NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Whynder*, 2020 NSCA 77

Date: 20201127
Docket: CAC 489483
Registry: Halifax

Between:

Ricardo Jerrel Whynder

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	September 29, 2020, in Halifax, Nova Scotia
Subject:	Criminal law: adequacy of jury charge on: the elements of accessory liability to murder; the duty to relate the evidence to those elements; and, the permissible uses of the after-the-fact conduct evidence
Summary:	The victim was murdered by a single gunshot wound. Circumstantial evidence and admissions by the appellant pointed to his presence at the time of the murder. The Crown's theory was that the appellant and another individual travelled to Nova Scotia and acted as co-principals in the first degree murder of the deceased—the appellant was guilty as either the shooter, a co-principal or as an aider to the shooter. The jury acquitted the appellant of first degree murder but convicted on the lesser and included offence of second degree murder.
Issues:	(1) Did the trial judge adequately relate the evidence to the issues the jury had to decide?

(2) Did the trial judge properly instruct the jury on the appropriate use they could make of the after-the-fact conduct evidence?

Result: The appeal is allowed and a new trial ordered on the charge of second degree murder. Where the cause of death could only have been inflicted by one person, there is no potential for co-principal liability. It was misdirection to leave with the jury the concept of the appellant's liability as someone who may have contributed significantly to the victim's death. He was liable either as the shooter or as an aider or abettor. At no time did the trial judge set out for the jury the issues they would have to decide to find the appellant guilty as an aider or abettor, nor the evidence relevant to those issues, in particular the very different mental elements applicable to accessorial liability.

In certain cases, after-the-fact conduct evidence can be relevant to the issue of an accused's intent. In this case, the appellant's deceit was not relevant to that issue.

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Judges:	Beveridge, Farrar and Derrick, JJ.A.
Appeal Heard:	September 29, 2020, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Beveridge, J.A.; Farrar and Derrick, JJ.A. concurring
Counsel:	Roger A. Burrill, for the appellant Mark A. Scott, Q.C., for the respondent

Reasons for judgment:

INTRODUCTION

[1] Matthew Sudds was murdered. A single gunshot to his head caused his death. There were no witnesses. However, ample circumstantial evidence and the appellant's admissions would permit no other conclusion but that he was present at the scene and, from a lay perspective, otherwise "involved" in that homicide.

[2] The Crown's theory was that the appellant and one Devlin Glasgow travelled to Nova Scotia to murder Mr. Sudds. They acted as co-principals in the planning and execution of the first degree murder of the deceased.

[3] Appellant's trial counsel admitted to the jury that it could not realistically be disputed that the appellant was present when the deceased was murdered, but the Crown had not established that he caused the deceased's death or was liable as a party to the murder.

[4] The jury acquitted the appellant of first degree murder but convicted him on the lesser and included offence of second degree murder. He now appeals. He asks for a new trial because the trial judge's jury charge did not properly relate the evidence to the issues the jury needed to decide and how it dealt with so-called after-the-fact conduct evidence. Despite Mr. Scott's stalwart efforts, I agree. I would allow the appeal and order a new trial on the charge of second degree murder.

[5] Because there must be a new trial, I will only set out as much of the evidence as is necessary to provide context for the issues the jury had to decide and why the jury charge fails to pass legal muster.

THE ISSUES/EVIDENCE BEFORE THE JURY

[6] The issues a jury must resolve are framed by the elements of the offence charged and the evidence the parties relied on to establish those elements or claim the existence of reasonable doubt on one or more of them.

[7] In broad strokes, the charge of first degree murder against the appellant required the Crown to prove beyond a reasonable doubt the appellant either caused Mr. Sudds' death on Thursday, October 10, 2013 with the requisite murderous

intent and the murder was planned and deliberate or he was otherwise liable as a party to that murder.

[8] To that end, the Crown presented a substantial body of circumstantial evidence that would permit a trier of fact to infer the appellant and Devlin Glasgow had forged a plan to murder Mr. Sudds. There was significant telephone communication between them in the days before and after the appellant traveled from Toronto to Halifax on October 7, 2013.

[9] The appellant's girlfriend rented a black Dodge Charger on October 8, 2013, with a scheduled return date of October 11, 2013.

[10] The deceased's mother, Mrs. Sudds, testified. She was frank. Her son sold drugs for a living. She had known the appellant for five years as her son's friend.

[11] On October 9, 2013, Mr. Sudds gave his mother $350 to give to the appellant. Later that evening, she gave the appellant the money, and saw him get into a black Dodge Charger.

[12] The police identified the appellant as either the driver or a passenger in that vehicle at two different times and locations in Halifax on Friday, October 10, 2013. Phone records would support the inference that the appellant picked Mr. Glasgow up at the Halifax airport on the morning of October 10.

[13] Various telephone exchanges between the appellant and the deceased led to an October 10 evening rendezvous in a Burger King parking lot. Video surveillance from that parking lot captured the deceased getting into a black Dodge Charger, never to be seen alive again.

[14] The black Dodge Charger was dutifully returned to the rental agency on the morning of October 11. Agency staff observed that the car came back "pretty clean"—"cleaner than the average rental car". Nonetheless, subsequent forensic examination turned up gunshot residue, along with DNA and fingerprints that were said to match those of Devlin Glasgow. Other stained areas contained blood with DNA that matched the deceased's. The forensic examination did not link the appellant to the car.

[15] In the afternoon of October 11, 2013, airline tickets were purchased by a third party for both the appellant and Mr. Glasgow for flights leaving later that evening from Halifax to Toronto, Toronto to Vancouver. Video surveillance

showed the appellant's girlfriend dropping them off at the Halifax airport. Records and further video surveillance confirmed Glasgow and the appellant travelled together on the flight from Halifax to Toronto.

[16] The appellant stayed in Toronto after a brief embrace and handshake with Mr. Glasgow, who continued on to Vancouver.

[17] The deceased did not return home after October 10, 2013. Calls and texts went unanswered. On October 12, Mrs. Sudds reached out to a number of people to try to find her son. One of those was the appellant. He said he would call her back and let her know. A half-hour later, he called back. He told her the deceased had got himself into some trouble in Dartmouth and that he had to put the deceased on a plane to Montreal to get him out of the city.

[18] The appellant added that the deceased had asked him to tell his mother not to worry. She never heard from either her son or the appellant again. Within days of that call, the appellant cancelled his cell phone contract.

[19] On October 14, 2013, the deceased's body was discovered in a ditch, some eight to ten feet off the Africville Road, in what is now a remote area in the north end of Halifax. It was obvious to the laypeople who discovered his body that he had been murdered—he had been shot in the forehead.

[20] Forensic examination of the area uncovered a spent cartridge in the earth beneath where his head had been located, an unfired cartridge, and two shell casings. An expert testified that the recovered evidence was consistent with one gun.

[21] The pathologist's report and her evidence could not have been clearer: the cause of death was a single gunshot head wound. There were also gunshot wounds to the deceased's arm and neck which could have been caused by a single shot. The only other injury apart from the gunshot wounds was a 3.5 cm laceration above his ear which could have been caused by his head striking something during a fall or by blunt force trauma caused by an object harder than a hand or elbow. All the pathologist could offer is the deceased received the laceration shortly before the fatal gunshot wound.

[22] The Crown's case was rounded out by admissions and statements the appellant made to a call-in line and to the police. On March 8, 2017, the appellant called a rewards program managed by the Nova Scotia Department of Justice.

Rewards of up to $150,000 are available to people offering information on unsolved homicides or missing person cases.

[23] The office was not open when the appellant first called on March 8, 2017. He left a recorded message that he had information on two homicides, those of Matthew Sudds and Horatio Clayton. A contact number was left.

[24] On March 9, 2017, the call was returned. The rules were explained to the appellant. To be eligible: he may have to testify; he cannot have been "involved"; and, the information must lead to a conviction.

