**NOVA SCOTIA COURT OF APPEAL**
**Citation:** R. v. Hawkins, 2011 NSCA 6

**Date:** 20110117
**Docket:** CAC 323369
**Registry:** Halifax

**Between:**

Herbert John Hawkins

Appellant

v.

Her Majesty the Queen

Respondent

**Revised Decision:** The text of the original decision has been corrected according to the erratum dated August 31, 2011. The text of the erratum is appended to this decision

**Judges:** Saunders, Beveridge and Farrar, JJ.A.

**Appeal Heard:** September 28, 2010, in Halifax, Nova Scotia

**Held:** Appeal from conviction is dismissed per reasons for judgment of Beveridge, J.A.; Saunders and Farrar, JJ.A. concurring.

**Counsel:** Darlene MacRury and Patricia A. Fricker, for the appellant
James A. Gumpert, Q.C. and Andre Arseneau, for the respondent

**Reasons for judgment**:

OVERVIEW

[1] Sheldon Boutilier (Shelly) was 46 years old. He lived alone in a small bungalow in North Sydney. Shelly was not rich. He lived on a disability pension, supplemented by income from picking strawberries and collecting recyclables. On Saturday, July 8, 2006 he was brutally murdered, and his house ransacked. Personal possessions were stolen.

[2] The appellant was seen at Shelly's home in the late afternoon of July 8. When he was taken into custody on July 10, 2006 he admitted being present, but insisted Shelly was fine when he last saw him. The appellant maintained that position through three statements to the police.

[3] Forensic evidence showed the appellant's barefoot and fingerprint impressions in blood inside Shelly's home. The appellant then told his ex-girlfriend that he had been in the wrong place at the wrong time – essentially, he had found Shelly inside the house already deceased, had gotten blood on himself when he checked for a pulse, tried to clean up, panicked and then left. He assured her that "it will all come out soon and everybody's gonna know what really happened".

[4] The appellant was tried by a court composed of a judge and jury on a charge of second degree murder. The appellant did not testify at trial. He was convicted and subsequently sentenced to life imprisonment without parole eligibility for twenty years. He now appeals from conviction and sentence. For the reasons that follow I would dismiss the appeal from conviction. Separate reasons addressing the appeal from sentence will be issued concurrently.

ISSUES

[5] The appellant attacks the validity of his conviction on three bases. They are framed as follows:

1. The verdict is unreasonable or cannot be supported by the evidence.

2. The trial judge erred in law in admitting post-offence conduct evidence and how he instructed the jury on that evidence.

3. There was a miscarriage of justice caused by Crown counsel referring to matters in his closing address to the jury for which there was no evidence.

ANALYSIS

*Unreasonable Verdict*

[6] By the authority of s. 686(1)(a)(i) an appellate court is given the power to allow an appeal from conviction where it is "of the opinion" the verdict is "unreasonable or cannot be supported by the evidence". The test to be applied by an appellate court on appeals from a jury trial is well known and uncontroversial. In *R. v. Yebes*, [1987] 2 S.C.R. 168, McIntyre J., for a unanimous six member panel, clarified that the correct approach is (pp. 185-186):

> ...Therefore, curial review is invited whenever a jury goes beyond a reasonable standard. In my view, then, *Corbett* is the governing case and the test is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered".
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> The appellant, while not quarrelling with the authority of the *Corbett* case, argues that it was misapplied here in a case depending entirely on circumstantial evidence. He argues that before a jury may convict on purely circumstantial evidence, it must be satisfied beyond a reasonable doubt that the circumstances proved in the evidence are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person. The test is sometimes stated in a somewhat different form, but to the same effect: the circumstances must be consistent with guilt and inconsistent with innocence. The appellant submits that the majority of the Court of Appeal erred in failing to apply this test.
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> In my view, the majority of the Court of Appeal did not fail to apply the correct principles relating to the treatment of circumstantial evidence. The function of the Court of Appeal, under s. 613(1)(a)(i) of the *Criminal Code*, goes beyond merely finding that there is evidence to support a conviction. The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the Court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case

> is based on circumstantial or direct evidence. In the Court of Appeal, the majority clearly found that there was sufficient evidence to justify the verdict and both Macdonald and Craig JJ.A. rejected all rational inferences offering an alternative to the conclusion of guilt. It is therefore clear that the law was correctly understood and applied.

[7] In *R. v. Biniaris*, [2000] 1 S.C.R. 381 the court was asked to reconsider the *Yebes* test. Arbour J., for the unanimous court, rejected any departure. She wrote:

> [36] The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebes* as follows:
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> > [C]urial review is invited whenever a jury goes beyond a reasonable standard. . . . [T]he test is 'whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered'.
> >
> > (*Yebes, supra*, at p. 185 (quoting *Corbett v. The Queen*, [1975] 2 S.C.R. 275 (S.C.C.), at p. 282, *per* Pigeon J.).)
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> That formulation of the test imports both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyse and, within the limits of appellate disadvantage, weigh the evidence. This latter process is usually understood as referring to a subjective exercise, requiring the appeal court to examine the weight of the evidence, rather than its bare sufficiency. The test is therefore mixed, and it is more helpful to articulate what the application of that test entails, than to characterize it as either an objective or a subjective test.
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> ...
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> [42] It follows from the above that the test in *Yebes* continues to be the binding test that appellate courts must apply in determining whether the verdict of the jury is unreasonable or cannot be supported by the evidence. To the extent that it has a subjective component, it is the subjective assessment of an assessor with judicial training and experience that must be brought to bear on the exercise of reviewing the evidence upon which an allegedly unreasonable conviction rests. That, in turn, requires the reviewing judge to import his or her knowledge of the law and the expertise of the courts, gained through the judicial process over the years, not simply his or her own personal experience and insight. It also requires that the reviewing court articulate as explicitly and as precisely as possible the grounds

> for its intervention. I wish to stress the importance of explicitness in the articulation of the reasons that support a finding that a verdict is unreasonable or cannot be supported by the evidence. Particularly since this amounts to a question of law that may give rise to an appeal, either as of right or by leave, the judicial process requires clarity and transparency as well as accessibility to the legal reasoning of the court of appeal. When there is a dissent in the court of appeal on the issue of the reasonableness of the verdict, both the spirit and the letter of s. 677 of the *Criminal Code* should be complied with. This Court should be supplied with the grounds upon which the verdict was found to be, or not to be, unreasonable.

[8] The appellant concedes that it would be reasonable for any jury to have concluded he was present in the home of the deceased on July 8, 2006 after injuries had been inflicted on Mr. Boutilier, but not that he had caused the death of the victim. Amongst other things, he argues there is no evidence linking him to any weapon, he had no motive to commit the offence, nor had the Crown established an exclusive opportunity to do so. He further suggests that the Crown's theory of a robbery gone bad was not borne out by the evidence, since none of the items of personal property missing from Mr. Boutilier's home were ever linked to him, and the theory that he needed money for drugs was contrary to the evidence that he was not using drugs. The clothing and footwear the appellant claimed to have worn had no blood on them, and the tread on his footwear did not match the bloody imprints found in Mr. Boutilier's home. There was, in addition, the appellant's consistent claim of innocence to the police and to his ex-girlfriend.

[9] To put these arguments into proper perspective, and to carry out the analysis mandated by *Yebes/Biniaris*, additional details of the evidence adduced at trial is necessary.

[10] The Crown called 32 witnesses and tendered an array of documentary and physical exhibits. The defense called five witnesses. They were: Cst. Delton MacDonald, Kenneth Burton, Heidi Hawkins, Deborah Hawkins and Kimberley Boyce. The appellant did not testify.

[11] Apparently the deceased, Sheldon Boutilier, had lived his whole life at 135 Maple View Drive in North Sydney. He developed meningitis when he was two years old. The disease caused brain damage. He took medication to prevent seizures. When his mother passed away in 2004, Shelly then lived by himself in the family home. Fortunately, members of his family lived next door. Those

family members, as well as his extended family, visited and otherwise checked in on him frequently.

[12] Shelly's main source of income was from disability benefits. He augmented his income by picking strawberries at his uncle's farm, and he collected recyclables. By all accounts Shelly was a friendly and outgoing individual. He loved to play and listen to music. He was well known in the Sydney Mines and North Sydney area. It would not be unusual for him to invite people back to his home. Members of his family feared that people often abused Shelly's trusting nature. Shelly enjoyed collecting expensive watches, which he kept in a case on his dresser.

[13] On Saturday, July 8, 2006 Shelly worked from early in the morning until the afternoon picking strawberries. His cousin, Stanley Boutilier, worked with Shelly. Both he and Shelly were paid cash that day. Stanley received $300. He was unsure of the exact amount that Shelly was paid, but believed it was $100. He drove Shelly home mid afternoon and never saw him again.

[14] Various estimates of time were given by witnesses as to when Shelly got home that day. The precise time the appellant was at Shelly's home was uncertain, but in light of the circumstantial and direct evidence, the jury would have no doubt that he was there on at least two occasions. Various witnesses described seeing a lone male driving a somewhat decrepit small black car leaving Shelly's driveway at around 3:00 p.m.

[15] Dena Quinn was Shelly's sister. She lived next door with her husband Kenneth and their children. They left to go out to dinner at a restaurant around 5:30 p.m., returning shortly after 8:00 p.m. Kenneth Quinn Jr. testified that on their way to the restaurant he noticed his teenaged cousin, Christopher Boutilier, and friends Kyle MacDonald and Barkley Keeping, on the way back to North Sydney on their bicycles.

