NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Garnier*, 2020 NSCA 52

Date: 20200723
Docket: CAC 472252
CAC 479782
Registry: Halifax

Between:

Christopher Calvin Vincent Garnier

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	December 3, 2019, in Halifax, Nova Scotia
Subject:	Admissibility of confessions; adequacy of jury charge on false confessions, after-the-fact conduct and unlawful act homicide. Appeal from sentence: calculation of remand credit for murder and use of aggravating factors for parole ineligibility and a concurrent sentence.
Summary:	The police started a missing person investigation when a female police officer failed to show up for work. The investigation quickly turned to one of homicide with the appellant as the prime suspect. CCTV footage showed the victim and the appellant together at a local pub and then leaving together in a cab. Further video captured them arriving going into an apartment in the North-end of Halifax. Forty-five minutes later, the appellant is seen putting the victim's body into a green recycling bin. He took the body and hid it approximately a kilometer away. The appellant engaged in other significant after-the-fact conduct which included: cleaning the apartment; disposing of a blood-stained mattress and all the victim's personal identification and other

belongings; throwing away his damaged chain necklace and buying an identical one; and, lying to his friend about his conduct. On the night of his arrest, he had a tarp, gasoline, gloves, and rope in the trunk of a car as he drove by where he had hidden the victim's body. During a lengthy interrogation, he repeatedly asserted his right to remain silent, but eventually confessed to having punched and strangled the victim. The appellant faced charges of second degree murder and improper interference with human remains.

At trial, the judge ruled the appellant's statement voluntary. The appellant testified he caused the victim's death unwittingly during erotic asphyxiation and that the details in his police statement were not true. He claimed no memory of much of his post-offence conduct. Expert opinion evidence was led to support the appellant's claim of no memory due to acute stress disorder. Appellant's trial counsel was extensively engaged in crafting a jury charge that brought out his defence. The jury convicted the appellant of both charges. The trial judge imposed life imprisonment with no parole eligibility before 13.5 years and four years' concurrent for the improper interference with human remains.

Issues: (1) Did the trial judge err in ruling the appellant's police statement voluntary?

(2) Did the trial judge err in not charging the jury on the phenomenon of false confessions?

(3) Did the trial judge err in his jury charge on after-the-fact conduct and the elements of unlawful act homicide?

(4) Did the trial judge err in treating the appellant's after-the-fact conduct as aggravating on both the sentence for murder and improper interference with human remains?

(5) Did the trial judge err in refusing to credit the appellant with time he had spent on remand due to allegations he had breached the terms of his release?

Result: The appeal from conviction was dismissed. The trial judge

set out the correct legal principles about the intersection of voluntariness and the appellant's right to remain silent and committed no error in his application of the law to his clear factual findings. Appellant's trial counsel did not request a jury charge on the phenomenon of false confessions, and in the circumstances of this case, one was not required. Further, the trial judge's charge was not marred by reversible error on the extensive evidence of after-the fact conduct and the appellant's partial defence of non-insane automatism, nor with respect to the elements of unlawful act homicide. Appellant's trial counsel was fully engaged in ensuring his client's defence was fully brought out in the jury charge. The trial judge did not "double count" the aggravating factors on parole ineligibility and the concurrent sentence for improper interference with human remains. The Crown conceded that the trial judge should have credited the appellant with an additional 54 days. The sentence appeal was allowed to the extent of an amendment to the Warrant of Committal to add that credit.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Garnier*, 2020 NSCA 52

Date: 20200723
Docket: CAC 472252
CAC 479782
Registry: Halifax

Between:

Christopher Calvin Vincent Garnier

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Beveridge, Farrar, and Beaton, JJ.A.
Appeal Heard:	December 3, 2019, in Halifax, Nova Scotia
Held:	Appeal on conviction dismissed; appeal on sentence allowed in part, per reasons for judgment of Beveridge, J.A.; Farrar and Beaton, JJ.A. concurring
Counsel:	Roger Burrill, for the appellant Mark A. Scott, Q.C., for the respondent

Reasons for judgment:

INTRODUCTION

[1] A chance meeting at a downtown bar can be enjoyable or it could turn into a fiasco—even a nightmare with tragic consequences. This case is about the latter.

[2] The appellant and his common-law partner had a fight on September 10, 2015. He left with the intention to move in, at least temporarily, with his father and step-mother. However, for the first night, he planned to go downtown with his friend, Mitchell Devoe, and stay at Mr. Devoe's McCully Street apartment.

[3] After drinks and marijuana, they went downtown, eventually ending up at a pub called the Alehouse. By happenstance, an off-duty police officer, Cst. Catherine Campbell, also went to the Alehouse.

[4] Cst. Campbell and the appellant talked, kissed and became so physically engaged that bar staff had to tell them to "cool it" three times. CCTV shows their arrival by cab at the Devoe apartment on McCully Street at 4:28 a.m. Approximately 43 minutes later, the appellant is captured on video carrying the victim's body to a recycling green bin. He later dumped her lifeless body a kilometer away under the MacDonald Bridge and covered it with a 90-pound box.

[5] The police started a missing person investigation when Cst. Campbell did not show up for work on Monday, September 14, 2015. It soon evolved into one of homicide, with the appellant as the prime suspect.

[6] The police obtained three recorded statements from the appellant: the first in a police car on September 15, 2015 without caution; a very lengthy cautioned statement post-arrest on September 16, 2015; and, on September 16 into the early morning hours of September 17, 2015, utterances he made to an undercover police officer while he was in a holding cell awaiting transport.

[7] The Crown sought admission of all three statements. This required proof beyond a reasonable doubt that the first two statements were free and voluntary. In addition, the appellant alleged that the police had violated a number of his rights guaranteed by the *Canadian Charter of Rights and Freedoms* and requested the judge exclude the statements on that basis.

[8] The trial judge, the Honourable Justice Joshua M. Arnold, heard a blended *voir dire* addressing all issues over 12 days in the summer and fall of 2017. On November 14, 2017, he gave oral bottom-line decisions. He concluded that: the first statement on September 15 was not voluntary and hence inadmissible; the second lengthy cautioned statement on September 16 was admissible as the Crown met its burden to prove it was voluntary and the police had not violated the appellant's *Charter* rights; and, the third statement of utterances to a undercover cell plant violated the appellant's right to silence and were excluded.

[9] I will provide further details later, but the September 16 cautioned statement was damning. The police repeatedly told the appellant that they believed the victim's homicide must have been an accident. There were even repeated suggestions that maybe it was "rough sex" gone wrong. The appellant denied any sexual activity. Largely, he either did not want to answer any questions or professed no memory of what had happened.

[10] The police officers persisted. Eventually, the appellant told the police he had punched the victim two or three times in the face. There was blood on her face, and he choked her with his hands until he heard her last breaths. He demonstrated his actions.

[11] The appellant insisted that he had no memory of what happened to the victim's belongings, the mattress or putting the victim into the green bin and wheeling her down the street; nor could he remember any discussion with the victim inside the McCully Street apartment.

[12] The appellant testified at trial. He described a much different scenario—essentially one of erotic asphyxiation gone wrong. He recounted that the victim had asked to be choked. They ended up on the pull-out bed. As he masturbated her, she asked him to strike her while she pulled down on his arm that was across her neck. When he noticed blood on his arm, he got up. On his return, she was gasping and took her last breath.

[13] The appellant did nothing to help the victim, although he had CPR training. He did not call 911. Instead, he pulled her body outside on the blood-stained mattress, and put her in a green bin which he wheeled a kilometer away and covered in order to prevent discovery. The appellant also engaged in other significant after-the-fact conduct when he: changed his clothes; disposed of the blood-stained mattress and bedding from the McCully Street apartment and all of the personal belongings of the victim; threw his broken chain-style necklace on top

of a nearby building and bought an identical replacement; and, lied to his friend about what had happened to the mattress.

