Unofficial English translation of the Judgment of the Court

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| Sorella c. R. | 2022 QCCA 383 |
| COURT OF APPEAL |
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| CANADA |
| PROVINCE OF QUEBEC |
| REGISTRY OF | MONTREAL |
| No.: | 500-10-007040-197 |
| (540-01-039473-098) |
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| DATE: |  March 21, 2022 |
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| CORAM: | THE HONOURABLE | FRANÇOIS DOYON, J.A.JEAN BOUCHARD J.A.CHRISTINE BAUDOUIN, J.A. |
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| ADÈLE SORELLA |
| APPELLANT – Accused  |
| v. |
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| HER MAJESTY THE QUEEN |
| RESPONDENT – Prosecutrix  |
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| JUDGMENT |
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1. The appellant appeals from two verdicts rendered on March 5, 2019, by a jury presided by the Honourable Sophie Bourque of the Superior Court, District of Laval, convicting her of the second degree murder of her daughters, Amanda and Sabrina De Vito, respectively 9 and 8 years old at the time, and acquitting her of two charges of first degree murder.[[1]](#footnote-1)
2. In support of her appeal, the appellant argues that the trial judge erred in law in her instructions to the jury respecting intent and the possibility of reasonable doubt arising from the lack of evidence, in addition to depriving her counsel of the right to submit the argument to the jury that the victims may have been killed by one or more persons connected with her spouse’s criminal activities. She also argues that the verdicts are unreasonable with respect to both guilt and the finding of not criminally responsible on account of mental disorder.
3. Let us first review the facts and the evidence presented at trial.

## Facts and evidence at trial

1. Even though the children’s murder took place on March 31, 2009, it is appropriate to go back in time to 2001 to properly illustrate the appellant’s mental state, which is inexorably linked to the facts as a whole.
2. That year, the appellant had a tumour removed from her right ear. The aftereffects of the operation were significant: she was left with facial paralysis, a crooked mouth, one eyelid that no longer shut, and a severe balance disorder.
3. The children were young at the time and needed their mother. Despite her willingness and the help she received from loved ones, the appellant struggled to bounce back. Depression gradually crept in. Then, one morning in November 2006, the Royal Canadian Mounted Police went to her home as part of a major police operation to arrest her spouse, Giuseppe De Vito. Mr. De Vito, who was not home at the time, was suspected of being an organized crime boss in Montreal.
4. This was too much for the appellant, who until then had been completely unaware of her spouse’s criminal activities. On November 30, 2006, she attempted suicide a first time by taking about a hundred Tylenol pills.
5. A short time after the appellant came home from the hospital, her mother, Teresa Di Cesare, came to live with her to help her keep house and care for the children since her spouse had run off and would never return to live with them. The appellant kept in touch with Giuseppe De Vito regularly through encrypted text messages, however, until his arrest in 2010. They were even able to see each other surreptitiously on three occasions, the last of which was in Toronto in March 2009, just a few weeks before the girls’ murder.
6. On November 28, 2007, nearly one year to the day after her first suicide attempt, a good Samaritan stopped the appellant from jumping off a bridge in a moment of great distress. In hospital, she was diagnosed with a chronic adjustment disorder related to the departure of her spouse.
7. Five months later, on April 27, 2008, the appellant was again admitted to hospital after once again ingesting about a hundred 500 mg Tylenol pills. In therapy, she said that she felt immense guilt with respect to her children. She felt that she was not up to the tasks that usually fall to a mother and that the girls would be better off without her. On that occasion, she was diagnosed with a major depressive state with anxiety and prepsychotic disorders.
8. Incidentally, among the uncontested pieces of evidence is the fact that the appellant adored both her daughters.
9. In short, at this stage it can be said that, in the years following her 2001 operation, the appellant went through a difficult period and that her psychological distress, which is moreover amply documented, can only be characterized as genuine.
10. This brings us to March 31, 2009.
11. It was 9 a.m. on a school day. The girls were wearing their school uniforms. Teresa Di Cesare was about to leave the house. Her sister’s driver had come to pick her up and was waiting in the car. She said goodbye to the children, who normally would have been in school at that time of day.
12. According to what Ms. Di Cesare reported later that evening to one of the police officers in charge of the investigation, the appellant was supposed to take her daughters to the dentist before driving them to school and then pick her up to take her to her gynecologist, with whom she had already booked an appointment. The appellant telephoned her later, however, to inform her that she could not drive her to her gynecologist’s appointment because the children’s appointments were taking longer than expected. According to the record, this call took place at 1:22 p.m.
13. At trial, Ms. Di Cesare denied this statement. She testified that the appellant did not refer to a medical appointment with her daughters that morning or later to explain why she was unable to drive her to the gynecologist’s office.
14. Hratch Vardanian, the driver who took Ms. Di Cesare to her sister’s on March 31, 2009, also testified at trial. His testimony somewhat confirms Ms. Di Cesare’s statement to the officer on the evening of March 31:

A. Well, she was trying to reach her, she couldn’t get a hold of her, so… because she had the appointment at eleven thirty (11:30), so she was nervous about that. And when I left, so I had to go do my stuff, so when I came back at one (1:00), she seemed to be more calm, so after she got in touch with Adele she said… she said: “*Yes, we got in touch*.” So, her appointment has been cancelled because… cancelled because… the doctor’s appointment was delayed.

Q. Which doctor, which doctor was that?

A. Both the girls, Amanda and Sabrina.

Q. So that’s what Mrs. Di Cesare told you?

A. That’s what she told me and that she wouldn’t be able to come and pick up Adele… um, Teresa for her doctor’s appointment.

1. As a question of fact, the evidence reveals that the girls did not have any medical appointments that day.
2. Following the call to her mother at 1:22 p.m., the appellant tried unsuccessfully to reach her brother, Luigi Sorella, and her brother-in-law, Nicholas De Vito. She left them each a voicemail message asking them to go to the family home in Laval. In the message to her brother Luigi, she asked him in a calm voice not to bring their mother, as appears from the recording.
3. Luigi Sorella heard his sister’s message later that afternoon. He was concerned, and was afraid that she had again attempted suicide. He called his younger brother, Enzo, to meet him. He testified that he also called his mother, who told him that the appellant was running late and had been unable to take her to the gynecologist.
4. When Luigi went to the house, his brother Enzo was already there. It was about 4:15 p.m. Their mother arrived soon after. They went into the house and found the two children in the playroom next to the living room, lying side by side in their school uniforms. They quickly saw that the girls were lifeless.
5. The appellant was not there. She did not answer the many calls made to her cell phone. The evidence later revealed that she had taken the battery out.
6. Then, at 3 a.m. on April 1, 2009, a Lexus automobile hit an electric pole on the Bas Saint-François range in Laval. It was the appellant’s car, and she was driving. All the witnesses, police officers, ambulance technicians, and firefighters sent to the scene observed that her behaviour was unnatural. Her gaze was expressionless and she did not react. Being told that she was under arrest for the murder of her daughters failed to elicit any more emotion from her. She appeared not to understand what was happening. She answered that her daughters were at home and asked the police officer who was questioning her to call to confirm this, which is consistent with the witnesses’ observations about her perturbed mental state, as it was unlikely that the girls would have been left alone at home overnight. Indeed, Ms. Di Cesare testified that [translation] “from the time they were born, the children had never been left unattended”. It would therefore be improbable for the appellant to have left them alone at home overnight.
7. Once at the police station, she spoke with the duty counsel, who made the same observations. The appellant appeared unable to understand the gravity of the situation. The duty counsel suggested to the police officers that they have her undergo an emergency psychiatric evaluation. She was taken to the hospital, where the physician who saw her noted that she did not really answer questions and was unable to talk about the circumstances surrounding the accident. The results of the blood analyses, however, showed that she was not intoxicated. After reading the appellant’s medical file, the physician recommended a psychiatric consultation to eliminate the hypothesis that she had made another suicide attempt.
8. Accordingly, a psychiatrist urgently met with the appellant to evaluate whether the accident could have been a suicide attempt. As a diagnostic impression, he noted: [translation] “difficult collaboration ... dissociation ...”. He prescribed an antipsychotic drug.
9. Once discharged from the hospital, the appellant was returned to custody. She appeared before the court the following day and was charged with the first degree murder of her daughters.
10. Between November 12, 2018, and February 5, 2019, no fewer than 51 witnesses, including 10 experts, testified at trial. The Crown’s case relied on circumstantial evidence based mostly on the appellant’s exclusive opportunity to commit the murders and her post-offence conduct. There is in fact no direct evidence of her involvement in the death of her daughters. The case is unique, to say the least.
11. There were no signs of a break-in. An expert noted, however, that it was possible to break in without leaving traces on the lock.
12. According to the pathologist who performed the autopsy, the simultaneous natural death of two healthy, young girls must be ruled out. However, the examination failed to reveal any trace of violence on their bodies. Similarly, toxicological analyses failed to reveal the presence of any potentially deadly substance. Consequently, the pathologist issued the hypothesis that death could have occurred because the children had been deprived of oxygen.
13. This hypothesis may be supported by the existence on the second floor of the home of a hyperbaric chamber, which had been purchased because of Sabrina’s juvenile arthritis. It is not a chamber in the usual sense of the word, but rather a cylinder measuring 2.20 metres in length and 84 centimetres in diameter when inflated. Inside, there is a small mattress and a pillow. The equipment required to operate it are an oxygen concentrator, two compressors, and hoses to feed oxygen into the chamber. Finally, it has two zippers that can be opened from the inside.
14. According to the expert chemist who examined the hyperbaric chamber, it can become an enclosed and airtight space if the oxygen is cut off, leading to the death of anyone who remains inside it for too long. Taking into consideration the children’s weight at the time of their deaths, the expert concluded his report as follows:

