

CITATION: R. v. Luciano, 2011 ONCA 89

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COURT OF APPEAL FOR ONTARIO

Feldman, Rouleau and Watt JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Michael Luciano

Appellant

DOCKET: C42706

AND BETWEEN

Her Majesty the Queen

Respondent

and

Michael Luciano

Appellant

James K. Stewart, for Her Majesty the Queen

Michael Dineen, for Michael Luciano

Heard: May 18, 2010

On appeal from a conviction of first degree murder, entered by the Honourable Justice Alfred J. Stong of the Superior Court of Justice, sitting with a jury, on May 22, 2003, and from an acquittal of second degree murder, entered by the Honourable Justice Bruce A. Glass of the Superior Court of Justice, sitting with a jury, on November 2, 2004.

Watt J.A.:

[1] On a cold weekend in late January 2000, the lengthy but brittle relationship among Michael Luciano, Colleen Richardson-Luciano and James Cooper ended. Abruptly and violently. First, in Woodbridge. Then, in Egmondville. Two deaths.

[2] Colleen Richardson-Luciano died first. In Woodbridge. Stabbed to death.

[3] A day later, James Cooper died in Egmondville. By asphyxia from strangulation.

[4] Michael Luciano either killed or witnessed the killing of his estranged wife, Colleen Richardson-Luciano. Then Michael Luciano killed his friend, James Cooper.

[5] Michael Luciano was charged with two counts of murder: the second degree murder of Colleen Richardson-Luciano and the first degree murder of James Cooper. Both counts were originally included in a single indictment.

[6] When Michael Luciano appeared for trial, the presiding judge decided that the counts should be severed and separate trials held.¹

¹ In this court neither party challenged the correctness of this ruling. Lack of any further reference to it in these reasons does not indicate either agreement with the reasons of Stong J. or affirmation of the correctness of the result.

[7] The trial of the first degree murder count involving the death of James Cooper proceeded first before the trial judge who had ordered severance. The jury heard evidence about both killings and convicted Luciano of first degree murder.

[8] The trial of the second degree murder count proceeded several months later before a different judge. The jury heard evidence about the killing of Colleen Richardson-Luciano, but not about Cooper's death or why Cooper didn't testify at trial. They found Luciano not guilty.

[9] In each case an appeal has been taken. Luciano appeals his conviction of first degree murder. He alleges that the trial judge made a number of mistakes in his final instructions to the jury. The Attorney General appeals Luciano's acquittal of second degree murder and argues that the trial judge was wrong in failing to admit evidence of the killing of Cooper, or at least evidence that Cooper was dead when the second trial occurred. Both appellants seek a new trial.

THE BACKGROUND FACTS

[10] The circumstances that underlie the prosecution of Michael Luciano (Luciano) provide the context necessary for an evaluation of the claims of error made in connection with both trials.

The Principals

[11] James Cooper was a 38-year-old career recidivist whose prior convictions included several robberies and other offences against the person. He had been deported to

Scotland in 1998 on his release from penitentiary, but returned to Canada illegally a few months before his death.

[12] Colleen Richardson-Luciano was an exotic dancer addicted to alcohol and cocaine. She had two children, a son, 14, and a daughter, 6. She pursued a somewhat nomadic lifestyle after her separation from Michael Luciano, the father of her children.

[13] Like Cooper, Michael Luciano was a 38-year-old with a lengthy criminal record. Unlike Cooper, however, Luciano had a full-time job. His last criminal conviction occurred in 1992.

The Relationship Among the Principals

[14] James Cooper introduced [then] Colleen Richardson to Michael Luciano. The couple lived together for two years, then married. Their relationship was turbulent, punctuated by verbal and physical abuse. Despite an earlier separation, Ms. Richardson-Luciano returned from time to time to the basement apartment in Woodbridge where her husband and children lived.

[15] Prior to mid-January 2000 neither Michael Luciano nor his estranged wife had had any contact with James Cooper for several years.

The Arrival of James Cooper

[16] On January 14, 2000, James Cooper arrived unbidden at Luciano's apartment in Woodbridge. Michael Luciano was at work. Colleen had been staying at her estranged husband's apartment for about a month prior to Cooper's arrival. She and Cooper drank.

Ms. Richardson-Luciano left the apartment and did not return for two days. Luciano blamed Cooper for her absence.

[17] The Lucianos argued often. Their arguments increased in frequency and volume after Cooper's arrival. Cooper also argued with Ms. Richardson-Luciano.

The Early Evening of January 21, 2000

[18] When Luciano returned home from work on Friday, January 21, 2000, Cooper and Colleen were in the apartment. Luciano and Colleen drove to a nearby liquor store to pick up some alcohol for the evening. Cooper, who had a walking cast on one leg, remained at the apartment with the couples' young daughter.

[19] Throughout the evening of January 21, 2000, Cooper and the Lucianos listened to loud music, yelled and cursed. Lucianos' 14-year-old son returned home by 11:00 p.m. and went to bed. He complained about the noise, but noticed nothing untoward between his parents or his parents and Cooper. The upstairs neighbours confirmed the din from the basement apartment.

The Fatal Assault

[20] The upstairs neighbours heard the sound of a loud thump from the Luciano apartment around midnight or an hour later. Silence followed.

[21] Michael Luciano is the only living witness to the killing of his wife. He claimed that Colleen and Cooper argued over a substantial debt Cooper owed to Colleen. The debt had been outstanding for a long time. Cooper assured Colleen that he would never repay

her. Colleen insulted Cooper and threatened retaliation if Cooper persisted in his refusal to pay. Cooper remained calm. Luciano told both combatants to “keep it down”. Colleen called Cooper a “fucking goof”. Cooper got up and stabbed Colleen. She collapsed on the floor.

[22] Deprived of a competing eyewitness version of events at the trial for Colleen’s murder, the prosecutor relied upon expert evidence about findings at the scene to contradict Luciano’s version of events. Luciano also adduced evidence that portrayed Cooper as a person with a propensity or disposition for violence and one likely to respond violently to the descriptive “goof”.

The Clean-Up

[23] Luciano and Cooper cleaned up the apartment and immediate area to rid it of any signs that Colleen had been killed there. The kitchen and stairwell were scrubbed and blood rinsed from the cleaning materials. They wrapped Colleen’s body in a rug, carried it to Luciano’s car and put it in the trunk. Luciano bumped into a neighbour’s car while turning his vehicle around to remove Colleen’s body from the area. He drove 12 kilometres from his home and deposited her body in a dumpster.

[24] Luciano acknowledged his participation in the clean-up and disposal of the body, but claimed he did so only out of fear of Cooper who had threatened his life and the lives of his children.

The Morning After

[25] On Saturday morning, Luciano's daughter awakened him. She wanted breakfast. After breakfast, she watched television. Later, Luciano's upstairs neighbour came into the apartment to speak to Luciano about repairing the damage to his [the neighbour's] car. The neighbour noticed Cooper in the apartment. Cooper was calm and relaxed. Luciano looked like a zombie.

[26] The neighbour returned to Luciano's apartment later in the day to pursue his claim for car repairs. Luciano wanted to resolve the neighbour's claim without involving the police. Either Luciano or Cooper suggested that the neighbour tell any investigators that the incident had occurred two days earlier.

The Trip to Egmondville

[27] Egmondville is not far from Goderich. Luciano has several relatives in the area, including his sister and a niece, Elvina Wells. After a series of telephone calls from Elvina, Luciano, his daughter and Cooper left Woodbridge on Saturday afternoon to drive to Egmondville to visit Elvina Wells. They stopped twice along the way and arrived in Egmondville in the early evening.

Collecting Supplies

[28] Shortly after the group arrived in Elvina's home in Egmondville, Luciano and Elvina drove over to the homes of some of their relatives to collect some liquor and beer for the evening. The beer and liquor stores were closed. Elvina and Luciano returned to

Elvina's place with a bottle of rum and a dozen beers to supplement Elvina's supplies. They began drinking around 8:30 p.m. Luciano's daughter was in another room of the house. No one said anything about what had happened on Friday night at Luciano's apartment.

The Discussions

[29] Cooper lay down shortly after midnight. After some teasing about his endurance, Cooper got up and continued to drink and to talk with the others. He lay down again about an hour later.

[30] Elvina and Luciano remained at the kitchen table. Luciano was drunk. Elvina had polished off two magnums of wine. Luciano told Elvina that Cooper had killed Colleen on Friday night. Luciano was an "accessory". Later, Luciano described Cooper as a "witness". He told Elvina that he (Luciano) was going to "do" Cooper that evening before Cooper "did" him.

[31] Elvina became very upset when Luciano told her about what had happened the night before and what he planned to do later. She telephoned her parents and asked them to come over, pick her up and take her to their place. Her parents arrived a few minutes later and took Elvina to their home. After she told them about what Luciano had said, Elvina called the police.

[32] Expert evidence based on Luciano's report of his alcohol consumption estimated his blood alcohol concentration at between 300 and 330 milligrams of alcohol in 100 millilitres of blood at 2:30 a.m. on Sunday, January 23, 2000.

The Killing of James Cooper

[33] According to Luciano, after Elvina had left, he and Cooper got into a physical confrontation. Cooper took a swing at Luciano, but missed. Luciano punched Cooper. They wrestled. Luciano was terrified and angry. Somehow, Cooper died of asphyxia, which required the application of pressure for at least 30 seconds to stop his breathing. The pressure could have been applied by an arm around his throat from the rear.

[34] Luciano's daughter woke up during the altercation with Cooper. She saw her father "on top of" Cooper, with his hands in front of him, but couldn't see where her father's hands were or what he was doing with them.

[35] James Cooper's death from asphyxia was consistent with manual strangulation.

The Removal of the Body

[36] Luciano carried Cooper's body out of Elvina's home and put it in the back seat of his car parked outside the house.

The Arrival of the Police

[37] Elvina Wells had called the police from her parents' home. She asked the police to go to her house to remove two men who were there and whom she feared were about to get into a fight. Two officers accompanied Elvina back to her home.

[38] When the police arrived, they were met by Luciano. Judging by the odour of alcohol on Luciano's breath, his speech and his appearance, the officers concluded that Luciano was drunk. In answer to their query, Luciano told the police that Cooper was "gone". The police took from this that Cooper had left on foot. The officers left to find Cooper, thinking that they may have seen him earlier in the evening walking along the road.

Luciano's Reaction

[39] Luciano was angry at Elvina for calling the police. He told her that he had "kicked Cooper's guts in good" and left him in the back of his car. Luciano had a knife and explained to Elvina that he was going to "gut" Cooper in a nearby field as Cooper had done to Colleen the night before.

The Return of the Police

[40] The police returned to Elvina Wells' home. They checked Luciano's motor vehicle parked outside the house and noticed Cooper in the rear seat. Luciano suggested that Cooper be left there to "sleep it off" and offered to turn on the ignition to activate the heater. The officers told Luciano that his suggestion was unacceptable. Luciano walked

outside, went immediately to the rear door on the driver's side of his vehicle and shook Cooper. He received no response.

[41] Luciano told the police that he and Cooper had had a fight. Luciano kicked Cooper out. Luciano had no visible injuries. But when the officers checked Cooper closely, they confirmed that he was dead.

Luciano's Statement

[42] Police officers provided Luciano with a statement form and asked him to complete his statement about the evening's events. Luciano fell asleep in the back of the police cruiser, and remained there sitting upright, with a pen in his hand and the statement form on his knee, for several hours.

THE APPEAL FROM CONVICTION (THE MURDER OF JAMES COOPER)

[43] Michael Luciano appeals his conviction of first degree murder of James Cooper. Luciano says that the trial judge made several mistakes in his final instructions to the jury. Sometimes, the trial judge said the wrong things. At other times, the trial judge left out things he should have said. When the errors and omissions are added together, Luciano argues, the sum takes the case beyond salvage under s. 686(1)(b)(iii) and requires a new trial to set it right.

Ground #1: The Instructions on Intoxication

[44] This ground accumulates several discrete but related complaints. Presentation of the relevant evidence in a manner that effectively removed intoxication, a viable defence

on the evidence, from the jury's consideration. Interpretation of the expert evidence about intoxication in a way that was prejudicial to the defence. Failure to distinguish between the levels of intoxication that could negate the mental element necessary to make an unlawful killing murder from the degree that would negate the deliberation requirement of planned and deliberate first degree murder. And the failure to leave second degree murder as an available verdict for the jury to return.