[14] The jury convicted the appellant of second degree murder and improper interference with human remains, contrary to s. 182(b) of the *Criminal Code*. The trial judge imposed the automatic sentence of life imprisonment for second degree murder and set the period of parole ineligibility at 13.5 years. For the offence of improper interference with human remains, he imposed a sentence of four years' incarceration to be served concurrently.

[15] The appellant appeals from both the murder conviction and sentence imposed. With respect to the conviction appeal, he argues: the judge was wrong to have admitted the second inculpatory statement; the judge failed to properly instruct the jury on the risks associated with false confessions; and, the jury charge was otherwise flawed.

[16] With respect to the sentence appeal, the appellant urges that the trial judge double counted the appellant's after-the-fact conduct and failed to correctly account for 54 days of pre-sentence remand credit.

[17] I am not convinced that we are at liberty to disturb the trial judge's determination that the second statement was admissible, nor does the trial judge's charge merit appellate intervention. I would dismiss the conviction appeal.

[18] The Crown acknowledges that the trial judge erred with respect to the 54 days of pre-sentence remand credit. That must be corrected. Otherwise, I would defer to the sentence imposed.

THE ISSUES

[19] The appellant's original Notice of Appeal from conviction advanced five grounds of appeal:

1. The Learned Trial Judge erred in law in holding that the Appellant's section 7 rights under the *Canadian Charter of Rights and Freedoms* were not violated.
2. The Learned Trial Judge erred in law in holding that the Appellant's second statement to the police was free and voluntary.

3. The Learned Trial Judge erred in law in refusing to admit and consider the opinion of Dr. Tim Moore in deciding whether the statement of the Appellant was free and voluntarily made.

4. The Learned Trial Judge's charge to the jury was so complicated and convoluted that no ordinary juror would be able to understand it.

5. The verdict of the jury is not reasonably supported by the evidence.

[20] The appellant abandoned grounds 3 and 5 and collapsed grounds 1 and 2 into one ground of appeal that challenges the trial judge's admissibility ruling on the second statement. The appellant morphed the jury charge ground into distinct complaints about the lack of an instruction on false confessions, flawed instructions on after-the-fact evidence and the elements of unlawful act homicide.

[21] I would therefore restate the issues on the conviction appeal to be as follows:

(1) Did the learned Trial Judge err in law in ruling the appellant's second statement to the police admissible as proven to be voluntary beyond a reasonable doubt.

(2) Did the trial judge fail to properly instruct the jury:

  (i.) by failing to provide any instruction on the phenomenon of false confessions;

  (ii.) on the proper use of after-the-fact conduct evidence; and

  (iii.) on the elements of unlawful act homicide given the evidence and theory of the defence.

ADMISSIBILITY OF THE SECOND STATEMENT

[22] The appellant argues that the trial judge erred by taking too narrow an approach to the concept of voluntariness and rendered meaningless the appellant's right to silence. This, the appellant says, led the trial judge to exhaustively examine the record for explicit threats or inducements and unduly minimized his repeated assertions of his right to silence. Because he found no inducements, the Crown had met its burden, but the judge was wrong not to look for implied inducements and comment that the appellant had merely expressed his right to remain silent.

[23] Instead, the appellant urges that the trial judge should have undertaken a contextual approach and realized the existence of an implied inducement by the police to get the appellant to tell them what had happened. Such a contextual

approach would bring into play the police indifference or dismissiveness of the appellant's right to silence.

[24] To put into perspective the trial judge's reasons and the appellant's complaints, it is necessary to set out a précis of the evidence and process that led to the admissibility ruling.

[25] I will then address the standard of review, and why, despite the eloquent efforts by Mr. Burrill, I would not accede to this ground of appeal.

[26] As noted above, there was one *voir dire* that addressed all relevant issues on the admissibility of the appellant's three statements. With respect to the second statement, the Crown called the officers who questioned the appellant on September 16, 2015. It also tendered the videotape of the interview along with an Agreed Statement of Facts that dealt with peripheral details.

[27] The appellant did not testify on the *voir dire*, but called Dr. Timothy Moore, a cognitive psychologist. The trial judge refused to permit Dr. Moore to testify about police interrogation tactics or the ultimate reliability and truthfulness of the second statement (see: 2017 NSSC 259). Dr. Moore was allowed to testify about a variety of subjects, all in relation to memory, including false memories, amnesia and the constructive and reconstructive nature of memory.

[28] The parties filed detailed written briefs and appeared in person before the trial judge. The appellant's main submission was 108 pages long. The majority of it dealt with the second statement. It is certainly not necessary to set out all of the details. It is sufficient to note the appellant advanced a comprehensive attack on the voluntariness of the second statement.

[29] Counsel naturally relied on the leading authorities on voluntariness (*R. v. Oickle*, 2000 SCC 38; *R. v. Spencer*, 2007 SCC 11) and the right to remain silent (*R. v. Singh*, 2007 SCC 48), along with the requirement that the appellant had an operating mind (*R. v. Whittle*, [1994] 2 S.C.R. 914).

[30] Counsel cited numerous cases that applied these authorities and quoted extensively from the transcript of the statement in a determined effort to convince the trial judge the Crown had not met its burden to establish beyond a reasonable doubt that the statement was free and voluntary.

[31] The trial judge's written reasons were released on April 12, 2018 (reported as 2017 NSSC 339). He made a number of findings of fact and of mixed law and fact. Later, I will set out some of his key findings. For now, it is sufficient to observe that he found: there were no threats or promises; there was no *quid pro quo*; although the interview was lengthy, the police conduct was not oppressive; the police treated the appellant respectfully and humanely throughout; the appellant's will was not overborne by the police; and, he had an operating mind.

Standard of Review

[32] The parties agree on the appropriate standard of review. A trial judge must correctly articulate the test for admissibility. But findings of fact or mixed findings of fact and law engaged by the application of the legal test are entitled to deference. This means that absent a palpable or overriding error or a finding tainted by an extricable legal error, an appellate court is not at liberty to interfere.

[33] This approach is hardly new. Iacobucci J., for the majority, in *R. v. Oickle* relied on previous leading Supreme Court of Canada authority about the essentially factual nature of the voluntariness question. He explained as follows:

> [22] While determining the appropriate legal test is of course a question of law, applying this test to determine whether or not a confession is voluntary is a question of fact, or of mixed law and fact. See *R. v. Ewert*, [1992] 3 S.C.R. 161, at p. 161; *Ward v. The Queen*, [1979] 2 S.C.R. 30, at p. 42 (per Spence J.); *R. v. Fitton*, [1956] S.C.R. 958, at pp. 983-84 (per Fauteux J.); *R. v. Murakami*, [1951] S.C.R. 801, at p. 803 (per Rand J., Locke J. concurring). Therefore, as this Court held in *Ewert*, a disagreement with the trial judge regarding the weight to be given various pieces of evidence is not grounds to reverse a finding on voluntariness. Respectfully, I believe that the Court of Appeal did just that. Therefore, following *Ewert*, the appeal must be allowed.