[translation]

Considering that the hyperbaric chamber is transformed into an enclosed space, and notwithstanding any other effect that might occur such as inanition, dehydration, hypothermia, etc., a young victim (Sabrina) weighing 28 kg could survive about 4 hours inside the hyperbaric chamber before reaching a 13% oxygen threshold. That time would be about 2.5 hours for a child weighing 51 kg. (Amanda).

In the event two young persons weighing 28 and 51 kg were placed in the hyperbaric chamber at the same time, the time would be 1.5 hours before reaching an atmosphere nearing a 13% oxygen air concentration.

1. The pathologist also noted something peculiar: the presence of autolysis in the girls’ body cavities. These are dead body cells that are digested by enzymes. It is a natural decomposition phenomenon that usually occurs some time after death. The pathologist was surprised to find autolysis less than 24 hours after death, a situation that she explained by the presence of a heat source such as, for example, the heat generated in the oxygen-deprived hyperbaric chamber.
2. Nevertheless, this hypothesis does not make it possible to directly link the appellant to the children’s murder. Indeed, there was no trace of the children’s DNA on the appellant or any trace of the appellant’s DNA on the children.
3. The evidence also shows that there was no contact between the children’s clothing and the sheet that was covering the hyperbaric chamber’s mattress, as the expert evidence did not reveal any fiber transfer between the items examined, which is something that would normally happen, or any trace of the children’s DNA. There was saliva on the hyperbaric chamber’s pillowcase, however, but that trace of saliva was not submitted to expert analysis so its provenance is unknown.
4. There is also the fact that the hyperbaric chamber was on the second floor of the family home, whereas the girls were found on the main floor and a 14-step staircase separated the two storeys. This implies that the appellant, who has had significant balance issues since her operation in 2001 and who must hold onto a handrail when she descends stairs, would have had to bring the children’s bodies down from the second floor by herself, without leaving any trace along the way or any marks on the bodies.
5. Finally, the evidence does not reveal that the appellant knew that the hyperbaric chamber could become an enclosed space that could lead to death if the oxygen compressor was not working or that death by oxygen deprivation did not leave any traces at autopsy.
6. On another note, some details should be added to some aspects of the psychiatric evidence presented at trial by the defence. According to the appellant’s theory, if she unlawfully caused the death of her daughters, she cannot be held criminally responsible because she was suffering from a pathological dissociative state that affected her ability to judge the nature of her actions.
7. This evidence is supported by the report of two psychiatrists, Dr. Chamberland and Dr. Bouchard, who also testified and who came to essentially the same conclusions, namely, that on March 31, 2009, the appellant was suffering from major depression conducive to a dissociative episode which, when occurring spontaneously, alters consciousness and clears the way for the subconscious. Not only are persons at that point deprived of their ability to judge their actions because they are being driven by their subconscious, they also will not remember anything they do. According to both psychiatrists, this is what appears to have happened on March 31, 2009, since the appellant had no apparent reason to want to kill her children.
8. That being said, Dr. Chamberland put forward another hypothesis, although one he feels is much less likely than the one described above. This alternative does not refer to a pathological dissociative state but to dissociative amnesia.
9. As will be discussed below, this theory alleges that the appellant formulated a plan to kill her daughters and then commit suicide, referred to as “extended” suicide, but that she apparently did not have the strength or courage to carry it out once her daughters were dead. In short, she acted consciously, but because the suffering was too much to bear, she became amnesic.
10. This theory of a failed extended suicide is what the respondent argued to the jury. While the evidence in this respect is contested, the respondent submitted that the fact the appellant lied to her mother on the morning of March 31, 2009, by telling her that she had to take her daughters to the dentist and by using this excuse again to explain why she could not drive her to her gynecologist’s appointment shows that she did not experience an episode of pathological dissociation, but rather dissociative amnesia resulting from the shock of killing her children.
11. Let us now consider the various grounds of appeal, but in an order differing from that suggested by the appellant.

## The jury’s rejection of the defence of not criminally responsible on account of mental disorder is an unreasonable decision.

1. The *Criminal Code* contains a specific provision on this subject:

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| **16 (1)** No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.**(2)** Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.**(3)** The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue. | **16.  (1)** La responsabilité criminelle d’une personne n’est pas engagée à l’égard d’un acte ou d’une omission de sa part survenu alors qu’elle était atteinte de troubles mentaux qui la rendaient incapable de juger de la nature et de la qualité de l’acte ou de l’omission, ou de savoir que l’acte ou l’omission était mauvais.**(2)** Chacun est présumé ne pas avoir été atteint de troubles mentaux de nature à ne pas engager sa responsabilité criminelle sous le régime du paragraphe (1); cette présomption peut toutefois être renversée, la preuve des troubles mentaux se faisant par prépondérance des probabilités.**(3)** La partie qui entend démontrer que l’accusé était affecté de troubles mentaux de nature à ne pas engager sa responsabilité criminelle a la charge de le prouver. |

