CITATION: R. v. Candir, 2009 ONCA 915
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COURT OF APPEAL FOR ONTARIO

Lang, Juriansz and Watt JJ.A.

BETWEEN:

Her Majesty the Queen

Respondent

and

Erhun Candir

Appellant

Delmar Doucette and Daniel Santoro, for the appellant

Susan Ficek and Peter Scrutton, for the respondent

Heard: May 11, 2009

On appeal from a conviction of first degree murder entered by Justice A.D.K. MacKenzie of the Superior Court of Justice, sitting with a jury, dated April 1, 2007.

Watt J.A.:

[1] As fall 2004 prepared to cede its place to winter, Erhun and Aysegul Candir were living together in their bungalow in a small town northwest of Toronto. The couple, who

had no children, had been married for 18 years. Erhun was retired. Aysegul worked as an ESL teacher at Bramalea Secondary School.

[2] For several years, Aysegul had been unhappy in and wanted to leave her marriage. She considered Erhun abusive. She was also fed up with Erhun's habit of collecting things and leaving them scattered indiscriminately all over the house. Despite endless pledges of immediate purge, Erhun's promises remained unfulfilled, the collection undivided. Embarrassed by the clutter, Aysegul felt unable to invite any friends for a visit.

[3] On December 2, 2004, Aysegul took advantage of her husband's planned visit to Turkey to leave her home and abandon her marriage. She moved into an apartment of her own in a building with several security features. She took a number of further precautions to ensure that Erhun could not find her or take any reprisals against her for deserting him.

[4] On December 6, 2004, Erhun Candir returned from Turkey. He found a note that Aysegul had left for him indicating that and why she had left their marriage. The note contained no information about Aysegul's whereabouts or how she could be contacted.

[5] Around noon on December 10, 2004, a lone gunman shot Aysegul to death as she sat in the driver's seat of her car in the parking lot in Bramalea Secondary School. The gunman fled.

[6] Within hours of the shooting, police arrested Erhun Candir. After his wife died, Candir was charged with first degree murder, the offence of which a jury later convicted him.

[7] Erhun Candir (the appellant) seeks a new trial on the basis of errors that he alleges the trial judge made in evidentiary and procedural rulings and in instructions to the jury. I would not give effect to any of these claims of error and, for the reasons that follow, would dismiss the appeal.

THE FACTS

[8] The prosecution's case against the appellant was largely circumstantial. Among its components were these:

i. eyewitness testimony from several persons who saw a man at or leaving the scene of the shooting at Bramalea Secondary School;

ii. evidence of the opportunity of the appellant to commit the offence because of his contemporaneous presence at or proximity to the scene of the shooting;

iii. evidence of the appellant's motive to kill the deceased;

iv. evidence of the appellant's stalking or surveillance of the deceased;

v. forensic evidence, including evidence of gunshot residue found on the appellant's gloves and the steering wheel of the vehicle he had rented on the day before the day of the shooting; and

vi. the appellant's admissions made upon arrest.

[9] The appellant did not testify. He called no witnesses. The defence advanced at trial was a denial of liability, coupled with a submission that the police investigation that led to his arrest was deeply flawed, the product of tunnel vision and a failure to pursue other legitimate suspects, including perhaps disgruntled or disaffected students.

The Evidence of Motive

[10] To prove that it was the appellant who unlawfully killed his wife and that the unlawful killing was a planned and deliberate murder, the prosecutor introduced evidence to support a finding that the appellant bore an *animus* towards the deceased because she had left him, thus had a motive to kill her in circumstances that amounted to first degree murder.

[11] In large measure, the means invoked by the prosecutor to establish the appellant's motive involved the introduction of a substantial number of remarks attributed to the deceased by several friends, close neighbours and colleagues at work, as well as her doctor, in the months preceding her death about her unhappiness in and desire to leave her marriage because of the appellant's possessive and controlling nature. Evidence of

the deceased's mental state, as revealed by her remarks, was offered to make it more probable that her relationship with the appellant was unsatisfactory to her, and that her leaving reflected a determination to put a permanent end to their relationship. In turn, these facts were said to make it more probable that the appellant bore the deceased an *animus*, thus had the motive alleged to kill her.

[12] In essence, the evidence of the recipients of the deceased's contemporaneous *ante mortem* remarks revealed that she was afraid of the appellant, especially of what she expected would be his reaction to her abandonment of the marriage, and was firmly convinced that he would not permit her to leave.

[13] Evidence was also adduced about the appellant's reaction when he discovered the deceased had left him. In a discussion with a friend the evening before the deceased was shot and in an email to the deceased the day she died, the appellant claimed that he had nothing to live for and had made changes to his will. He complained that the deceased had taken some property from the house and cautioned his friend, Ms. Schiller, not to call the deceased.

The Stalking Evidence: December 7-9, 2004

[14] Evidence was introduced upon which the jury could conclude that the appellant was watching for, perhaps stalking, the deceased at the one place he knew she would be: Bramalea Secondary School.

[15] The appellant returned home from Turkey on December 6, 2004. The following afternoon, a van resembling the appellant's 1996 Safari LSX Minivan appeared in the parking lot of Bramalea Secondary School. Moments later, an agitated man identified as the appellant sought to gain entry to an area of the school to which an access card was required. A student, assisting in the supervision of a student sports activity, refused the appellant entry.

[16] On December 8, 2004, a vehicle resembling the appellant's Safari minivan entered the parking lot of Bramalea Secondary School at about the same time as the appellant's van had entered the lot on the previous day.

Evidence of Opportunity and Proximity

[17] At about 9:00 a.m. on December 9, 2004, the day before the shooting, the appellant rented a 2005 extended model Pontiac Montana SV6 from a car rental office in the town where he lived.

[18] The appellant returned several items to a Staples outlet in Bolton around 10:00 a.m. on December 10, 2004, and left the store around 10:17 a.m. The store is about a 5 minute drive from Bramalea Secondary School.

[19] The surveillance cameras at Bramalea Secondary School showed a silver Montana minivan similar to the one the appellant had rented the previous day enter the school parking lot at 10:23 a.m. and leave six minutes later, immediately behind a vehicle

similar to the deceased's Honda. The silver minivan returned at 10:46 a.m., the vehicle similar to the deceased's Honda at 11:05 a.m.

[20] According to the time on the school surveillance video, the Montana left the lot at an increased rate of speed at ll:08 a.m., six minutes before the first emergency vehicle, a police cruiser, arrived after the shooting of the deceased had been reported.

The Forensic Evidence: Gunshot Residue

[21] The van rented by the appellant on December 9, 2004, was a new model with distinctive characteristics. The van had only recently arrived from the manufacturer through a local dealership and had never been rented before the appellant's rental of it on December 9. He returned the van slightly more than an hour after his wife had been shot. Police seized the vehicle before it was rented again.

[22] A chemist from the Centre of Forensic Sciences examined the steering wheel and driver's door handle of the van, as well as the clothing worn and gloves carried by the appellant at the time of his arrest. The chemist found nine particles of gunshot residue on the steering wheel of the van, but none on the door handle. He found 13 particles of gunshot residue on the gloves carried by the appellant when arrested and other particles on his clothing and right hand.

[23] Gunshot residue can be deposited on a surface because a person has fired or been in close proximity to someone who has fired a gun, or by transfer from some other items or person to which or to whom the residue is adherent.

[24] The deceased was killed by shots fired from a .32 calibre semi-automatic handgun. The weapon used was not recovered. Police found ammunition hidden in the appellant's home that could be fired in a .32 calibre handgun.

The Appellant's Admissions on Arrest

[25] The appellant was arrested at his home shortly before 2:00 p.m. on December 10, 2004. He was told he was being arrested for an attempted murder in Brampton. After caution and *Charter* advice, the appellant told the police that when he had called his wife from Europe and received no answer, he knew something was wrong so he flew home. He said he had been depressed.

[26] The appellant admitted that he had been in Brampton at a Staples store that day and referred to a receipt he had obtained. He may have gone to his wife's school, but couldn't remember. He referred to his wife in the past tense:

> She was everything to me. She was all I had. I loved my wife. She shouldn't have left me. I wouldn't have done that to her.

[27] In answer to a police query, the appellant explained that while he would never have robbed his wife: "she used me and robbed me on top of that".

THE GROUNDS OF APPEAL

[28] The appellant advances several grounds of appeal. Some assert error in admitting *ante mortem* statements of the deceased and in instructing the jury on the use it could make of hearsay, eyewitness identification and expert evidence. Others contend that the trial judge erred in restricting the scope of cross-examination and enlarging the range of re-examination of some witnesses who gave evidence for the prosecution. The final complaint faults the trial judge for his decision not to remedy an allegation of failed or late disclosure advanced by the appellant's trial counsel.