[16] Christopher Boutilier, Kyle MacDonald and Barkley Keeping testified. Their evidence was similar. They described stopping at 135 Maple View Drive to visit Chris Boutilier's uncle, Shelly, at around 5:30 to 6:00 p.m. on July 8, 2006. They stayed for 10-15 minutes. They all recalled a man sitting in Shelly's kitchen,

drinking coffee and smoking a cigarette. There was a black two-door car in the driveway.

[17] Kyle McDonald testified that the man was wearing tan/beige coloured shorts and sandals. He specifically recalled taking note of the man's feet, as his toes were cracked from being dry. Barkley Keeping confirmed that the man was wearing shorts. Neither he nor Chris Boutilier offered any evidence as to the man's footwear.

[18] Although none of these witnesses could identify the appellant as the man they observed in Shelly's kitchen, the content of the appellant's statements to the police made it obvious that the man the boys saw was in fact the appellant. The defence did not argue otherwise at trial.

[19] Before describing the circumstances and content of the various utterances made by the appellant to the police, and to others, it is first useful to highlight some of the considerable body of forensic evidence led by the Crown.

[20] The victim's body was discovered on July 9, 2006 by another of Shelly's sisters, Sharon Tobin. The family believed that Shelly was out picking strawberries. Sharon Tobin and her two young daughters used a key to gain entry into the victim's house. Mrs. Tobin simply wanted to pick up strawberries she understood were there for her. She encountered a truly gruesome scene. The small bungalow seemed to be awash in blood. The telephone was off the wall. There were pools of blood on floors, furniture and blood splatters on the walls. There were numerous footprints, barefooted and with footwear, on the floors. The victim was lying on the floor in the hallway with gaping wounds to his neck. The telephone cord was wrapped around his neck with the other end tied to the doorknob to the master bedroom. A towel was also tied around the victim's neck and secured in a knot behind his neck.

[21] Other family members arrived and entered the victim's house. The police were called immediately. At no point did any of the family members touch or move anything in the house. As the family members left, they heard the police coming. The scene was immediately secured and subjected to a detailed forensic analysis.

[22] In all, the Crown called five experts to give opinion evidence. Dr. Matthew Bowes, Chief Medical Examiner for Nova Scotia, performed an autopsy. It was his opinion that the victim's death was a homicide, the cause of death being ligature strangulation and multiple sharp force injuries to the neck. The wound to the victim's neck went from one side of the jaw to the other (approximately 8" x 1"). The wound did not sever the carotid artery or jugular vein. It did not interfere with the ability of the victim to breathe. However, this wound could have caused death alone, but would not necessarily have done so.

[23] The ligature strangulation was from the telephone cord wrapped around the victim's neck. There was also a towel tied very snugly around Mr. Boutilier's neck. Dr. Bowes opined that either the telephone cord alone or the combination of the cord and the towel could have been the cause of death.

[24] I have already made mention of the gruesome scene inside Mr. Boutilier's home. Not all of it need be detailed. What is evident is that there were numerous footwear impressions and barefoot print impressions throughout the house. These impressions were made on the floor and were in the victim's blood.

[25] Constable Geoff MacLeod was qualified to give opinion evidence with respect to finger and footprints. Constable MacLeod testified that he found the appellant's right great toe print as part of a barefoot print impression in blood in one of the bedrooms. Furthermore, it was his opinion that all of the barefoot impressions in the blood throughout the house were the same, in terms of toe area, the heel, ball and arch.

[26] Constable MacLeod was also of the opinion that all of the footwear impressions in blood had the same tread wear pattern. None were different and all came from one donor. In at least one of the impressions, the brand name 'River Rapids' was visible. The footwear of all the individuals who entered the victim's house, be they civilian, police or emergency personnel were ruled out as contributing to any of the impressions in blood in Mr. Boutilier's home. Cst. MacLeod also eliminated the victim's footwear. Since the deceased was found only wearing socks on his feet, his feet were also ruled out as a contributor to any barefoot impressions. Importantly, for reasons that will become apparent later, there were no barefoot impressions in the blood on the floor of the bathroom. There were seven discernible footwear impressions in the bathroom.

[27] Detective Cst. Robert Pembroke of the Halifax Regional Police was qualified, again without objection, to give expert evidence in the field of forensic blood stain pattern analysis and to interpret the physical events that give rise to the shape, location, size and distribution of blood stains. It was his opinion that the initial bloodletting of the victim occurred in the livingroom. The victim then moved to the couch area where he bled profusely and then ended up on the floor of the hallway. He testified as to the various areas in the home where there had been an attempt to clean up. It was his opinion that someone with a heavy concentration of blood, mixed with water, had moved around the master bedroom. Drawer handles had diluted blood deposited on them. It was his further opinion that when the victim was tied to the doorknob of the master bedroom, it could no longer be opened. Therefore, he concluded that the diluted blood in the master bedroom had to be deposited before the victim was tied to the doorknob.

[28] Detective Cst. Pembroke's opinion was that the blood stain patterns in the bathroom, including the shower, were consistent with a bleeding or a bloody person cleaning themselves or an object while in the bathroom. He was also of the opinion that the bathroom floor was stained with partial footwear impressions of a similar pattern to footwear impressions found in the livingroom, hallway, kitchen and bedroom floors. He also saw no barefoot impressions in the bathroom.

[29] Constable Mark Christiansen was qualified, without objection, to give opinion evidence on finger and footprints. He carried out a comparison of the left great toe of the appellant with a barefoot impression found in blood on the floor of the victim's kitchen. It was his opinion that the barefoot impression was made by the toe of the appellant. He also identified two latent fingerprints deposited in blood on the trim of the bathroom door jamb as being those of the appellant's left ring and middle fingers.

[30] Nicole McCullough is employed in the biology section of the RCMP forensic laboratory in Halifax. She was qualified without objection to be an expert, to give opinion evidence in hair and bodily fluid identification and in the field of DNA analysis. Her evidence was that the victim's DNA was found in blood on the driver's side floor mat of the appellant's motor vehicle (a black two-door Sunbird). Of eight cigarette butts found in an ashtray on the victim's kitchen table, seven had the victim's DNA profile on them, the eighth that of the appellant.

[31] Ms. McCullough also gave evidence on the testing carried out on a plastic bag containing cigarettes. Evidence was led at trial linking this bag of cigarettes to the appellant on the night of July 8, 2006. McCullough's evidence was that one of the DNA profiles found on the plastic bag was of mixed origin consistent with having originated from two individuals, one of which was male. The profile of the major component of that DNA profile matched that of the deceased.

[32] The appellant was arrested by the police on July 10, 2006. He was the lone occupant of his motor vehicle, a black two-door Sunbird. The jury heard evidence about a number of statements made by the appellant. On arrest or shortly thereafter, the appellant said: "what happened to Shelly, someone said he had his throat cut"; and "so I heard they hung him, that's awful". The defence initially challenged the admissibility of these utterances. The trial judge ruled the first one was admissible. The defence then withdrew its objection to the admissibility of the second utterance. The appellant takes no issue with the ruling by the trial judge.

[33] The appellant also gave three formal videotaped statements to the police. The statements were admitted by consent of the appellant. The first was on July 11, 2006 in Sydney; the second on July 19, 2006 in Vancouver; the third on July 21, 2006, also in Vancouver. Transcripts of the statements were also tendered as exhibits by consent. Some of the details given by the appellant in and between the three statements may vary, but essentially the appellant denied any involvement in the death of the victim. In each, he admitted to having gone to the victim's house in the afternoon of Saturday, July 8, 2006. On the first occasion he hooked up a DVD player for the victim and then received $30 from the victim for the appellant to buy black market cigarettes for the victim. He confirmed being present smoking a cigarette at the victim's kitchen table when two young guys came to the house.

[34] As noted above, the second videotaped statement was taken in Vancouver. After being interviewed by the Cape Breton Regional Police on July 11, 2006, he was released. The police put 24-hour surveillance on the appellant. The appellant told the police he planned to go to the Halifax area to work and would be living with his father in Dartmouth. The appellant told the same thing to his probation officer, seeking her approval to move to Dartmouth. When the appellant got on the plane in Sydney, the police discovered that the flight was not to Halifax, but to Vancouver. The police obtained a general warrant to compel the appellant to

provide footprint impressions. The warrant was forwarded to the Vancouver police who detained the appellant pursuant to the warrant and took impressions of his feet.

[35] The second statement was a video of him being interviewed preparatory to execution of the general warrant. The appellant was arrested for the murder of the victim when a forensic examiner concluded one or more of the barefoot impressions in the victim's home were made by the appellant. In both the first and second statements he insisted that when he left Shelly's home, the victim was fine.

[36] The third videotaped statement was taken when Cape Breton Regional Police travelled to Vancouver to interview the appellant and transport him back to Nova Scotia. Despite being confronted with what was then the preliminary results of the forensic examination that his foot and fingerprints were found in blood in the victim's home, he still insisted that Shelly was fine when he left. He did allude to giving more information later, but wanted to wait until he returned to Nova Scotia to consult with counsel. The trial judge properly instructed the jury that they could draw no adverse inference against the appellant by reason of his refusal to answer the questions being asked of him by the police.

[37] The Crown also called the appellant's ex-girlfriend, Kimberley Boyce. The appellant spoke to her on the telephone a couple of months after the murder. She said she did not believe for a second that he had done what they said. She testified the appellant told her that when he went to the victim's house the victim was laying on the floor. He bent down to see if he had a pulse. The appellant got blood on himself. In her words, "I guess he got kind of messy from it and scared at the same time and he said he went in to try to get some of the blood off his hands and stuff and then just got confused and ran." She elaborated that the appellant had gotten blood on his hands and on his knee or knees so he went to the bathroom to wash it off. She asked him if anyone else was involved. He said "it's all gonna come out in the wash and everybody will find out exactly what happened and who was there or whatever." No such further explanation was ever forthcoming.

