NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Calnen*, 2017 NSCA 49

Date: 20170614
Docket: CAC 448011
Registry: Halifax

Between:

Paul Trevor Calnen

Appellant

v.

Her Majesty the Queen

Respondent

Judge: Scanlan, J.A.
MacDonald, C.J.N.S. (Dissenting)

Appeal Heard: February 15, 2017, in Halifax, Nova Scotia

Subject: **Appeal of criminal conviction for murder and appeal of sentence.**

Summary: The appellant was convicted by a jury in relation to the death of a female partner. They had been in a relationship and the deceased intended to leave the appellant, planning to steal some of his personal property when she left. The appellant came home to discover her in the process of leaving with some of his property. There were texts suggesting that the situation became tense. There was no evidence at trial, other than the appellant's statement to the police and the deceased's mother where he gave his version as to what occurred at the time of the deceased's death. The appellant at all times maintained that he did not cause the death of the deceased. He said she took a swing at him in anger, missed, and the momentum carried her down the stairs where the appellant, upon deciding she was dead, said he removed the body from his house so as not to be blamed for her death. In an attempt to deflect blame, the appellant sent a text suggesting she had left the property when in fact she was dead. There was no evidence as to the cause of death, the appellant

had repeatedly moved and subsequently incinerated the body of the deceased. Repeated searches of the appellant's home did not reveal any evidence of a struggle or any blood. Her remains were never located, the appellant had given a statement to the police saying he burned the body several times until there were only ashes, which he dispersed in a lake in front of the cottage of the deceased's parents.

The vast majority of the evidence against the appellant was circumstantial evidence mainly related to his after-the-fact conduct.

The appellant pleaded guilty to the offences related to the burning of the deceased body. He was sentenced to five years concurrent on each of two offences.

Issues: (1) Appeal of conviction of murder based on an assertion by the appellant that the trial judge made numerous errors in the evidentiary rulings and the instructions to the jury.
(2) The fitness of the sentences related to the burning of the deceased body. The court was unanimous in dismissing the appeal of that sentence.

Result: The appellant appealed the convictions on a number of grounds. He argued that the trial judge did not properly instruct the jury as to the use of evidence of after-the-fact conduct. He also appealed the trial judge's refusal to grant a motion for a directed verdict. The majority determined that the final instruction to the jury related to after-the-fact conduct was inadequate. The conviction of second degree murder was set aside. The majority also held that the trial judge should have granted the motion for directed verdict on the second degree murder charge as the after-the-fact conduct evidence alone was not evidence that could prove the requisite intent for second degree murder. There was no other evidence that could prove intent to murder. The majority noted that, in the absence of any additional evidence, any retrial should not include the charge of second degree murder.

The dissenting judgement held that the jury charge was not deficient and that the after-the-fact conduct evidence together with the other evidence

was sufficient to maintain a conviction. The dissenting judge would have dismissed all grounds of appeal.

There were a number of other grounds of appeal related to the statements of the accused to the deceased's mother and to the police, use of texts as evidence, and expert evidence. The court was unanimous in saying there was no merit to any other grounds of appeal.

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Judges:	MacDonald, C.J.N.S.; Scanlan and Bourgeois, JJ.A.
Appeal Heard:	February 15, 2017, in Halifax, Nova Scotia
Held:	**Appeal on conviction of second degree murder allowed per reasons for judgment of Scanlan, J.A.; Bourgeois, J.A. concurring; MacDonald, C.J.N.S. dissenting; Appeal on sentences relating to indecently interfering with human remains dismissed per reasons for judgment of Scanlan, J.A.; MacDonald, C.J.N.S. and Bourgeois, J.A. concurring;**
Counsel:	Peter D. Planetta and Matthew MacMillan (Law Student), for the appellant Jennifer MacLellan, Q.C., for the respondent

Reasons for judgment:

Overview

[1] Trial judges routinely instruct juries that cases must be decided based upon legally admissible evidence, not emotion. The actions of the appellant in this case; repeatedly burning the body of Reita Louise Jordan after her death, would inflame the emotions of most people. It is of the utmost importance that the trial judge in this case precisely proscribe any limitations in the use of that evidence as it relates to the issue of proof of the intent to murder. Below I explain why how, in my opinion, the trial judge failed to properly instruct the jury on the limitations as to the use of after-the-fact evidence. I also explain, a proper application of the limitations in the use of that evidence leaves the Crown unable to prove requisite intent for a conviction for murder in this case.

[2] Chronologically it is worth noting that at the preliminary inquiry stage, Provincial Court Judge A. Derrick, *R. v. Calnen*, 2014 NSPC 17, did not commit the appellant. The Crown proceeded by Preferred Indictment.

[3] A jury found the appellant, Mr. Calnen, guilty of second degree murder in relation to the March 18, 2013, death of Reita Louise Jordan. He was sentenced to life imprisonment with parole ineligibility of 15 years. In addition, the appellant pleaded guilty to two charges of indecently interfering with the remains of Reita Louise Jordan and he was sentenced to five years concurrent for those offences.

[4] Mr. Calnen now appeals the second degree murder conviction and the sentence related to indecently interfering with human remains.

Background

[5] The deceased resided with the appellant in his home. They had been involved in a sexual relationship that appeared to have been fueled by their joint use of crack cocaine. Telephone text messages and other evidence revealed that the deceased was planning to end the relationship and move out of the appellant's home around the time of her death. She also intended to steal some of the appellant's belongings at or about the time of her leaving.

[6] The text messages, and a statement from the appellant, suggest that around the time the appellant learned the deceased was moving out, there was a heated

exchange between him and Ms. Jordan. In his statement to the police, the appellant described the deceased as being angry, kicking furniture and throwing a can of pop at him. The appellant says he did not cause the death of Ms. Jordan.

[7] In relation to the death of Ms. Jordan, the only other evidence as to what occurred comes from the statement the appellant later gave to the police, together with his re-enactment of events. That statement and re-enactment occurred several weeks after Ms. Jordan disappeared. Her body has not been found. The appellant says he moved the body several times and burned it several times, finally disposing of the remaining ashes in a lake in front of her parents' cottage.

[8] As to the events proximate to the time of Ms. Jordan's death, the appellant described the deceased as taking a swing at him and missing, but having enough momentum in her swing to cause her to fall backwards down the stairs. He said as she was unconscious, he attempted to resuscitate her, but concluded that she was dead. At no time did he try to call for help.

[9] He described himself as then having consumed crack cocaine. With his mind then fueled by drugs, he decided to remove Ms. Jordan's body from his home. He also attempted to mislead the authorities and others as to where the deceased was prior to her death. This was in part an attempt to shift suspicion away from himself, or blame others for her disappearance.

[10] What the appellant did to Ms. Jordan's body after her death can only be described as horrific. He moved her remains on a number of occasions; first, from his house to a wooded area, moving the remains a number of times thereafter. Mr. Calnen also burned her remains on a number of occasions. The final time was in a fire pit in his own back yard. Eventually, he spread what was left of Ms. Jordan's ashes in a lake in front of Ms. Jordan's parents' cottage.

[11] A subsequent investigation resulted in the recovery of what appeared to be some bone fragments from the lake, in the area where the appellant said he had deposited the ashes. There was no DNA available in the recovered material to confirm that the material recovered matched the DNA of the deceased.

[12] Although there are several legal issues that arise in this appeal, I am satisfied this case turns on the issue of whether evidence as to after-the-fact conduct alone can prove intent to commit murder. In that regard, I am satisfied that it is extremely important that, aside from the after-the-fact conduct, there was no evidence, physical or otherwise, that contradicted the appellant's version of events. In saying

this, I take into account texts I referred to in paragraph four above, a text about the "shit hitting the fan", and a text from Ms. Jordan saying he had laid a hand upon her. Also I am cognizant of a text sent, post-mortem, from Ms. Jordan's phone that was likely sent by the appellant in an effort to make it look as though Ms. Jordan had left his residence.

[13] For weeks Mr. Calnen denied having any involvement in the disappearance of Ms. Jordan, finally telling, first her mother, then the police, his version as to events at the time of and subsequent to her death. His version suggests that he did not kill Ms. Jordan, but that he did repeatedly move and burn her body.

[14] The Crown's evidence relating to the cause of the victim's death, and specifically the issue of intent to kill or inflict harm knowing it might cause death, was entirely circumstantial. It was based exclusively on the appellant's after-the-fact conduct. As noted, no body was recovered, there was no evidence as to the cause of death or the nature or extent of any injuries, or the type or degree of force required to inflict them.

[15] The appellant's home was searched twice; on April 13 and on June 19, 2013. The searches did not discover any evidence of a violent struggle, or blood stains. In his statement to the police, the appellant indicated that there was no blood from the deceased. Unlike other cases I refer to below, there was nothing to indicate there were any repairs done to the appellant's home to cover up damage that may have resulted from any altercation. In fact, there was no evidence of a physical altercation. There was no evidence of any attempt to clean up forensic evidence such as blood. The only evidence the searches revealed was a sticky substance on the TV and the wall, not blood stains. This is consistent with the appellant's statement to the authorities that the deceased threw a can of pop at him.

[16] There were texts from Ms. Jordan prior to her death. They suggested she intended to steal Mr. Calnen's property and that the situation on the day of her death was tense; she had sent a text saying: "Shit is hitting the fan for me right now".

[17] I am also convinced the trial judge should have granted a defence motion for a directed verdict on the charge of second degree murder. In addition, I am satisfied the jury was not properly instructed as to the limits on the use of evidence of after-the-fact conduct as it relates to proof of intent as required for conviction for murder.

Issues

[18] The Amended Notice of Appeal lists a number issues:

> 1. The trial judge erred in applying the law of voluntariness to the evidence on the *voir dire*;
> 2. The trial judge erred in admitting all of the text messages the Crown sought to have admitted;
> 3. The trial judge erred in denying the defence motion for a directed verdict of acquittal;
> 4. The trial judge erred in his instructions to the jury on the permissible uses of the after the fact conduct evidence;
> 5. The jury's verdict was unreasonable and not supported by the facts;
> 6. The trial judge erred in imposing the maximum sentence of 5 years for the charge contrary to section 182(b) of the *Criminal Code*;
> 7. The trial judge erred in imposing a period of 15 years parole ineligibility.

[19] I am satisfied I need only deal with issues #3 and #4 as they are dispositive of this appeal. In saying this I note the appellant still maintains that he did not cause the death of Ms. Jordan and causation will be very much a live issue on any re-trial. On a re-trial, the only issue for the jury should be whether Mr. Calnen caused the death of Ms. Jordan. Evidence of after-the-fact conduct is admissible as proof of consciousness of guilt. This is distinct from the issue of degree of culpability which has given rise to the difficulties in the case on appeal.

[20] I have read Chief Justice MacDonald's reasons and I agree with his conclusion that there is no merit to issues 1, 2, 6 and 7 as raised by the appellant.

Standard of Review

[21] On the issue of a directed verdict, Saunders, J.A. held in *R. v. Beals*, 2011 NSCA 42 that the standard of review for a directed verdict decision is that of correctness.

[22] On the issue of the jury charge, Saunders, J.A. stated in *R. v. Miller*, 2009 NSCA 71 that:

> [14] … In charging a jury, the trial judge is engaged in providing appropriate instructions on the law. Legal principles are explained so that the jury will understand how to apply the law to the facts as they find them. The judge's

> directions on the law must be right. Correctness is the standard of review we apply in our assessment of a judge's charge to the jury.

[23] In the context of this case, the trial judge's instructions should be sufficiently clear so as to delineate for the jury what use they can make of evidence of after-the-fact conduct in relation to intent and causation. As noted by Beveridge, J.A. in *R. v. Murphy*, 2014 NSCA 91:

> [4] Courts of appeal have an important role to play in criminal cases. They must ensure that wrongful convictions do not occur. The Court's jurisdiction is statutorily defined by s. 686(1) of the *Criminal Code*. The Court is given the power and duty to reject **verdicts** that are tainted by non-harmless legal error, a miscarriage of justice or where the evidence is so tenuous that a reasonable trier of fact, properly instructed, could not reasonably convict.
>
> [Emphasis in original]

[24] As I explain below, after-the-fact conduct in this case has little probative value in proving the appellant's intent at the time of Ms. Jordan's death. I am satisfied that verdict was the result of a legal error in both the instructions to the jury and the failure to grant the motion for directed verdict.

Analysis

[25] I analyse this case from two perspectives. One: the permitted use of evidence of after-the-fact conduct as it relates to the proof of degree of culpability (murder versus manslaughter). Second: were the instructions to the jury sufficiently clear as to how circumstantial evidence was to be used and the limiting instructions on the use of circumstantial evidence when it comes to drawing inferences as to intent. I suggest there was not sufficient clarity in that regard.

[26] My thesis below is that, although in some cases after-the-fact conduct is relevant to and capable of proving degree of culpability, that is not the situation that exists here. The appellant had made a motion asking the trial judge to take the charge of second degree murder away from the jury. I am satisfied that motion should have been granted because, in the circumstances of this case, after-the-fact conduct could not prove degree of culpability. In the absence of evidence of after-the-fact conduct, there was no evidence upon which a jury, properly instructed, could reasonably infer that the appellant had the requisite intent to commit murder. The refusal to grant the motion to take second degree murder from the jury created an unacceptably high risk of wrongful conviction on the charge of murder.

Can after-the-fact conduct alone prove intent/degree of culpability?

[27] The issue in this case is whether the circumstantial evidence, specifically evidence of after-the-fact conduct, could be used to prove the requisite intent to commit murder. In this case the accused had admitted to the horrific acts of repeatedly moving, repeatedly burning and disposing of the victim's body. The trial judge invited the jury to use that evidence in determining whether Mr. Calnen's after-the-fact conduct supported the rational inference that he had the requisite intent to commit murder.