1. By rendering a guilty verdict, the jury obviously rejected the evidence of mental disorder presented by the appellant. It necessarily concluded that the appellant had failed to meet her burden of proving her assertion on a balance of probabilities.
2. To support the argument that the decision is unreasonable, the appellant places great emphasis on the absence of expert evidence from the prosecution capable of contradicting the testimony of her own experts.
3. While this type of evidence does rely on the testimony of experts, it remains governed by a well-known rule: it is up to the trier of fact (in this case, the jury) to determine whether the accused has proved what is required under the law: *R. v. Baker*, 2010 SCC 9, and a “jury may therefore reject the opinion of experts, even when the experts called are unanimous and uncontradicted by other experts”: *R. v. Molodowic*, 2000 SCC 16 at para. 8.
4. It is true that, in most cases, the trier of fact conducting such an inquiry will have to contend with contradictory expert testimony. Nevertheless, it is up to the trier of fact to decide based on the evidence as a whole, not only on the expert testimony, even though the latter is obviously important.
5. Absent an error of law by the trial judge, it must be determined whether the jury’s decision in this respect was unreasonable.
6. As in *Baker*, cited above, at para. 1, the jury was confronted with “statements from the appellant suggesting, at some points, that [she] understood the moral blameworthiness of [her] conduct”. This is confirmed by the appellant’s telephone calls to her brother and brother-in-law, her conduct towards her mother (taking for granted that the jury could accept this evidence), and the fact that she fled.
7. What is more, in the defence evidence itself, there is at least one element that could lead the jury to conclude that the appellant failed to establish the merits of her argument.
8. As previously mentioned, the most probable hypothesis according to Dr. Chamberland is that, following a major depression which has been documented by lengthy psychiatric evidence going back several years, the appellant was in a dissociative state rendering her unaware of what she was doing and unable to control her actions (his evaluation even led him to believe that on a [translation] “scale of 1 to 10”, the probability of a dissociative state was at 9.5). In short, based on this premise, the appellant was suffering, to use the very terms of s. 16 *Cr. C*., from “a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong”.
9. Dr. Bouchard is essentially of the same opinion. In his report, he wrote that the appellant was [translation] “in a dissociative mental state that prevented her from being aware of her actions and of knowing that these actions were wrong”. He agrees with the [translation] “fundamental aspects” of Dr. Chamberland’s examination.
10. In short, since no expert testified for the prosecution, on its face, the defence evidence was uncontradicted by medical evidence, which usually would have been enough to establish the nature and scope of the appellant’s mental disorders.
11. However, as seen earlier, Dr. Chamberland, who displayed objectivity, added that there was another, albeit much less likely, hypothesis of dissociative amnesia, which would mean that the appellant was conscious when she acted yet remembers nothing because of her too-intense emotional burden. If this is the case, the dissociative state occurred only after the tragic events.
12. In short, according to the hypothesis of an extended suicide, the appellant knew what she was doing but forgot her actions due to the unbearable horror they created due to their excessive intensity.
13. If this second hypothesis were accepted, the requirements of s. 16 *Cr. C*. would not be met.
14. Even though Dr. Chamberland assigned a low percentage of likelihood to this hypothesis, he did not shut the door on it, and the jury could reasonably accept it to render its decision. Let us see why.
15. Dr. Chamberland explained that a person in a dissociative state cannot [translation] “knowingly hide things” or lie for the purpose of facilitating the crime. However, evidence of such behaviour exists if the version given to officers by Ms. Di Cesare is accepted. The psychiatrist even answered that, if Ms. Sorella told her mother that the victims had a medical appointment [translation] “for the purpose of keeping the children home to cause their death” and then called her mother to tell her that [translation] “the medical appointment was too long”, [translation] “this would fall more under the second hypothesis, at that point” (that is, the hypothesis of dissociative amnesia).
16. The same is true with respect to planning: according to Dr. Chamberland, a person in a dissociative state cannot plan or [translation] “prepare something”. The evidence certainly leaves room in this case for a conclusion that there was a plan.
17. It was up to the jury to decide whether the first or the second hypothesis applied. It is a question of credibility. The decision therefore fell to the jury and, in the circumstances, it cannot be concluded that the decision to reject the appellant’s arguments on the issue of mental disorder was unreasonable.
18. In *Molodowic*, cited above, the Supreme Court recalled that judicial experience shows that the issue of mental disorder is a delicate one and may even provoke unjustified skepticism in the minds of jurors, which may sometimes lead to a verdict that is unreasonable based on the available evidence. Here, we are not in the situation described in that judgment, where the evidence did not make it possible to contradict the firm opinion of the defence experts. In this case, such contradictory evidence exists and is sufficient to reject the argument of an unreasonable decision.
19. Accordingly, this ground of appeal must fail.

## The trial judge erred in law by prohibiting the appellant from submitting to the jury the theory of an inference other than guilt based on Giuseppe De Vito’s connection to organized crime.

1. It bears repeating: the prosecution’s theory was based first and foremost on exclusive opportunity, to which was added the appellant’s post-offence conduct (repeated falsehood to her mother, calls to her brother and brother-in-law, removal of battery from her cell phone, and suicide attempt – if that is what it was – by driving her car into a pole). In other words, the appellant was the only one in a position to commit the murders, and her post-offence conduct is an important element of the Crown’s evidence showing her involvement in the murders. It is the cornerstone of the prosecution’s theory.
2. The value of this argument obviously depends on the totality of the evidence, which is circumstantial.
3. This theory of exclusive opportunity has a determinative consequence: if the appellant was the only person able to commit the crimes, certain weaknesses and gaps in the evidence might be forgiven without affecting the belief beyond a reasonable doubt that she is guilty. In other words, this argument relies on the absence of another possibility and may also allow the mind to set aside certain concerns regarding the evidence, even unconsciously, given the impossibility for the murders to have been committed by another. The peculiarity of this type of evidence becomes all-important in this case due to the many gaps in the evidence that we might ignore if we are convinced that the appellant was the only one who could commit the murders.
4. Thus, even if exclusive opportunity is only one aspect of the circumstantial evidence, the fact remains that, where the gaps and weaknesses in the evidence are many, there is a danger of relying on the theory of exclusive opportunity to rebut the reasonable doubt that might arise from the lack of evidence or the gaps therein. In other words, in spite of the gaps that could lead to a reasonable doubt, it is possible for the door of exclusive opportunity to be so wide open before the jurors that they forget the most important thing: has the prosecution convinced them beyond a reasonable doubt of the appellant’s guilt? Therefore, if there was error, it cannot be characterized as negligeable and, for the reasons below, this possibility cannot be excluded.
5. Let us consider some examples of the gaps or weaknesses in the evidence, several of which were caused by shortcomings in the police investigation. The intention at this stage is not to criticize anything or anyone whatsoever. Rather, the aim is to ponder the possibility that these gaps, which might have raised a reasonable doubt, were set aside because of the conclusion of exclusive opportunity, even though the argument the appellant wanted to submit was admissible and had the potential to contradict this conclusion.
6. First, with respect to the evidence itself, it is impossible to determine the exact cause of death. The appellant would have had to have considerable physical strength to a degree almost incompatible with her state to carry the bodies from one floor down to the other without leaving any traces at the scene (DNA, fibers, etc.) or on the bodies (injuries, marks, torn clothing, etc.). Her mental state can hardly be reconciled with planning worthy of the most complex and sophisticated crimes.
7. The absence of any evidence of contact between the appellant and the hyperbaric chamber or her daughters is troubling. There were no signs of violence. Keeping two girls in a hyperbaric chamber until their death would require uncommon strength, hardly consistent with the appellant’s functional limitations, especially since the chamber’s zipper could be used from the inside and the toxicological reports reveal the absence of any tranquilizers in the victims. She would have had to rely only on her authority over them, as their mother, which appears unlikely in the circumstances.
8. The surveillance camera recording unit was inexplicably taken down in the days leading up to the event so no images of the scene were captured. In fact, the residence’s entire alarm system was deactivated on March 26, 2009 (less than five days before the events), and this system could record in its memory when any doors or windows were opened or shut.
9. Second, with respect to the police investigation, there is no expert assessment of a boot print found in the house, and the police officer tasked with taking crime scene photos failed to take one of the print. None of this has been explained. This print is important if we consider the defence theory that a third party was involved. Aside from an examination of the lock, there was no serious expert assessment of whether signs of a break-in or fingerprints could be found elsewhere, such as on the windows of the house or the garage door. No expert assessment was performed on the saliva detected on the hyperbaric chamber pillow, without any reason being given. While a test was done on the transfer of fibers inside the hyperbaric chamber, none was performed on the outside.
10. Once again, the exercise on appeal does not seek to criticize. The situation must simply be considered to understand that the decision to allow or refuse the defence’s request to argue that organized crime was involved in the murders was a delicate and difficult one because of the very nature of the evidence and the prosecution’s theory of exclusive opportunity. This theory should not have led the jury to overlook the weaknesses in the evidence due to the refusal of the defence’s request (if it was reasonable), it being understood that a reasonable doubt may arise from weaknesses in the evidence: *R. v. Villaroman*, 2016 SCC 33 at paras. 30, 36, and 37, which, moreover, make it possible to consider the gaps in the police investigation.
11. In her decision to refuse the appellant the right to argue the involvement of organized crime (specifically the “mafia”, as we will see later) because it was mere speculation, the judge emphasized the difficult task before her:

[translation]

[34] Once again, in light of the particular facts of this case, the line between what is a reasonable conclusion and what is speculation is thin. The very different analysis of the evidence and the contradictory inferences the parties draw from it show to what degree this line is difficult to trace.

