para. 42. The presence of an admission is an important contextual factor because it establishes a baseline culpability such that the legal issue becomes whether the after-the-fact conduct evidence is equally consistent with two or more offences. When an accused denies culpability in respect of the offence charged and any included offence, the legal issues are different and the comparison expands to include other potential inferences, specifically that there has been no offence committed at all. That said, an admission is not the only way to establish culpability. The above passage from *White (2011)* addresses the stage of the analysis when there are two or more offences under consideration: a point at which some baseline culpability has already been established. Culpability will arise whenever the fact finder has determined that the presumption of innocence has been rebutted by proof beyond a reasonable doubt and any proffered defence of accident has already been rejected. It should not matter whether that culpability arises from an admission or a finding to that effect.

[124] After-the-fact conduct evidence will not always or necessarily be equally consistent with two offences, and it is open to the trier of fact to conclude that the conduct is more consistent with one offence than the other: see *White (1998)*, at para. 27. The key is therefore determining what “equally explained by” or “equally consistent with” means. This Court has never said that every time multiple possible explanations for conduct are proposed, they become “equally probable” and the evidence in question therefore loses relevance (because it does not make any fact more or less likely). The existence of alternative explanations for the accused’s conduct does not mean that certain evidence is no longer relevant. The overall conduct and context must be such that it is not possible to choose between the available inferences as a matter of common sense, experience and logic. This is a composite standard in which the three considerations interact and one may take on greater significance in a particular case. For example, when hypothetically it could be one offence or another, common sense and experience may support one inference over the other. Pure logic is not the only, or even primary consideration. Any threshold determination of relevance must also respect that it is normally the function of the trier of fact to determine what inference is accepted and the weight to be given to it, and “[f]or the trial judge to interfere in that process will in most cases constitute a usurpation of the jury’s exclusive fact-finding role”: *White (1998)*, at para. 27.

[125] A key factor in assessing probative value is the specific nature of the conduct. In *Arcangioli*, when the sole issue was whether flight by the accused made it

more likely he committed a common or aggravated assault, the nature of that accused's conduct was singular, relatively simple, and occurred over a short period of time. In contrast, the nature of Mr. Calnen's conduct is very different. Mr. Calnen acted over the course of many days, he took numerous risky steps to achieve the total destruction of evidence, and he began to burn Ms. Jordan's body only after he learned that the missing person investigation had become a homicide investigation. There is a wide range of possible ways to alter, conceal or destroy evidence: from trying to wipe a surface clean to completely obliterating the evidence. What steps were taken, when they were taken, and at what risk may all be factors to consider when assessing the nature of the conduct in a particular case.

[126] The relationship between any explanation provided by the accused for his or her actions and the accused's actual actions may also inform the determination of whether the inference is reasonable and rational as a matter of logic, common sense, and human experience. In *White (1998)*, at para. 32, the Court stated:

It is possible to imagine cases in which evidence of post-offence conduct could logically support a distinction between two levels of culpability for a single act, or between two offences arising from the same set of facts. By way of illustration, where the extent of the accused's flight or concealment is out of all proportion to the level of culpability admitted, it might be found to be more consistent with the offence charged.

When assessing the actions of an accused and the inferences that may be drawn from the after-the-fact conduct at the admissibility or no probative value stage, the trial

judge may take into account the disproportionality between the explanation proffered and the conduct at issue.

(1) After-the-Fact Conduct Evidence May Be Admissible on Intent

[127] In *Rodgerson*, this Court considered how evidence of concealment and the destruction of evidence may be probative on the issue of the accused's intent. In that case, the accused claimed that he was acting in self-defence when he caused the deceased's death. He said that the deceased attacked him with a knife, and the two struggled. He pressed down on the deceased's face with his forearm until she apparently passed out, and he passed out shortly thereafter. When he awoke in the morning, he found that she was dead. The accused moved the deceased's body to the backyard, where he removed her clothing and jewelry, placed the body in a shallow grave, poured bleach over it, and filled the grave with dirt. He disposed of items including the bloodstained mattress and carpet and used bleach to clean his home.

[128] The issue in that case was whether the evidence of the accused's concealment of the body and his attempts at clean up were relevant to the issue of his intent at the time of her death. The Court found that these actions were relevant to the accused's intent, stating:

It is relatively straightforward to understand how Mr. Rodgerson's efforts at concealment and clean-up were capable of supporting the

inference that he acted unlawfully. The jury could reasonably have concluded that he was attempting to conceal evidence of a crime that he had committed — that is, unlawfully causing Ms. Young's death. However, these efforts were also capable of supporting the further inference that he was acting not merely to hide the fact that a crime had occurred, but to hide the extent of the crime. In other words, the jury might reasonably have concluded that he sought to conceal Ms. Young's body and clean up the scene of her death in order to conceal the nature and extent of Ms. Young's injuries and the degree of force required to inflict them. As indicated, the more severe the injuries, and the more force required to inflict them, the stronger the inference that he intended to kill Ms. Young or cause her bodily harm which he knew was likely to cause death. This is not the only inference that could be drawn from the concealment and clean-up, but it is one the jury was entitled to draw. [Emphasis deleted; para. 20.]

[129] The inferences available in *Rodgerson* are virtually identical to the inferences proposed by the Crown in this case. The Crown argued that Mr. Calnen's extraordinary efforts to destroy the body support the further inference that he was not simply acting to conceal evidence of a crime he committed, but also to hide the extent of that crime because the nature and extent of her injuries were such that they would support a further inference that the person who inflicted them had the intent for second degree murder. This flows from common sense inferences. First, that the nature of some wounds may make them relevant to intent on second degree murder: for example, a knife wound to the heart. And second, the more severe the injuries, and the more force required to inflict them, the stronger the inference that Mr. Calnen had the requisite intent for second degree murder.

[130] The Defence argued, and the majority of the Court of Appeal accepted, that the reasoning in *Rodgerson* was unavailable here because, in that case, there was physical and forensic evidence about the nature and extent of the deceased's injuries. The Defence asserted that in the absence of similar physical evidence of the cause of death or the nature and extent of Ms. Jordan's injuries, using after-the-fact conduct as evidence of intent was pure speculation in the guise of an inference. Without knowing what Ms. Jordan's injuries were, there was nothing to ground the chain of reasoning. The majority of the Court of Appeal looked at the other evidence in the trial to determine if there was a sufficient logical connection between this conduct and Mr. Calnen's intent. Concluding that there was no other such evidence, the majority held that the requested inference on intent was simply speculative. The majority stated:

I wish to make a broader reference to cases to explain, as I understand it, why in some cases after-the-fact conduct is probative of the issue of intent, yet in others it is not. When doing so I keep in mind that the case on appeal is somewhat unique. The only evidence, other than the appellant's statement to the police and his re-enactment, is the circumstantial evidence based on texts to and from Ms. Jordan's phone and the appellant's after-the-fact conduct. That puts the issue of what limitations there are in the use of after-the-offence conduct to prove both causation and intent squarely before the court. In other cases where after-the-fact conduct has been used to prove intent there was other evidence to be considered. [para. 56]

[131] In my view, this claimed distinction fails to persuade. First, this appeal does not require the Court to determine whether after-the-fact conduct evidence,

alone, can be used to infer intent. This was not a case in which the only evidence adduced by the Crown was the contested after-the-fact conduct evidence. There was other evidence to be considered in this case. Indeed, the above-cited paragraph itemizes some of the other evidence before the jury: texts to and from Ms. Jordan's phone, Mr. Calnen's statement to the police, and his re-enactment. There was also the non-contested after-the-fact conduct evidence, the photographs of the home and stairwell, measurements of the stairwell, Ms. Jordan's theft of Mr. Calnen's ring and laptop, and the police evidence about finding no forensic evidence in the home (which included no signs of a clean up and no physical damage to the stairwell, walls, or railings).

[132] Second, nothing said by this Court in *Rodgerson* conditions an inference concerning intent on the presence of other physical or forensic evidence demonstrating the nature and extent of injuries suffered by the deceased. Such other evidence may strengthen the inference of intent, as it did in *Rodgerson*, but *Rodgerson* does not suggest that the physical evidence available in that case was a necessary prerequisite for any inference on intent. The chain of reasoning employed by the Court in *Rodgerson*, linking the destruction of evidence and intent for murder, does not arise from, nor rest upon, the presence of other confirmatory or contradictory evidence. It is not the law that an offence must be separately established before after-the-fact conduct evidence can be used by the trier of fact to determine an accused's intent; after-the-fact conduct evidence is not merely complementary evidence.

[133] The idea that the probative value of particular after-the-fact conduct may be assessed by reference to the record as a whole simply conveys that whether an inference is rational and reasonable must be assessed in context. It does not mean that no reasonable and rational inference can be drawn from the after-the-fact conduct unless there is some other direct evidence that somehow supports or corroborates it. It may be that other evidence supports a particular inference (like a body which demonstrates certain injuries were sustained), but such is not a precondition when the inference is available as a matter of common sense, logic, and human experience. The suggestion that additional and direct evidence of the nature and extent of the deceased's injuries is required before an inference is available thus finds no basis in the jurisprudence, and cannot be reconciled with the general principles and practices which govern admissibility determinations. After-the-fact conduct is assessed in context. Its significance may be strengthened or weakened by the presence or absence of other evidence, but it is not a secondary form of evidence.

[134] Not only is it an error to relegate after-the-fact conduct evidence to a supporting or secondary role, there is also a need to maintain the distinction between the threshold admissibility of evidence and the separate issue of whether the Crown has met its ultimate burden of establishing the guilt of the accused beyond a reasonable doubt. The test for the admission of evidence is first focussed on relevance, and the tendency of the evidence, as a matter of logic, common sense and human experience, to make the proposition for which it is advanced more likely than

that proposition would be in the absence of that evidence. After-the-fact conduct evidence, when admitted, simply adds that piece of evidence as a building block in the Crown or Defence case. It is at the end of the case, when all the evidence has been heard, that the fact finder is required to determine how much, if any, weight they will place on this evidence, how it fits with other evidence, and whether, based on the totality of the evidence, the Crown has proved the charges beyond a reasonable doubt. Conflating these standards means that those charged with the difficult task of weighing evidence and determining innocence or guilt may be deprived of relevant evidence.