[34] The admissibility of evidence in general, and in particular, an accused's out-of-court statement is a question of law for purposes of appellate jurisdiction. But, if the trial judge got the law right, then an appellate court may only interfere if the findings are marred by clear and material error or can be traced to an error in principle. As Cromwell J.A., as he then was, explained in *R. v. Grouse*, 2004 NSCA 108:

> [43] In *Housen*, the majority of the Court held that the standard of review on mixed questions of law and fact, such as the application of a legal standard to the facts, lies along a spectrum: para. 36. Where the decision is traceable to some

> "extricable error in principle", the standard of review is correctness: para. 37. This may occur, for example, if the legal test requires consideration of certain factors but they are not all considered by the judge: *Housen* at para. 27 citing *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 39. Otherwise, mixed questions of law and fact should be reviewed on the palpable and overriding error standard.
>
> [44] In summary, I would state the applicable principles of the standard of appellate review of a finding of voluntariness in a conviction appeal as follows:
>
> > 1. The judge's findings of fact, including the weight to be assigned to the evidence and the inferences drawn from the facts, are to be reviewed on the standard of palpable and overriding error: *Buhay* at para. 45.
> >
> > 2. The judge's statements of legal principle are to be reviewed on the standard of correctness: *Oickle* at para. 22.
> >
> > 3. The judge's application of the principles to the facts is to be reviewed on the standard of palpable and overriding error unless the decision can be traced to a wrong principle of law, in which case the correctness standard should be applied: *Buhay* at para. 45; *Housen* at para. 37.

Analysis

[35] The appellant does not suggest the trial judge did not understand the legal principles that govern voluntariness, nor how voluntariness and the right to remain silent intersect. His arguments on appeal are a more subtle version of what was argued unsuccessfully before the trial judge, and I would not accede to them on appeal.

[36] The trial judge accurately set out the law, and he made clear findings of fact and of mixed fact and law that support his ultimate conclusions that the appellant's right to silence was not infringed and the statements he made to the police were voluntary. The evidence fully supports those conclusions.

[37] I do have some concerns over some of the things said by the police. Taken in isolation, and in some circumstances, such comments could raise a reasonable doubt about the voluntariness of a statement. But in the overall context of the interplay between the police officers and the appellant, the trial judge's conclusion that the statement was voluntary is unmarred by any error, let alone any that could be seen as clear and material.

[38] The trial judge's decision is broken down into four main categories: inducements such as threats and promises; oppression; operating mind; and, breach of the right to remain silent.

[39] With respect to inducements, the trial judge found the police did offer moral inducements. Following the direction in *Oickle* to determine if the police offered a *quid pro quo*, he found none. The judge quoted from *Oickle*:

> [57] In summary, courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne. On this point I found the following passage from *R. v. Rennie* (1981), 74 Cr. App. R. 207 (C.A.), at p. 212, particularly apt:
>
> > Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if promoted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession.
>
> The most important consideration in all cases is to look for a *quid pro quo* offer by interrogators, regardless of whether it comes in the form of a threat or a promise.

[40] The trial judge reasoned as follows:

> [17] The police did rely on moral inducements in order to persuade Mr. Garnier to speak with them. They told him he would feel better about himself as a person, his family would be relieved, Ms. Campbell's family would be relieved, and his girlfriend would be relieved if he explained what had occurred. However, the police made no improper promise (or threat), subtle or otherwise, to Mr. Garnier.

> There is no *quid pro quo* offer from the police to Mr. Garnier to be found within the second statement.
>
> [18] The officers did say many times to Mr. Garnier that he was a good person and also suggested that Ms. Campbell's death may have been caused by something akin to an accident, a mistake, or rough sex gone wrong. He rejected all of those suggestions and instead explained (and demonstrated) that he had purposefully punched and choked her.

[41] The appellant relies heavily on the Ontario Court of Appeal decisions in *R. v. Wabason*, 2018 ONCA 187 and *R. v. Othman*, 2018 ONCA 1073. He argues the trial judge erred by taking too narrow an approach to the issue of voluntariness. The absence of an express *quid pro quo* should not end the inquiry; and, in the context of this interrogation, there was an implied *quid pro quo* that the trial judge did not address.

[42] I do not doubt the need to be mindful of the possibility of an implied *quid pro quo* and the limits to which the police can legitimately go to encourage a suspect to provide a statement in the window of opportunity exposed by the statement taking process. But the factual matrix in cases like *Wabason*, *Othman* and *R. v. Otis* (2000), 151 C.C.C. (3d) 416 (Que. C.A.) are quite different from this case.

[43] In *Wabason*, the trial judge found the appellant's statement to be voluntary because the police did not make any direct threats or promises to induce the statement. The Ontario Court of Appeal concluded the trial judge had taken too narrow an approach to the issue of voluntariness. Pardu J.A., for the Court, observed that despite the appellant's attempt to assert his right to silence, the police repeatedly told him he would be in less jeopardy if he spoke, and if he did not, he would "take the fall" for a murder he did not commit (para. 12).

[44] Justice Pardu concluded a new trial was necessary because in the context of the interrogation, the police comments went beyond exhortations and amounted to both threats and promises:

> [18] The application judge erred in discounting the inducements and threats on the basis that no police or court action was promised in return. Properly conceived, the interviewing officer's veiled inducements of decreased jeopardy for speaking and threats of increased jeopardy for silence gave rise to an implicit *quid pro quo.*

[45] Some months later, the same Court applied this concept in *R. v. Othman*, where a 19-year-old suspect confessed to murder after seeing a video of his girlfriend's interview where she told the police of the appellant's incriminating description of the offence. The trial judge discounted concerns over the police comments that undermined the appellant's legal advice and the implication that he would not get another opportunity to testify.

[46] In a judgment by the Court, the appeal was allowed and a new trial ordered. The police had undermined the legal advice the appellant had received to remain silent and had told the appellant he may never get another opportunity to tell his side of the story. They went so far as to say to him that the trial court would see him in the video statement, refusing to comment (para. 14). The Court reasoned:

> [17] In our view, the interviewing officer's comments, as set out above, constituted both a threat and an inducement as they suggested negative legal consequences if the appellant failed to speak and positive consequences if he spoke.
>
> [18] Moreover, the combined suggestion that, despite legal advice, the 19-year-old appellant should make his own decision about whether to speak and that he would not be believed if he did not speak during the police interview, improperly undermined the advice the appellant received from his lawyer.
>
> [19] We conclude that the trial judge erred in failing to recognize that the interviewing officer's comments amounted to both threats and inducements.

[47] The appellant argues that in this case, there was a similar implied *quid pro quo* that was not addressed by the trial judge. His factum puts it this way:

> 60. The right to silence was rebuffed, ignored, or deflected repeatedly by the police officers. But more importantly, it is the intersection of this continuous ignoring of the Appellant's desire not to say anything and the repeated emphasis on the urgency of the need to speak that creates the context of involuntariness. The police went so far, on occasion, as to actively undermine the right to silence by suggesting, repeatedly, something to the effect that: "This is your time"; "This is your opportunity"; and/or "This is your chance".

[48] I agree that an accused's opportunity to explain what happened is not a limited time offer. There should never be any adverse consequences expressly or impliedly communicated to a suspect to induce a statement. Police officers who try to persuade suspects by such comments run the risk that a court may view them as crossing over the line from moral or spiritual inducements to a threat of negative legal consequences or of positive results that induces a suspect to give a statement.

[49] The appellant raises legitimate concerns. But the problem is all of the impugned comments were before the trial judge, with the same apprehension that they amounted to inducements, a denigration of the appellant's right to remain silent and an implied benefit if he spoke or adverse consequences if he did not.

[50] The complaint that the trial judge's approach was too narrow is betrayed by his comprehensive and meticulous decision that responded to all of the issues raised by counsel, including concerns over the appellant's assertion of his right to remain silent and the officers' comments that: "This is your time"; "This is your opportunity"; and/or "This is your chance". These expressions were in the context of sometimes lengthy soliloquies that appealed to the appellant's conscience to let his family, girlfriend or the victim's family know what had happened.