1. While the particularities of the evidence must obviously be considered in all cases, they should have led the judge in this case to allow this argument. Although the deference owed to such a decision should be recognized because of the privileged position of the trial judge, the fact remains that permission should have been granted. Here is why.
2. The appellant made the following arguments:
* Giuseppe De Vito disappeared on the evening of the police raid to dismantle the mafia in Montreal. He was on the run from November 2006 to 2010, when he was finally arrested. He was sentenced to 15 years in prison.
* While he was on the run, Giuseppe De Vito remained in touch with the appellant. They communicated by encrypted text messages and saw each other on three occasions; the last time was in Toronto in March 2009, a few weeks before the children’s murder.
* He died in detention in a maximum security penitentiary on July 8, 2013, by cyanide poisoning.
* While he was living in the family home, he had surveillance cameras and a sophisticated alarm system installed. This system was deactivated on March 26, 2009, less than five days before the murder. The image recording unit was also taken down shortly before March 31, 2009, a deduction that can be inferred, according to an expert, because of the traces of dust where the unit had been.
* On March 31, 2009, six men of Italian origin went up to the police cordon installed around the residence by officers. When asked to identify themselves, they became aggressive and left the scene.
* The theft of only the motorcycles belonging to the girls from Giuseppe De Vito’s business.
* The fears expressed by Nicholas De Vito for the safety of the appellant and her children during his brother’s flight.
1. Moreover, the bodies of the two young victims were placed side by side in a sort of ceremonial position and were almost holding hands. Although this element is not determinative, everything should be taken into consideration, including this rather unusual aspect of the crime scene.
2. In the judge’s opinion, this evidence was insufficient to demonstrate that Giuseppe De Vito’s ties to organized crime might have been connected to the children’s death.
3. Let us review the reasons given by the judge to refuse the request:

[translation]

[19] Rather, this evidence falls within the analysis of the proof of exclusive opportunity. The question is, considering the overall picture of the evidence adduced at trial, and taking into account the respective theories of the parties, whether there is sufficient evidence to argue that there is a reasonable conclusion other than Adèle Sorella alone, to the exclusion of all others, had the opportunity to kill her children.

[20] The Court is of the opinion that this is not the case, for the following reasons.

[21] As stated, the evidence of Adèle Sorella’s involvement in the death of her daughters is entirely circumstantial.

[22] As stated by Cromwell J. in *Villaroman*, a certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense (para. 36).

[23] Once again, a particularity in this case is that the autopsies did not determine the cause of the girls’ death. The jury could deduce from this evidence that for someone to successfully cause the death of not one but two persons without leaving a trace, a certain degree of knowledge about the subject would be necessary, and a plan to achieve such a result would have to be prepared.

[24] The jury could conclude that nothing in the evidence indicates that Adèle Sorella has this knowledge or sought to gain it. It could conclude that the evidence demonstrates that Adèle Sorella has suffered from major depression for several years and that she needs the help of her loved ones to perform her daily activities.

[25] The jury could also conclude that it is not in evidence that Adèle Sorella knew that the hyperbaric chamber could become an enclosed space that could cause an undetectable death. It could also conclude that there is a lack of evidence on the manner in which Adèle Sorella convinced her daughters to get into the hyperbaric chamber and how she then brought them downstairs, inert, to the playroom where they were found.

[26] The jury could also conclude that the evidence does not clearly reveal that Adèle Sorella had any motive whatsoever to kill her daughters.

[27] The jury could further take into consideration any other evidence, such as the boot print in the main floor office, the fact that the camera recording unit was removed some time earlier, that it was possible to pick a lock without leaving a trace, etc.

[28] These are only examples of gaps in the evidence. It will be up to the jury to analyze the evidence as a whole.

[29] Let us recall that the defence need not prove that a specific third party was involved to stymie the theory of exclusive opportunity. In light of the gaps in the prosecution’s evidence and the rest of the evidence, the defence could submit to the jury that an analysis of the evidence makes it possible to draw a reasonable conclusion other than that it was Adèle Sorella who caused the death of her daughters, and thereby raise a reasonable doubt. Furthermore, even if the jury concludes that Adèle Sorella had the exclusive opportunity to cause the death of her daughters, that is no more than an inference the jury may consider; it does not automatically result in a guilty verdict.

[30] Admittedly, the evidence reveals that Giuseppe DeVito had ties to a known and notorious criminal organization, the mafia.

[31] The evidence shows that Giuseppe DeVito died of cyanide poisoning on July 8, 2013, while he was in custody in a maximum security penitentiary. The report indicates nothing more about the circumstances of the death, however, stating that it would be up to the police investigation to establish them. The evidence as to the circumstances of that death stops there. The jury could infer that it was not an accidental death, and that in 2013, someone held a sufficient grudge against him to murder him or have him murdered, but any other hypothesis as to the circumstances or the person who caused that death remains speculative.

[32] Giuseppe DeVito died more than four years after his daughters. Aside from the evidence of some contact with his family, there is no evidence of his activities, criminal or otherwise, between 2006 and 2010, the year he was arrested. There is no evidence tying his death to the mafia rather than to another criminal group or to an isolated act, and if it is a homicide, the evidence is silent as to the motive.

[33] It is true that the jury could also conclude from the evidence of the camera and alarm systems installed by Giuseppe DeVito at his residence that he felt the need to do so to protect himself and his family. But this installation predates 2006, and there is no evidence of threats against the family at any point whatsoever, and no evidence that Giuseppe DeVito had any particular fears for his family or that he warned Adèle Sorella about the dangers when they met while he was on the run from the police.

[34] Once again, in light of the particular facts of this case, the line between what is a reasonable conclusion and what is speculation is thin. The very different analysis of the evidence and the contradictory inferences the parties draw from it show how difficult this line is to trace. Faced with this evidence, however, the Court concludes that the theory that the mafia could be connected to the girls’ death rests on speculation.

[35] Therefore, the defence may not submit to the jury that a reasonable alternative conclusion may be drawn from the evidence regarding Giuseppe DeVito’s involvement with the mafia, namely, that someone else, who was connected to the mafia, may have caused the deaths of Amanda and Sabrina DeVito.

1. In short, the defence was allowed to argue the gaps in the evidence to raise a reasonable doubt as to exclusive opportunity or even raise third party involvement, but it could not directly raise the possibility of organized crime being involved in the murders. The jury may have wondered whether a third party broke into the house to commit the murders, but it could not do so if the argument tied this third party to organized crime, even if the latter theory is more reasonable than the former.
2. The thin line correctly described by the judge should have been crossed. The involvement of organized crime is certainly plausible. In this respect, in para. 26 of *R. v. Grant*, 2015 SCC 9, Karakatsanis J. recalled that “there is no principled reason to require that the connection be established by evidence relating directly to the third party where that individual is unknown”. In this case, we are at the juncture of the rules applicable to a known third party suspect (organized crime) and those applicable to an unknown third party suspect (not knowing the identity of the member in question). By adapting these rules to this situation, the connection is sufficient according to the test applied by Karakatsanis J., which requires an examination of the specifics of the case to determine “the strength of the connection” between the events. “[T]he absence of some nexus with the alleged offence” cannot be argued here; it would be pure speculation in the case of an unknown third party suspect: *Grant* at para. 28, quoting *R. v. McMillan*, Ont. C.A., affirmed by [1997] 2 S.C.R. 824. Also, in the circumstances, the integrity of the trial was assured, as required in *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577, and *Grant*, because the jury did not risk being otherwise distracted due to the argument from the exercise of its duty, which is to analyse the relevant evidence.
3. The judge took into account the disturbing circumstances of Mr. De Vito’s death, but felt that they were insufficient. On the subject, she referred to the period of over four years between his death and the girls’ death. That time period is not significant, however. His death was by cyanide, in a maximum security detention centre. If it was a murder or a suicide, for example (an accident appears unlikely), it would require time and proper preparation; a period of over four years is therefore not an argument that carries much weight, especially since it took place only two months after Mr. De Vito testified at the appellant’s first trial.
4. The lack of evidence concerning Mr. De Vito’s activities while he was on the run, which the judge mentioned, is unsurprising. By definition, the flight allowed Mr. De Vito to hide and therefore to keep his activities secret. Nothing could be more normal. The answer is the same with respect to his fears. The fact that he did not show any fear while on the run is also unsurprising. His decision to install a complex and sophisticated surveillance system to keep an eye on the family home just before running off is more revealing. In that context, it cannot be asserted, as the judge did, that [translation] “there is no evidence of threats against the family at any point whatsoever”.
5. It is also possible to believe, solely for the purpose of determining the admissibility of the argument and not of drawing an inference, that his flight was not wholly unrelated to his fears. It is known that he was an important member of organized crime, and it is known that organized crime is violent and unforgiving. An assessment of the circumstances of his death in the penitentiary, still for the purpose of deciding the admissibility of the evidence, cannot ignore the violence of organized crime. In fact, in his testimony, Mr. De Vito’s brother Nicholas clearly stated the legitimate fears the family had because of his contacts:

**A.** I was fearing for my brother's safety.

**Q.** Okay. And when you're talking about your brother's safety, what do you mean?

**A.** Well, we were pretty much in the dark. We just wanted to be sure that he was alive or you know there was so many rumours out there. … Myself and Adele were always kept in the dark. …

**Q.** When you were fearing for your brother's safety, would it be fair to say that you were not only fearing for your brother's safety because of the police but because of others?