[135] In addition, the absence of supporting physical evidence does not, as a general rule, make the inference sought speculative. To hold otherwise is to unduly limit the scope of after-the-fact conduct evidence in certain cases, and to place cases in which the accused has successfully destroyed the body of the deceased beyond the realm of proof. As in all cases engaging after-the-fact conduct evidence, the strength of the inference will be determined by the nature of the conduct, what is sought to be inferred from the conduct, the parties' positions, and the totality of the evidence: *Smith*, at para. 77. If the totality of the evidence satisfies the chain of reasoning for a particular inference, then that inference is available — regardless of whether supporting physical evidence is part of the evidentiary record.

[136] Other cases have recognized that the absence of a body does not preclude an inference on intent. In *R. v. Teske* (2005), 32 C.R. (6th) 103, the Ontario Court of Appeal considered the relevance of after-the-fact evidence of concealment to the issue of the accused's intent. In that case, the accused admitted to cremating his wife's body. He claimed that his wife had died during an altercation during which she was punching and kicking him; he pushed her, and she fell down the stairs, hit her head, and died. He stated that after he cremated his wife's body in the backyard of their home, he spread her ashes on the river — later, he admitted that he had actually dumped her ashes in a ditch. A police search of the ditch revealed the victim's ashes, bones, and teeth, as well as carpet from the accused's vehicle. Further, a forensic examination of the home exposed significant efforts to clean up evidence of bloodstains and blood spattering.

[137] The Ontario Court of Appeal concluded that the accused's after-the-fact conduct could be admitted as evidence of his intent to commit murder. The court recognized that “[t]he evidentiary value of this evidence depends on the reasonable inferences that a trier of fact can draw from it when considered in the context of the entirety of the evidence and the issues raised at trial”: para. 85. As a matter of common sense and human experience, when viewed in the entire evidentiary context, some after-the-fact conduct may be “reasonably capable” of supporting an inference as to the accused's state of mind at the relevant time: para. 85. The court described the reasonableness of the inference sought, in that case, as follows:

The trial judge found that the appellant's course of conduct from the time he killed his wife on Sunday evening until his arrest some four days later was consistent with the conduct of a person who had intentionally inflicted serious injuries on his wife and then went to great length to try to cover up what he had done and to develop an "innocent" explanation for his wife's disappearance. For example, the trial judge's conclusion that the appellant's cremation of his wife's body, which took several hours and created a strong stench, was a calculated and risky attempt to ensure that the police would be unable to determine the cause of Mrs. Teske's death and the exact nature of her injuries. Proof of those facts could have gone a long way to determining whether the appellant acted with the intent required by s. 229(a)(ii) when he caused his wife's death. As a matter of common sense, it is reasonable to infer that someone who destroys a body after causing the death of that person does so because he knows that the victim suffered injuries that are inconsistent with a non-intentional cause of death.

The appellant engaged in an elaborate cover-up of his wife's killing. Faced with this evidence, the trial judge inferred that the appellant had engaged in this concerted effort to cover up his wife's death because he had deliberately inflicted serious bodily harm likely to cause death. I think this was an eminently reasonable inference. More to the point, once it is acknowledged that the inference could be drawn, it was for the trier of fact to decide whether the inference should be drawn: *R. v. Trochym* [(2005) 186 C.C.C. (3d) 417], at para. 25. [paras. 86-87]

[138] Thus, there is no categorical legal rule against using after-the-fact conduct evidence to infer the accused's intent. This jurisprudence clearly establishes that after-the-fact conduct evidence may be relevant to the issue of intent. Further, contrary to the submissions of Defence counsel, the cases indicate that the relevance of after-the-fact conduct to intent does not depend on the existence of further evidence (such as a body).

[139] It bears repeating that the determination of the relevance of after-the-fact conduct evidence is a case-by-case, “fact-driven exercise”: *White (2011)*, at para. 42. As such, the statement in *Teske* above — that “[a]s a matter of common sense, it is reasonable to infer that someone who destroys a body after causing the death of that person does so because he knows that the victim suffered injuries that are inconsistent with a non-intentional cause of death” — must be read as referring to the facts of that case: para. 86. It may not always be reasonable to infer that an individual who destroys a body after causing their death has done so to conceal the nature and extent of the injuries. The reasonableness of that proposition will depend on the record as a whole and the issues raised at trial.

[140] With these principles in mind, I now turn to the relevance and admissibility of the after-the-fact conduct evidence on the facts of this case.

C. *The Admissibility of the Evidence*

[141] It remains to be determined whether, as a matter of logic, common sense, and human experience, Mr. Calnen’s after-the-fact conduct makes the Crown’s proposition — that he intended to cause Ms. Jordan bodily harm knowing that it was likely to cause her death and was reckless as to whether death ensued — more likely than that proposition would be in the absence of that evidence. In my view, the same

inferences permitted in *Rodgerson* also arise on these facts in respect of Mr. Calnen's after-the-fact conduct.

[142] As noted, if a trial judge finds that a piece of evidence is not relevant to a live issue (i.e., if it is incapable of making the proposition for which it is advanced more likely than it would be in the absence of the evidence), then it is her responsibility to either exclude the evidence, or, if it is already admissible for another purpose, provide a limiting or no probative value instruction. If, however, the evidence is found to be relevant (i.e., it has some tendency to make the proposition more likely), then it will be up to the trier of fact to determine how much weight it should be given.

[143] The Defence argued that because there are multiple explanations for Mr. Calnen's behaviour, any inference concerning intent lacks probative force and is stripped of relevance. There are multiple explanations for Mr. Calnen's conduct. They include that he panicked and did not want anyone to find out Ms. Jordan was dead; that he sought to hide the fact that her death was not an accident but was caused by him; and/or that he wanted to hide injuries that showed that he *intended* to cause Ms. Jordan's death.

[144] However, the mere existence of two or more *plausible* explanations for given after-the-fact conduct does not make that conduct *equally consistent* with those

explanations such that a proffered inference may lose its probative force. Further, the fact that multiple explanations can be produced for after-the-fact conduct does not automatically mean that that conduct is equally consistent with multiple offences — it simply means that alternative explanations exist and are arguable.

[145] Whether an inference is available is measured against what is reasonable and rational according to logic, human experience, and common sense. It is this combination which informs the determination of whether the impugned evidence makes the proposition more or less likely. This is an evaluative assessment, which is not defeated simply by listing alternative explanations. As long as the evidence is more capable of supporting the inference sought than the alternative inferences, then it is up to the fact finder, after considering all explanations, to determine what, if any, inference is accepted, and the weight, if any, to be provided to a piece of circumstantial evidence.

[146] The drawing of inferences is fact specific. However, the strength of the inferential link between the evidence in question and the fact to be established is often assessed based on factors such as what was done, when it occurred, and the risks associated with such conduct. In this case, Mr. Calnen first hid Ms. Jordan's body in a remote location. After he learned the missing person investigation became a homicide investigation, he embarked on a multi-step process to completely destroy the body by reducing it to ash and fragments. He retrieved a body that had been exposed in the

woods and had been compromised by the elements. He took that body to one location, built a fire, and burned it. He moved the torso to his home and burned it further in his backyard, until it was only unidentifiable remains. He traveled with those remains on two occasions and placed them in a lake. This conduct involved repeated, risky, and successive actions across a considerable span of time.

[147] On the day that Ms. Jordan died, she and Mr. Calnen fought. Mr. Calnen threatened suicide: showing a distressed emotional state. Mr. Calnen was the only person present when Ms. Jordan died. The text messages exchanged between Ms. Jordan and Mr. Weeks in the weeks prior to Ms. Jordan's death reveal that Ms. Jordan and Mr. Calnen had a tumultuous, even violent, domestic relationship, and that it was ending. Ms. Jordan did not feel safe and wanted to move back to her mother's home. Ms. Jordan was leaving their home with some of his property.

[148] In my view, the nature of the conduct (Mr. Calnen's successful destruction of Ms. Jordan's body, and with it any evidence of her injuries), its relationship to the evidentiary record (which includes evidence of a relationship fraught with discord, including violence and threats of suicide), and the issues raised at trial (the Crown's theory that Mr. Calnen destroyed the body to hide the nature and extent of the injuries) indicate that the evidence was relevant to Mr. Calnen's level of culpability. In other words, the after-the-fact conduct evidence makes the Crown's proposition — that Mr. Calnen intended to cause Ms. Jordan bodily harm knowing

that it was likely to cause her death and was reckless as to whether death ensued — more likely than that proposition would be in the absence of this evidence. Mr. Calnen’s determined efforts over numerous days to destroy Ms. Jordan’s body strengthen the inference that he attempted to remove any ability to ascertain Ms. Jordan’s cause of death and the nature and extent of her injuries.

[149] In addition, and as stated above, proportionality is one possible element of the “reasonableness” of an inference: *White (1998)*, at para. 32. It was open to the trial judge, in his gatekeeper function, to determine that Mr. Calnen’s attempts to conceal and destroy Ms. Jordan’s body were out of all proportion to either the claim that this was an accidental death and/or to the offence of manslaughter. Indeed, MacDonald C.J. considered the extreme measures Mr. Calnen took to destroy Ms. Jordan’s body to infer that the nature of the injuries on Ms. Jordan’s body would reveal that Mr. Calnen had the intention to kill Ms. Jordan (second degree murder), not just the fact that he did kill her by committing an unlawful act (manslaughter).

[150] In conclusion, the relevant, reasonable, and rational inference that the jury could draw regarding Mr. Calnen’s level of culpability, on the basis of the contested after-the-fact conduct evidence, is similar to that described in *Rodgerson* — that Mr. Calnen concealed and destroyed Ms. Jordan’s body “in order to conceal the nature and extent of her injuries and the degree of force required to inflict them”: para. 27; see also *Teske*, at paras. 86-87. Ms. Jordan’s body would have provided

evidence of how she died. If Mr. Calnen had not destroyed Ms. Jordan's body, that evidence could have established the cause of her death and been relevant to his intent to kill her. The common sense inference is that he took those actions to conceal evidence of what he had done. His successful destruction of this evidence is out of all proportion to the explanation put forward and could support the inference that Mr. Calnen sought to conceal this evidence and to hide not only the existence of a crime, but its extent.