[51] The appellant asks us to re-interpret the record and come to a different conclusion about the consequences of the police officers' remarks. He argues in his factum:

> 65 **These remarks could only be interpreted as an effort to impress upon the Appellant that urgency was required and that the right to silence was an impediment to his legal best interests.** These comments, at the very least, mischaracterized the Appellant's legal situation. At the most, the officers' approaches were dismissive of and/or disregarded the Appellant's will to remain silent. **Contrary to the Trial Judge's determinations, the Appellant says that in the full context of this interrogation, the state's concerted erosion of the Appellant's repeated expression of his desire to remain silent is indicative of the Appellant's will being overborne. A contextual review of the video exhibit reveals that the Trial Judge mischaracterized the Appellant's sophistication and exercise of agency in the interrogation process, in light of the full context of the interview**.
>
> [Emphasis added]

[52] The trial judge was aware of the appellant's right to remain silent and the potential that continued police questioning can result in an involuntary statement (para. 46). He simply disagreed with the appellant's interpretation. The trial judge made these key findings:

> [53] Mr. Garnier told the police repeatedly that his lawyer had advised him not to provide a statement. Yet he then chose to speak. He told the police many times that he could not or should not speak to them. Then he spoke with them. In argument he says that he expressed his right to silence to the police in one way or another approximately 66 times. In my opinion, while not of ultimate significance in the overall determination of voluntariness of his statement, the number of times

> Mr. Garnier asserted his right to silence is lower than he suggests, as some of the remarks he says were assertions of his right to silence were actually claims that he could not remember what happened, or were outward expressions of his internal conflict about providing a statement.
>
> …
>
> [56] Mr. Garnier's remarks during the second statement suggest he was informed of his right to silence by counsel. He knew he was speaking to police officers. There is no question that the police continued to question him after he said his lawyer had told him to remain quiet. They tried to persuade him to provide a statement. **It is also clear that Mr. Garnier was well-informed as to his right to silence. He referred to it on numerous occasions. Neither Corporal Allison, nor Detective Constable Dooks-Fahie improperly denigrated the legal advice Mr. Garnier received. Instead they spoke to Mr. Garnier in a respectful, and at times, sympathetic manner. The officers appealed to Mr. Garnier's conscience and tried to persuade him to provide a statement by having him focus on explaining the situation to his own family, his girlfriend, and Ms. Campbell's family. They persuaded him, but did not smother his right to choose.**
>
> [Emphasis added]

[53] And later:

> [64] Mr. Garnier did, at times, express his right to remain silent in accordance with his lawyer's advice. Yet, he often engaged with the police. In persistent, but gentle ways, the police continued to reveal evidence to him and continued to try to persuade him to provide a statement. Merely because Mr. Garnier expressed his right to remain silent, the police were not obligated to retreat from the interview. **In watching the video, it appeared to me that Mr. Garnier wanted to speak with the police from the outset. He understood his right to remain silent. At times he asserted that right. At other times he chose to speak. At times he obviously had an internal struggle as to whether or not he should make a confession. However, he was always capable of exercising his own free will while the police were persuading him to talk. Mr. Garnier eventually confessed.**
>
> [Emphasis added]

[54] The record amply supports these findings. For example, the Crown accurately points out many of the appellant's responses were: "I can't", punctuated with other equivocal remarks, such as "not yet"; "I don't want to talk anymore" (three times); "I can't talk anymore"; "I want to tell my lawyer first"; "Can I be alone for a few minutes first?"; and "I want to, I can't".

[55] Given the trial judge's role to make findings of fact or of mixed fact and law, it is not our function, absent clear and material error or an error in law or principle, to come to a different conclusion.

[56] With respect to the right to remain silent, the trial judge was well aware of the importance of the right of the appellant to remain silent and how that right interacts with the issue of voluntariness. He referenced *R. v. Singh*, where Charron J., for the majority, not only remarked on the considerable overlap between the voluntariness inquiry and the review into an alleged breach of the right to silence under s. 7 of the *Charter* (para. 2), but concluded that where a suspect knows they are speaking with a person in authority, the two tests are functionally equivalent (paras. 8, 25).

[57] Furthermore, the modern voluntariness rule requires a Court to determine whether the accused was denied their right to silence. If the circumstances demonstrate a violation of the right to silence, the Crown cannot meet the voluntariness test. However, if a statement is properly found to be voluntary, there can be no finding of a s. 7 violation of the right to silence. Charron J. explained as follows:

> [37] Therefore, voluntariness, as it is understood today, requires that the court scrutinize whether the accused was denied his or her right to silence. The right to silence is defined in accordance with constitutional principles. A finding of voluntariness will therefore be determinative of the s. 7 issue. In other words, if the Crown proves voluntariness beyond a reasonable doubt, there can be no finding of a *Charter* violation of the right to silence in respect of the same statement. The converse holds true as well. If the circumstances are such that an accused is able to show on a balance of probabilities a breach of his or her right to silence, the Crown will not be in a position to meet the voluntariness test. It is important to understand, however, the proper scope of the constitutionalized right to silence, a question that I will address in a moment. As I will explain, Mr. Singh's real bone of contention lies in the scope of the right to silence now constitutionally entrenched under s. 7 of the *Charter*. However, before I do so, more needs to be said on the interrelation between the confessions rule and the residual protection afforded under s. 7 of the *Charter*.

[58] The appellant also argued at trial that the statement was obtained by police oppression because: the interview was too long; the appellant was overtired and hungry; there was persistent questioning; and, the police exerted psychological pressure.

[59] The trial judge recognized that oppressive conditions or conduct can impact the suspect's will and produce an induced confession. The trial judge made clear findings that rejected problematic police conduct. These included the following:

> [28] During the interview Mr. Garnier did not appear to be overtired. He appeared to be alert and responsive throughout.
>
> [29] As noted, Mr. Garnier was given a meal at 11:46 AM. He was given another meal during the interview. He was given water regularly. He was given bathroom breaks upon his request. The police asked him whether he was hungry or thirsty at appropriate intervals.
>
> [30] The police were often sympathetic and comforting with Mr. Garnier. He was treated respectfully and humanely throughout the interview.

[60] The trial judge also rejected the suggestions that the appellant was fatigued or he was ready to say anything in order to end the persistent questioning or the police methods were problematic:

> [39] The police arrested Mr. Garnier in the early morning hours after he was seen driving past the location of Ms. Campbell's body with a tarp, rope, gloves, and gasoline in his SUV. The police had questions for him. Not knowing what had occurred, they suggested to him that he was not a monster and that this must have been an accident. They suggested that he was a good person who may not have meant for Ms. Campbell to die. They asked him if this was rough sex gone wrong or sexual asphyxiation gone wrong. **Mr. Garnier did not merely repeat the police suggestions or always agree with their suggestions. He denied certain suggestions, agreed with others, refused to answer certain questions, claimed a lack of memory, and corrected the police when they inaccurately summarized some of his comments.**
>
> [40] Mr. Garnier was tearful at times during the interview. He never appeared to be so distraught or cognitively debilitated that he could not properly answer questions. He was not offered inducements such that he would anticipate more lenient treatment if he confessed. **Officers were persistent but not relentless in their questioning. They listened to Mr. Garnier and did not speak over him, although they did attempt to persuade him to speak to them, despite the assertion of his right to silence. His will was not overborne by the interviewing methods. There was nothing about the interview that would cause concern that he had been rendered susceptible to the suggestions of the police such that his confession might be false because of police tactics.**
>
> [41] **In this case, contrary to the assertions of Dr. Moore, Mr. Garnier exercised the freedom of will to choose whether or not to answer the police questions. He did not merely repeat the assertions of the police and was not**

> **so overwhelmed when speaking with the police that he lost his ability to exercise his free will**.
>
> [Emphasis added]

[61] I would not accede to this ground of appeal.

FAILURE TO PROPERLY INSTRUCT THE JURY

[62] The appellant complains the trial judge's jury charge was flawed because of omissions. That is, he failed to properly assist the jury by not instructing them on: the phenomenon of false confessions; the after-the-fact conduct evidence; and, the defence of consent and accident. I will address each separately, but before doing so, it is important to observe these complaints were not raised at trial.