[25] They discussed what "involved" meant. The appellant volunteered that he was there on both occasions. He was told he could not have helped set it up or driven the person to commit the homicide. The appellant explained that he was in the vehicle for each of the homicides.

[26] When directly asked for information, the appellant demurred. He needed to sit down with a lawyer to make sure he was covered—"have it all on paper what's in it for me"—before he gave any information.

[27] The appellant said he was not motivated to see people locked up, as he was "no innocent himself"—and "no model innocent citizen". The call ended with the appellant's announced intention to call a lawyer and one Detective Kent with the Halifax Regional Police.

[28] It turns out that Detective Kent was actually Sgt. Walsh. Sgt. Walsh learned on March 9 of the appellant's call to the rewards program offering information on Matthew Sudds' homicide. The appellant did call Sgt. Walsh that very day. The appellant said he was the one who had called the rewards line. An arrest team quickly assembled. They flew to British Columbia, where the appellant was then living, and arrested him on March 10, 2017.

[29] A recorded interview followed. As police interviews go, it was mostly unfruitful. The appellant told many transparent lies. He denied: he even knew the deceased or his mother; he was in the black Dodge Charger; or he was the rewards line caller.

[30] After the recorded interview, the appellant requested to see Sgt. Walsh in cells. The appellant told Sgt. Walsh that he could "give him the shooter" in the Matthew Sudds homicide.

[31] The next day, the appellant asked Sgt. Walsh if Devlin Glasgow was in Halifax and whether he had been arrested. The answer was negative to both queries. With respect to the second question, the appellant then responded, “He will be on Wednesday”.

[32] At the close of the Crown’s case, the appellant moved for a directed verdict to have the charge dismissed on the basis that, although the jury could reasonably conclude the appellant was present when the murder occurred, they could not infer he was the principal or a party with the requisite mental element. The Crown argued there was ample evidence that would permit the jury to convict the appellant as a principal, a co-principal or as an aider or abettor.

[33] The trial judge, the Honourable Justice Denise Boudreau, dismissed the motion in a bottom-line decision on June 18, 2019, with detailed reasons to follow (now reported as 2019 NSSC 234). I mention this event because it served as a debut of the legal divide between the Crown and the appellant about available avenues for liability and the role that the after-the-fact conduct evidence could legitimately play in the jury’s determination of the appellant’s level of culpability.

[34] After the failed directed verdict motion, the appellant did not testify or call any evidence.

[35] With this background, I return to the issues.

THE ISSUES

[36] The Notice of Appeal set out the following two grounds:

1. The trial judge erred by instructing the jury that they could use after-the-fact conduct evidence as proof of the accused’s level of culpability and as proof of his mental state at the time of the offence;

2. The trial judge erred by failing to properly instruct the jury as to the elements of manslaughter for an accused acting as a party to an offence.

[37] The appellant’s factum presents arguments that differ somewhat from these grounds. Instead, counsel argues the jury charge was flawed as it failed to: (1) properly relate the evidence to the issues the jury had to decide in relation to the appellant’s liability for murder as a party, and in particular the position of the

defence that he was present, but no more; and, (2) instruct on the proper use they could make of the after-the-fact conduct evidence. The respondent takes no exception to the revamped complaints.

[38] Before addressing the complaints, it is appropriate to recognize the principles that guide appellate scrutiny.

STANDARD OF REVIEW

[39] The law is settled. The parties do not suggest any ambiguity or uncertainty on the principles that control appellate review. We must not require perfection. Deference is owed to the many available approaches a trial judge may choose to properly equip the jury to carry out its adjudicative duty. To that end, minute scrutiny is avoided. Instead, a functional and contextual approach predominates (*R. v. Araya*, 2015 SCC 11 at para. 39; *R. v. Calnen*, 2019 SCC 6 at paras. 8-9).

[40] Substance, not form, is the watchword. Putative errors are examined in the context of the entire charge and the trial as a whole (*R. v. Jaw*, 2009 SCC 42 at para. 32). This includes addresses by counsel, how the parties treated the issues at trial and their submissions about the jury charge.

ANALYSIS

[41] As is becoming the custom, the trial judge gave her draft jury charge to counsel. A day later, submissions were made. Appellant's trial counsel strenuously objected to: the proposed charge about party liability; the lack of any relation of the evidence to the elements of party liability; and, the proposed charge on how the jury could use the after-the-fact conduct evidence. I will discuss the after-the-fact conduct charge later.

The liability of the appellant as a party

[42] It is apparent that the trial judge relied on the well-known and highly regarded guide on appropriate jury instructions, *Watt's Manual of Criminal Jury Instructions*, 2nd ed (Toronto: Carswell, 2015). Also of assistance are the Canadian Judicial Council's *Model Jury Instructions* and *Canadian Criminal Jury Instructions (CRIMJI)*, loose-leaf updated November 2019, 4th ed (Vancouver: Continuing Legal Education Society of British Columbia, 2005).

[43] However appropriate and accurate specimen charges are in the abstract, they are the beginning of the process, not the end.

[44] Appellant's trial counsel voiced no objection about the generic description of aiding and abetting, nor the articulation in the jury charge of the elements to establish the appellant's potential liability as a principal.

[45] To be guilty as a principal, the Crown needed to prove beyond a reasonable doubt the following four essential elements:

> (1) That Ricardo Whynder caused the death of Matthew Sudds;
>
> (2) That Ricardo Whynder caused the death of Matthew Sudds unlawfully;
>
> (3) That Ricardo Whynder had the state of mind required for murder; and,
>
> (4) That Ricardo Whynder's murder of Matthew Sudds was both planned and deliberate.

[46] Each of these elements were transposed into questions. The first dealt with causation. The trial judge told the jury that they had to be satisfied that the appellant's conduct caused or contributed significantly to Matthew Sudds' death:

> … did Ricardo Whynder cause Matthew Sudds's death? To prove that Ricardo Whynder's conduct caused Matthew Sudds's death Crown counsel must prove beyond a reasonable doubt that Ricardo Whynder's conduct caused or contributed significantly to Matthew Sudds's death. Ricardo Whynder's conduct may contribute significantly to another person's death, even though that conduct was not the only or main cause of the other person's death. If you are satisfied beyond a reasonable doubt that Ricardo Whynder's conduct contributed significantly to Matthew Sudds's death, it does not matter that proper or timely medical treatment might have saved Matthew Sudds's life.

[47] The trial judge instructed the jury that to answer this question, they must consider all of the evidence:

> To answer this question you must consider all the evidence, take into account the testimony of all witnesses who described the events that took place around the time that Matthew Sudds died, as well as the opinions of the experts. Use your good common sense.
>
> There is no direct evidence of Mr. Whynder causing or significantly contributing to Mr. Sudds's death. The evidence for you to consider, if you accept it, is circumstantial.

[48] The trial judge then embarked on a complete and comprehensive recitation of the trial evidence. At the end of her recapitulation, she summarized their task on this element:

> As I said, the evidence as to this element is entirely circumstantial. Remember that I told you that in order to find an accused person guilty of an offence on the basis of circumstantial evidence you must be satisfied beyond a reasonable doubt that guilt is the only reasonable inference that can be drawn on the whole of the evidence. If you are not satisfied beyond a reasonable doubt that Ricardo Whynder caused or contributed significantly to the death of Matthew Sudds, you must find Ricardo Whynder not guilty of that charge. Your deliberations would be over. **If you are satisfied beyond a reasonable doubt that Ricardo Whynder caused or contributed significantly to the death of Matthew Sudds, you must go on to the next question**.
>
> [Emphasis added]

[49] This direction, in these circumstances, amounts to misdirection in light of the evidence and real issues the jury had to decide. I say this because causation was never an issue. The cause of death was a single gunshot wound to the head.