The First Ground: Admissibility of and Instructions on *Ante Mortem* Statements of Deceased

The Background

[29] At the appellant's trial two principal issues emerged:

i. the identity of the deceased's killer; and

ii. the legal character of the crime the deceased's killer committed.

The appellant denied any involvement in the deceased's death.

[30] At trial, the prosecutor proposed to introduce through 16 recipients about 150 statements attributed to the deceased by the recipients in the months, weeks and days before her death on December 10, 2004. The statements were tendered as narrative, as

statements disclosing the deceased's state of mind, and as statements that satisfied the requirements of necessity and reliability under the principled approach to hearsay.

[31] Trial counsel for the appellant conceded that many of the deceased's contemporaneous *ante mortem* statements were properly admissible, some subject to editing to delete some words or descriptions that revealed prior misconduct by the appellant.

[32] In making submissions on the admissibility of the deceased's *ante mortem* statements, counsel for the appellant at trial acknowledged that the deceased

i. was unhappy in her marriage to the appellant;

ii. had made arrangements to move out of the matrimonial home while the appellant was in Turkey;

iii. had moved out of the home and abandoned the marriage while the appellant was in Turkey; and

iv. had left a note for the appellant advising him that she had abandoned their marriage and explaining why she had done so.

The appellant also conceded that he found the deceased's note when he returned home from Turkey.

[33] At trial, the prosecutor offered evidence of the deceased's contemporaneous *ante mortem* statements as circumstantial evidence of motive on the part of the appellant to kill his wife. This evidence, the prosecutor contended, rendered more likely a conclusion that the appellant was the deceased's killer and that his crime was planned and deliberate first degree murder.

[34] The trial judge admitted 39 of the 57 contested statements into evidence, some in edited form. A dozen witnesses recounted their recollections of what the deceased had told them. The recipients gave their evidence during the first week of an eight-week trial.

The Ruling of the Trial Judge

[35] The trial judge approached the decision on admissibility by setting out the principles applicable to the state of mind exception, as well as the reliability requirement under the principled approach. He recognized that he had a discretion to exclude otherwise admissible hearsay, at the very least where the prejudicial effect of any statement exceeded its probative value.

[36] For each individual statement identified by counsel, the trial judge described the basis upon which the admission was sought and objection taken, then stated his conclusion on admissibility.

The Positions of the Parties on Appeal

Admissibility

[37] For the appellant, Mr. Doucette contends that the trial judge erred in his overall approach to the admissibility of the deceased's contemporaneous *ante mortem* statements. The error, Mr. Doucette says, was the trial judge's failure to consider the materiality of the statements proposed for admission in light of the appellant's acknowledgement of the basic facts underlying these statements. The deceased was unhappy in her marriage. She wanted to leave her marriage and planned to do so. She executed her plan. Her move was permanent. With these acknowledgements, evidence of the deceased's statements indicating her intention to do what she did was at once irrelevant and immaterial.

[38] Mr. Doucette submits that even if the several statements of the deceased were relevant and material and satisfied a listed or the principled exception to the hearsay rule, the trial judge erred in failing to exclude them. In light of the defence position, the probative value of this evidence was slight, clearly overshadowed by its prejudicial effect in painting the appellant as an insensitive and abusive cad. And what is more, the evidence should have been kept out in the exercise of the trial judge's discretion to control the court's process and prohibit the needless presentation of cumulative evidence.

[39] The appellant advances specific complaints about the trial judge's inconsistent treatment of terms such as "abusive" and "abuse", as well as the deceased's speculative

"he would kill me" remarks. In some instances, the remarks were edited, yet not in others. Similar inconsistent treatment was accorded remarks about two specific incidents that portrayed the appellant in a bad light. One involved a quarrel about the setting on a household thermostat, the other a squabble about an energy supply contract. The appellant argues that a proper application of the cost benefit analysis would have excluded all of this evidence.

[40] For the respondent Ms. Ficek takes a contrary position. To begin, the hearsay statements of the deceased were neither irrelevant, nor immaterial. The concessions of trial counsel, which were not formal admissions, did not render the evidence of the deceased's statements irrelevant. These statements were probative of the deceased's state of mind. They revealed that the marital relationship was unsatisfactory to her, that she determined to end it and to end it on a permanent basis. These inferences enhanced the likelihood that the appellant had the motive ascribed to him by the prosecutor. Evidence of motive is of importance on the two contested issues at trial: identity and the legal character of the unlawful killing.

[41] Ms. Ficek says that the reception of this evidence is amply supported by authority. It is routinely admitted in prosecutions of domestic homicide, despite its frequent inclusion of reference to extrinsic misconduct by the surviving and accused partner. The trial judge balanced probative value and prejudicial effect. His assessment of where the balance fell is entitled to substantial deference. The mere fact that some evidence was

admitted, but other evidence about the same subject excluded is reflective of the nature of the balancing exercise, not of any error in its application.

[42] Ms. Ficek contends that if the cost benefit analysis includes the control of needless presentation of cumulative evidence, what occurred here did not justify exclusion on this ground.

Jury Instructions

[43] The appellant says that, even if the deceased's contemporaneous *ante mortem* statements were properly admitted, the jury was not properly instructed about the use of this evidence. The trial judge failed to relate the use of the evidence, whether as reflective of the deceased's state of mind or as evidence of the truth of what was said, to the specific items of evidence. Further, while evidence admitted to reflect the deceased's state of mind was properly confined, no such limitations were imposed on other hearsay admitted on a different basis.

[44] Ms. Ficek reminds that the instructions given coincided with the position of the appellant's trial counsel, who, for sound tactical reasons, eschewed specific reference and sought generic instructions to which he took no objection. The appellant has suffered no prejudice as a result of either the form or content of the instructions.

The Governing Principles - Admissibility

[45] To determine whether the trial judge was right in his decision to admit the contemporaneous *ante mortem* statements of the deceased and, if so, in what he told the

jury about their use of the statements, it is helpful to recall some basic principles of our law of evidence.

[46] To be receivable in a criminal trial, evidence must be relevant, material and admissible.

[47] Relevance is not an inherent characteristic of an item of evidence. Relevance exists as a relation between an item of evidence and a proposition of fact that the party adducing the evidence seeks to prove or disprove by the introduction of the evidence. Relevance is relative, not absolute, a function of and dependent on the circumstances of the case in which it is offered, including, but not only, the positions of the parties: *R. v. Pilon* (2009), 243 C.C.C. (3d) 109 (Ont. C.A.), at para. 33.

[48] The threshold for relevance is not high. To determine whether an item of evidence is relevant, a judge must decide whether, as a matter of human experience and logic, the existence of a particular fact, directly or indirectly, makes the existence of a material fact more probable than it would be otherwise: see *R. v. Cloutier*, [1979] 2 S.C.R. 709, at pp. 730-32. The exclusivity or cogency of the inferences that may be drawn from the item of evidence have no place in the inquiry into relevance: see *R. v. Underwood* (2002) 170 C.C.C. (3d) 500 (Alta. C.A.), at para. 25.

[49] Materiality is a legal concept. Materiality defines the status of the proposition a party seeks to establish by the introduction of (relevant) evidence to the case at large.

What is material is determined by the governing substantive and procedural law and the allegations contained in the indictment. Evidence is material if what it is offered to prove is in issue according to the governing substantive and procedural law and the allegations contained in the indictment. Evidence is immaterial if what it is offered to prove is not in issue under the governing substantive and procedural law and the allegations contained in the indictment.

[50] Admissibility is wholly and exclusively a creature of the law. The rules of admissibility, for the most part negative, exclude evidence that is both relevant and material. A rule of admissibility need not be invoked when an item of evidence is either irrelevant or immaterial. Evidence is admissible if it satisfies all applicable exclusionary rules.

Relationship Evidence in Prosecutions of Domestic Homicide

[51] In a prosecution for a crime of domestic homicide, evidence of the relationship between the principals, the persons charged and deceased, may be relevant and material: *R. v. Moo* (2009), 247 C.C.C (3d) 34 (Ont. C.A.), at para. 98. Evidence that shows or tends to show the relationship between the principals may help to establish a motive or *animus* on the part of the accused. And evidence of a person's *animus* or motive to unlawfully kill another may assist in proving the identity of the killer and the state of mind that accompanied the killing. *Moo* at para. 98; *R. v. F. (S.D.)* (1999), 43 O.R. (3d)

609 (C.A.), at para. 23; *R. v. Jackson* (1980), 57 C.C.C. (2d) 154 (Ont. C.A.), at p. 167; *Plomp v. R.* (1963), 110 C.L.R. 234 (H.C.A.) at pp. 243, 249-50.