[63] While a failure to object to impugned jury instructions has never been considered determinative, it can be seen as evidence that any failing was not serious or caused prejudice (*R. v. Van*, 2009 SCC 22 at para. 43; *R. v. Brooks*, 2000 SCC 11 at para. 99).

[64] An accused is entitled to a fair trial. This requires the jury be properly instructed. Perfection is not the yardstick—a jury charge is reviewed in a functional and contextual way (*R. v. Araya*, 2015 SCC 11 at para. 39; *R. v. Calnen*, 2019 SCC 6 at paras. 6-9). The fundamental question is whether the jury was properly equipped to decide the case according to the law and the evidence.

[65] In this case, not only were there no objections at the end of the jury charge, Crown and defence counsel were actively involved in crafting the charge. As Doherty J.A. observed in *R. v. Polimac*, 2010 ONCA 346:

> [96] ... It is hardly accurate to describe the position of trial counsel who makes no objection after being given a full opportunity to vet and comment on the jury instructions before they are delivered as a "failure to object". **Counsel's duty to assist the court in fulfilling its obligation to properly instruct the jury, referred to by Fish J. in *R. v. Khela*, [2009] 1 S.C.R. 104 at para. 49, takes on added significance where counsel has been given a full copy of the proposed instructions and an ample opportunity to vet them, and has engaged in a detailed pre-trial dialogue with the trial judge. In those circumstances, counsel's position at trial becomes very important when evaluating complaints, raised for the first time on appeal, that matters crucial to the defence were not properly addressed by the trial judge in her instructions.**
>
> [Emphasis added]

See also: *R. v. Huard*, 2013 ONCA 650 at para. 74.

[66] I will provide the details of defence counsel's involvement where the context necessitates.

No charge on the phenomenon of false confessions

[67] The appellant argues that because he testified what he had said to police in his videotaped statement was not true, coupled with the evidence of Dr. Stephen Hucker, the trial judge was required to caution the jury about the phenomenon of false confessions.

[68] With respect, I am unable to agree. The appellant did not falsely confess to having caused Cst. Campbell's death. When he testified before the jury, he admitted he had done so, just in a way that was significantly different than what he had told the police. The question then became one of credibility.

[69] If the jury believed his trial testimony or if it raised a reasonable doubt, there was no unlawful act and an acquittal would follow. If the jury had a doubt whether the appellant meant to cause her death or bodily harm that he knew was likely to cause death and was reckless whether death ensued, a conviction for the lesser and included offence of manslaughter would be the required outcome.

[70] The appellant relies entirely on *R. v. Pearce*, 2014 MBCA 70 where the Court found that in the circumstances the trial judge was required to instruct the jury on the phenomenon of false confessions. In that case, a golf club had been used to beat the victim to death. A man had disclosed to a gas station employee intimate, non-public details about the crime. The police sought the public's help to locate this witness.

[71] In response, the appellant contacted the police and volunteered that he may be the gas station witness. When interviewed, he had no useful information. He agreed to a polygraph examination. The examiner concluded the appellant had nothing to do with the homicide.

[72] The appellant was upset. He later insisted on a further interview. He provided some vague details that appeared to match what the police knew. They then arrested him for murder and arranged for a videotaped interview. The appellant related how he felt horrible, had a lot of anger at the deceased, and "just temporarily lost it" and must have hit the victim. The trial judge admitted the

statement. There was a complete absence of any forensic or other evidence that implicated the appellant.

[73] Mainella J.A., for the Court, discussed the general principles about the courts' role to protect against wrongful convictions due to false confessions. He observed that cases where a jury caution on the phenomenon are advisable typically involve non-custodial situations with undercover police operatives. Juries will not likely be exposed to a false confession induced by improper police interrogation techniques because the voluntariness inquiry, properly applied, excludes such confessions (*Oickle, supra* at paras. 34-47). Nonetheless, a trial judge has the discretion, and in some circumstances, a duty to give a jury caution on the phenomenon.

[74] However, if the explanation for the false confession is not complicated and readily understandable by the jury, such a caution, while prudent, is not necessary. The content of the caution is also within the trial judge's discretion. As noted by Mainella J.A. in *R. v. Pearce*:

> [130] The decision to give a jury caution on the phenomenon of false confessions, and the content of such a caution, is within the discretion of a trial judge. Where the explanation for the potential false confession is not complicated and readily understandable by the jury such a caution, while prudent, is not necessary as a matter of law (*Thomas* at para. 2). Like any caution, what the jury needs to be told about the phenomenon of false confessions, if such a caution is given, will vary with the facts of a particular case.

[75] In this case, the appellant explained to the jury that what he had told the police was what he could remember at the time. He could not tell them the full story of what happened because "they would think I was just trying to blame it on her". He just told them "what they wanted to hear". The possibility the appellant suffered from impaired memory was supported by the opinion of Dr. Stephen Hucker.

[76] Dr. Hucker provided expert opinion evidence to the jury in the form of his report and his testimony. One of his opinions was that the appellant suffered from acute stress disorder caused by severe emotional shock following the death of Cst. Campbell. This, he opined, put the appellant in a dissociative state, and memory loss is a recognized feature of that disorder. I will add further details of his opinion later.

[77] The notion that the appellant suffered from acute stress disorder which caused memory loss would not explain the details of the offence he gave to the police which matched the forensic evidence. The police officers never suggested to the appellant that he had strangled the victim. They did not know the cause of death.

[78] Acute stress disorder also seemed to be inconsistent with the extensive logical efforts the appellant undertook to cover up the homicide, and with the demonstrated ability of the appellant to carry on with his life immediately afterwards with apparent normality.

[79] The uncontradicted evidence was that the appellant: changed his clothes; hid the victim's body some distance away; disposed of the victim's personal effects, some of which were found in a dumpster with his t-shirt, (other items were never recovered); disposed of the blood-stained mattress and bedding; threw away his damaged necklace; purchased an identical new one so his girlfriend would not notice its absence; jokingly lied to his friend about what happened to the mattress; carried out internet searches about drug and alcohol interactions and violent behaviour; reconciled with his girlfriend; attended family social events; and, started his new job.

[80] As recognized in *R. v. Pearce*, a caution about the phenomenon of false confessions is not mandatory in every case where an accused claims that what they told the police or others was not true. This was the case in *R. v. Thomas*, 2010 ONCA 209; leave ref'd [2011] S.C.C.A. No. 34, and *R. v. Lavalee*, 2018 ABCA 328, leave ref'd [2019] S.C.C.A. No. 41. Common to those cases is the notion that a jury, without an express caution, would have readily understood the confession may have been false in the sense it was not true or accurate. Furthermore, the trial judges gave detailed charges about the appropriate assessment of the accuseds' credibility and the overarching requirement for the Crown to prove their guilt beyond a reasonable doubt.

[81] I see no legal error by the trial judge's failure to specifically caution the jury about the phenomenon of false confessions. I agree with the thrust of the Crown's submissions that the charge was not required because experienced defence counsel, fully engaged in mounting a vigorous defence, did not request it, and the reliability of the appellant's police statement due to acute stress disorder or police questioning was front and centre before the jury.

[82] The jury saw the complete videotaped police statement and heard the appellant's trial explanation. The trial judge gave to the jury a complete and accurate charge on the assessment of the appellant's credibility, including the principles from *R. v. W.(D.)*, [1991] 1 S.C.R. 742—that even if they did not believe the appellant's evidence, if it raised a reasonable doubt, they were required to acquit.

[83] Defence counsel read the proposed jury charge. Both he and Crown counsel made numerous suggestions before and during the trial judge's delivery of the charge. There was no request for such a caution. The phenomenon of false confessions could hardly have been overlooked by counsel. It was fully discussed in *R. v. Oickle*, a pivotal case thoroughly explored at trial.