The Background Facts

[45] The availability of intoxication as a factor for the jury to consider in deciding whether an unlawful killing was murder and, if murder, whether it was planned and deliberate first degree murder, was not controversial at trial.

[46] The common currency among Elvina Wells, James Cooper and Michael Luciano on the evening of January 21, 2000, and into the early hours of the following morning was alcohol. For Elvina Wells, it was wine – two magnums and a start on a third. James Cooper drank beer. Micheal Luciano had the lion's share of a bottle of rum, then converted to peach schnapps.

[47] Expert testimony augmented the evidence of alcohol consumption. Based on the assumed truth of Luciano's evidence of consumption, an expert calculated the blood-alcohol concentration of a person of Luciano's proportions at between 300 and 330 milligrams of alcohol per 100 millilitres of blood at around the time Luciano caused Cooper's death. Another expert explained the effect of such a blood-alcohol

concentration on a person's thought processes, including the ability to undertake goal-directed purposeful behavior and to recall various events.

[48] To some extent at least the accounts of alcohol consumption provided by Luciano and Elvina Wells were confirmed by the detritus observed by investigators in Wells' home. The police officers who responded to Wells' 911 call also confirmed Luciano's drunken state.

The Positions at Trial

[49] James Cooper died of asphyxia. The cause of his death is consistent with manual strangulation, the application of pressure for at least 30 seconds.

[50] Michael Luciano admitted that his conduct caused Cooper's death. But, according to Luciano, his conduct did not attract criminal liability because it occurred by accident during a consensual, thus, lawful activity, wrestling, or in lawful self-defence against an assault by Cooper. Luciano also relied on evidence of intoxication to confine his criminal liability to the crime of manslaughter.

[51] The prosecutor and Luciano's trial counsel both agreed that the trial judge should *not* leave the included offence of second degree murder to the jury.

The Instructions of the Trial Judge

[52] To establish Luciano's guilt of first degree murder as the sole principal, the prosecutor relied on the definition of murder in s. 229(a) of the *Criminal Code*. To

establish that the murder was first degree murder, the prosecutor invoked s. 231(2) of the *Criminal Code*: the murder was planned and deliberate.

[53] In cases like this, of planned and deliberate first degree murder, in this province and in others, judges instruct jurors about the essential elements of first degree murder in a series of steps. These step directions include instructions about the mental or fault element required to make an unlawful killing murder, and about the added requirement that the murder be planned and deliberate to amount to first degree murder; evidence of intoxication is a relevant consideration at both steps.

[54] In this case, the trial judge wandered off the conventional path of step-directions. He combined, in a single instruction about “the state of mind required for first degree murder”, brief mention of the intent to kill and parts of the specimen charge on planned and deliberate first degree murder. The trial judge did not provide jurors with the specimen or any instruction about the mental or fault element in murder as defined in s. 229(a)(ii).

[55] In his instructions about planning and deliberation, the trial judge listed several factors for the jurors to consider. Included in the list were Luciano’s condition, state of mind, and the degree of his intoxication. The trial judge continued:

All these things and the circumstances in which they happened, including the evidence about how much alcohol he drank and over how long, the opinion of the experts, Drs. LeBlanc and Ervin who testified about Mr. Luciano’s state of mind as affected by the consumption of alcohol, the acute stress disorder, the exhaustion from being deprived of sleep,

may shed light on his state of mind at the time he allegedly committed the offence charged.

All this evidence may help you decide what he meant or didn't mean to do and whether he planned and deliberated or did not plan and deliberate. Along with this evidence consider the evidence of those to whom he spoke after the death of Mr. Cooper and what he said to them about the death.

In considering all of the evidence, use your good common sense.

[56] The trial judge gave jurors specific instructions about intoxication. He referred to the common sense inference of intention from conduct as a means by which state of mind could be proven and explained that, in deciding whether to draw the inference, the jury was required to take into account the evidence of Luciano's alcohol consumption and its effects. He related intoxication to part of the fault element in murder and to a "planned and deliberate killing" in these terms:

Drunkenness becomes a defence for first degree murder if it precludes a finding beyond a reasonable doubt of the specific intent to kill and the planning and deliberation required for first degree murder at the time of the act of asphyxiation, or if it raises a reasonable doubt about it.

If you find that Mr. Luciano had consumed alcohol, you may consider the effect of that consumption upon him along with the other facts bearing on his intent to kill and on his planning and deliberation in determining whether he had the requisite state of mind for first degree murder.

[57] The instructions on intoxication followed the two-step approach of *R. v. MacKinlay* (1986), 28 C.C.C. (3d) 306 (Ont. C.A.), rather than the one-step format of *R. v. Canute* (1993), 80 C.C.C. (3d) 403 (B.C. C.A.), but emphasized that what the jury had

to decide was Luciano's *actual* intent at the time of the killing. The trial judge also gave the jurors the "rolled-up" instruction on the issue of "the state of mind" required for first degree murder.

[58] The trial judge left three verdicts for the jurors to consider:

- not guilty
- guilty of first degree murder
- not guilty of first degree murder, but guilty of manslaughter.

The listed verdicts did not include "not guilty of first degree murder, but guilty of second degree murder". Nor did the instructions distinguish, in express terms, between the level of intoxication that may raise a reasonable doubt about the fault element required in murder under s. 229(a), on the one hand, and the degree of intoxication that may negate the deliberation component of planned and deliberate first degree murder on the other.

The Positions of the Parties on Appeal

[59] For Luciano, Mr. Dineen says that the instructions on intoxication contained several errors that, in combination, command our intervention.

[60] First, Mr. Dineen contends that the trial judge's review of the expert evidence about alcohol consumption and its effects was freighted with negative characterizations about what it did *not* prove, automatistic behaviour, rather than about what it did and how it related to the factual findings the jury was required to make.

[61] Second, Mr. Dineen urges, the trial judge denigrated and interpreted the expert evidence for the jury, rather than reviewing it objectively for the jurors, leaving its effect on the adequacy of the prosecutor's proof of the critical mental elements for the jurors to decide. In his instructions, the trial judge posited that Luciano had an operating mind, a state belied by the expert evidence.

[62] Third, Mr. Dineen continues, the trial judge was wrong in failing to leave second degree murder as an available verdict. The trial judge made no mention of second degree murder in his final instructions. The verdict was reasonably available on the evidence, despite the joint position of Luciano's experienced trial counsel and the prosecutor that the verdict should not be left. If the jurors had a reasonable doubt that the murder of James Cooper was deliberate, for example because of the effects of intoxication, the proper verdict would have been not guilty of first degree murder but guilty of second degree murder. Part of the problem was that the trial judge never told the jurors that a lesser degree of intoxication could negate deliberation than might raise a reasonable doubt about the fault element in murder.

[63] For the respondent, Mr. Stewart characterizes the instructions on intoxication as fair and balanced, thorough and effective. He points out that the trial judge's instructions on intoxication were directed at two discrete issues, thus served two different purposes. The first had to do with Luciano's claim that the conduct that caused Cooper's death was not unlawful because it was either accidental or occurred in lawful self-defence. And the

second required the judge to relate intoxication as a “stand alone defence” to the essential elements of first degree murder.

[64] Mr. Stewart says that it was not wrong for the trial judge to clear away any suggestion of automatistic behaviour that may have emerged from the expert evidence. Automatism was not and could not be advanced as a defence in this case. By clearing it out of the way, the trial judge could and did focus on the relevance of intoxication to the issues of this case. Any interpretive references the trial judge made to the expert evidence were for the purpose of confining it to its legitimate purposes.

[65] According to Mr. Stewart, the instructions on the substantive defence of intoxication expressly related it to accident, self-defence, intent to kill, planning and deliberation and even to manslaughter. Nothing was said that was wrong. The two-step charge was appropriate because of the manner in which the experts expressed their opinions and the degree of intoxication advanced. In any event, the instructions made it clear that the issue the jury was to determine was Luciano’s *actual* intent, not his capacity to form intent.

[66] Mr. Stewart contends that the failure to instruct on second degree murder does not constitute error. The trial judge simply gave effect to the express agreement of experienced counsel about the available verdicts. At all events, the evidence at trial afforded no air of reality to a verdict of second degree murder. The blood-alcohol concentration advanced was not such that it would raise a reasonable doubt about the

deliberate character of the killing, but not about the underlying intention to kill. But what is more is that the exclusion of second degree murder as an available verdict was advantageous to Luciano: a reasonable doubt about first degree murder would have resulted in a verdict of manslaughter, even if the reasonable doubt related only to the requirement of deliberation.

[67] Mr. Stewart also denies the obligation to provide an express instruction that a lesser level of intoxication may raise a reasonable doubt about deliberation than is required to create a reasonable doubt about proof of the fault or mental element in murder. In every event, this common sense conclusion would not be lost on the jury on the basis of the trial judge's final instructions in this case.

The Governing Principles

[68] The assertions of error advanced require consideration of several underlying principles.

The Review of Jury Instructions

[69] Worthy of reminder at the outset is the overarching principle that the parties in a criminal case are entitled to properly, not perfectly instructed juries: *R. v. Daley*, [2007] 3 S.C.R. 523, at para. 31; *R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 2 and 32. What matters is the substance of the instructions, not their adherence to or departure from some prescriptive formula. The language used and sequence followed fall within the firmly

embedded discretion of the trial judge, to be exercised in accordance with the demands of justice in each case: *Daley* at para. 30.

[70] Failure to tell jurors everything they might have been told is not misdirection. Misdirection occurs when the judge tells the jury something that is wrong, or tells them something that would make wrong what the judge has left the jury to understand. Non-direction, without more, is not misdirection: *R. v. Demeter* (1975), 25 C.C.C. (2d) 417 (Ont. C.A.), at pp. 436-37, aff'd [1978] 1 S.C.R. 538; *Abrath v. North Eastern Ry. Co.* (1883), 11 Q.B.D. 440, at p. 453.

[71] Appellate courts are to read jury instructions as a whole. We are not forensic pathologists dissecting the *corpus* of a charge in search of a disease process, much less to assay its effect on the survival of the body. Our task is to administer justice, to deal with valid objections and to determine whether those claims have led to a miscarriage of justice: *R. v. Cohen and Bateman* (1909), 2 Cr.App.R. 197 (C.C.A.), at p. 207.

The Evidentiary Review

[72] A trial judge is under a duty to review the *substantial* parts of the evidence adduced at trial and to relate that evidence to the issues that are for the jury to decide, thereby to ensure that the jurors appreciate the value and effect of the evidence: *Azoulay v. The Queen*, [1952] 2 S.C.R. 495, at p. 497. A trial judge is under no obligation, however, to review *all* the evidence. Indeed, a colourless rendition of all the evidence,

culled from the trial judge's bench book, is more apt to numb jurors into catatonia than to help them do their job.

[73] Nor do we impose upon a trial judge the obligation to say twice what he or she has said correctly once, in a review of the substantial parts of the evidence, when that same evidence may relate to the juror's decision on more than one issue at trial: *Jaquard* at paras. 13-14. In a prosecution for first degree murder based on planning and deliberation, for example, the same evidence may exert influence on the jurors' decisions about whether an unlawful killing is murder and whether a murder is planned and deliberate.

Included Offences and Second Degree Murder

[74] A general principle of our criminal law holds that counts are divisible. Where the commission of an offence charged in an indictment, as described in the offence-creating section, or as a result of these two factors in combination, includes the commission of another offence, an accused may be convicted of an included offence that has been proven, even though the full offence charged has not been proven: *Criminal Code*, s. 662(1). And so it is that an accused charged with first degree murder may be found not guilty of first degree murder, but guilty of second degree murder: *Criminal Code*, s. 662(2).