V. Should the Trial Judge Have Granted the Defence Application for a Directed Verdict?

[151] The Defence stated that if the after-the-fact conduct was admissible on the issue of Mr. Calnen's intent for second degree murder, there would have been sufficient evidence to withstand the directed verdict application. There is therefore no need to address this issue.

VI. Did the Trial Judge Properly Instruct the Jury?

[152] Most of Mr. Calnen's critique on the sufficiency of the jury charge centred on whether the after-the-fact conduct was properly before the jury on the issue of intent and whether a no probative value limiting instruction was necessary. Given my previous findings, only two of the Defence's remaining arguments about the instructions need to be addressed. First, did the jury charge differentiate between

using after-the-fact conduct evidence on causation and intent? Second, did the instructions sufficiently delineate how this after-the-fact conduct evidence could be used to infer intent?

A. *Using After-the-Fact Conduct Evidence on Causation and Intent*

[153] The reviewing court will assess the jury charge in its entirety: see *R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 14 and 20; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 32. In each case, the jury must be properly — but not perfectly — instructed: see *Jacquard*, at para. 2. The trial judge’s instructions to the jury must be sufficient to inform the jurors on “the issues involved, the law relating to the charge the accused is facing, and the evidence they should consider in resolving the issues”: *R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 163.

[154] In my view, the instructions adequately differentiated between using this evidence in relation to causation and intent. The trial judge gave two instructions on after-the-fact conduct evidence: first in relation to causation, and second on intent for second degree murder. Certain statements and principles were repeated in both parts of the instructions.

[155] In terms of causation, the trial judge set out the inference that the Crown requested — that these actions were evidence that Mr. Calnen knew he committed a

crime. The trial judge also set out other available inferences and informed the jury that they need not draw the requested inference by the Crown. The trial judge informed the jury that “[w]hat a person does after a crime was committed may help you decide whether it was that person who committed it. It may help, it may not help”: A.R., vol. I, at p. 133. The jury was told that, generally, after-the-fact conduct evidence may support an inference of culpability, but that “the conduct may be that of an innocent person who simply wants to avoid involvement in a police investigation or embarrassment for himself or others or because the person is anxious and confused”: p. 133. More specifically, they were informed:

Evidence that a person burned the body of a deceased may show that the person acted in a manner which, based on human experience and logic, is consistent with the conduct of a person who is blameworthy and inconsistent with the conduct of a person who is not blameworthy. Burning a body may also be caused by some other reason that has nothing to do with having committed an unlawful act. [p. 133]

[156] In addition, the jury was asked to consider the weight to be given to this circumstantial evidence, together with all of the other evidence, and told to consider this at the end of their deliberations. There was also an express caution against jumping too quickly to a conclusion and the jury was warned further that after-the-fact conduct evidence would not, alone, establish the guilt of Mr. Calnen beyond a reasonable doubt:

Keep in mind that any inference you may draw to the effect that the accused burned Reita Jordan's body to evade the consequences is not by itself sufficient to prove the guilt of the accused beyond a reasonable doubt. It is simply another piece of circumstantial evidence to use in making your ultimate determination. [p. 134]

[157] The second instruction on the after-the-fact conduct evidence occurred squarely within the trial judge's discussion of intent for second degree murder. The trial judge introduced his discussion of intent as follows: "If you are satisfied beyond a reasonable doubt that what happened to Reita Jordan was not an accident, you must go on to the next question. Did Paul Trevor Calnen have the . . . state of mind required for murder?" (p. 160). The trial judge then instructed the jury on how to determine Mr. Calnen's state of mind at the time of the murder, looking to his "words and conduct before, at the time and after Reita Jordan's death": p. 161. The trial judge repeated his earlier instructions on after-the-fact conduct evidence. He then expressly provided further instructions that signalled to the jury that it was to consider the after-the-fact conduct evidence in relation to intent differently and separately from the issue of causation:

In this regard, you may take into account the evidence of Mr. Calnen's burning of Reita Jordan's body in determining whether he intended to kill Ms. Jordan or to cause her serious bodily harm which he knew was likely to cause death. On this issue, you will need to consider the evidence in a different way than I have instructed you previously. You may conclude that Mr. Calnen sought to burn Ms. Jordan's body in order to conceal the evidence. You may or not reach this conclusion. It is up to you. But if you do reach this conclusion, you may consider this along with all of the other pertinent evidence in determining whether Paul Trevor Calnen had the requisite intent for second degree murder.

Please remember, as I have said before, that awareness of having committed a blameworthy act is not the only reason why someone might burn a body. Mr. Calnen's actions in burning and hiding the body are after-the-fact conduct which may or may not assist you in determining his guilt or innocence. This evidence may or may not assist you in determining intent. In the event, based on all of the evidence; you determine guilt, this after-the-fact conduct may help -- may or may not help you decide whether it was murder or manslaughter. [pp. 164-65]

[158] The trial judge's instructions on the after-the-fact conduct evidence as they related to intent were framed within his instructions on second degree murder, and he expressly stated that the after-the-fact conduct evidence was being discussed in relation to a different purpose than he had instructed previously on causation. The jury would have known that it was being asked to consider the evidence for the new and distinct purpose of intent. In my view, this clear structure and proper guidance adequately explained the different uses of this evidence as between causation and intent.

B. *The Instructions Sufficiently Delineated Which Aspects of This After-the-Fact Conduct Evidence Could Be Used to Infer Intent*

[159] The Defence also argued that the instructions on intent were not clear or adequate because the judge should have expressly connected the after-the-fact conduct evidence of concealment to the nature and extent of injuries that Ms. Jordan may have suffered: see *Rodgerson*, at para. 28. The Defence claimed that the trial judge's reference to "conceal the evidence" was too general to be of assistance.

[160] By way of background, in the pre-charge meetings with Defence counsel and the Crown, the Crown requested and the trial judge originally proposed instructions which tracked the wording used in *Rodgerson*: “You may conclude that Mr. Calnen sought to burn Ms. Jordan’s body in order to conceal the nature of the injuries and the degree of force required to inflict them” (A.R. vol. III, at pp. 2151-52). In response, Defence counsel objected to this wording and argued that the more specific wording drawn from *Rodgerson* amounted to “directing the jury to speculate”: p. 2152. At Defence counsel’s suggestion, the judge then changed the charge to read: “. . . you may conclude that Mr. Calnen sought to burn Ms. Jordan’s body in order to conceal the evidence . . .” (p. 2154). Thus, the trial judge’s final choice of wording, being “conceal the evidence”, was crafted in response to a request by Defence counsel.

[161] Trial judges bear the ultimate responsibility for the content, accuracy, and fairness of the jury charge: see *Jaw*, at para. 44; *Jacquard*, at para. 37; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 49. Both Crown and Defence counsel are obliged to “assist the trial judge and identify what in their opinion is problematic with the judge’s instructions to the jury”: *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 58. In this case, the suggestions of Defence counsel are assumed to be in furtherance of that obligation and to help the judge leave the jury with a “sufficient understanding of the facts as they relate to the relevant issues”: *Jacquard*, at para. 14. In this instance, a sufficient understanding was achieved. No confusion or unfairness

was generated by counsel's suggestion that the instruction be shortened and generalized. In most cases, a more precise explanation, and an express statement of the available inferences, are likely to provide greater guidance to the jury. Nonetheless, this particular treatment of the subject is sufficient in the circumstances. The jury knew they were dealing with the intent for second degree murder, and the judge clearly outlined the intent requirements for second degree murder. In addition, the trial judge expressly told the jury that they would need to consider the after-the-fact conduct in a different way for intent than for causation and that they may or may not be assisted by this evidence. The trial judge referred to competing inferences the jury could draw from the after-the-fact conduct evidence and cautioned them to reserve their judgment on the after-the-fact conduct evidence until they were "putting all the evidence together": A.R., vol. I, at p. 134.

[162] According to *Daley*, at para. 58, the jury charge is also to be understood in the context of the arguments made by the parties. The link between intent and concealing evidence was made by the Crown in its closing argument. The Crown's theory was that the reason Mr. Calnen burned Ms. Jordan's body was so that the police would not find the injuries he inflicted upon her. The trial judge also referred to this link when addressing the Crown's theory of the case, and explained the relevance that the Crown sought to draw from the evidence — that Mr. Calnen intended to kill Ms. Jordan or to cause her serious bodily harm which he knew was likely to cause death.

[163] Jury charges do not have to adhere to prescriptive formulas — it is the substance of the charge that matters: see *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 48. In this case, the trial judge explicitly linked the destruction of Ms. Jordan’s body with the concealment of *evidence*. The trial judge has “a general duty to inform the jury of the relevant evidence, and to assist the jury in linking that evidence to the issues that it must consider in reaching a verdict”: *Rodgerson*, para. 30. However, “[t]he level of detail that is required varies depending on the context”: para. 30. In context, this level of detail provided sufficient guidance to the jury on the inference available to them on Mr. Calnen’s intent.

C. *Conclusion on After-the-Fact Conduct and Intent*

[164] The after-the-fact conduct evidence was relevant to a live, material issue – Mr. Calnen’s intent — and it was therefore admissible. The instructions to the jury adequately differentiated between using after-the-fact conduct evidence on causation and intent, and they sufficiently delineated how this after-the-fact conduct evidence could be used to infer intent.