[28] The circumstantial evidence in this case almost exclusively related to after-the-fact conduct. The trial judge said on several occasions that after-the-fact conduct may or may not help the jury decide whether it was murder or manslaughter. I will discuss *R. v. Angelis*, 2013 ONCA 70 in greater detail below but note here that it was exactly that type of instruction to the jury that caused the Ontario Court of Appeal to set aside the guilty verdict in *Angelis.*

[29] I refer to a number of passages where the trial judge repeated that after-the-fact conduct could be used to prove Mr. Calnen's state of mind at the time of Ms. Jordon's death:

> To determine Paul Trevor Calnen's state of mind, what he meant to do, you should consider **all** the evidence. You should consider:
>
> Number one, what he did or did not do.
>
> Number two, how he did or did not do it.
>
> Number three, what he said or did not say.
>
> …
>
> **Evidence of an accused's acts or conduct after the crime with which he is charged is another piece of circumstantial evidence which should be considered by you, together with all of the other evidence, in determining whether the Crown has proven the guilt of an accused beyond a reasonable doubt.** We refer to this as after-the-fact conduct. After-the-fact conduct is only some evidence which is to be weighed by you, together with all of the other evidence, in deciding whether or not the guilt of the accused has been proven beyond a reasonable doubt.

(Emphasis added)

[30] The trial judge did not specifically separate the issue of proof of intent to commit murder from the issue of proving manslaughter. He left it open to the jury to use after-the-fact conduct to prove the requisite intent for murder:

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

(Emphasis added)

[31] I am concerned that in the above noted passage the trial judge referenced the jury perhaps concluding that "… Mr. Calnen sought to burn Ms. Jordon's body in order to conceal the evidence." Few would dispute the fact that he burned the body to conceal evidence. But, it is then a quantum leap to say the evidence of the moving and burning proves beyond a reasonable doubt Mr. Calnen had the requisite intent to commit murder. This passage in the jury charge, as is the case with other passages suggests that if the deceased's body was burned to conceal evidence that may be proof of the requisite intent to commit murder.

[32] It begs the question of whether a person involved in a manslaughter may have tried to conceal evidence. It begs the question as to whether a person who was not responsible for the death of a person in their home, with thought processes fueled by crack cocaine, may conclude that they would not be believed if they argued they had nothing to do with a dead body found in their house. What of a person who moved a body just so it would not be found in their home. Upon realizing that it was not well hidden might they then fear being caught and attempt to destroy the body by burning, then repeatedly moving and burning it until it was nothing but ashes. Each time they did something, might they have been getting deeper in trouble for what had started as an accident.

[33] Even if that person were responsible for the death originally, how does the after-the-fact conduct prove that it was a murder, and not a manslaughter? With the

greatest respect, on the facts of this case the evidence cannot serve to prove the requisite intent for murder.

[34] Case reports are replete with examples of individuals taking extreme measures, much more serious than the original crime, in order to conceal their involvement in lesser offences. This cascading of events associated with hiding ones involvement does not mean that the original event was any more or less serious.

[35] In this case, the trial judge explicitly instructed the jury that after-the-fact conduct could be used to differentiate as between manslaughter and murder.

> …Mr. Calnen's actions in burning and hiding the body are after-the-fact conduct which may or may not assist you in determining his guilt or innocence. This evidence may or may not assist you in determining intent. **In the event, based on all of the evidence, you determine guilt, this after-the-fact conduct may help – may or may not help you decide whether it was murder or manslaughter.**

(Emphasis added)

Was the instruction to the jury as to the use of after-the-fact conduct correct?

The position of the parties:

[36] The appellant takes the position that it was an error in law for the trial judge to instruct that after-the-fact conduct could, in this case, be used to prove intent. The respondent says the trial judge made no error in that aspect of the charge.

[37] Courts have permitted after-the-fact evidence to be admitted as it relates to the issue of consciousness of guilt. I refer, for example, to *R. v. Peavoy*, [1997] O.J. No. 2788 (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. …

[38] After-the-fact conduct may be used to prove the accused had a "guilty mind". But as Justice Major noted in *R. v. White*, [1998] 2 S.C.R. 72;

> 20 … "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. …
>
> 21 …In some cases it [after-the-fact conduct] may be highly incriminating, while in others it might play only a minor corroborative role….

[39] In *R. v. White*, [2011] 1 S.C.R. 433 the court was considering a case involving an accused involved in a fight. The accused had a handgun and fired it into the chest of his opponent, killing him instantly. Mr. White immediately fled the scene. The only issue for the jury was manslaughter versus second degree murder. The jury convicted of murder.

[40] The Crown referenced the immediate flight of the accused as evidence of intent, saying "One would expect hesitancy if the shot was anything other than the intended action…" Defence counsel did not object to the evidence nor the instruction. Justice Rothstein distinguished *White [2011]* from *White [1998]* and *R. Arcangioli*, [1994] 1 S.C.R. 129 based on the facts. In *White [1998]* Justice Major said:

> [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 had 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.
>
> [23] Two legal doctrines have arisen in response to these concerns. As a preliminary matter, this Court held in *Arcangioli* that a jury should not be permitted to consider evidence of post-offence conduct when the accused has admitted culpability for another offence and the evidence cannot logically support an inference of guilt with respect to one crime rather than the other. That rule is essentially a matter of relevance and will usually apply in narrow circumstances. More generally, this Court has also held that when evidence of post-offence conduct is put to the jury, the jury should be "properly instructed" to ensure that the evidence is not misused: *Arcangioli*, at p. 143; *R. v. Gudmondson* (1993), 60 C.C.C. 332 (S.C.C.) at pp. 332-33. …

Justice Major also said:

> [24] …[W]here an accused 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.

[41] In the circumstances of Mr. Calnen's case he has not admitted culpability of any offence related to the death of Ms. Jordan but that does not alter the fact that the after-the-fact conduct here could be equally explained through consciousness of guilt for murder or manslaughter.

[42] In *White [2011]* Justice Rothstein said:

> [22] The principle that after-the-fact conduct may constitute circumstantial evidence of guilt remains good law. At its heart, the question of whether such evidence is admissible is simply a matter of relevance (*White (1998)*, at para. 23) … As with all other evidence, the relevance and probative value of post-offence conduct must be assessed on a case-by-case basis (para. 26). Consequently, the formulation of limiting instructions with respect to the broad category of post-offence conduct is governed by the same principles as for all other circumstantial evidence. Thus, while the term "consciousness of guilt" may have fallen out of use. It is still permissible for the prosecution to introduce evidence of after-the-fact conduct in support of an inference that the accused had behaved as a person who is guilty of the offence alleged- provided that, as with all circumstantial evidence, its relevance to that inference can be demonstrated.
>
> 23 That being said, though the use of such evidence has an extensive history in our criminal jurisprudence, it has also long been recognized that the introduction of post-offence conduct for the purpose of establishing the accused's "consciousness of guilt" carries with it a substantial risk of jury error (*Gudmondson v. The King* (1933), 60 C.C.C. 332 (S.C.C)). Jurors may be tempted to "jump too quickly from evidence of post-offence conduct to an inference of guilt" (*White* (1998), at para. 57) without giving proper consideration to alternate explanations for the conduct in question.

[43] In *White [2011]*, Justice Rothstein discussed the use of limiting instructions versus cautions to the jury. In this case, the evidence of after-the-fact conduct was admissible on the issue of causation of the death. The question then is what the trial judge should have done in terms of instructing the jury on the use of that evidence on the issue of murder versus manslaughter. If the evidence had no probative value in distinguishing between murder versus manslaughter the jury should have, at a minimum, been instructed that the evidence could not support any inference concerning Mr. Calnen's level of culpability. Instead the trial judge instructed the jury they could use the after-the-fact conduct evidence in deciding whether Mr. Calnen was guilty of murder or manslaughter. Both murder and manslaughter were still before the jury. The after-the-fact conduct would not assist the jury in determining murder versus manslaughter.

[44] In many ways this case is best compared to the *Angelis* case from the Ontario Court of Appeal. In that case, the appellant was charged with second degree murder of his wife. There, the appellant accepted that he had caused his wife's death during a physical altercation. The issues were whether he acted in self-defence, and, whether he intended to commit murder. Mr. Angelis' after-the-fact conduct was bizarre. In a violent struggle that preceded the victim's death, the deceased attacked the appellant and scratched him on his face, lips, chest and torso. She clawed his penis, drawing blood. He suggested that in an attempt to prevent further injury he sat atop his wife and held her, finally realizing that she was no longer alive.

[45] The couple's children had witnessed the struggle that resulted in their mother's death. Mr. Angelis was a trained nurse, but did not administer CPR or call 911. Over the next three or four hours he folded the living room carpet over his wife's body, then dragged her body to the master bedroom from the living room. He said he did this to prevent his son from touching her. After dragging her body to the bedroom, the appellant used his wife's makeup to hide his injuries. He also put on six pairs of underwear, saying he did so because he said the blood from his penis kept soaking through.

[46] He then took the children to church where he took communion and from there he telephoned his brother in Montreal to arrange for him to get the children. He returned to his home with the children, got Christmas presents and gave them to the children, saying he did so because he thought they might be separated from him for some time.

[47] Three or four hours after his wife's death, the appellant called 911 and with a calm and casual voice reported her death.

[48] Laskin, J.A. noted at ¶43, the appellant's intent became a central issue in the case. In the charge to the jury, the trial judge had repeatedly instructed the jury "no less than eight times" that they could use the appellant's post-offence conduct to decide whether the appellant had intended to kill his wife. The appellant argued that the trial judge erred by letting the jury think they could infer from the appellant's post-offence conduct that he had intended to kill his wife. Laskin, J.A., writing for a unanimous court, agreed that the trial judge had erred. He said the error in the instruction was neither harmless nor the result of a tactical decision of defence counsel. On the latter point, I note that in Mr. Calnen's case, counsel applied for a directed verdict, asking the court to take both murder and manslaughter from the jury. Counsel shoulders no responsibility for the instruction to the jury in this case.

[49] In *Angelis*, and many other cases, trial and appeal courts have used the term "post-offence conduct". I use the term "after-the-fact conduct". If this matter again proceeds to trial I suggest the term "after-the-fact conduct" is a more appropriate term. Post-offence conduct implies that an 'offence' has, in fact, been committed and proven. In the context of this case, causation is a live issue and it would be inappropriate for a trial judge to suggest or imply the accused committed an 'offence'. Cases I have considered often use the term "post-offence conduct" and where I adopt those words it is only for the purpose of consistency with those authorities.

[50] In *Angelis*, Laskin, J.A. discussed the limitations on the use of post-offence conduct to determine culpability:

> 51 An accused's post-offence conduct is generally admissible to show that the accused 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: *R. v. Peavoy* (1997), 34 O.R. (3d) 620 (C.A), at p. 629.
>
> 52 However, evidence of post-offence conduct may be susceptible to jury misuse, especially when, as in this case, the accused has admitted to committing the *actus reus* of an offence and the Crown is relying on the post-offence conduct to demonstrate a specific level of intent. Although this evidence will often be prejudicial to the accused, it will rarely have any significant probative value going to the accused's state of mind during the commission of the criminal act. That people will generally behave one way after they kill someone purposefully and another way after they kill someone accidentally is often a dubious assumption.

> 53 Therefore, in a long line of cases, both the Supreme Court of Canada and various courts of appeal, including this court, have held that an accused's post-offence conduct may be probative of an accused's culpability, but not of the level of that culpability. These courts have so held because the accused's post-offence conduct is as consistent with an inference that the accused committed manslaughter as it is with an inference that the accused had the intent for murder. Where self-defence is raised as a defence, an accused's post-offence conduct is circumstantial evidence from which a jury can infer that the accused committed a culpable act, and thus did not act in self-defence. But, ordinarily, trial judges have been obliged to instruct juries that post-offence conduct evidence cannot be used to infer that the accused committed murder rather than manslaughter: see *R. v. Arcangioli*, [1994] 1 S.C.R. 129, at pp. 145-146; *R. v. Marinaro*, [1996] 1 S.C.R. 462, adopting the dissenting reasons in (1994), 95 C.C.C. (3d) 74 (Ont. C.A.); *R. v. Peavoy*, at para. 34; *R. v. White* (1998), [1998] 2 S.C.R. 72, at p. 89; *R. v. Swanson*, 2002 BCCA 528, 168 C.C.C. (3d) 1, at para. 18; *R. v. Rodrigue*, 2007 YKCA 9, 223 C.C.C. (3d) 53, at paras. 47-49; *R. v. Figueroa*, 2008 ONCA 106, 232 C.C.C. (3d) 51, at paras. 35-37.
>
> (Emphasis added)

[51] *Angelis* was not appealed to the Supreme Court of Canada. *Angelis* says of the accused at ¶ 58:

> [58] … I am not persuaded that his conduct could rationally support an inference of an intent to kill, rather than simply an inference of having done something wrong. Indeed, recent case law from this court suggests that an accused's failure to render assistance after learning the victim may be dead is not probative of an accused's level of culpability: see *R. v. Anthony*, 2007 ONCA 609, at paras. 52-58; *R. v. Cudjoe*, 2009 ONCA 543, at para. 88; *R. v. McIntyre*, 2012 ONCA 356, at para. 40.