[75] The obligation of a trial judge to instruct jurors about the availability of a verdict of an included offence is *not* absolute, rather is conditioned upon an air of reality in the evidence adduced at trial to permit a reasonable jury, properly instructed, to conclude that

the essential elements of the included offence have been established: see, generally, *R. v. Cinous*, [2002] 2 S.C.R. 3, at paras. 50-55; *R. v. Chalmers* (2009), 243 C.C.C. (3d) 338 (Ont. C.A.), at para. 51; *R. v. Sarrazin* (2010), 259 C.C.C. (3d) 293 (Ont. C.A.), at para. 62; and *R. v. Aalders*, [1993] 2 S.C.R. 482.

[76] Sometimes, like here, counsel may not want a particular included offence, or a defence, justification or excuse, which may lead to an intermediate verdict, left with the jury. The reasons vary, but are often laced with tactical and practical considerations. Incompatibility with a primary defence. Presumed risk of a “compromise” verdict. An unpalatable alternative in the circumstances disclosed by the evidence.

[77] To determine whether failure to instruct on an included offence reflects error, appellate courts take into account the position of counsel at trial, especially defence counsel: *R. v. Murray* (1994), 20 O.R. (3d) 156 (C.A.), at p. 171. See also, *R. v. Squire*, [1977] 2 S.C.R. 13, at p. 19; *R. v. Chambers*, [1990] 2 S.C.R. 1293, at pp. 1319-320. After all, an accused has a constitutional right, not without limits, to control his or her own defence: *R. v. MacDonald* (2008), 236 C.C.C. (3d) 269 (Ont. C.A.), at paras. 35-36; *Chalmers* at para. 51. See also, *R. v. Lomage* (1991), 2 O.R. (3d) 621 (C.A.), at pp. 629-30; and *R. v. Levert*, [1994] 76 O.A.C. 307 (C.A.), at para. 7. No different principle applies where the included offence at issue is second degree murder.

Instructions on Intoxication

[78] In this case, the trial judge was dealing with “advanced” intoxication, in other words, intoxication to a degree that impairs an accused’s specific intent or foresight of the consequences of his or her conduct that are essential to liability: *Daley* at para. 41. In some cases, those in which the death of the deceased is an obvious consequence of an accused’s conduct, evidence of a particularly advanced state of intoxication may be essential if a claim of intoxication reducing murder to manslaughter is to succeed: *Daley* at para. 42.

[79] In prosecutions for murder, it is commonplace for the prosecutor to rely on the common sense inference of intention from conduct. The inference is relied upon to aid in the prosecutor’s proof of an intention to kill under s. 229(a)(i), and the knowledge and foresight constituents of s. 229(a)(ii): *Daley* at para. 53; *MacKinlay* at p. 322. Where the prosecutor relies on the common sense inference and evidence of advanced intoxication is adduced, we require jury instructions expressly to link the evidence of intoxication to the common sense inference. The jury must be told to take into account the evidence of alcohol or drug consumption, along with the rest of the evidence relevant to the intent or foresight requirement, in determining whether to draw the common sense inference in all the circumstances: *Daley* at para. 50; *R. v. Seymour*, [1996] 2 S.C.R. 252, at paras. 19, 21 and 23.

[80] Where expert evidence is introduced to support a claim of intoxication, a trial judge should avoid drawing inferences from or interpreting the evidence for jurors in final instructions. Any review of expert testimony, and the relation of it to relevant issues, should not expressly or impliedly remove the determination of the critical facts from the jury's consideration: *Daley* at para. 62; *Cooper v. The Queen*, [1980] 1 S.C.R. 1149, at p. 1171.

Intoxication and Planning and Deliberation

[81] Evidence of intoxication is relevant to proof of the requirement of deliberation in prosecutions for planned and deliberate first degree murder: *R. v. Mitchell*, [1964] S.C.R. 471, at pp. 475-76; *R. v. Wallen*, [1990] 1 S.C.R. 827, at pp. 831-32 and 844. Evidence of intoxication that falls short of what may be required to negate the intention and foresight requirements in the definition of murder in s. 229(a) may raise a reasonable doubt about whether a murder was planned and deliberate on the part of the person charged: *R. v. Reynolds* (1978), 44 C.C.C. (2d) 129 (Ont. C.A.), at p. 138; *R. v. Howard* (1986), 29 C.C.C. (3d) 544 (Ont. C.A.), at p. 557, *aff'd* on other grounds, [1989] 1 S.C.R. 1337.

[82] Despite the decisions in *Reynolds* and *Howard*, which require an express instruction that planning and deliberation may be negated by a degree of intoxication less than that required to negate the intent requirement of s. 229(a)(i) and the knowledge and foresight components of s. 229(a)(ii), a majority of the Supreme Court of Canada

held in *Wallen* that no such express instruction need be given: *Wallen* at pp. 836 and 844-45.

The Principles Applied

[83] This ground of appeal does not warrant our intervention on any basis upon which the convictions are impeached as wrong through error or omission.

[84] To take first the complaint about the trial judge's interpretation or denigration of the expert evidence, rather than a simple review of its substantive features and its relation to the issues ripe for the jury's decision.

[85] The trial judge explained the influence of intoxication on the jury's decision on two issues:

- i. the unlawful character of the killing; and
- ii. the legal character of the offence committed.

Evidence of intoxication required consideration on both these issues. As the judge explained, evidence of intoxication was relevant to the jury's assessment of the claims of accident and self-defence advanced on Luciano's behalf to raise a reasonable doubt about the unlawfulness of his conduct that caused Cooper's death. And the same evidence, as the judge instructed, required consideration in the jury's decision about the adequacy of the prosecutor's proof of the mental or fault element in first degree murder.

[86] In his review of the expert evidence, the trial judge pointed out that the evidence did not suggest that Luciano's conduct was automatistic. This observation was correct:

defence counsel was not advancing, nor would the law tolerate in the circumstances of this case, a defence of non-mental disorder automatism.

[87] The excursion into automatistic conduct and a level of intoxication that was not in issue could easily have been omitted from the judge's final instructions but, sometimes at least, clearing away the underbrush of what is not at issue sharpens the focus of what is to be decided. The detritus aside, the trial judge then focused on the influence of evidence of intoxication on the controverted issues in the case: the *actual* state of mind of Michael Luciano.

[88] The complaint about the "negative" aspect of the instructions on intoxication lacks substance. What was said here is no different than what appears in the opening paragraph of the one-step charge in *Canute* affirmed by the Supreme Court of Canada in *Daley*: *Canute* at p. 419; *Daley* at para. 48; *MacKinlay* at pp. 321-22; and *R. v. Robinson*, [1996] 1 S.C.R. 683, at para. 49. The purpose of the instruction is to ensure that jurors appreciate the nature and extent of intoxication required to warrant consideration, along with other relevant circumstances, on proof of the specific mental or fault element in the offence charged. The trial judge made it clear to the jury that, like the evidence of any witness, they were entitled to accept or reject the evidence of the experts in whole or in part.

[89] Luciano contends that the trial judge's failure to leave second degree murder as an available verdict prejudiced him in two ways. First, the failure to leave second degree murder effectively precluded a considered examination of the effect of the evidence of

intoxication on the requirement of deliberation. Second, the failure to leave second degree murder predisposed the jury to convict of first degree murder.

[90] I would not give effect to either aspect of this claim of error.

[91] The trial judge did not follow the prevailing practice of dividing up the offence charged, first degree murder, into its essential elements:

- i. that Luciano caused Cooper's death;
- ii. that Luciano caused Cooper's death unlawfully;
- iii. that Luciano had a state of mind required for murder when he unlawfully killed Cooper; and
- iv. that Luciano's murder of Cooper was both planned and deliberate.

Had the trial judge followed these steps and instructed the jury on the legal requirements of each essential element, a reasonable doubt about element iii would have led to a conviction of manslaughter, and a reasonable doubt about element iv to a conviction of second degree murder.

[92] The omission of second degree murder as an available verdict was at the specific joint request of counsel conducting the trial. The only basis upon which a finding of guilt of second degree murder could have been recorded was if the evidence of intoxication did not raise a reasonable doubt about the intent to kill (the only fault element in murder mentioned by the trial judge), but did raise a reasonable doubt that the intentional killing was deliberate. The incapacitating degree of intoxication advanced here, a blood-alcohol

concentration of between 300 and 330 milligrams of alcohol per 100 millilitres of blood, if accepted, was incompatible with murder of either degree.

[93] In this case the trial judge instructed the jurors that if they had a reasonable doubt that Luciano intended to kill Cooper and that he planned and deliberated the killing, they (the jurors) were to consider whether Luciano was guilty of manslaughter. A proper instruction would have left second degree murder as the verdict if the reasonable doubt related to deliberation, but *not* to the intent to kill. The verdict of the jury indicates that the jurors were satisfied beyond a reasonable doubt, not only that Luciano intended to kill Cooper, but also that he planned and deliberated the murder.

[94] The final complaint about the instruction on intoxication has to do with the failure of the trial judge to instruct the jury, expressly, that the deliberation requirement essential for murder to be classified as first degree murder under s. 231(2) of the *Criminal Code* may be negated by a degree of intoxication less than what may negate the mental element in murder under s. 229(a).

[95] In this case, the trial judge instructed the jurors that evidence of intoxication was one of the factors for them to consider in deciding whether the prosecution had proven the “state of mind” required for first degree murder. In the instructions, “state of mind” included both the intent to kill and planning and deliberation.

[96] In at least two prior decisions, *Reynolds* and *Howard*, this Court has held that a judge should instruct the jury expressly that a lesser degree of intoxication than might be

required to negative the intent to kill may negative planning and deliberation: *Reynolds* at p. 138; *Howard* at p. 557. In *Wallen*, however, a majority of the Supreme Court of Canada considered it the better course to include such an instruction, but not a fatal error to omit it: *Wallen* at pp. 836-37 and pp. 844-45.

[97] As *Wallen* points out, in the final analysis, the influence of evidence of intoxication upon the issue of whether a murder was planned and deliberate is an issue of fact. And what is more, the issue is one with which jurors are quite capable of dealing when equipped with instructions about the essential elements of planned and deliberate first degree murder: *Wallen* at p. 845.

[98] I would not accede to any ground of appeal relating to the adequacy of the final instructions on intoxication.

Ground #2: The Instructions on Propensity Evidence

[99] The jurors heard evidence about the circumstances in which Colleen Richardson-Luciano was killed. Luciano and Cooper were there. Luciano said Cooper killed her after Colleen called Cooper a “fucking goof”. The jurors also heard evidence about what Luciano and Cooper did after Colleen’s death to dispose of her body and remove any traces of the killing from Luciano’s basement apartment.

[100] Counsel for Luciano at trial, an experienced criminal lawyer, offered no objection to the relevance, materiality or admissibility of evidence about the relationship between the Lucianos and the circumstances surrounding Colleen’s death. The complaint here is

that the trial judge never properly curtailed the use the jurors could make of this evidence of extrinsic misconduct.

[101] As with any ground of appeal, context is critical. A thumbnail sketch will do in this case.

The Background Facts

[102] At Luciano's trial for the first degree murder of James Cooper, the jurors heard evidence about the circumstances leading up to, surrounding and following Colleen Richardson-Luciano's death. The evidence disclosed that Colleen and Michael Luciano argued often and loudly. The only direct evidence about Colleen's death came from Michael Luciano who said Cooper did it. And Cooper was not there to deny liability because Michael Luciano had killed Cooper within about 24 hours of Colleen's death.

[103] To support his claim that it was James Cooper, not he, who had killed Colleen, Luciano adduced evidence of Cooper's general propensity for violence, including Cooper's substantial criminal record. In contrast, Luciano, whose last criminal conviction had occurred in 1992, was said to be a good father and a good, reliable and hard working employee.

The Jury Instructions

[104] The prosecutor contended that Luciano killed his wife. Cooper was a witness to the killing. The motive for Luciano to kill Cooper, according to the prosecutor, was to eliminate Cooper as a witness who could incriminate Luciano in Colleen's death. The

trial judge instructed the jury about the use it could make of the evidence of motive and described the motive as the elimination of Cooper as a witness to the killing of Colleen.

[105] The trial judge concluded his instructions on motive in these terms:

The purpose of allowing this evidence was to help prove the issue of motive which is directly relevant to the Crown's theory. That was the only purpose for admitting the evidence. You should disregard any evidence relating to the character or disposition of Mr. Luciano that showed he was involved in any illegal or immoral activity. More specifically, you must not infer from this evidence of character and disposition alone that he was such a person as to have likely committed the offence of first degree murder.