[50] The lengthy repetitive charge about causation being satisfied if they found he "contributed significantly" to Matthew Sudds' death would likely be harmless if the only issue for the jury were whether they could infer the appellant was the shooter.

[51] But the Crown theory advanced to the jury premised the appellant's liability for murder as either the shooter, a co-principal, or a party to the offence as an aider or abettor under s. 21(b) or (c). Although the trial judge charged the jury on the potential for liability as a party under s. 21(b) or (c), she did so in the abstract. At no time did she ever define or explain those requirements in the context of the evidence in this case, nor how the appellant could somehow be liable as a co-principal.

[52] Appellant's trial counsel objected to the recitation of the questions the jury had to resolve because they said nothing about the issues the jury would have to decide to find the appellant criminally liable as an aider or abettor. In addition, it was inappropriate to focus on causation if liability as an aider or abettor was a live issue. These, and other concerns about the necessity for an aider and abettor to have been aware of the principal's murderous intent when acts were done that aided or encouraged, were brushed aside at the Crown's urging.

[53] The Crown appeared to convince the trial judge that it was wrong to equate the concept of principal as only the shooter. This is how they put it:

> The Crown sees a real issue with that because it's equating the shooter with the principal which is not the case. Being a principal is a legal definition. It's not necessarily the principal. **I don't want them to be left with the impression that it is only the person who pulled the trigger that is the principal for this offence because the law is clearly not that.**
>
> …
>
> The Crown doesn't have to prove who pulled the trigger, the gun. In order to be a principal of a homicide, it doesn't have to be shown that it was Mr. Whynder who pulled the trigger and [sic] the gun.
>
> **It's open to the jury to find that he's a principal, a joint principal, or a party by aiding or abetting. They can all have different thoughts on which one he is. They don't even have to agree on that. All of those are open to them.**
>
> And to equate the shooter with the principal, to have those interchangeable is problematic. Because in law, we don't have to establish that the shooter ... that the person who pulled the trigger is indeed the principal.
>
> [Emphasis added]

[54] As I will demonstrate shortly, in these circumstances, that is not the law. But first, it is important to observe that the Crown advocated this very view to the jury:

> There's a couple of different ways we can prove this. You could be a party or a principal. There might be some argument over what a principal is. But nonetheless, we know the person that fired the gun and killed him is definitely the principal.
>
> In our view, of course, **a principal could be anybody that's moving along with the whole plan.** You don't have to fire that gun in order to be convicted of first-degree murder. That's important for you, because as you hear from the evidence there may be another shooter. Not another shooter. The shooter might be a different person than Ricardo Whynder.
>
> [Emphasis added]

[55] At no time did the trial judge instruct the jury about how they could find the appellant guilty as a co-principal or a principal other than as someone who caused or contributed significantly to Matthew Sudds' death.

[56] To be sure, the concept of co-principals exists as two or more people can commit all of the essential elements of the same offence. It can only apply in cases

of murder where multiple accused commit acts which significantly contribute to the victim's death (with the necessary mental element) but it is uncertain which acts actually caused death. LeBel J., in *R. v. Pickton*, 2010 SCC 32, explained:

> [63] In certain circumstances, uncertainty as to the involvement of known or unknown third parties as co-principals in the offence may also be legally irrelevant. Co-principal liability is codified in s. 21(1)(a) of the *Criminal Code*: "Every one is a party to an offence who actually commits it". It therefore arises whenever two or more people "actually commit" an offence to make both people individually liable for that crime. It also arises where two or more persons together form an intention to commit an offence, are present at the commission of the crime, and contribute to it, although they do not personally commit all of the essential elements of that offence (*R. v. Mena* (1987), 34 C.C.C. (3d) 304 (Ont. C.A.), at p. 316). If the trier of fact is satisfied beyond a reasonable doubt that the accused committed all elements of the crime, it does not matter whether another person may also have committed it.
>
> [64] In relation to murder, which, as noted above, is premised on a causal requirement (the allegedly unlawful act must "cause" death), the classic scenario in which the potential for co-principal liability arises is when two or more persons assault the victim at the same time, by beating him or her to death: see, for example, *R. v. McMaster*, [1996] 1 S.C.R. 740. In a joint beating case, since each accused commits each element of the offence of murder (the entire *actus reus* and *mens rea* of the offence), and only factual causation may be uncertain (which person delivered the "fatal" blow), legal causation will allow for uncertainty as to the actual act which caused the death. The only requirement for "causation of death" is that related to murder/manslaughter generally. It must be established that each accused's assault of the victim was a "significant contributing cause" (for manslaughter or murder generally) or an "essential, substantial and integral part of the killing" (for first degree murder under s. 231(5)): *Nette*, at para. 73.

[57] LeBel J. went on to stress that where the cause of death could only have been inflicted by one person there can be but one principal offender. The potential for co-principal liability is eliminated:

> [67] Where the cause of death could clearly only have been inflicted on the victim by one person, however, and there is no evidence of any other force being applied to the victim prior to death, then absent any other evidence, likely the only logical inference is that there exists only a single principal offender. The principles of criminal causation demand such a conclusion, as there cannot be said to be any other "significant contributing cause" to the death. In that situation, the potential of co-principal liability is eliminated.

[58] It is important to note that Justice LeBel wrote for a minority of three, concurring in the result. I see no disagreement in the majority opinion of Charron J. with the statement of the governing principles set out by LeBel J. Instead, she concluded that although the jury charge was imperfect, it adequately conveyed the relevant legal principles.

[59] On the other hand, LeBel J. reasoned the charge was legally flawed, yet would have upheld the convictions by invocation of the curative proviso due to the overwhelming evidence.

[60] As in this case, in *Pickton*, the factual cause of death with respect to three of the murder counts was a gunshot wound to the head. Potential liability as a co-principal was simply not available. As LeBel J. reasoned:

> [70] In this case, it was accepted in counts 1 through 3 that the factual cause of death of those victims was a gunshot wound to the head. Therefore, regardless of what else happened before or after each of the victims was murdered, only one person actually fired the bullet which caused the victims' deaths.
>
> [71] There was no evidence of any other "significant contributing cause" to the deaths of the victims other than the gunshot wounds. There was no basis on the evidence admitted at trial to infer that two persons, acting together, caused the deaths of the victims in any of the six counts such that they would be rendered co-principals; there could only have been one shooter of the gunshot which caused the victims' deaths. I agree with the appellant that the potential for a situation such as in *Miller v. The Queen*, [1977] 2 S.C.R. 680, simply did not exist here. There was no evidence that there may have been one person holding the gun, and one person who pulled the trigger, and thus two participants in the unlawful act causing death. Potential liability for other forms of participation in those murders had to flow, not through co-principal liability, but through aiding and abetting.

[61] It has long been recognized and emphasized that the findings of fact and the legal principles to determine accessory liability are very different than those for a principal (see: *R. v. Briscoe*, 2010 SCC 13; *Pickton* at paras. 73 and 76). These requirements were set out by this Court in *R. v. Johnson*, 2017 NSCA 64 (see also *R. v. Kelsie*, 2017 NSCA 89, appeal allowed in part, not on a different view of party liability, 2019 SCC 17).

[62] Appellant's trial counsel provided the trial judge with a copy of *R. v. Johnson* that particularized the elements the Crown must prove in order to establish liability of an accused as an aider or abettor of first degree murder (paras. 80-81). None of those requirements were canvassed with the jury. Furthermore,

the Decision Tree given to the jury only set out the elements for potential liability as a principal.

[63] The only reference to the principles that govern accessory liability were early on in the charge. It described the legal concepts that would apply to any allegation where an accused faced liability as an aider or abettor. At no time did the trial judge relate those general constructs to the concrete reality of this case.