[52] As in *Angelis*, I am satisfied here that the trial judge erred when he expressly instructed the jury that they could take the appellant's after-the-fact conduct into account in determining whether he intended to kill Ms. Jordan. As was stated in *Angelis*:

> [60] Instead, he should have instructed the jury that the appellant's post offence [after-the-fact] conduct was relevant only to the question whether the appellant had committed a culpable act… And, because the appellant's post-offence conduct was not relevant to the issue of his intent, the trial judge should have further instructed the jury this evidence had no probative value on the question whether the appellant was guilty of murder or manslaughter: see *R. v. White, (2011)* at ¶ 60.

[53] A Nova Scotia case dealing with post-offence conduct was *R. v. Cromwell*, 2016 NSCA 84. In that case, Mr. Cromwell and his girlfriend were being harassed by a very drunk Mr. Tremblay. A fight erupted. Mr. Cromwell took a knife from his backpack and stabbed Mr. Tremblay, killing him. Cromwell and his girlfriend then ran away, got rid of his bag and hid from the police. The trial judge put this evidence of flight to the jury specifically relating to the determination of intent.

[54] At trial, defence counsel argued that the post-offence behaviour would be identical whether Mr. Cromwell committed murder or manslaughter. There was no concealment of the body, no attempt to disguise what he had done, only an attempt to escape the scene and distance himself from the offence. Van den Eynden, J.A. writing for the Court, set aside the conviction and ordered a new trial.

[55] In *Cromwell* the trial judge invited the jury to consider post-offence conduct when considering the issue of intent. When defence counsel objected the judge refused to reinstruct the jury. The Appeal Court referred to *R. v. White*, 2011 SCC 13 where Justice Rothstein noted that post-offence conduct may not be probative as between *mens rea* for second degree murder and manslaughter. The comments of Justice Moldaver in *R. v. Rodgerson*, 2015 SCC 38 were also noted and applied. I will expand on both of these cases below.

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

[57] In order for the jury to convict the appellant of second degree murder the jury would have to be satisfied beyond a reasonable doubt that the appellant meant to cause the death of Ms. Jordan or meant to cause her bodily harm that he knew was likely to cause her death and was reckless as to whether death ensued or not. In this regard, I refer to s. 229(a)(ii) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46.

[58] In *R. v. Jaw*, 2009 SCC 42 at ¶39, LeBel J., for the majority, said post-offence conduct cannot usually, serve on its own, as the basis for inferring the

specific degree of culpability of an accused person who has admitted involvement in an offence. It can be used more generally, to impugn the accused person's credibility. In *Jaw*, the accused admitted to having shot a police officer during a violent struggle but he claimed a lack of intent to kill. The issue on appeal was whether the trial judge's comments in the charge to the jury suggesting the jury could infer intent from the accused's post-offence conduct was an error. The trial judge there twice drew the jury's attention to the accused's conduct after the shooting. LeBel J. said:

> 24 The appellant argues that the trial judge erred by instructing the jury to infer from evidence of the appellant's post-offence conduct that he intended to shoot the deceased. I cannot agree with the appellant's submission. The charge to the jury must be read as a whole, with attention paid to the fact that the trial was conducted in both Inuktitut and English. <u>As I will explain in these reasons, the placement of the impugned reference in the charge indicates that the jury would not have interpreted the judge's reference to post-offence conduct as an instruction to infer intent merely from the appellant's actions following the shooting</u>.
>
> [Emphasis added]

[59] The Supreme Court did not set aside the conviction as Mr. Jaw had requested. The Court did not back away from the principle that post-offence conduct alone cannot be used to infer intent at the time of the offence. The case turned on a review of the trial judge's instructions to the jury, the Court concluding that, if the impugned section was read in isolation, the instruction to the jury could be understood to suggest that the appellant's post-offence conduct might be used to infer that he intended to kill the officer. (¶3) The Court determined, however, that in the charge to the jury, read as a whole, the trial judge did not put that inference to the jury. Nothing in *Jaw* took away from the principle that post-offence conduct on its own cannot usually serve as a basis for inferring a specific degree of culpability of an accused person (see ¶ 39).

[60] In *R. v. White*, *[1998]*, Major J., writing for the Court, discussed the use of evidence of post-offence conduct suggesting that:

> [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 may play only a minor corroborative role. …

[61] At ¶26, Justice Major referenced *Arangioli*, , explaining that the issue of whether a jury is permitted to consider post-offence conduct, will depend on the

facts in each case. The question that should be asked at the outset is: What did the Crown seek to prove by means of the evidence? Clearly Mr. Calnen's credibility is in issue. The use of post-offence conduct to attack credibility, in general, is not prohibited. The Crown went beyond using the evidence to attack credibility. In the case on appeal the Crown was clearly asking the trial judge to allow the jury to use after-the-fact conduct as evidence from which it could infer that the actions of Mr. Calnen not only caused the death of Ms. Jordan, but that he had the requisite intent for murder. The judge's instructions to the jury encouraged them to use after-the-fact conduct to make that determination.

[62] In *Arcangioli*, the Court was dealing with an accused who was charged with aggravated assault in the stabbing of a victim. He admitted punching the victim but said he fled when he saw another person stab the victim in the back. A new trial was ordered based on a number of issues related to the charge to the jury including the fact that the trial judge failed to instruct the jury properly regarding what use could be made of the evidence of flight from the scene. For the evidence of flight to be useful, it must give rise to an inference of consciousness of guilt in regard to a specific offence. Where an accused's conduct may be equally explained by reference to consciousness of guilt of two or more offences, a trial judge should instruct a jury that such evidence has no probative value with respect to any particular offence.

[63] In the context of Mr. Calnen's case, he has not admitted guilt of murder or manslaughter, arguing that the death was the result of an accident of Ms. Jordan's making. Applying the reasoning of *Arcangioli* to this case, the jury should have been instructed that because the evidence of after-the-fact conduct may be equally explained by reference to consciousness of guilt of manslaughter or murder, the evidence was of no probative value on the issue of proving intent required for a murder conviction.

[64] The limiting instruction on the use of post-offence conduct was discussed more recently in *R. v. Foerster*, 2017 BCCA 105. In that case the accused was convicted of first degree murder. The issues at trial were whether he had an intention to kill and whether he was attempting to commit a sexual assault at the time of the killing. The accused had disposed of a flashlight and a shoelace after the death of the victim. The Court said the jury should have been told that Foerster's disposal of a shoelace and flashlight had no bearing on the issue of whether he was guilty of murder rather than manslaughter. In that case, Mr. Foerster admitted he was responsible for the injuries but contended he was guilty

of manslaughter, not second degree murder. A new trial was ordered as a result of the deficient instructions on the use of post-offence conduct evidence. The court reviewed the cases I have cited above, including *Arcangioli* and *White [1998]*, pointing out that, in *White [1998]*, the court made it clear that the no probative value instruction was not always necessary. I am satisfied that in the present case it was necessary.

[65] Below I go one step further and suggest that the charge of second degree murder should have been taken from the jury based on defence counsel's motion for directed verdict. I will return to that point later.

[66] In *Foerster*, the court also discussed *R. v. White, [2011]*, noting, as do I, that post-offence conduct evidence is not a special category of evidence requiring special rules in respect to admissibility or limiting instructions. It is, however, an area in which a judge must take care to ensure that a jury does not misuse the evidence, or treat it as more persuasive than is warranted.

[67] I referred to *Rodgerson* earlier but I want to discuss it in greater detail. It emphasizes when after-the-fact conduct can be used to assess the issue of the degree of culpability. In that case, the accused and the victim met for the first time on the day of the victim's death. They did not previously know one another but got drunk together, did some drugs, and returned to the accused's home. The events from that point forward were unknown. The Crown's case was entirely circumstantial as to the issue of the accused's intent. The accused testified that after getting to his house, he changed his mind and suggested they return to a bar. There was a dispute over money for drugs. The victim, according to the accused's testimony, then attacked him. During the ensuing fight the accused said he pressed down on the victim's face until she seemed to pass out. He said he then also passed out and when he awoke he discovered that she was dead. The accused removed the deceased's body and took steps to conceal and destroy it. He cleaned up the scene and attempted to flee when the police arrived to execute a search warrant. He also made false statements to the police suggesting someone else had killed the deceased.

[68] In that case the accused relied upon self-defence, lack of intent and provocation. The trial judge reviewed the evidence and potential use of all of the circumstantial evidence. He allowed the evidence of the accused's post-offence conduct to go to the jury on the issue of intent. This included evidence of his false statements and his attempted flight.

[69] In *Rodgerson* the appeal focused on the appropriateness of leaving evidence of concealment and clean up to the jury on the issue of intent, in support of the Crown's theory that Mr. Rodgerson had the intent to commit murder. There was forensic evidence as to the extent and the severity of the altercation. The evidence showed that Mr. Rodgerson had removed a bloodstained mattress from the bedroom, cut up bloodstained carpet and placed it in garbage bags. He used bleach to clean up blood, and other remnants of their physical activity and physical altercation, located on the living room carpet, the kitchen floor, and the bedroom walls. The evidence at trial included expert analysis of the blood stain patterns. The Crown argued that the nature and extent of the injuries suffered by the victim and the degree of force required to inflict them was consistent with the intent to commit murder. The Crown suggested, the more severe the injuries caused by Mr. Rodgerson and the more force required to inflict them, the stronger the inference that he had the requisite intent for murder. The victim's body was recovered and an autopsy conducted. Justice Moldaver, writing for the Court, said:

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

[70] I respectfully suggest that *Rodgerson* was based on a nuanced fact pattern that does not exist in this case. In *Rodgerson* the after-the-fact conduct was only part of the case against the accused. Justice Moldaver noted this at ¶21 of the decision. The jury was entitled to consider the evidence related to the injuries and the blood stains to determine the nature and extent of the injuries and the degree of force required to inflict them. There was ample evidence in *Rodgerson* to suggest a more prolonged and violent physical altercation than what had been described by

Mr. Rodgerson. It was in that context, that Mr. Rodgerson's post-offence conduct became relevant to the issue of intent.

[71] Justice Moldaver endorsed the reasoning of Doherty, J.A. where he said:

> [22] On this point, I reach the same conclusion as the Court of Appeal. Doherty J.A. summarized the necessary inferential reasoning in the following manner:
>
> > Before the post-offence conduct relating to the hiding of the body and the clean-up of the homicide scene could assist the Crown in proving the appellant's state of mind, the jury first had to be satisfied that there was a somewhat prolonged and bloody struggle during which the appellant struck Ms. Young in the head or face several times, or at least more than twice. The jury could come to that conclusion only after a careful consideration of the competing interpretations of the forensic evidence placed before it. Second, the jury had to be satisfied that the appellant had engaged in the post-offence conduct to destroy evidence that would reveal an extensive struggle and assault well beyond that admitted by him in his evidence.
>
> (Emphasis added by Moldaver, J.)

[72] In this case, there was no forensic evidence to suggest that there had been any struggle at Mr. Calnen's home. There was no evidence of any efforts to clean up the home, nor was there any evidence as to the extent of the victim's injuries. The Crown of course pointed out that evidence as to the extent of the injuries is only unavailable because of the actions of the appellant.

[73] At ¶23 in *Rodgerson* Justice Moldaver expressed a concern that his comments not be misinterpreted so as to suggest that it would be "impermissible for the jury to consider the concealment and clean-up evidence at *all* until it had first satisfied itself, based on *other* evidence, that the altercation between Mr. Rodgerson and Ms. Young had taken a particular form." He said:

> [23] … Moreover, it would represent an unwarranted requirement that the evidence be placed in artificial silos before being considered by the jury. The jurisprudence disfavours this type of evidentiary segregation: see *R. v. Morin*, [1988] 2 S.C.R. 345. The jury was entitled to consider both the forensic evidence and the evidence of post-offence concealment and clean-up simultaneously, as a whole, in determining the nature and extent of Ms. Young's injuries and the degree of force required to inflict them.

[74] In Mr. Calnen's case there is no second silo. This case should have stopped at the point that was referred to by Doherty, J.A. in my ¶71 above. Post-offence conduct in this case could not assist the jury on the issue of degree of culpability.

[75] *R. v. Hill*, 2015 ONCA 616 was a case where Mr. Hill was involved in a non-exclusive sexual relationship with the victim. She had informed him that she was pregnant and that he was the father. He told her that he did not want to be involved with the pregnancy and that he had other plans. He said he would help, and tried to convince her that she should terminate the pregnancy. Mr. Hill claimed that the parties were discussing the pregnancy and as they were leaving she tripped and fell. Mr. Hill alleged the victim then said that if anything happened to the baby she would tell others that he had pushed her. The facts were unclear but the suggestion is that he then strangled her without intending to kill her or without fully realizing what he was doing or simply that he did so in a rage.

[76] Mr. Hill concealed the victim's body, later burying it. He lied to various people about his knowledge as to her whereabouts, even suggesting that she was still alive and living elsewhere. This continued until he finally confessed and the body was recovered. The Crown did not introduce the evidence of post-offence conduct for the purpose of inferring intent. The trial judge suggested to the jury that it could be used for such a purpose (see ¶52-53). The Ontario Court of Appeal noted that, unlike in *Rodgerson*, the accused had strangled the victim and nothing else. The burying of the victim's body could not disguise this or conceal the nature of the attack as the injuries observed on autopsy were consistent with what the accused was alleging. The Ontario Court of Appeal said as such that it was

> [57] …farfetched to suggest that the appellant was aware of and appreciated the significance of the bruising and took steps to hide the body to avoid discovery of the tell-tale bruising.

[77] In the matter now before the Court, as between the offence of murder and manslaughter, post-offence conduct was not probative to the issue of intent. The jury should not have been invited to use after-the-fact conduct as evidence in determining whether the appellant had committed murder.

