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COURT OF APPEAL FOR ONTARIO

ROSENBERG, GILLESE and ARMSTRONG JJ.A.

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	
	)	**Carol Cahill and**
	)	**Joseph Wilkinson**
(Respondent)	)	**for the appellant**
	)	
- and -	)	
	)	**Milan Rupic**
	)	**for the respondent**
LOUIS CZIBULKA	)	
	)	
(Appellant)	)	**Heard: May 13, 2004**

On appeal from the conviction by Justice Archie G. Campbell of the Superior Court of Justice dated April 21, 2001, and the sentence imposed by Justice Campbell on May 2, 2001.

ROSENBERG J.A.:

[1] The appellant appeals from his conviction for second-degree murder and from the period of parole ineligibility of seventeen years imposed by A. Campbell J. The principal grounds of appeal concern the trial judge's ruling permitting the Crown to lead evidence of hearsay statements made by the deceased, and the charge to the jury on the intent for murder. In my view, these hearsay statements were inadmissible, and given their importance to the Crown's case the conviction cannot stand. I am also of the view that the jury was misdirected on the intent for murder under s. 229(a)(ii) of the *Criminal Code*.

THE FACTS

(1) The death, the appellant's statements to police and to his daughter

[2] The morning of Monday, June 8, 1998, the appellant called 911 and reported that his wife was unconscious and not breathing. He suggested that she had overdosed on drugs. Emergency personnel found the body of the appellant's wife, Maria Czibulka, face down on her hands and knees on the living room floor. She was clad only in a bra and underwear. Her body was covered in bruises. The paramedics were the first to attend the scene. The appellant told the paramedics he had had a fight with the deceased over her giving "sexy massages". The police attended a short time later. The appellant was described by one officer as having a strong odour of alcohol on his breath and talking or mumbling to himself. The police observed many cases of empty beer bottles in the apartment. The police also found newspapers with advertisements for sensual massages by the deceased.

[3] In the ensuing hours, the appellant made statements to the police concerning his relationship with the deceased. The appellant attended at the police station that same day and gave a statement to the police. He confirmed that he had hit the deceased in the past, including two days before, but suggested she had died from an overdose of alcohol or drugs. The police noticed that he had cuts to his hands, as well as scratches on his right arm and right shoulder.

[4] The next day, June 9th, the appellant gave another statement to the police. He stated that he had been "sick and tired, nearly drunk and tired" the day before. He denied beating the deceased or causing her serious injury, although he stated that he had slapped her the day before her death. As he had the day before, he again claimed that the deceased was still alive at 4:30 a.m. on the morning of June 8th, but had been intoxicated, so he took her from the bedroom and placed her in the living room.

[5] On June 9th, the appellant also told police that he and the deceased had been married for 35 years and that she worked as a masseuse and prostitute. He claimed that she had affairs with men and women.

[6] The appellant was not arrested until ten months later, after DNA testing showed that scrapings under the deceased's fingernails matched the appellant's DNA. Other testing confirmed that the deceased had not died from ingesting drugs or alcohol. The autopsy showed that the deceased had been severely beaten. She had 25 fractured ribs, a fracture at the base of her skull, massive internal bleeding, a ruptured diaphragm and numerous bruises over nearly the entire surface of her body. It appeared that some of the

injuries were caused by someone stomping on the deceased. Other injuries were consistent with punches. The police had found clumps of the deceased's hair in the apartment. It appeared that the hair had been pulled out.

[7] Prior to his arrest, the appellant gave two versions of his wife's death to his adult daughter, Jeanette. He claimed that they had been fighting over a bottle of alcohol and she had fallen and hit her head on a piece of furniture. In a second version he claimed that he heard people in the apartment so he went to check and found the deceased sitting alone with a bottle in her hands. When he tried to take the bottle, they fought and he lightly slapped her. She fell to the floor and he kicked her. He then left her lying there while she begged for forgiveness. He told his daughter that he knew he was going to go to jail.

[8] At his wife's funeral, the appellant was very emotional. He was crying and asked his wife to forgive him. Further, in February 1999, the appellant was picked up by paramedics at a mall. He was intoxicated and depressed and kept repeating that he loved his wife and that he hated "that bitch". He told the paramedics that his wife was cheating on him and that she was employed as an escort.

(2) The hearsay evidence

(a) The letter

[9] Louis Szenczi was a relative of the deceased who lived in California. He had only occasional contact with the deceased, usually by telephone or letter. He had, however, stayed at their home on at least one occasion, and had noticed that the appellant and the deceased were both heavy drinkers. In March 1998 (i.e. about three months before the death),[1] Mr. Szenczi received a very disturbing letter from the deceased. The letter was written in Hungarian. Mr. Szenczi tried to contact the deceased or her son or daughter to discuss the letter's contents but was unable to do so. I have reproduced the English translation of the entire letter in Appendix "A" to these reasons. Its contents may be summarized as follows:

- The deceased was happy that Mr. Szenczi called "yesterday", but she could not talk long as "he" was at home;
- He had ripped out handfuls of her hair, trampled on her face with his foot, kicked her and beat her with his fist;

[1] Mr. Szenczi actually testified that he received the letter in May 1998 based on the postmark on the envelope. This would seem to be an error on his part. The postmark shows "5 III" i.e. March 5th rather than May 3rd.

- "Yesterday, Sunday" he had been drinking and ripped out her hair and hit her;
- He accused her of stealing $300,000 from him to give to others to "fuck" her, but she denied that they had ever had $300,000;
- The deceased wrote that he was unhappy all his life and would only be happy if she brought a man or woman "here" and he could watch them perform various sexual acts;
- She wrote that he is becoming more dangerous but she has nowhere to go until Welfare or Ontario Housing is arranged;
- He spits at her and told her to drop dead;
- Her daughter told her not to complain as she [the daughter?] lived with it and she should divorce him.

[10] Mr. Szenczi testified that approximately two to three weeks before he received the letter, the deceased had called him and asked if she could live with him in California. He told her no because he did not have room for her and because of the expense of her health care. The letter was postmarked Thursday, March 5, 1998. The police checked with Metropolitan Toronto Housing and Welfare authorities. The deceased had not made an application. The next time Mr. Szenczi spoke to the deceased she seemed happy about her new massage job. Neither of them mentioned the letter.