[64] The consequences of a failure to adequately relate the evidence to the particular requirements of liability as an aider or abettor were addressed by the Ontario Court of Appeal in *R. v. Mendez*, 2018 ONCA 354; *R. v. Josipovic*, 2019 ONCA 633; and, *R. v. Barreira*, 2020 ONCA 218.

[65] In *Mendez*, the appellants were convicted of first degree murder. After a series of phone calls, the victim left his home. The two appellants had been at a baby shower nearby. They left the shower shortly after the last phone call. Surveillance cameras captured their images running towards the victim's house. One of the appellants shot the victim in the back of the head and back. The non-shooter was in the vicinity at the time. Both appellants fled to the home of a former girlfriend of one of the men. They each changed some of their clothes. The murder weapon was found outside that home.

[66] Pardu J.A., for the Court, observed that because the Crown could not prove which role, if any, each of the appellants had played, both had to be acquitted unless the Crown could prove that the non-shooter aided or abetted the killing (para. 4).

[67] The convictions were quashed and a new trial was ordered for two reasons: the jury charge did not relate the evidence to the issues of planning and deliberation in a balanced way; and, the trial judge failed to relate the evidence to the necessary elements of aiding and abetting (para. 5).

[68] Although, as here, the trial judge had set out the legal principles of aiding or abetting in general, there was no attempt to relate the evidence to those requirements (para. 8). Instead, the trial judge in *Mendez* instructed the jury to determine if the appellants acted jointly or in concert:

> [9] The trial judge told the jury that it could consider the appellants' conduct after the shooting to determine whether they were acting jointly or in concert before or during the shooting. She defined active participation in the killing as either shooting or doing something for the purpose of aiding or abetting the killing.

> Rather than focusing the jury's attention on the issue of whether the Crown had proven the elements of aiding or abetting in relation to the non-shooter, she invited the jury to consider whether the killing itself was planned and deliberate and whether either individual accused participated in the killing by acting jointly with the shooter. While the instructions elsewhere in the charge correctly set out the elements of aiding and abetting, the instructions had the functional effect of telling the jury that if the shooting was planned and deliberate, and if the parties "acted jointly," both were guilty of planned and deliberate murder. This obscured the need to find proof of the elements of aiding or abetting, the act of assistance or encouragement, and the intention to assist or encourage a second degree murder or a planned and deliberate first degree murder.
>
> [Emphasis in original]

[69] Based on the principles drawn from LeBel J. in *Pickton*, this approach was found to have failed to properly equip the jury. Pardu J.A. reasoned:

> [12] As noted in *Pickton*, at para. 69, "phrases such as 'concerted action', 'acted in concert', 'common design', 'participation in a common scheme' and 'joint participation' are phrases which properly capture the entire gamut of principal liability, co-principal liability and liability as an aider or abettor."
>
> [13] The majority agreed that the trial judge in *Pickton* should have charged the jury on aiding and abetting, but dismissed the appeal because the evidence of the accused's guilt was overwhelmingly strong: *Pickton*, at para. 10.
>
> [14] Here, the trial judge's instruction inviting the jury to consider whether the non-shooter was an "active participant" in the killing without relating the evidence to the elements of aiding and abetting in a balanced way had the potential to mislead the jury. It is by no means obvious that the non-shooter's presence in the general area where the shooting occurred amounted to assistance or encouragement or that the non-shooter intended to provide assistance or encouragement to the shooter by his presence.

[70] In this case, it was the Crown who urged the jury to find the appellant guilty of murder on the basis that he had "moved along with the whole plan". The trial judge repeated this concept when she recited to the jury the position of the Crown that they should find the appellant guilty because he had worked "in concert" with the shooter:

> [...] **That Ricardo Whynder worked in concert with Devlin Glasgow to commit the planned and deliberate murder of Matthew Sudds.** Through text messages and telephone calls Ricardo Whynder set up the meeting at the Burger King parking lot, was present in the car as Mr. Sudds was yanked back in his seat and taken from the parking lot to Africville Road where he was shot to death and left in the overgrown ditch. In order to escape liability he fled the province the

> following day and lied to both Darlene Sudds and the police about his involvement. It is the Crown's position that Ricardo Whynder should be found guilty of the offence that is before you.
>
> [Emphasis added]

[71] The Crown also advocated to the jury that to find the appellant guilty as a party they just needed to find he had helped the shooter in some way:

> It's also open whether or not you find him a party by aiding and abetting**. Helped in some way the shooter to where they were going, for example. Helped him get the person to the meeting by phoning them, for example. Helped him by renting a car, for example.** And it doesn't matter if this half of the jury box says he was a principal and this half of the box says he was an aider. It doesn't matter if one person says aider and everybody else thinks he's the principal. As long as you all agree that one of these ways have been proven and proven beyond a reasonable doubt. And if we've proven planning and deliberation, we're [*sic*] proven first-degree murder.
>
> I've probably already told you a little bit about the principal. Mere presence is not enough. So they say sometimes, somebody is accidentally somewhere and a murder takes place. But as we know, as we believe we've proven, this is a little more than just presence. **Examples of being a little more than presence, of course - driving to commit the offence, setting up the victim, providing the means and access - the means and access - to the victim.**
>
> I don't know the victim. I've never met the victim. How would I get access to that victim so I can kill him? How do I do that? **Do I find somebody that can help me that knows the victim, who has access to the victim, that can set up a victim, a meeting? I've already told you this. You don't have to find he pulled the trigger to convict him of first-degree murder. It can be either/or**.
>
> [Emphasis added]

[72] In these circumstances, it was non-direction amounting to misdirection not to make it clear to the jury that if they had a doubt the appellant were the shooter, liability for murder could only flow from accessory liability as an aider or abettor. This required clear and comprehensive instructions about the need for the Crown to prove beyond a reasonable doubt not just acts by the appellant which in fact helped or encouraged the shooter, but when he did them it was with knowledge of the shooter's murderous intent and with the particular intention to facilitate or encourage the principal to commit the offence (*R. v. Briscoe*, *supra* at paras. 14 and 16-18; *R. v. Johnson*, *supra*, at paras. 80-81).

[73] There are also parallels to the case of *R. v. Josipovic*, *supra*. Two brothers, John and Mato Josipovic, were charged with first degree murder. The jury convicted them of second degree murder.

[74] The deceased was killed by a single gunshot to the head fired at point blank range as he lay in the street at the end of a chase by the brothers throughout the streets of Hamilton. The Crown argued it did not matter which brother actually fired the gun that killed the deceased; rather, that the "killing was the product of, and done in furtherance of, the brothers' plan to find and kill [the deceased]" (para. 7).

[75] Both brothers testified that John drove the vehicle, was in possession of the gun throughout the chase, and fired all of the shots, including the single fatal gunshot to the head. They also testified that Mato was not part of any plan to find and kill the accused.

[76] On appeal, the appellants' two main complaints were that the trial judge's instructions conflated the appellants' positions into a single entity, and the trial judge failed to relate the applicable principles as an aider to the elements of murder or to the evidence.

[77] Doherty J.A., for the Court, found substantial merit to these complaints. With respect to the issue of jury instruction on liability as an aider, Doherty J.A. concluded that the trial judge should have separately described the elements of murder, particularly the requisite *mens rea* (para. 50) and related these to the specifics of the case before the jury:

> [66] I have canvassed the instructions on aiding to some extent in my analysis of the first ground of appeal. I have explained that in outlining the essential elements of the crime of murder, **the trial judge should have separately described those elements as they applied to the shooter and to the helper.** As articulated in *R. v. Huard*, 2013 ONCA 650, at para. 64:
>
> > Since the *actus reus* and *mens rea* of aiding and abetting are different from the corresponding elements of the principal offence, jury instructions in a case in which an accused is alleged to have participated in the commission of an offence as an aider or an abettor should not only explain the essential elements in aiding or abetting, but should also link those elements to the essential elements of the offence charged, so that the jury understands what the Crown must prove to establish an accused's liability for the specific offence as an aider or an abettor.