[38] From this evidence alone, in my opinion, it was open for the jury to infer that the appellant was the person who had brutally caused the death of the victim and had ransacked his home in the process of a robbery. They had clear evidence that the appellant was present in the victim's home, after the bloodletting event

occurred. Amongst other pieces of evidence were his footprints in blood. The appellant admitted to his ex-girlfriend he got blood on himself from the victim and had gone into the bathroom to wash it off. There were only footwear impressions in the bathroom. The opinion evidence before the jury was that all of the footwear impressions had the same tread pattern. The jury could therefore conclude that the appellant had his footwear on when he went into the bathroom to wash blood off himself.

[39] However, at other times he was in his bare feet. His barefoot prints were found in two different locations, one in the second bedroom – nowhere near the body of the victim, and the other in the kitchen. The Crown experts had also testified to finding diluted blood in the master bedroom and footwear impressions, which Cst. Pembroke opined had been deposited there prior to the victim being tied with the telephone cord to the door knob of the master bedroom.

[40] The jury could therefore conclude the appellant was not simply in the victim's home by coincidence and merely happened to check the victim's pulse after someone else had murdered him, as he explained to his ex-girlfriend.

[41] The appellant argues that the Crown had not established motive or exclusive opportunity for the appellant to have committed the offence. The Crown theory at trial was that the appellant had decided to rob the victim in order to get money to buy drugs. The victim resisted and the appellant caused his death in the ensuing struggle. The appellant suggests the Crown failed to prove its theory as the personal possessions of the victim known to have gone missing have never been traced to him, and the evidence demonstrated that he was not using drugs around the time of the homicide. No authority is cited by the appellant for the proposition that the Crown is somehow required to prove beyond a reasonable doubt its theory about the rationale for the commission of any particular offence. I know of none. The Crown is required to prove beyond a reasonable doubt the essential elements of the offence. Nothing more. Nothing less.

[42] With respect, there was evidence which did amply support the theory of the Crown. There was uncontradicted evidence that the victim was paid in cash on July 8, 2006. No cash was found in his home. Granted, the items of personal property missing from the victim's home, such as his DVD recorder, rings and watch collection, were never linked to anyone. However, there was evidence that

the appellant had battled an addiction to cocaine and was using cocaine proximate in time to the murder.

[43] The appellant certainly tried to distance himself from any use of cocaine. He elicited from Kimberley Boyce that he just smoked weed and drank non-alcoholic beer. She said she never knew him to do cocaine or anything like that. The police confirmed that on all of their searches they found no cocaine or any indication he had been using drugs. Mrs. Deborah Hawkins testified that when she saw her son on July 8 and 9, 2006, the appellant was not under the influence of anything, as he knew how she felt about it – "Yes he wouldn't be around me." Hardly a ringing endorsement that he was not in fact using cocaine in and around the time of the offence.

[44] On the other hand, in his statement to the police of July 11, 2006 the appellant recounted his problem with cocaine; how he had been spending probably one hundred dollars a day on it. He had been to Talbot House to deal with his addiction. No clear evidence was before the jury as to when he actually left Talbot House, but it was apparently in the spring or early summer of 2006. In any event, the appellant told the police "But now I just started to getting into it again, a little bit". He was asked when was the last time he used cocaine. His response was "Oh, jeez, last week...something like that".

[45] The appellant's assertion that there was no evidence to link him to a robbery of the victim's possessions is not really borne out by the evidence. Christopher and Deborah Marsh testified. Mr. Marsh, at least as of July 2006, sold cocaine. He said one night in July 2006 the appellant came to his house in the evening looking to buy a bag of cocaine. Marsh testified that he sold him a bag of cocaine in exchange for money. The appellant paid him something like $115. He said the money was saturated with blood, or a least a red substance. It was plain to see. He inquired what it was. He thought the appellant responded that it was food colouring. He knew Herbie Hawkins, as Herbie used to hang around with Marsh's brother. There was no indication of animosity between the appellant and Mr. or Mrs. Marsh.

[46] Mr. Marsh gave the money to his wife to take it to the grocery store as he did not feel comfortable being in possession of it. Marsh testified that an hour and a half to two hours later the appellant returned with a bag of cigarettes. Marsh paid

him $10 for the bag. There were small specks or stains on the bag. He said to the appellant "that better not be blood". Marsh said the appellant told him it was food colouring. He positively identified exhibit # 16 as the bag of cigarettes that he purchased from the appellant, and later turned over to Sgt. Max Sehl of the Cape Breton Regional Police. Nicole McCullough testified that the DNA profile of the victim was the major component of the DNA found on one of the samples from exhibit # 16. It is from one of the samples from exhibit # 16 that Nicole McCullough said had, as its major composition, the DNA of the victim.

[47] Deborah Marsh corroborated the general thrust of the evidence given by Christopher Marsh. She testified that the appellant came to their home in July 2006 to buy drugs. When Mr. Marsh came back from the door he gave her money that had blood on it. The second time the appellant came to their home that night she went to the door. She bought a bag of cigarettes from the appellant for $10. She said that she challenged the appellant that "that better not be blood on the money," and the appellant said "no it was food coloring, his sister was playing with". She saw spots on the bag of cigarettes. She confirmed that the bag of cigarettes (Ex. # 16) was turned over to Sgt. Sehl.

[48] With respect to this evidence, the appellant simply submits "that no reasonable jury would accept this evidence as credible or reliable". No elaboration is given to support this submission. A review of the transcript demonstrates ample reason for a trier of fact to be cautious about accepting or relying on the evidence of Christopher and Deborah Marsh. There are numerous inconsistencies between them as to who did and said what. Each witness was confronted with previous statements that revealed inconsistencies. Christopher Marsh did not even mention selling cocaine to the appellant when statements were taken from him and Deborah Marsh in March 2009. The first time he referred to blood-stained money was to the police on October 20, 2009, two days before he testified. Christopher Marsh had a criminal record for conspiracy to traffic in narcotics.

[49] The trial judge gave a "*Vetrovic*" warning to the jury in his charge to the jury about the evidence given by Christopher Marsh. He instructed the jury that they should approach his evidence with caution and to look skeptically at it, and only accept that portion of his evidence which they feel is supported by other evidence that they believe. He also cautioned the jury to look at Deborah Marsh's evidence

carefully. No objection was taken at trial or on appeal with respect to these instructions.

[50] Generally speaking, assessments of the credibility and reliability of evidence are peculiarly within the province of the jury. I have referred to some of the facts that caused the trial judge to instruct the jury to approach this evidence with caution. On the other hand, there was no suggestion at trial that either Christopher or Deborah Marsh were mistaken in the identification of the appellant. Nor was there any suggestion of any animosity or other motive for either of these witnesses to testify adversely against the appellant. Furthermore, it was open to the jury to find that the evidence of the Marshes was corroborated by the testimony of Sgt. Sehl and the results of the DNA testing on the biological materials found on the bag of cigarettes.

[51] The appellant laid considerable stress on the presence of the DNA profile of an unidentified male, on jeans located on the floor of the kitchen, that what he was wearing on arrest was in no way linked to the crime scene – indeed his footwear was excluded by the Crown experts as a source of the tread marks in the victim's home. In addition, he says the evidence called by the defence established he did not have the opportunity to commit the offence, as he had established a 'time line' for his whereabouts from 5:00 p.m. on July 8, 2006 to 7:15 a.m. the next morning.

[52] With respect, none of these references to the evidence make the verdict unreasonable or not supported by the evidence. The jeans found on the floor of the kitchen were identified by Kelly Quinn as a pair of jeans that he had given to the victim. It was Cst. Pembroke's opinion that they were heavily diluted with water. It appeared to him that there was blood on the inside of the fabric as well as the outside. He thought it was possible that the perpetrator had the jeans on at some point, tried to wash blood off them in the bathroom, sat down at a kitchen chair and, in the process of pulling them off, transferred blood to the inside of the fabric.

[53] Three areas of the jeans were analyzed for DNA profiles. It was Ms. McCullough's opinion that the victim's DNA profile was present in the sample from one area, and was the major component of the mixed DNA profiles from the other two. McCullough could not exclude Kelly Quinn as a possible contributor to one of the mixed DNA profiles, but testified that the appellant was excluded as a

possible contributor to the mixed DNA profile. In my opinion, this evidence is hardly telling of anything. First of all, Ms. McCullough made it clear that not all contact with an object will lead to the deposit of DNA. Furthermore, DNA testing was done on only three areas of the jeans.

[54] The footwear the appellant had on when arrested was excluded from making the tread marks in the victim's home. It was open to the jury to place no weight on this. The appellant was not arrested until the early evening of July 10, 2006. He was wearing grey sneakers. Apparently, no blood was found on them. On the other hand, the jury heard evidence from Kyle MacDonald that the appellant was wearing sandals as he sat in the victim's kitchen smoking a cigarette. There were bloody tread marks leaving the victim's home, and the victim's blood was found on the floor mat of the appellant's vehicle. The appellant told Kimberley Boyce he walked into the bathroom to clean blood off. Yet, the footwear the appellant claimed to have worn had no indication of blood on them, and did not match the tread marks in the bathroom or anywhere else.