(b) The complaint to the family physician

[11] Dr. Florian Espiritu was the deceased's physician. He saw the deceased on approximately twelve occasions between November 1995 and June 1998. On June 3, 1998, the deceased came to Dr. Espiritu's office to show him some bruises. He saw one bruise on each arm and one on the leg. The bruises were fairly small (about two centimetres), but were noticeable. They seemed fairly new. The deceased told Dr. Espiritu that she wanted to show him the bruises "for the record", and that her husband had kicked her. She did not want Dr. Espiritu to call the police. When he asked why not, she just laughed and smiled. She seemed quite happy.

(3) Other evidence of injuries to the deceased

[12] In cross-examination by counsel for the appellant, the appellant's daughter, Jeanette, testified that the deceased frequently hit the appellant, and that she saw the

appellant hit the deceased on occasion. This was when the Jeanette was nine or ten. Jeanette testified that she later saw that her mother had a black eye and bruises. At the preliminary inquiry, Jeanette had made no mention of any such injuries, and she had told the police that she had never seen any injuries or marks on her mother. She also testified at trial that her mother was a heavy drinker.

[13] Janice Hayden, who occupied the apartment next to the appellant and the deceased, testified that about seven or eight months before the death, she saw the deceased at a bus shelter and noticed that she had two black eyes and a cut on her nose just below her eyes. She was wearing a lot of eye make-up. Ms. Hayden asked about the injuries, and the deceased said she had been wrestling. Adrienne Willock lived in the same apartment building and was a friend of Ms. Hayden. She testified that in January 1998 she saw the deceased in the laundry room and noticed that her jaw was very swollen and black and blue. Ms. Willock asked what had happened. The deceased replied that she had a sore tooth and was numbing it with alcohol. The deceased smelled "terribly" of alcohol and was wobbly on her feet. In March or April 1998, Ms. Willock again saw injuries on the deceased, this time at a bus shelter. At that time, Ms. Willock noticed that the deceased had two black eyes and was wearing a lot of eye make-up. She did not ask her any questions about the injuries. In her statement to the police, Ms. Willock had said that it looked like the deceased had not had enough sleep.

(4) Defence evidence

[14] The appellant did not testify. He called some expert evidence to try and cast doubt on the Crown evidence about whether the deceased's hair was pulled out, as well as on the significance of the finding of the appellant's DNA in the deceased's fingernail scrapings. The defence also called neighbours of the appellant and the deceased, who testified that they frequently saw men coming to the apartment during the daytime. One neighbour testified that the Saturday morning before the death, he saw a man knocking quite aggressively on the door of the Czibulka apartment.

[15] The appellant's defence was that someone else, perhaps one of the deceased's massage clients, may have entered the apartment and killed her. Alternatively, the defence argued that the appellant lacked the requisite intent for murder either by reason of intoxication or a combination of factors. The trial judge also put the defence of provocation to the jury.

THE ISSUES

[16] In his factum, the appellant submits that the trial judge erred in admitting the appellant's statements to the police. That ground of appeal was not pursued in oral argument. The remaining issues are the following:

(1) The trial judge erred in admitting the hearsay statements in the letter to the deceased's cousin and to the family physician;

(2) The trial judge misdirected the jury with respect to the *mens rea* for murder;

(3) The trial judge did not adequately direct the jury with respect to the neighbours' evidence of injuries to the deceased and other evidence of discreditable conduct by the appellant;

(4) The Crown's jury address had the effect of shifting the burden of proof to the appellant, and this effect was uncorrected by the trial judge in his charge; and

(5) The trial judge did not adequately direct the jury with respect to the appellant's post-offence conduct.

[17] The appellant also submits that the period of parole ineligibility is excessive.

ANALYSIS

(1) The hearsay statements

[18] The deceased's letter to her cousin did not fit within any established hearsay exception, and its admission therefore depended upon application of the principled approach to hearsay as explained in cases such as *R. v. Khan* (1991), 59 C.C.C. (3d) 92 (S.C.C.), *R. v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.) and *R. v. Starr* (2000), 147 C.C.C. (3d) 449 (S.C.C.). A part of Dr. Espiritu's evidence could come within the established exception for statements of present physical condition; however, in Canada the law would seem to be that statements as to the cause of the condition, as in this case that the injuries were caused by the appellant, are inadmissible. See *Youlden v. London Guarantee and Accident Co.* (1912), 26 O.L.R. 75 (H.C.J.), affirmed (1913), 28 O.L.R. 161 (C.A.).[2] Thus, admission of this evidence also depended on application of the principled approach.

[2] Compare Rule 803(4) of the United States *Federal Rules of Evidence* which permits admission of statements made for purposes of medical diagnosis or treatment including the cause "insofar as reasonably pertinent to diagnosis or treatment".

[19] The trial judge held that the hearsay statements in the letter and to the physician met the requirements of necessity and reliability under the principled approach. Necessity was, of course, not an issue given the death of the declarant. As to threshold reliability, the trial judge held that this had to be determined without reference to independent external evidence that tended to support or diminish its ultimate reliability. With respect to the letter, the trial judge held as follows:

> The obvious hearsay dangers of the letter are that:
>
> 1. Mrs. Czibulka was not under oath or affirmation when she wrote the letter
>
> 2. The jury cannot assess Mrs. Czibulka's demeanour or credibility
>
> 3. The defendant cannot cross examine Mrs. Czibulka as to:
>
> The circumstances under which the letter was written
>
> The truth of the contents of the letter
>
> 4. The defendant has no direct way to inquire into Mrs. Czibulka's perception, memory, narration, or sincerity
>
> Five indicia of threshold reliability are:
>
> 1. There is no danger of mistaken observation or recollection. Mrs. Czibulka was in a perfect position to see and hear the events of the previous day described in the letter.
>
> 2. There is no apparent motive to lie. Mrs. Czibulka has nothing to gain by falsely complaining of assaults and threats by her husband. Szenczi could give her no help, nor does she ask it. She seeks no benefit or advantage from the addressee and has nothing to gain by falsely accusing her husband of threats and assaults.

The defence suggests that a motive to lie is evidenced by her earlier request to Szenczi to stay with him in Los Angeles and his refusal on the basis that she had no American insurance coverage for her serious health problems. Had the letter repeated the request, that might arguably pose a motive to lie but the letter does not repeat the request and in fact suggests, to the contrary, that she contemplates moving out of the matrimonial apartment with the assistance of local welfare and housing authorities.

3. The matters described in the letter do not put Mrs. Czibulka in a particularly good light. Although not admissions against interest her statement derives some greater likelihood of truth because people are less likely to lie when describing themselves in an unfavourable light.