**A.** That’s correct. Never the police. I don't know. Why would you say police?

**Q**. Maybe your brother was not interested in being arrested, for example?

**A**. Okay. (Inaudible). I'm saying yes, we were scared about people around him, yes. But not the police.

**Q**. So you felt... yes, and that's quite proper, so you felt this guy's safety was at a peril, was in danger by people around him that might be looking for him to assault him, to kill him or whatever?

**A**. Yes, that's the impression we got.

…

**Q**. You also mentioned that you were fearing for your brother's safety and the family. Would it be fair to say that you were not the only one fearing for Mr. De Vito's safety? Your parents were afraid. Sorella, Luigi was afraid. Enzo was afraid. Madam Di Cesare, Mr. Enrico Sorella, all of these people linked to Mr. Giovanni... Giuseppe De Vito were afraid for his safety, correct?

**A**. Yes. …

1. There was therefore evidence of serious fears of organized crime, at least in Mr. De Vito’s family, and it cannot be found, as the judge did, that [translation] “there is no evidence tying his death to the mafia rather than to another criminal group or to an isolated act”.
2. To reiterate, the purpose of the exercise is not to know whether organized crime murdered the girls, but to decide whether the defence should have been allowed to raise the argument.
3. The judge was too strict. The very particular circumstances of the case commanded that the appellant’s request be granted. The connection between organized crime and Mr. De Vito and the very nature of organized crime were enough to make the appellant’s argument plausible, not merely speculative. The logical link discussed in *R. v. Seaboyer; R. v. Gayme*, cited above, is established. Where there is a line that is [translation] “difficult to trace”, the appellant should have been allowed to argue it because it was plausible. In fact, in *R. v. Cairney*, 2013 SCC 55, McLachlin C.J. pointed out the need to allow the presentation of a defence if the judge has a doubt as to the air of reality test:

[22] If this air of reality test is met, the judge should leave the defence to the jury. While judges must ensure that there is an evidential foundation for the defence, they should resolve any doubts as to whether the air of reality threshold is met in favour of leaving the defence to the jury.

1. This Court judiciously summarized the relevant case law on the subject in *R. v. Lefebvre*, 2021 QCCA 1548:

[translation]

[27] Furthermore, two crucial factors frame the judge’s decision on the applicability of the air of reality test to a defence: (1) the construction of the evidence most favourable to the accused’s position must be accepted [*R. v. Cinous*, 2002 SCC 29 at para. 98; *R. v. Gauthier*, 2013 SCC 32 at para. 25], and (2) in the event of doubt, the defence should be left to the jury [*R. v. Cairne*y, 2013 SCC 55 at para. 22; *R. v. Pappas*, 2013 SCC 56 at para. 26; *R. v. Turcotte*, 2013 QCCA 1916 at para. 68].

1. The trial judge clearly had such a doubt when she repeatedly referred to a [translation] “fine” or [translation] “thin” line.
2. A fact of some importance should be added, that is, the presence of six men [translation] “of Italian origin” (in fact, according to Officer Couture, they were men with [translation] “Italian accents”) near the police cordon on the very night of the events. This incident is important and, obviously without passing any judgment, it is in line with the argument that the “mafia” was involved that the appellant submits.
3. In paragraphs 37 and 50 of *R. v. Villaroman*, cited above, Cromwell J. wrote on behalf of the Court:

[37] When assessing circumstantial evidence, the trier of fact should consider “other plausible theor[ies]” and “other reasonable possibilities” which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff’d [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to “negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused”: *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. “Other plausible theories” or “other reasonable possibilities” must be based on logic and experience applied to the evidence or the lack of evidence, not on speculation.

[50] When dealing with the defence position, the judge correctly stated the law, in my opinion. The judge properly noted that “the accused cannot ask this Court to rely on supposition or conjecture, that flows from a purely hypothetical narrative to conclude that the Crown has not proven he is guilty of the offences with which the Crown has charged him”: para. 47. The judge’s citation of McIver was intended to make the same point, i.e. that a reasonable doubt cannot arise from speculation or conjecture. This is perfectly correct. As the Court said in *Lifchus*, “a reasonable doubt must not be imaginary or frivolous” ... .

 [Emphasis added.]

1. In this case, it was more than conjecture “that flows from a purely hypothetical narrative” and the argument did not lead to an “imaginary or frivolous” doubt. The argument was not akin to the category of “fanciful or far-fetched” defences that must not be put before the jury: *Grant*, cited above, at para. 90. In truth, the intervention of an unknown third party, a hypothesis that the judge found to be reasonable in her decision, is more in keeping with this category. As a matter of fact, the judge did not write that the mafia argument was based on a purely hypothetical narrative when she said that the line between inference and speculation was thin. The thin line, in itself, was not an answer to the question.
2. It should be added that the involvement of organized crime, with all its knowledge and mastery of crime, would explain several nebulous aspects of the evidence or would at least make it possible to see them from a different angle.
3. In short, this argument was admissible due to the close ties between Mr. De Vito and organized crime (he was one of the ring leaders) because of events that occurred in the last years of his life, because of the troubling circumstances of the murders and their complexity, and therefore, because of its relevance. It is worth recalling that relevance rests on logic and human experience, in that it “has some tendency ... to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence”: D. M. Paciocco and L. Stuesser, *The Law of Evidence* (1996), at 19, quoted in *R. v. J.-L.J.*, 2000 SCC 51 at para. 47.
4. Moreover, the judge did not merely prevent the appellant from submitting the argument to the jury; she specifically prohibited the jury from reaching that conclusion in the following terms, which leave no room for interpretation:

[translation]

During the trial, you have heard evidence of Giuseppe DeVito’s ties to the mafia. This evidence is relevant. It is part of the narrative of Adèle Sorella’s life, which may allow you to understand her mental state.

However, in law, you cannot conclude from this evidence that there was another reasonable alternative to Adèle Sorella’s involvement in the death of her daughters, that is, that the death may have been caused by a third party connected to Giuseppe DeVito’s ties to the mafia. While it may be tempting, I have found that there was not enough evidence to allow an inference that the mafia may be involved in the death of the girls and that it is nothing more than speculation. Therefore, you cannot take into consideration the mafia’s involvement as a reasonable alternative when assessing the evidence of exclusive opportunity.

1. Thus, according to the judge, the evidence of Giuseppe De Vito’s criminal activities was relevant, but only in relation to the appellant’s mental state. Yet the overall evidence revealed the reasonable possibility of a connection between his criminal activities and the girls’ murder.
2. In fact, in the circumstances, this instruction completely shut the door to the only possibility for the jury to entertain a reasonable doubt that someone other than the appellant had caused the children’s death, even though the judge admitted that such a doubt could be legitimate. By rejecting the theory of retaliation by organized crime, the involvement of a third party becomes an unlikely hypothesis: how could an unknown person have acted in this way for no reason while planning a nearly perfect crime for which only the appellant could be found guilty?
3. In addition, the effects of the judge’s error are magnified by another decision she rendered.
4. As discussed, there was no transfer of fibers from the girls’ clothing to the fitted sheet in the hyperbaric chamber, which makes the hypothesis that this chamber was used less likely. To counter this fact and support its own theory, the prosecution argued that the appellant had used a sheet as a barrier between the children’s clothing and the fitted sheet. The judge summarized the prosecution’s argument as follows:

[translation]

[30] The prosecution’s theory is that Adèle Sorella killed her daughters by placing them in the hyperbaric chamber on the second floor and then brought them downstairs and laid them side by side in the playroom.