[55] The evidence of a so-called time line for the appellant was hardly concrete. It was up to the jury to consider the probative value of that evidence, in light of all of the other evidence. The jury did not find it raised a reasonable doubt. The existence of this evidence alone, or in conjunction with other evidence, does not make the verdict unreasonable or not supported by the evidence.

[56] As an adjunct to his argument that the verdict is unreasonable or cannot be supported by the evidence, the appellant contends that not only was there no evidence of motive, the Crown had not established exclusive opportunity to have committed the murder. The appellant relies on the cases of *R. v. Ferianz*, [1962] O.W.N. 40, 37 C.R. 37 (C.A.) and *R. v. MacFarlane* (1981), 61 C.C.C. (2d) 458 (Ont. C.A.).

[57] Both stand for the proposition that evidence of motive and opportunity is insufficient to establish proof beyond a reasonable doubt unless the Crown can establish exclusive opportunity. These cases were cited with approval by McIntyre J. in *Yebes, supra*. After referring to these cases, McIntyre J. wrote (pp. 188-189):

> It may then be concluded that where it is shown that a crime has been committed and the incriminating evidence against the accused is primarily evidence of opportunity, the guilt of the accused is not the only rational inference which can

> be drawn unless the accused had exclusive opportunity. In a case, however, where evidence of opportunity is accompanied by other inculpatory evidence, something less than exclusive opportunity may suffice. This was the view expressed by Lacourcière J.A. in *R. v. Monteleone* (1982), 67 C.C.C. (2d) 489 (Ont. C.A.), at p. 493, where he said:
>
> > It is not mandatory for the prosecution to prove that the respondent had the exclusive opportunity in a case where other inculpatory circumstances are proved.
>
> It is also supported by further comments of Martin J.A. in *R. v. Stevens* (1984), 11 C.C.C. (3d) 518, at p. 534 *et seq.*, and see, as well, *Imrich v. The Queen*, [1978] 1 S.C.R. 622, *per* Ritchie J. at p. 627.

[58] In my opinion, for all of the reasons I have described, there was certainly other inculpatory circumstances established by the evidence against the appellant. There was no requirement for the Crown to establish exclusive opportunity before the jury could be satisfied beyond a reasonable doubt that the guilt of the accused was the only rational conclusion to draw from the evidence.

[59] Based on all the evidence, in my opinion, it was open to the jury to conclude the Crown had proved the only reasonable inference to draw from the evidence was that the appellant was the perpetrator. I would, therefore, not give effect to this ground of appeal.

*Post-Offence Conduct*

[60] The appellant's Notice of Appeal broadly asserts that the trial judge erred in law "in permitting evidence to be adduced at trial". The appellant's factum narrows the complaint to echo the defence objection at trial to the Crown adducing evidence about lies he told the police and his probation officer on July 17 and 18, 2006. He told them he was going to Metro Halifax but flew to Vancouver. At the hearing of the appeal the appellant voiced concerns over the adequacy of how the jury was charged on the post-offence conduct evidence.

[61] The defence raised a timely objection to the Crown calling the evidence. A *voir dire* was held in the absence of the jury. The appellant agreed that the trial judge would not have to hear the proposed evidence. It would be sufficient for the Crown to summarize the essence of it to permit argument and adjudication.

[62] The contentious evidence was to come from Wilma Menzies, the appellant's probation officer, Staff Sgt. Walter Rutherford and Cst. Barry Best. Ultimately, the trial judge ruled the Crown could adduce this evidence. These three witnesses testified. Rather than rely solely on the outline given by the Crown on what it expected the evidence to be, it is preferable to refer to the actual evidence heard by the jury.

[63] Wilma Menzies testified that she arranged a meeting with the appellant for July 17, 2006. To arrange the meeting she spoke with the appellant by phone. The appellant advised her that he was a suspect in the Boutilier case. When they met the appellant asked her if he could leave the area for work. He said he was going to go to Dartmouth to reside with his father and work there. She agreed he would be able to relocate to Dartmouth, provided he report to a probation officer in Dartmouth.

[64] The appellant gave her his father's address and phone number and also provided his own personal cell phone number. Although the procedure would be somewhat different if a client wanted to relocate outside the province, Ms. Menzies conceded that the terms of the appellant's probation did not oblige him to stay in Nova Scotia. Should he leave the province, he would be required to notify her when he was leaving and where he was going. She also conceded it was common for Cape Bretoners, even while they're on probation, to go out West to work.

[65] She acknowledged that the appellant voiced his concern over the police surveillance being conducted, and he might be in some danger due to the popularity of the deceased.

[66] Staff Sgt. Rutherford testified about a short, in-person conversation he had with the appellant at approximately 12:30 p.m. on July 18, 2006. His purpose in seeing the appellant was to ask if he was interested in taking a polygraph examination. He said the appellant agreed he would take a polygraph. Rutherford explained it would take a few days to arrange this as the Cape Breton Regional Police Service did not have their own examiner.

[67] Staff Sgt. Rutherford said the appellant told him that he was heading to Halifax for work purposes and would be staying with his father. Staff Sgt.

Rutherford asked when he was going. The appellant told him he was flying to Halifax at 2:30 that afternoon, and returning on Sunday. He said the appellant gave assurances that he would return prior to Sunday if requested.

[68] Staff Sgt. Rutherford conceded that he had assigned two officers to carry out continuous surveillance on the appellant. The surveillance was not only visible to the appellant, but to the public. He also acknowledged that the appellant was free to come and go from Nova Scotia, and it was quite conceivable that he would have instigated surveillance on the appellant once he moved to Halifax.

[69] Constable Best was one of the officers assigned to conduct surveillance on the appellant. His evidence was short. He testified that July 18, 2006 they followed the appellant to the Sydney airport. He said the appellant approached them and said that he was going to Halifax. After the appellant boarded a flight, they checked with the Air Canada counter and learned the flight was going to Vancouver. Constable Best acknowledged that the appellant did not try to evade surveillance nor disguise his appearance, and had booked the flight under his own name.

[70] The trial judge warned the parties that due to time constraints (imposed by when the issue was raised), he may only be able to give them a bottom line decision with reasons to follow later. Submissions were made first thing on Monday, October 26, 2006. The Crown quite accurately pointed out to the trial judge that the jury had already heard a good deal of evidence of post-offence conduct in relation to the actions and statements of the appellant, all without objection. They had heard the appellant's statements to the police and to Kimberley Boyce, his attempts to sell his black Sunbird for $100, and then $50 to Bill Young, so he could go out West, his comments to Nancy Walsh and Jean Marc Caron, also about going out West.

[71] The Crown argued that the proposed evidence from Ms. Menzies, Staff Sgt. Rutherford and Cst. Best would demonstrate that, when the police continued their focus on the appellant, he decided to flee the jurisdiction, lying as to his real destination to avoid detection. Furthermore, it contended the evidence was really part of the narrative. Without it, the jury would be left with the wrong impression that the appellant had simply and innocently followed through on his plan to go out West to work.

[72] The Crown and the defence referred to such leading authorities as *R. v. Argangioli*, [1994] 1 S.C.R. 129, (1994), 87 C.C.C. (3d) 289 (S.C.C.) and *R. v. White*, [1998] 2 S.C.R. 72, (1998), 125 C.C.C. (3d) 385 (S.C.C.). The defence also relied on *R. v. Turcotte*, 2005 SCC 50. The defence stressed the danger in admitting evidence of post-offence conduct to support an inference of consciousness of guilt on the basis that it can be highly ambiguous and susceptible to jury error. The defence argued that the proposed evidence was dated. It related to events more than one week following the date of the offence. In addition, there was ample innocent explanation for the appellant to have lied to the police about his travel plans and leaving Nova Scotia, other than consciousness of guilt for his alleged culpable involvement in the homicide of Shelly Boutilier.

[73] After considering the matter for approximately forty minutes, the trial judge returned and announced: "We are in the absence of the jury, and I indicated to crown at most at this stage, I would be giving the bottom line decision, and the bottom line is that the evidence will be admitted." No further reasons were given by the trial judge. There is no indication that reasons were requested.

[74] This is mentioned because, in his factum, the appellant expanded his argument under this ground of appeal to include the issue of the sufficiency of reasons for the trial judge to have admitted this particular post-offence conduct evidence. It is somewhat difficult to grasp the meat of the appellant's complaint. At one point, the appellant suggested that the failure to give reasons impacted on the fairness of the trial proceedings. I fail to see how, in these circumstances, this argument has any merit. Generally, a failure to give adequate reasons has import, if at all, on the ability of an appellant to effectively pursue his or her avenues of appeal. It is the spectre of unfairness to the appellant in the appeal process by precluding meaningful appellate review that animates the necessity for adequate reasons.

[75] The rationale for the recognition of the duty to give reasons was reviewed by McLachlin C.J. in giving the unanimous judgment of the court in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3. The Chief Justice stressed the requirement for a functional approach in determining what constitutes in a particular case 'sufficient' reasons. She wrote:

> [25] The functional approach advocated in *Sheppard* suggests that what is required are reasons sufficient to perform the functions reasons serve — to inform the parties of the basis of the verdict, to provide public accountability and to permit meaningful appeal. The functional approach does not require more than will accomplish these objectives. Rather, reasons will be inadequate only where their objectives are not attained; otherwise, an appeal does not lie on the ground of insufficiency of reasons. This principle from *Sheppard* was reiterated thus in *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 31:
>
> > The general principle affirmed in *Sheppard* is that "the effort to establish the absence or inadequacy of reasons as a freestanding ground of appeal should be rejected. A more contextual approach is required. **The appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case" (para. 33). The test, in other words, is whether the reasons adequately perform *the function* for which they are required, namely to allow the appeal court to review the correctness of the trial decision.** [Emphasis added.]