[84] The decision not to request a specific caution may well have been a prudent tactical decision. A caution would have required the trial judge to review the evidence which was consistent or conflicted with the claim that the details of what the appellant had told the police were false. The problem is this: there was no evidence that tended to support a claim the details in the police statement were fabricated, but there was ample independent evidence that supported the truth of what he had told the police. As observed by Moldaver J. in *Calnen*, *supra*:

> [17] Second, experienced defence counsel, well aware of the issue of potential propensity reasoning, did not raise that issue, much less seek a limiting instruction, during the pre-charge conference while vetting the proposed final jury instructions. In short, he signed off on the trial judge's charge knowing full well that it did not contain the kind of limiting instruction that my colleague now says was both obvious and crucial – and indeed fatal to sustaining Mr. Calnen's conviction for second degree murder.
>
> [18] In these circumstances, I consider it fair to ask: Why did defence counsel not raise the issue of general propensity reasoning with the trial judge and seek a limiting instruction of the kind that my colleague now says was essential? The answer, as I will explain, is that in all likelihood defence counsel made a deliberate and conscious tactical decision to marshal the discreditable conduct evidence in an attempt to bolster the truthfulness of Mr. Calnen's out-of-court statement and re-enactment, upon which his defence rested. In these circumstances, while it would have been open to the trial judge to provide a limiting instruction against impermissible propensity reasoning, such an instruction would have had the potential to undermine Mr. Calnen's credibility and thereby undercut his defence.

[85] Experienced counsel signed off on the charge before and after its deliverance with the knowledge that it did not contain a caution on false confessions.

[86] I would not accede to this ground of appeal.

After-the-fact conduct

[87] The appellant accurately concedes the trial judge faced a difficult challenge to create a comprehensive and correct jury charge.

[88] There was a great deal of evidence presented about what the appellant did and said after the homicide. Some of the after-the-fact conduct amounted to direct evidence to establish the elements of the second count of improper interference with the victim's remains.

[89] During the presentation of the defence case, the appellant advanced a defence of non-insane automatism to that charge. The trial judge properly recognized that if the appellant acted in an automaton state, his after-the-fact conduct up to when Mr. Devoe woke him up on September 11 would have no relevance to the murder charge. But the defence of non-insane automatism places the burden on the appellant to satisfy the trier of fact on a balance of probabilities he was in an automatonic state.

[90] Only if he did not meet that burden could the jury then consider the extensive evidence of the appellant's after-the-fact conduct as circumstantial evidence relevant to his guilt on the first count of unlawful act homicide.

[91] The parties agreed the after-the-fact conduct evidence was irrelevant to the issue of intent—that is, his level of culpability. This was because at the time of the trial, this Court had decided that after-the-fact conduct had no probative value on the issue of intent (*R. v. Calnen*, 2017 NSCA 49); a position subsequently rejected by the Supreme Court of Canada (2019 SCC 6).

[92] The appellant now complains that the trial judge's charge became confusing to the point of being unhelpful, if not incorrect. He raises two concerns: the position in the charge where the trial judge explained to the jury that the defence had the burden to establish the defence on non-insane automatism; and, the charge was "under-inclusive".

[93] It cannot be gainsaid that reliance on after-the-fact conduct evidence can create pitfalls. It is important to keep in mind what after-the-fact evidence is and what it can be used for. It is circumstantial evidence tending to show that an accused acted in a manner demonstrating awareness of his or her criminal wrongdoing, thereby permitting a trier of fact to infer that the accused is guilty of the offence with which he or she is charged. This concept was well expressed by Weiler J.A. in *R. v. Peavoy* (1997), 117 C.C.C. (3d) 226 (Ont. C.A.):

> [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.

[94] As observed by Major J. in *R. v. White*, [1998] 2 S.C.R. 72: "In some cases [post-offence conduct evidence] may be highly incriminating, while in others it might play only a minor or corroborative role" (para. 21).

[95] The first step to ensure clarity for juries is for counsel and trial judges to be alive to the intended use for which the evidence is being tendered and the inferences which might be drawn from it. Martin J. (not in dissent on this issue) in *Calnen, supra* explained:

> [113] In addition to being aware of the general principles, it is important for counsel and trial judges to specifically define the issue, purpose, and use for which such evidence is tendered and to articulate the reasonable and rational inferences which might be drawn from it. This often requires counsel and the court to expressly set out the chain of reasoning that supports the relevance and materiality of such evidence for its intended use. Evidence is to be used only for the particular purpose for which it was admitted. When evidence is admissible for one purpose, but not for another, the finder of fact, whether judge or jury, needs to be mindful of and respectful of its permissible and impermissible uses. In such cases, a specific instruction to a jury that certain evidence has a limited use or is of no probative value on a particular issue is required.

[96] In this case, some of the significant after-the-fact conduct of the appellant after the homicide until he was wakened by Mr. Devoe the next morning

constituted both direct evidence to establish the offence of improper interference with the victim's remains, and powerful circumstantial evidence that he knew he had acted unlawfully—the victim's death was not an accident caused by erotic asphyxiation gone wrong.

[97] As recognized by trial counsel, absent a defence of automatism, the appellant had no viable defence to the charge of improper interference with the victim's remains. He urged the trial judge to find that there was an air of reality to the defence and to put it to the jury.

[98] The trial judge agreed. There were extensive pre-charge discussions on December 15, 2017. Counsel were to provide their views on the appropriate charge on the after-the-fact conduct evidence. Apparently they did so, although their submissions do not form part of the appeal record. Discussions on the issue continued on Monday, December 18, 2017. Defence counsel was to provide his further views in writing.

[99] The trial judge gave his draft charge to counsel on December 19, 2017. It was extensively discussed on December 20. The trial judge explained to counsel his reasons for his placement of the charge on automatism. Defence counsel said that he liked where the trial judge had put it.

[100] Appellate counsel acknowledges that the trial judge fully and comprehensively explained the intricacies of non-insane automatism to the jury.

[101] The endorsement by trial counsel with full opportunity, before and during the jury charge is a significant, albeit not a determinant factor on appeal (*R. v. Bouchard*, 2013 ONCA 791 at paras. 38-39, aff'd 2014 SCC 64; *R. v. Patel*, 2017 ONCA 702 at para. 82). In these circumstances, I see no merit in the complaint on how the trial judge charged the jury on the intersection of the proffered defence to the second count and the after-the-fact conduct evidence.

[102] I do have a concern about the Crown's reliance on what it called after-the-fact conduct evidence in the days following the homicide. The trial judge divided the after-the-fact conduct evidence into two time frames. The first was:

> The after-the-fact conduct evidence relating to the time period between Mr. Garnier determining that Ms. Campbell was dead and Mitch Devoe waking him up on the couch includes, from my recollection of the facts: his failure to perform CPR; his failure to call 9-1-1; his failure to call anyone for assistance; moving Ms. Campbell's body from the residence on the mattress; retrieving a green bin;

> placing Ms. Campbell in the green bin; placing a black garbage bag on top of the green bin; pulling the green bin down the driveway between Fred's and Soma Vein; throwing his broken chain onto the roof of Fred's; moving the green bin across Agricola Street, down North Street, and across Barrington Street; leaving his Cheers bracelet in a separate location in the bushes; placing Ms. Campbell in the brush; putting a cat box on top of Ms. Campbell; moving the empty green bin back across Barrington Street to the North Street ramp and placing it in the woods; concealing his t-shirt, Ms. Campbell's keys, and two towels in a black garbage bag and putting it in the dumpster at the EHS parking lot; disposing of Ms. Campbell's cell phone, ID, and shoes; disposing of the mattress; disposing of the bedding; and going to sleep afterwards.