[31] However, during the testimony of an expert fiber chemist, the evidence revealed that there was no primary contact between the clothing worn by the girls when they were discovered and the fitted sheet found on the hyperbaric chamber mattress.

[32] According to that expert, given the exclusion of primary contact, if the girls spent time in the hyperbaric chamber, they were either naked or there was another fabric, sheet or other, that prevented contact between their clothing and the fitted sheet.

[33] This expert assessment means that the girls did not spend time in the hyperbaric chamber as it was found.

[34] The prosecution argues, however, that the following evidence is sufficient to support the inference that the death resulted form the girls being in the hyperbaric chamber and that Adèle Sorella used a sheet to prevent their clothing from coming into contact with the fitted sheet:

1.  Death by oxygen deprivation leaves no detectable signs at autopsy.

2.  The hyperbaric chamber is an enclosed space.

3.  Teresa Di Cesare, the grandmother who was living with Adèle Sorella and her daughters ever since the disappearance of Adèle Sorella’s husband in November 2006, testified that the hyperbaric chamber was never used, that the children did not touch the hyperbaric chamber, and that she never opened the machine and never saw it opened.

4.  Adèle Sorella testified that she had never used this machine, whether for herself or for Sabrina, whose juvenile arthritis no longer required treatments in a hyperbaric chamber.

5.  The hyperbaric chamber was wide open on March 31, 2009.

6.  The biological expert assessments show two strands of Amanda’s hair outside the hyperbaric chamber, including one on the closed zipper, and a hair tegument similar to Sabrina’s hair.

7.  There was saliva on the pillow in the hyperbaric chamber.

8.  Gianni Gallo testified that he showed Adèle Sorella how to use the hyperbaric chamber.

9.  The expert hyperbaric chamber chemist established that, when shut, the hyperbaric chamber is a vacuum, that the human body produces heat, and that the longer it stays inside, the hotter it will get.

10. Pathologist Tanguay testified that there was autolysis in the body cavities at autopsy, which could be explained by exposure to heat in the hyperbaric chamber. The evidence does not reveal any other heat source to which the girls could have been exposed.

11. On photograph 98 of the playroom where the girls’ bodies were found, there is a folded blanket on the sofa.

1. In short, there was a series of arguments making it possible to argue that the hyperbaric chamber could have been used to deprive the girls of oxygen (the judge’s ruling to allow this argument is not questioned by the appellant), but there was no argument on the use of a sheet to avoid transferring any fibers or DNA other than pure hypothesis. The judge nevertheless allowed the prosecution to raise the argument to the jury that a sheet was used, even though the appellant’s argument on the involvement of organized crime was just as speculative. Admittedly, the judge warned the jury:

[translation]

Here, I must make a remark on the inference the Prosecution would like you to draw from this evidence, that is, that Adèle Sorella used a sheet in the hyperbaric chamber, which explains why there is no trace of the girls.

This is an example of the fine line between inference and speculation, and a demonstration of how important it is to be careful before drawing an inference, especially when that inference arises from important evidence.

Here, there is no evidence proving that a sheet was used. There was no sheet in room K, no sheet near the girls in the playroom, in the washer or dryer, or in Adèle Sorella’s car, for example. You have no direct evidence that the girls went into the hyperbaric chamber.

The reasoning submitted to you here is that you can infer that Adèle Sorella placed her daughters in the hyperbaric chamber with a sheet and that this explains why there are no traces. As with any inference, if you do draw it, it becomes evidence, important evidence. I would suggest to you that the more an inference you are asked to draw is important, the more care you must put into analyzing the evidence before drawing that inference.

This inference rests not on a lack of evidence of traces the girls allegedly left, but on evidence that establishes that there was no contact between their clothing and the sheet in the hyperbaric chamber, which the expert Tremblay states could happen if a sheet was used to prevent all contact between the girls and the hyperbaric chamber, or if they were naked. It is like not having evidence of a motive, but having evidence of a lack of motive.

1. Despite this warning, the judge still allowed the argument, even though there was [translation] “no evidence proving that a sheet was used”, in her own words. This reveals an imbalance with her decision on organized crime when, in both cases, the line between inference and speculation is [translation] “thin”.
2. In other words, and in all likelihood, the parties were not treated equally and, in the absence of the possibility for the defence to argue the involvement of organized crime, the involvement of a third party became almost inconceivable.
3. All things considered, the judge erred in law by refusing the appellant’s request, which prevented her from raising a reasonable alternative that, moreover, was the only other reasonable theory because the unexpected involvement of a third party was not a defensible avenue. What is more, it cannot be concluded that this error resulted in no substantial wrong, to use the wording of s. 686(1)(*b*)(iii) *Cr. C*.
4. In fact, with respect to the consequences of that error, another incident makes it even more damaging, as will be seen below.

## The judge erred in law in her instructions: (1) by refusing to instruct the jury that murder is a crime of specific intent that requires a thought process and reasoning more complex than merely being aware of committing the unlawful act, and (2) by instructing the jury that the post-offence conduct was relevant to deciding the issue of intent required for murder.

1. It is known that the offence of second degree murder requires evidence of the intent to kill, not only evidence that the accused knew or was aware of the consequences of the actions. That is exactly what the judge said. Here is an example, taken from her instructions:

[translation]

**THIRD QUESTION: DID ADÈLE SORELLA INTEND TO CAUSE THE DEATH OF HER DAUGHTERS?**

To establish that ADÈLE SORELLA had formed the intent required for murder, the Crown must prove beyond a reasonable doubt that ADÈLE SORELLA intended to cause her daughters’ death;

In other words, you must decide whether the Crown has proved beyond a reasonable doubt that ADÈLE SORELLA intended to kill her daughters.

To decide whether the Crown has proved that ADÈLE SORELLA intended to kill her daughters, you must examine all the evidence and any words spoken or actions taken in the circumstances of the case, as well as Adèle Sorella’s mental state.

I have just told you that you must consider Adèle Sorella’s mental state to decide whether the Prosecution has convinced you beyond a reasonable doubt that she intended to kill her daughters.

1. The appellant argues that the judge erred by refusing to specify that [translation] “the intention to cause death is something more than awareness, that it is a complex process that may be affected by the mental state”. For the appellant, this omission is significant in the circumstances. By presenting evidence of being not criminally responsible on account of mental disorder, there was a possibility of diminished awareness depriving her of the capacity to form the intent. Thus, according to the appellant, it became necessary to explain that mere awareness is insufficient, and the absence of such an instruction could lead the jury to confuse awareness of her actions (general intent) with the specific intent required for murder.
2. However, the judge carefully explained the requisite state of mind and insisted on the importance of taking the evidence into consideration, including the mental state, to determine whether intention had been proved:

[translation]

If you examine the issue of intent, it is because the defence has failed to convince you on a balance of probabilities that Adèle Sorella suffered from mental disorders preventing her from judging the nature of her actions. But here, when you examine the issue of intent, it is up to the Prosecution to convince you beyond a reasonable doubt that Adèle Sorella intended to kill her daughters.

The intention is the mental element of the offence; it is therefore normal for you to consider any evidence relevant to this element, including evidence of Adèle Sorella’s mental state.

Since the burden of proof lies with the Prosecution here, the evidence of Adèle Sorella’s mental state need only raise a reasonable doubt in your minds that Adèle Sorella intended to kill her daughters. To decide whether Adèle Sorella intended to kill her daughters, you must consider the evidence of her mental state.

There is nothing contradictory in that evidence being insufficient for a verdict of not criminally responsible on account of mental disorder but raising a reasonable doubt concerning Adèle Sorella’s intention in the moment of killing her daughters.