[76] Here we are dealing with an interlocutory ruling by a trial judge on the admissibility of evidence. It is a question of law. There is no dispute it is reviewable by this Court. Ordinarily questions of law are reviewed on a standard of correctness. There are some admissibility of evidence issues for which considerable deference is owed to the trial judge, such as findings of fact or mixed law and fact, that are integral to the determination of admissibility. This includes those rulings where the trial judge must carry out a balancing analysis on such issues as necessity and reliability or probative value and prejudicial effect. Of course, the judge must correctly articulate the appropriate legal principles and apply them. Here the trial judge was not asked to specifically undertake any balancing of the probative value of the preferred evidence against its potential prejudicial effect and exercise his residual discretion to exclude the evidence on that basis (see *R. v. White*, *supra*, at para. 33).

[77] While it would be preferable for the trial judge to have given reasons for his decision on admissibility, the appellant is still able to pursue his remedy on appeal. In my opinion, the failure to provide reasons is inconsequential. It adds nothing to the appellant's complaint of error in admitting the evidence. If anything, the absence of reasons diminishes whatever deference may have been due the trial judge's decision on admissibility. In these circumstances, it is appropriate to

review his decision on a standard of correctness. I would not give effect to this aspect of the appellant's ground of appeal.

[78] In any event, in my opinion, the record discloses the basis for the trial judge's ruling. As noted earlier, both counsel referred to the leading authorities from the Supreme Court of Canada on evidence of consciousness of guilt. In *R. v. Arcangioli*, *supra*., Major J., for the court, commented on the well-entrenched principle of a trier of fact being able to infer guilt from evidence demonstrating consciousness of guilt. He wrote (p. 143):

> It is well established that an inference of guilt may be drawn from circumstantial evidence such as flight from the scene of a crime or the fabrication of lies relating to the offence in question. However, in charging a jury, a trial judge must take care to ensure that evidence of flight is not misused. The danger exists that a jury may erroneously leap from such evidence to a conclusion of guilt if not properly instructed, see *McCormick on Evidence, supra*, vol. 2, § 263, at p. 182:
>
> > . . . in many situations, the inference of consciousness of guilt of the particular crime is so uncertain and ambiguous and the evidence so prejudicial that one is forced to wonder whether the evidence is not directed to punishing the "wicked" generally rather than resolving the issue of guilt of the offense charged.

[79] Major J. quoted with approval the approach to such evidence articulated in *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977) (pp. 144-145):

> A similar situation arose in *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977). The accused was wanted for two robberies; one was committed in Pennsylvania and the other in Florida. The reported decision concerns the latter. There was evidence that the accused fled when approached by FBI agents. Clark J. canvassed the law, adopted the view expressed in *McCormick on Evidence* (2nd ed. 1972), § 271, at p. 655, and concluded that the proper approach determines whether there is sufficient evidence in support of drawing four inferences:
>
> > (1) from the accused's behavior to flight,
> >
> > (2) from flight to consciousness of guilt,
> >
> > (3) from consciousness of guilt to consciousness of guilt concerning the offence in question,

> (4) from consciousness of guilt of the offence in question to actual guilt of the offence in question.
>
> Clark J. held that the third inference could not be drawn. Since the accused knew that he was wanted for a robbery committed in Pennsylvania, the possibility existed that he fled solely out of consciousness of guilt with respect to it, rather than the Florida robbery. To be useful, flight must give rise to an inference of consciousness of guilt in regard to a specific offence.

[80] In *Arcangioli*, the appellant was charged with aggravated assault in relation to a stabbing. The appellant had fled from the scene. He testified that he had been involved in an assault on the victim, but had not been a party to any stabbing. The jury was charged that they could consider the appellant's flight in arriving at a verdict, but that the evidence was not conclusive as sometimes people flee in panic, even if they are entirely innocent. Major J. concluded that because the accused's conduct could be equally explained by reference to consciousness of guilt of another offence, and the accused had admitted to culpability to one of those, the trial judge was required to charge the jury that such evidence has no probative value.

[81] The Supreme Court of Canada again discussed the role of consciousness of guilt evidence in *R. v. White*, *supra*. The appellants were convicted of an execution-style killing of a victim in Ottawa. They left Ottawa for two weeks. They were in violation of their parole and committed two armed robberies elsewhere in Ontario. On their return to Ottawa, they fled from the police, and tried to dispose of a firearm that was linked to being used in the robberies as well as the murder. The appellants objected to the jury being able to consider this evidence as consciousness of guilt with respect to the murder. Major J. again wrote the unanimous reasons for judgment. He emphasized it is generally for the jury to weigh competing inferences that might be drawn from evidence of flight or other post-offence conduct. Major J. explained:

> [21] Evidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence. In some cases it may be highly incriminating, while in others it might play only a minor corroborative role. Like any piece of circumstantial evidence, an act of flight or concealment may be subject to competing interpretations and must be weighed by the jury, in light of

> all the evidence, to determine whether it is consistent with guilt and inconsistent with any other rational conclusion.
>
> ...
>
> [27] As a general rule, it will be for the jury to decide, on the basis of the evidence as a whole, whether the post-offence conduct of the accused is related to the crime before them rather than to some other culpable act. It is also within the province of the jury to consider how much weight, if any, such evidence should be accorded in the final determination of guilt or innocence. For the trial judge to interfere in that process will in most cases constitute a usurpation of the jury's exclusive fact-finding role. Consequently, a "no probative value" instruction like the one required in *Arcangioli* will be called for only in limited circumstances.

[82] Here, the appellant denied any culpable involvement in the homicide of Shelly Boutilier or any other offence. Instead, he argued that the obvious falsehoods to his probation officer and the police were motivated not by flight from the authorities but by a desire to pursue his planned move to British Columbia without police surveillance. For example, he insisted in his statements to the police of July 19 and 21, 2006 that he had a job in the Vancouver area. His employer was unable to pick him up at the airport because the police had arrested him when he got off the plane, and he had an open return plane ticket to Nova Scotia and would have returned voluntarily on request.

[83] In my opinion, it would be up to the jury to consider the competing inferences and assign whatever weight to this evidence they should. Therefore, the trial judge did not err in admitting this evidence.

[84] There are some aspects of this, and other evidence heard by the jury, that deserves mention. It was obvious that the appellant had a criminal record since Wilma Menzies was his probation officer. It was a live issue right up to the end of the trial whether the appellant would testify. The trial judge was alert to the possible prejudice to the appellant of having the jury learn of his criminal record, even for property offences, which are usually relevant to the issue of his credibility and only then if he should testify. He said:

> ...my concern is that if record of property, theft related offenses is put in, there's, there's a danger that the, the jury would have, have difficulty following the instruction that they could only use it for credibility and not for propensity. Because I take it the theory of the crown is that this was a robbery, theft gone bad,

> and I'm, I'm afraid that if, if the, the accused is cross examined on, on theft type offenses the jury might have difficulty separating the improper use of the record, that is evidence of propensity from proper use, assessing credibility. And I want to hear counsel's arguments on, on that issue. Anyway I, you know, when I was thinking about the trial and the potential for the accused testifying and whether or not he has a record, given the circumstances that, that was one concern that came up and so...

[85] However, by the time the issue of the appellant's probation officer was addressed, the jury had already heard the evidence of the statements made by the appellant to the police on July 11, 19 and 21, 2006. There are numerous references in these statements concerning the appellant's convictions for criminal offences and other discreditable acts. As noted earlier, these statements were admitted by the consent of the appellant. No application was made to edit out these objectionable references. I note there is also some discussion in these statements that the appellant is someone not known to be violent and involvement in the homicide of Shelly Boutilier would be considered out of character for him. In my opinion, it would have been preferable to have appropriately edited these statements. The trial judge emphasized to the jury that they should not let evidence of a record or past misconduct be a part of their deliberations. No objection was taken at trial or on appeal with respect to this aspect of his charge to the jury.

[86] The trial judge was initially told that Staff Sgt. Rutherford had discussed with the appellant another "investigative technique" on July 18, 2006. During the *voir dire*, the Crown elaborated that the technique was the polygraph examination, and the defence had no objection disclosing this to the jury, on the theory that the appellant's agreement to undergo such an examination stood in his favour. This is indeed what the defence argued to the jury, presumably on the basis it constituted some evidence of consciousness of innocence. The Crown conceded at trial that if the agreement by the appellant was real, it would stand to his credit. Evidence about refusal or agreement to take a polygraph examination raise problematic issues as post-offence conduct supporting guilt or innocence (see for example *R. v. Richards* (1997), 6 C.R. (5$^{th}$) 154, 87 B.C.A.C. 21, [1997] B.C.J. No. 339; *R. v. S.C.B.* (1997), 119 C.C.C. (3d) 530, 104 O.A.C. 81, [1997] O.J. No. 4183). Given the position of the appellant taken at trial, and his lack of complaint on appeal, the admission of this evidence was of no consequence.