[103] The second was with respect to what he did and said after Mr. Devoe woke him up:

> There is other after-the-fact conduct relating to what Mr. Garnier is alleged to have done after Mitch Devoe woke him up. This is also circumstantial evidence of the same sort I just described. The only difference is, is that automatism does not impact on this evidence. That evidence included, from my recollection of the facts: going to his father's and speaking to his father; reconciling with Ms. Francis on the evening of September 11th; returning to the back yard at McCully Street on September 12th; texting with Mitchell Devoe, including commenting that he had gotten rid of the mattress because he had vomited on it; attending at his father's birthday party; starting a new job on Monday; working on Monday and Tuesday with no apparent difficulty; meeting with Mitch Devoe in the parking lot of Leon's on Tuesday, September 15th, and making certain comments to Mr. Devoe; searching Cipralex and violence, Cipralex and alcohol, Cipralex and marijuana, Cipralex and memory loss on September 15th, 2015; driving by the scene at least twice, as testified to by the police; picking up a black garbage bag from near where Ms. Campbell's body was hidden; walking the dog with Ms. Francis and then leaving her home, in her vehicle, after she went to sleep; taking items from his vehicle, including a blanket, tarp with a rope, a gas can and gloves, and placing them in Ms. Francis' vehicle; taking with him toiletries, clothing, his passport, medication, and love notes from Ms. Francis; driving down to where the body was located and coming to a stop near the body for approximately 10 seconds.

[104] With respect, mixed in with what is plainly relevant after-the-fact conduct evidence, were references to what is more properly called after-the-fact demeanour evidence. This included the appellant going to his father's home, attending his birthday party; reconciling with his girlfriend; starting his new job without apparent difficulty; and, meeting with Mitch Devoe in a parking lot. Simply because these events and actions occurred after the offence, does not change them

into conduct capable of supporting an inference of consciousness of guilt (see: *R. v. Turcotte*, 2005 SCC 50 at paras. 36-39).

[105] The dangers of reliance on demeanour evidence to sustain an inference of guilt is accepted (see for example, *R. v. Enright*, 2009 ABCA 236 at para. 19; *R. v. Anderson*, 2009 ABCA 67 at paras. 51-52). Binnie J., in dissent in the result, but writing for the majority on the applicable principles, in *R. v. White*, 2011 SCC 13, accepted the caution about demeanour evidence voiced by various courts and by *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998), by the Honourable Fred Kaufman, at pp. 1142-50 (paras. 141-2; 183).

[106] There was no objection to the admission of this evidence. I certainly do not suggest that all of what was proffered as after-the-fact conduct evidence was not admissible. It was either relevant to the credibility of the appellant's narrative or to Dr. Hucker's opinion that the appellant suffered from acute stress disorder. Nonetheless, with respect, a limiting instruction about the use the jury could make of this evidence was warranted.

[107] If the trial judge erred by not giving such an instruction, the error was harmless and I would apply the s. 686(1)(b)(iii) proviso.

[108] The last complaint by the appellant is that the charge was "under-inclusive". He says the trial judge did not provide meaningful assistance to the jury about alternative explanations for the evidence about the appellant's conduct in the days following the homicide. The putative error was compounded by the judge's reference for the jury to look to see whether there was any "innocent explanation" before being able to consider the after-the-fact evidence as competent to support an inference of guilt.

[109] The appellant argues the other alternative explanation that should have been provided was that his conduct after he woke up at McCully Street was related entirely to his guilt associated with his improper interference with the victim's body. I am unable to agree.

[110] This position was never advanced by trial counsel nor did he request the trial judge include such an alternate explanation in his charge. All for good reason—the appellant's evidence was that he could not recall having disposed of the victim's body. Logically, how could his conduct be explained by consciousness of guilt caused by something he had no memory of?

[111] To give credence to the appellant's complaint about the use of "innocent explanation" would be to endorse a microscopic parse of the jury charge. It is clear from the overall charge that the jury had to consider all other explanations for the appellant's conduct before it could be used to infer guilt for an unlawful act homicide.

[112] For example, the trial judge told the jury:

> […]On the other hand, if you find that Christopher Garnier was not acting as an automaton, if you find that there is no innocent explanation for his behavior and that what Christopher Garnier did or said afterwards was related to the commission of the first offence on the Indictment **and not to something else**, you may consider this evidence, together with all the other evidence, in reaching your verdict as I have described to you.
>
> [Emphasis added]

[113] The judge also explained:

> If you find that Christopher Garnier did not do or say what he is alleged to have done after Ms. Campbell's death, you must not consider this evidence in reaching or helping you reach your verdict. On the other hand, if you find that Christopher Garnier actually did or said what he is alleged to have done or said after Ms. Campbell's death, you must consider next whether what Christopher Garnier said or did was related to the first offence charged, that is, murder, **or to something else. If you find that Christopher Garnier actually did or said what he is alleged to have done or said after the first offence was committed, you must be careful not to immediately conclude that what he did or said was related to the commission of the first offence charged rather than to something else.**
>
> [Emphasis added]

[114] Finally, the trial judge also included this direction:

> As circumstantial evidence, evidence of after-the-fact conduct has only an indirect bearing on the issue of Christopher Garnier's guilt. You must be careful from inferring that Christopher Garnier is guilty on the basis of after-the-fact conduct, **because there might be other explanations for that conduct, something unconnected with his participation in the offence charged. You may use this evidence of after-the-fact conduct, along with other evidence, to support an inference of guilt only if you have rejected any other explanation for this conduct.**
>
> [Emphasis added]

[115] I see no error in this aspect of the charge and would not accede to this ground of appeal.

Charge on defence of consent and accident

[116] The appellant does not suggest the jury charge was incorrect. He argues it was unduly complex to the point of being incomprehensible. A charge which fits that description may amount to legal error (*R. v. Hebert*, 1996] 2 S.C.R. 272; *R. v. Rodgerson*, 2015 SCC 38 at para. 42).

[117] I earlier referred to the mandated approach to appellate assessment of a jury charge (¶ 64). In addition to those comments, I would adopt Watt J.A.'s succinct description of the governing principles in *R. v. Almarales*, 2008 ONCA 692:

> [60] Jury instructions should equip jurors to decide the case the parties have presented to them for decision. From these instructions, **the jurors, the decision-makers of the parties' choice, must understand the issues of fact that require their decision, as well as the legal principles that govern and the essential features of the evidence that inform that decision. The instructions must also leave the jurors with a firm understanding of the positions of the parties**. *R. v. MacKinnon* (1999), 132 C.C.C. (3d) 545 (Ont. C.A.) at para. 27.
>
> [61] We test the adequacy of jury instructions in a functional way, in other words, against their ability to fulfill the purposes for which they are given, rather than by measuring the extent of their compliance with or departure from a particular approach or formula. *MacKinnon* at para. 27; *R. v. Jacquard*, [1997] 1 S.C.R. 314, 113 C.C.C. (3d) 1 at para. 32; and *R. v. Archer* (2005), 202 C.C.C. (3d) 60 (Ont. C.A.) at para. 48. The adequacy of jury instructions falls to be decided by an assessment of the instructions as a whole, in the context of the trial in which the instructions were given. *Jacquard*, at paras. 32 to 38; *R. v. Cooper*, [1993] 1 S.C.R. 146, 78 C.C.C. (3d) 289 at 301; and *Archer* at para. 48.
>
> [Emphasis added]

[118] This begs the question: what were the factual issues that required resolution, the governing legal principles and the evidence that should inform the jury's decision?

[119] The Crown did not allege the appellant unlawfully caused the victim's death while committing or attempting to commit a sexual assault. If it did, the charge may well have been first degree murder (s. 231(5) of the *Criminal Code*). The Crown alleged the appellant caused the victim's death by means of an unlawful

act—strangulation—accompanied by the requisite murderous intent defined in s. 229(a) of the *Criminal Code*.