1. The instructions concerned the fundamental issue of true intention, and there was no need to explain to the jury the difference between the capacity to form the intention and the fact of actually having formed it or not, or to distinguish the general *mens rea* from the specific *mens rea* required for murder. The instructions allowed the jury to understand the requisite intent, and the state of mind described by the judge dismissed the possibility that mere awareness of committing an act was enough. The jurors saw well enough the complexity of the intention to kill and could not conclude that mere awareness was sufficient.
2. Moreover, the judge also indicated that, even in rejecting a verdict of not criminally responsible on account of mental disorder, the jury could take the mental disorders into account to harbour a reasonable doubt as to the intention to kill. The appellant’s mental state could certainly lead to a conclusion of diminished responsibility.
3. With respect to post-offence conduct, the appellant acknowledged in her written memorandum [translation] “that the various pieces of evidence of conduct after the facts enumerated above were relevant to determining whether she caused the death of her daughters through an unlawful act and that they were also relevant to assessing her defence of not-criminally responsible”. She is of the view, however, that this evidence, because it was not probative, was inadmissible [translation] “to show the specific intent to kill and, of course, that the actions were planned and deliberate”.
4. It goes without saying that any error concerning only the charges of first degree murder, including the question of whether it was “planned” and “deliberate”, is of no interest here given the acquittals rendered on those two charges.
5. There remains only the admissibility of this evidence with respect to the intention to kill.
6. The judge had the following to say about it:

[translation]

Note that evidence of after-the-fact conduct has only an indirect bearing on the issue of ADÈLE SORELLA’s guilt. Be prudent before drawing an inference of guilt based on this evidence, because the conduct might be explained otherwise. You can use the evidence of after-the-fact conduct to support an inference of guilt only if you have rejected every other explanation for this conduct.

When examining whether it is appropriate to draw an inference from this evidence of after-the-fact conduct, do not forget that sometimes people conduct themselves in certain ways for perfectly innocent reasons.

…

You can use the evidence you have heard on ADÈLE SORELLA’s after-the-fact conduct when examining the defence of not criminally responsible on account of mental disorder, remembering that it is up to her to convince you on a balance of probabilities that she was suffering from pathological dissociation when she acted.

I remind you that you may also consider this conduct when examining the evidence of Adèle Sorella’s involvement in the death of her daughters, of her intention to kill, and of the planning and deliberation. You must remember that during this evaluation, Adèle Sorella need only raise a doubt in your minds.

1. This evidence could also be explained by manslaughter, and prudence was necessary when putting it to the jury.
2. First, at the time of the instructions, this evidence was clearly relevant to the issue of mental disorder, which meant that it was relevant to the intention to kill, given the possibility of diminished responsibility. Therefore, it cannot be argued that it had no probative value with respect to intent. Second, counsel for the appellant did not object to the instruction. Obviously, this does not justify an injustice, but it is a factor to consider to determine the value of the argument on appeal, as the Supreme Court stated in *R. v. Daley*, 2007 SCC 53 at para. 58 (see also *R. v. Barton*, 2019 SCC 33 at para. 49):

Furthermore, it is expected of counsel that they will assist the trial judge and identify what in their opinion is problematic with the judge’s instructions to the jury. While not decisive, failure of counsel to object is a factor in appellate review. The failure to register a complaint about the aspect of the charge that later becomes the ground for the appeal may be indicative of the seriousness of the alleged violation. See *Jacquard*, at para. 38: “In my opinion, defence counsel’s failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection.”

1. Moreover, in addition to its impact on and relevance to the notion of diminished responsibility (and therefore to the issue of intent), this evidence could also have been considered with respect to the issue of intent for other reasons or to prove the identity of the murderer. Let us see why.
2. The call made at 1:22 p.m. to Ms. Di Cesare to cancel the gynecologist’s appointment was relevant with respect to her intent to kill because it might have been part of the appellant’s strategy to cover up the murders. It could also confirm the theory of exclusive opportunity because the call came from the appellant’s home, since the cell tower that relayed it was located near that home. The calls to her brother and brother-in-law could confirm the call to her mother and the lies told that morning, which the appellant contested. The suicide attempt (if the jury accepted this hypothesis, even though it is unlikely according to the accident reconstruction expert) could show the attempted extended suicide suggested by the expert evidence and argued by the prosecution. Removing the battery from the cellular phone could show her intention not to be found, which fits into the argument about her capacity to form the intention and the existence of a plan, etc.
3. For these reasons, the appellant has not convinced the Court of the merits of this argument.

## The judge erred in law by instructing the jury that the origin of any inference other than guilt needed to be found in the evidence.

1. The instructions must be analyzed according to a functional approach, that is, by considering “the alleged error in the context of the entire charge and of the trial as a whole”: *R. v. Jaw*, 2009 SCC 42 at para. 32 (see also *R. v. Araya*, 2015 SCC 11 at para. 39). The exercise does not consist of taking each element and analyzing it individually, but of properly considering the whole to determine whether the instructions were sufficient and just.
2. When considering the adequacy of the instructions, the Court must ask whether the judge gave instructions that allowed the jury to have a sufficient understanding of the questions of law and fact as they relate to the relevant issues: *R. v. Jacquard*, [1997] 1 S.C.R. 314 at 326.
3. The appellant cited the following excerpts from the instructions to argue that the judge failed to sufficiently explain to the jury that reasonable doubt may arise from a lack of evidence:

[translation]

I must tell you that an inference requires a much higher level of proof than speculation. An inference must logically arise from the evidence presented to you. If it does not arise from the evidence, it is speculation, and speculation is not evidence.

In some cases, the line may be thin between inference and speculation, and it is necessary to be prudent and not draw an inference if the evidence does not support it. It is up to you to decide.

In this case, the evidence of the unlawful act causing the death and the identity, those of the first question, is entirely circumstantial.

Before concluding that Adèle Sorella unlawfully caused the death of her daughters, you will be asked to draw a series of inferences from the evidence adduced. In some cases, the inference you are being asked to draw itself rests on an inference you drew before that. Each of them must therefore be analyzed with care.

Because, when proof of an essential element rests entirely or in large part on circumstantial evidence, before reaching a guilty verdict, you must be convinced beyond a reasonable doubt that guilt is the only reasonable conclusion you can reach from the evidence as a whole.

1. Later, the judge added:

[translation]

I remind you of what I said about the difference between an inference and speculation.

An inference is a fact that you can logically draw from the evidence before you. Once drawn, an inference becomes evidence, like the facts on which it rests. And you can rely on this inference as you can on any other evidence to reach a verdict.

Speculation is much weaker than inference. While we may speculate on the basis of the evidence or the lack thereof, the connection to the evidence is much more tenuous.

Sometimes the line between inference and speculation is thin. To repeat the popular expressions, [translation] “it seems”, and [translation] “I think so” are much closer to speculation than inference. Properly examine the evidence as a whole before drawing an inference. Ask yourself questions. Always examine any inference put to you in light of the evidence as a whole.

1. It is true that, in these excerpts, the judge does not explicitly say that a reasonable doubt need not necessarily be based on the evidence but may also be caused by a lack of evidence or a weakness or gap in the evidence likely to “result in inferences other than guilt” if it is reasonable: *Villaroman*, cited above,at para. 36.
2. The fundamental distinction rests on the requirement that inferences leading to guilt come from established facts, whereas those in favour of acquittal may arise from a lack of evidence or gaps therein. In this case, the explanation itself of the difference between speculation and inference poses no problem.
3. These two excerpts from the instructions must be put in context. The first excerpt is from a section titled [translation] **Inference vs. speculation**, which is itself in the chapter called [translation] **Types of Evidence**.The description of the law is correct and causes no confusion: it is true that inference is different from speculation and that a distinction must be made, especially because the section closes with a reminder of the importance of reasonable doubt and the need for guilt to be the only reasonable conclusion based on the evidence as a whole to reach such a verdict. There is nothing saying that reasonable doubt can be based only on the evidence.
4. The second excerpt is in the section concerning the first question to be decided: **Did the appellant’s unlawful act cause the death of her daughters**,and follows the words [translation] “Such a verdict [not guilty] is not a failure, for anyone whatsoever. Nor is it a gift. Such considerations must not cross your mind; they are of no relevance in deciding this matter. Your verdict, whatever it may be, will be simply a reflection of the evidence presented to you”.
5. In other words, when we read the excerpts in context, to find the appellant guilty, and specifically to find that her unlawful act caused the death of her daughters, the jury could rely only on inferences based on the evidence. It is obviously not wrong to insist in this way on the notion of inference if it concerns the prosecution’s burden to prove the guilt of the accused beyond a reasonable doubt: *Villaroman* at para. 49.
6. The judge was also explicit about the obligation to reach a conclusion of guilt solely if it is the only reasonable conclusion. In these circumstances, this instruction led the jury to “guard against the risk of “filling in the blanks” by too quickly overlooking reasonable alternative inferences”: *Villaroman* at para. 30.
7. Moreover, the judge peppered her instructions with examples of gaps in the evidence likely to generate a reasonable doubt or theories such as an accidental cause of death that could lead to such doubt.
8. In addition, elsewhere in her instructions she often reminded the jurors that doubt may come from a lack of evidence:

[translation]

What does the expression “beyond a reasonable doubt” mean? A reasonable doubt is not an imaginary or frivolous doubt. It is not based on an outpouring of sympathy for or a prejudice against one of the persons concerned by the proceedings. On the contrary, it is based upon reason and common sense. It logically arises from the evidence or the lack of evidence.