VII. Unreasonable Verdict

A. *Introduction*

[165] Given my conclusions on the previous issues, I am now required to consider whether the jury verdict was unreasonable. An unreasonable verdict, or a verdict which cannot be supported by the evidence, is one that “a properly instructed jury acting judicially could not reasonably have rendered”: *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180, at para. 26; see also *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 185; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36. In *W.H.*, this Court described the appellate court’s task in assessing the reasonableness of a verdict. Not only must the court ask whether there is some evidence which, if believed, supports the conviction, it is required to review, analyze and weigh the evidence, and consider through the lens of judicial experience, whether “judicial fact-finding precludes the conclusion reached by the jury”: *W.H.*, at para. 28, quoting *Biniaris*, at para. 39 (emphasis deleted). Thus:

. . . in deciding whether the verdict is one which a properly instructed jury acting judicially could reasonably have rendered, the reviewing court must ask not only whether there is evidence in the record to support the verdict, but also whether the jury’s conclusion conflicts with the bulk of judicial experience: *Biniaris*, at para. 40.

(*W.H.*, at para. 28)

[166] The reasonableness of this jury verdict was directly at issue before both the Court of Appeal and this Court. Although one of Mr. Calnen’s listed grounds of appeal at the Court of Appeal was that the jury verdict was unreasonable, the majority at the Court of Appeal did not need to consider the Defence’s arguments on

unreasonable verdict because of its other conclusions. However, MacDonald C.J., in dissent, found that the jury's verdict was reasonable. Before this Court, the Crown noted the majority's silence on the issue of unreasonable verdict, and argued in support of MacDonald C.J.'s decision that the verdict was reasonable: A.F., at paras. 130-44. The Defence argued that the verdict was not supported by the evidence and was unreasonable: R.F., at para. 115.

[167] The Defence's main argument before this Court continued to be that the after-the-fact conduct was inadmissible on intention. But the Defence also asserted that this was a case built on circumstantial evidence and the evidence was not consistent *only* with Mr. Calnen's guilt because many other rational inferences could be drawn from it. In particular, the Defence argued:

Even if [the inferences] were reasonable, the weight of judicial experience would dictate that they are not capable of supporting a valid finding beyond a reasonable doubt. The jury could not have been acting reasonably and judicially in reaching their verdict. They could easily have been unduly inflamed by the deplorable nature of the evidence of the after the fact conduct of the Respondent.

(R.F., at para. 114)

[168] The Defence claims that because the jurors could have been unduly inflamed, the verdict was unreasonable, and Mr. Calnen should be acquitted. In response to this argument, I accept that, based on the jury charge as a whole, there was a real risk that the jurors could have been inflamed by the deplorable nature of

Mr. Calnen's conduct. However, accepting this argument leads me to a different result and remedy.

[169] When a court reviews the reasonableness of a verdict, it is assumed that the jury has been properly instructed. When addressing the prejudice associated with this evidence, the logically prior question, before taking the step into unreasonableness, is to ask why the jurors could have been unduly inflamed when it is clear that the law does not allow jurors to reason based on an accused's discreditable conduct or propensity.

[170] A jury can only be acting judicially if they are properly informed about the law which governs their deliberations. This jury needed to know that the law prevents them from engaging in impermissible propensity reasoning. But this jury received no limiting instructions on how to think about the obvious prejudice associated with Mr. Calnen's contested after-the-fact conduct. The trial judge never told them not to fill in the gaps in the evidence by drawing inferences based on the type of person Mr. Calnen's actions may have shown him to be. In this case, the Defence's argument about an unreasonable verdict is based upon and demonstrates a deficiency in the jury charge. Whether the jury was properly charged on the prejudice of the after-the-fact conduct stems directly from the issue of whether this was a reasonable verdict. In my view, in this case, when the jury has not been properly instructed in how to act reasonably and judicially, the better remedy is not an

acquittal based on an unreasonable verdict, but to find that there is an error in the jury charge that necessitates a new trial.

[171] In this next section, I begin by explaining why a limiting instruction against propensity reasoning based on discreditable conduct was necessary in the circumstances and how its absence is a serious error of law warranting a new trial. I then answer three observations made by the majority. Specifically, I say: first, fundamental problems of trial fairness in the jury charge cannot be ignored because the Defence Counsel did not specifically ask for a limiting instruction on propensity reasoning at the pre-charge conference. Second, I do not accept the statement that Defence counsel made a strategic choice not to ask for limiting instructions on propensity reasoning, and that therefore, on this basis, no remedy should be given for its absence. Finally, while the principle of finality is of fundamental importance in criminal proceedings, it must be balanced with the equally fundamental societal interest in a fair trial.

B. *A Limiting Instruction Against the Use of Propensity Reasoning Was Required to Ensure That the Jury Was Properly Instructed*

(1) A Difficult, Even Borderline Case

[172] In order to convict Mr. Calnen of second degree murder, the jury must have been satisfied, beyond a reasonable doubt, that (1) Mr. Calnen caused Ms.

Jordan's death by means of an unlawful act, and (2) Mr. Calnen meant to cause Ms. Jordan's death, or that he meant to cause her bodily harm that he knew was likely to cause death and was reckless as to whether death ensued. The criminal standard of proof would require that the jurors were "sure" that Mr. Calnen committed second degree murder, and not merely that they thought that he was probably or likely guilty.²

[173] The bulk of judicial experience would suggest that this case would be very close to the line when it came to determining whether the Crown met its ultimate burden of establishing each constituent element of second degree murder beyond a reasonable doubt: see *W.H.*, at para. 26; see also *Yeves*, at p. 185; *Biniaris*, at para. 36; and *R.F.*, at para. 111. Remember that whatever caused Ms. Jordan's death left no evidence of a clean up or damage in the house, and Mr. Calnen destroyed the information that might have been garnered from an examination of Ms. Jordan's body. There was therefore no evidence as to the cause of death other than Mr. Calnen's statement and his after-the-fact conduct. The case was based on circumstantial evidence and the jury was asked to engage in inferential reasoning. There were reasonable inferences other than murder which could be drawn from the

² Once a trial judge has adequately explained the meaning of the expression "beyond a reasonable doubt", the jury may be advised that they can convict if they are "sure" or "certain" of the accused's guilt: *R. v. Lifchus*, [1997] 3 S.C.R. 320, at paras. 33-34 and 39. Accordingly, in the case at bar, the trial judge first gave proper instructions regarding the meaning of "beyond a reasonable doubt" and then instructed the jury as follows: "If, at the end of the case, after considering all the evidence, you are sure that Mr. Calnen committed the offence, you should find Paul Trevor Calnen guilty of it, since you would have been satisfied of his guilt of that offence beyond a reasonable doubt": *A.R.*, vol. I, at p. 75 (emphasis added).

evidence, as my colleague Justice Karakatsanis discusses. Further, the fine line between innocence and guilt is reflected in the fact that not only were the judges divided on the main legal issues, but Mr. Calnen was discharged at a preliminary inquiry.

[174] For the verdict to be assessed for its reasonableness, the jury first needed to be properly instructed. I have already decided that the trial judge properly addressed the general risks of after-the-fact conduct by outlining how it may invite speculation and imprecise reasoning. The trial judge also brought alternative inferences and explanations to the attention of the jury so they did not jump to a particular conclusion: see *White (1998)*; *White (2011)*. However, a review of the charge indicates that the jury was never told about the specific perils of filling in gaps, drawing inferences, or reaching conclusions based on Mr. Calnen's propensity or character. Without such instructions, the jury would have felt free to fill in gaps or draw inferences based on Mr. Calnen's discreditable after-the-fact conduct and to use this evidence improperly to help them reach the verdict of guilty on second degree murder.

(2) Propensity Reasoning

[175] The perniciousness of propensity evidence is well known and managing its risks has been a preoccupation of the courts since at least the seventeenth century:

Harrison's Trial (1692), 12 How. St. Tr. 833 (Old Bailey (London)), at p. 864, cited in *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 32. In *Handy*, at para. 139, this Court outlined the contours of bad character evidence and its “poisonous potential” (at para. 138) to result in moral prejudice:

It is frequently mentioned that “prejudice” in this context is not the risk of conviction. It is, more properly, the risk of an unfocussed trial and a *wrongful* conviction. The forbidden chain of reasoning is to infer guilt from *general* disposition or propensity. The evidence, if believed, shows that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather than proof, thereby undermining the presumption of innocence enshrined in ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. [Emphasis in original; para. 139.]

[176] There is also the possibility of reasoning prejudice, which distracts the members of the jury from their proper focus on the charge: *Handy*, at paras. 144-45. Distraction can occur in different ways. In *R. v. D. (L.E.)* (1987), 20 B.C.L.R. (2d) 384 (C.A.), McLachlin J.A. (as she then was) (in dissent but adopted in *Handy*, at para. 145) observed, at p. 399, that similar facts are capable of “raising in the minds of the jury sentiments of revulsion and condemnation which might well deflect them from the rational, dispassionate analysis upon which the criminal process should rest”.

[177] While this Court's statements of principle regarding bad character evidence often arise in the context of similar fact evidence, the dangers of propensity reasoning can surface in any case in which the Crown seeks to introduce discreditable

conduct on the part of the accused that may compromise the jury's ability to conduct a dispassionate analysis: *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, at p. 735.

(3) Analysis

[178] In admitting the contested after-the-fact conduct evidence, the trial judge decided that the probative value of the evidence outweighed its prejudicial effects. That decision was correct. However, the conclusion that the evidence was more probative than prejudicial did not negate the trial judge's responsibility to meet and address any specific propensity prejudice of that evidence in the jury charge. Clear instructions to the jury about the uses that they could — and could not — make of the discreditable conduct evidence were essential:

It is an obligation on trial judges that they properly instruct juries as to the use that those juries can make of evidence which is highly prejudicial to an accused in relation to the accused's character. . . . Given that the testimony might have a strong prejudicial effect on the jury and that the jury might then convict on the basis that the accused is a bad person of the sort likely to commit the offences in question, clear directions to the jury about the use that they could make of the testimony were essential. More specifically, the judge was required to explain clearly in the instructions to the jurors that they must not infer from the evidence that tended to show the appellant's bad character that the appellant was guilty because he is the sort of person who is likely to commit the offences in question.