You heard Mr. Luciano testify in these proceedings. In these circumstances you may use the evidence concerning his past conduct and utterances to assess his credibility.

[106] In a later passage in his final instructions, the trial judge referred to the propensity or disposition for violence of both Cooper and Luciano and advised the jurors about its use:

In this case there is evidence from Mr. Luciano particularly that Mr. Cooper killed her. That evidence, along with the evidence of his prior convictions for robbery and arson, may leave a reasonable doubt in your mind whether it was Mr. Luciano who killed Colleen. It is for you to say.

With respect [to] the killing of Colleen where the determination of who was responsible is limited to two persons, you may be helped by considering who of the two had the greater propensity for violence. The significance of propensity for violence can be of assistance in identifying who between Cooper and Luciano is the killer of Colleen.

It is for you to determine who is more likely to have the disposition to kill Colleen, Cooper or Luciano, and then determine if disposition is of assistance.

[107] The trial judge returned later to the subject of disposition evidence. He instructed the jurors in these terms:

It is open to you to contrast James Cooper's disposition for violence with evidence concerning Michael Luciano's good character, including the Marucci's depiction of him as a good father who kept a neat and tidy home and the evidence of his employer that he is a good, reliable and hard working employee.

It is for you to determine on all of the evidence whether the nature of the stabbing death of Colleen was more akin to a rage killing with all the thrusts of the knife and, if so, whether that is in keeping with the violent disposition of Cooper.

It is for you to determine also whether Cooper was the type of person to kill a long time friend.

It is for you to determine as well whether the type of killing if it is akin to a rage killing, is more consistent with the history of the relationship between the Lucianos, taking into consideration Deborah's evidence that there was quarrels in the past and yelling and an animus for some physical violence as she remembered from the age of four on.

It is for you to determine on all of the evidence whether James Cooper had a disposition for violence and, if so, whether he was more likely the person who killed Colleen Richardson-Luciano.

The Positions of the Parties on Appeal

[108] The nub of Mr. Dineen's grievance resides in the failure of the trial judge to confine this evidence of extrinsic misconduct to its legitimate purpose. It was of service to the prosecutor as evidence of motive, but nothing more. Critical to its confinement are

positive instructions about its permitted use and negative instructions about the use to which it cannot be put. The instructions should have included an injunction against its use as punishment for prior misconduct and a reminder not to be distracted and confused by it, thus to lose sight of the real issue in the case.

[109] Mr. Dineen contends further that the trial judge's instructions against propensity reasoning were contradicted later when he invited jurors to speculate about the psychological profile of Colleen's killer and to consider whose profile, that of Luciano or that of Cooper, coincided with the nature of the killing. The error, Mr. Dineen submits, includes both speculation and prohibited reasoning.

[110] For the respondent, Mr. Stewart characterizes the trial judge's instructions as, at the same time, legally sufficient to enjoin prohibited reasoning and fair in the circumstances.

[111] Mr. Stewart points out that the evidence was properly admitted as evidence of motive, and its use as evidence of motive was properly explained by the trial judge. The trial judge's limiting instructions correctly and adequately warned the jurors against propensity reasoning, including inferring guilt from prior misconduct. This was the most likely and virulent strain of prejudice in the circumstances of this case.

[112] Mr. Stewart resists any suggestion that the instructions about disposition or propensity evidence were self-contradictory. The instructions distinguished, as the law requires, between general and specific propensity, forbidding the former but permitting

the latter. Instructions that expressly enjoin a conviction based on repayment for punishment previously avoided and warn against distraction or confusion from evidence about misconduct are *not* mandatory and were not warranted in these circumstances.

The Governing Principles

[113] It is well established that, although motive is not an essential element of an offence, evidence of motive may assist in proof of an accused's participation in an offence and of the state of mind with which the offence was committed: *Plomp v. The Queen* (1963) 110 C.L.R. 234 (H.C.), at pp. 243 and 249-50; *R. v. Griffin*, [2009] 2 S.C.R. 42, at paras. 59-60; *R. v. Candir* (2009), 250 C.C.C. (3d) 139 (Ont. C.A.), at para. 51.

[114] Sometimes, evidence of motive discloses the commission of other offences or other disreputable conduct. Where motive involves the commission of other offences or extrinsic disreputable conduct, the traditional limiting instructions associated with such misconduct may not be required: *R. v. Jackson* (1980), 57 C.C.C. (2d) 154 (Ont. C.A.), at pp. 168-69; *R. v. Krugel* (2000), 143 C.C.C. (3d) 367 (Ont. C.A.), at para. 85; *R. v. Holtam* (2002), 165 C.C.C. (3d) 502 (B.C. C.A.), at para. 45.

[115] Where an accused advances a defence that a third party committed the offence with which the accused is charged and adduces evidence of the third party's disposition or propensity as circumstantial evidence of the third party's conduct, the prosecutor may be permitted to adduce responsive evidence of the accused's disposition or propensity: *R.*

v. M.(W.) (1996), 112 C.C.C. (3d) 117 (Ont. C.A.), at pp. 123-24, aff'd [1998] 1 S.C.R. 977.

[116] Typically, the prosecutor's response to evidence adduced by the accused of the third party's propensity or disposition reveals extrinsic misconduct by the accused. Inherent in evidence of extrinsic misconduct are both moral and reasoning prejudice. The trier of fact may found the conviction on the basis that the accused is a "bad person" who is likely to have committed the offence charged. The trier of fact may tend to punish the accused for prior misconduct by finding him or her guilty of the offence charged. The trier of fact's attention may be deflected from the main purpose of their deliberations, the offence charged, and, once having determined that the extrinsic misconduct took place, substitute their decision on it for their verdict on the offence charged: *R. v. D.(L.E.)*, [1989] 2 S.C.R. 111, at pp. 127-28. Jury instructions must guide the jury away from prohibited reasoning, but the actual language of which the instruction is composed may vary: *R. v. Thomas* (2004), 72 O.R. (3d) 401 (C.A.), at para. 43.

[117] The law does not set its face against all propensity reasoning: *R. v. Handy*, [2002] 2 S.C.R. 908, at paras. 89-91; *R. v. Dooley* (2009), 249 C.C.C. (3d) 449 (Ont. C.A.), at para. 170. What is prohibited is general propensity reasoning. What is permitted is situation-specific propensity reasoning: *Dooley*, at para. 170.

The Principles Applied

[118] I would give no effect to this ground of appeal. The instructions given were adequate in the circumstances of this case.

[119] First, the evidence of the circumstances surrounding the death of Colleen Richardson-Luciano was introduced (at the trial for the murder of Cooper) as evidence of motive for Michael Luciano to kill James Cooper: to eliminate the sole surviving witness to the killing of Colleen. Motive is an item of evidence for jurors to consider, together with the rest of the evidence, in deciding whether an accused committed the offence charged and did so with the required state of mind: *Griffin* at paras. 59-60; *Candir* at para. 51; *Plomp* at pp. 243 and 249-50.

[120] Second, the trial judge did instruct the jury, in unqualified language, that they were *not* to infer that Luciano killed Cooper merely because they were satisfied that he (Luciano) had killed his wife. This instruction inoculated the jurors against the most virulent strain of prohibited reasoning, inferring guilt from general propensity. To some extent, this instruction enjoining general propensity reasoning takes in some of the ground covered by the more specific “no punishment for past sins” or “he owes us one” instructions.

[121] Third, the failure of the trial judge to say everything that could properly be included in a jury instruction is not reversible error: *Dooley* at para. 176.

[122] The complaint about non-direction here is that the trial judge failed to tell the jurors that they should not be confused or distracted by the evidence about the killing of Colleen Richardson-Luciano. This claim is rooted in the third form of prejudice identified by Sopinka J. in *D.(L.E.)* as inherent in evidence of similar acts extrinsic to the counts contained in an indictment. But it does not follow from the inherent prejudicial effect of evidence of similar acts that each of the ways identified by Sopinka J. must be converted into a mandatory jury instruction in prosecutions that include evidence of extrinsic misconduct. The specific warning required by *D.(L.E.)* is that jurors must *not* rely on the evidence of the extrinsic misconduct as proof that the accused is the sort of person who would commit the offences charged, and on that basis, infer his or her guilt of the offences charged: *D.(L.E.)* at pp. 127-28. To say that further instruction may be preferable does not make its omission legally wrong: *R. v. B.(C.)* (2003), 171 C.C.C. (3d) 159 (Ont. C.A.), at para. 35.

[123] The trial judge's instructions about the way in which jurors could use the evidence of the propensity or disposition of Luciano and Cooper, in particular his characterization of the "type" of homicide involved in the killing of Colleen Richardson-Luciano, were, at once, unhelpful and unfocused. That said, the complaint that the instructions are contradictory and invite speculation elevates them to a status that exceeds any reasonable construction. Their purpose was to invite jurors to use their common sense in determining whether Luciano or Cooper killed Colleen.

[124] We should also not lose sight of the relationship of these instructions to the issues that require decision in this case. Michael Luciano admitted that his conduct caused the death of James Cooper. The issues for the jury to resolve were whether the prosecutor had proven beyond a reasonable doubt that Luciano *unlawfully* caused the death of Cooper and, if he did, whether he committed first degree murder. Whether it was Luciano or Cooper who killed Colleen was relevant only to a motive to kill Cooper, which was not an essential element of the offence with which Luciano was charged.

[125] I would not give effect to any ground of appeal relating to the instructions on evidence of disposition.

Ground #3: The *Vetrovec* Instruction

[126] The trial judge decided to give a *Vetrovec* or *Vetrovec*-like instruction to the jury about the testimony of three related prosecution witnesses: Elvina Wells, Marie Bieber and Larry Bieber. The principal reasons underlying the caution were the central position their evidence occupied in the prosecution's case and collusive conduct among the witnesses to provide a consistent account of various events.

[127] The error advanced as fatal here has nothing to do with the language used in the warning itself. Luciano fixes upon the "evidence" the trial judge cited as potentially confirmatory of the testimony of the tainted witnesses. Once again, the setting is important.

The Background

[128] Michael Luciano admitted that his conduct caused James Cooper's death. But, according to Luciano his conduct was lawful, either accidental or in lawful self-defence. Alternatively, if his conduct was unlawful, it did not amount to planned and deliberate first degree murder.

[129] None of the tainted witnesses saw Luciano kill Cooper. Their evidence, especially the testimony of Elvina Wells, reported what Luciano said or did before and after the killing that assisted in proof of its legal character and classification.

The Instructions of the Trial Judge

[130] The passage in the final instructions to which Michael Luciano takes exception is this:

If you find that Mr. Luciano killed James Cooper because James Cooper witnessed Luciano killing Colleen and Luciano wanted to get rid of a witness to his deed, then that evidence is a source of evidence independent of Elvina Wells particularly and is capable of confirming her evidence.

However, if you do not find that Mr. Luciano killed James Cooper because Cooper witnessed Luciano killing Colleen and Luciano wanted to get rid of a witness to his deed, then that evidence of motive is not capable of confirming Elvina Wells' testimony. The circumstances in which he testified might well make you wish that somebody or something else confirmed what she said.

The Positions of the Parties on Appeal

[131] Mr. Dineen's protest about the instructions on potentially confirmatory evidence is threefold. First, he submits the trial judge left a conclusion of fact as potential confirmation, rather than an item or items of evidence. Second, he contends, what was left was not independent of Elvina Wells' testimony. And finally, he says, the effect of the instruction about potentially confirmatory evidence was to dilute the efficacy of an otherwise unexceptionable caution.

[132] Mr. Stewart resists the submission of prejudicial error. He claims that the instructions were free of error. They emphasized the need for *independent evidence* of motive for the evidence to be confirmatory, not proof of guilt. The effect of the instruction was that, if the jury rejected the prosecutor's claim of motive, then the other evidence of motive could not be considered as confirmatory of the evidence of Elvina Wells.