4. The letter is in the declarant's own words with no possibility of misperception, misunderstanding, faulty recollection, or motive to lie by anyone to whom the declaration was made.

5. The declaration appears spontaneous, not elicited or induced by any encouragement from the recipient

The timing of the letter, three months before death, is a neutral factor. It is close enough that the Crown can argue it is relatively contemporaneous and it is far enough removed in time that the defence can argue it is of little weight as to the state of mind of the accused three months later.

Balanced against these indicia of the threshold reliability, matters arguably detracting from threshold reliability are:

1. The lack of detail about the circumstances under which the letter was written, for instance whether the writer, an alcoholic, was drinking at the time

2. The animus against the accused reflected in the letter, although this is so closely bound up with the allegations of assault and threats by the accused that it

> does not suggest a motive to lie about the threats and assaults that produced the writer's animus. Although there are references to money problems there is no specific evidence that the letter is written in the course of a dispute that would give the writer a motive to lie about assaults and threats
>
> 3. The fact that the envelope is postmarked Thursday March 5 1998 but refers to "yesterday, Sunday"
>
> 4. The medical condition of the writer, who suffered from cirrhosis of the liver; although Dr. Espiritu mentioned some potential hypothetical problems associated with advanced cases of cirrhosis that could affect perception, there is no evidence that they existed in this case or that Mrs. Czibulka's cirrhosis was of a kind or intensity that could give rise to problems of perception.
>
> Although these negative factors will provide the jury on the question of ultimate reliability of some ways to test the truth of the statement, they are not so significant that they outbalance the strong elements in favour of threshold reliability referred to above.
>
> The letter meets the test of threshold reliability.

[20] As to the statement to the physician, the trial judge held as follows:

> As for Dr. Espiritu's evidence Mrs. Czibulka's statement was made for the purpose of creating a record against her husband, but again the purpose is bound up with the allegations of assault themselves and the doctor saw the bruises himself. There is no evidence of any animus that would give her a reason to lie to Dr. Espiritu about the assaults.
>
> The evidence of Dr. Espiritu meets the test of threshold reliability.

> As for the balance between unfair prejudice and probative value, for the reasons mentioned above, the high probative value outweighs the potential for unfair prejudice.
>
> For these reasons the letter, the evidence of Mr. Szenczi, and the evidence of Dr. Espiritu will therefore be admitted.

[21] Since the letter and the physician's evidence raise different hearsay problems, I will deal with them separately.

(a) The letter to the cousin

[22] In its principled approach to hearsay, the Supreme Court of Canada has developed at least two models of analysis concerning the reliability prong of the test. See *Starr* at para. 215. In the first model, represented by cases such as *Khan, Smith*, and *Starr,* the court looks for a circumstantial guarantee of trustworthiness that the statement is true and accurate and thus, in particular, cross-examination is unnecessary. Lamer C.J.C. explained the rationale in *Smith* at p. 268:

> "Guarantee", as the word is used in the phrase "circumstantial guarantee of trustworthiness", does not require that reliability be established with absolute certainty. Rather, it suggests that where the circumstances are not such as to give rise to the apprehensions traditionally associated with hearsay evidence, such evidence should be admissible even if cross-examination is impossible. According to Wigmore, *while it was not possible to generalize as to all cases* in which other circumstances would provide a functional substitute for testing by cross-examination, certain broad categories could be identified:
>
> > §1422 ... Though no judicial generalizations have been made, there is ample authority in judicial utterances for naming the following different classes of reasons underlying the exceptions:
> >
> > a. *Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed*;
> >
> > b. Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force;

> c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected. [Emphasis added.]

[23] While, as pointed out by Lamer C.J.C., it is "not possible to generalize as to all cases", of the three categories described by Wigmore to be admissible, the deceased's letter to the cousin would have to have been made under such circumstances "that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed".

[24] The other model for reliability of hearsay evidence looks to whether there are substitutes for the safeguards that courts have traditionally relied upon to determine the truth or falsity of evidence, such as contemporaneous cross-examination, the oath and the ability to observe the declarant's demeanour at the time the statement was made. In these cases, the declarant is generally available for cross-examination at trial; one example of this is where a party seeks to make substantive use of a prior inconsistent statement, as explained in *R. v. B. (K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.).[3] Thus, even though there may be some reason to suspect the truth or reliability of the hearsay statement, substitute safeguards such as the opportunity to cross-examine the declarant will enable the trier of fact to determine the truth and ultimate reliability of the statement.

[25] Under either approach, at the admissibility stage the trial judge is to determine only threshold reliability. The judge is not concerned with whether the statement is true or not, which is a question of ultimate reliability for the jury, should the statement be admitted. See *Starr* at para. 215.

[26] Since the declarant was not available in this case, threshold reliability turned on the *Smith, Khan* and *Starr* line of cases. Admissibility depended on the judge being satisfied that the circumstances under which the letter was written "negate or at least ameliorate the dangers inherent in hearsay evidence". See *R. v. Kimberley* (2001), 157 C.C.C. (3d) 129 (Ont. C.A.) at para. 151. If the court cannot say that the contents of the hearsay statement "could not reasonably have been expected to have changed significantly had [the deceased] been available to give evidence in person and subjected to cross-examination", threshold reliability has not been made out: *Smith* at p. 273.

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[3] Of course, all cases where the evidence may meet the reliability threshold requirement may not fit neatly into one of these two models.

[27] As Doherty J.A. explained in *R. v. Merz*, (2000), 140 C.C.C. (3d) 259 at para. 49, when reviewing a trial judge's decision to admit evidence under the principled approach, absent manifest error, this court must accept the trial judge's findings of fact. The court "must, however, apply a correctness standard to the ultimate question of whether the trial judge properly applied the criteria relevant to the admissibility of the evidence to the facts as found by the trial judge". In my view, the trial judge made two errors in his approach to determining the admissibility of the letter. First, he relied upon the truthfulness of the contents of the letter to decide whether the statement was reliable. Second, he relied upon the absence of evidence of the circumstances under which the letter was written to find that accordingly, there was no evidence of a motive to fabricate.

(i) Use of contents of letter for its truth

[28] As a preliminary matter, I note that almost nothing is known about the circumstances under which the letter was written except what is related by the deceased in the letter itself.