[52] Motive or *animus* has to do with an accused's state of mind, not that of the deceased. Yet evidence of the deceased's state of mind may constitute a link in a chain of reasoning that could lead a trier of fact to conclude that an accused bore the deceased some *animus* or had a motive to kill the deceased: *R. v. Foreman* (2002), 62 O.R. (3d) 204 (C.A.), at para. 30; *R. v. P. (R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.), at p. 339.

The Use of Hearsay to Prove the Nature of the Relationship

[53] Evidence that discloses the nature of the relationship between spouses who are the principals in an allegation of domestic homicide, more particularly evidence that discloses *animus* and motive on the part of one to kill the other, must not contravene an admissibility rule if it is to be received as evidence in the proceedings.

[54] Where by choice or force of circumstances the prosecutor seeks to establish the nature of the relationship between the principals, thus to demonstrate *animus* or motive, by the introduction of *ante mortem* statements of the deceased, the prosecutor is confronted by the hearsay rule. Sometimes, the statements escape the reach of the hearsay rule because they are not offered to prove the truth of their contents. But in other instances, the rule is implicated and the prosecutor must demonstrate compliance with a listed or the principled exception to the exclusionary rule to have the evidence received.

[55] In cases like this, where the prosecutor alleges that the murder charged was motivated by the appellant's anger in the deceased's decision to end the relationship, the prosecutor is entitled to adduce evidence to prove the deceased's contemporaneous mental or emotional state with respect to the accused, such as dislike, hatred or fear of the accused. From the deceased's state of mind, the trier of fact will be asked to infer and can conclude that the deceased acted in accordance with his or her emotional state and that his or her conduct supplied the accused with his or her own motivation to act: *P. (R.)* at p. 339; *R. v. Bari* (2006), 215 C.C.C. (3d) 346 (N.B.C.A.), at para. 23; *R. v. Lemky* (1992), 17 B.C.A.C. 71, at para. 24; *Foreman* at para. 28.

[56] The prosecutor may tender explicit statements of the declarant's state of mind or statements that give rise to an inference about the declarant's state of mind. The former are hearsay and require an exception to establish their admissibility. The latter are not hearsay and are admitted as circumstantial evidence from which the declarant's state of mind may be inferred: *P. (R.)* at p. 341. Whether admitted by exception or as beyond the exclusionary reach of the hearsay rule, the statements should be contemporaneous with the state of mind of which they are evidence.

[57] Necessity was not an issue here. The declarant was dead. To justify reception under the principled exception, the prosecutor was required to demonstrate that the statements were reliable because of the circumstances in which they were made. Those circumstances must be sufficient to serve as a surrogate for cross-examination of the

declarant, the traditional method of testing the well-documented frailties of hearsay evidence: perception, memory, narration and sincerity.

[58] Trial judges are well-situated to determine the extent to which hearsay dangers in the case at hand are of concern and whether they can be alleviated. A trial judge's ruling on admissibility, including findings on reliability, if informed by correct legal principles, is entitled to deference: *R. v. Blackman*, [2008] 2 S.C.R. 298, at para. 36. The trial judge was there. We were not.

Discretionary Exclusion of Otherwise Admissible Evidence

[59] A party who meets the requirements of a listed or the principled exception to the hearsay rule removes its exclusionary features as a barrier to admissibility. But ascension over one barrier to admissibility does not preordain reception. A trial judge has a residual discretion to exclude otherwise admissible evidence, including admissible hearsay, where its impact on the trial process (cost) exceeds its value to the correct disposal of the litigation at hand (benefit). The prejudicial effect of the evidence may overwhelm its probative value. Introduction of the evidence may involve a significant expenditure in time, not commensurate with the value of the evidence. The evidence may mislead because its effect on a trier of fact, especially a jury, may be disproportionate to its reliability: *R. v. Mohan*, [1994] 2 S.C.R. 9, at pp. 20-21; *R. v. Khelawon*, [2006] 2 S.C.R. 787, at para. 3; *R. v. Humaid* (2006), 81 O.R. (3d) 456 (C.A.), at para. 57.

[60] The general exclusionary rule described in the preceding paragraph is sufficiently expansive to permit exclusion in order to prohibit or reduce the needless presentation of cumulative evidence. This forensic piling on of evidence by the acre unnecessarily lengthens trials, diffuses their focus and diverts the attention of the trier of fact. Cumulative evidence, whether testimony, exhibits or both, often occupies a borderland around the periphery of the case, adding nothing to the contested issues, preferring instead to suffocate the trier of fact with the uncontroversial or marginal.

[61] A general exclusionary discretion to prohibit or reduce the needless presentation of cumulative evidence sits comfortably with the cost benefit analysis of *Mohan* that balances time expended (the cost) against value received (the benefit). In some instances, appellate courts, including this court, appear to have recognized an exclusionary discretion to insulate the trial process against needless presentation of cumulative evidence. See e.g. *R. v. Parsons* (1996), 146 Nfld. & P.E.I.R. 210 (Nfld. C.A.), at para. 41; *R. v. Proctor* (1992), 69 C.C.C. (3d) 436 (Man. C.A.) at pp. 447-48; *R. v. C. (R.)* (2005), 77 O.R. (3d) 364 (C.A.), at paras. 20-21; *R. v. Assoun* (2006), 207 C.C.C. (3d) 372 (N.S.C.A.), at paras. 106-09.

[62] In trials before federal magistrates and judges in the United States, Rule 403 of the *Federal Rules of Evidence* bespeaks the possibility that the parties may go overboard in trying to make or prove a point. There, as here, the courts generally leave it to the

litigants to determine whether they have proven a point. Rule 403 furnishes the judge or a magistrate with a discretion to find that "enough is enough".

[63] Rule 403 permits a judge or magistrate to exclude evidence "by considerations of undue delay, waste of time, or needless presentation of cumulative evidence". Cumulative evidence is evidence that adds very little to the probative force of the other evidence in the case. The Rule permits exclusion where the contribution of the cumulative evidence to the determination of the truth of the allegations contained in the indictment would be outweighed by its contribution to the length of the trial, along with its potential for confusion and prejudice to other litigants who must stand in line longer for their trial: *United States v. Kizeart*, 102 F.3d 320 (7th Cir. 1996), at p. 325: *United States v. Williams*, 81 F.3d 1434 (7th Cir. 1996), at p. 1443.

[64] Section 655 of the *Criminal Code* permits but does not require an accused charged with an indictable offence to admit any fact alleged against him or her for the purpose of dispensing with proof of the admitted fact. We do not require Crown counsel to accept admissions proposed by an accused or his counsel, but once accepted, the facts admitted are proven. Judicially admitted facts require no evidence from the party benefitting from the admission. Indeed, any evidence offered in connection with the facts admitted, whether to confirm or deny, should be excluded. Such evidence is immaterial, superfluous and cumbers the trial. What is more, any added dramatic force thought to be gained by examination of a witness to the admitted fact is not something to which the

party is necessarily and always entitled: *Wigmore on Evidence* (Chadbourn rev. 1970), vol. 9, s. 2591, at p. 824.

[65] On the other hand, informal admissions do not erect any absolute bar to the introduction of evidence about their subject-matter. That said, a trial judge retains the discretion to exclude cumulative evidence on the basis of a cost benefit analysis, including to control the needless presentation of cumulative evidence: *Foreman* at para. 29.

Jury Instructions on Admissible Hearsay

[66] Reception of evidence of limited admissibility, such as admissible hearsay, requires a trial judge to advise jurors how they may use the evidence in reaching their decision. Limiting instructions consist of three elements:

i. identification of the evidence to which the instruction relates;

ii. an instruction in permissive terms ("may") explaining the use that jurors may make of the evidence (the permitted use); and

iii. a direction in mandatory terms ("must not") describing the use that jurors must not make of the evidence (the prohibited use).

See, for example, *R. v. Starr*, [2000] 2 S.C.R. 144, at para. 184; *Federal Rules of Evidence*, Rule 105; *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 695.