> [67] Although the trial judge made reference to aiding in the course of discussing the elements of the offence, he never explained what the Crown had to prove to establish liability for murder as an aider. **He did not relate the generic description of aiding to the specifics of this case, or the evidence that could assist the jury in determining whether either appellant was liable as an aider.**
>
> [Emphasis added]

[78] *R. v. Barreira*, *supra*, serves as a recent example of the duty to relate the evidence to the issues, in particular where there are multiple accused whose liability hinges on their alleged roles as aiders or abettors.

[79] Four accused were tried for first degree murder. The jury convicted one of manslaughter. The others, as charged. They appealed.

[80] The victim died of a single gunshot chest wound. One appellant, through counsel, admitted he was the shooter. None testified. The liability of two of the appellants rested completely on being accessories as aiders or abettors. The trial judge correctly defined the essential elements of first degree murder for a principal and the standard instruction on aiding and abetting.

[81] After identifying the first element of causation, the judge reviewed all of the trial evidence without any attempt to relate it to the issue of causation or to the other issues that were contentious, such as intent or potential liability as an aider or abettor. Nordheimer, J.A., for the Court, referred to the well-established legal principles that although trial judges enjoy a broad discretion in how to charge a jury, there is a fundamental obligation to relate the relevant evidence to the issues they must decide and this is not accomplished by a rote regurgitation of the trial testimony (see: paras. 24-30; also, *R. v. Levy*, 2016 NSCA 45 at paras. 93-98).

[82] The trial judge had given a standard instruction on aiders or abettors, but did not relate the evidence to those requirements:

> [36] Another significant issue that the jury had to determine was party liability. Indeed, it was the Crown's position that Joshua, Brandon and Rebelo were guilty of first degree murder, not as principals, but as aiders and/or abettors. The trial judge gave the standard instructions to the jury regarding aiders and abettors. There is no issue with the adequacy of the standard instructions. However, having given those standard instructions, the trial judge did not then mention any evidence that related to whether any of these accused could be found to be either an aider or an abettor. Rather, after setting out the standard instructions, the trial judge proceeded to address the issue of intoxication as it related to the state of mind requirement for the offence of murder.

> [37] As a result, the jury was not given any assistance in terms of what they should consider in deciding whether they could be satisfied, beyond a reasonable doubt, that any of the accused were parties to the murder of Johnson. Party liability is, of course, not an issue with which jurors are likely to be familiar.

[83] In the case at hand, the appellant, Crown and the trial judge recognized there was an air of reality to the issue of the appellant's liability as an accessory. In these circumstances, I agree with the appellant that it was vital to inform the jury that liability as an aider or abettor could only be established if the appellant had the requisite knowledge of the principal's intent and assisted or encouraged him for the purpose of carrying out the offence.

[84] The elements of accessory liability in the context of first degree murder were canvassed in *R. v. Johnson*, *supra* (paras. 80 and 81). It is a straightforward task to transpose these to the case against the appellant for the lesser and included offence of second degree murder as follows:

(a) the accused did one or more acts that aided the principal to unlawfully cause Matthew Sudds' death;

(b) the accused did one or more of those acts for the purpose of aiding the principal to unlawfully cause Matthew Sudds' death;

(c) when he did those acts that aided the principal, he knew that the principal had the requisite intent for murder as found in s. 229(a) of the *Criminal Code* (means to cause Sudds' death or cause him bodily harm that the principal knows is likely to cause death and is reckless whether death ensues or not);

(d) when he did those acts that aided the principal, he did them for the purpose of aiding the principal to commit the murder of Matthew Sudds.

[85] At no time did the trial judge charge the jury on these requirements or that if they had a doubt about the knowledge component of accessory liability it could lead to a manslaughter conviction.

[86] On this ground alone, I would allow the appeal and order a new trial on the charge of second degree murder. I will discuss later why it is inappropriate to invoke the curative proviso found in s. 686(1)(b)(iii) of the *Criminal Code*. I will first address the issue of after-the-fact conduct evidence as this will be relevant on the re-trial.

The jury charge on after-the-fact conduct evidence

[87] The appellant's trial counsel voiced no objection to the admissibility of the evidence of what the appellant did and said after Mr. Sudds' murder. He did urge a proper instruction. With respect, one was not forthcoming.

[88] The trial judge referred to the role of after-the-fact evidence fairly early in her charge as follows:

> The next section of my instructions relates to post-offence conduct. Evidence about what a person said or did after an offence was committed may help you decide whether it was that person who committed the offence. It may help or it may not. What a person does or says after an offence was committed is a type of circumstantial evidence. **Like any circumstantial evidence, it is for you to say what inference should be drawn from the evidence**. You may use this evidence along with all the other evidence in the case in deciding whether Crown counsel has proven an accused's guilt beyond a reasonable doubt, but, as I just mentioned in relation to circumstantial evidence, you must not infer an accused's guilt from this type of evidence unless, when you consider it together with the rest of the evidence, you are satisfied beyond a reasonable doubt that his guilt is the only reasonable inference that can be drawn from all the evidence.
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> [Emphasis added]

[89] With respect, the jury needed to be properly instructed about what inferences were available to them. This direction, in these circumstances, was a non-direction that amounted to a serious misdirection. I will elaborate on why later.

[90] The trial judge then referred to the following as the after-the-fact evidence:

- The October 11 flight from Nova Scotia with Devlin Glasgow, with tickets purchased by a common third party;
- The October 12 phone calls with Mrs. Sudds where the appellant told her that Matthew was in trouble, there had been shootings in Dartmouth, and "I had to get him on a plane to get him out of the city"; he was at the airport dropping Matthew off, and she was not to worry. The appellant cancelled his phone on October 13, ending all contact with Mrs. Sudds;

- The rewards line call of March 9, 2017, where the appellant acknowledged being in the car during the homicide[1]; and,
- The appellant's police statements of March 2017 in which he denied he knew either Matthew or Darlene Sudds, or that he had called the rewards line.

[91] Later in the charge, the trial judge fully reviewed the testimony about the appellant's lies, statements and flight with Devlin Glasgow on October 11, 2013 with respect to the issue of causation.

[92] When the trial judge dealt with the third element, the state of mind required for murder, she directed the jury to look at the appellant's words and conduct before and after the unlawful act that caused death:

> To determine Ricardo Whynder's state of mind, what he meant to do, you should consider all the evidence. You should consider what he did or did not do, how he did or did not do it, and what he did or did not say. You should look at Ricardo Whynder's words and conduct before and after the unlawful act that caused Matthew Sudds's death. All these things and the circumstances in which they happened may shed light on Ricardo Whynder's state of mind at the time. This may help you decide what he meant or didn't mean to do.

[93] The trial judge then canvassed the circumstantial evidence she said the jury "might look at" or "might consider" on the issue of intent. This included the lies the appellant had told Mrs. Sudds, the police, and the rewards line call. The trial judge provided no guidance on how the appellant's deceit and other conduct could assist them to make inferences about his state of mind.

[94] In pre-charge discussions, appellant's trial counsel strenuously objected. He sought a "no probative value" instruction on the basis that evidence of flight and deceit could not legitimately assist the jury to determine his level of participation in the homicide.

[95] This issue had already been canvassed in the appellant's directed verdict motion. The trial judge had concluded that the after-the-fact conduct evidence

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[1] The recorded call does not actually show that the appellant admitted he was in the vehicle "during the homicide". He said, "One of the situations I was in the vehicle and I was a passenger and I got shot at as well. The other situation, I was in the vehicle". That admission, coupled with other evidence, including being able to give the police "the shooter", could lead to a reasonable inference he was present at the time of the homicide. Indeed, the defence appeared to concede that the Crown had established the appellant's presence.

could reasonably support inferences about the appellant's level of culpability (2019 NSSC 234 at paras. 34-36).