[29] As indicated in the excerpt from his reasons, the trial judge found five *indicia* of reliability, which can be summarized as follows:

> 1. There was no danger of mistaken observation or recollection because the deceased was in a "perfect position to see and hear the events of the previous day described in the letter".
>
> 2. The deceased had no apparent motive to lie. She had nothing to gain by falsely complaining of assaults and threats by the appellant. Her cousin could give her no help and she did not ask for help. "She seeks no benefit or advantage from the addressee and has nothing to gain by falsely accusing her husband of threats and assaults."
>
> 3. The matters described in the letter do not put the deceased in a particularly good light. "Although not admissions against interest her statement derives some greater likelihood of truth because people are less likely to lie when describing themselves in an unfavourable light."
>
> 4. The letter is in the declarant's own words "with no possibility of misperception, misunderstanding, faulty recollection, or motive to lie by anyone to whom the declaration was made".

> 5. The declaration appears spontaneous, not elicited or induced.

[30] There is no question that the contents of a hearsay statement can be used for some purposes to determine its admissibility. For example, in *Khan,* the court found as an indicium of reliability that the very young complainant was unlikely to have knowledge of the sexual acts in question and therefore unlikely to have concocted the story. However, this determination could be made from the fact the statements were made and did not depend on the assumption that the statements were true.

[31] Similarly, the statement against interest exception to the hearsay rule, to which the trial judge made reference, necessarily requires an examination of the contents of the statement to determine whether the statement was in fact against interest. However, in looking at the statement the court does not assume the contents of the statement to be true; rather it looks to the fact that the statement was made. The circumstantial guarantee of trustworthiness derives from the fact that people are unlikely to make false statements against their interest; an example of this would be to admit that one still owes a debt. Similarly, to some extent, the fact that the letter portrays the deceased in a bad light tends to somewhat enhance that part of the letter. However, that portrayal was a minor aspect of the letter. There was no reason to believe that the deceased was unlikely to lie about the very serious allegations she made against the appellant. In any event, in other respects the trial judge went beyond relying on the fact that the statements were made and instead assumed the statements were true.

[32] The trial judge's first indicium of reliability was that there was no mistaken observation or recollection because the deceased was describing events of the previous day. In fact, there is no admissible evidence to support that assertion. It depends entirely on accepting the truth of the deceased's statements, "I was so happy that you called me yesterday" and that the appellant assaulted her "yesterday, Sunday". There was no evidence from Mr. Szenczi, for example, that he spoke to the deceased the day before the letter was shown to have been posted. As I read his evidence, he spoke to the deceased about two to three weeks before he received the letter, and at that time she asked to come to California.

[33] The trial judge's fourth point was that the letter is in the declarant's own words, "with no possibility of misperception, misunderstanding, faulty recollection, or motive to lie by anyone to whom the declaration was made". This is true and so there is little danger of so-called mistakes in transmittal. However, this factor does not guarantee the truth or accuracy of the contents of the letter itself.

[34] The trial judge's fifth point was that the declaration "appears spontaneous". This finding of spontaneity also depended upon the truth of the contents of the letter; there was no evidence, other than the contents of the letter, that the statements were made spontaneously in response to the alleged assaults by the appellant.

(ii) No motive to lie

[35] It seems to me that it was fundamental to the trial judge's conclusion about reliability that the deceased had "no apparent motive to lie". In my view, however, since there was little or no evidence of the circumstances under which the letter was written, the trial judge had no evidence that the deceased had no motive to lie. The trial judge appeared to approach the question of fabrication by using the absence of evidence of fabrication to find that there was no evidence of a motive to fabricate. There was nothing in the circumstances to justify this approach. This was not a case like *Khan,* for example, where it was apparent from the circumstances as related by the mother that the declarant child had no motive to accuse the accused falsely. The absence of evidence of motive to fabricate is not the same as evidence of the absence of motive to fabricate. In fact, what evidence exists tells against the deceased having no motive to fabricate.

[36] In *Starr* at para. 215, Iacobucci J. noted the central role that motive to fabricate plays in admission of hearsay under both the *Khan/Smith* and *K.G.B./F.J.U.* models:

> Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness. *This could be because the declarant had no motive to lie* (see *Khan, supra; Smith, supra*), or because there were safeguards in place such that a lie could be discovered (see *Hawkins, supra; U. (F.J.), supra; B. (K.G.), supra*). [Emphasis added.]

[37] Whether there is a motive to fabricate the story related in the hearsay statement can turn on a number of considerations. Sometimes it will depend on the nature of the relationship between the declarant and the person to whom the statement was made. That was the case in *Starr*. At para. 179, Iacobucci J. agreed with the reasons of Twaddle J.A. for finding that the statement was made under circumstances of suspicion and therefore could not meet the present intentions exception to the hearsay rule:

> Twaddle J.A. found that the circumstances surrounding the making of the statement cast serious doubt upon the reliability

> of the statement. The possibility that Cook [the deceased/declarant] was untruthful could not be said to have been substantially negated. *Twaddle J.A. relied, in particular, upon the fact that Cook may have had a motive to lie in order to make it seem that he was not romantically involved with Weselowski* [the witness to whom the statement was made] and upon the ease with which Cook could point to the appellant, who was sitting nearby in a car but out of earshot, as being the person with whom he was going to do a scam. In my view, Twaddle J.A. was correct in finding that these circumstances bring the reliability of Cook's statement into doubt. The statement was made under "circumstances of suspicion", and therefore does not fall within the present intentions exception. The statement should have been excluded. [Emphasis added.]

[38] For the same reason, Iacobucci J. concluded at para. 209 that the statement could not meet the threshold reliability under the principled approach.

[39] In other cases whether or not there is a motive to lie may turn on the nature of the relationship between the declarant and the person (usually the accused) about whom the statement is made. That was the case in *Merz* at para. 53, where the declarant was in a bitter custody dispute with the accused and therefore it served her purposes “to paint as black a picture as she could of the [accused]”.

[40] In still other cases, the circumstances themselves under which the statement was made negative the suggestion of fabrication, as in the spontaneous utterances exception where the statement is admitted because it is made so closely to the startling event that the declarant had no opportunity to concoct or fabricate. In a similar vein, in *Khan*, the declarant’s age and the subject matter of the statement demonstrated the declarant had no motive to lie. In that case at p. 101, McLachlin J. adopted a portion of the reasons of the Court of Appeal where Robins J.A. pointed out that, “Where the declarant is a child of tender years and the alleged event involves a sexual offence, special considerations come into play in determining the admissibility of the child's statement. This is so because young children of the age with which we are concerned here are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken.” By contrast, one of the factors that led the court in *Merz,* at para. 53, to find that the declarant may have lied at her own trial for threatening her son was that in attempting to secure an acquittal on

that charge it was in her interests to throw blame on someone else, in this case, her husband now on trial for her murder.