The Governing Principles

[133] The purpose of a *Vetrovec* caution is to alert the jury to the danger of relying on the unsupported evidence of an unsavoury witness and to explain why special scrutiny of this evidence is required: *R. v. Khela*, [2009] 1 S.C.R. 104, at para. 11. The content of the caution is controlling, not the particular word formula followed: *Khela* at para. 13.

[134] Where a *Vetrovec* caution has been given, a trial judge, in appropriate cases, should also direct the jurors' attention to evidence capable of supporting or confirming

material parts of the suspect witness's evidence: *Khela* at para. 11. Potentially confirmatory evidence has two essential qualities: it must be capable of restoring the faith of the trier of fact in relevant aspects of the suspect witness's account and it must be independent, in other words, come from some source other than the suspect witness: *Khela* at paras. 39 and 43. An item of evidence need *not* implicate the accused to be confirmatory: *Khela*, at para. 41.

[135] Jury instructions about potentially confirmatory evidence must make clear the type of evidence capable of offering support. Although the items of potentially confirmatory evidence are to be illustrative and *not* exhaustive, a trial judge must not simply turn the jury loose to rummage about the evidence adduced at trial in search of whatever it feels confirms the truth of a witness's testimony, without any instructions about the essential qualities of confirmatory evidence.

The Principles Applied

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

[137] The *Vetrovec* caution in this case related to the evidence of three of Luciano's relatives who are alleged to have stitched together an account inculpatory of Luciano from threads of conversation and conduct contemporaneous with the death of James Cooper. The caution recited at length myriad contaminants that nourished the need for caution in the jurors' approach to this evidence. They were told alternatively that it was "very dangerous" or "extremely dangerous" to act on this evidence on its own, but

reminded that they could do so if they were satisfied that the witness's account was truthful.

[138] The effect of the challenged portion of the instruction is that the jurors were told that, if they found that Luciano killed Cooper to eliminate a witness to Luciano's killing of his wife, they could use "that evidence" as confirmation of Elvina Wells' account. Failure to make the finding left her evidence unconfirmed. The judge concluded his instructions in these terms:

You may believe Elvina Wells, Marie Bieber and Larry Bieber if you find their testimony to be trustworthy, even if no one or nothing else confirms it. When you consider it, however, keep in mind how they gave the evidence and the circumstances under which they testified.

It is for you to determine, having regard for the opportunity for comparison, collaboration and discussion among themselves, whether the evidence has been tainted and, if so, to what degree, if any, it has been rendered unreliable. Evidence which you find to be unreliable can attract very little weight and it would be very dangerous to form a basis for conviction.

[139] Despite Luciano's denial of participation in the killing of his wife, the evidence adduced at trial about what occurred in the apartment contemporaneously with the killing, including the clean-up and disposal of the body, could support a conclusion that it was Luciano who killed his wife. And from that, together with the fact that the killing occurred in the presence of one eyewitness, Cooper, it would scarcely strain credulity to infer that Luciano had a motive to kill Cooper. And independently of anything Elvina

Wells said about Luciano's admissions. Evidence of motive may provide confirmatory evidence: *R. v. Chenier* (2006), 205 C.C.C. (3d) 333 (Ont. C.A.), at para. 35.

[140] The instructions on motive as potentially confirmatory of Elvina Wells' evidence were muddled, but not so confusing to warrant our intervention. Indeed, their insistence on an actual finding of motive in order to be confirmatory was unduly favourable to Luciano: it is *evidence* that confirms, not findings of fact, especially those that, on their own, would render a conviction almost inevitable.

Ground #4: The "Honest Witness" Instruction

[141] An assessment of this ground of appeal involves an additional reference to the evidence adduced at trial. A brief sketch of related subjects included in the final instructions provides the essential context.

The Instructions of the Trial Judge

[142] The trial judge included several instructions about the assessment of evidence in his charge to the jury. He told the jurors to use their collective wisdom and common experience in gauging the credibility of witnesses and the reliability of their evidence. He explained that it was the exclusive responsibility of the jurors to evaluate the evidence and make their findings of fact based on that evidence and reasonable inferences drawn from it. The trial judge devoted several pages of his charge to instructions about the assessment of evidence and the factors jurors could take into account in making their assessment.

[143] The “honest witness” instruction followed hard on the heels of several pages of *Vetrovec* or *Vetrovec*-like cautions about the evidence of Elvina Wells, Marie Bieber and Larry Bieber. The specifics of the “honest witness” instruction are these:

There is a presumption in law that a witness comes to court to tell his or her honest recollections, and statements are used to refresh their memories. However, while honest witnesses may make mistakes, you must beware of the witness you find has lied to you in one area. Because while he or she may be telling the truth in other areas, you have a right to be suspicious and treat the evidence with the greatest of caution. Again, you may believe all, part or none of what a witness says.

The Positions of the Parties on Appeal

[144] For Luciano, Mr. Dineen contends that the “honest witness” instruction is both wrong in law and prejudicial in its effect. The law recognizes no such presumption. The prejudice resides in the requirement that jurors must cast about for evidence to rebut the presumption that each witness is telling the truth. Absent any rebuttal, the instruction required jurors to accept the account as the truth. Further, in this case, the instruction detracted from the *Vetrovec* or *Vetrovec*-like caution provided about the evidence of Elvina Wells and Marie and Larry Bieber.

[145] On behalf of the respondent, Mr. Stewart acknowledged that the “honest witness” instruction was wrong. But, he says, it was harmless error when looked at through the prism of the charge as a whole.

[146] Mr. Stewart points out that the instruction relates to *credibility* only, not to both the credibility of a witness and the reliability of his or her evidence. Besides, the instruction must not be stripped of its surroundings. Those environs included instructions about the assessment of evidence, including its reliability and the credibility of the witnesses who gave it. Jurors were told repeatedly of their right to believe some, none or all of the testimony of any witness who gave evidence of fact or of opinion. The *Vetrovec* or *Vetrovec*-like instructions in connection with the evidence of Elvina Wells and the Biebers urged a cautious approach to their testimony. In the end, the instructions, as a whole, more than made up for the erroneous reference to the phantom presumption.

The Governing Principles

[147] The law recognizes no presumption of honesty among witnesses summoned to testify in a criminal trial: *R. v. Thain* (2009), 243 C.C.C. (3d) 230 (Ont. C.A.), at para. 32.

The Principles Applied

[148] Despite the error in the reference to a presumption that is unsupported by any authority, I would not order a new trial on this ground. My reasons are several.

[149] First, critical to a proper evaluation of the impact of an admitted error is a functional approach to the instructions as a whole, especially other instructions about the credibility of witnesses and the reliability of their evidence.

[150] The error appears in the first sentence of a paragraph that refers not only to honest witnesses but also to witnesses that the jury conclude have lied to them. The passage ends

with one of several reminders to jurors of their authority to believe all, part or none of the evidence of any witness. The trial judge had already given several pages of instructions on the exclusive authority of the jurors to determine the facts, including their obligation to ignore any judicial opinions about those facts, and the use by the jurors of their collective wisdom and common sense in their assessment of the evidence. The evidence of several witnesses had been the subject of a *Vetrovec* caution because of evidence of collusion.

[151] Second, as a witness on his own behalf, Michael Luciano was the gratuitous beneficiary of the erroneous instruction. Rebuttal of the presumption would have the effect of adding to the prosecutor's burden of proof.

[152] Third, it is by no means clear that the decision Luciano invokes to support his claim of fatal error, *Thain*, supports the conclusion he advances. *Thain* was a trial by judge alone. The trier of fact made three errors of which the "honest witness" presumption was one. Two related expressly to the evidence of the appellant. One shifted the burden of proof. The respondent offered a "strained and generous reading" of the "honest witness" reference as an antidote to the prejudice caused by the other errors. The argument failed. Sharpe J.A. concluded that the errors committed in the credibility assessment were fatal. Put simply, that is not this case.

Ground #5: The New Theory of Liability

[153] The final allegation of error is anchored in a brief passage in the charge to the jury about the identity of Colleen Richardson-Luciano's killer. To assess the validity of this claim, a brief reference to the positions of the parties at trial is necessary.

The Positions of the Parties at Trial

[154] Michael Luciano and James Cooper were in Luciano's basement apartment when Colleen Richardson-Luciano was stabbed to death.

[155] The prosecutor contended that Michael Luciano stabbed his wife to death, then strangled Cooper to death about a day later to eliminate him as a potential witness against Luciano for killing his wife.

[156] Michael Luciano said that James Cooper killed Colleen Richardson-Luciano after she called him a "fucking goof" during an argument over repayment of a debt. Luciano acknowledged that he had caused Cooper's death but said that the killing was not unlawful or, if unlawful, was not first degree murder.

[157] Neither party at trial suggested that the killing of Colleen Richardson-Luciano was a joint venture with Luciano and Cooper as joint or co-principals. Luciano is the only survivor of both killings.

[158] Elvina Wells testified that, in a conversation that occurred before Cooper was killed, Michael Luciano described himself as an "accessory" to the killing of Colleen by Cooper.

The Instructions of the Trial Judge

[159] During his instructions about motive, the trial judge referred to the motive advanced by the prosecutor for the killing of Cooper (to eliminate a witness to Luciano's killing of his wife), then continued:

You may reach a verdict based on the theory advanced by Crown counsel or on a theory of motive different from that. For example, it is open for you to find on the evidence that it was Jimmy Cooper who killed Colleen Richardson Luciano on the basis of his antecedents and his propensity for violence and to conclude that Mr. Luciano planned and deliberated his murder to avenge her death. It is likewise open to you to find on the evidence that both Michael Luciano and Jimmy Cooper murdered Colleen together and Mr. Luciano planned and deliberated Cooper's murder to rid himself of a witness.

Even though Crown counsel submits to you that his theory is the most likely, other factual avenues are open to you. You need not all of you arrive at your verdict by the same route. You need not agree on all the underlying factors. You need only find that all of the essential elements have been proven beyond a reasonable doubt, and motive is not one of them. Motive is not an essential element of the offence of first degree murder.

It is for you to decide whether Mr. Luciano had a motive such as that theorized by Crown counsel or any motive at all, and how much or little you will rely on it to help you decide this case.

The Positions of the Parties on Appeal

[160] For Luciano, Mr. Dineen points out that the prosecutor never advanced the position at trial that Luciano and Cooper were co-principals or joint principals in the killing of Colleen Richardson-Luciano. The reference by the trial judge to a joint venture

involving the two men amounted to the introduction of a new theory or basis of liability without notice to Michael Luciano. In the result, Mr. Dineen says, the trial was unfair because counsel was unable to respond to this sudden shift in the basis of liability.

[161] For the respondent, Mr. Stewart submits that the reference to which exception is taken was neither erroneous nor unfair. The evidence about the circumstances surrounding the death of Colleen Richardson-Luciano and what happened afterwards could support an inference of a joint venture that resulted in her death. Said in another way, there was evidentiary support for a joint principals instruction.

[162] Mr. Stewart also reminds that a jury is not bound to decide a case in accordance with a “theory” advanced by the prosecutor, rather must consider whether the evidence proves the essential elements of the offence beyond a reasonable doubt. Likewise, the trial judge is not bound to instruct the jury only in accordance with the positions advanced by the parties. The obligation to instruct derives from the capacity of the evidence advanced to establish an air of reality for the instruction.

[163] Mr. Stewart acknowledges, as indeed he must, that instructions on a new “theory” of liability late in the trial may be foreclosed because its introduction would be unfair or would interfere with an accused’s right to control his or her own defence. But no scent of unfairness drifted into these proceedings. This instruction was about motive and the motive didn’t change with the reference to joint principals.

The Governing Principles

[164] Motive is not part of the definition of murder nor an essential element of its classification as first degree murder under s. 231(2). Evidence of motive is relevant, material and admissible in prosecutions for murder, especially where the prosecutor's case consists of circumstantial evidence: *R. v. Lewis*, [1979] 2 S.C.R. 821, at pp. 837-38.

[165] Evidence of motive is material because it helps to establish two essential elements of the prosecution's proof – identity and state of mind: *Plomp* at pp. 243 and 249-50; *Griffin* at para. 60; *R. v. Cloutier*, [1940] S.C.R. 131, at p. 135; and *Candir* at para. 72.

The Principles Applied

[166] This ground of appeal is unavailing.