(*B. (F.F.)*, at pp. 733-34)

[179] A permissible line of reasoning in this case would have been that Mr. Calnen destroyed Ms. Jordan's body in order to destroy evidence that he had caused her death unlawfully. The jury was also permitted to reason that Mr. Calnen's total destruction of Ms. Jordan's body, over multiple days and in multiple locations, could support the further inference that he was not simply acting to conceal evidence of a crime he committed, but also to hide the extent of that crime. The jury was not, however, permitted to reason that because Mr. Calnen moved and burned a human being's body, he was the type of person who would kill, and that therefore, he did kill Ms. Jordan. Yet the risk that the jury would engage in precisely this line of forbidden reasoning was very real in the circumstances. Thus, while the evidence was admissible for the purposes of causation and intent, it bore all the hallmarks of propensity evidence that could, absent proper limiting instructions, import both moral prejudice and reasoning prejudice into the jury's analysis.

[180] Let me explain further. The nature of Mr. Calnen's after-the-fact conduct was likely to elicit a strong emotional reaction in the jurors. Burning Ms. Jordan's body was morally and viscerally repugnant. These actions were variously and repeatedly described in the decisions below as "horrific" (four times in the Court of Appeal's majority reasons alone); "extreme"; "shocking"; "desperate"; "obsessive"; and "extraordinary". The disturbing nature of the conduct was made clear to the jury. In the closing address to the jury, Crown counsel described Mr. Calnen's conduct in great detail and tied it directly to a request to draw the inference that Mr. Calnen

intended to kill Ms. Jordan. The nature of the evidence, while admissible, thus ushered in a significant risk that Mr. Calnen would be convicted of second degree murder not because the jury had concluded beyond a reasonable doubt that he had killed Ms. Jordan, but because his after-the-fact conduct had convinced the jurors that he was the sort of person who would kill: see *Handy*, at paras. 31-36; *B. (F.F.)*, at p. 734. There was the further risk of reasoning prejudice. As the jurors assessed whether the totality of the evidence established causation and intent beyond a reasonable doubt, they were likely to be experiencing the precise mix of “revulsion and condemnation” that could deflect them from a rational and dispassionate analysis of the evidence.

[181] Further, Mr. Calnen was a habitual user of illegal drugs. He told the police that he first met Ms. Jordan when he engaged her services as a sex worker. Mr. Calnen had advertised Ms. Jordan’s sexual services in the newspaper. Mr. Weeks testified that he had had three-way sex with Mr. Calnen and Ms. Jordan. Illegal drug use, hiring and advertising sex workers, and sexual adventurousness are frequent subjects of social censure. Taken together, these facts were such that the jurors may have assembled a mental image of a man whose moral compass was so broken that he may well have been capable of murder. This constituted another form of general propensity or bad character evidence that required legal guidance from the trial judge to ensure that it would not prejudice the jury’s reasoning. In other words, there was a

risk that the jury may, at least in part, convict on the basis of “bad personhood”:
Handy, at para. 31.

[182] The prejudicial nature of the after-the-fact conduct was an issue throughout the trial. For example, at the first *voir dire*, Defence counsel argued that the admission of Mr. Calnen’s statements would have an “enormous prejudicial effect with a jury” (A.R., vol. II, at p. 22), and that the statements ask the jury “to draw a forbidden inference” (A.R., vol. III, at p. 585). At the second *voir dire* heard on November 2, 2015, the Defence argued that Mr. Calnen’s statement was inadmissible, because its “probative value is outweighed by its prejudicial effect”: A.R., vol. II, at p. 66. In oral submissions, the Defence said of the statement: “It’s prejudicial because it paints him in a bad light because of what he did afterwards . . .” (A.R., vol. III, at p. 704). The Defence again raised the prejudicial nature of the after-the-fact conduct evidence in its motion for a directed verdict. It is here that the Defence first introduced the spectre of an unreasonable verdict caused by propensity reasoning, arguing: “As noted in *Beals* [2011 NSCA 42, 302 N.S.R. (2d) 358] the risk of a wrongful conviction may be considered. The facts of this case give rise to a substantial possibility of an unreasonable verdict based on the inflammatory nature of the evidence of the after the fact conduct” (A.R., vol. II, at p. 180). Counsel further argued in oral submissions:

. . . When you’re trying to -- when the Crown is trying to prove a case entirely by a piece of evidence which, you know, has been treated with

caution consistently in the case law, you know, you're running a real risk, if this goes to the jury, of a wrongful conviction. . . . That is a concern here. And, you know, there's no sugarcoating the fact that the after-the-fact evidence here is -- as I've said in my brief, it's inflammatory and it's susceptible to overuse. [Emphasis added.]

(A.R., vol. III, at pp. 2040-41)

The record thus reflects that Defence counsel repeatedly raised the prejudicial nature of this evidence.

[183] The trial judge was also alive to these concerns. After the second *voir dire* in which he admitted portions of Mr. Calnen's statements, the trial judge emphasized that he would require the help of counsel to draft the charge on the after-the-fact conduct evidence: 2015 NSSC 318, 368 N.S.R. (2d) 93, at para. 42. In addition, in his decision denying the Defence's motion for directed verdict, the trial judge stated: "[a]ny risk of prejudice can be averted by a proper instruction on the proper use of this evidence" (2015 NSSC 331, 368 N.S.R. (2d) 129, at para. 42).

[184] Indeed, even the majority of the Court of Appeal, at para. 1, understood the potential effect of emotion:

Trial judges routinely instruct juries that cases must be decided based upon legally admissible evidence, not emotion. The actions of the appellant in this case; repeatedly burning the body of Reita Louise Jordan after her death, would inflame the emotions of most people. It is of the utmost importance that the trial judge in this case precisely proscribe any

limitations in the use of that evidence as it relates to the issue of proof of the intent to murder.

Although this statement was directed at a different subject, I also accept that this evidence would inflame the emotions of most people and that it is of the utmost importance that the trial judge precisely proscribe any limitations on the use of that evidence. In my view, that includes limitations on both the general risks of all after-the-fact conduct and the specific propensity risks arising from this particular evidence.

[185] I agree with the majority that the jury charge adequately guarded against the risks that are generally associated with after-the-fact conduct evidence. However, the trial judge's generic instructions on after-the-fact conduct evidence did not adequately address the perils of propensity reasoning and its possible impact on the jury's reasoning and ultimate conclusions. A propensity instruction is not the same as the instructions developed to address after-the-fact conduct evidence. They are separate instructions which address different thought processes. In addition, not all after-the-fact conduct evidence is highly prejudicial. After-the-fact conduct can range from failing to answer the door when the police knock to burning a body to ash. While all after-the-fact conduct requires the general instructions provided by the trial judge in this case, in some circumstances, further specific limiting instructions will be required to address other reasoning risks associated with the evidence.

[186] In this case, there existed a reasoning risk beyond the risks generally associated with after-the-fact conduct evidence — the further reasoning risk was that Mr. Calnen’s actions were so morally repugnant that he would be convicted on the basis of bad personhood. This required the trial judge to “explain clearly in the instructions to the jurors that they must not infer from the evidence that tended to show the [accused’s] bad character that the [accused] was guilty because he is the sort of person who is likely to commit the offences in question”: *B. (F.F.)*, at p. 734. This was not done. The charge was silent on the specific propensity reasoning risks that arise when a jury is asked to assess evidence that is acknowledged to be “horrific”, “extreme”, “shocking”, and “distract[ing]”. Thus while the trial judge’s instructions adequately warned the jury to avoid jumping to a conclusion of guilt on the basis of the after-the-fact conduct evidence alone, they did not equip the jury to handle the mix of revulsion and condemnation that was elicited by this particular evidence.

[187] Nor did the trial judge’s introductory remarks with respect to Mr. Calnen’s guilty plea on the charge of indecent interference constitute sufficient instruction to guard against propensity reasoning. The instruction to the jury to put the guilty plea out of their minds was helpful — but given that the jury went on to hear multiple days of testimony detailing Mr. Calnen’s interference with human remains, the introductory remarks had to be bolstered by further specific instructions on propensity. None were forthcoming.

[188] Had this been a judge-alone trial, the risk of propensity reasoning would have been effectively managed by the trial judge. Trial judges can be expected to warn themselves against the prejudice of propensity reasoning because they “are presumed to know the law with which they work day in and day out”: *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 54; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para 47.

[189] A jury, however, requires instructions. Juries are not presumed to know the law and trial judges bear the ultimate responsibility for the content, accuracy, and fairness of the jury charge: see *Jaw*, at para. 44; *Jacquard*, at para. 37; *Khela*, at para. 49. To properly bring to our justice system the “healthy measure of common sense” that makes jurors such an invaluable part of the legal process, jurors must first be equipped with the correct rules of law: *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 692. Jury instructions ensure that the path of permissible reasoning has been adequately explained to the jurors, and that they have received any necessary cautions and limiting instructions on the uses to which certain evidence can be put. Equipped with clear instructions in the law, juries can reach sound, lawful, and reasonable verdicts.

[190] While the Crown did not argue propensity at trial, it did argue for the jurors to use their common sense. Indeed, this continues to be the Crown’s argument on appeal to this Court: A.F., at para. 114. Without an express limiting instruction, jurors cannot be expected to know that at the same time that they are being told to use

common sense, they are in fact prohibited from engaging in what many jurors may also see as just another form of common sense reasoning: propensity reasoning. The reason judges caution against propensity reasoning is precisely because this form of thinking is recognized as being so intuitive and powerful. In this instance, the jurors could not have understood the potentially poisonous nature of propensity evidence, and the manner in which the law has circumscribed its use, without an express instruction on the issue.

[191] We therefore have a situation in which the jury (1) was left to rely on evidence that carried a recognized and specific risk of prejudice; (2) was not equipped with a limiting instruction as to how to avoid the pitfalls of prejudicial propensity or bad character reasoning; and (3) very likely relied on that evidence to arrive at its verdict of guilt. The highly emotive nature of the evidence was recognizable to every judge who presided over this matter. Though the evidence was admissible, it required a clear instruction in law to ensure that the jury would use the evidence properly, both generally and specifically. In the circumstances, the failure to instruct on this crucial point resulted in a jury that was not properly instructed in law.