[41] The question of motive to fabricate the hearsay statement raises two distinct but related issues. The first concerns the nature of the proof required of motive to lie. This latter issue may be crucial where there is little known about the circumstances under which the hearsay statement was made. The second issue concerns the extrinsic evidence the court may look to in determining threshold reliability. I will deal first with the question of the nature of the proof required.

[42] The nature of the proof required of motive to fabricate does not seem to have been directly addressed by the Supreme Court of Canada. In *Smith* at p. 272, Lamer J. simply observed that with respect to two of the three hearsay statements tendered by the Crown, "[The declarant] had no known reason to lie." In *Khan* at p. 105, McLachlin J. said that, "Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability."

[43] It seems to me the record will disclose some variation on three scenarios where the Crown seeks to tender a hearsay statement under the *Khan/Smith* model of the principled approach. First, the Crown may be able to show that the declarant had no known motive to fabricate the hearsay story to this witness about this accused. *Khan* and *Smith* (in respect of the first two statements) were such cases. Conversely, the circumstances may be such that either because of direct evidence or logical inference it is apparent that the declarant did have a motive to fabricate this story. *Starr* and the third call in *Smith* would seem to be such cases. Or, the case may be one where there is simply no evidence and no logical inference that the declarant had no motive to lie. In the last scenario, motive is in effect a neutral consideration. Because it is for the proponent of the hearsay evidence to show that it was made under circumstances of trustworthiness[4], if there are few other compelling circumstances of reliability the application to admit the hearsay statement will probably fail. If there are other *indicia* (and for example in *Khan* there were many others) the statement may or may not be admitted depending on the strength of those other factors on the reliability issue.

[44] Lack of evidence of motive to fabricate is not equivalent to proved absence of motive to fabricate. In other words, a finding that there is simply no evidence one way or the other that the declarant had a motive to fabricate cannot be converted into a finding in

[4] See Sopinka, Lederman and Bryant, *The Law of Evidence in Canada,* second edition, (Toronto: Butterworths, 1999) at 192

favour of the proponent that the declarant had no motive to fabricate. In my view, this view of the nature of the evidentiary burden is not inconsistent with the decisions of the Supreme Court of Canada and especially *Starr* at para. 216, although admittedly there has been no discussion of the third "neutral" scenario:

> And indeed, lower courts have recognized that the absence of a motive to lie is a relevant factor in admitting evidence under the principled approach: … Conversely, the presence of a motive to lie may be grounds for exclusion of evidence under the principled approach. *Put another way, it is the role of the trial judge to determine threshold reliability by satisfying him or herself that notwithstanding the absence of the declarant for cross-examination purposes, the statement possesses sufficient elements of reliability* that it should be passed on to be considered by the trier of fact. [Emphasis added.]

[45] Where absence of motive to fabricate is an important factor in resolving the reliability question I do not see how a trial judge could be satisfied the statement possessed "sufficient elements of reliability" in the absence of evidence of motive.

[46] Of course, cases will not always fall neatly into one or other of the scenarios; the evidence may well point in different ways as to whether this particular declarant had a motive to fabricate this statement to this particular witness. Nevertheless, *Starr* and related cases indicate that the trial judge must make a determination of threshold reliability.

[47] The question in this case is whether the trial judge could reasonably conclude on this record that, as he put it, "The deceased had no apparent motive to lie." In my view, this was not a reasonable conclusion. The Crown adduced no evidence of any such lack of motive. There was nothing special in the relationship between the deceased and her cousin from which one could conclude that she would not lie to him about her relationship with the appellant. I also see nothing in the record to justify the trial judge's conclusion that the deceased had nothing to gain by falsely complaining of assaults and threats by the appellant. To the contrary, the evidence of the relationship between the deceased and her cousin that does exist suggests that she did have such a motive to fabricate a story. At its highest, the evidence might be considered neutral, because the deceased did not seek these favours in the letter. But that is of no assistance to the Crown in this case given the lack of any other *indicia* of reliability of the hearsay statement.

[48] The second question with respect to evidence of motive to fabricate concerns extrinsic evidence; to what evidence may the trial judge look, to determine the threshold reliability of a hearsay statement? In *R. v. Starr* at para. 217, Iacobucci J. held that certain extrinsic evidence could not be considered in determining the threshold admissibility question:

> At the stage of hearsay admissibility the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. … In summary, under the principled approach a court must not invade the province of the trier of fact and condition admissibility of hearsay on whether the evidence is ultimately reliable. However, it will need to examine whether the circumstances in which the statement was made lend sufficient credibility to allow a finding of threshold reliability.

[49] This court also considered the question of use of extrinsic evidence in determining reliability in *Merz* at para. 51, where Doherty J.A. wrote as follows:

> The reliability inquiry, when made in the context of determining the admissibility of a hearsay statement, looks to those factors surrounding the making of the statement which tend to diminish the risks associated with the admission of out-of-court statements. Evidence from other witnesses which is consistent with the substance of an out-of-court statement is not a circumstance surrounding the making of that statement and cannot generally be seen as diminishing the risks associated with the admission of hearsay evidence. If, however, the circumstances of the taking of the statement provide sufficient indicia of reliability to admit the statement, then the evidence from the other witnesses can certainly be considered by the trier of fact in determining the ultimate reliability of the out-of-court statement. [Footnote omitted.]

[50] Thus, the fact that the police found that the deceased did not make applications to welfare or housing authorities was not relevant to the threshold reliability question. It seems relatively clear, however, that in addition to the immediate circumstances under which the statement was made, the court may take into account evidence of the

relationship between the declarant and persons to whom the statement was made. Thus, in *Starr,* Iacobucci J. took into account that the deceased may have lied to the declarant about where he was going because they had been romantically involved and he was in the presence of another woman. See paragraphs 178 and 179 of *Starr*. Similarly, in *Smith*, Lamer C.J.C. found that a statement by the deceased to her mother may have been untruthful; in that case, the deceased did not want her mother to send a particular person to pick her up and thus, wanting to "allay her mother's fears", she may have told her mother the accused was going to drive her home. See *Smith* at pp. 272-73.