[67] Where hearsay statements of a declarant who does not testify are admitted into evidence, a trial judge should instruct jurors that they should decide first whether the alleged statement was made and, if so, its content. Whether the statement was made involves consideration of all the relevant evidence bearing on the issue. If the jurors are satisfied that the statement was made, they may consider the statement in deciding the case. The trial judge should also explain the shortcomings associated with the hearsay evidence and invite the jurors to examine the rest of the evidence when considering the reliability of the admissible hearsay: *R. v. A.(S.)* (1992), 11O.R. (3d) 16 (C.A.), at pp. 22-23.

[68] Sometimes, admissible hearsay that describes the relationship between principals in a prosecution for domestic homicide recounts incidents of extrinsic misconduct by the person accused of the unlawful killing. These statements are often proffered, as here, to establish *animus* between the principals, thus a motive to kill. Where the statements are offered to prove motive, thereby to establish identity and the state of mind that accompanied the unlawful killing, the usual limiting instruction about evidence of extrinsic misconduct has no place: *Jackson* at pp. 168-69; *R. v. Pasqualino* (2008), 233 C.C.C. (3d) 319 (Ont. C.A.), at para. 65.

The Principles Applied: Admissibility

[69] The appellant says that the trial judge wrongly failed to exclude the deceased's *ante mortem* statements as immaterial and more prejudicial than probative, and further

failed to apply the governing principles consistently to the entire body of *ante mortem* statements. I disagree.

[70] Evidence is properly regarded as immaterial if the proposition of fact the evidence is offered to prove is not an issue before the trier of fact under the prevailing substantive and procedural law.

[71] In this case, evidence of the deceased's *ante mortem* statements was offered to prove the deceased's state of mind about her relationship with the appellant, thus enhancing the probability that the relationship with the appellant was unsatisfactory to her, that she determined to end it, and that she did end it on a basis that to her was permanent. These facts make it more probable that the appellant had a motive to kill her than would be the case without the evidence.

[72] Evidence that a person had a motive to do an act, for example to unlawfully kill another, is relevant to prove that the person with the motive did the act, and did so intentionally.

[73] At trial, the appellant denied any involvement in the deceased's death. He was not her killer. Somebody else killed her. He did not commit murder. Said in another way, the appellant, as he was entitled to do, put Crown counsel to strict proof of his participation in the unlawful killing and of the legal character of the crime committed.

[74] Any evidence that showed or tended to show, directly or by inference, that the appellant had a motive to kill the deceased was relevant to prove that the appellant in fact had such a motive. Since evidence of motive is circumstantial evidence that may help to establish not only the identity of the person who committed an offence, but also the state of mind with which the offence was committed, evidence of motive was material.

[75] Whether a formal admission under s. 655 of the *Criminal Code* would have the effect of rendering immaterial evidence that tended to show the appellant had a motive to kill, thus killed the deceased (a matter about which I have grave doubts since the state of mind issue would remain at large), the informal acknowledgement of "basic facts" made here can have no such effect. Taken at its highest, the informal admission was a factor for the trial judge to consider in determining whether to exclude the hearsay evidence on the ground that its prejudicial effect exceeded the probative value: *Foreman* at para. 29.

[76] The trial judge did not err in failing to exclude the deceased's *ante mortem* statements as immaterial.

[77] The second point the appellant makes on the admissibility issue faults the trial judge for failing to exercise his general exclusionary discretion to reject the *ante mortem* statements as more prejudicial than probative or needlessly cumulative. I would not give effect to this ground.

[78] Whether introduced through the testimony of recipients of hearsay statements made by a deceased declarant before death or from some other sources, evidence exposing the nature of the relationship between the principals in a prosecution for domestic homicide often discloses incidents or a pattern of extrinsic misconduct by the surviving partner, the accused. The capacity of this evidence to generate both moral and reasoning prejudice is well recognized. And so it is that the trial judge has a discretion to exclude the evidence where its prejudicial effect exceeds its probative value. That said, where the evidence is admitted and relied upon to establish motive, it may not be necessary for the trial judge to give the usual warning against propensity reasoning in final instructions: *Jackson* at pp. 168-69.

[79] This case does *not* involve evidence of prior physical abuse of the deceased by the appellant, a feature that was emphasized by the appellant's trial counsel in his closing address. Without minimizing the inherent potential of emotional abuse to generate moral prejudice, the risk of misuse seems of a different magnitude and lesser likelihood than where the evidence reveals a prolonged pattern of physical abuse and threats.

[80] The trial judge clearly recognized that he had a discretion to exclude any hearsay statement on the ground that its probative value was outweighed by its prejudicial effect. He excluded some statements on this ground. He admitted others where, in his view, probative value prevailed. Balancing probative value and prejudicial effect of various items of evidence is notoriously a fact-sensitive and case-specific exercise. The trial

judge's conclusions informed by correct legal principles, are entitled to deference. That some conclusions appear on their face inconsistent with others seems the quintessence of the process in which the trial judge was engaged. At all events, differences in result for declarations about a common subject-matter tendered through different recipients is scarcely a badge of error.

[81] Several witnesses gave evidence as recipients of various statements made by the deceased about her desire to leave her marriage and fears of reprisal if she followed through with her plan. These expressions culminated in her abandonment of the marriage while the appellant was in Turkey. It was of no little importance to the case for the Crown to show the pervasive nature of her dissatisfaction with the marital relationship and the firmness of her resolve to end it on a permanent basis. That her state of mind persisted and was shared with several over many months went some way towards proof of what the Crown sought. These facts, in their turn, made it more probable that the appellant had the motive assigned to him than would have been the case without the evidence of the deceased's state of mind.

[82] The hearsay statements of the deceased declarant were proffered and admitted as circumstantial evidence of the appellant's motive to kill the deceased. Evidence of motive was relevant to prove that it was the appellant who killed the deceased, and to establish his state of mind when he did so. Both identity and the legal character of the unlawful killing were contested issues at trial. Other evidence adduced at trial

demonstrated that the deceased had abandoned the marriage. She left the matrimonial home for a new premises that she had leased. She took various precautions to ensure that the appellant could not find her new residence. The value added by her hearsay statements was of the continuity of her state of mind, the deep-seated nature of her complaints and the firmness of her resolve to permanently end the marriage. It is doubtful whether such evidence could be available from any other source.

[83] The moral prejudice asserted with this evidence was not high. It involved no complaint of any assaultive behaviour. Boorish. Cheap. Messy. The statements revealed little more about the nature of the appellant than the "Dear John" note left for the appellant.

[84] Apart from an argument that the hearsay statements were immaterial because there was no dispute about certain "basic facts", trial counsel for the appellant does not appear to have asked the trial judge to exclude the statements on the ground that to admit them would amount to the needless presentation of cumulative evidence. Indeed, trial counsel consented to the admission of many statements and did not object to others because he thought their impact caused no prejudice to the appellant.

[85] In the circumstances of this case, I am not prepared to say that the trial judge should have excluded the contested hearsay statements on the ground of needless presentation of cumulative evidence. That the same purpose could have been achieved by the introduction of fewer statements does not mean that the number adduced called for

the invocation of the exclusionary discretion. The line between enough and too much is not always easy to fathom, even with hindsight. But it was not crossed here.

The Principles Applied: The Instructions on Hearsay

[86] Several times during the trial the trial judge instructed jurors about the manner in which they could use evidence of the deceased's hearsay statements in deciding the case. He advised the jurors about the frailties associated with hearsay evidence and explained the preliminary findings necessary before they could make any use of the statements.

[87] Some hearsay statements were admitted as evidence of the deceased's contemporaneous state of mind. The trial judge repeatedly told the jury that these statements were not evidence of the appellant's state of mind, only the state of mind of the declarant, the deceased. These limiting instructions were given as mid-trial instructions first, later repeated as finals.

[88] The trial judge also instructed the jury about hearsay statements admitted to establish that prior events or acts took place. The distinction drawn by the trial judge would have made it clear to the jury that they could not rely on hearsay statements of the declarant's fear that the appellant would kill her as proof that he did.

[89] The trial judge offered drafts of his final instructions on hearsay to counsel who made submissions about their accuracy and completeness. Trial counsel for the appellant resisted Crown counsel's suggestion that the charge should contain specific reference to

various declarations. Defence counsel preferred what he termed a "minimalist" approach so that the hearsay statements would not be accorded a pre-eminent place in the charge. The trial judge agreed.

[90] The jury instructions on the admitted hearsay do not reflect error.

The Second Ground: Identification Evidence

The Background

[91] The second ground of appeal relates to the evidence of three witnesses who saw the shooting or events that took place immediately thereafter, and to the testimony of another witness about an encounter she had with a man who tried to gain entry to a restricted area of Bramalea Secondary School three days before the shooting.