[78] In Mr. Calnen's case, his version of events suggests that in his crack-infused reasoning he had to first move, and later desecrate Ms. Jordan's remains because he would not be believed when saying he was innocent in terms of causation of

Ms. Jordan's death. It is perhaps not totally dissimilar to the situation in *R. v. Arcangioli*.

[79] Mr. Arcangioli had been accused of stabbing someone in the course of a large brawl. A number of persons had combined to assault a single victim. Mr. Arcangioli had been seen fleeing the scene after the victim had been stabbed and the prosecution sought to rely on this as circumstantial evidence of "consciousness of guilt". The trial judge instructed the jury that such an inference was indeed available, and Mr. Arcangioli was convicted of the stabbing.

[80] Although the conviction was upheld by the majority of the Ontario Court of Appeal, the Supreme Court of Canada determined that the jury charge was deficient and a new trial was ordered. In that case, the accused had admitted to taking part in a group attack and punching the victim several times, making him guilty of common assault. Furthermore, he claimed to have fled the scene in panic after seeing someone else stab the victim; panic which was brought on by his having already committed a crime. The court found that, even if Mr. Arcangioli's flight were evidence of "consciousness of guilt", that guilt was equally explained by either common assault or aggravated assault (i.e., the stabbing).

> [27] … The evidence concerning his flight therefore had no probative value in determining which offence he had committed, and the trial judge should have instructed the jury that this evidence could not support any inference concerning his level of culpability. (*White [2011]*, ¶27)

[81] In Mr. Calnen's case, his actions after the death of Ms. Jordan, could speak to consciousness of guilt of murder or manslaughter. The instructions in Mr. Calnen's case required a minimum, instructions as to a limited use of post-offence conduct as it related to the issue of intent.

[82] In *White [2011]*, the trial judge warned the jury to be careful with the evidence relating to Mr. White's flight and that there may be one or more explanations for his conduct. What Mr. White argued was that the judge ought to have told the jury that it was not allowed to consider the evidence of his immediate flight in deciding as between the finding of second degree murder or manslaughter. In *White*, (*2011)*, it was noted:

> [39] … For example, flight *per se* may be relevant in determining the identity of the assailant, but may not be relevant in determining the accused's level of culpability as between murder and manslaughter. In such a case, the rules of evidence remain unchanged: the evidence is left with the jury, for it to weigh with

> respect to the issue of identity; the jury is precluded from considering the same evidence with respect to determining the *mens rea* for murder as opposed to manslaughter, by way of a limiting instruction to the effect that this evidence is not probative of this particular live issue. That judges must sometimes give limiting instructions as to appropriate and inappropriate inferences to be drawn from the evidence is merely an application of the rule of relevance tailored to different live issues in a single case.
>
> [40] … According to *Arcangioli* and *White (1998)*, the inquiry is fact-specific and a "no probative value" instruction is warranted when the evidence of post-offence conduct is "equally consistent with" or "equally explained by" either determination of the live issue in question (here, with a finding of murder or manslaughter); that is, when the evidence is not probative of that live issue, on the facts of the case.

[83] I am satisfied that in the circumstances of Mr. Calnen's case, evidence of after-the-fact conduct has no probative value with respect to differentiating as between murder versus manslaughter.

[84] If the evidence could not be used to differentiate as between murder versus manslaughter what approach should the trial judge have taken? I note that causation but not identity was a live issue. The trial judge had the discretionary right to exclude the evidence if he determined that it was disproportionately prejudicial in light of the evidence as a whole. I have already concluded that the after-the-fact conduct was not relevant to the issue of intent and that the trial judge failed to recognize or instruct as to the limited use that could be made of the after-the-fact evidence as it related to the degree of culpability. Below I will return to the issue of what the trial judge should have done when I discuss defence counsel's motion requesting the trial judge take the charge of murder from the jury.

[85] In *White [2011]*, Justice Rothstein discussed the fact-specific nature of post-offence conduct referring specifically to *Arcangioli* where he asked: "Would the accused have been *equally* likely to flee the scene whether he was guilty of murder or of manslaughter? (in *Argangioli*) Would the accused have been *equally* likely to hesitate before fleeing had he shot the victim intentionally or accidentally? (in this case)" He said of the two questions they raise a distinct set of considerations:

> [69] … On the one hand, logic and human experience suggest that there is no reason to think that a person who has committed manslaughter would be more likely to stay at the scene of the crime than one who has committed murder. In both cases the person has committed a very serious offence by unlawfully killing someone and will be just as likely to flee. In both cases, the person may flee for a host of reasons, such as to avoid arrest, to minimize evidence of that person's

> connection with the crime, or to buy additional time. Indeed, flight is a response equally consistent with a wide range of much less serious offences, such as theft, vandalism, or common assault (as discussed in *Arcangioli*).

[86] Applying that to the present case, the jury, properly instructed, might use the post-event conduct to consider what a reasonable or rational person might do in the case of death by accident, an event to which they did not contribute. You might ask whether they would flee the scene or in this case remove the body of the victim, moving it from location to location and incinerating it on a number of occasions for fear of wrongfully being accused of causing the death of the person who died as a result of an accident? Or would a rational person contact the authorities to explain the incident as it occurred? This evidence would go to the issue of culpability of Mr. Calnen in terms of his involvement in the death of Ms. Jordan so I do not suggest the evidence had no relevance to the issue of causation.

[87] It is important to maintain the distinction in terms of the use of evidence of after-the-fact conduct to prevent wrongful convictions. Justice Charron in *White, [2011]*, spoke of an accused's demeanor and the fact that it may call for a special caution or be subject to exclusion. She referenced the "infamous prosecutions" of Susan Nelles and Guy Paul Morin for crimes they did not commit saying that Justice Binnie:

> [107] … rightly notes that the case against each was built in part on inferences of guilt drawn from equivocal post-offence conduct. For example, one witness testified that Ms. Nelles had a "very strange expression on her face and no sign at all of grief" following the death of the fourth baby (*R. v. Nelles* (1982), 16 C.C.C. (3d) 97 (Ont. Prov. Ct. (Crim. Div.)), at p. 124). In the case of Guy Paul Morin, police witnesses drew a negative inference of guilt, for example, from the fact that Mr. Morin came out to greet them rather than wait for them to reach his door. …

[88] This case is distinct from both *Nelles* and *Morin* based on the nature of the acts of Mr. Calnen following the death of Ms. Jordan. It was more than just demeanour in this case. The actions of Mr. Calnen were more than innocuous acts from which the police drew a negative inference of guilt. Mr. Calnen's actions were extreme. Having said that, the risk of wrongful conviction resulting from the improper use of inferential reasoning in this case is extremely high.

[89] Justice Charron in dissent in *White, [2011]* said:

> 168 The same thing, of course, could be said of circumstantial evidence provided by pre-offence conduct. If the evidence introduced in relation to a contentious issue has no probative value -- or "value" that depends entirely on

> "speculative or unreasonable inferences" -- it is irrelevant and should not be cluttering up the jury's deliberations. The question, as always, is what is the strength of the inferential link between the evidence in question and the fact sought to be established: (*Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (3rd ed. 2009), at s. 2.58). In other situations the inferences urged by the prosecution from post-offence conduct are impermissible for legal reasons rather than illogicality. The right of a suspect to remain silent is a frequent instance. …

[90] A safer solution in this case would have been to take second degree murder away from the jury. Once the limitation in the use of after-the-fact conduct evidence was applied there was no evidence upon which a properly instructed jury, acting reasonably, could convict for murder.

[91] Before ending I want to return to the issue of the jury charge. In the case before the Court, the trial judge's charge tracks very closely Watt's *"Post Offence Conduct" Instructions* with some minor variations. He blended the issue of post-offence conduct going to the issue of causation with intent. The instruction as delivered to the jury failed to give the jury clear instruction as to where post-offence conduct can or cannot assist with the level of culpability as it relates to the issue of intent. *Watt's Manuel of Criminal Jury Instructions* notes that the issue of intent requires specific instructions on the use of evidence. As useful as *Watt's Manuel Jury Instructions* may be for trial judges, it is worth noting that neither *Rodgerson* nor *Hill* had been released at the time of the publication of *Watts* most recent version. A specimen jury charge must be adapted to the particular facts of each case. In this case there was a substantial risk that, in view of the horrific nature of the after-the-fact conduct the jury might use inferential reasoning to fill in the blanks.

[92] As was noted by Cromwell, J. in *R. v. Villaroman*, 2016 SCC 33, ¶26:

> [26] …There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the jury may unconsciously "fill in the blanks" or bridge gaps in the evidence to support the inference that the Crown invites it to draw. Baron Alderson referred to this risk in *Hodge's Case*. He noted the jury may "look for -- and often slightly ... distort the facts" to make them fit the inference that they are invited to draw: p. 1137. …

Saying further at ¶29:

> [29] An instruction about circumstantial evidence, in contrast, alerts the jury to the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence: *Berger*, at p. 60. This is the danger to which Baron

> Alderson directed his comments. And the danger he identified so long ago -- the risk that the jury will "fill in the blanks" or "jump to conclusions" -- has more recently been confirmed by social science research: see *Berger*, at pp. 52-53. This Court on occasion has noted this cautionary purpose of a circumstantial evidence instruction: …
>
> [30] It follows that in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt. No particular language is required. Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences. It may be helpful to illustrate the concern about jumping to conclusions with an example. If we look out the window and see that the road is wet, we may jump to the conclusion that it has been raining. But we may then notice that the sidewalks are dry or that there is a loud noise coming from the distance that could be street-cleaning equipment, and re-evaluate our premature conclusion. The observation that the road is wet, on its own, does not exclude other reasonable explanations than that it has been raining. The inferences that may be drawn from this observation must be considered in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[93] In the context of the case now before the Court, the trial judge could not properly instruct the jury without clearly separating the issue of causation from intent. The jury, if it was permitted to use the evidence of after-the-fact conduct, to prove causation, would then have to be clearly instructed that that does not necessarily prove intent and the jury would have to look to the evidence as a whole to see whether Mr. Calnen had intended to cause the death or inflict the injuries that he would expect to cause the death.

[94] In *R. v. Griffin*, 2009 SCC 28, Charron, J. writing for the majority said:

> [33] We have long departed from any legal requirement for a “special instruction” on circumstantial evidence, … The essential component of an instruction on circumstantial evidence is to instill in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty. Imparting the necessary message to the jury may be achieved in different ways: …

[95] In *Villaroman*, Cromwell, J. referred to *Griffin* and noted:

> [22] … However, where proof of one or more elements of the offence depends solely or largely on circumstantial evidence, it may be helpful for the jury to receive instructions that will assist them to understand the nature of circumstantial evidence and the relationship between proof by circumstantial evidence and the requirement of proof beyond reasonable doubt. …

[96] Justice Cromwell went on to refer to s. 10.2 of the *Model Jury Instructions*, https://www.nji-inm.ca/index.cfs/publications/model-jury-instructions/, (last updated June 2012), as prepared by the National Committee on Jury Instructions of the Canadian Judicial Council and to give an example of how the relationship between circumstantial evidence and proof beyond a reasonable doubt may be explained. With respect, I am not satisfied that relationship was sufficiently explained to the jury in this case.

The Directed Verdict

[97] I have noted the fact the appellant has appealed the trial judge's refusal to allow the appellant's motion for a directed verdict at the close of the Crown's case. The standard of review on this issue, as I have already noted, is correctness. The trial judge correctly referred to the applicable test as set out in *R. v. Rowbotham*, [1994] 2 S.C.R. 463 and *United States of America v. Shephard*, [1977] 2 S.C.R. 1067. That is, whether there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty. This would have been the same test applied by Provincial Court Judge Derrick at the preliminary inquiry. I already noted, she did not commit Mr. Calnen to stand trial.

[98] I am satisfied that had the trial judge understood the requirement to provide a limiting instruction as to the use of evidence of after-the-fact conduct he would have considered the merits of the motion from a different perspective. Once the jury was instructed that they could not use after-the-fact conduct to infer the degree of culpability, there was no evidence that the jury could use to infer that the accused had the requisite intent to commit murder. I am satisfied the trial judge erred in not taking the charge of second degree murder from the jury and leaving only the included offence of manslaughter.

[99] This is important because if the Crown decides to send this matter back for trial, in the absence of any new evidence, it should proceed as a manslaughter charge only.

[100] Before concluding, there are some other points I wish to discuss. The charge to the jury was delivered over two days, November 18 and 19, 2015. On the first day of the charge to the jury, the trial judge referred to circumstantial evidence and the fact that in order to convict based on circumstantial evidence the inference of guilt had to be the only rational inference. This reference to circumstantial evidence was made only once in the entire charge. It was delivered near the end of the first day of instructions to the jury, separate and apart from the main instructions to the jury. The trial judge said:

> Now, some of you may have heard the terms "direct evidence" and "circumstantial evidence." You may believe or rely upon either, one as much or as little as the other, in deciding this case.
>
> …
>
> In order to find Paul Trevor Calnen guilty on the basis of circumstantial evidence, you must be satisfied beyond a reasonable doubt that his guilt is the only rational conclusion or inference that can be drawn from the whole of the evidence. If you find that there are other rational inferences available to you based on the evidence, you are not satisfied beyond a reasonable doubt.

[101] Considering how important circumstantial evidence, including after-the-fact conduct was in this case, I am concerned that it was separated from the main charge by a day. A much better approach would have been to not separate that aspect of the charge from the main body of the charge. Although I express my concern about the separation I do not say here that the lapse of one day alone would be fatal.

[102] At ¶130 of his dissent Chief Justice MacDonald, after reviewing the trial judge's comments to the jury and submissions by counsel objecting to the charge both at trial and on appeal said:

> I reject this submission. Instead, it is hard to imagine what more the judge could have done.