[51] Accordingly, in this case it was open to the trial judge to take into account the relationship between the deceased and her cousin. In my view, those circumstances tended to cast suspicion on the reliability of the statements in the letter. The deceased had been rebuffed by her cousin when she asked to come to California. She may have made the statements in the letter about her relationship with the appellant, not because they were true, but to obtain sympathy from her cousin so he might change his mind. The cousin was thousands of miles away, and thus, the deceased was not making the statements under any apprehension that any falsehoods would be detected. She was known to be a heavy drinker and was being treated by her family physician for cirrhosis of the liver, yet no one observed the deceased at the time the letter was allegedly written or posted to be able to testify whether the deceased was sober when she wrote the letter. The trial judge discounted the possibility that the deceased was trying to gain sympathy from her cousin because she did not repeat the request in the letter to move to California. I agree that if she had repeated the request, the fact of making the request would strongly tell against reliability. However, the reasonable possibility that the statements were made for that purpose was sufficient to cast doubt on the deceased's motive, and thus to cast doubt on the truthfulness of the statements in the letter. As Lamer C.J.C. pointed out in *Smith* at p. 273, the issue was not whether this was an accurate reconstruction of events, but whether the circumstances under which the letter was written provided a circumstantial guarantee of trustworthiness:

> *I wish to emphasize that I do not advance these alternative hypotheses as accurate reconstructions of what occurred on the night of Ms. King's murder.* I engage in such speculation only for the purpose of showing that the circumstances under which Ms. King made the third telephone call to her mother were not such as to provide that circumstantial guarantee of trustworthiness that would justify the admission of its contents by way of hearsay evidence, without the possibility of cross-examination. *Indeed, at the highest, it can only be said that hearsay evidence of the third telephone call is equally consistent with the accuracy of Ms. King's statements,*

> *and also with a number of other hypotheses.* I cannot say that this evidence could not reasonably have been expected to have changed significantly had Ms. King been available to give evidence in person and subjected to cross-examination. I conclude, therefore, that the hearsay evidence of the contents of the third telephone conversation did not satisfy the criterion of reliability set out in *Khan*, and therefore were not admissible on that basis. [Emphasis added.]

[52] The trial judge also considered the relationship between the deceased and the appellant and discounted the possibility that the statements in the letter were made out of animus towards the appellant. He said the following:

> Matters arguably detracting from threshold reliability are:
>
> …
>
> 2. The animus against the accused reflected in the letter, although this is so closely bound up with the allegations of assault and threats by the accused that it does not suggest a motive to lie about the threats and assaults that produced the writer's animus. Although there are references to money problems there is no specific evidence that the letter is written in the course of a dispute that would give the writer a motive to lie about assaults and threats.

[53] In my view, the trial judge erred in making this finding. That finding of lack of animus was based either on the assaults having occurred or the nature of the relationship between the appellant and the deceased. As to the former, the reasoning is circular. It assumes that the allegations of threats and assaults are true and "produced the writer's animus", and that therefore the deceased had no motive to lie about those threats and assaults. As to the latter, my concern is that there is no evidence that the relationship between the appellant and the deceased was such that she would not falsely accuse him. Again what evidence does exist of that relationship does not inspire confidence that either one would necessarily be truthful. The relationship was at least a stormy one; the appellant apparently objected to his wife's occupation and we know from the daughter that there was some history of conflict in the marriage.

[54] The trial judge also discounted money problems as a motive because there was no "specific evidence" that the letter was written in the course of a dispute. In my view, the trial judge's approach on that issue was also in error. It was for the Crown as the proponent of this evidence to show that it was made under circumstances of trustworthiness. See Sopinka, Lederman and Bryant, *The Law of Evidence in Canada,* second edition, (Toronto: Butterworths, 1999) at 192. The fact that the deceased mentioned that the appellant accused her of theft, whether true or not, raised the spectre that the deceased may have been motivated to lie. The question was not whether there was extrinsic evidence to support this allegation but whether there were circumstances in the making of the statement to negate the possibility that the statement was false. Since there was no evidence of the circumstances under which the letter was written, the Crown could not meet that burden.

[55] In his very helpful submissions, Mr. Rupic described the letter as a "*cri de Coeur"* that was inherently reliable. For the reasons set out above I cannot accept this characterization. It depends on the assumption that the deceased wrote this letter under the pressure of events that had occurred only a short time earlier. There is no evidence to support this theory. It could well have been written weeks or days after some real or imagined incident and contrived by the deceased to put the appellant in a bad light and strengthen the possibility of a move to California.

[56] In my view, the trial judge erred in admitting the letter. I will consider the impact of this error after a brief consideration of the physician's evidence.

(b) The statement to the physician

[57] The trial judge made similar errors in relation to the statement to the physician. He seems to have found that the statement was reliable because the purpose of making the statement was "bound up with the allegations of assault themselves". Again, however, that finding depends on accepting the truth of the statement. The trial judge also found that there was "no evidence of any animus that would give her a reason to lie to Dr. Espiritu about the assaults". I can find nothing in the evidence to support this finding. To the contrary, the circumstances under which the statement was made strongly suggest a motive to fabricate. She told the physician the statement was made for the purpose of creating a record. This suggests that her intention in making the statement

was that she was contemplating litigation.[5] A statement made in contemplation of litigation is a classic reason to suspect that the statement was contrived. Thus, for

[5] The fact that the deceased said she was creating a record was admissible to show her state of mind and thus some evidence of her intention. The use of the statement for this purpose does not offend my earlier holding that the judge cannot rely on the truth of the contents of the hearsay statement to determine its reliability.

example, see *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 30(10)(a)(ii), which precludes admission of business records made in contemplation of litigation. The deceased's demeanour, which Dr. Espiritu described as quite happy, is also inconsistent with the truth of the contents of the statement. Finally, the fact that she did not want the matter reported to the police indicates that she made the statement without any apprehension that the accuracy of her complaint would be investigated. The deceased's statement to Dr. Espiritu that the appellant had assaulted her should not have been admitted.

(c) Conclusion on the admissibility of the hearsay evidence

[58] In my view, this would not be a proper case to apply the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*. Standing alone, admission of the physician's evidence might not require a new trial, although it must be said that there was very little other reliable evidence of prior assaults by the appellant on the deceased.[6] In any event, the letter is quite a different matter. While the case against the appellant as the perpetrator of the assaults leading to the death was strong, whether the appellant had the requisite intent for murder was a live issue. The letter, if available to the jury for the truth of its contents, was powerful evidence of an animus on the part of the appellant and strongly supported the Crown's case on identity and on intention. The circumstances

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[6] See para. 71 *infra.*

described in the letter resemble the circumstances of the deceased's death, and in her jury address, Crown counsel made frequent and effective use of the letter on the issues of identity and intention. The trial judge also referred to the letter in his charge to the jury on both those issues.