[92] Riccardo Terzi arrived at Bramalea Secondary School minutes before the shooting. While he was speaking to a friend in the parking lot, Terzi noticed a man hovering around the cars. The man was crouched down, as if he were hiding and trying to break into cars. The man darted towards a dark Honda. About 30 seconds later, Terzi heard a gunshot, a scream, then another gunshot. The same man ran towards a silver coloured minivan and drove away. Terzi noted what he thought was a licence number of the van and called 911.

[93] In his 911 call, Terzi described the shooter as an adult whom he thought was "Indian or something". He agreed with the 911 operator's "possibly East Indian" suggestion. Terzi went to the police station after the shooting and there wrote down a

description of the man. Middle Eastern or European. Light skinned. Mid-forties or fifties. Wearing a long-blue jacket, blue or black toque and glasses attached to a chain around his neck.

[94] Terzi viewed a photo lineup at the police station the day after the shooting. He reviewed 12 photographs sequentially. The appellant, shown in photo number 8, was the only person wearing a collarless shirt. Terzi said that the appellant's photo was the closest of three photos in the lineup of persons who looked familiar. He was not asked, thus did not make an in-dock identification at trial.

[95] Milton Murray participated in the 911 call but did not testify at trial. When an ambulance call-taker asked "is he male, East Indian?" Murray said "Yes".

[96] After Cynthia Gatch heard a scream and some gunshots, she looked out her bedroom window and saw a man standing by a row of cars in the parking lot of Bramalea Secondary School. Seconds later, the man walked towards a new mini van, got in the vehicle, and drove away. Ms. Gatch called 911. She told the 911 operator that she thought the man was Indian, but was unsure whether East Indian or Native. He was not a white person.

[97] Ms. Gatch later told police that because the man was wearing a dark-hooded jacket, she could only see his face, not his ears or hair. She thought he was a young person in his early 20s because of his baggy clothes and presence at a high school. She

thought he was East Indian because most of the people in the area around the school were East Indian.

[98] About 10 days later, Ms. Gatch attended a photo lineup where she selected the appellant's photo from a group of 12. She was 80% sure because the person she saw had a dark complexion and she had seen only 80% of his face. Ms. Gatch felt that the photos included the person whom the police believed was the shooter. The photo she chose, that of the appellant, was the person she saw from her window. Ms. Gatch made an in-dock identification of the appellant at trial.

[99] Brittany Farley, a grade 12 student who helped out after school at a wrestling practice, noticed a stranger poke his head into the room at the practice on December 7, 2004. The man told Ms. Farley that he wanted to get to the Tech Room. Ms. Farley refused the man entry because he didn't have a visitor's pass or the proper lanyard. The man was quite agitated. At trial, she described the man as in his late 50s, white skinned, and with grey hair, beady eyes, a long slim chin and a thin build.

[100] About two weeks after the incident, Ms. Farley was twice shown a photo lineup. She indicated no one on the first occasion, but picked out the appellant's photo on the second occasion, expressing 80% certainty despite some differences in the hair colour. Prior to viewing the lineup, Ms. Farley had seen sketches of the appellant on the internet, sketches that did not resemble the person she had seen.

[101] Ms. Farley made an in-dock identification of the appellant at trial.

The Allegations of Error

[102] The appellant made several complaints about omissions from the trial judge's final instructions on identification evidence.

[103] Mr. Doucette says that the trial judge failed to point out to the jury the individual frailties of each eyewitness' evidence, as well as the cumulative effect of those frailties. The trial judge did not make it clear that inconsistencies in the witnesses' descriptions and discrepancies between those descriptions and the appellant's actual appearance were factors the jury should consider in assessing the reliability of their evidence not their credibility.

[104] Mr. Doucette also assigns error to the failure of the trial judge to apprise the jury that changes in the witnesses' descriptions of the same physical features, for example, skin colour or ethnicity, as factors that affected the reliability of their evidence. Nor did the trial judge make it clear that by adopting their prior descriptions of the shooter or intruder, with features inconsistent with those of the appellant, the witnesses provided exculpatory, rather than inculpatory evidence.

[105] For the respondent, Mr. Scrutton begins with a reminder that the position advanced on the appellant's behalf about this evidence, more specifically final instructions to the jury about how they should approach it, differs significantly from the position advanced at trial. In extended pre-charge discussions, the appellant did not seek

instructions of the nature advanced as fatal omissions here, nor complain afterwards of their omission in the final instructions.

[106] Mr. Scrutton acknowledges the need for both a general warning about the frailties of eyewitness identification testimony and instructions about the specific frailties alleged in the evidence adduced at trial. In prosecutions in which the case for the Crown depends substantially on the correctness of eyewitness identification evidence. But this is not a prosecution in which the appellant's liability falls to be decided substantially on the basis of eyewitness identification evidence. Other evidence, including surveillance photos, evidence of opportunity and motive, the presence of gunshot residue on the appellant's clothing and in the van he rented and the appellant's own admissions constituted the bulk of the prosecution's case and amply supported the appellant's guilt.

[107] At all events, Mr. Scrutton continues, the trial judge provided a textbook caution for the jury on the frailties of eyewitness identification evidence, then highlighted the specific features of the evidence of each witness, including the deficiencies advanced by the appellant. The charge included specific mention of the factors affecting reliability, including the manner in which the photo lineups were conducted, the disparities in the various descriptions and the effect of adopting prior statements of prior descriptions as accurate.

The Governing Principles

[108] The parties do not differ meaningfully upon the principles that govern our decision on this ground of appeal.

[109] Where the prosecution's case depends substantially on the accuracy of eyewitness identification evidence, a trial judge must instruct the jury about the need for them to be cautious in dealing with eyewitness testimony. The charge must deal with issues of credibility but also elucidate the inherent frailties of eyewitness identification due to the unreliability of human observation and recollection. The trial judge should explain to the jury the myriad factors that can affect the reliability of eyewitness identification testimony given by perfectly honest witnesses and remind jurors that mistaken identification has been responsible for miscarriages of justice because persons who have been mistakenly identified by one or more honest witnesses have been wrongly convicted: *R. v. Wristen* (1999), 47 O.R. (3d) 66 (C.A.), at para. 32; *R. v. Thompson* (2000), 146 C.C.C. (3d) 128 (Ont. C.A.), at para. 57.

[110] Sometimes a general warning about the risks of error inherent in eyewitness identification testimony will be sufficient to caution jurors about reliance upon it. In other instances, more detailed and specific instructions will be required because of specific frailties that emerge as the witnesses are questioned at trial: *R. v. Baltovich* (2004), 73 O.R. (3d) 481 (C.A.), at paras. 78-83. Trial judges have considerable latitude

in deciding how best to apprise the jurors about the frailties of eyewitness identification testimony: *Baltovich* at para. 78.

[111] One form of identification that often attracts a specific instruction is in-court or in-dock identification. Eyewitness in-court identification of an accused as the person responsible for an offence often has a dramatic effect, frequently disproportionate to its value as probative of guilt. A specific and fortified caution may be necessary to dispel the deceptive reliability of this evidence: *R. v. Hibbert*, [2002] 2 S.C.R. 445, at paras. 50-51.

[112] Where there are material discrepancies, said in another way, dissimilarities between the descriptions provided by an eyewitness and the appearance of the person later identified by the same witness as the perpetrator, a fortified caution, sometimes an instruction that the evidence is exculpatory, may be required, at least in the absence of other inculpatory evidence: *R. v. Boucher* (2000), 146 C.C.C. (3d) 52 (Ont. C.A.), at para. 19; *R. v Bennett* (2003), 67 O.R. (3d) 257 (C.A.), at paras. 93-95; *R. v. Rybak* (2008), 90 O.R. (3d) 81 (C.A.), at paras. 120-21; *R. v. Dimitrov* (2003), 68 O.R. (3d) 641 (C.A.), at para. 18.

[113] Where a witness adopts a prior statement as true, the adopted statement becomes part of the witness' evidence at trial. What is adopted becomes evidence of the truth of its contents: *R. v. Deacon*, [1947] S.C.R. 531, at p. 534; *R. v. Tat* (1997), 35 O.R. (3d) 641 (C.A.), at p. 651.

[114] A witness may adopt none, some or all of his or her prior statement. Provided there is an evidentiary basis to support a conclusion that a witness has adopted in whole or in part, a prior statement as true, it is for the trier of fact to determine the extent to which the witness has adopted the prior statement: *R. v. Toten* (1993), 14 O.R. (3d) 225 (C.A.), at pp. 242-43.