Jury Charge on Post Offence Conduct

[87] Immediately after the jury heard the evidence about the circumstances surrounding the appellant leaving Cape Breton for Vancouver, the Crown closed its case. The trial judge then advised the parties that he intended to give them an interim direction on a number of things, such as the presumption of innocence and proof beyond a reasonable doubt, and would include a direction on the after the fact conduct evidence. He outlined what he intended to say. The appellant agreed with the content of the instruction. The judge told the jury:

> What I want to tell you at this point is that you should reserve, you should reserve your final judgment about the meaning of such after the fact conduct until you consider all the evidence in the normal course of your deliberations. **At the end of the day you may draw whatever permissible inferences you choose from the evidence you've heard**.
>
> Now I will be, in my final instruction to you, I will be referring to that evidence and I will be amplifying that instruction I just gave you but for the moment it is important that, you know the case isn't over yet. You've heard the evidence for the crown, you haven't heard the defence evidence, you haven't heard the summation of counsel, you haven't heard my address. So it is important that you reserve judgment on that after the fact evidence, indeed all of the evidence, until the conclusion of the case and then you consider it altogether.
> [Emphasis added.]

[88] In his final charge to the jury, the trial judge referred to two categories of after the fact conduct by the appellant. The first was one that he suggested was of little value to them. This was the evidence from Nancy Walsh who described the appellant's demeanour on Sunday, July 9, 2006 as nervous. Jean Marc Caron was present at that time and did not support Walsh's description, but did say, on July 9, 2006 when a police car drove by, the appellant ducked down and said "5-O, 5-O". William Young also related how the appellant was trying to sell his car so he could leave the area. The trial judge said this was equally consistent with an innocent person leaving the area. With respect to this evidence, the trial judge directed the jury either it was of no or little assistance.

[89] The only other after the fact evidence mentioned was what the trial judge labelled as the "main after the fact evidence". This was the evidence about what he told his probation officer and the police about going to Halifax, and then flying to Vancouver. With respect to this evidence, he repeated his suggestion that they

should consider the meaning of the accused's after the fact conduct in the context of all of the evidence in the normal course of their deliberations, and at the end of the day, draw whatever permissible inferences from the evidence they had heard. If this is how the instruction was left, in my opinion, taken in isolation, it would constitute non direction amounting to misdirection. However, the trial judge went further. He then instructed them:

> You should keep in mind that people often travel or even lie for entirely innocent reasons. Accordingly, you must weigh the possibility that the accused's actions were motivated by a feeling of guilt against the possibility that he merely wanted to relieve the stress caused by community suspicion and police surveillance. You also have to consider that the travel took place in the context of the accused's expressed intention to Kimberley Boyce and to members of his family, as well as to Jean Marc Caron that he wished to go out west to seek employment. And of course, he was under no legal obligation to stay in Cape Breton. If you determined that the accused's actions were motivated by a feeling of guilt then you may weigh that evidence when deciding whether the accused is guilty or not guilty. But if you determine that there is an innocent explanation for the accused's conduct then you should disregard the evidence and give it no weight in your deliberations as to whether Herbert Hawkins is guilty or not guilty. Again I am going to give you my view on the evidence, not for the purpose of pushing you in one direction or the other. I am endeavoring to be as neutral in this as I can, but to assist you in deciding how you are going to deal with the evidence and you can either accept it or reject it. Again, I know I am ad-nauseam, it is up to you. But my view is that the whole sequence of that evidence sheds little light on the ultimate issue here. That is why you should consider it, I suggest that that it might be more productive for you to focus on the evidence of the accused's actions on July 8th and the evidence gathered at Sheldon Boutilier's home. But as I say, that is only my opinion and you are perfectly free to disregard it.

[90] Viewed in light of the evidence and overall charge, the trial judge did not err in how he instructed the jury on how to approach this evidence of post-offence conduct. As Major J. emphasized in *R. v. White*, the dangers of post-offence conduct evidence is that it can be highly ambiguous and susceptible to jury error. Thus, a jury may fail to consider alternate explanations of the behaviour and wrongly leap from such evidence to a conclusion of guilt. Major J. expressed the principles that underlie a proper instruction as follows:

> [36] In cases where a "no probative value" instruction is not required and the post-offence conduct of an accused is put before the jury, the trial judge should nevertheless provide an instruction regarding the proper use of that evidence. The

> purpose of such a charge is to counter the jury's natural tendency to leap from evidence of flight or concealment to a conclusion of guilt, and to ensure that alternative explanations for the accused's conduct are given full consideration. In particular, the trial judge should remind the jury that people sometimes flee or lie for entirely innocent reasons, and that even if the accused was motivated by a feeling of guilt, that feeling might be attributable to some culpable act other than the offence for which the accused is being tried. The jury should be instructed to keep these principles in mind when deciding how much weight, if any, to give such evidence in the final evaluation of guilt or innocence.

[91] Here, a more fulsome explanation may well have been useful about the requisite steps for this kind of evidence to have probative value on the ultimate issue of the guilt of the accused. Nonetheless, in the context of this trial, the instruction given with respect to this evidence did not amount to error. I say this for two reasons. First, the trial judge very fairly and clearly put to the jury the alternate explanations for the appellant's conduct in travelling to Vancouver. He stressed to the jury that the evidence would only be relevant on the ultimate question of guilt if they determined that his actions were motivated by a feeling of guilt.

[92] Second, the trial judge downplayed the significance of this evidence. He told them, in his view, the whole sequence of this evidence shed little light on the ultimate issue, and it would be more productive for them to focus on the evidence of the appellant's actions on July 8, 2006 and the evidence gathered at the victim's home.

[93] There is one aspect of the trial judge's instructions that is problematic. There was also significant post-offence conduct evidence arising from the statements made by the appellant to the police and to Kimberley Boyce. It was not referred to as such by the trial judge. When first arrested he said "what happened to Shelly, someone said he had his throat cut?"; and "so I heard they hung him, that's awful". In a series of three videotaped statements the appellant admitted being present with the victim late in the afternoon of July 8, 2006 but insisted in each that the victim was fine when he left. Within two months, the appellant told Kimberley Boyce he found the victim laying on the floor and bent down to check for a pulse. He then went to the washroom to wash blood off, got confused and fled. The appellant did not deny making any of these statements. In fact, he argued to the jury that the police had lied to him, yet he had told them the truth in his statements, admitting such things as being present, smoking a cigarette,

hooking up the deceased's DVD player and recalling the presence of the teenaged boys. The appellant also argued to the jury that what he told Ms. Boyce was true, just that his finding of the deceased occurred later.

[94] As already noted earlier, our law has long recognized that if a trier of fact is satisfied that an accused deliberately lied or otherwise tried to deceive the authorities it can be used as circumstantial evidence tending to show his or her culpable involvement in the crime alleged. (*R. v. Arcangioli*, para. 39; *R. v. White*, para. 20, 22; *DPP v. Jones* (1962), 46 Cr.App.R. 129 (H.L.); *R. v. Khan*, [1967] 1 All E.R. 80 (J.C.P.C.).)

[95] Like other types of circumstantial evidence, the probative value of the evidence will vary according to the nature of the evidence and the issues in the case. Proof by the prosecution that an accused has told lies about the conduct in question may have little or immense probative value. What is important is that the jury must not merely disbelieve an explanation given by an accused. They must be satisfied that such an explanation was deliberately false, not given due to some innocent rationale, but due to knowledge of his or her culpable involvement in the offence. In other words, mere disbelief of an alibi or other explanation is insufficient. To have probative value, the trier of fact must be satisfied it was deliberately false and there is not some innocent rationale for the deception (see generally, *R. v. O'Connor* (2002), 170 C.C.C. (3d) 365 (Ont. C.A.); *R. v. Hein*, 2008 BCCA 109; *R. v. Hazel*, 2009 ONCA 38; *R. v. Peavoy* (1997), 117 C.C.C. (3d) 226 (Ont. C.A.)).

[96] In *R. v. Peavoy*, *supra*, Weiler J.A. wrote of the role of after the fact conduct as follows:

> [26] Evidence of after-the-fact conduct is commonly admitted to show that an accused person has acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person. The after-the-fact conduct is said to indicate an awareness on the part of the accused person that he or she has acted unlawfully and without a valid defence for the conduct in question. It can only be used by the trier of fact in this manner if any innocent explanation for the conduct is rejected. That explanation may be expressly stated in the evidence, such as when the accused testifies, or it may arise from the trier of fact's appreciation of human nature and how people react to unusual and stressful situations. It is for the trier of fact to determine what inference, if any, should be drawn from the evidence.

[97] Major J. in *R. v. White* also expressed the need to ensure a jury approaches this kind of evidence correctly:

> [21] Evidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence. In some cases it may be highly incriminating, while in others it might play only a minor corroborative role. Like any piece of circumstantial evidence, an act of flight or concealment may be subject to competing interpretations and must be weighed by the jury, in light of all the evidence, to determine whether it is consistent with guilt and inconsistent with any other rational conclusion.
>
> [22] It has been recognized, however, that when evidence of post-offence conduct is introduced to support an inference of consciousness of guilt it is highly ambiguous and susceptible to jury error. As this Court observed in *Arcangioli*, the danger exists that a jury may fail to take account of alternative explanations for the accused's behaviour, and may mistakenly leap from such evidence to a conclusion of guilt. In particular, a jury might impute a guilty conscience to an accused who has fled or lied for an entirely innocent reason, such as panic, embarrassment or fear of false accusation. Alternatively, the jury might determine that the conduct of the accused arose from a feeling of guilt, but might fail to consider whether that guilt relates specifically to the crime at issue, rather than to some other culpable act.

[98] Here there was no issue about a feeling of guilt arising from another culpable act, but it was still up to the jury to determine if the statements of the appellant were in fact deliberate deceptions, and if so, arose from a guilty conscience or due to such reasons as panic, embarrassment or fear of false accusation.