[120] The Crown's theory was amply supported by: the forensic evidence; the appellant's statement where he described and demonstrated punching the victim in the face and strangling her until he heard her last breaths; and the appellant repeatedly rejecting police suggestions that the victim had died in the context of "rough sex" gone wrong; and, the extensive after-the-fact conduct indicative of someone who knew that they had committed an unlawful act.

[121] The defence theory was that the victim invited sexual masochism and erotic asphyxiation. The appellant was uncomfortable but acquiesced. The application of force was with the victim's consent and without any intent to cause bodily harm, let alone bodily harm that he knew was likely to cause death and being reckless whether death ensued.

[122] The appellant had no explanation for the extensive after-the-fact conduct other than his claim that he could not recall any of it. Dr. Hucker's theory that the appellant was in an automaton state was rejected by the jury acting pursuant to accurate and comprehensive instructions.

[123] While I agree the charge could have been shorter and clearer, the jury was well equipped to understand the issues they needed to address, the relevant evidence and the position of the parties. The appellant's complaint is that "the charge would have been far more intelligible" if the trial judge had indicated at the outset the possibility of two types of unlawful acts: assault causing bodily harm in conformance with the Crown theory, and sexual assault in response to the evidence presented by the defence. Instead, he criticizes because the jury was left with a charge structured on the Crown theory of the case with references grafted on to consent in the sexual context.

[124] The appellant also complains about the incompleteness of the charge on honest but mistaken belief in consent. With respect, honest but mistaken belief in consent was irrelevant. The appellant testified that the victim consented. Honest but mistaken belief in consent was added to the charge at the appellant's request. I see no error in failing to provide additional instructions.

[125] The trial judge clearly instructed the jury that if the victim consented to the "rough sex" and if the appellant did not intend to cause bodily harm, then his actions were not unlawful; even though he caused the victim's death, the appellant

would have to be acquitted. On the other hand, if the appellant intended to cause bodily harm, then the jury would have to consider whether the unlawful death was accompanied by the intent for murder.

[126] This case was quintessentially about credibility. If the jury believed the appellant, or if his evidence raised a reasonable doubt, he was entitled to be acquitted. The appellant voices no complaint about the trial judge's instructions on how to assess the credibility and reliability of a witness or the *W.(D.)* instruction.

[127] Finally, it is significant that highly experienced trial counsel, fully engaged in his client's defence, assisted the trial judge with crafting the jury instruction that accurately brought out the defence in full force and effect. Counsel was satisfied with the charge. The evidence and issues were clearly understood by all parties at trial and were adequately conveyed to the jury by the trial judge.

[128] I would not accede to this ground of appeal.

THE SENTENCE APPEAL

[129] While unrepresented by counsel, the appellant filed a separate Notice of Appeal from sentence. The grounds of appeal were as follows:

> 1. The sentencing judge failed to properly take into account the circumstances of the appellant and over-emphasized the aggravating factor of the improper interference with a human body in determining parole ineligibility;
> 2. The sentencing judge imposed a manifestly excessive sentence;
> 3. Such other grounds of appeal as may be revealed after a review of the transcript of evidence.

[130] On appeal, appellate counsel confined his submissions to two issues: the trial judge "double-counted" the aggravating factor of the appellant's after-the-fact conduct in trying to dispose of the victim's body to increase the period of parole ineligibility, yet used that conduct to impose four years' incarceration for the improper interference with human remains; and, the trial judge refused to include the time the appellant spent on remand pending the Crown's bail revocation hearing as part of his time spent in predisposition custody.

[131] The trial judge's reasons are reported as 2018 NSSC 196.

Double-counting

[132] I accept the Crown's submission that where a court sentences an offender on two or more counts arising from the same transaction on a concurrent basis, it will usually be appropriate to consider the commission of other offences as aggravating to the main count because they may inform the gravity of the offence and the overall moral culpability of the offender (see for example *R. v. White*, 2020 NSCA 33).

[133] Attempts to cover up a homicide have long been considered a relevant aggravating factor when a court is required to fix the appropriate period of parole ineligibility (see for example: *R. v. Sodhi* (2003), 175 O.A.C. 107 at paras. 130-1, leave to appeal to SCC refused, [2004] S.C.C.A. No. 31; *R. v. Ryan*, 2015 ABCA 286 at para. 26; *R. v. Hawkins*, 2011 NSCA 7 at para. 60).

[134] In this case, the trial judge referred to the appellant's conduct, not just in relation to improper interference with the victim's remains, but also other evidence as aggravating after-the-fact conduct:

> [73] Mr. Garnier was a physically capable man. Ms. Campbell was an unsuspecting and vulnerable woman. **Her strangulation was ongoing for between two and six minutes, and Mr. Garnier went to considerable efforts to hide her body and other evidence**. This warrants an increase beyond the 10-year minimum. However, unlike *Calnen, McRae,* and *Sodhi*, this was not a domestic situation and that statutorily proscribed aggravating factor is not present.
>
> [74] Balancing this is Mr. Garnier's previously pro-social lifestyle, extremely positive character reference letters and Pre-Sentence Report, as well as his lack of prior involvement with the criminal justice system. However, the facts of his crime are serious and reflect a high degree of moral culpability. Mr. Garnier's personal circumstances do not outweigh the aggravating factors in this case.
>
> …
>
> [76] Considering cases that involve similar offenders and similar situations, Christopher Garnier's parole ineligibility will be set at 13.5 years.
>
> [Emphasis added]

[135] The trial judge also imposed four years' incarceration for the offence of improper interference with the victim's remains to be served concurrently. I accept that double-counting can occur if a court were to impose a *consecutive* sentence for improper interference with human remains if it were also considered as aggravating on the main charge (*R. v. Shyback*, 2018 ABCA 331 at para. 23).

Even if the improper interference were the only aggravating after-the-fact conduct—which was not the case—I see no reversible error where the sentence imposed for the unlawful interference is to be served concurrently.

Remand time

[136] Appellate counsel identifies what he says is an error by the trial judge with respect to a failure to include in the warrant of committal 54 days the appellant spent on remand following his arrest for an alleged failure to abide by his terms of release.

[137] Rosinski J. heard and dismissed the Crown's bail revocation application. In the meantime, an Information had been laid in Provincial Court which charged the appellant with the same conduct as breaches of his release conditions, contrary to s. 145(3) of the *Criminal Code*. These charges were subsequently stayed after Justice Rosinski's dismissal.

[138] The trial judge reasoned:

> [79] Mr. Garnier argues that time he spent in custody for the s. 145 allegation, 53 days, should be included in the total time provided for remand credit. I do not agree. Mr. Garnier was remanded during that time for the s. 145 charge, not in relation to the murder charge or the interfering with human remains charge. His bail on the murder charge was never revoked. There is no authority to apply remand credit for time served on remand in relation to one charge to reduce the sentence of a separate charge.

[139] The respondent agrees the trial judge took too narrow an approach to s. 746 (a) of the *Criminal Code* that directs calculation of the sentence of life imprisonment to include the day the person was arrested and taken into custody "in respect of the offence for which that person was sentenced to imprisonment for life and the day the sentence was imposed".

[140] Similar language in s. 719(3) that permits a court to take into account any time an accused has spent in custody "as a result of the offence" has been interpreted to simply require a logical connection between the offence and the time spent in predisposition custody (see: *R. v. Hoelscher*, 2017 ABCA 406 at para. 27). I agree.

[141] As a result, I would allow the sentence appeal only to the extent of an amendment to the Warrant of Committal from a credit of 699 days in predisposition custody to 753 days.

[142] Otherwise, I would dismiss the conviction appeal and the other issues raised on the sentence appeal.

Beveridge, J.A.

Concurred in:

Farrar, J.A.

Beaton, J.A.