I am satisfied the answer to this rhetorical statement is found in the law. As I set out above, based on the facts of this case, proof of degree of culpability, could not be proven through evidence of after-the-fact conduct yet the trial judge invited the jury to do just that. The trial judge's charge to the jury repeatedly suggested that after-the-fact conduct may be used to prove the intent of an offender at the time of the offence.

Appeal of sentence in relation to indignity to human remains

[103] I would dismiss the appeal of the sentence as imposed on those offences. In spite of the guilty plea and the fact Mr. Calnen is a first time offender, the prolonged and repeated, horrific actions of Mr. Calnen were extremely serious. The impact on Ms. Jordan's family and the community at large is no doubt severe. The sentencing judge is entitled to deference on the issue of sentencing. I am not satisfied that he misapplied any principles of sentencing, or that the sentence is inappropriate.

[104] The appeal of sentences is dismissed.

[105] The conviction for murder should be set aside. On appeal the respondent argued strenuously that, given the number of times the appellant burned the body, murder was the only possible conclusion for the jury and that manslaughter was not even a real consideration for this Court. I am satisfied that, unless the Crown is able to present additional evidence on the issue of intent, any retrial should be on the charge of manslaughter only. That would allow the jury to focus on the contentious issue of causation.

Scanlan JA

Concurred in:

Bourgeois, J.A.

Dissenting Reasons: (MacDonald, C.J.N.S.)

[106] My colleague, Justice Scanlan, has concluded that there should have been a directed verdict removing second degree murder and that Justice Chipman's jury instructions were flawed as they applied to the appellant's after the fact conduct. Respectfully, I disagree. Furthermore, I would dismiss all remaining grounds of appeal. My following reasons therefore will address: (a) the directed verdict motion; (b) the jury charge; and (c) the remaining grounds of appeal not addressed in the majority judgment.

The Directed Verdict Motion

[107] When addressing the directed verdict motion, the judge was keenly aware of his task – whether there was sufficient evidence to allow his jury to convict. His legal analysis was thorough and accurate. It included:

> [9] The question to be addressed is whether there is sufficient evidence such that a reasonable jury properly instructed could find the accused guilty. Subject to a limited exception in relation to circumstantial evidence, the trial judge is not to weigh or assess the evidence beyond satisfying himself or herself that there is admissible evidence adduced by the Crown in relation to each element of the offence.
>
> …
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> [14] In *Charemski*, Justice McLachlin (as she then was), in dissent, formulated the test as "whether a properly instructed jury could reasonably convict on the evidence" (p.692). At p.699, Justice McLachlin summarized her position as follows:
>
> > In my opinion, the test for a directed verdict in Canada remains the traditional one: whether a properly instructed jury acting reasonably could find guilt beyond a reasonable doubt. Where it is necessary to engage in a limited evaluation of inferences in order to answer this question, as in cases based on circumstantial evidence, trial judges may do so; indeed, they cannot do otherwise in order to discharge their obligation of determining whether the Crown has established a case that calls on the accused to answer or risk being convicted.
>
> [15] Justice McLachlin emphasized that where there is circumstantial evidence a judge must engage in a limited weighing of the evidence in order to determine whether it is "rationally possible" for the jury to draw the inferences the Crown seeks to be drawn. This important caveat is fleshed out in later jurisprudence.
>
> …

> [19] The latest word from the Supreme Court on directed verdicts appears to be the decision of Justice Binnie in *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368. The case dealt primarily with the privileged identity of police informants, but the Crown had also appealed a directed verdict of acquittal on a charge of obstruction of justice. The Crown alleged that the accused had obstructed justice by taking investigative steps to identify a confidential police source for the purpose of interfering with the trial of another individual. Justice Binnie said the following at para.48:
>
> > [48] A directed verdict is not available if there is any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction… Whether or not the test is met on the facts is a question of law which does not command appellate deference to the trial judge. An error of law grounds a Crown appeal under s. 676 of the *Criminal Code*.

[108] In my view, there was sufficient evidence to put second degree murder to the jury. Although much of the evidence is circumstantial, it is nonetheless highly probative. For example, consider the extraordinary lengths the appellant went to first hide (several times) and then destroy Ms. Jordan's body by burning it, not once but twice. This is succinctly summarized in the Crown's factum:

> 15. In his statement, the Appellant alleged that he came home to discover Jordan's bags packed. He spied his laptop and jewelry among her belongings. The two had an argument and he claimed that Jordan became violent. He described her death as an accident, claiming that she took a swing at him, he ducked and her momentum caused her to fall down the stairs.
>
> 16. Calnen claimed he tried mouth-to-mouth (tab 33, p.696). He determined that she must have banged her head and that she was dead. There was no blood coming from her head (p.711). Mr. Calnen did not call 911 or anyone else to attend to Ms. Jordan or confirm his diagnosis.
>
> 17. Calnen then claimed that he looked for crack cocaine and put Reita Jordan's body in his truck. He then said to himself: "Oh, shit, now what – fuck, I moved her, now what do I fuckin' do?" (at p.697). He thought of dumping her "somewhere on a sidewalk" (p.712).
>
> 18. The Appellant then drove all the way to Peggy's Cove with Ms. Jordan's body in the cab of his truck before deciding to go to Ingramport. There he drove on a logging road and hid her in the woods (p.698). He then took her belongings, went through them to make sure that she had not taken anything of his, and burnt them. This included her cell phone (p.715).
>
> 19. The next day, after he finished work, Mr. Calnen returned to Ingramport, determined that he could see Ms. Jordan's elbow from the road and decided to drag her further into the woods. He covered her body with spruce boughs.

20. Mr. Calnen checked to ensure that her belongings which he had burnt the previous day had been fully destroyed. Any items which had not fully burned, such as her crack pipe, earrings and cell phone, he collected and threw further into the woods (at p.699).

21. After learning that the missing person investigation had turned into a homicide investigation, Mr. Calnen returned to Reita's body. Her remains had been desecrated by the elements or wildlife. Calnen took her body, put it back in his truck, and moved her to Musquodoboit. With Ms. Jordan's remains in the back of his truck, he entered a logging road and got stuck. He called CAA to assist him. By the time he was towed out it was daylight (pp.700-701).

22. Given that the tow truck operator had seen him at that location, Calnen drove on and picked another logging road. He told the police that he "got a big fire going", pulled Reita's remains out of the back of his truck and put her on the fire. While this was going on the police were calling him (at p.701).

23. Calnen noticed that Reita's torso had not burned in the fire, so he put it in a canvas bag he had in his truck and once again moved her. He went to speak to the police. Later he burned Ms. Jordan's torso in his backyard. As Mr. Calnen put it: "Made a good fire first and then put her on, then I had a metal pail, I put her in that . . ." (at p.702).

24. Calnen told the police that he took her remains to a diving rock by a lake in Sherbrooke. He took her parents' boat out at night, dumped her ashes in the lake and went home.

25. Calnen claimed that although he did all this, he did not kill Jordan (at p.703).

26. Following his admissions to the police, the Appellant agreed to a re-enactment at his home regarding his version of the events of March 18, 2013.

27. Investigators found the Ingramport burn site. Exhibit 12 contained six items located in the vicinity: a frame, burnt clothing and fabric, a perfume or nail polish bottle, metal belt buckle and lipstick container. All appeared to have been burned (p.1388).

28. Police divers found bone fragments in the Sherbrooke lake Calnen described which appeared to have been burnt.

[109] I concede that the appellant's initial decision to hide the body is not particularly relevant to establishing the requisite intent for second degree murder. Having consumed cocaine, his actions may be equally consistent with the confusion and shock flowing from either him killing her unintentionally (manslaughter) or (as he proclaimed) an accidental death that simply occurred in his presence. Further and for the same reasons, his decision to mislead the police has no probative value to this issue. But how does the appellant explain the

obsessive, desperate, and even frantic efforts to make sure her body was destroyed? Consider the risks he took – going down wood roads – getting stuck – calling a tow truck with the body in his vehicle – starting a huge fire. These depict a desperate man. In my view, this begs one important question. What was it about Ms. Jordan's body that the appellant went to such extreme measures to hide? This desperation, in my view, is relevant not just to whether he killed Ms. Jordan (manslaughter), but also whether the nature of the injuries would reveal an intention to kill (murder).

[110] Then there is other probative evidence. For example, we know that the appellant and Ms. Jordan were intimate partners. Recent texts from Ms. Jordan suggested he had been domestically violent towards her. On the day in question, he found out their relationship was over. He had suggested suicide, should she leave him. Ms. Jordan texted a friend – "shit is hittin the fan 4 me". We know that she died in his presence. We know that there was a confrontation. She was adding insult to injury by stealing some of his things, in the process of moving out. All this adds up to motive and opportunity.

[111] The judge was well aware of all these facts when he denied the appellant's motion for a directed verdict of acquittal. Thus, in my view, the judge's reasoning was sound in concluding:

> [39] When I conduct my limiting weighing of the evidence, I am particularly mindful of the testimony of [the deceased's friend] Wade Weeks and [the deceased's mother] Donna Jordan, along with Reita Jordan's and the statements of Mr. Calnen which have been placed in evidence before the jury. In my view, if the jury chooses to accept parts of this evidence, it is more than sufficient in establishing the requisite intent for second-degree murder. Having said this, I am especially mindful of Justice Moldaver's wise words in *Rodgerson* in terms of how this post-offence conduct must be characterized for the jury. With this in mind it seems to me that Mr. Calnen's own statements and the texts reveal the possibility of a fight having occurred between him and Ms. Jordan on the day she died. Furthermore, we knew from his June 18 statement and re-enactment statement that Ms. Jordan was preparing to leave Mr. Calnen and that he spied his laptop in one of her packed bags and found his gold ring in her purse.
>
> [40] From Donna Jordan, we have her evidence that Reita wanted to move back home in the lead up to her death. As for Mr. Weeks' evidence, there are the text messages he spoke of and in particular the ones about Mr. Calnen laying hands on Ms. Jordan and the one where she tells Mr. Weeks not to worry about Mr. Calnen hurting her because she's tough. Furthermore, there are Reita Jordan's texts to both Mr. Weeks and Mr. Calnen which speak to a tumultuous relationship involving herself and Mr. Calnen.

> [41] While all of this evidence may be explained away – as it has to a degree, through the cross-examinations and other parts of Mr. Calnen's statements – I find that when properly instructed, the jury may choose to accept some or all of it. If they so choose, this evidence establishes the requisite intent for second-degree murder.
>
> [42] I would add that post-offence conduct has been found in other cases to be probative of intent. Mr. Calnen has admitted to burning and disposing of Ms. Jordan's body. This conduct may or may not be probative on the issue of intent in this case. His denials in the statements are admitted into evidence. Any risk of prejudice can be averted by a proper instruction on the proper use of this evidence.
>
> [43] When I review *Rodgerson* and *Hill,* I do not find they alter what the Alberta Court of Appeal stated in *Svekla*. As noted in *Hill*, with any inference-drawing process the primary facts are crucial. In the case at Bar, when I conduct a limited weighing of the evidence led by the Crown, I arrive at the conclusion that there is some circumstantial evidence on all of the essential elements of the offence of second-degree murder. Accordingly, I dismiss the Defendant's directed verdict motion.

The Jury Charge

[112] I begin with this observation. The judge's jury charge was thorough, balanced and legally correct. He understood and explained to the jury the use it could make of circumstantial evidence (including after-the-fact conduct). In the jury's absence, he shared his proposed charge with counsel. They painstakingly went through each aspect. He addressed all their concerns.

[113] I now turn to the specific challenge – the judge's handling of the appellant's after-the-fact conduct. I conclude that it was error free for the following reasons.

[114] Firstly, it is well established that after the fact conduct can be relevant not only to establish the commission of an offence but also the degree of culpability. In essence, this type of evidence can serve the same purpose as any other circumstantial evidence. *R. v. White*, 2011 SCC 13, is one of the leading Supreme Court authorities on this point. Justice Rothstein offered this:

> [22] The principle that after-the-fact conduct may constitute circumstantial evidence of guilt remains good law. At its heart, the question of whether such evidence is admissible is simply a matter of relevance (*White* (1998), at para. 23). As Major J. noted in *White* (1998), "[e]vidence 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" (para. 21). As with all other evidence, the relevance and probative value of post-offence conduct must be assessed on a case-by-case basis (para. 26). Consequently, the formulation of limiting instructions with respect to the broad category of post-offence conduct is governed by the same principles as for all other circumstantial evidence. Thus, while the term "consciousness of guilt" may have fallen out of use, it is still permissible for the prosecution to introduce evidence of after-the-fact conduct in support of an inference that the accused had behaved as a person who is guilty of the offence alleged — provided that, as with all circumstantial evidence, its relevance to that inference can be demonstrated.
>
> **[. . .]**
>
> [31] Given that "[e]vidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence", the admissibility of evidence of post-offence conduct and the formulation of limiting instructions should be governed by the same principles of evidence that govern other circumstantial evidence. In particular, to be admissible, such evidence must be relevant to a live issue and it must not be subject to a specific exclusionary rule (e.g. the hearsay rule); it may also be excluded pursuant to the exercise of a recognized judicial discretion (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at p. 26), such as the discretion to exclude evidence whose prejudicial effect outweighs its probative value. These same principles also determine the need for and scope of a limiting instruction.

[115] When and how such evidence will be used is dependant on the facts of each case. Justice Rothstein elaborates:

> [38] As with all other evidence, the relevance or probative value of post-offence conduct "will depend on the facts of each case" (*White* (1998), at para. 26). I agree with Binnie J. that there is no general rule applying to post-offence conduct: relevance must be assessed on a case-by-case basis.