C. *Remedy*

[192] In this case, the trial judge's failure to caution on propensity evidence was not advanced as a discrete ground of appeal. The prejudice of this evidence was,

however, part of the Defence's argument about unreasonable verdict and was also relied upon throughout the appeal in relation to other legal issues.

[193] Given the history of this matter, nothing turns on the fact that the Defence did not argue against the prejudice of this evidence under the rubric of a deficiency in the jury charge. It is in no way a new issue per this Court's definition in *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 30: see also *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39. It is not a "new basis for potentially finding error in the decision under appeal" because it is not "[g]enuinely new": *Mian*, at para. 30. Instead, the prejudicial nature of the evidence and the jury's inability to deal with it formed the basis of the Defence's argument of an unreasonable verdict. The prejudice of this evidence is thus not "legally and factually distinct" from the ground of unreasonable verdict raised by the Defence: para. 30. On the contrary, it arises squarely from the evidence and arguments before this Court, and "stem[s] from the issues as framed by the parties": para. 30.

[194] Although the prejudicial nature of the evidence formed the basis of the Defence's argument of an unreasonable verdict, in my view, the failure of the trial judge to provide a limiting instruction on propensity reasoning is best seen as an error of law under s. 686(1)(a)(ii) of the *Criminal Code*. An appellate court's review of the reasonableness of a verdict is "predicated on the accused having had a proper trial on legally admissible evidence accompanied by instructions that are correct in law": *R. v.*

S. (P.L.), [1991] 1 S.C.R. 909, at p. 915. In this case, there is an undeniable connection between the allegation of an unreasonable verdict and an error of law, because the error of law meant the jury was not properly instructed and was not, therefore, equipped to reach a reasonable verdict.

[195] Given that this was an error of law, the Crown would be able to rely on the curative proviso if the legal error was harmless or if the evidence against Mr. Calnen was so overwhelming that a trier of fact would inevitably convict: *R. v. O'Brien*, 2011 SCC 29, [2011] 2 S.C.R. 485, at para. 34; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at paras. 26-31; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at paras. 48 and 54; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at paras. 34-36. However, I conclude that, in this case, the legal error was not harmless. Even though a jury charge does not have to be perfect, and this was a single omission in a comprehensive charge, the trial judge's failure to provide a limiting instruction on propensity resulted in a jury that was not properly instructed to assess the key piece of evidence supporting the Crown's theory of guilt. In the result, important reasoning risks were left unaddressed and the potential impact of this error is sufficiently serious to warrant a new trial.

[196] Further, the evidence was not such that the jury would inevitably convict on second degree murder. It was open to the jury to conclude that the evidence did not establish any criminal culpability. Alternatively, the jury could have concluded

that the evidence supported an inference that Mr. Calnen had some unlawful involvement in Ms. Jordan's death and that he caused her death. It was not inevitable that a properly instructed jury would go even further down the path of inferential reasoning and conclude that the Crown had proven beyond a reasonable doubt that Mr. Calnen intentionally caused Ms. Jordan's death. A verdict of not guilty, or guilty on manslaughter, rather than murder, was also possible in this case.

[197] I conclude that the jury was not properly instructed, and that there is legally admissible evidence on which a conviction could reasonably be based. The reasonableness of any verdict of second degree murder could only be assessed if jurors knew they could not reason that because Mr. Calnen destroyed Ms. Jordan's body in the manner that he did, he was the type of person who would have murdered her. In my view, the trial judge's instructions were not correct in law on this point and the remedy is not an acquittal, but a new trial.

D. *Other Concerns*

[198] In this section, I will answer certain concerns raised by the majority in its reasons for judgment. By way of a general statement, it would have been preferable had the Defence requested a limiting instruction against propensity reasoning at the pre-charge conference and raised the failure to instruct against propensity and bad personhood reasoning as a distinct ground of appeal, rather than as part of the

unreasonable verdict argument. It is also to be hoped, even expected, that counsel will do just that in the future when the after-the-fact conduct at issue carries other specific reasoning risks, like those associated with propensity reasoning. However, in my view, the focus in this case should be on overall trial fairness, not finality, and on ensuring that the jury did not take a wrong turn when asked to consider multiple and progressive inferences from circumstantial evidence.

(1) The Trial Judge Is Responsible for the Adequacy of the Jury Charge

[199] The majority is of the view that “defence counsel’s failure to object on the basis that the trial judge was required to provide a limiting instruction against general propensity reasoning may reasonably be taken as an indication that the defence considered the charge to be satisfactory and that a limiting instruction would not be in his client’s interests”: para. 41. With respect, and on the facts of this case, I cannot agree.

[200] Though not determinative, counsel’s failure to object to a jury charge is a factor that is worthy of consideration: *Thériault v. The Queen*, [1981] 1 S.C.R. 336, at pp. 343-44; *Jacquard*, at paras. 37-38; *R. v. Chambers*, [1990] 2 S.C.R. 1293, at pp. 1319-20; *Arcangioli*, at p. 143; *Van*, at para. 43; *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581, at para. 51. The determining factor is, however, context — not only the context of the charge, but the context of the trial as a whole: “. . . we should not

divorce the jury charge from the greater context of the trial” (*Jacquard*, at para. 33; see also *Araya*, at para. 52).

[201] Counsel’s failure to object must therefore be assessed in light of the jury charge and trial as a whole, alongside other factors such as whether and to what extent the parties and the trial judge were alive to the issue throughout the trial and how important the issue was to the accused’s defence. The context of this trial was that Defence counsel was consistently concerned about the propensity prejudice associated with the disputed after-the-fact conduct evidence, and the trial judge intended to address that prejudice in the jury charge. This is unlike *Jacquard*, in which “the ‘planned and deliberate’ issue was not expressly raised by the [accused] as a live issue at trial”: para. 33. Similarly, *Thériault* is distinguishable because, unlike in *Thériault*, the trial judge’s failure to instruct in the case at bar concerned evidence that was foundational to the key issues of causation and intent: see pp. 342-44. Here counsel’s failure to object is outweighed by his repeated and express references to the inflammatory nature of the evidence throughout the trial, as well as the importance of the issue of propensity to Mr. Calnen’s defence.

[202] Ultimately, “the jury charge is the responsibility of the trial judge and not defence counsel”: *Jacquard*, at para. 37; see also *Jaw*, at para. 44; *Khela*, at para. 49. Thus, even where both parties agree on the adequacy of the charge, it falls to the trial judge, as the judge of the law and the guarantor of trial fairness, to decide on its

content. In *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, at para. 27, Charron J. stated this principle as follows:

Discussions between counsel and the trial judge about the content of the charge can provide invaluable assistance in crafting correct jury instructions and, as such, should be encouraged. However, it is the trial judge's role to instruct the jury on all relevant questions of law that arise on the evidence. In some cases, these instructions will not accord with the position advanced by counsel for the Crown or the defence.

(See also *B. (F.F.)*, at pp. 735-36; *R. v. MacLeod*, 2014 NSCA 63, 346 N.S.R. (2d) 222, at para. 95.)

[203] While the obligation to assist in the charge rests on all counsel (*Daley*, at para. 58), it was ultimately the trial judge's role to instruct the jury on relevant questions of law so that the jury could return a lawful verdict, control the prejudice associated with propensity reasoning, and ensure that Mr. Calnen received a fair trial. Given that the Defence consistently raised the prejudice associated with Mr. Calnen's after-the-fact conduct, and the trial judge recognized the need to address prejudice in the charge, ultimately it was the trial judge's responsibility to inquire further into the issue of propensity reasoning when it came time to draft the charge. In such circumstances, Defence counsel's failure to object is of a more limited import: "... it is the duty of the trial judge to consider the admissibility of all evidence and to charge the jury properly: absence of comment or objection by counsel for the accused does not vitiate this duty" (*B. (F.F.)*, at pp. 735-36).

[204] Nor can a failure to raise an issue bar a court from ordering a new trial where the trial judge's error may contribute to a miscarriage of justice: *Chambers*, at pp. 1319-20.

(2) There Is No Basis to Say That Defence Counsel Made a Tactical Decision

[205] The majority, at para. 18, also states that “in all likelihood defence counsel made a deliberate and conscious tactical decision to marshal the discreditable conduct evidence in an attempt to bolster the truthfulness of Mr. Calnen’s out-of-court statement and re-enactment, upon which his defence rested”, and further, at para. 68, that “[g]iven the strategy adopted by the defence, a limiting instruction against general propensity reasoning would have risked highlighting the negative impact of Mr. Calnen’s discreditable conduct on his credibility and thereby unravelling his defence — a risk which the defence chose not to take.”

[206] I do not share this view for three reasons. First, great caution needs to be used when speculating about why counsel acted in a particular manner at trial. Courts will not ordinarily have full information about what is going on behind the scenes and concluding that something is a conscious, deliberate, and tactical decision often has profound legal consequences for the accused.

[207] This is not a case in which bad character evidence was primarily led by the Defence to suit its own tactical purposes; nor is it a case in which Defence counsel expressly waived the accused's right to seek a propensity limiting instruction: *R. v. R.T.H.*, 2007 NSCA 18, 251 N.S.R. (2d) 236, at para. 98; *R. v. Smith*, 2007 ABCA 237, 77 Alta. L.R. (4th) 327, at paras. 26-27. Remember that the key issue in this trial was the admissibility and use of the after-the-fact conduct evidence in relation to intent. Considering the thrust and parry of a criminal trial, when the contest is occurring primarily on one issue or in one arena, it is not uncommon for alternative arguments, even good ones, to slip through the cracks. Sometimes different ways of seeing what should have been done only come later.

[208] What we do know is that Defence counsel did not ask for a propensity limitation. Nor did the Crown, who is a quasi-judicial officer with a recognized responsibility to contribute to a proper charge. The trial judge recognized prejudice as a future issue to address in the jury charge but did not raise it again at the pre-charge conference. If the trial judge had specifically inquired about inserting a limiting instruction at the pre-charge conference as a way to control the prejudice of the after-the-fact conduct, and Defence counsel had rejected it, then there would be some basis in fact to suggest that Defence counsel made a deliberate decision driven by tactical motivations. However, without any further information, the failure of the Defence, Crown and trial judge to direct their minds to the prejudice of the after-the-fact

conduct may be equally consistent with forgetfulness, fatigue, or by having placed the focus elsewhere.