[115] It is worth reminder that adopted prior statements of a witness stand on no different footing, occupy no preferred place and attract the same level of scrutiny from the trier of fact as the balance of the testimony of that witness and the evidence given by others. Jurors, as trial judges unfailingly instruct them, may accept and rely upon some, none or all of any witness' testimony, including any prior statements the witness has adopted as true.

[116] Any assessment of the adequacy of jury instructions requires a functional approach. We test what was said against the ability of those instructions to fulfill the purpose for which jury instructions are given. We do not require any pre-ordained approach or formula for final instructions, thus do not measure adequacy by the extent of adherence to or departure from a pre-fabricated structure: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 1-2; *R. v. MacKinnon* (1999), 43 O.R. (3d) 378 (C.A.), at p. 386.

The Principles Applied

[117] This ground of appeal is advanced in connection with the testimony of the witness who gave evidence about an event that occurred three days before the deceased was shot

and of two witnesses who reported seeing a man in the parking lot at Bramalea Secondary School contemporaneously with shooting. None claimed to be 100% certain about the identity of this person.

[118] The trial judge instructed the jury in terms to which no exception has been or could be taken about the inherent frailties of eyewitness identification evidence. The jurors were told to be very cautious about acting on eyewitness identification evidence because of its causal link to previous miscarriages of justice. The trial judge reminded jurors that honest witnesses can make mistakes and that the confidence with which a witness expresses him or herself should not be equated with or taken as reflecting the reliability of their evidence. The trial judge listed several questions for jurors to consider when they examined the circumstances under which the jurors made their observations and their identifications in the photographic lineup. The trial judge also invited the jurors to consider the various descriptions provided by the witnesses of the person they saw, including variations and inconsistencies in those descriptions.

[119] At the end of his general instructions about the inherent frailties of eyewitness identification evidence, the trial judge reviewed the specifics of the testimony of the three witnesses – Farley, Terzi and Gatch. He pointed out their earlier descriptions, including the discrepancies between their earlier descriptions, later descriptions and trial testimony, as well as the differences between those descriptions and the appellant's physical appearance. He also reviewed the photo lineup procedure, not only in relation to each

witness, but also in connection with the officer who conducted the lineup. Among the features highlighted was the failure to follow the appropriate protocol for the display of photos to eyewitnesses.

[120] Adherence to and application of a functional test in assessing the adequacy of the trial judge's instructions on the eyewitness testimony compels the conclusion that what was said was adequate to apprise the jury about this evidence in the circumstances of this case. This was a circumstantial case, not a case that was substantially dependent on the testimony of eyewitnesses who claimed to have seen the shooting. Motive. Opportunity. A forensic link. A telling admission. A formidable combination, when left unexplained.

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

The Third Ground: The Restriction on Cross-Examination

The Background

[122] A position advanced by defence counsel at trial was that an unknown assailant, likely a person of East Indian origin in his 20s, had killed the deceased. In 911 calls reporting the shooting, Riccardo Terzi, Milton Murray and Cynthia Gatch described the person they saw near or running from the scene of the shooting as East Indian. Despite this information, police did nothing to follow up in their investigation, rather focused exclusively on the appellant.

[123] At trial, defence counsel sought to develop his position that an unknown East Indian student may have killed the deceased through cross-examination of various

prosecution witnesses. He cross-examined a vice-principal and another ESL teacher at Bramalea Secondary School about incidents of student on teacher violence at the school. The prosecutor did not object to this line of questioning.

[124] Defence counsel asked another teacher, who had worked with the deceased at an elementary school, about her knowledge of any incidents between the deceased and students at the other school. When the witness indicated that she was aware of these incidents, counsel asked the witness to describe the incidents. The incidents, which occurred in 2003, had been described in disclosure the prosecutor had provided to defence counsel. Included in the disclosure were the names of the students involved in the incidents.

[125] The prosecutor objected to the cross-examination on the ground that the evidence sought was irrelevant and inadmissible hearsay.

[126] Defence counsel reiterated his position that he was not advancing a third party suspect defence because he could not identify any specific third party suspect. He wanted to demonstrate "that the deceased's character was such that she would intervene".

[127] The trial judge considered the question to be inappropriate and did not permit the witness to answer.

The Positions of the Parties on Appeal

[128] Mr. Doucette did not press this complaint in oral argument. He readily acknowledged that, on its own, the trial judge's ruling, even if in error, would not warrant appellate intervention, much less an order for a new trial.

[129] In his factum, Mr. Doucette contended that the trial judge wrongly applied the legal principles that govern claims that a (specific) third party committed the offence to what the appellant's trial counsel sought to do here. The basis advanced for the proposed cross-examination was rooted in contemporaneous descriptions of the person fleeing the parking lot as an East Indian in his 20s. The evidence to be elicited would raise a doubt, according to counsel at trial, about the identity of the assailant, and rebut any suggestion that the deceased was universally loved by her students.

[130] In his factum, the respondent contended that the ruling barred only a specific line of cross-examination that would have elicited irrelevant evidence and inadmissible hearsay. Defence counsel had already adduced evidence from teachers at Bramalea Secondary School about student-teacher violence and had cross-examined several witnesses about tunnel vision, in particular the failure to investigate the prospect that an East Indian male in his 20s had killed the deceased. The descriptions, which did not fit the appellant, were already before the jury.

The Governing Principles

[131] It is fundamental that any person charged with a murder of another may introduce evidence at his or her trial that it was someone else, a third party, who killed the deceased. The evidence adduced in support of what has become known as a "third party suspect" defence, may be either or both direct and circumstantial evidence: *Wigmore on Evidence* (Tillers Rev. 1983), vol. 1A, s. 139 at pp. 1723-24; *R. v. McMillan* (1975), 7 O.R. (2d) 750 (C.A.), at p. 757; *R. v. Grandinetti*, [2005] 1 S.C.R. 27, at paras. 46-48.

[132] Evidence that the offence charged was committed by a third party, rather than by the accused, must be relevant and satisfy any applicable rule of admissibility. To ensure that any evidence proffered for admission on this issue has sufficient probative value to justify its reception, we require evidence that the third party is sufficiently connected by other circumstances to the crime charged to give the proposed evidence some probative value: *Wigmore on Evidence* (Tillers Rev. 1983), vol. 1A, s. 139 at p. 1724; *McMillan* at p. 757; *Grandinetti* at paras. 46-48.

[133] It is also open to an accused to attack the integrity or adequacy of the police investigation that has culminated in charges for which the accused is on trial: *R. v. Dhillon* (2002), 166 C.C.C. (3d) 262 (Ont. C.A.), at para. 45; *R. v. Lane* (2008), 94 O.R. (3d) 177 (C.A.), at para. 40; *R. v. Mallory* (2007), 217 C.C.C. (3d) 266 (Ont. C.A.), at para. 87.

The Principles Applied

[134] The ruling that has spawned this ground of appeal responded to an objection made by the prosecutor to defence counsel's cross-examination of a former colleague of the deceased. Counsel invited the witness to describe for the jury incidents between the deceased and students at a school at which the deceased had previously been a teacher. The trial judge ruled that the witness would not be permitted to answer the question.

[135] The trial judge's ruling on the propriety of the question asked by the appellant's trial counsel was correct. The witness did not observe the incidents about which she was asked. The names of the students involved had been disclosed to the cross-examiner. It was never suggested that either student was enrolled at Bramalea Secondary School, or was otherwise present when the deceased was killed. Although defence counsel denied any third party suspect claim, he acknowledged "trying to create the scenario which would explain who that other person was".

[136] The open-ended question posed by the cross-examiner invited a response that was, at best, inadmissible hearsay. The witness did not see either incident. Her knowledge of the incidents was gained from reports by another or others. The purpose of the evidence was to prove that the altercations had taken place, in other words, to establish their truth. That the answer of the witness would have been inadmissible hearsay is sufficient to sustain the trial judge's ruling.

[137] It would also have been open to the trial judge to exclude the witness' answer on other grounds. Given trial counsel's disavowal of any third party suspect claim, evidence that two former students had an altercation with the deceased at another school a year before the deceased was shot to death would seem neither relevant nor material. Nor would the response service a claim that the police investigation was inadequate.

[138] This ground of appeal fails.

The Fourth Ground: The Re-examination of Detective Sergeant Magnus

The Background

[139] Det. Sgt. Brent Magnus was one of the investigating officers. His examination-in-chief was largely completed in one day, but concluded on another about two weeks later. In the interim, defence counsel indicated that he proposed to cross-examine the officer on the scope of his investigation between the time of the shooting and the appellant's arrest later the same day. The prosecutor concluded his examination-in-chief of Det. Sgt. Magnus by eliciting evidence from the officer that the photo lineups shown to various witnesses contained the photograph of only one suspect: the appellant.