[116] Granted, for after-the-fact conduct to be relevant, it cannot be equivocal. That removes its probative value, as Justice Rothstein explains:

> [39] In some cases, an item of evidence may be probative of one live issue, but not of another. For example, flight per se may be relevant in determining the identity of the assailant, but may not be relevant in determining the accused's level of culpability as between murder and manslaughter. In such a case, the rules of evidence remain unchanged: the evidence is left with the jury, for it to weigh with respect to the issue of identity; the jury is precluded from considering the same evidence with respect to determining the mens rea for murder as opposed to manslaughter, by way of a limiting instruction to the effect that this evidence is not probative of this particular live issue. That judges must sometimes give

> limiting instructions as to appropriate and inappropriate inferences to be drawn from the evidence is merely an application of the rule of relevance tailored to different live issues in a single case.
>
> [40] Mr. White sought to have this Court accept that *Arcangioli* and its successor cases, such as *White* (1998), stand for the very broad proposition that "post-offence conduct is generally inadmissible in determining whether an accused is guilty of manslaughter or murder" (A.F., at para. 46). *Arcangioli* did not have — nor was it intended to have — so far-reaching an effect. According to *Arcangioli* and *White* (1998), the inquiry is fact-specific and a "no probative value" instruction is warranted when the evidence of post-offence conduct is "equally consistent with" or "equally explained by" either determination of the live issue in question (here, with a finding of murder or manslaughter); that is, when the evidence is not probative of that live issue, on the facts of the case.

[117] At the same time, in circumstances where the evidence is not equivocal, as a matter of logic and human experience, it can be used, even when (as here) its purpose is to help the jury decide between murder and manslaughter:

> [41] It may sometimes be the case that, when the accused has admitted the *actus reus*, much of the accused's post-offence conduct will be irrelevant to determining the level of culpability. Indeed, according to Major J., in *White* (1998), a "no probative value" instruction is "most likely to be warranted" in precisely these circumstances (para. 28 (emphasis added)). However, this was not meant to be a free-standing principle governing admissibility or limiting instructions. *Arcangioli* and *White* (1998) make it clear that the basic test is always relevance in the ordinary sense:
>
> > . . . <u>where an accused's conduct may be equally explained by reference to consciousness of guilt of two or more offences</u>, 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. [Emphasis added; *Arcangioli*, at p. 145.]
> >
> > . . . a jury should not be permitted to consider evidence of post-offence conduct when the accused has admitted culpability for another offence <u>and the evidence cannot logically support an inference of guilt with respect to one crime rather than the other</u>. [Emphasis added; *White* (1998), at para. 23.]
>
> [42] Thus, *Arcangioli* and *White* (1998) should be understood as a restatement, tailored to specific circumstances, of the established rule that circumstantial evidence must be relevant to the fact in issue. In any given case, that determination remains a fact-driven exercise. Whether 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. *There will undoubtedly be*

> *cases where, as a matter of logic and human experience, certain aspects of the accused's post-offence conduct support an inference regarding his level of culpability.*
>
> Emphasis added.

[118] In this case, as I have noted, the appellant's desperate acts to burn Ms. Jordon's body, as a matter of logic and human experience, can assist the jury to decide whether he had the requisite intent to establish second degree murder. A similar approach was taken by the Ontario Court of Appeal in *R. v. Teske*, [2005] O.J. No. 3759 where Doherty J.A. concluded:

> [86] The trial judge found that the appellant's course of conduct from the time he killed his wife on Sunday evening until his arrest some four days later was consistent with the conduct of a person who had intentionally inflicted serious injuries on his wife and then went to great length to try to cover up what he had done and to develop an "innocent" explanation for his wife's disappearance. For example, the trial judge's conclusion that the appellant's cremation of his wife's body, which took several hours and created a strong stench, was a calculated and risky attempt to ensure that the police would be unable to determine the cause of Mrs. Teske's death and the exact nature of her injuries. Proof of those facts could have gone a long way to determining whether the appellant acted with the intent required by s. 229(a)(ii) when he caused his wife's death. *As a matter of common sense, it is reasonable to infer that someone who destroys a body after causing the death of that person does so because he knows that the victim suffered injuries that are inconsistent with a non-intentional cause of death*.
>
> [87] The appellant engaged in an elaborate cover-up of his wife's killing. Faced with this evidence, the trial judge inferred that the appellant had engaged in this concerted effort to cover up his wife's death because he had deliberately inflicted serious bodily harm likely to cause death. I think this was an eminently reasonable inference. More to the point, once it is acknowledged that the inference could be drawn, it was for the trier of fact to decide whether the inference should be drawn: *R. v. Trochym, supra*, at para. 25.
>
> Emphasis added.

[119] Thus, in my view, this evidence was properly before the jury. The fundamental question then becomes whether the judge properly instructed the jury on its use. This is primarily achieved by an appropriate caution. Justice Rothstein in *White*, *supra*, explains:

> [56] A warning or caution does not serve to remove the evidence from the jury's consideration. Instead, providing a caution allows for juries to benefit from judicial experience concerning the risks associated with certain types of evidence,

> while respecting the jury's competence in fulfilling its fact-finding role. The point is that once jurors are alerted to the risks that are not necessarily apparent to the average citizen, they can be trusted to properly weigh the evidence. Our jury system is predicated on the conviction that jurors are intelligent and reasonable fact-finders. It is contrary to this fundamental premise to assume that properly instructed jurors will weigh the evidence unreasonably or draw irrational and speculative conclusions from relevant evidence. I agree with the view expressed by Dickson C.J., in *R. v. Corbett*, [1988] 1 S.C.R. 670, that "it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense" (p. 692 (emphasis in original)).
>
> **[. . .]**
>
> [60] In sum, it is important to remember that, when dealing with risky evidence, the trial judge is not left with a stark choice between removing the evidence from the jury's consideration with respect to one or more live issues, and simply leaving the evidence with the jury without any guidance. It is also possible for the judge to warn the jury of the risks and thereby assist them in performing their fact-finding function. In my view, a limiting instruction is only appropriate when the evidence is not relevant to one or more live issues, is subject to a specific exclusionary rule or is explicitly found by the trial judge to be more prejudicial than probative. Otherwise, judicial experience about the risks associated with certain types of evidence should be communicated to the jury by way of a caution.

[120] So how did the judge in this case handle that aspect of his charge? First of all, he cautioned the jury on the use of circumstantial evidence generally:

> In order to find Paul Trevor Calnen guilty on the basis of circumstantial evidence, you must be satisfied beyond a reasonable doubt that his guilt is the only rational conclusion or inference that can be drawn from the whole of the evidence. If you find that there are other rational inferences available to you based on the evidence, you are not satisfied beyond a reasonable doubt.

[121] The judge, as well, twice gave an appropriate direction on how the jury could use after the fact conduct generally. Here is one example:

> Now, evidence of an accused's acts or conduct after the crime with which he is charged is another piece of circumstantial evidence which should be considered by you, together with all of the other evidence, in determining whether the Crown has proven the guilt of an accused beyond a reasonable doubt. We refer to this as after-the-fact conduct.

> After-the-fact conduct is only some evidence which is to be weighed by you, together with all of the other evidence, in deciding whether or not the guilt of the accused has been proven beyond a reasonable doubt. Like other circumstantial evidence, evidence of after-the-fact conduct must be reasonably capable of supporting an inference which tends to make the existence of a fact in issue more or less likely. What a person does after a crime was committed may help you decide whether it was that person who committed it. It may help, it may not help. The conduct may indicate that the person committed the crime. On the other hand, the conduct may be that of an innocent person who simply wants to avoid involvement in a police investigation or embarrassment for himself or others because the person is anxious and confused.
>
> Evidence that a person burned the body of a deceased may show that the person acted in a manner which, based on human experience and logic, is consistent with the conduct of a person who is blameworthy and inconsistent with the conduct of a person who is not blameworthy. Burning a body may also be caused by some other reason that has nothing to do with having committed an unlawful act.

[122] The judge also twice cautioned that after-the-fact conduct alone would not be sufficient to find the appellant guilty. Here is one example:

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

[123] Then the judge proceeded to the impugned aspect of his charge; explaining how the appellant's actions in burning Ms. Jordon's body could assist them in deciding whether the appellant had the requisite intent to commit murder:

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

[124] The judge then made it clear that should they find "guilt" (murder or manslaughter) based on all the evidence, this conduct might help them find the requisite intent for murder. Otherwise, it would be manslaughter.

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

[125] Here the judge cannot be faulted because he followed precisely the guidance recently offered by the Supreme Court of Canada dealing with essentially the same issue. Specifically, in *R. v. Rodgerson*, 2015 SCC 38, Moldaver J. proposed an appropriate direction when, as here, after-the-fact conduct is used to help establish the requisite intent for murder.

[126] There Mr. Rodgerson said he killed his female victim in self defence. Justice Moldaver described his after-the-fact conduct:

> [13] Mr. Rodgerson made extensive efforts to conceal Ms. Young's body and clean up the scene of her death. He purchased bleach, rubber gloves, and garbage bags, and dug a shallow grave in the backyard of the house. He then dragged Ms. Young's body from the bedroom to the backyard. He removed her clothing and jewellery, placed her body in the grave, poured bleach into the hole and filled it up with dirt. He then returned to the house and removed his bloodstained mattress from the bedroom. He cut up the bloodstained carpet and placed it in garbage bags, along with Ms. Young's shoes and remnants of their sexual activity. He also broke Ms. Young's cellphone and removed the battery. Finally, he used bleach to clean up the blood, and other remnants of their sexual activity and physical altercation, located on the living room carpet, the kitchen floor, and the bedroom walls.
>
> [14] Several days after Ms. Young's death, on October 29, police officers executed a search warrant at Mr. Rodgerson's home. When the police arrived, Mr. Rodgerson attempted to flee, but he was quickly caught and arrested near the front steps of his home. During his initial police interview, he made various false statements in which he attempted to deflect blame from himself by suggesting that someone else had killed Ms. Young.

[127] Like here, some of this conduct was relevant to establishing an intent to murder (hiding the body and cleaning the scene) and some was equivocal and therefore irrelevant (fleeing the scene and lying to the police). Yet, the trial judge

told the jury they could use it all when considering intent for murder. A majority of the Ontario Court of Appeal set the guilty verdict aside on that basis. The Supreme Court agreed.

[128] Justice Moldaver added that a special instruction was required when this type of concealment and clean-up evidence is used to establish an intent to murder:

> [26] Throughout the charge, the trial judge repeatedly referred back to the evidence of concealment and clean-up in his instructions on the elements of the relevant offences and of Mr. Rodgerson's defences. On each occasion, he provided the same type of generic instruction. He did not draw any distinction between using the concealment and clean-up evidence to evaluate whether Ms. Young died as a result of an unlawful act, and using it to evaluate Mr. Rodgerson's intent. Each time, he simply instructed the jury that "[o]nce again you also have to consider the post offence conduct which I have previously outlined to you", or words to that effect (A.R., vol. IX, at p. 119). On some occasions, the trial judge provided a brief factual summary of the relevant evidence, while on others he did not. At no point, however, did he assist the jury in understanding *how* it could use the concealment and clean-up evidence in determining whether Mr. Rodgerson had the requisite intent for murder. Nor did he explain how the inferential reasoning was different on this issue than on the question of whether Mr. Rodgerson had acted unlawfully.
>
> [27] The jury was entitled to consider the concealment and clean-up evidence in respect of Mr. Rodgerson's self-defence claim and whether he *unlawfully* killed Ms. Young. *It was also entitled to consider this evidence in evaluating whether he had the requisite intent for murder.* Regarding self-defence and unlawful killing, the relevance of the concealment and clean-up and the nature of the available inference was a matter of common sense: concealing the body and cleaning up the scene of Ms. Young's death could be viewed as evidence that Mr. Rodgerson knew he had killed Ms. Young unlawfully and was acting to cover it up. Once the jury moved on to the issue of intent for murder, however, this simple inferential reasoning was no longer of any use. Rather, the limited relevance of this post-offence conduct on the issue of intent rested on the following, narrower inference: *the jury might reasonably conclude that Mr. Rodgerson concealed Ms. Young's body and cleaned up the scene of her death in order to conceal the nature and extent of her injuries and the degree of force required to inflict them.*
>
> [28] In the sections of the jury charge relating to the issue of intent, the trial judge failed to link the evidence of concealment and clean-up to the nature and extent of Ms. Young's injuries and the force required to inflict them. Rather, his charge merely reiterated the existence of the evidence, and instructed the jury to consider it along with all the other evidence adduced at trial. This was a legal error. Having first used the concealment and clean-up evidence in a common sense manner based on clear and readily accessible inferences, there was a risk

> that the jury might continue to rely on the evidence in this same manner on the issue of intent. The failure to instruct the jury on the narrower basis for using the evidence created a risk that the jury might convict Mr. Rodgerson for murder based only on the broader inference that had previously been sufficient: that the concealment and clean-up pointed to a consciousness of guilt and a desire to prevent discovery of an unlawful killing.
>
> Emphasis added.