[59] Admittedly, there was some evidence of animus on the part of the appellant apart from the letter, such as evidence from the daughter, evidence of the February 1999 incident, and some of the appellant's statements to the police. However, none of this evidence carried the force of the letter and the physician's evidence.

[60] Mr. Rupic also pointed out that the defence used the letter to support the intoxication and provocation defences. However, there was other evidence that was more proximate to the death to support these defences such as the appellant's appearance when the police attended, as well as his statements to the police. The viability of these defences did not depend on the letter, which was very damaging to the defence case.

[61] Accordingly, on this ground alone I would allow the appeal and order a new trial.

(2) The direction on *mens rea*

[62] The appellant submits that the trial judge misdirected the jury with respect to the *mens rea* for murder as defined in s. 229(a)(ii) of the *Criminal Code.* The trial judge instructed the jury that the Crown could prove that the appellant had the requisite intent for murder based on either s. 229(a)(i) or (ii). The former requires proof that the appellant intended to cause his wife's death. There is no suggestion of any error in respect of this part of the definition. The error relates to the latter provision, which provides as follows:

> Culpable homicide is murder
>
> (a) where the person who causes the death of a human being …
>
> (ii) means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not;

[63] On several occasions the trial judge correctly directed the jury with respect to s. 229(a)(ii) by reading out the provision verbatim. He also included this definition in written instructions that he gave to the jury. The impugned part of the charge is as follows:

> So far as bodily harm and recklessness are concerned, if a person is aware that the conduct is likely to bring about *bodily harm* and persists in that conduct, heedless and uncaring of the risks involved, then he is reckless. That's what reckless means in s. 229.
>
> Another way to put the meaning of reckless as set out in that section of the *Criminal Code* is found in the attitude of that person. *If the person is aware that there's a danger their conduct could bring about death from bodily harm,* but the person carries on despite that risk that is the conduct of one who sees a risk and takes the chance. That intention is sufficient for murder. [Emphasis added.]

[64] While they were deliberating, the jury asked the following question:

> Clarification on intent and what constitutes recklessness as per the law.

In answering the question, the trial judge repeated the instructions he gave in the charge, including both the impugned instructions and the *Criminal Code* definition.

[65] In my view, the impugned instruction contains two errors. The first is the statement that if a person is aware that his conduct is likely to bring about "bodily harm", and persists in that conduct heedless and uncaring of the risk, then he is reckless. I assume this was a slip on the trial judge's part and he intended to say that if a person is aware that his conduct is likely to bring about "death" and persists in the conduct heedless and uncaring, then he is reckless. Unfortunately, this slip was repeated when the trial judge answered the jury's question.

[66] The second error was in the trial judge's reference to a "danger" that the conduct could bring about death, in his attempt to define recklessness. The definition used by the trial judge was apparently drawn from *R. v. Sansregret* (1985), 18 C.C.C. (3d) 223 (S.C.C.) at 233 where the court defined recklessness in the context of sexual assault as follows:

> In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal *mens rea*, must have an element of the subjective. It is found in the attitude of one who, aware that there is *danger* that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the *risk*. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term "recklessness" is used in the criminal law and it is clearly distinct from the concept of civil negligence. [Emphasis added.]

[67] While this definition is appropriate in the sexual assault context, it must be modified when explaining recklessness under s. 229(a)(ii). In *R. v. Cooper* (1993), 78 C.C.C. (3d) 289 (S.C.C.) at 295, Cory J. set out a portion of the excerpt from *Sansregret* set out above, and then said the following:

> The same words can apply to s. 212(a)(ii) with this important addition: it is not sufficient that the accused foresee simply a *danger* of death; the accused must foresee a *likelihood* of death flowing from the bodily harm that he is occasioning the victim.
>
> It is for this reason that it was said in *Nygaard* [*R. v. Nygaard* (1989), 51 C.C.C. (3d) 417 (S.C.C.)] that there is only a "slight relaxation" in the *mens rea* required for a conviction for murder under s. 212(a)(ii) as compared to s. 212(a)(i). [Emphasis in original]

[68] In other words, the risk of death embodied in the terms “danger” and “likelihood” are not of the same magnitude. As indicated, Cory J. thought the difference was “important”. It is of considerable significance that the jury was apparently uncertain about the meaning of recklessness and that these misdirections were repeated in answer to a question from the jury. In *R. v. S. (W.D.)* (1994), 93 C.C.C. (3d) 1 (S.C.C.) at 6, Cory J. said the following concerning the importance of answering jury questions accurately:

> It is true that directions to a jury must always be read as a whole; however, it cannot ever be forgotten that questions from the jury require careful consideration and must be clearly, correctly and comprehensively answered. This is true

> for any number of reasons which have been expressed by this court on other occasions. *A question presented by a jury gives the clearest possible indication of the particular problem that the jury is confronting and upon which it seeks further instructions*. Even if the question relates to a matter that has been carefully reviewed in the main charge, it still must be answered in a complete and careful matter. It may be that after a period of deliberation, the original instructions, no matter how exemplary they were, have been forgotten or some confusion has arisen in the minds of the jurors. *The jury must be given a full and proper response to their question. The jury is entitled to no less*. It is the obligation of the trial judge assisted by counsel to make certain that the question is fully and properly answered. [Emphasis added.]

[69] Similarly, in *R. v. Petel* (1994), 87 C.C.C. (3d) 97 at 105, Lamer C.J.C. commented on the concern with an error in the answer to a jury question:

> The importance of adequately answering questions put by the jury should be borne in mind: *R. v. W. (D.)* (1991), 63 C.C.C. (3d) 397 at pp. 410-1, [1991] 1 S.C.R. 742, 3 C.R. (4th) 302. The question will generally relate to an important point in the jury's reasoning, so that any error the judge may make in answering it becomes all the more damaging.

[70] Although the jury did have the correct written version of s. 229 with them while they deliberated, the jurors were told not to put their own interpretation on the *Criminal Code* provisions, but to take the interpretation of the sections from the trial judge. In view of my conclusion concerning the hearsay evidence, I need not decide whether this error standing alone would have warranted a new trial.[7]

(3) The evidence of the neighbours

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[7] Crown counsel drew our attention to the Standard Jury Instructions of the Superior Court of Justice Jury Trial Project for the intent for murder and in particular to footnote 6 to the instructions for murder, which reads as follows:

> For those who wish to convert the reference to "reckless" into plain English, the following may help:
>
> > '… saw the risk that (NOC) could die from the injury, but went ahead anyway and took the chance.'