[140] Contrary to his original announced intention, defence counsel did not cross-examine Det. Sgt. Magnus on the scope of the police investigation in the hour between the shooting and the arrest of the appellant. Instead, counsel focused on the adequacy and propriety of the procedure followed by the police in displaying photographs to the witnesses Terzi, Gatch and Farley.

[141] In cross-examination, Det. Sgt. Magnus was asked whether investigators had ever thought of showing Ms. Gatch a photo lineup of 12 male East Indians in their 20s. The officer replied that, as far as he knew, the police did not develop any suspects that matched counsel's description throughout the entire investigation.

[142] In re-examination, Det. Sgt. Magnus explained that from the time of the shooting until display of the photo lineups, the only suspect developed by the police was the appellant. The re-examination concluded:

> Q. And specifically relating to Mr. Moon's question in cross-examination, did you have during that timeframe any other suspects of East Indian or younger East Indian individuals that you could have put in any photo lineup?
>
> A. No, we did not. We did not have any information except for some information that came to light immediately that a description may have been provided as a male East Indian.
>
> MR. MOON [Defence Counsel]: I can't hear the witness.
>
> THE COURT: Your last sentence dragged off, could you just repeat it please, Detective Sergeant Magnus.
>
> THE WITNESS: There was some information initially from calls and through the dispatcher that a male East Indian description may have been provided, but initially it's very chaotic when an incident such as this transpires, and once you start analyzing all the information coming in, you can get a – a complete picture as to what has transpired.

The Positions of the Parties on Appeal

[143] For the appellant, Mr. Doucette reminds us that the adequacy of the police investigation was not challenged during cross-examination of Det. Sgt. Magnus. The cross-examination concentrated on the specific flaws associated with the photographic lineup and their impact on the reliability of any identification made by the witnesses to whom the photos were shown. Yet the trial judge permitted the re-examination to exceed what was permissible, allowing Det. Sgt. Magnus to offer his opinion of the appellant's guilt since the appellant was the only suspect developed during the investigation.

[144] Mr. Scrutton for the respondent contends that the trial judge was satisfied, as he was entitled to conclude from the conduct of the defence, that the adequacy of the police investigation was being challenged. The responsive evidence was confined to the two-week period between the shooting and the last photo lineup displayed and was properly admitted in re-examination.

The Applicable Principles

[145] An accused may challenge the adequacy of the police investigation that has resulted in the charges on which he or she is being tried. The evidence may be elicited by cross-examination of prosecution witnesses, the introduction of defence evidence, or by both means. Where the defence asserts an inadequate police investigation, however, the prosecutor is entitled to a fair opportunity to rebut the defence assertion: *Dhillon* at para. 46; *Lane* at para. 41.

[146] The entitlement of the prosecutor to adduce rebuttal evidence may permit the introduction of investigative hearsay, subject to the general discretion to exclude evidence the probative value of which is overshadowed by its prejudicial effect: *Dhillon* at para. 46. The responsive evidence may also include otherwise inadmissible evidence of the accused's antecedents, provided the evidence is relevant to the adequacy of the investigation: *Dhillon* at para. 46.

[147] The perils associated with raising an "other suspects" or "inadequate investigation" issue have attracted comment in previous decisions of this court: *Mallory* at para. 87; *Lane* at para. 40. Whether either issue has been raised in a case is for the trial judge to determine on the basis of all the circumstances, not simply the cross-examination of a single witness. Substance prevails, not form. Calling it something other than what it is in an attempt to avoid the threshold requirement or the introduction of rebuttal evidence, in other words, an end-around, is to no avail. After all, a rose by any other name … .

The Principles Applied

[148] It is fundamental that the permissible scope of re-examination is linked to its purpose and the subject-matter on which the witness has been cross-examined. The purpose of re-examination is largely rehabilitative and explanatory. The witness is afforded the opportunity, under questioning by the examiner who called the witness in the first place, to explain, clarify or qualify answers given in cross-examination that are

considered damaging to the examiner's case. The examiner has no right to introduce new subjects in re-examination, topics that should have been covered, if at all, in examination in-chief of the witness. A trial judge has a discretion, however, to grant leave to the party calling a witness to introduce new subjects in re-examination, but must afford the opposing party the right of further cross-examination on the new facts: *R. v. Moore* (1984), 15 C.C.C. (3d) 541 (Ont. C.A.), at p. 568.

[149] The defence position at trial was that the police investigation of this killing was inadequate, reflective of tunnel vision. The police focus fell immediately upon and never shifted from the appellant who was arrested within about 90 minutes of the shooting. A particular complaint was the failure of investigators to follow up on the involvement of an East Indian male in his 20s, a description provided by 911 callers.

[150] It was open to defence counsel at trial to challenge the adequacy or thoroughness of the police investigation into the unlawful killing of the deceased. As part of that challenge, it was open to defence counsel to adduce evidence that tended to show that investigators did not pursue the potential involvement of any East Indian men in their 20s, despite eyewitness descriptions of such a person leaving the scene of the shooting.

[151] But the defence could not have it both ways. Their pursuit of a claim of inadequate investigation left it open to the prosecutor to adduce evidence rebutting the claim, in essence, demonstrating the thoroughness of the investigation and explaining why the particular "lead" was not pursued.

[152] The response permitted in re-examination of one of the lead investigators was measured and specific. It contained no reference to any extrinsic misconduct by the appellant and was limited to the steps taken in the period between the shooting and the last photo lineup. It was open to the trial judge to make the ruling he did.

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

The Fifth Ground: Late Disclosure

Background

[154] To link the appellant to the shooting of the deceased, the prosecutor relied upon the cumulative effect of several items of evidence that showed or tended to show that the appellant was in the parking lot of Bramalea Secondary School at the time of the shooting. One of the items of evidence upon which the prosecutor relied was a security video that showed vehicular movement in and out of the parking lot and school property about the time of the shooting.

[155] The vehicular movement depicted on the security video showed a van, alleged to be the Pontiac Montana van rented the previous day by the appellant, entering and leaving the school property at least twice during the morning of the shooting. Of particular importance was the temporal link between the final departure of the van and a 911 call to Peel Regional Police said by the caller to have been made within two minutes of the shooting.

[156] Imprinted on the video tape produced by the various security cameras at Bramalea Secondary School is the time at which the events captured by the camera occurred. According to the digital printout displayed on the video tape generated by the school's security cameras, the silver Pontiac Montana van left school property quickly at 11:08 a.m. on December 10, 2004.

[157] The computer assisted dispatch (CAD) system maintained by emergency services in Peel Region to respond to 911 calls records incoming calls and the time at which the call takes place. The first 911 caller to report gunshots at Bramalea Secondary School said that he made the call about two minutes after he had heard the gunshots. On this CAD system, the 911 call was logged at 11:14 a.m.

[158] At trial, defence counsel developed the suggestion that if the van seen leaving the school at 11:08 a.m. was the van rented by the accused, as the prosecutor contended, and the 911 call at 11:14 a.m. was made within two minutes of the shooting, as the caller said, the appellant could not have been the deceased's killer because he had left the schoolyard before the shooting occurred.

[159] To advance this position, defence counsel sought to file as an exhibit a printout of the 911 calls received in connection with the shooting. The first call was received at 11:14:28 a.m. according to the 911 system. The van had left the school property at 11:08:20 a.m. according to the school security system.

[160] The prosecutor objected to tender of the 911 printout as an exhibit at trial. The witness through whom defence counsel proposed to introduce the exhibit was a videotape analyst called to give evidence about the vehicles depicted on the security video from Bramalea Secondary School. The witness had no knowledge about the accuracy of the time displayed on the school video or whether the two systems were synchronous.

[161] As part of the disclosure provided to the defence after the appellant had been charged with the murder of his wife, the prosecutor had furnished the "will state" of a police officer about a time check done on December 16, 2004, less than a week after the killing. The officer called 911 and spoke to a civilian operator. The officer announced to the operator the time displayed on the video system at the school and had the operator tell him the time displayed on the CAD system used for 911 calls. The times differed by about five and one-half minutes: the school system showed the earlier time. The officer's name was on the witness list provided to defence counsel before trial.