…

If the evidence, lack of evidence, reliability or credibility of one or more witnesses raises a reasonable doubt in your mind about the guilt of ADÈLE SORELLA, you must acquit ADÈLE SORELLA.

…

If, after having examined the theory of exclusive opportunity in the context of the evidence as a whole, for example the particular circumstances of this case, the negative autopsies, the lack of direct evidence connecting Adèle Sorella to the deaths, you have a reasonable doubt that Adèle Sorella unlawfully killed her daughters, you must acquit her.

1. What is more, she explained to the jury the consequences of the absence of some evidence on the analysis it had to perform, such as the absence of DNA, fiber transfer, marks on the victims’ bodies, biological substances on the clothing worn by the appellant, etc.
2. In short, while the judge could have been more specific in the excerpts quoted by the appellant, there is no real risk that the jury did not understand that the lack of evidence or gaps therein could result in a reasonable doubt.
3. In truth, that is not where the problem lies. To understand what follows, it is necessary to know that the judge, after having orally delivered her instructions, gave a written copy of them to the jurors. This is a laudable practice that should be encouraged; it has many benefits, if only in that it gives the jurors unfettered access to the instructions during their deliberations thus allowing them to avoid a misunderstanding of the law, particularly following a long trial involving many questions of law: *R. v. Poitras*, (2002) 1 C.R. (6th) 366 at para. 47.
4. This benefit exists, however, only if the two versions are similar. In this case, the written version differed from the oral version on a significant point concerning exclusive opportunity. According to the oral version, the lack of direct evidence tying the appellant to the crime [translation] “or any other lack of evidence could” lead to a reasonable doubt, whereas, according to the written version, only a lack of direct evidence could raise a reasonable doubt:

[translation]

**Oral version**: If, after having examined the theory of exclusive opportunity in the context of the evidence as a whole, you have a reasonable doubt that Adèle Sorella unlawfully killed her daughters, you must acquit her. For example, the circumstances, the particular circumstances as a whole, the negative autopsy, the lack of direct evidence connecting Adèle Sorella or any other lack of evidence could lead you to find there is a reasonable doubt.

**Written version**: If, after having examined the theory of exclusive opportunity in the context of the evidence as a whole, for example the particular circumstances of this case, the negative autopsies, the lack of direct evidence connecting Adèle Sorella to the deaths, you have a reasonable doubt that Adèle Sorella unlawfully killed her daughters, you must acquit her.

 [Emphasis added.]

1. In other words, with regard to exclusive opportunity, the expression [translation] “or any other lack of evidence” is not found in the text given to the jurors.
2. This means that the description of the law to which the jurors had access during their deliberations was a detriment to the appellant in that only the absence of direct evidence was at issue, even though other aspects of the evidence could be lacking and lead to a reasonable doubt.
3. It has not been shown that this difference alone was determinative, because somewhere else the judge added that reasonable doubt [translation] “logically arises from the evidence or the lack of evidence”. Nevertheless, the significance of the difference between the two versions increases in light of the judge’s decision not to allow the argument of organized crime in connection with exclusive opportunity.
4. Indeed, not only was the appellant deprived of the argument that was intended to contradict the theory of exclusive opportunity, but the jurors also may not have realized that reasonable doubt could be based on the gaps in or lack of evidence regarding this theory, as well as the lack of direct evidence involving the appellant.
5. As stated above, even though this observation alone would be unlikely to justify the Court’s intervention, it must be taken into account when considering the consequences of the judge’s error in not allowing the appellant to argue that organized crime was involved.

## The guilty verdicts are unreasonable and cannot be supported by the evidence.

1. Given the evidence, particularly the telephone calls, some of which were made from the home, it is possible for a jury to accept the argument of exclusive opportunity despite all of the appellant’s disabilities, especially since the girls were never left alone; the appellant was probably with them until their death because they did not go to school and their lunch boxes were found on the kitchen counter. If the theory of exclusive opportunity is accepted, guilt is a reasonable verdict because this theory may reasonably exclude the possibility that another person committed the murders, whatever gaps there may be in the evidence.
2. In any event, one fact remains: if a jury accepts Ms. Di Cesare’s statement, the appellant lied to her twice on March 31, 2009, which could convince them that the appellant acted in this manner to facilitate her plan or to cover it up. This conclusion would in fact give greater probative force to the other aspects of her post-offence conduct, considered from the perspective of a determination of whether the verdict is reasonable in light of the evidence: [translation] “a verdict is unreasonable if it cannot be supported by a weighted and careful assessment of the evidence as a whole or if it is based on illogical reasoning” (*Dubourg c. R.* , 2018 QCCA 1999 at para. 18; see also *R. v. Sinclair*, 2011 SCC 40; *R. v. Biniaris*, 2000 SCC 15 at para. 36).
3. As this Court recalled in *Dubourg*, at para. 20:

[translation]

[20] ... to determine whether a verdict based on strictly circumstantial evidence is reasonable, it is necessary to ask whether a reasonable assessment of the evidence as a whole leads to the conclusion that the only reasonable inference is the accused’s guilt. In short, are the conclusions the trier of fact has drawn from the evidence and the conclusion that the only reasonable inference is guilt reasonable?

[Reference omitted.]

1. For the reasons expressed above, it was open to the jury to conclude, taking into account all the evidence including any gaps therein, that the appellant lied to some persons to carry out an extended suicide plan, committed the murders with the required intent by using the hyperbaric chamber (it should be recalled that it was open when the officers arrived, which could suggest that it was used that day), hid her crime, attempted suicide and, overwhelmed by the horror of her actions, completely forgot them in a state of dissociative amnesia. Obviously, it cannot be said that it was the only conclusion the jury could reach, but it may be found to be a reasonable verdict based on circumstantial evidence due to exclusive opportunity and post-offence conduct.
2. To quote *Dubourg*, [translation] “the conclusion that the only reasonable inference is guilt” is itself reasonable.
3. It remains to be seen whether a new jury will reach the same verdict while having the opportunity to consider the argument that organized crime was involved.

## Conclusion

1. In short, the judge erred by refusing to allow the appellant to argue the theory that organized crime was involved in the murder of the young victims. This error is not insignificant, especially since the written instructions in this case may have exacerbated its impact. This leads the Court to allow the appeal yet without ordering an acquittal, as the appellant would like, given that the verdict is not unreasonable. Moreover, as the appellant was acquitted of first degree murder and there was no appeal from that issue, there is *res judicata*, and the Court cannot order a new trial on the charges of first degree murder.

**FOR THESE REASONS, THE COURT:**

1. **ALLOWS** the appeal;
2. **SETS ASIDE** the guilty verdicts on the charges of second degree murder;
3. **ORDERS** a new trial on the two charges of second degree murder.

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|  | FRANÇOIS DOYON, J.A. |
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|  | JEAN BOUCHARD J.A. |
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|  | CHRISTINE BAUDOUIN, J.A. |
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| Mtre Pierre PoupartAlexandra Boulanger, articling student |
| LES AVOCATS POUPART, TOUMA |
| Mtre Ronald Prégent |
| BATTISTA TURCOT ISRAEL |
| For the appellant |
|  |
| Mtre Alexis Marcotte Bélanger |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS |
| For the respondent |
|  |
| Hearing date: | November 29 and 30, 2021 |

1. It should be noted that on June 14, 2013, the appellant was convicted of first degree murder in a first trial. Following an appeal of that verdict, this Court ordered a new trial: *Sorella c. R*., 2017 QCCA 1908. [↑](#footnote-ref-1)