[209] Second, if a strategy is to be imputed to counsel, it should be clear not only that it was a strategy, but that it was a coherent and sound one as well. The strategy put forward by the majority is problematic, not only because it involves a complex chain of reasoning, but because the strength of each link is weakened by other considerations. As the majority rightly points out (at para. 64), “[i]t is a matter of common sense that evidence of bad character may reflect badly on the accused’s credibility, and that the jury can use it as a factor in determining if the accused is likely to be telling the truth”: *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716, at para. 70; see also *White (1998)*, at para. 26. Accordingly, it was always open to the trial judge to tell the jury that Mr. Calnen’s after-the-fact conduct could be used to assess his credibility: *Jaw*, at para 39. It was also always open to the Crown to request this instruction. The Crown would not have needed to wait for a Defence request for a limiting instruction on propensity to make its own request for an instruction on credibility in respect of any of the discreditable conduct evidence. It therefore cannot be the case that the Crown would “unquestionably have insisted on such an instruction” as the majority states, because the Crown already had the chance to do so and did not: para. 65. It is not logical to theorize that the Defence was avoiding a limiting instruction on propensity to avoid an instruction on credibility when that credibility instruction did

not hinge on a propensity limiting instruction and, in fact, could have been requested at any time.

[210] Furthermore, even if the Crown had insisted on an additional credibility instruction, the majority overstates the damage that such an instruction would have caused to Mr. Calnen's defence. The truthfulness of Mr. Calnen's June 18 statement was already in issue in this trial. Even if Mr. Calnen's defence relied on much of the discreditable conduct evidence as support for his exculpatory statement, the truthfulness of that statement was already called into question based on other evidence, namely: the inconsistency between Mr. Calnen's statements to the police on April 5 and June 18, and the evidence, introduced by Wade Weeks, Krista Andrews, Donna Jordan, and Mr. Calnen himself, that Mr. Calnen repeatedly lied to the police and to Ms. Jordan's family and friends with respect to Ms. Jordan's whereabouts and his involvement in her death. In the closing address, Crown counsel thoroughly attacked Mr. Calnen's credibility. Given that Mr. Calnen's credibility was already at the forefront, he would have had more to gain, and little to lose, by having the trial judge instruct on propensity, even if that meant including another instruction on credibility.

[211] There is therefore no inherent link or trade-off between requesting a limiting instruction on propensity and having a trial judge instruct on credibility. And even if there was, Mr. Calnen's credibility was already so central an issue that it is not

logical to imagine that counsel would have resisted requesting a propensity instruction in order to avoid a discussion of Mr. Calnen's credibility. The tactic imputed to Defence counsel is, in my view, based on an either-or formulation of the use of Mr. Calnen's statement when the reality is that he could have asked the jury to use it to corroborate his story and also asked for a limiting instruction to prevent the jury from engaging in propensity reasoning. There is no reason to believe that the theory of the Defence in this case and a limiting instruction on propensity would have been at cross purposes. On the contrary. It was in Mr. Calnen's interest to guard against a possible wrongful conviction borne of forbidden propensity reasoning. Limiting instructions on propensity would have helped achieved this.

[212] Third, in any event, whether the Defence counsel's decisions were tactical or not, "a lawyer's position on the appropriate parameters of a jury charge, driven by tactical considerations, cannot change the law": *MacLeod*, at para. 94. A jury that engages in propensity reasoning is a jury that is not acting judicially.

(3) The Principle of Finality Does Not Prevail Over the Right of an Accused to a Fair Trial

[213] The majority, at para. 70, states that the jury instructions "adequately guarded against the risk of general propensity reasoning" and that, in such a context, the principle of finality should prevail.

[214] Respectfully, and as I have discussed above, the jury charge did not adequately guard against the risk of propensity reasoning. There was nothing in the jury charge that would have informed the jury that it could not reason that because Mr. Calnen engaged in discreditable conduct, he was more likely to have killed Ms. Jordan. To the extent that the majority finds that the jury was informed of the specific dangers associated with this forbidden line of reasoning, I respectfully cannot agree.

[215] Thus the principle of finality does not come into play in the manner in which the majority has framed it. This is not a case in which “the defence made a legitimate tactical decision at trial and lost”: para. 70. Rather, this is a case in which, *regardless of Defence counsel’s tactical decisions*, the jury was not properly instructed and was therefore unable to reach a reasonable verdict. At stake was nothing less than Mr. Calnen’s right to a fair trial based on lawful reasoning.

[216] In *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, Major J. tempered his discussion of the importance of finality and order in the context of the due diligence criterion respecting fresh evidence by stating, “[t]hat criterion must yield where its rigid application might lead to a miscarriage of justice”: para. 19. Thus “despite the importance of these values [of finality and order], this Court has also stated that the due diligence criterion should not be applied as strictly in criminal matters as in civil cases”: *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at para. 131, referencing

Palmer v. The Queen, [1980] 1 S.C.R. 759, at p. 775, referencing *McMartin v. The Queen*, [1964] S.C.R. 484, at p. 493.

[217] Indeed, this Court has rarely adopted a rigid approach to the principle of finality. Rather, the criminal justice system is predicated on two equally important principles that must be counter balanced: the principle of finality and the principle of trial fairness: see, e.g., *R. v. Wong*, 2018 SCC 25, at para. 29. Where an individual is at risk of wrongful conviction, the principle of trial fairness outweighs that of finality as this Court “has consistently affirmed that it is a fundamental principle of justice, protected by the *Charter*, that the innocent must not be convicted”: *R. v. Leipert*, [1997] 1 S.C.R. 281, at para. 24. A majority of this Court further stated in *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 89, that “our justice system has always held that the threat of convicting an innocent individual strikes at the heart of the principles of fundamental justice.”

[218] The risk of conviction on the basis of propensity reasoning is the risk of a wrongful conviction, thereby undermining the presumption of innocence enshrined in ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms: Handy*, at para. 139. In the case at bar, the jury was presented with highly prejudicial conduct evidence and was not adequately instructed on the prohibited uses of that evidence. The risk that the jury engaged in propensity reasoning is real and directly undermined Mr. Calnen’s right to be presumed innocent until proven guilty. In such

circumstances, the principle of finality cannot, and does not, supersede the accused's right to a fair trial.

E. *Conclusion on Unreasonable Verdict*

[219] Mr. Calnen's argument that the verdict was unreasonable because the jury could easily be inflamed shows that the jury was not properly instructed in respect of the prejudice arising from this after-the-fact conduct and its specific risks of forbidden propensity reasoning. In this way, the jury was not equipped to return a reasonable verdict because there was an error in law in the instructions with which they were provided. In such a case, the preferable remedy is not an acquittal, but a new trial.

VIII. Disposition

[220] I would therefore allow in part the Crown's appeal. I agree with the Court of Appeal that Mr. Calnen's second degree murder conviction should be set aside, however, a new trial should be ordered on second degree murder.

The following are the reasons delivered by

KARAKATSANIS J. —

[221] I have read the reasons of my colleagues, Moldaver and Martin JJ. I agree with the general principles set out in Martin J.'s reasons regarding the admissibility of after-the-fact conduct. However, I reach a different conclusion from both of my colleagues on the application of those principles to the evidence in this case. In my view, the accused's destruction of the deceased's body was inadmissible as evidence of intent for second degree murder.

[222] While Mr. Calnen's conduct in destroying the body is relevant to the issue of whether he unlawfully caused Ms. Jordan's death and was admissible for that purpose, it cannot assist in distinguishing between manslaughter and second degree murder. If the jury concluded that the accused had unlawfully caused the death of the deceased, then the accused's destruction of the body could only be *equally* consistent with both offences.

[223] I would add this. I agree with Martin J. that the failure to provide instructions warning the jury of the dangers of propensity reasoning requires a new trial. However, given my view that the evidence in this case was not probative of intent for murder and that a directed verdict of acquittal should have been granted, I would uphold the decision of the majority of the Court of Appeal (2017 NSCA 49, 358 C.C.C. (3d) 362), which ordered a new trial on the manslaughter charge only.

[224] My colleague, Martin J., sets out the facts of this case in detail. Mr. Calnen told the police that Ms. Jordan's death was an accident: the two had an argument as a result of her decision to leave him and the fact that she was departing with some of his belongings; she became violent and tried to take a swing at him; the momentum of her swing caused her to fall down the stairs.

[225] The Crown pointed to evidence of a difficult relationship with overtones of domestic violence ("he put his hands on me i don't think im safe here"); Mr. Calnen's threats of suicide should Ms. Jordan leave him ("I cant leave him hes suicidal because he dosnt want me to go hes a mess"); the plan between Ms. Jordan and her friend to steal some of Mr. Calnen's belongings; the heightened tension on the day of Ms. Jordan's death ("shit is hittin the fan 4 me right now"); and Mr. Calnen's state of mind on finding Ms. Jordan with her bags packed along with his laptop and gold ring (he testified: "that kind of got [him] pissed off").

[226] In the days following Ms. Jordan's death, the accused went to great lengths to destroy her body — he made multiple attempts to hide the body before ultimately burning it on two separate occasions and putting the remains in a lake. The Crown's theory was that this after-the-fact conduct was evidence that Mr. Calnen had not only unlawfully caused Ms. Jordan's death, but was also evidence indicative of an intent to kill.

[227] The actions an accused takes after a crime has been committed may be relevant and admissible as evidence of guilt. The relevance of this type of evidence is often highly fact specific. What was the jury entitled to infer from the actions the accused took to destroy the body of the victim in this case?

[228] It is undisputed that Mr. Calnen's after-the-fact conduct can support the inference that he was involved in Ms. Jordan's unlawful death. The jury was entitled to reject the accused's description of an accident and instead infer from these actions that the accused committed an unlawful act that resulted in death, and wanted to avoid detection for that unlawful act. This evidence is relevant and admissible to show a guilty conscience.