[162] After defence counsel had cross-examined the videotape analyst to establish the evidentiary basis for a submission that the appellant's van had left the school property before, not immediately after, the shooting, the prosecutor asked investigators to determine whether an audio recording had been made of the time check of December 16, 2004, and was still available. The audio recording was located, delivered to the prosecutor, and disclosed to defence counsel at the end of the next day's sittings.

[163] Defence counsel sought a mistrial, among other things, on the ground of delayed disclosure. The jury was excused for a full week while the motion was argued and considered. The trial judge dismissed the application.

The Positions of the Parties on Appeal

[164] For the appellant, Mr. Doucette contends that the position advanced at trial, that the appellant's van had left the school prior to the shooting, was a viable one, despite the time comparison references contained in officers' notes disclosed prior to trial. The prejudice to the appellant here resided in the prosecutor's failure to disclose the audio recording immediately on receipt. The audio recording was real evidence, incapable of dislodgement or qualification by cross-examination, unlike testimony from police witnesses, members of the same police force who had rushed to judgment in charging the appellant within 90 minutes of the shooting.

[165] Mr. Scrutton responds with a denial of any failure of timely disclosure. The information contained in the audio recording added nothing to the disclosure that had been provided well in advance of the appellant's preliminary inquiry and trial. The prosecutor's initial objection to filing the 911 call log was based on the inability of the witness then being cross-examined to testify about the recording systems and the presence or absence of synchronicity between the two systems. At all events, the audio recording was disclosed three weeks before the witness who conducted the time check testified.

The Governing Principles

[166] When an issue about delayed disclosure is raised at trial, the logical place to begin is with an inquiry into whether the subject-matter of the complaint fell within the scope of prosecutorial disclosure required by the authorities. A negative response ends the inquiry. An affirmative answer signals further examination.

[167] The right to disclosure is a component of the right to make full answer and defence, itself a principle of fundamental justice. Not every breach of the prosecutor's disclosure obligation will impair an accused's right to make full answer and defence: *R. v. Dixon*, [1998] 1 S.C.R. 244 at para. 31. And so it will fall to the trial judge to assay the impact of the failure to make timely disclosure on the accused's right to make full answer and defence and to have a fair trial. It equally falls to the trial judge to determine the appropriate remedy where an accused has demonstrated a *Charter* infringement due to late disclosure. The remedy must be just and appropriate in all the circumstances. In many cases, an adjournment will suffice: *Dixon* at para. 31.

The Principles Applied

[168] Under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, the prosecutor's first-party disclosure obligation is to disclose all relevant *information* in its possession relating to the investigation of the accused. Relevant information includes not only information related to those matters the prosecutor intends to adduce evidence against the accused,

but also any information in respect of which there is a reasonable possibility that it may assist the accused in making full answer and defence: *Stinchcombe* at pp. 343-44; *R. v. McNeil*, [2009] 1 S.C.R. 66, at para. 17.

[169] Well in advance of trial, defence counsel received information in the disclosure provided that indicated that investigators had compared the times recorded on the video surveillance system at Bramalea Secondary School with those revealed on the CAD system used for 911 calls. The precise times were included in the notes of two police officers. In each instance, the difference disclosed was more than five minutes. According to the CAD report on the incident, police were dispatched to the school at 11:16 a.m. and arrived there at 11:19 a.m. The school video system showed the arrival time as 11:14 a.m., two minutes earlier than the officers had even been dispatched according to the CAD system.

[170] Defence counsel acknowledged that he had and had read the disclosure provided by the prosecutor.

[171] Apart from the form in which it was made, the substance of what was recorded in the audio recording was no different than what had been disclosed in writing as part of the pre-trial first-party disclosure. When the recording was disclosed, defence counsel could listen to the time check, not just read about it. Two senses, rather than one. Granted, the prosecutor should have moved more quickly to turn over the recording once

he had received it from the police. That said, later delivery in different form of information already disclosed lacks even the scent of constitutional taint.

[172] This ground of appeal fails.

The Sixth Ground: Jury Instructions on Evidence of Gunshot Residue (GSR)

Background

[173] A chemist from the Centre of Forensic Sciences gave opinion evidence about the finding and significance of particles of gunshot residue found adhering to the steering wheel of the Pontiac Montana van rented by the appellant one day before the deceased was shot to death and on the appellant's clothing and hands when he was arrested about 90 minutes after the shooting.

[174] This evidence formed part of the circumstantial case advanced by the prosecutor. The evidence tended to link the appellant and the van to discharge of a firearm. Other evidence linked the appellant to ammunition of a calibre suitable for firing in the weapon used to kill the deceased, a weapon that was never found, and the van to the school at about the time of the shooting.

The Positions of the Parties on Appeal

[175] On this issue, Mr. Santoro for the appellant emphasized the importance of GSR evidence to the prosecution's case. Yet this evidence, he urged, is notoriously unreliable, a contributor to if not exclusively responsible for wrongful convictions in other

jurisdictions like the United States. The trial judge should have highlighted the inherent frailties in the GSR evidence, including the failure of the examining scientists to follow the scientific method and the substantial likelihood of pre-examination contamination because of the way in which the motor vehicle and other exhibits were handled.

[176] Mr. Scrutton begins with a reminder that trial judges are not required to review every item of evidence adduced at trial, much less to recapitulate the submissions of counsel about individual items of evidence. The trial judge left the issue of contamination to the jury for them to consider in assessing the weight to be assigned to the expert's opinion. Instructions of the nature claimed here were not sought and would have invited impermissible speculation by the jury.

The Governing Principles

[177] At its core, this ground of appeal contests the adequacy of the trial judge's instructions about the expert opinion evidence given by a chemist properly qualified to express opinions about the finding and significance of gunshot residue on the appellant, his clothing, and the van he rented the morning of the shooting.

[178] Complaints about the manner in which a trial judge refers to the evidence in final jury instructions frequently amount to claims of an inadequate review of the evidence on an issue or a failure to relate the evidence bearing on an issue to that issue.

[179] A trial judge is not and never has been required to review every item of evidence adduced at a criminal trial when summing up to the jury. A failure to mention an item of evidence only amounts to error when the item omitted is the foundation of a defence: *R. v. Demeter* (1975), 10 O.R. (2d) 321 (C.A.), at 340-41, affirmed on other grounds, [1978] 1 S.C.R. 538. In the absence of any affirmative obligation on a trial judge to recite or refer to every item of evidence adduced at trial, it would seem reasonable to conclude that there is equally no obligation on the trial judge to recapitulate the positions of the parties in relation to each piece of evidence.

[180] A trial judge is required to review the substantial parts of the evidence and relate it to the issues upon which it has a bearing so that jurors can appreciate the value and effect of the evidence: *R. v. Azoulay*, [1952] 2 S.C.R. 495, at pp. 497-98; *Jacquard* at para. 20; *R. v. Daley*, [2007] 3 S.C.R. 523, at paras. 54-58.

[181] The defence attacks on the finding and interpretation of the presence of gunshot residue in this case were many and varied. Pre-sampling contamination due to improper handling. Poor collection techniques. The prospect of contamination from extraneous sources, such as the rear seat of a police cruiser, contact with officers who had recently fired or been near a fired gun. Many of the attacks were based on suggestions put to the chemist derived from articles contained in publications with which the expert was either not familiar or did not recognize as authoritative. The suggestions, unadopted by the witness, did not, upon rejection, become evidence of their contents.

The Principles Applied

[182] Testing the adequacy of the instructions in a functional way, I am satisfied that the charge on the GSR evidence in this case does not reflect error.

[183] The trial judge reviewed the substance of the expert opinion evidence on gunshot residue. He pointed out that the expert's findings could be explained by or originate from the appellant having fired a gun or having been in close proximity to another person who had fired a gun. The judge also explained that the particles could also have been transferred from another source to which they had adhered to the items on which they were found.

[184] The trial judge reminded the jurors of the evidence that, despite the large number of particles on the appellant's gloves and the unlikelihood of their origin in a transfer from another source, the possibility of transfer could not be discounted.

[185] The trial judge also told the jurors about the evidence of contamination from brake parts and the failure to follow a protocol for control sampling often used in scientific analysis. The trial judge further reminded the jurors that the expert could only confirm the presence of gunshot residue, not identify its source or the circumstances in which it came to be on the item.

[186] Importantly, defence counsel did not object to the omission from the final instructions of anything now advanced as essential to a fair evaluation of this evidence.

[187] This ground of appeal fails.

CONCLUSION

[188] For these reasons, I would dismiss the appeal.

RELEASED: December 22, 2009 (“R.G.J.”)

“David Watt J.A.”
“I agree S.E. Lang J.A.”
“I agree R.G. Juriansz J.A.”