[167] To begin, Michael Luciano does not and could not suggest that there was no evidence to justify instruction on joint participation in the death of Colleen Richardson-Luciano. Both Luciano and Cooper had equivalent opportunity to cause her death. Nothing in the circumstances of her death pointed more to one of them than to the other, or indicated that her death could only have been caused by a single assailant. What occurred thereafter, the clean-up and disposal of her body, was a joint venture. Both had argued with her earlier on Friday evening.

[168] Second, the instruction to which objection is taken is *not* one that expands the basis upon which Luciano could be found guilty of the offence charged: the first degree murder of James Cooper. In other words, this is not a case, like *Ranger*, where an

alternative basis of liability was left to the jury in the charge that was incompatible with the manner in which the case had been conducted. The instruction in this case related to motive: Luciano's motive to kill Cooper. That motive was to eliminate a witness, the only surviving witness, beyond Luciano himself, to the killing of his estranged wife. Whether Luciano killed his wife in the presence of or with the assistance of Cooper did not alter his motive to kill Cooper. The motive to kill Cooper was the same whether Cooper was simply a witness or a fellow killer who was also a potential witness.

[169] Third, unlike in *Ranger* where the controversial instruction expanded the basis of Ranger's liability, the instruction here was not concerned with the basis of liability. Luciano admitted that his conduct caused Cooper's death. The issues for the trier of fact were whether Luciano had caused Cooper's death unlawfully and, if so, whether Luciano had committed first degree murder. Evidence of motive was relevant to each issue, but it was but a single item of evidence for the jury to consider.

[170] Finally, the brief reference to which exception is taken caused no unfairness to Luciano. This was not a game-changer, a paradigm shift in the basis of liability that swept away the defence advanced at trial or took control of it out of Luciano's hands. No harm, no foul.

Conclusion

[171] I would dismiss the appeal from conviction.

THE APPEAL FROM ACQUITTAL (THE MURDER OF COLLEEN RICHARDSON-LUCIANO)

[172] In early November 2004, about seventeen months after a jury had convicted him of the first degree murder of James Cooper, another jury found Michael Luciano not guilty of the second degree murder of his estranged wife.

[173] The Attorney General seeks a new trial on the charge of second degree murder. The single error alleged in the conduct of the second trial is an admissibility ruling made by the trial judge prior to jury selection. The ruling excluded any evidence that Michael Luciano killed James Cooper, as well as evidence that Cooper was dead.

[174] Some brief background is necessary to appreciate the allegation of error.

The Background Facts

[175] James Cooper and Michael Luciano were the only adults in the basement apartment when Colleen Richardson-Luciano was stabbed to death there.

[176] Michael Luciano denied killing his wife. Luciano said that Cooper killed her after she insulted Cooper during an ongoing squabble over repayment of a debt.

[177] Michael Luciano admitted that he helped Cooper clean up the apartment and surrounding area and dispose of Colleen's body in a dumpster twelve kilometres from the apartment. According to Luciano, he helped Cooper because Cooper threatened to kill both Luciano and his children.

[178] The knife used to kill Colleen Richardson-Luciano was never found.

The Evidence of James Cooper's Disposition

[179] To support his account that James Cooper stabbed Colleen Richardson-Luciano to death, Michael Luciano adduced evidence that tended to show Cooper had a disposition for violence. Cooper's criminal record, which included convictions for robbery, was filed as an exhibit. The jurors heard evidence that, a few months earlier, Cooper had pulled a knife on a man who had hugged him (Cooper). Investigators found a "shiv" in Cooper's bag likely honed from cutlery in a jail. Expert opinion evidence was adduced about Cooper's disposition for violence.

[180] In the end, Michael Luciano's account that implicated James Cooper as Colleen's killer was supported by evidence of Cooper's disposition or propensity for violence. Said somewhat differently, evidence of Cooper's disposition or propensity for violence was introduced as circumstantial evidence of his conduct to support the defence that he, Cooper, not Michael Luciano, killed Colleen.

The Pre-Trial Application

[181] Before jury selection began, the prosecutor applied to introduce evidence that Luciano killed Cooper about 24 hours after Colleen's death. When the application was made, another jury had already convicted Luciano of first degree murder arising out of Cooper's death.

[182] The prosecutor's application proceeded on the basis of an agreed statement of facts that included reference to both killings and observations made by two O.P.P. officers who were summoned to the home in which Cooper had been killed.

[183] The agreed statement of facts included reference to a comment Elvina Wells attributed to Luciano that he (Luciano) was going to "do" Cooper before Cooper "did" him. The statement also contained the observations Luciano's daughter made of her father "over" Cooper with his hands in front of him.

[184] The agreed statement of facts recited two remarks attributed to Luciano by Elvina Wells after she returned home from her parents. Luciano told her, according to Ms. Wells, that he had "kicked Cooper's guts in good" and was going to "gut" Cooper, just as Cooper had done to Colleen.

The Positions of Counsel at Trial

[185] At trial, the prosecutor (who was not Mr. Stewart) offered the evidence of the Cooper killing as evidence of after-the-fact conduct. He suggested that the evidence could be admitted for any one or more of five purposes:

- i. to establish the identity of Colleen's killer (because only her killer would need to dispatch a witness to his crime);
- ii. to rebut any claim that Luciano might advance that he was only an innocent bystander when Cooper killed Colleen;
- iii. to complete the narrative of what was, despite the order for severance, a single transaction;
- iv. to avoid jury speculation about the whereabouts of James Cooper; or

- v. to rebut the inference that only Cooper was capable of the violence necessary to kill Colleen.

According to the prosecutor, the probative value of this evidence on any of the issues to which it was relevant, exceeded its prejudicial effect, thus mandated its admission.

[186] Trial counsel for Luciano did not oppose the introduction of what Luciano and Cooper did after Colleen had been stabbed to death, but drew the line at the introduction of any evidence about the fact and circumstances of Cooper's death. Counsel contended that evidence that pointed to Luciano as Cooper's killer was equally consistent with Luciano killing Cooper to avenge Colleen's death as it was to eliminate a witness. This ambiguity or ambivalence rendered its probative value minimal and significantly outweighed by its prejudicial effect. Further, to permit admission of the evidence would allow the introduction of evidence of a more serious crime to prove a less serious one.

[187] Counsel for Luciano at trial decried the prosecutor's submission that the evidence was necessary to complete the narrative or stifle speculation about Cooper's absence from the proceedings. The narrative that required completion could be quite nicely accomplished without reception of the most damning prejudice, evidence of another murder.

The Ruling of the Trial Judge

[188] The trial judge characterized the evidence as evidence of after-the-fact or post-offence conduct. He concluded that, because the explanations Luciano gave to Elvina

revealed a “variety of degrees of culpability”, the proposed evidence failed to meet the standard required by *R. v. Arcangioli*, [1994] 1 S.C.R. 129, thus was inadmissible.

[189] The trial judge then considered admissibility on the assumption that the requirements of *Arcangioli* had been met. He concluded that because the evidence revealed discreditable conduct on Luciano’s part, the admissibility decision came down to a balancing of probative value and prejudicial effect. He concluded that, in this analysis, prejudicial effect prevailed and the evidence should be excluded.

[190] The following passage represents the essence of the trial judge’s reasoning:

[35] My concern is that the introduction of this evidence will not lead to a level playing field for both sides in this trial. Rather, it will distort the trial so that the jury will become fixated on the death of Jimmy Cooper. If Michael Luciano is the killer there, with Mr. Cooper having been present when Colleen was killed, the jury will not be likely to distance themselves from that evidence in an objective way regardless of any instructions given by the trial judge during the trial or at the conclusion of the trial. The Crown’s case can be established by the evidence that it has without presenting the evidence about the death of Mr. Cooper. To add that evidence will only go to talking up the Crown’s case in a manner that takes away a fair trial. I’m advised that there will be evidence indicating that Mr. Luciano indicated that he was going to kill Mr. Cooper because he killed Colleen and at another time he made a statement that Cooper was a witness. That will carry an inference that Michael Luciano killed Colleen Richardson-Luciano. I’m not persuaded that the introduction of the evidence regarding the death of Mr. Cooper will be assessed objectively by the jury. Also the jury could become fixated on the killing of Mr. Cooper as proof that Mr. Luciano killed Colleen. It may be said that there are two positions for consideration by the jury. One is that Mr. Luciano killed his wife and then killed the witness to that

killing. The other is that Mr. Luciano killed his wife's killer. Although that presentation is available to the jury, I am persuaded that there is such a high prejudicial impact by this evidence that the jury will look at it feeling that they have to choose between one of two considerations. They are more apt to consider Mr. Luciano a bad person who killed another. The jury will be sent off on the issues of who killed Mr. Cooper when that is not the central issue of this trial. That being the case, this evidence cannot be presented.

[36] I find that the discreditable conduct of killing Jimmy Cooper carries a greater prejudicial impact on the trial than any probative value. It forces the jury into moral and reasoning prejudice. I am concerned that regardless of any instruction from me both during the trial and at the end of the trial, the jury will be enmeshed in thinking that if Michael Luciano killed Jimmy Cooper then he is the type of person who would kill his wife and further that he must have been the Colleen's *[sic]* killer. That removes a level playing field because the jury will be preoccupied with the death of Jimmy Cooper. When a jury goes off on a tangent as I am concerned that they will, they are likely to make the decision on the after-the-fact conduct evidence mainly rather than on all of the evidence.

Conclusion If the Evidence Passes the Principles of *Arcangioli*

[37] On the second consideration of the after-the-fact conduct should its introduction not be inadmissible by the principles of *Arcangioli*, the evidence is too prejudicial to be tendered. Its probative value is that it helps to determine the identity of the killer of Colleen Richardson-Luciano, but it does so marginally. Its greatest impact is that it waives *[sic]* a red flag at the jury so that they will be prone to think of Michael Luciano as a bad person who would likely kill Colleen Richardson-Luciano if he was a killer of Jimmy Cooper. The jury will travel down that road like a locomotive unable to draw themselves away from being consumed with that information. That removes a level playing field. No amount of instructions from the trial judge not to do so will succeed.

The Arguments on Appeal

[191] The parties advanced their positions with admirable clarity and commendable brevity. Any inaccuracy in my paraphrase or prolixity in their statement is my fault, not theirs.

[192] For the appellant, Mr. Stewart denies a place here for the principles in *Arcangioli* and its followers. The issue here was not the level or degree of Luciano's culpability, rather the identity of Colleen's killer. Evidence of what happened later can support an inference of participation in what occurred earlier. Whether the jurors would draw that inference was for them to decide. But they were wrongly denied the chance to do so.

[193] Mr. Stewart contends that the evidence was also admissible to balance or level the playing field at trial where evidence of Cooper's disposition was to be admitted. The jury was entitled to know that there were *two* persons with a violent disposition with equivalent opportunity to kill Colleen Richardson-Luciano, not just one. The evidence also tended to blunt Luciano's explanation for his participation in the clean-up and body disposal activities and his fear of Cooper.

[194] Mr. Stewart says that the trial judge erred further in his assessment of the probative value and prejudicial effect of the evidence and his determination that, in the balance, prejudicial effect predominated. The trial judge undervalued the probative potential of the evidence and overvalued its prejudicial effect. He was unreasonably dismissive of the efficacy of limiting instructions. This evidence, given by witnesses who

would be testifying in any event would neither confuse issues nor distract the jurors from the task assigned them at trial. No deference is due his assessment.

[195] Mr. Stewart advances an alternative argument. He submits that, at the very least, the prosecutor should have been permitted to adduce evidence that Cooper was dead. Cooper's absence was the elephant in the courtroom at trial. The undertaking of defence counsel to say nothing about Cooper's absence at trial was inadequate in light of the trial judge's instruction that a reasonable doubt could arise from the absence of evidence.

[196] Mr. Dineen heads quickly to the bottom line. In the end, he submits, the ruling involved the exercise of judicial discretion. In determining probative value. In assessing prejudicial effect. In deciding where the balance fell. The trial judge did all of this, considered the proper factors and reached a conclusion that is entitled to substantial deference.