[99] Before mentioning post-offence conduct evidence in his charge to the jury, the trial judge reviewed the evidence dealing with the statements by the appellant. No mention was made by the trial judge that these statements constituted evidence of after the fact conduct. The complete direction on how to deal with this evidence was:

> What he does say in the video statements is that when he left, and of course I am paraphrasing, but this is the gist of what he says, is that when he left Sheldon Boutilier's home Sheldon Boutilier was fine. That of course is contradicted by what Kimberley Boyce says he told her, that is that when Herbert Hawkins went

> to Sheldon Boutilier's, Sheldon Boutilier was already dead and now you will have the whole transcript of that conversation to make of it what you will.
>
> **As far as the three videotaped statements are concerned you have to consider whether, in your view, Herbert Hawkins was deliberately trying to deceive the police. You should reserve your judgement about the meaning of the accused's deception if that is what you determine it was, until you consider all of the evidence in the normal course of your deliberations. At the end of the day you may draw whatever permissible inferences you choose from the evidence you heard.** [Emphasis Added]

[100] In my opinion, in the context in which it was given, this direction standing alone, and in these circumstances, was deficient. What were the "permissible inferences" they could draw? There was no discussion about what they must find before concluding his statements to the police were false nor anything about turning their collective appreciation of human nature to consider any alternate reason for having said something they found to be false or deceptive.

[101] The language used by the trial judge does track some of the suggested wording from Gerry A. Ferguson, Michael R. Dambrot & Elizabeth A. Bennett *CRIMJI: Canadian Criminal Jury Instructions*, 4th ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2005 (loose-leaf updated November, 2009) at p. 4.21-6:

> 8. You should reserve your final judgment about the meaning of the accused's post - offense conduct until you consider all the evidence in the normal course of your deliberations. At the end of the day you may draw whatever permissible inferences you choose from the evidence you heard.

[102] In my opinion, this language, used in the proper context, is quite correct. The learned authors have an introductory heading to para. 8. The heading is:

> EVIDENCE OF THE ACCUSED'S POST-OFFENCE CONDUCT SHOULD BE CONSIDERED WITH ALL THE OTHER EVIDENCE—CAUTION

[103] The learned authors reference para. 57 of *R. v. White*, as authority for using the suggested language in para. 8. One of the key issues before the Supreme Court of Canada in *R. v. White* was whether or not the jury had to be instructed to examine post-offence conduct evidence separately from the rest of the evidence,

and to first determine if they were satisfied beyond a reasonable doubt whether the conduct reflected a consciousness of guilt. If they were not so satisfied then they could draw no inference from the accused's conduct. The Court rejected that approach. It confirmed that the standard of proof beyond a reasonable doubt generally only applies to the jury's ultimate determination of guilt, and not to individual items or categories of evidence. It is in this context, Major J. wrote at para. 57:

> [57] A good deal of the difficulty disappears once the discussion of "consciousness of guilt" is eliminated from the trial judge's instruction. It is preferable simply, in the spirit of *Morin*, to leave evidence of flight or concealment evaluated, but somewhat at large until the final stage of putting all the evidence together and seeing if it proves the case beyond a reasonable doubt. As previously noted, there is a risk that juries might jump too quickly from evidence of post-offence conduct to an inference of guilt. However, the best way for a trial judge to address that danger is simply to make sure that the jury are aware of any other explanations for the accused's actions, and that they know they should reserve their final judgment about the meaning of the accused's conduct until all the evidence has been considered in the normal course of their deliberations. Beyond such a cautionary instruction, the members of jury should be left to draw whatever inferences they choose from the evidence at the end of the day.

[104] The acknowledgement that the jury is permitted to draw whatever inferences they choose is in relation to **all of the evidence**, including that of the post-offence conduct of the accused, and not just that evidence. First they have to be properly charged on the correct approach to such evidence.

[105] Standardized jury charge language reference works such as *CRIMJI*, and David Watt, ed., *Watt's Manual of Criminal Jury Instructions* (Toronto: Carswell, 2005) are very valuable tools in crafting clear and legally correct instructions. But the language the authors suggest must be placed in the appropriate context. There are other paragraphs in *CRIMJI* that deal expressly with post-offence conduct including false statements by an accused that would have been useful (see, for example, paras. 1 and 1A., p. 4.21-2; and *Watt*, pp. 194-99).

[106] Unfortunately, the context in which the trial judge used this language left the jury without any real direction on how to approach this post-offence conduct evidence, including what permissible inferences they could draw from it. I must

conclude that there was a non direction that amounted to a misdirection and was hence an error in law.

[107] The Crown argued that if an error of law was found in how the judge charged the jury that this Court should apply the proviso set out in s. 686(1)(b)(iii) of the *Criminal Code*, and uphold the conviction on the basis that no substantial wrong or miscarriage of justice occurred. I agree. Let me explain.

[108] The appellant did not object at trial to this or any other aspect of the charge to the jury. As noted by Lamer C.J. in *R. v. Jacquard*, [1997] 1 S.C.R. 314, the failure to object, while by no means determinative, is worthy of consideration in assessing the overall accuracy of the jury instructions and the seriousness of the misdirection in issue (paras. 37-38).

[109] The jury was not actively misdirected. The error was not enough direction on this aspect of the post-offence conduct heard by the jury. Further, the jury was in fact properly directed on what the parties considered to be the main post-offence conduct evidence: the lies to the probation officer and police and flight to Vancouver.

[110] Furthermore, the trial judge's charge to the jury was otherwise fair and balanced. He properly instructed them on all aspects of the law and evidence, including how to deal with circumstantial evidence. Included was the following:

> As the facts are for you to determine so are the inferences to be drawn from the facts. An inference is a logical conclusion which may be arrived at based upon the proven facts. An inference is not to be confused with an assumption or a suspicion or something taken for granted without proof. An inference requires more than that. You may draw inferences or conclusions only if they are founded on the evidence and are the logical result of the evidence. However, you must not reach any conclusion against the accused unless it is the only reasonable inference or conclusion open upon the proven facts. If it is not the only reasonable inference or conclusion open to you, then you must not use it against the accused.

[111] Lastly, the post-offence conduct evidence was but one facet of the case against the appellant. The Crown adduced evidence to establish the appellant was present proximate in time to the death of the victim; there was no evidence of anyone else being present; he needed money but then was able that night to buy

over $100 worth of cocaine with money that appeared to be stained with blood; he later that night sold a bag of cigarettes that had the blood on it, determined to contain the DNA profile of the victim; he used the washroom in the victim's house to wash blood off himself wearing footwear that left impressions there and at various locations throughout the victim's house; he also, at some point, removed his footwear and left barefoot impressions in the victim's blood at locations inconsistent with merely checking the victim's life signs.

[112] I am satisfied that the failure to fully charge the jury on some aspects of the post-offence conduct evidence was not a serious error and did not result in prejudice to the appellant. I would therefore not give effect to this ground of appeal.

[113] The last issue the appellant raises under this ground of appeal is the decision by the trial judge to provide to the jury a copy of the transcript of Kimberley Boyce's evidence to the jury. The complaint is that this unduly emphasized her evidence.

[114] This issue has a tenuous connection to any of the grounds of appeal. The Crown raised no objection and addressed the complaint in its factum.

[115] It is obvious that the judge and the parties at trial had difficulty hearing her evidence. The trial judge told counsel he was almost one hundred percent certain the jury would want her evidence played back. The judge proposed that he would read parts of the transcript of her evidence verbatim to the jury. Defence counsel said she had no problem with that procedure.

[116] During his charge to the jury the judge decided a more practical way of dealing with the evidence from Ms. Boyce was to provide them with the transcript. It was made an exhibit. In its entirety it is only 22 pages. No objection was voiced by the appellant at trial.

[117] The complaint by the appellant has no merit. The trial judge has an obligation to ensure the jury is properly equipped to consider the evidence adduced at trial. He recognized that Boyce's evidence was hard to follow. The transcript, for which there is no complaint over accuracy, acted as an aide memoire so that the jury could fulfill its duty. The fact the jury had a transcript of this evidence did not

unduly emphasize her evidence. It put her evidence on the same footing as the statements of several hundred pages of transcript from the three videotaped statements the appellant gave to the police. Lastly, it was the appellant who wanted to emphasize the evidence of Kimberley Boyce at trial, insisting that, due to his relationship with her, he would and did tell her the truth – he did not commit the offence. Even if the transcript emphasized Boyce's evidence, I fail to see any prejudice to the appellant. There was no error in how the trial judge dealt with this issue.

*Improper Remarks by Crown Counsel*

[118] The appellant says that Crown counsel, in his summation to the jury, referred to three matters that were not proven in evidence. They were: a) that the appellant's innocent explanation to Kimberley Boyce about finding the victim after he was deceased was a fabrication, done after he had received his disclosure; b) that the accused walked up to the head of the bed in the bedroom, slipped out of his footwear, put them back on and then left the room; and c) that it is not whose DNA at the scene that is important, but where you find it, and if the appellant is tracking the victim's blood to the floor mat of his car, there should be footprints left on the way to the car, and there were.

[119] The general principles on the proper parameters on Crown counsels' argument to a jury are without controversy. Perhaps the most well known case is *R. v. Boucher*, [1955] S.C.R. 16 where Rand J. and Locke J., in separate reasons, describe the appropriate role of a Crown prosecutor. In that case, the Crown had expressed his personal belief in the guilt of the accused and of the investigation undertaken by the Crown before proceeding with the prosecution. This kind of advocacy was found to be inappropriate and unfairly impacted on the fair trial rights of the accused. The thrust of the opinions expressed by the Supreme Court are that the prosecutor is to act as a minister of justice, pressing the case against the accused fairly and impartially, not with any feeling of animus or hostility, but with the goal of determining the truth. The '*Boucher* standard' has continued to be the yardstick against which alleged advocacy excesses by the Crown are measured. (See *Pisani v. R.*, [1971] S.C.R. 738; *R. v. Romeo* (1989), 93 N.B.R. (2d) 332 where the dissent of Ayles J.A was adopted by the S.C.C., [1991] 1 S.C.R. 86; *R. v. Michaud*, [1996] 2 S.C.R. 458.)