It might be preferable for the trial judge using the Standard Jury Instructions to employ the terms used by Cory J. in *Cooper*, and to replace the word "risk" with the word "likelihood".

[71] The appellant submits that the trial judge should have directed the jury to ignore the evidence of the neighbours, Ms. Hayden and Ms. Willock, and that in the alternative, the trial judge should have directed the jury as to the use to be made of this bad character evidence. While no objection was taken at trial to the admission of this evidence, I have serious reservations as to its admissibility because there was no evidence to link the deceased's appearance, as described by the witnesses, to the appellant. At the new trial, the trial judge will have to consider whether this evidence has any probative value. If the injuries to the deceased cannot be linked to the appellant, the evidence is irrelevant to the prosecution's case. While I think on this record it would have been preferable for the trial judge to have told the jury to ignore this evidence in considering the Crown's case, given that it had not been linked to the appellant, the tenor of the charge to the jury was to that effect. The trial judge made only brief mention of this evidence. Further, when he directed the jury about evidence going to identity and animus, he made no reference to this evidence and instead focused on items of evidence such as the letter and the testimony of Dr. Espiritu. Moreover, to some extent the defence relied on the neighbours' evidence to support the theory that someone else may have killed the deceased or that some of her injuries were self-inflicted while she was drunk.

[72] In my view, the appellant was not prejudiced by any non-direction concerning the use of this evidence and I would not give effect to this ground of appeal.

(4) The Crown's jury address

[73] The appellant submits that the effect of a portion of the Crown's jury address was to shift the burden of proof to the appellant, and that the trial judge erred in failing to correct this erroneous impression.

[74] A portion of Crown counsel's jury address took the form of asking a number of questions such as: "On the evidence before you, who hated Maria Czibulka this much? Louis Czibulka and nobody else. Who had ever threatened her life? Louis Czibulka and nobody else." I see nothing wrong with this form of address. It is a legitimate advocacy technique. These comments were in response to defence counsel's suggestion in his closing address that some unknown person entered the apartment while the appellant was sleeping and killed his wife. Given that the trial judge repeatedly instructed the jury that the Crown had the onus to prove every element of the offence beyond a reasonable doubt, I see no possibility that the jury would fail to realize that the Crown had the ultimate burden of proving the case beyond a reasonable doubt.

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

(5) Post-offence conduct

[76] There was some evidence of post-offence conduct in this case in the form of the appellant's apparently false statements that his wife had been drunk or had been taking drugs, his explanations to his daughter, his conduct at the funeral and the February 1999 incident. The appellant submits that the trial judge did not give an adequate direction concerning the use of this evidence and should have directed the jury that certain of this evidence was not admissible to prove whether the appellant was guilty of murder or manslaughter.

[77] In my view, the charge to the jury was adequate in the circumstances. In particular, the trial judge asked the jury to consider whether there were alternative explanations that might be consistent with innocence as opposed to guilt. He then expressly told the jury that later on in his charge, he would deal with possible explanations consistent with innocence. Then, for example, after reviewing the evidence of the appellant's conduct at the funeral and the possible explanation for that behaviour, the trial judge told the jury that they would probably not find the evidence of the appellant's conduct at the funeral significant.

[78] When the charge is considered as a whole I do not see any error in the trial judge's treatment of the post-offence conduct. When dealing with the issues of intent, intoxication and provocation the trial judge only referred to evidence that was properly probative of those issues. In view of the structure of the trial judge's charge and the care he took in referring the jury to the evidence relevant to the particular issues, the appellant was not prejudiced by the failure of the trial judge to direct the jury expressly that, for example, the appellant's conduct in February 1999 was not relevant to whether the appellant was guilty of murder or manslaughter.

CONCLUSION

[79] Accordingly, I would allow the appeal, set aside the conviction and order a new trial on the charge of second-degree murder. In view of my conclusion on the conviction appeal, I need not consider the appeal from the period of parole ineligibility.

Signed: **"M. Rosenberg J.A."**
"I agree E.E. Gillese J.A."
"I agree Robert P. Armstrong J.A."

RELEASED: "MR" SEPTEMBER 15, 2004

APPENDIX "A"

Dear La..

I was so happy that you called me yesterday, unfortunately I couldn't say anything because he was at home, if you saw me you would be frightened of me, he ripped out my hair by the handful, the top of my head is bald, on the two sides it's bald. With the sole of his foot he trampled on my face, the blood was pouring out of me, he beat me with the fist, kicked me. And the most terrifying is that I don't have anyone to go to because from the old friends no one wants to meddle. I cannot go to Csaba because his father would come there, break down the door on him and would beat him to death and me as well, even if they'll lock him up, he always tells me that he would kick off my head, slash my throat. Also yesterday, Sunday, he already started drinking in the morning, by evening again he ripped out a handful of hair, he hits me with his fist, and cries, as to where did I get him to, I stole from him at least 300,000 dollars and I give it to others to fuck me. The whole street fucked me, the only one who didn't is who didn't want to. I couldn't say it's not true because he would beat me to death that I am lying, he knows everything because he was told so, I am telling you that I also worked for 25 years, he had the RRSP for 40,000 forty thousand dollars, we sold the condo, it was worth 80,000 but we were left with only 62,000 because it was not paid off yet. So how was there 300,000. And even before he did not work he kept going to the beach (English) while I was working, he was lazy about coming to pick me up because traffic (English) is heavy, he was not happy in all his life, he would only be happy if I would have brought a woman or a man here, and if he could watch how they lick, suck, and fuck. Well this is what signifies happiness to him and he says that I don't do it because I am envious of his/her body shape, because it's better than mine that I only did it in front of others. Which of course it's not true. But he is starting to become more dangerous, you should see when his eyes are burning with anger, truly I am afraid, all night I shake and I am unable to sleep. But the most terrifying is that I do not have where to go until the Welfare (English) and the Ontario Housing (English) is arranged, sorry that I write so ugly but I am very nervous, this morning when he went out he spat on me and he said drop dead dog (English). If he is eating and his mouth is full, he spits that on me as well. Csaba was also happy that he freed himself of him. I cannot go anywhere, and I have to bear everything. Jeanette said that I should not complain to her because she lived in it and knows everything, why don't I divorce him. She doesn't understand it's not that simple, because what she looks at is

that she has lots of relatives and there is where to go, she is still young and can even find work easily. Well I won't bore you.
Lots of kisses, Marika