[197] Mr. Dineen submits that the evidence about the killing of James Cooper had little probative value in helping to establish Luciano's guilt of the murder of his estranged wife. Several explanations may underpin the killing of Cooper, thus diminish the probative value of the evidence. The trial judge was entitled to reach this conclusion.

[198] In a similar way, Mr. Dineen says, the trial judge was entitled to consider the prejudicial effect of this evidence extremely high. The moral prejudice of the evidence is difficult to overstate. The evidence, offered at a trial where the issue is the identity of the killer, demonstrates that Luciano killed the only other adult present at the first killing

about 24 hours later. Reasoning prejudice was also substantial. The evidence about the killing of Cooper would be lengthy, dominate the trial and distract the jurors from their task.

[199] Mr. Dineen resists the submission that evidence about the Cooper killing should have been admitted to respond to the evidence about Cooper's disposition, thus to level the playing field. The prosecutor at trial did not take the position that Luciano had put his character in issue, thus this line of argument should not be paid any heed here. In every event, the final analysis comes down to balancing probative value and prejudicial effect with no different result than that recorded by the trial judge.

[200] In response to the alternative ground raised by Mr. Stewart, that the prosecutor should have been permitted to adduce evidence that Cooper was dead, Mr. Dineen points out that the jurors were not told that they could draw any adverse inference from Cooper's absence. The instruction given about a reasonable doubt arising from an absence of evidence is legally correct under *R. v. Lifchus*, [1997] 3 S.C.R. 320. And even if the evidence had been admitted, the verdict would not have changed.

The Governing Principles

[201] The only ground of appeal advanced against the acquittal has to do with the exclusion of the evidence of the killing of James Cooper 24 hours after the killing of Colleen Richardson-Luciano for which Luciano was being tried.

[202] The effect of the trial judge's ruling was that the jury, before whom Cooper was put forward as the real killer of Colleen Richardson-Luciano, learned nothing about what had happened to Cooper after he arrived with the others at Egmondville on the night after Colleen was killed.

[203] The issue raised can be determined by the application of general principles of the law of evidence, not the pigeon-hole approach that seems favoured any time the evidence discloses conduct of a party after an offence has been committed.

Relevance

[204] Relevance is not an inherent characteristic of any item of evidence. Relevance exists as a relation between an item of evidence proposed for admission and a proposition of fact that the proponent seeks to establish by its introduction. Relevance is a matter of everyday experience and common sense. Attaching a label like "evidence of after-the-fact conduct" or "post-offence conduct" to an item of evidence does not establish its relevance. An item of evidence is relevant if it renders the fact it seeks to establish slightly more or less probable than it (the fact) would be without the evidence, through the application of everyday experience and common sense.

[205] We assess the relevance of items of evidence in the context of the entire case and the positions of counsel. Relevance does not exist in the abstract or in the air: *R. v. Cloutier*, [1979] 2 S.C.R. 709, at pp. 730-32. An item of evidence does not cease to be

relevant or become irrelevant because it can support more than one inference: *R. v. Underwood* (2002), 170 C.C.C. (3d) 500 (Alta. C.A.), at para. 25.

[206] To be relevant, an item of evidence need not prove conclusively the proposition of fact for which it is offered, or even make that proposition of fact more probable than not. What is essential is that the item of evidence must reasonably show, by the application of everyday experience and common sense that the fact is slightly more probable with the evidence than it would be without it: 1 *McCormick on Evidence* (6th ed.), para. 185, at p. 733.

Materiality

[207] To make its way into a criminal trial, an item of evidence must also be material. Evidence is material if what it is offered to prove or disprove is a fact in issue. What is in issue is determined by and a function of the allegations contained in the indictment and the governing procedural and substantive law. If the fact the evidence is offered to prove is not in issue, for example because of an admission, the evidence is immaterial: *Candir* at para. 49.

[208] In a prosecution for unlawful homicide charged as murder, evidence that tended to show the identity of the killer and the killer's state of mind contemporaneous with the killing would be material.

Admissibility

[209] Admissibility is a legal concept. Its rules, which are negative and exclusionary, are rooted in policy considerations we regard as of sufficient importance to justify the exclusion of relevant and material evidence. No single policy underlies every admissibility rule. Sometimes, an admissibility rule is animated by concerns about the reliability of evidence. In other instances, a rule may attempt to curb a prohibited chain of reasoning.

[210] Admissibility rules are not unyielding. They give ground, admitting evidence by exception. What justifies exceptional admission varies from one admissibility rule to another, but is generally linked to the policy that underpins the rule of exclusion.

[211] In this case, as in most, several admissibility rules have a say in an assessment of the correctness of the trial judge's ruling excluding evidence about the killing of James Cooper.

Evidence of Third Party Participation

[212] The principal issue at trial was the identity of the person who killed Colleen Richardson-Luciano. The suspects were two, both of whom had equivalent opportunity to do so. Michael Luciano was one. James Cooper was the other. Luciano said it was Cooper. And Cooper could not deny it because Luciano killed him about a day after Colleen had been stabbed to death.

[213] A person charged with the murder of another is entitled to adduce evidence in response to the charge that shows or tends to show that another person committed the murder: *R. v. McMillan* (1975), 7 O.R. (2d) 750 (C.A.), at p. 757, aff'd [1977] 2 S.C.R. 824; 1A *Wigmore on Evidence* (Tillers Rev.) at para. 139, pp. 1723-724.

[214] But not every item of evidence offered in support of a claim that someone else killed the deceased will be admitted. To permit the introduction of evidence supportive of a claim of third party authorship, we insist upon a sufficient connection between the third party and the offence charged: *McMillan* at p. 757; *Wigmore* at para. 139, p. 1724; *R. v. Grandinetti*, [2005] 1 S.C.R. 27, at para. 47. The evidence connecting the third party to the crime charged may be direct or circumstantial: *McMillan* at p. 758.

[215] An accused who has met the threshold to permit the introduction of evidence of the (alleged) involvement of a third party may proffer evidence of the third party's disposition (to commit the offence charged): *Grandinetti* at para. 49; *McMillan* at p. 758. The tendency or disposition of a person to do something is relevant to indicate the probability that she or he did it, and may be admissible to prove it. In other words, evidence of disposition or propensity is offered as circumstantial evidence of conduct in accordance with the disposition: *McMillan* at p. 758; *Grandinetti* at para. 49.

[216] An accused who fortifies his assertion of third party involvement with evidence of the third party's disposition risks a response in kind from the prosecutor, lest the trier of fact be left with an entirely distorted picture of those with an equivalent opportunity to

kill the deceased: *McMillan* at pp. 767-68; *M.(W.)* at pp. 123-24, aff'd [1998] 1 S.C.R. 977; *R. v. Parsons* (1993), 84 C.C.C. (3d) 226 (Ont. C.A.), at p. 238; *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 690.

Evidence of Extrinsic Misconduct

[217] Evidence of extrinsic misconduct by the person charged may be relevant and material in a criminal prosecution. This evidence may demonstrate a motive on the part of the accused to commit the offence, or his possession of the instruments used to commit the crime. Thus, evidence of extrinsic misconduct may help to establish an accused's participation in an offence, as well as his or her state of mind when committing it. Sometimes, evidence of extrinsic misconduct completes the narrative of or provides context for relevant events.

[218] Evidence of extrinsic misconduct includes conduct that occurs before, at the same time or after the conduct that forms the subject-matter of the charge. The reasoning process involved in the inquiry into relevance or materiality may be different depending on when the extrinsic misconduct occurred in relation to the crime charged.

[219] But evidence of extrinsic misconduct brings baggage to the trial. Prejudice. Of two kinds. *Moral* prejudice – the risk of an unfocused trial and a wrongful conviction. The trier of fact may follow a chain of reasoning the law forbids – inferring of guilt from general disposition or propensity. The verdict may be based on prejudice, rather than

proof and the accused convicted because of what he is, rather than what he did: *Handy* at para. 139.

[220] Evidence of extrinsic misconduct generates *reasoning* prejudice. Introduction of this evidence distracts jurors from their proper focus on the charge particularized in the indictment and lengthens the trial process: *Handy* at paras. 144-46.

[221] Relevant and material evidence of extrinsic misconduct is generally inadmissible when tendered by the prosecutor: *R. v. Robertson*, [1987] 1 S.C.R. 918, at p. 941; *Handy* at paras. 31 and 36. The exclusionary rule generally prohibits prosecutorial use of character evidence, and evidence of extrinsic misconduct to establish character, as circumstantial proof of conduct: *Handy* at para. 31. See also, *Morris v. The Queen*, [1983] 2 S.C.R. 190, at pp. 201-02; *R. v. Morin*, [1988] 2 S.C.R. 345, at p. 370; and *R. v. B(C.R.)*, [1990] 1 S.C.R. 717, at pp. 731-32.

[222] Like other admissibility rules, the rule that generally excludes evidence of extrinsic misconduct tendered by the prosecutor allows its introduction by exception. The exception becomes engaged when the probative value of the evidence exceeds its prejudicial effect: *Handy* at paras. 41 and 49.

Evidence of After-The-Fact Conduct

[223] Evidence of extrinsic misconduct is circumstantial evidence. It includes, but is not limited to things said and done after an offence has been committed. We often label this as evidence of “post-offence conduct” or “after-the-fact conduct”. Unfortunately, our

fondness for labelling obscures the true character of this evidence, assigns it an undeserved place of prominence in final instructions, invites appellate fission and inhibits a clear-eyed and principled evaluation of its role in proof of the prosecution's case.

[224] Evidence that falls within the descriptives “post-offence” or “after-the-fact” conduct has no mythical or magical quality inherent in it or about it: *R. v. Peavoy* (1997), 34 O.R. (3d) 620 (C.A.), at para. 24. It is neither more nor less than an item of circumstantial evidence, a link in the chain of the prosecutor's proof, that involves retrospectant reasoning to connect an accused to an offence: *R. v. Figueroa* (2008), 232 C.C.C. (3d) 51 (Ont. C.A.), at para. 33.

[225] When evidence of what an accused said or did after an offence was committed discloses extrinsic misconduct, the evidence bumps up against the general rule of exclusion discussed earlier. But the evidence may gain entry by exception if its probative value exceeds its prejudicial effect.

The Probative Value/Prejudicial Effect Balance

[226] To invoke the exception to the general rule that excludes evidence of extrinsic misconduct, a prosecutor must establish, on the balance of probabilities, that the probative value of the proposed evidence exceeds its prejudicial effect: *Handy* at paras. 41, 49 and 55.

[227] When evidence of extrinsic misconduct is tendered for admission, courts sometimes proceed directly to the probative value/prejudicial effect analysis upon which

admissibility depends. But there are other questions that require response before the crucial balancing need be undertaken:

- Is the conduct that of the accused?
- Is the evidence relevant?
- Is the evidence material?
- Is the conduct discreditable to the accused?

[228] An affirmative response to each question is essential before it becomes necessary to undertake the probative value/prejudicial effect analysis: *R. v. B.(L.)*; *R. v. G.(M.A.)* (1997), 35 O.R. (3d) 35 (C.A.), at para. 10.

[229] The balancing process begins with an assessment of the probative value of the proposed evidence.

[230] To determine probative value, the judge should first determine the issue to which the proposed evidence relates. After all, probative value does not exist in the abstract. Like relevance, probative value is a relative concept to be determined in the context of the case being tried: *Handy* at para. 99; *B.(L.)*; *G.(M.A.)*, at para. 23. An assessment of probative value requires consideration of several factors including the strength of the proposed evidence, the extent to which the proposed evidence supports the inference the prosecutor seeks to have drawn from it and the extent to which what the evidence tends to establish is at issue at trial: *B.(L.)*; *G.(M.A.)* at para. 23; *Robertson* at p. 943.

[231] The second step in the balancing process involves an assessment of the prejudicial effect of the proposed evidence.

[232] The term “prejudice” does not refer to the risk of conviction, rather has to do with the risk of an unfocussed trial and a wrongful conviction through an impermissible chain of reasoning – to infer guilt from general disposition or propensity: *Handy* at para. 139. Propensity reasoning uses evidence of character or disposition as circumstantial evidence of conduct. An accused is convicted because of what he is, rather than because of what he has done. Prejudice is a surrogate for proof, character for conduct.