[120] In *R. v. Pisani*, *supra*, Laskin J., as he then was, wrote for the Court (p. 740):

> The reasons for judgment given separately in *Boucher* by Kerwin C. J., Rand, Locke and Cartwright JJ. amply point up the obligation of Crown counsel to be accurate, fair and dispassionate in conducting the prosecution and in addressing the jury. Overenthusiasm for the strength of the case for the prosecution, manifested in addressing the jury, may be forgivable, especially when tempered by a proper caution by the trial judge in his charge, where it is in relation to matters properly adduced in evidence. A different situation exists where that enthusiasm is coupled with or consists of putting before the jury, as facts to be considered for conviction, matters of which there is no evidence and which come from Crown counsel's personal experience or observations. That is the present case.

[121] In *R. v. Romeo*, *supra*, the prosecutor expressed his personal views in denigrating the credibility of a defence expert on the defence of insanity. The majority of the New Brunswick Court of Appeal considered the remarks by the prosecutor to have been personal and slanted and warranted comment by the trial judge to temper their effect, but the failure to do so did not give rise to a miscarriage of justice. Ayles J.A., in dissent, found the statements to be unfair and prejudicial, and the failure by the trial judge to instruct the jury on them amounted to an error of law that could not, in the circumstance, be saved by the s. 686(1)(b)(iii) proviso. Lamer C.J., for the majority agreed. He succinctly described the approach and his conclusion as follows (p. 95):

> There are two basic questions which must be addressed in order to resolve this issue. The first question is whether the trial judge erred in not commenting on the prejudicial remarks of Crown counsel in his charge to the jury. If the nondirection does amount to an error of law, the question arises whether the appeal should be nonetheless dismissed under s. 686(1)(b)(iii) on the basis that no substantial wrong or miscarriage of justice has occurred.
>
> I am in complete agreement with the dissenting reasons of Ayles J.A. with respect to this issue (at pp. 358-59):
>
> > [T]he remarks of Crown counsel were prejudicial to a degree sufficient to impose a legal duty on the trial judge to comment and thus ensure that the position of the defence, in this case the appellant's alleged insanity at the time that Officer Aucoin was killed, was fairly put to the jury. The failure of the trial judge to comment on Crown counsel's improper remarks constituted an incorrect decision on a question of law.

> I also share his view that no case has been made out for the application of s. 686(1)(b)(iii) of the *Criminal Code*. I would therefore allow the appeal and order a new trial.

[122] In my opinion, the correct approach, in the absence of concessions by the parties, can best be expressed as follows:

1. Were the impugned comments wrong?

2. Were they prejudicial?

3. Were they prejudicial to such a degree that the judge was obliged as a matter of law to comment and try to correct the prejudice?

4. If the trial judge acted to try to correct the prejudice caused by the improper remarks of the prosecutor, were the remedial instructions sufficient?

5. If the trial judge erred in law by failing to correct or gave inadequate instructions, can the error be considered harmless under the s. 686(1)(b)(iii) curative proviso?

[123] With this framework, I now turn to the three complaints.

a) The appellant's innocent explanation was post receiving disclosure

[124] Defence counsel raised this with the trial judge. Crown counsel at trial conceded that his comments went too far. The trial judge said he would correct this in his charge, and in fact did so. He told the jury there was no evidence of when the appellant received disclosure and they should disregard that reference, and assess the appellant's statements to Kimberley Boyce in the context of all the evidence they had heard. The appellant at trial made no complaint as to the adequacy of the trial judge's remedial instructions on the Crown's comment to the jury.

[125] The appellant now says the evidence of the appellant's statements to Kimberley Boyce were crucial to his defence and the prosecutor's comment was so

highly prejudicial that it denied him his right to a fair trial. Improper comments suggesting an accused has concocted his evidence or statement after receiving disclosure, if left uncorrected by the trial judge, can be so important as to deprive an accused of his right to a fair trial, and a new trial will be the appropriate remedy (see *R. v. Peavoy* (1997), 117 C.C.C. (3d) 226 (Ont. C.A.), [1997] O.J. No. 2788).

[126] But here, the trial judge did clearly correct the improper remark by identifying it, and directing the jury to disregard it. Furthermore, I am not convinced that the comment by the Crown, although improper, was all that prejudicial. The innocent explanation he gave to Kimberley Boyce helped to explain, to some extent, why his bloody footprints were in the victim's home and, hence, the victim's blood in his car. The jury already had clear evidence before them that on July 19 and 21, 2006 the police had disclosed to the appellant at least the preliminary forensic evidence that put him in the victim's home, after the bloodletting had occurred. Therefore, the appellant knew of this evidence well before he spoke with Kimberley Boyce. I see no error in how the trial judge dealt with the comment made by the prosecutor.

b) Slipping footwear off and on in the bedroom

[127] This comment was also raised with the trial judge. The prosecutor at trial explained to the judge that he was not giving expert evidence, but was asking the jury to use their common sense about how the barefoot prints got in the bedroom when there were none coming into or leaving the room. The trial judge apparently accepted this explanation. No reference was made to it in his charge. There is scope for the Crown or the defence to ask a jury to draw an inference from evidence based on their common sense. As explained in *R. v. Mitchell* (2006), 212 C.C.C. (3d) 258 (Ont. C.A.):

> [35] In the end, while Crown counsel regrettably overstated the evidence and her position in several instances during her closing address, I am not convinced that those statements prejudiced the appellant in any way that would justify the ordering of a new trial. The trial judge clearly corrected the two most egregious instances and in other respects the criticized remarks either conformed to the evidence, when considered in their context, or constituted inferences that the Crown was entitled to ask the jury to draw, or were comments that the jury's common sense and the trial judge's instructions as a whole would overcome.

[128] Here the Crown was asking the jury to rely on common sense. In addition, the Crown did not misquote or make up evidence. Detective Cst. Pembroke had in fact testified that the isolated side-by-side diluted barefoot prints in the bedroom could be accounted for by someone wearing footwear into the room, taking them off, and then putting them back on again. I do not see how the comments were wrong let alone prejudicial.

c) Bloody footprints from the house on the way to the appellant's car

[129] At trial the appellant made no objection to this comment by the Crown. What Crown counsel said to the jury was "If Herbert Hawkins is tracking Sheldon Boutilier's blood onto his floor mat, he should have left footprints on his way to the car. We have footprints on the way to the car."

[130] I accept the respondent's submissions on appeal that the impugned comment by the Crown was based on the evidence and inferences that could properly be drawn from the evidence. The appellant's car had been parked in the driveway. The evidence from the witnesses and photographs demonstrated the steps from the porch down to the driveway. Constable MacLeod testified that certain closeup photographs showed bloody, partial footwear impressions on the steps. The victim's DNA was found in blood located on the driver's side floor mat of the appellant's car. In my opinion, there was no misstatement of the evidence by the Crown. I also fail to see how such a comment could in any way be prejudicial to the appellant, who admitted to Kimberley Boyce that he was in the victim's house and got so bloodied checking the victim's vital signs that he used the washroom to try to clean himself. Nor was there any challenge to the evidence that the blood of the victim was on the floor mat of his car.

[131] I would not give effect to this ground of appeal.

SUMMARY AND CONCLUSION

[132] After examining and to some extent reweighing the evidence, the verdict of guilty of second degree murder is one that a reasonable jury, properly instructed and acting judicially, could reasonably have rendered. The trial judge made no error in admitting the contested evidence of post-offence conduct of the appellant. Some aspects of the judge's charge to the jury on other post-offence conduct

evidence were deficient, but the omission did not result in any substantial wrong or miscarriage of justice to the appellant and the curative proviso set out in s.686(1)(b)(iii) of the *Criminal Code* applies. Further, of the claimed rhetorical excesses by the Crown in its summation to the jury, one was appropriately corrected by the trial judge; the others were not wrong or improper, nor did they cause any prejudice to the appellant.

[133] Accordingly I would dismiss the appeal from conviction. As noted earlier, separate reasons addressing the appeal from sentence are being released concurrently.

Beveridge,
J.A.

Concurred in:
Saunders, J.A.
Farrar, J.A.

**NOVA SCOTIA COURT OF APPEAL**
**Citation:** R. v. Hawkins, 2011 NSCA 6

**Date:** 20110831
**Docket:** CAC 323369
**Registry:** Halifax

**Between:**

Herbert John Hawkins

Appellant

v.

Her Majesty the Queen

Respondents

**Revised judgment:** **The text of the original judgment has been corrected according to this erratum dated August 31, 2011.**

**Judges:** Saunders, Beveridge and Farrar, JJ.A.

**Appeal Heard:** September 28, 2010, in Halifax, Nova Scotia

**Held:** Appeal from conviction is dismissed per reasons for judgment of Beveridge, J.A.; Saunders and Farrar, JJ.A. concurring.

**Counsel:** Darlene MacRury and Patricia A. Fricker, for the appellant
James A. Gumpert, Q.C. and Andre Arseneau, for the respondent

**Erratum:**

[134] The Docket number on the title page has been changed from CAC 232269 to CAC 323369.