[96] When it came time to confront this issue in pre-charge discussions, the Crown asserted the Supreme Court of Canada had set out a "black-and-white rule" in *R. v. Calnen*, 2019 SCC 6 that such evidence could be used to infer level of culpability:

> Yes, My Lady. So the Crown's position quite frankly is that the section on Post-Offence Conduct that you have drafted is sufficient. There are black-and-white rules with regards to this type of evidence. And the Supreme Court of Canada very recently in *Calnen* set out that black-and-white rule.
>
> And that is, to put it very bluntly, post-offence conduct can be used to infer level of culpability. It's very clear in that decision that it is the type of evidence that can be used for it.

[97] The "rule" is by no means black-and-white. The admissibility and use that a trier of fact can make of post-offence or after-the-fact conduct evidence is context and fact specific. The law on its use is complicated. I will canvass some of the principles before turning to *R. v. Calnen*.

[98] Post-offence or after-the-conduct evidence used to go by the moniker "consciousness of guilt" evidence. What an accused said or did after an offence could be used as 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 they are charged.

[99] Weiler J.A., of the Ontario Court of Appeal, gave the following apt description of this type of evidence in *R. v. Peavoy* (1997), 117 C.C.C. (3d) 226:

> [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.

[100] While the term "consciousness of guilt" is now discouraged, there can be little doubt that the reasoning path usually engages a trier of fact in an examination whether, based on their appreciation of human nature, the conduct was such to show the accused demonstrated a consciousness of guilt. In *R. v. Arcangioli*, [1994] 1 S.C.R. 129, the appellant fled from the scene of a stabbing and an assault. Major J., for the Court, set out the chain of reasoning that may be available for a trier of fact as they wrestle with evidence of flight or deceit:

> [42] 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:
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> > (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.
>
> [43] The test articulated in *Myers* provides helpful guidance on the inferences that may be drawn from evidence of an accused's flight (or other possible indicia of consciousness of guilt, such as lying). Such evidence can serve the function of indicating consciousness of guilt only if it relates to a particular offence. Consequently, where an accused's conduct may be equally explained by reference to consciousness of guilt of two or more offences, and where an accused has admitted culpability in respect of one or more of these offences, a trial judge should instruct a jury that such evidence has no probative value with respect to any particular offence.

[101] In *R. v. White*, [1998] 2 S.C.R. 72, the Court disparaged the use of the term "consciousness of guilt", even though that is precisely the usual reason for the probative value of the evidence. Major J., again for the Court, explained:

> [20] Evidence of this kind is often called "consciousness of guilt evidence", since it is introduced to show that the accused was aware of having committed the crime in question and acted for the purpose of evading detection and prosecution. That label is somewhat misleading and its use should be discouraged. **"Consciousness of guilt" is simply one inference that may be drawn from the evidence of the accused's conduct; it is not a special category of evidence in itself. Moreover, the words "consciousness of guilt" suggest a conclusion about the conduct in question which undermines the presumption of innocence and may prejudice the accused in the eyes of the jury. As has been suggested by the Ontario Court of Appeal, to the extent a general description is necessary, the use of more neutral language such as "evidence of post-offence conduct" or "evidence of after-the-fact conduct" is preferable:** *Peavoy*, *supra*, at p. 238. Regardless of which phrase is used, however, the focus of the jury should be kept on the specific items of evidence at hand -- the act of flight, the false statement, as the case may be -- and on the relevance of those items to the ultimate issue of guilt or innocence.
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> [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.
>
> [Emphasis added]

[102] Rules were established. First, a jury should not be permitted to consider post-offence conduct where the accused has admitted culpability for another offence and the evidence cannot support an inference of guilt as to which crime. Second, where the jury hears post-offence conduct evidence, they must be properly instructed on its use (see *White* (1998) at para. 23).

[103] In some circumstances, certain post-offence conduct evidence may be used to support an inference about the extent or level of culpability (see: *R. v. Teske* (2005), 202 O.A.C. 239; *R. v. White*, 2011 SCC 13; *R. v. Hartling*, 2013 NSCA 51; *R. v. Khan*, 2007 ONCA 779; *R. v. Adan*, 2019 ONCA 709; *R. v. Aravena*, 2015 ONCA 250, at paras. 129-30, leave to appeal refused, [2015] S.C.C.A. No. 497; *R. v. Café*, 2019 ONCA 775).

[104] However, not all post-offence conduct evidence can legitimately support an inference about level of involvement such as differentiating between manslaughter, second degree murder and first degree murder (*R. v. Charlette* (1992), 83 Man.R. (2d) 187 (C.A.); *Regina v. Wiltse et al.* (1994), 19 O.R. (3d) 379; *R. v. Marinaro*, [1996] 1 S.C.R. 462, rev'g (1994), 95 C.C.C. (3d) 74 (Ont. C.A.); *R. v. Cromwell*, 2016 NSCA 84; *R. v. Hill*, 2015 ONCA 616; *R. v. Rodgerson*, 2015 SCC 38; *R. v. Robinson*, 2017 ONCA 645).

[105] For example, in *Rodgerson*, the appellant, charged with first degree murder of a young woman, was convicted of second degree murder. He claimed self-defence, lack of intent and provocation. To counter those claims, the Crown relied on Mr. Rodgerson's post-offence conduct of his efforts to conceal her body and his extensive efforts to clean the death scene. The jury also heard evidence of the accused's flight when the police showed up to search his home and his lies to the police.

[106] The trial judge instructed the jury that they could use all of the post-offence conduct as evidence of the appellant's guilt. The conviction was quashed by a majority decision of the Ontario Court of Appeal (2014 ONCA 366).

[107] Doherty J.A., for the majority, concluded it was wrong to tell the jury they could use the evidence of flight and deceit to infer intent. Further, the general instruction on the use of the post-offence conduct to conceal the body and clean the homicide scene failed to provide adequate guidance to the jury on how that evidence might be viewed as relevant to the issue of intent. A new trial was ordered.

[108] MacPherson J.A., dissenting in result, agreed that the evidence of flight and deceit were not relevant to the issue of intent, but differed on the impact of the guidance given to the jury on the evidence of concealment and clean-up. The Crown appealed as of right to the Supreme Court of Canada.

[109] Moldaver J. wrote the unanimous reasons for judgment to dismiss the appeal and uphold the order for a new trial. In the Supreme Court, the Crown conceded the trial judge had erred in his instructions to the jury that it could consider the appellant's flight and lies to the police on the issue of intent (para. 17). As to the post-offence conduct of concealment and clean-up, this evidence was relevant to the issue of the appellant's self-defence claim and whether he had unlawfully killed the victim.

[110] It also had further limited relevance on the issue of intent because the jury might reasonably infer that the appellant had hidden the body and cleaned the scene in order to conceal the nature and extent of her injuries and the degree of force used to inflict them (para. 27).

[111] However, it was legal error to simply leave the post-offence conduct of concealment and clean-up without guidance on *how* that evidence could be used (paras. 28-31). These two errors precluded the availability of the curative proviso (paras. 38-39).

[112] With these principles in the background, I return to *R. v. Calnen*.

[113] The appellant told the police that his live-in girlfriend disappeared. The appellant had sent false messages from her cellphone to make it look like she had gone to the city. He called a third party to inquire about her whereabouts. It turned out she was dead. He had failed to call an ambulance at the time of her death.

[114] The appellant went to extraordinary efforts to dispose of her belongings and her body. He took her body to a remote location and burned it. He then moved it back to his property where he burned what remained and dumped the ashes into a lake. Eventually, he told the deceased's mother and the police what he had done with the body, but insisted that her death had been accidental—she had fallen down the stairs. He panicked and, in a drug-induced state, tried to cover up her death.