[129] Justice Moldaver even proposed an appropriate direction. Note its similarity to the direction in our case:

> [29] A more specific instruction was required. It need not have been long or complex. After first explaining to the jury the factual link between Mr. Rodgerson's concealment and clean-up efforts and the resulting concealment of the injuries to Ms. Young's body and the blood at the scene, the trial judge need only have added a few sentences, along these lines:
>
> The nature and extent of the injuries and the force used to inflict them are factors you may consider in assessing Mr. Rodgerson's intent at the time he caused Ms. Young's death. In this regard, you may take into account the evidence of Mr. Rodgerson's concealment and clean-up in determining whether he intended to kill Ms. Young, or to cause her serious bodily harm which he knew was likely to cause death. On this issue, you will need to consider this evidence in a different way than I have instructed you previously. You may conclude that Mr. Rodgerson sought to conceal Ms. Young's body and clean up the scene of her death in order to conceal the nature and extent of Ms. Young's injuries and the degree of force required to inflict them. You may or may not reach this conclusion — it is up to you — but if you do reach this conclusion, you may consider this along with all of the other pertinent evidence in determining whether Mr. Rodgerson had the requisite intent for murder.

[130] We know that Justice Chipman was following Justice Moldaver's direction because he said so during his pre-charge meeting with counsel. In fact, the one variation was at the appellant's request (over the Crown's objections). Here is the exchange, after the judge introduced his proposed wording and defence counsel, Mr. Planetta raised a concern:

> **THE COURT:** Okay. I will tell you that this instruction is following Justice Moldaver at paragraph 29, and, admittedly, you know, and I've heard lots of arguments on the case, so I don't want to sort of have a re-do on that, but I'm interested in the Crown's response to what Mr. Planetta's suggesting here. First of all, Mr. Planetta, how would you change it?

MR. PLANETTA: Well, I had just suggested, in order to conceal evidence.

THE COURT: So where are we, on the last line?

MR. PLANETTA: The -- yes.

THE COURT: So just read it to me how you'd like it to read.

MR. PLANETTA: You may conclude that Mr. Calnen sought to burn Ms. Jordan's body in order to conceal evidence.

THE COURT: Any thoughts on that, Crown?

MR. WOODBURN: Once again, we're in a different area here than -- we're not just talking about evidence, what evidence? And, of course, I think the cases do say that people destroy evidence so that -- to conceal the nature of any injuries and degree of force required to inflict them, which goes to the two ways that the Crown can prove that he committed the murder. One, he either intended to or intended to cause an injury which caused her death. I'm shortening it up because my brain is starting to slow down.

THE COURT: Yeah.

MR. WOODBURN: But I think this is appropriate. My friend is saying that you're telling -- you're directing them to speculate, but it's part of the Crown's theory, of course, that the reason for the burning of the body is so that the police would not find the injuries that he inflicted on her, and part of the reasoning in Rodgerson and others is that that's -- that's a line of reasoning that they can go along.

THE COURT: Well, I've reviewed...

MR. WOODBURN: And it's followed -- sorry...

THE COURT: Yeah.

MR. WOODBURN: It's followed up with the may or may not reach this conclusion, it's up to you.

THE COURT: Yeah.

MR. WOODBURN: So, I mean, you're fairly careful in that way.

THE COURT: True. And I'm mindful of *Rodgerson* and the suggestion of Justice Moldaver that I've tried to track, but I'm also mindful of the distinction that Mr. Planetta speaks of. I'm going to change it to read, at the bottom of page 64, you may conclude that Mr. Calnen sought to burn Ms. Jordan's body in order to conceal the evidence, period, and then I am going to go on with what I have, you may or may not, etc. So I'm making the change as requested by the defence in that regard. Okay.

[131] I acknowledge that the appellant remains unsatisfied, as evidenced by this passage in his factum:

> 89. This above passage was altered after discussion, but the Crown's statements to the jury were not. The Crown insisted the wording be lifted straight from *Rodgerson* and at first the trial judge agreed. Justice Chipman later relented, but the combination of what was left still clearly instructed the jury they were free to speculate on the penultimate issue in the trial. The trial judge properly pointed out that the trial judge's instruction on the law is to be accepted over those of counsel, but then gave an instruction which was a statement of the Crown's theory. With respect, the trial judge endorsed the Crown's faulty reasoning as being the proper statement of the law to which the jury was to apply the law.

[132] I reject this submission. Instead, it is hard to imagine what more the judge could have done.

[133] In my view, this was a fair and balanced charge, properly reflecting the state of the law.

The Remaining Grounds of Appeal

[134] Before us, the appellant also challenges: (a) the admission of his statements to the police; (b) the admission of certain text messages; (c) other aspects of the jury charge; (d) the reasonableness of the verdict; (e) his 15-year parole ineligibility on the murder conviction; and (f) his 5-year sentence for the Indignity to Human Remains charge.

[135] I would dismiss the sentence appeal on the indignity to human remains charge for the reasons articulated by Justice Scanlan.

[136] I will now address the remaining issues in order.

The Admission of the Appellant's Statements

[137] During questioning, the police brought the deceased's mother, Donna Jordan, into the interrogation room in order to persuade the appellant to tell her where her daughter's body was. This prompted the appellant to confess to destroying it and, in fact, he provided a re-enactment. The appellant insists that this constituted an atmosphere of oppression, thereby casting doubt on the voluntariness of his statements.

[138] Before us, the appellant concedes that the judge properly articulated the relevant law. However, he challenges its application. For example, I refer to the appellant's factum:

> 46. In his reasons the trial judge focused unduly on the lack of evidence of any mental health issues on the part of the Appellant. The oppression segment of *Oickle* does not require a complete loss of control, nor does it require the existence of mental health issues. Voluntariness is called into question when the circumstances are such that they may cause stress compliant confessions. The test here does not involve police trickery in the sense of the separate branch of *Oickle*. The atmosphere in the case at bar was so clearly oppressive that if the test had been applied properly, it would have raised a reasonable doubt as to voluntariness. The introduction of a civilian who repeatedly begged the Appellant to break his silence in this manner is prima facie oppressive.
>
> 47. On oppression, McWilliams says:
>
> *Oickle* makes it clear that the test for oppression is not "shock the conscience" but whether the relevant factors when examined in the context of all the circumstances leave the trial judge with a reasonable doubt about whether the accused's will has been overborne by the conduct of the police.
>
> It is respectfully submitted that this is a concise statement of the law.
>
> 48. With the greatest of respect, the issues are constantly in a state of conflation in the trial judge's decision. This may be due to discussion in *Oickle* of police trickery both on its own, and as a subset of oppressive circumstances. In this vein, the trial judge discussed the introduction of Donna Jordan as a "tool to pry admissions" from the Appellant as a matter of police trickery under that specific branch of the test in *Oickle*, and not under oppression. The introduction of Jordan into the interview is then found not to shock the community. Finally, in the decision's conclusion, the trial judge discusses oppression and finds that the Appellant exhibited an operating mind, which is not the correct inquiry. The trial judge's reasons were incorrect and the statement ought not have been admitted.
>
> 49. It is respectfully submitted that on the face of the evidence the atmosphere is extremely oppressive. It raises a reasonable doubt when the voluntariness rule is applied correctly. The standard of review on questions of law is correctness.

[139] There is no merit to this ground of appeal. The judge (as the appellant concedes) well understood the law and, in my view, did not misapprehend the facts. He was entitled to reach this conclusion:

> [72] While obviously not a police officer and lacking in the experience and training, I nevertheless find Ms. Jordan was appropriately briefed. In scrutinizing her questioning of Mr. Calnen, it cannot be said that she offered any inducements or the like. Without question, her presence in the interview room upped the

> emotional quotient. Mr. Calnen and Ms. Jordan clearly had an emotional exchange, characterized by hugging, crying and whispered voices. In this regard, the session was unorthodox but I do not find that it crossed the line. Indeed, I find Ms. Jordan exhibited great skill, composure and discipline as she pled for Mr. Calnen to tell her of the whereabouts of (the remains of) her daughter.
>
> [73] Quite apart from the situation in *Ciliberto*, there is no evidence Mr. Calnen suffered from a mental illness. There is no evidence he was on mind-altering medication. There is no evidence that the authorities lied to him in any way.
>
> [74] From the *Oickle* factors, the Defence has chosen to emphasize oppression. When I examine the totality of the recordings and transcripts as well as evaluate the *viva voce* evidence, I see no contextual basis for arriving at the conclusion that there was an oppressive atmosphere. To the contrary, Mr. Calnen was treated with respect and he exhibited an operating mind. The police strategy was clearly designed to play to Mr. Calnen's emotions. I do not say this critically. It seems to me that appealing to the man's conscience by playing an audio plea from his son, reading a letter from his daughter, and putting a picture of Reita Jordan and her sisters before him were prudent things to do. Similarly, I have no problem with the constant refrain of the officers to "do the right thing".
>
> [75] Bringing Donna Jordan into the interview room was obviously a late attempt to elicit a confession. It worked and Mr. Calnen subsequently told the police more details and walked them through a re-enactment. When I consider all of the facts, the law, and apply a contextual analysis, I come to the overwhelming conclusion that the Crown has proven beyond a reasonable doubt that the statements were voluntary.

The Text Messages

[140] The appellant challenges two series of text messages from the deceased's phone. They are to her friend Mr. Wade Weeks. The first suggests prior domestic abuse on the appellant's part. The second deals with the deceased's stated intention to steal from the appellant. The appellant explains his concerns in his factum:

> 51. At trial the defence had argued against admission of all text messages as hearsay, some of which was uttered by persons with motive be untruthful. Particular exception was taken with admission of the following discussions between Reita Jordan and Wade Weeks:
>
> Jordan: he put his hands on me I don't think I'm safe here
>
> Weeks: can't wait to see you did he hurt you

> Jordan: he tried im tough tho
>
> Weeks: Have you had any more problems
>
> Jordan: nuthin major
>
> These discussions raise the spectre of the Appellant being a person who had assaulted the deceased in the past and hence that he is a person of bad character. The trial judge's decision on admissibility makes no reference to these discussions and gives no explanation of their lack of prejudice. No caution on propensity reasoning was given in the charge to the jury.
>
> **[. . .]**
>
> 53. Similarly, there is a lengthy discussion between Weeks and Jordan with regards to stealing virtually everything of value from the home of the Appellant. The discussions could be evidence of motive, if the Appellant knew of them. They could give insight into the state of mind of the Appellant, but not if he was unaware of the discussion. There was no evidence that he was aware. In argument on the *voir dire* the Crown submitted they would be arguing he did know of them, but late in the proceedings the Crown made an about face and indicated they would not be suggesting he knew. Their inclusion in the body of evidence could lead a jury to impute motive improperly. No instruction was given on this point. No consideration was given to their probative value, which is negligible absent the Appellant's knowledge of them. Quite simply, these text discussions warranted special care that wasn't given.
>
> **[. . .]**
>
> 56. …Finally, the trial judge held that Wade Weeks could be cross-examined on the text messages, which would lessen any prejudice or unfairness. With respect, Wade Weeks could not be cross-examined on Reita Jordan's allegation of some prior assault.

[141] I see no merit to this ground of appeal for several reasons. First of all, some context is required. This was a mid-trial *voir dire* with a jury waiting. Again the appellant alleges no error on the judge's articulation of the law. He simply faults its application of the law and shortcomings in the judge's reasons.

[142] Dealing with the domestic abuse texts, this type of evidence can be probative and may not need a special instruction, as this Court explained in *R. v. Eisnor*:

> [172] There are sound reasons for this. Such evidence can provide necessary context about the relationship, and the likely reaction by the accused to conduct by the deceased, such as leaving the marriage and starting a new relationship. Thus it can provide evidence to establish identity, motive and animus, which can go the issue of intent by the accused in committing the homicide. This is aptly explained in *R. v. Moo*, 2009 ONCA 645:

> [96] The second admissibility rule that the appellant invokes looks to the substance of the hearsay declarations, in particular their disclosure of the appellant's bad character. The character rule generally prohibits the use of character evidence as circumstantial proof of conduct: *R. v. Handy*, [2002] 2 S.C.R. 908, at para. 31. This exclusionary rule equally bars evidence of similar acts or extrinsic misconduct to support an inference that an accused has the propensity or disposition, in other words, character, to do the type of acts charged and, accordingly, is guilty of the offence: *Handy*, at para. 31. We establish guilt by proof of conduct, not by proof of character.
>
> [97] Despite this general rule excluding character evidence as circumstantial proof of guilt, we recognize that, sometimes, evidence of prior misconduct, which tends to show bad character, may be so highly relevant and cogent that its probative value in the search for the truth outweighs any potential for misuse: *Handy*, at para. 41. Thus, we permit admission of this evidence by exception where its probative value exceeds its prejudicial effect.
>
> [98] In prosecutions for domestic homicide, evidence is frequently admitted to elucidate the nature of the relationship between the accused and the deceased. This evidence, which often discloses misconduct other than that charged, not only demonstrates the nature of the relationship between the parties, but also may afford evidence of motive and animus relevant to establish the identity of the deceased's killer and the state of mind with which the killing was done: *R. v. Chapman* (2006), 204 C.C.C. (3d) 449 (Ont. C.A.), at para. 27; *R. v. Cudjoe* 2009 ONCA 543, at para. 64; *R. v. Van Osselaer* (2002), 167 C.C.C. (3d) 225 (B.C. C.A.), at para. 23, leave to appeal refused, [2002] S.C.C.A. No. 444, 313 N.R. 199n (S.C.C.).

> [173] There is also some authority that when a jury hears evidence of prior discreditable conduct concerning assaultive behaviour by the accused toward a domestic homicide victim, a limiting instruction may not actually be required to caution against the risk of reasoning prejudice (see for example: *R. v. Merz*, 140 C.C.C. (3d) 259 (Ont.C.A.); *R. v. Pasqualino, supra*.; *R. v. Krugel* (2000), 143 C.C.C. (3d) 367; *R. v. Cudjoe*, 2009 ONCA 543 at paras. 64-69, but see *R. v. Assoun*, 2006 NSCA 47 at para. 134, leave ref'd [2006] S.C.C.A. No. 233).