[229] But is the evidence that the accused burned the body capable of establishing not only that the deceased was the victim of a crime, but also the degree of culpability of the crime that resulted in her death? Was the evidence relevant to proving the specific intent required for second degree murder? That is the specific issue in this case.

II

[230] The *actus reus* for both murder and manslaughter requires proof of an act of killing. The *mens rea* for second degree murder requires that the accused *intended*

either to cause death, or to inflict bodily harm knowing that it was likely to cause death and was reckless as to whether death ensued. Unlawful act manslaughter requires fault short of an intention to kill. More specifically, the *mens rea* for unlawful act manslaughter is made out if a reasonable person, in all of the circumstances of the accused, would have appreciated that bodily harm was the foreseeable consequence of the dangerous act of the accused (*R. v. Creighton*, [1993] 3 S.C.R. 3, at pp. 44-45). In the circumstances of this case, the “dangerous act of the accused” would be an assault-based offence.

[231] Is the accused’s after-the-fact conduct capable of distinguishing between the *mens rea* for second degree murder and the *mens rea* for manslaughter?

III

[232] As noted by this Court in *R. v. White*, [1998] 2 S.C.R. 72, evidence of after-the-fact conduct is not fundamentally different from other types of circumstantial evidence and may be used to demonstrate culpability (para. 21). In certain circumstances, it may also be used to ground an inference with respect to an accused’s degree of culpability; i.e. whether the accused had the *mens rea* required for a given offence. However, its relevance and probative value must be assessed on a case-by-case basis. Whether or not after-the-fact conduct is probative with respect to an accused’s intent for a specific offence “depends entirely on the specific nature of

the conduct, its relationship to the record as a whole, and the issues raised at trial” (*R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 42, per Rothstein J.). To be relevant, such evidence must have “some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence” (*White (2011)*, at para. 36, citing D.M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at p. 31). However, if conduct could be “equally explained by” or “equally consistent with” two or more offences, it is not probative with respect to determining guilt as between the offences (*White (2011)*, at para. 37, citing *White (1998)*, at para. 28; *R. v. Arcangioli*, [1994] 1 S.C.R. 129, at pp. 145 and 147).

[233] I agree with the Crown that the mere existence of alternative *plausible* explanations for the accused’s conduct does not mean that those explanations are equally consistent. Admissibility of evidence as to the state of the accused’s mind at the time of the offence turns on whether the after-the-fact conduct is *capable* of being more consistent with intent for murder than with manslaughter. As my colleague points out, to be inadmissible, “[t]he overall conduct and context must be such that it is not possible to choose between the available inferences as a matter of common sense, experience, and logic” (Martin J.’s reasons, at para. 124 (emphasis added)). It falls to the jury to determine whether the conduct *was* or *was not* equally consistent with murder and manslaughter beyond a reasonable doubt, if they can do so based on common sense, experience, and logic, rather than bare speculation. A trial judge does

not usurp the jury's function, however, by determining that the conduct could not assist in differentiating between second degree murder and manslaughter, and is thus inadmissible as evidence of the specific intent required for second degree murder.

[234] The Crown puts the logical inference sought as follows. The deceased's body would have provided evidence of her injuries, and the degree of force required to inflict them. The more severe the injuries, and the more force required to inflict them, the stronger the inference that there was an intention to kill (*R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760, at para. 20). Because the accused went to such extreme lengths to destroy Ms. Jordan's body, it was open to the jury — faced with some evidence of motive and animus — to infer that the accused destroyed the body in order to conceal evidence of injuries that would have shown his guilt for murder, rather than manslaughter.

[235] This inference rests entirely on the assumption that the accused destroyed the body because it could have yielded evidence of injuries more consistent with murder than manslaughter. As a matter of logic and experience, I accept that, had the body not been destroyed, it could have revealed such extreme and forceful injuries as to make the intent for murder more likely than manslaughter. Similarly, however, the body might also have provided evidence of injuries more consistent with manslaughter than murder. There must be something in the factual context to ground

the inference that the accused destroyed the body to hide evidence that he intended to cause Ms. Jordan's death; otherwise, that inference rests entirely on speculation.

[236] The absence of any evidence whatsoever regarding the nature of the injuries distinguishes the facts here from cases like *Rodgerson* or *R. v. Teske* (2005), 32 C.R. (6th) 103 (Ont. C.A.). In *Teske*, "significant efforts had been made to clean up the home and to obliterate any evidence of bloodstains or splattering" (para. 14). The Crown expert testified that the blood splatter patterns indicated a number of medium (at least) velocity impacts, as well as other evidence that indicated a prolonged struggle (para. 16). Similarly, in *Rodgerson*, the Crown's interpretation of the evidence was that it "revealed a more prolonged and violent physical altercation than the version of events described by Mr. Rodgerson. It was open to the jury to look to the post-offence concealment and clean-up as evidence that tended to confirm this interpretation" (para. 21). In those cases, the evidence supported factual findings about the extent of the injuries, and it was those factual findings that allowed the jury to draw the inference linking the after-the-fact conduct to the required *mens rea* for murder. In contrast, the evidence here did not yield any information about the extent of the injuries: there is no evidence whatsoever of blood splatters, an attempted clean up of the crime scene, or any other evidence of a "prolonged and violent physical altercation". Such evidence could have suggested injuries more capable of supporting the intent for murder than for manslaughter. Without it, we are being asked to ground

an inference regarding *mens rea* on speculation about what the evidence *might* have revealed about the injuries.

[237] Further, I do not accept the Crown's proposition that, as a matter of logic, the accused's conduct in destroying the body was out of all proportion to manslaughter. The Crown submits that the extremity of the efforts to destroy this evidence, sustained over time and entailing significant risks, was out of all proportion to either accident or to a lesser offence like manslaughter and can therefore only speak to second degree murder.

[238] The preliminary inquiry judge found that the evidence was capable only of showing that Mr. Calnen did not want anyone to suspect Ms. Jordan was dead — it was “pure speculation” to infer that he hid and disposed of her body in order to hide the fact that he killed her by an unlawful act (2014 NSPC 17, at paras. 94-95 (CanLII)). However, in this Court, it was not disputed that the after-the-fact conduct was admissible to infer that an unlawful act had occurred. That the conduct was extreme, extended, and risky could logically be seen as out of all proportion to an accident, and is capable of supporting the inference that the accused wanted to destroy any evidence that he was criminally involved in Ms. Jordan's death, despite the accused's testimony that it was heavy crack cocaine use influencing his extreme after-the-fact conduct. Mr. Calnen went to some effort to make it appear that Ms. Jordan had left him and their home, but was still alive. As a matter of logic and

common sense, the jury could infer that an individual may decide to destroy evidence of a culpable homicide — a serious crime with heavy penal consequences — and may go to extreme lengths to do so. But given that both manslaughter and second degree murder are serious crimes, it is difficult to understand why, logically, the extent of his destruction of the body could assist the jury in differentiating between the *mens rea* for manslaughter and second degree murder. It flies in the face of logic to suggest that a person would only go to great lengths to cover up an intentional homicide, but not an unintentional one.

[239] Finally, I do not accept that the evidence regarding the relationship between the deceased and the accused or the circumstances of that day — which the Crown says establishes motive and animus — strengthens the significance of the after-the-fact conduct or makes it relevant to the level of culpability.

[240] The Crown submits, and Martin J. accepts, that the evidence speaking to “the disintegration of [Mr. Calnen and Ms. Jordan’s] relationship and the range of emotions Mr. Calnen cycled through the day of Ms. Jordan’s death” strengthens the inference that Mr. Calnen had the requisite intent to commit murder, and therefore permits the inference that the after-the-fact conduct shows an intent to commit murder (A.F., at para. 61).

[241] In my view, the evidence relating to motive and animus cannot assist the jury in finding that the after-the-fact conduct makes it more likely the accused had the intent for second degree murder rather than manslaughter, because it is equally supportive of both. The evidence is not sufficient to distinguish between an intent to cause harm, reckless of whether death resulted (the *mens rea* for second degree murder) or an intent to commit assault that a reasonable person could foresee would cause bodily harm (the *mens rea* for manslaughter). The evidence of domestic violence, of threats of suicide if the deceased should leave, and of heightened tensions on the day of Ms. Jordan's death would all be equally consistent with the inference that Ms. Jordan's death may have arisen as the unintended result of an unlawful act, such as assault causing bodily harm or aggravated assault. Such evidence cannot make the specific intent for second degree murder *more likely* than the general intent for unlawful act manslaughter. In the absence of any evidence regarding the nature of the injuries, it stretches any logic to find that Mr. Calnen's actions in destroying the body — even within the evidentiary context of what the Crown characterized as motive and animus — were capable of being *more* consistent with second degree murder than with manslaughter. In the context of this case, this additional inference would be based on pure speculation.

[242] The conduct in this case can be “equally explained by” or “equally consistent with” two or more offences (*White (2011)*, at para. 37). Therefore, the evidence is not probative with respect to determining guilt as between the offences of

manslaughter and murder. It should not have been admissible for this purpose. Because it was admissible to show culpable homicide but not to prove second degree murder, the jury required strong direction as to the limitations of its use.

[243] Given my conclusion that the after-the-fact conduct was inadmissible on the issue of intent for second degree murder, it follows that there would not have been sufficient evidence to withstand the defence's application for a directed verdict of acquittal on second degree murder. Indeed, the Crown submitted that the strongest inference of Mr. Calnen's guilt arose from the after-the-fact conduct evidence (2014 NSPC 17, at para. 82). In my view, the evidence relating to the relationship between the accused and the deceased and the circumstances on the day of her death did not provide any evidence upon which a reasonable jury, properly instructed, could find the accused guilty of second degree murder. I agree with the majority of the Court of Appeal that the motion for a directed verdict of acquittal should have been granted.

[244] For these reasons, I would dismiss the appeal. I agree with the Court of Appeal that the conviction for second degree murder should be set aside and any new trial be restricted to the charge of manslaughter.

Appeal allowed, MARTIN J. dissenting in part and KARAKATSANIS J. dissenting.

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