[115] The appellant pled guilty to the charge of indecent interference with the deceased's remains. His police statement and re-enactment provided the evidentiary basis for his claim that he had committed no other culpable act.

[116] The trial judge charged the jury that they could use all of the post-offence conduct evidence as relevant to whether the appellant knew he had committed a crime.

[117] However, if the jury were satisfied what had happened to the victim was not an accident, then they could consider the appellant's conduct of burning the body also on the issue of intent as an effort to conceal the nature and extent of the victim's injuries. The jury convicted the appellant of second degree murder.

[118] This Court, in a split decision (2017 NSCA 49), quashed the murder conviction and ordered a new trial on the lesser and included offence of manslaughter on the basis that the appellant's conduct surrounding the burning and disposal of the body was not probative of intent.

[119] The Supreme Court, by a majority of three, allowed the appeal and reinstated the murder conviction. Karakatsanis J., in dissent, would have dismissed the appeal. Martin J., in a partial dissent, would have ordered a new trial on the original charge of second degree murder because of the absence of a limiting instruction on propensity reasoning.

[120] The majority judgment (Moldaver, Gascon and Rowe JJ.) did not disagree with Justice Martin's reasoning and disposition of the issues about instructions for the use of the post-offence conduct evidence. It is therefore her reasons that provide the necessary guidance.

[121] Martin J. was clear: there is no rigid rule that governs whether post-offence conduct evidence is probative of intent in order to distinguish between different levels of culpability; it is fact specific to the nature of the conduct and the issues raised at trial:

> [119] Contrary to certain suggestions made in the courts below, there is no legal impediment to using after-the-fact conduct evidence in determining the accused's intent. The jurisprudence of this Court is clear: after-the-fact conduct evidence may be relevant to the issue of intent and may be used to distinguish between different levels of culpability (see *White (1998)*, at para. 32; *White (2011)*, at para. 42; *Rodgerson*, at para. 20). Specifically, this Court has said that "[w]hether or not a given instance of post-offence conduct has probative value with respect to the accused's level of culpability depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial": *White* (*2011*), at para. 42. There is therefore "no *per se* rule declaring post-offence conduct irrelevant to the perpetrator's state of mind": *R. v. Jackson*, 2016 ONCA

> 736, 33 C.R. (7th) 130, at para. 20, per Doherty J.A. As there are also no automatic labels which make certain kinds of after-the-fact conduct always or never relevant to a particular issue, "we must consider all the circumstances of a case to determine whether the post-offence conduct is probative and, if so, what use the jury may properly make of it": see *R. v. Angelis*, 2013 ONCA 70, 296 C.C.C. (3d) 143, at para. 55.

[122] The post-offence conduct evidence put forward in *Calnen* as probative was not his extensive deceit or failure to call for help—it was his efforts to burn and dispose of the body. The divisive issue was whether his post-offence conduct to destroy the victim's body was relevant to the issue of intent:

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

[123] In *Calnen*, the jury were asked to rely on the same chain of reasoning in issue in *Rodgerson*. The efforts by the respective accused were done to hide the extent and nature of the injuries such that, had they been available, they would support the inference that the person who inflicted them had the intent for murder. Martin J. explained:

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

> [150] In conclusion, the relevant, reasonable, and rational inference that the jury could draw regarding Mr. Calnen's level of culpability, on the basis of the contested after-the-fact conduct evidence, is similar to that described in *Rodgerson* — that Mr. Calnen concealed and destroyed Ms. Jordan's body "in order to conceal the nature and extent of her injuries and the degree of force required to inflict them": para. 27; see also *Teske*, at paras. 86-87. Ms. Jordan's body would have provided evidence of how she died. If Mr. Calnen had not destroyed Ms. Jordan's body, that evidence could have established the cause of her death and been relevant to his intent to kill her. The common sense inference is that he took those actions to conceal evidence of what he had done. His successful destruction of this evidence is out of all proportion to the explanation put forward and could support the inference that Mr. Calnen sought to conceal this evidence and to hide not only the existence of a crime, but its extent.

[124] Contrary to the situation that necessitated a new trial in *Rodgerson*, the trial judge in *Calnen* did sufficiently instruct the jury to only look at the appellant's efforts to burn the victim's body as probative of intent (paras. 157-8; 164).

[125] In this case, there was no evidence of destruction or concealment of the victim's body. Given the nature and circumstances of the homicide, there could be little doubt that whoever shot the deceased had the requisite murderous intent. The issue for the jury was whether they were satisfied that the appellant was the shooter; if not, was he liable as a party to the murder as an aider or abettor.

[126] No one disputed that the evidence of the appellant's flight to Toronto with Devlin Glasgow, the lies he told Mrs. Sudds, the cutting off of ties to his cell phone, the rewards line call, and his various police statements were not admissible. They were. But on what basis and for what purpose?

[127] It is vital for counsel and the trial judge to specifically define the issue, purpose and use of evidence being tendered. As stressed by Martin J., where the evidence is post-conduct evidence, counsel and the court must advert to the chain of reasoning that supports the relevance and materiality of the proffered evidence:

> [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.

See also: *R. v. Cromwell*, 2016 NSCA 84 at para. 49.

[128] Let us briefly examine the so-called after-the-fact or post-offence conduct evidence and what it could or could not be legitimately used for.

The rewards line call of March 9, 2017

[129] While this event occurred after the offence, and hence from a lay perspective, is after-the-fact or post-offence conduct evidence, it is not from a juridical perspective.

[130] It did not demonstrate conduct that would permit an inference that on March 9, he had acted in a manner which, based on human experience and logic, was consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person.

[131] The call contained the appellant's admission that he was at least present at the time of the homicide. Arguably, this evidence could also support the rather weak conclusion he had some culpable involvement based on his ambiguous comments that he was "no innocent" and "not a model innocent citizen".

[132] In any event, it was not post-offence conduct evidence and was completely irrelevant to support an inference as to his state of mind or intent. It was misdirection to tell the jury they could use it for that purpose.

Lies to the police in March 2017

[133] The appellant was interviewed by the police on March 10 and 11, 2017. He lied when he told them he had not been the rewards line caller nor knew Matthew or Darlene Sudds.

[134] Lies and other acts of deceit can amount to post-offence conduct that may permit a trier of fact to infer an offender knows they are guilty of one or more of the culpable acts set out in the indictment. An accused's lies or deceit may well be viewed as an attempt to deflect suspicion from themselves, even perhaps to blame others.

[135] However, in these circumstances, I fail to see how a trier of fact could infer intent or state of mind from superficial lies told to the police almost three years after the event. Particularly, when the appellant within hours admitted to Sgt. Walsh he had made the rewards line call and could provide to the police the shooter's name.

[136] A no-probative value instruction on the issue of intent was needed. The trial judge did the opposite.

Lies to Mrs. Sudds

[137] In response to queries on October 12, 2013 about the deceased's whereabouts, the appellant told Mrs. Sudds the deceased was in trouble; he was at the airport to get him to Montreal, and not to worry. The next day, the appellant cancelled his phone, ending her ability to try to contact him.

[138] Again, while this evidence was probative to permit an inference that the appellant knew he had been involved in blameworthy or culpable conduct and he tried to evade detection by comments that could lead to delays for the search for the deceased, it was irrelevant to the issue of intent.

Flight on October 11, 2013 with Devlin Glasgow

[139] The trial judge did not instruct the jury that they could consider this evidence on intent. I agree with the respondent that in this, and in some other respects, the jury charge was under-inclusive. I will explain.

[140] First, I want to stress that by "flight" I don't endorse the concept that fleeing the scene or locale can usually be probative of different levels of intent (see *Rodgerson* at paras. 10 and 17). Although in some circumstances it can (*R. v. White*, 2011 SCC 13 at para. 67).

[141] Here, there was evidence that the appellant was living in Toronto in October 2013. I find it odd one could legitimately say he "fled" to Toronto by his return to where he was living as probative of his involvement in blameworthy or culpable conduct.