[143] I see no reviewable error here.

[144] As to the text portraying the deceased's intention to steal from the appellant, any potential harm was neutralized when the Crown conceded that the first the appellant knew about the deceased's intention to steal was when he arrived home and the ensuing confrontation. This was made clear to the jury when the judge directed:

> Now, recall yesterday's closing arguments. I emphasize that the addresses were argument and not evidence. Both sides have provided me with their theories of the case. Once again, these are their versions of the case which I will now read, firstly from the Crown.
>
> On March 18, 2013, Paul Calnen and Reita Jordan's relationship was on the rocks. Having known each other for years, their relationship had increased in intimacy, and by that time they had been living together for more than a couple of months. *She was leaving him and she was planning to take some of his valuables as she left, which he found out about when he arrived home.* The Crown submits he was upset and angry about all this. When he got home that day, they argued. It is the Crown's theory that Paul Calnen murdered Reita Jordan in anger. To avoid getting caught, he calculatedly tried to make it seem like she had just taken off and left him.
>
> When police later told him they were treating her disappearance as a homicide, suddenly the stakes for him became much higher. He quickly retrieved her body, burned it and disposed of it in order to obliterate evidence about her death and what had caused it.
>
> Emphasis added.

[145] I also agree with the Crown that these texts were not prejudicial to the appellant. I refer to its factum:

> 75. The Crown submits that these text messages between Weeks and Jordan remained relevant to the state of mind of the deceased, and the state of Calnen/Jordan relationship. They were not prejudicial to Calnen. If anything, the text messages were indicative of bad character on the part of Reita Jordan, who planned to steal from Calnen. The text in which Jordan states: "I want to fuck Paul over so bad I already got all his gold jewelry but I want to get him good I got to get out of here", demonstrates her desperation to leave Mr. Calnen.
>
> 76. The jury was specifically told that the Crown theory was that Calnen only learned Reita Jordan was stealing from him on March 18, when he saw his laptop and ring in her bag. The trial Judge repeated Calnen's statement that he did not see the text messages (tab 67, p.1827). To infer the jury misused this evidence is speculative.

[146] Finally, on this ground of appeal, the appellant did, in fact, cross examine Mr. Weeks regarding these texts.

Other Aspects of the Jury Charge

[147] Aside from the challenges to the judge's use of the appellant's after-the-fact conduct, the appellant raises two more issues with his directions, one dealing with

circumstantial evidence and the other dealing with causation. He explains in his factum:

> 81. The trial judge delivered the charge to the jury on November 18th and 19th, 2015. It was crafted using a series of sections from "*Watts' Manual of Jury Instructions*". The trial judge summarized the evidence for the jury, and gave instructions on several issues. On motive he explained:
>
> > In this case, Crown counsel is relying on evidence that Reita Jordan was leaving Mr. Calnen and stealing his things as a motive for Mr. Calnen to commit the offence charged. It is for you to decide whether Paul Trevor Calnen had such a motive or any motive at all and how much or little you will rely on it to help you to decide this case.
>
> 82. With respect, the explanation insufficient, it does not explain it as circumstantial evidence or provide any guidance on or inference drawing and to what ends. From this, it would have been up to the jury to use the plan between Jordan and Weeks as evidence of motive. It would have been unclear to the jury if the "stealing his things" referred to the scant items the Appellant knew of, or the plan between Jordan and Weeks, of which it seems the Appellant was unaware. As shown previously, motive goes to identity and intent, none of this is explained to the jury.
>
> 83. When the trial judge moved into after the fact conduct he stated:
>
> > What a person does after a crime was committed may help you decide whether it was that person who committed it. It may help, it may not help. The conduct may indicate that the person committed the crime.
>
> 84. The charge is effectively silent on Causation. The jury is instructed they may find he committed "the" crime, without clear evidence on causation. This standard instruction is clearly suggesting it may assist the jury in determining identity. This instruction is insufficient as it fails to advise the jury whether this aspect can or cannot be used to prove the *actus reus*. This wouldn't be a concern in a case where there is clear evidence of an unlawful act. That is probably why no wording of this type is used in the standard charge. Given the nuances of this case, it is clear the jury could not have been properly assisted by this, and likely filled the gaps with impermissible reasoning. A tailored instruction was required on this issue.

[148] I respectfully reject these complaints. First of all, as noted, the judge gave a fair and balanced instruction on the use of circumstantial evidence. The appellant cannot cherry pick isolated sections of the charge out of context.

[149] Furthermore, I find the issue surrounding causation to be a red herring. The issue of causation is inextricably wrapped up with the issue of intent. The jury was

satisfied that the appellant killed Ms. Jordon with intent. That subsumes any concerns over causation.

Unreasonable verdict

[150] The test for an unreasonable verdict is similar but not identical to the directed verdict test described above. The directed verdict test is limited to simply whether there was sufficient evidence for a jury to convict. The one exception as the judge noted, involves circumstantial evidence which must be weighed to a limited extent by the directed verdict judge. In an unreasonable verdict assertion, the appeal court must, to a limited extent, weigh all the evidence. Here I accept the appellant's articulation of the this test, as set out in his factum:

> 95. In *R v. Biniaris* Justice Arbour, as she then was, explained the test for an appeal on the basis of an unreasonable verdict:
>
> The test for an appellate court determining whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence has been unequivocally expressed in *Yebes* as follows:
>
> [C]urial review is invited whenever a jury goes beyond a reasonable standard. ... [T]he test is whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered'. (*Yebes*, *supra*, at p. 185 (quoting *Corbett v. The Queen*, [1975] 2 S.C.R. 275, at p. 282, per Pigeon J.).)
>
> That formulation of the test imports both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what ***verdict*** a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyse and, within the limits of appellate disadvantage, weigh the evidence. **This latter process is usually understood as referring to a subjective exercise, requiring the appeal court to examine the weight of the evidence, rather than its bare sufficiency.** The test is therefore mixed, and it is more helpful to articulate what the application of that test entails, than to characterize it as either an objective or a subjective test.
>
> 96. In *R. v. Murphy*, Justice Beveridge explained the role of the Appellate Court on an unreasonable verdict appeal:
>
> Courts of appeal have an important role to play in criminal cases. They must ensure that wrongful convictions do not occur. The Court's jurisdiction is statutorily defined by s. 686(1) of the Criminal Code. The Court is given the power and duty to reject ***verdicts*** that are tainted by non-harmless legal error, a miscarriage of justice or where the evidence is so tenuous that a reasonable trier of fact, properly instructed, could not reasonably convict.
>
> 97. In *R. v. Barrett*, Cromwell J.A., as he then was, noted:

> I would conclude that while the test for whether a verdict is reasonable is the same in all cases, where the Crown's case is entirely circumstantial, the reasonableness of the verdict must be assessed in light of the requirement that circumstantial evidence be consistent with guilt and inconsistent with innocence: see *Yebes* at page 185 where this formulation was said to be the equivalent of the requirement that the circumstantial evidence be inconsistent with any rational conclusion other than guilt. This was summed up by Low, J.A. in *R. v. Dhillon* (2001), 158 C.C.C. (3d) 353 (B.C.C.A.). At para. 102, he stated that where the Crown's case is entirely circumstantial, the appellate court applying the unreasonable verdict test must determine "... whether a properly instructed jury, acting judicially, could have reasonably concluded that the only rational conclusion to be reached from the whole of the evidence is that the appellant ..." was guilty.

[151] Drawing on my colleague Justice Beveridge's summary in *Murphy*, this verdict is not tainted by error, nor do I see the potential for a miscarriage of justice. Nor, for the reasons I have articulated in my directed verdict analysis, is it the product of evidence so tenuous that this jury could not reasonably convict.

Parole Ineligibility

[152] Here are the aggravating and mitigating factors found by the judge:

> [43] [. . .]
>
> Aggravating Factors
>
> 1. The crime was particularly horrific as it involved the secret moving, hiding, repeated burning and disposal of Ms. Jordan's body;
>
> 2. Despite Mr. Calnen's overt attempts to minimize his relationship with Ms. Jordan, I have found that they lived together in a domestic relationship and that the crimes he perpetrated amount to the ultimate acts of domestic violence;
>
> 3. Not only were Mr. Calnen's actions which involved incinerating Ms. Jordan's body shocking, they amounted to concealing and destroying evidence relating to how he murdered her, which obstructed justice; and
>
> 4. By not disclosing the truth to the police along with Ms. Jordan's family, Mr. Calnen prolonged the agony for them of not knowing what happened to her.
>
> Mitigating Circumstances
>
> 1. Mr. Calnen has no prior criminal record;
>
> 2. He has a good work history;
>
> 3. Mr. Calnen has expressed remorse and at the outset of trial he plead guilty to interfering with human remains; and

4. The P.S.R. is generally positive and includes background indicating:

a) solid family support;

b) grade 12 diploma and machinist's certificate;

c) no present issues with drugs or alcohol; and

d) good overall health.

[153] The appellant insists that the only legitimate aggravating factor was his intimate relationship with the deceased. On this basis, he suggests parole ineligibility of 11 years.

[154] In my view, the appellant has not established, as he must, that this disposition is "demonstrably unfit".

[155] Here, I adopt the submissions of the Crown in its factum:

> 131. The trial Judge canvassed the relevant jurisprudence. He identified the range of sentence for second degree murder as being between ten and twenty-five years. He listed fourteen cases provided to him by the Crown and defence which included leading cases from both the NSCA and the SCC which he stated he paid special regard to as they were binding on him (at paras.34-35). This included *Hawkins* and its lengthy discussion of sentencing range for second degree murder.
>
> 132. The trial Judge correctly reviewed the positions of the Crown and defence on sentencing. He noted that the Crown was relying in particular on R. v. Borbely, 2013 ONSC 3355 in which a period of parole ineligibility of seventeen years had been set in a case of second degree murder with a five year concurrent sentence in relation to dismemberment of the deceased's body. The trial Judge correctly stated the defence position and quoted at length from Mr. Planetta's submissions.
>
> **[. . .]**
>
> 140. The trial Judge made no error in his imposition of a fifteen year period of parole ineligibility. As discussed, while he relied on *Borbely*, he recognized the ways in which it differed and reduced his sentence accordingly. The trial Judge did not doubly sentence Mr. Calnen for the indignity to human remains and the second degree murder. Such an argument might be supportable where the time given runs consecutive (*Wills*, para.62). Here indignity to human remains sentence ran concurrent. There was not a double accounting.
>
> 141. The trial Judge made no error in considering the actions which Mr. Calnen took following the death of Reita Jordan to cover his tracks and destroy evidence to amount to an obstruction of justice, or that that particular crime being the

indignity to human remains was “horrific”. While the Appellant was well within his rights to proceed to trial, such is different from the concerted web of deceit engaged in with Jordan’s family and friends.

142. In *R. v. Thomas*, 2015 ONSC 3472, the accused’s actions of hiding evidence of the murder and lying to police and the deceased’s family, thereby increasing the family’s pain and anxiety was found to be aggravating. A sentence of sixteen years for second degree murder was imposed.

143. The defence argues that the trial Judge failed to establish a range. The trial Judge considered the range widely to be anywhere from ten to twenty-five years (at para.34). He then noted that he had carefully considered all of the authorities that had been provided to him. This would seem to imply, that he drew his range from those cases.

144. The Appellant submits that the trial Judge made no error in principle, assigned appropriate weight to each of the statutory factors, and ordered a period of parole ineligibility within the appropriate range for this offender and this offence committed in these circumstances. Unusual circumstances are not required to increase a period of parole ineligibility from a statutory minimum of ten years (*R. v. Salah*, 2015 ONCA 23, at para.262). The trial Judge’s finding that the two were in a domestic relationship, conceded by the Appellant, makes denunciation and deterrence in the circumstances paramount.

145. In *R. v. Landry*, 2016 NSCA 53, this Court stated that the accused is not entitled to be sentenced according to the most lenient view of the circumstances consistent with the jury verdict (para.48). To be unfit the sentence must be one that is unreasonable in the sense that it is inappropriate as falling outside the acceptable range (para.62). In *R. v. Nash*, 2009 NBCA 7 cited in *Hawkins*, the Court considered ten to fifteen years to be an appropriate range for those offences of second degree murder at the lower end of the scale. As such, it cannot be said that the sentence imposed by Justice Chipman was excessive.

146. In *R. v. Keene*, [2015] O.J. No. 4347 (Ont.S.C.J.) the Court imposed a sentence of seventeen years for second degree murder and five for indignity to human remains. The case involved significant post-offence conduct. The victim and deceased were friends but not domestic partners. His lies to authorities were found to be aggravating as was the desecration of her body.

147. In *R. v. Folker*, 2013 NLTD(G) 176 a sentence of fifteen years for the second degree murder of an intimate partner and three and a half years’ concurrent were considered appropriate.

148. In *R. v. Hales*, 2014 NSSC 408, Justice Duncan imposed a parole ineligibility period of seventeen years in a domestic homicide of a former partner.

[156] This disposition was therefore reasonable, in my view.

[157] In reaching this conclusion, I would like to address one concern. I do not accept the judge's decision to classify the appellant "not disclosing the truth" as an aggravating factor. Of course, that would be an affront to his right to silence and presumption of innocence. However, I am convinced the judge simply misspoke, by framing his concern that way. I am satisfied he, instead, was referring to the appellant's decision to mislead the police. That, in my view, would be an aggravating factor. In this context, there would be therefore no basis for me to interfere.

Conclusion

[158] I would dismiss the appeal.

MacDonald, C.J.N.S.