[233] No closed list of factors occupies the field in the inquiry into prejudicial effect. Both moral prejudice, the risk of an unfocussed trial and wrongful conviction, and reasoning prejudice, distraction of the trier of fact from the focus of the trial by the introduction of evidence of extrinsic misconduct and the time taken to introduce that evidence, have a place in the assessment: *Handy* at paras. 139-145. Important considerations include the extent of the discredibility disclosed by the conduct, the extent to which the conduct may support an inference of guilt based exclusively on bad character, the extent to which the evidence may confuse rather than help to decide issues and the ability of the accused to respond to the evidence: *B.(L.)*; *M.(A.H.)* at para. 24.

[234] The final step in the decision about admissibility requires the judge to balance probative value and prejudicial effect and to determine where the balance falls: *Handy* at para. 149. In the absence of a legal error, a misapprehension of material evidence or an unreasonable result, a trial judge’s decision on where the balance falls between probative value and prejudicial effect attracts substantial deference on appeal: *R. v. J. (B.T.)* (2006),

84 O.R. (3d) 227 (C.A.), at para. 33; *Handy* at para. 153; *B.(C.R.)* at pp. 23-24; *B.(L.)*; *M.(A.H.)* at para. 51; *R. v. Shearing*, [2002] 3 S.C.R. 33, at para. 73.

[235] In the assessment of the prejudicial effect of evidence of extrinsic misconduct, further, in the determination of where the balance falls between probative value and prejudicial effect, a trial judge must keep in mind that evidence of limited admissibility requires jury instructions that explain both the permitted and prohibited use of the evidence. And what is more, the difficulty encountered by a trial judge in composing limiting instructions does not yield a commensurate deficit in adherence to and application of them by jurors. To make too much of the risk of jury misuse of evidence of limited admissibility, for that matter to assume jurors will not adhere to their oath, is legally wrong: *Corbett* at p. 695; *R. v. Sauvé* (2004), 182 C.C.C. (3d) 321 (Ont. C.A.), at paras. 88-89; and *Griffin* at paras. 71-74. See also, *R. v. Emms*, 2010 ONCA 817, at para. 26.

The Principles Applied

[236] To determine whether the trial judge erred in law in excluding the evidence that Luciano killed Cooper requires close examination of what was proposed for introduction, the grounds upon which the case for reception was advanced, and whether the trial judge's decision coincides with or departs from the governing principles.

The Proposed Evidence

[237] The prosecutor proposed to adduce evidence that tended to show that Luciano killed Cooper within about 24 hours after Colleen Richardson-Luciano had been stabbed to death in Luciano's apartment. The proposed evidence, as summarized in the agreed statement of facts filed on the admissibility inquiry, was largely, if not entirely, circumstantial.

[238] The agreed statement of facts contained no reference to the defence position at trial, for example that the defence would adduce evidence about Cooper's propensity or disposition for violence in support of a claim that Cooper, not Luciano, killed Colleen. That said, the reasons of the trial judge acknowledge at least the prospect that evidence of Cooper's disposition or propensity would be tendered as circumstantial evidence of his conduct, thus pointing the finger at Cooper as Colleen's killer.

[239] The trial judge made his ruling on admissibility at the outset of the trial, before jury selection. He excluded the proposed evidence. The prosecutor did not renew his application to introduce the evidence later in the trial as the evidence supportive of the claim that Cooper killed Colleen began to emerge.

Relevance

[240] The excluded evidence supports an inference that Luciano killed Cooper. Evidence of a single violent incident occurring contemporaneously with another can

support an inference that a person has a propensity or disposition for violence: *R. v. Yaeck* (1991), 68 C.C.C. (3d) 545 (Ont. C.A.), at p. 564.

[241] In paragraph 20 of his reasons, the trial judge appears to have concluded that, because the proposed evidence could support more than one inference, it had no probative value. To the extent that this finding could be characterized as one involving relevance, it is wrong.

[242] Individual items of circumstantial evidence often give rise to competing or different inferences. That they do so is at once the very essence of circumstantial evidence and does not mean that they are or can be written off as irrelevant. To require that the inference for which the evidence is offered be the only inference available from the evidence would pose a standard of conclusiveness that very few items of circumstantial evidence could meet. Such a requirement confuses weight with relevance. Provided the inference advanced is one that is reasonably available on the evidence, the proponent has established that the evidence is relevant.

[243] Further, the trial judge characterized the proposed evidence as evidence of “after-the-fact conduct” and applied the principles discussed in *Arcangioli*. Characterization of the proposed evidence as evidence of “after-the-fact conduct” tends to obscure the analysis, risking the substitution of category for principle.

[244] The proposed evidence satisfied the minimal standard required for relevance.

Materiality

[245] A critical issue at trial was the identity of the person who killed Colleen Richardson-Luciano. Two people had equivalent opportunity to do so: Michael Luciano and James Cooper.

[246] The trial judge seems to have invoked *Arcangioli* to support his conclusion that the proposed evidence did not “possess probative value of something that needs to be proven in the trial of the murder of Colleen Richardson-Luciano”. The materiality of the evidence that Luciano killed Cooper at Luciano’s trial for the murder of Colleen is not governed by *Arcangioli*. The material issue here is the identity of Colleen’s killer, not the legal character of the crime he committed.

Admissibility

[247] The trial judge rested his decision to exclude the evidence on a second ground that involved an assessment and balancing of the probative value and prejudicial effect of the evidence.

[248] The trial judge concluded that the introduction of the evidence that Luciano killed Cooper would “distort the trial” by causing the jurors to become “fixated on the death of Jamie Cooper”. Limiting instructions would not deflect the jurors from propensity reasoning. Evidence of Luciano’s disposition for violence would not level the playing field, instead prompt jurors to “travel down that road [propensity reasoning] like a locomotive”.

[249] The trial judge's assessment of the probative value and prejudicial effect of the proposed evidence, as well as his determination of where the balance between them fell, is entitled to deference in the absence of a legal error in the assessment process.

[250] Critical to a proper assessment of the probative value of the evidence that Luciano killed Cooper is an approach to it that is rooted in principle.

[251] The evidence proposed for introduction was circumstantial evidence. Its probative value was to be determined in the context of the other evidence in the case, the positions of the parties, and the issues that were ripe for the jury to decide. The central issue in the case was the identity of the killer of Colleen Richardson-Luciano. The prosecutor said it was Luciano. Luciano said it was Cooper.

[252] To support his claim that Cooper killed Colleen, Luciano gave evidence at trial that directly established that Cooper was the killer. He also adduced evidence at trial of Cooper's propensity or disposition for violence. The purpose of this propensity evidence was to invite the jury to have a reasonable doubt about Luciano's guilt because Cooper's violent tendencies rendered him more likely to be Colleen's killer than Luciano, her estranged husband.

[253] The probative value of the proposed evidence rested in its capacity to demonstrate Luciano's disposition or propensity to violence, thus to show that there were two people, not just one, of similar disposition with equivalent opportunity to kill Colleen: *McMillan*

at p. 767. It was evidence of a single incident of significant and contemporaneous violence offered to establish propensity.

[254] The trial judge was invited by the prosecutor to rule on the admissibility of the proposed evidence before the jury was selected. The governing admissibility rule required the trial judge to assess the probative value of the evidence. The trial judge considered the apparent strength of the evidence and its ability to support the inference advanced (that Luciano also had a disposition for violence), as well as whether what it tended to show was at issue at trial. The Crown has not demonstrated any legal error in this assessment.

[255] Evidence that Luciano killed Cooper is inherently prejudicial. The conduct is discreditable of Luciano, perhaps even more so than the killing charged because of evidence that the killing of Cooper was planned and deliberate. The evidence invokes propensity reasoning and may enhance the risk of an unfocused trial by diverting the jurors attention from the crucial issue of the identity of Colleen's killer.

[256] Introduction of evidence about the killing of James Cooper may also generate reasoning prejudice. Jurors may become distracted from their proper focus on the charge itself, aggravated by the time consumed in adducing the evidence of the Cooper killing in divergent circumstances.

[257] In his assessment of the prejudicial effect of permitting introduction of evidence about the killing of Cooper, as well as in deciding where the balance between probative

value and prejudicial effect fell, the trial judge was required to consider the effect of limiting instructions in curbing both moral and reasoning prejudice. The reasons of the trial judge make it clear that he considered limiting instructions *incapable* of curtailing the prejudicial effect of the evidence.

[258] The reasons of the trial judge are open to the interpretation that he may have reasoned from a premise of presumptive evidentiary misuse despite limiting instructions. To reason in this way is to turn the presumptive efficacy of limiting instructions and jury adherence to those instructions on its head: *Corbett* at pp. 695-696; *Sauvé* at paras. 88-89; and *Griffin* at paras. 71-74. An error in the assessment of the prejudicial effect of evidence also has implications on the decision about where the balance falls between probative value and prejudicial effect.

[259] On an appeal from acquittal, the Attorney General cannot succeed simply by demonstrating a legal error in the conduct of the trial, for example, in a ruling about the admissibility of evidence. Nor can the Attorney General succeed on an appeal from an acquittal on the basis of some abstract or purely hypothetical possibility that an accused would have been convicted were it not for the error of law. Something more is required. And that something more is to satisfy the appellate court that the error might reasonably be thought, in the concrete reality of the case, to have had a material bearing on the acquittal: *R. v. Graveline*, [2006] 1 S.C.R. 609, at para. 14.

[260] It is worth reminder that the appeal of the Attorney General is from the *acquittal*, not the admissibility ruling that is said to constitute an error in law. What is required is a demonstration of a legal error (in the admissibility ruling) and a nexus between the legal error and the verdict rendered (an acquittal). The authorities teach that acquittals are not to be overturned lightly. The Attorney General must establish that the verdict would not necessarily have been the same had the error not been made: *Graveline* at para. 16; *R. v. Sutton*, [2000] 2 S.C.R. 595, at para. 2; and *R. v. Vezeau*, [1977] 2 S.C.R. 277, at pp. 291-292.

[261] In this case, counsel for the Attorney General has failed to satisfy this heavy onus. I say so for several reasons.

[262] First, whether the trial judge erred in his determination of the prejudicial effect of the proposed evidence, thus in his decision about whether the balance of probative value and prejudicial effect favored admission or exclusion, is not entirely clear. If, in his assessment of prejudicial effect, the trial judge proceeded from the premise that jurors were *incapable* of following complex legal instructions involving evidence of limited admissibility, he was wrong. The presumption is to the contrary. But it was open to the trial judge to conclude, notwithstanding the presumption, that the limiting instructions required *in this case*, in light of the evidence to be adduced, would not be adequate to overcome the prejudicial effect of the evidence so that probative value would predominate. Said in another way, it is far from clear that this admissibility ruling, made

in an evidentiary desert before jury selection, would have been different had the trial judge started with the presumption that jurors follow limiting instructions.

[263] Second, the principal basis of admissibility advanced on appeal, that the evidence was admissible to respond to the evidence of Cooper's disposition for violence, was not the basis upon which the case for admissibility was advanced at trial. The prosecutor at trial considered that the evidence was "likely inadmissible" on the primary ground now advanced, thus did not seek its admission on this ground. New theories of admissibility advanced by the Crown should garner no more appellate approval than new theories of liability.

[264] Third, the prosecutor never renewed the application made at the outset of the trial to have the evidence of Luciano's disposition admitted after the full extent of the "Cooper as killer" evidence unfolded. Although the pre-trial ruling was based on the premise that evidence of Cooper's disposition for violence *would* be adduced at trial, it was open to the prosecutor to renew the application when the full extent of the evidence was revealed. See, by analogy, *R. v. Underwood*, [1998] 1 S.C.R. 77, at para. 11.

[265] Finally, admissibility in this case depended upon an assessment of probative value, prejudicial effect, and of where the balance fell between them. These assessments are notoriously fact-specific. Absent clear error, these decisions should rest with their primary constituency – the trial judge: *Shearing* at para. 73.

DISPOSITION

[266] For these reasons, I would dismiss both appeals.

RELEASED: February 1, 2011 “KF”

“David Watt J.A.”

“I agree K. Feldman J.A.”

“I agree Paul Rouleau J.A.”