[142] On the other hand, there are circumstances about the flight he took with Devlin Glasgow that could be viewed as probative to the issue of his knowledge and intent and, hence, the level of his culpability in the homicide.

[143] That flight, like all pieces of circumstantial evidence, should not be looked at in isolation. Here, the Crown led evidence that either established or permitted the inference of: extensive communication between the appellant and Devlin Glasgow leading up to Glasgow's arrival in Halifax from Vancouver on October 10; the appellant picked Glasgow up at the Halifax airport on October 10; the appellant set up a meeting with the deceased at the Burger King parking lot; the appellant's girlfriend had rented a black Dodge Charger that was used by the appellant when he was in Halifax; the deceased was last seen alive getting into that car on October 10; the occupants of that car drove the deceased to a secluded area of the city where one of them shot and killed the deceased; the fingerprints and DNA of Devlin Glasgow were found in that black Dodge Charger along with the DNA of the deceased; and, the appellant appeared to admit he was present at Mr. Sudds' death.

[144] The circumstances about the flight on October 11 included evidence that: a relative of Devlin Glasgow booked expensive airline tickets for both him and the appellant for October 11; the appellant's girlfriend drove Glasgow and the appellant to the airport together; Glasgow and the appellant travelled on that flight in amiable companionship; and, they parted in Toronto with a handshake and hug.

[145] While the appellant suggested that the evidence at trial only established his presence at the time of the homicide, the circumstances of the October 11 flight, in light of all of the other evidence, made it more likely the appellant knew what the shooter had intended. There was no evidence of shock or dismay at what happened to his friend on Africville Road—only solidarity with the person the jury could infer was the shooter.

[146] In these circumstances, it was circumstantial evidence that could permit an inference the appellant was a party to first or second degree murder of the deceased.

[147] However, the fact that the charge may have been under-inclusive to the benefit of the appellant is of no moment. The Crown did not appeal the first degree murder acquittal. The failure to properly include the October 11 flight evidence as relevant to the issue of intent cannot cure the other legal errors.

[148] Just as in *Rodgerson* and *Calnen*, the evidence of the appellant's lies and other deceitful acts were not probative of his intent and/or knowledge and hence, level of culpability. It was legal error to tell the jury otherwise.

[149] Before turning to the issue of the curative proviso, I want to return to my earlier comment that the trial judge's general instruction on post-offence conduct amounted to serious misdirection (¶89). The judge told the jury, "Like any circumstantial evidence, it is for you to say what inference should be drawn from the evidence". With respect, this is insufficient.

[150] It provided no guidance to the jury about *how* they could use the post-offence conduct evidence. The Supreme Court of Canada has repeatedly stressed the dangers associated with post-offence conduct evidence. Careful instructions about the dangers and the inferences truly available are required (*R. v. White* (1998) at para. 48; *R. v. White* (2011) at paras. 33, 55; *R. v. Rodgerson* at para. 34).

[151] In *R. v. Hawkins*, 2011 NSCA 6,[2] the jury were charged that they may draw whatever permissible inferences they chose from the post-offence conduct of deliberate lies by the appellant. This was found to be legally deficient (paras. 100-106), but in the circumstances was harmless error.

[152] It is, of course, appropriate that the jury consider the significance, if any, of the post-offence conduct evidence in light of all of the evidence, not in a separate silo on a different standard of proof. But they must first understand what inferences can legitimately be drawn from that evidence.

[153] The appropriate approach is aptly set out in the CJC *Model Jury Instructions*:

> **11.14 After-the-Fact Conduct (Formerly Consciousness of Guilt or Post-Offence Conduct)**
>
> [1] You have heard evidence about certain things that (*NOA*) is alleged to have (*specify, said and/or done*) after the incident charged in the indictment. For convenience, I shall refer to this as "after-the-fact conduct." In this case, it is alleged that (*NOA*) (*summarize the alleged conduct: e.g., that (NOA) fled the scene of the offence or the jurisdiction; that (NOA) made false or misleading statements; that (NOA) tried to conceal evidence; that (NOA) attempted to commit suicide; etc.*).
>
> (*Review relevant evidence*.)
>
> [2] If you find that this conduct occurred, you may use this evidence with respect to (*specify issue*). You must not use this evidence with respect to (*specify issue*).

[2] Leave to appeal dismissed, [2011] S.C.C.A. No. 102.

> [3] After-the-fact conduct is a type of circumstantial evidence. As with all circumstantial evidence, you must consider what inference, if any, may be drawn from it. **The inferences you may draw from this evidence are (*specify*)**. (You must not use this evidence (*specify impermissible inferences in this case*)).
>
> [4] You may use this evidence, along with all the other evidence in the case, in deciding whether the Crown has proved (*NOA*)'s guilt beyond a reasonable doubt. However, you must not infer (*NOA*)'s guilt from this evidence unless, when you consider it along with all the other evidence, you are satisfied that it is consistent with his/her guilt and is inconsistent with any other reasonable conclusion.
>
> [5] You must be careful about inferring (*NOA*)'s guilt from this evidence because there might be other explanations for it. You may use evidence of after-the-fact conduct to support an inference of guilt only if you have rejected any other explanation for this conduct.
>
> [6] When considering what inference, if any, to draw from evidence of after-the-fact conduct, keep in mind that people sometimes (*specify, e.g., flee, lie, etc*.) for entirely innocent reasons, such as panic, embarrassment, or fear of a false accusation. (Even if (*NOA*) was motivated by a feeling of guilt, that feeling might be attributable to something other than involvement in the offence with which he/she is now charged.)
>
> [Emphasis added]

[154] The Crown argues that if the trial judge erred in law the conviction should be upheld by resort to the s. 686(1)(b)(iii) curative proviso.

The proviso

[155] The curative proviso is only available to excuse legal error or procedural irregularity where the Crown persuades an appellate court that there has been no substantial wrong, miscarriage of justice or prejudice. This requires the Crown to demonstrate that the error was harmless or trivial, or notwithstanding it was not, the evidence is so overwhelming the trier of fact would inevitably convict.

[156] Moldaver J. for the majority in *R. v. Sekhon*, 2014 SCC 15, summed up the principles that guide:

> [53] As this Court has repeatedly asserted, the curative proviso can only be applied where there is no "reasonable possibility that the verdict would have been different had the error . . . not been made" (*R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617, aff'd in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 28). Flowing from this principle, this Court affirmed in *Khan* that there are two situations where the use of s. 686(1) (b)(iii) is appropriate: 1) where the error is harmless or

> trivial; or 2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict (paras. 29-31).

[157] Despite the apparent strength of the Crown's case on the charge of first degree murder, the jury acquitted. The Crown does not suggest the case against the appellant is overwhelming in the sense that a conviction was inevitable.

[158] It was an open question whether the appellant was liable as the principal (the shooter) or as an aider or abettor. The complete absence of instructions to set out for the jury the *mens rea* requirement for accessory liability and relate the evidence to that and other issues for party liability are not minor or insignificant. It is not appropriate to apply the proviso (see *R. v. Zoldi*, 2018 ONCA 384 at paras. 53-55).

[159] That error is associated with the failure to properly instruct the jury on the use they could make of the post-offence conduct evidence. The thrust of the defence was that the appellant was present, but the Crown had not established he had shot the deceased nor had the necessary intent for him to be liable as a party. The jury were improperly told they could draw an inference about the appellant's intent based on his lies. It is therefore inappropriate to apply the proviso (*R. v. Bennett* (2003), 177 O.A.C. 71 at para. 152; *R. v. Rodgerson*, at paras. 38-39).

[160] I would allow the appeal on both grounds and order a new trial on the charge of second degree murder.

Beveridge, J.A.

Concurred in:

Farrar, J.A.
Derrick, J.A.