English translation of the judgment of the Court by SOQUIJ

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| Tshilumba c. R. | 2022 QCCA 1591 |
| COURT OF APPEAL |
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| CANADA |
| PROVINCE OF QUEBEC |
| REGISTRY OF  | MONTREAL |
| No.: | 500-10-006567-174 |
| (500-01-136420-160) |
|  |
| DATE: |  November 28, 2022 |
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| PANEL: | THE HONOURABLE | JULIE DUTIL, J.A.DOMINIQUE BÉLANGER, J.A.GUY COURNOYER, J.A. |
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| RANDY TSHILUMBA |
| APPELLANT – Accused  |
| v. |
|  |
| HIS MAJESTY THE KING |
| RESPONDENT – Prosecutor  |
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|  |
| JUDGMENT |
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1. The appellant appeals from a guilty verdict rendered on October 20, 2017, after a trial by jury presided over by the Honourable Hélène Di Salvo of the Superior Court, Criminal Division, District of Montreal, finding him guilty of having committed first degree murder on April 10, 2016.

***OVERVIEW***

1. That day, the appellant caused the death of Clémence Beaulieu-Patry by stabbing her multiple times at her workplace, a food supermarket, in full view of everyone, a tragic and extremely violent event.
2. According to the appellant, the events can be explained by his mental disorder manifested as a delusion of persecution during which his life was endangered by the victim and her friends. This delusion prevented him from knowing that what he was doing was wrong. The Crown maintains that it was an intentional, planned and deliberate homicide.
3. In *Winko*, Chief Justice McLachlin explained that: “[i]n every society there are those who commit criminal acts because of mental illness. The criminal law must find a way to deal with these people fairly, while protecting the public against further harms. The task is not an easy one”.[[1]](#footnote-1)
4. The issue at trial was whether the appellant’s mental disorder had deprived him of the capacity to know whether the acts committed were wrong or whether that disorder should raise a reasonable doubt as to the requisite intent for murder.
5. The jury had to make this difficult determination, guided by improper instructions. As we will see, the appellant’s main argument concerns the confusing and contradictory nature of the instructions regarding his post-homicide conduct.
6. The appellant’s trial was held before the Supreme Court of Canada rendered its decision in *Calnen*.[[2]](#footnote-2) The trial judge and the parties did not therefore have the benefit of the useful lessons of this decision, which would have undoubtedly simplified the instructions given to the jury concerning the appellant’s post-homicide conduct, although the case law was already moving in that direction.
7. That said, the Court cannot but note that the instructions given only orally to the jury were unduly lengthy, unnecessarily complex, and above all clearly contradictory and prejudicial to the appellant’s position.
8. The instructions were supposed to clarify and simplify the jury’s task. The jury required clear and reconcilable instructions, a particularly crucial requirement in the care that had to be taken in formulating the corrective instructions requested by the parties concerning the appellant’s post-homicide conduct.
9. The structure of the instructions in general and the corrective instructions according to which the after-the-fact conduct *had no probative value* (except for one piece of evidence) in determining the appellant’s guilt confused the fundamental issue of the trial, that is, consideration of the appellant’s uncontested mental disorder at all stages of the jury’s deliberations (defence of mental disorder, second degree murder, and first degree murder). An instruction according to which the after-the-fact conduct had no probative value will be called for only in limited circumstances.[[3]](#footnote-3) This was not the case here because this evidence had to be assessed as a whole and not in a compartmentalized manner.
10. The corrective instructions thus prevented the jury from considering all of the evidence concerning the appellant’s post-homicide actions to determine whether he intended to kill the victim and, if so, whether this murder was planned and deliberate. This evidence, including evidence of the appellant’s mental disorder, could have raised a reasonable doubt as to his guilt, in regard to both second degree murder and first degree murder.
11. Although the jury’s verdict cannot be characterized as unreasonable, the contradictory instructions concerning the appellant’s post-homicide conduct prevented the jury from properly assessing the sequence of events as a whole. Furthermore, the Crown’s argument invited the jury to engage in speculation about assumptions that had no factual basis. For the following reasons, a new trial is necessary.

***BRIEF SUMMARY OF THE EVIDENCE***

1. To fully understand the case and the defence of mental disorder presented by the appellant, it is necessary to go back in time.
2. For the first four years of high school, the appellant attended the same school as the victim and four other girls. He was not close to this group of friends. At the end of Secondary IV, changes appeared in his behaviour. He isolated himself, and his grades began to fall. He asked to change schools, which he did in Secondary V. At the same time, he developed stress and anxiety problems.
3. In September 2014, when he was a CEGEP student, he discovered a Facebook page where anonymous messages targeting people at his CEGEP were posted. He believed that these messages were intended for him and that they came from a group of five girls, including the victim.
4. This marked the beginning of the development of delusions about this group of friends. Chance meetings with some of the members of the group during the summer of 2015 fueled a perception of persecution in the appellant. He asked his mother to move, saying that at he feared for his life. He told his brother and sisters about his fears.
5. In October 2015, he had a job offering points cards in various supermarkets, including the Maxi supermarket on Papineau Avenue, where the victim worked. During a shift, the appellant saw her at the Maxi. He thought she was there to spy on him and that she wanted to kill him.
6. In October or November 2015, the appellant purchased a knife because he was now convinced that the five girls wanted to kill him. A feeling of panic came over him every time he left the house; he thought that they were hiding behind cars to shoot at him.
7. In early 2016, the appellant twice confided in his best friend about his fears concerning this group of friends.
8. First, around January 2016, he spoke to his friend about a [translation] “group of people who [wanted] to sully his reputation” by publishing anonymous messages to him on Facebook. He remained enigmatic about the identity of the group. When the appellant showed his friend the messages, his friend tried to convince him that they did not concern him and told him that he was [translation] “paranoid”. The appellant then told his friend that he did not understand.
9. Shortly thereafter, the appellant called his friend to tell him that he feared for his life. It was at this time that the appellant revealed to him that the group in question was a group of girls who had attended the same high school as them. This group, he confided to him, wanted to kill him. His friend told him once again that he was paranoid; he added that this was crazy and that he should focus on school.
10. The two friends did not speak about this matter again after that.
11. In early April 2016, the appellant twice crossed paths with some members of the group. These encounters reinforced his delusional beliefs.
12. On April 3, 2016, the appellant went to the Maxi to meet the victim and convince her that he was a good person. A short discussion began between them during which the appellant asked the victim for her phone number and Facebook account. The victim did not give him this information.
13. When the appellant left, he said “bye” to the victim, who answered [translation] “Take care of yourself”. The appellant interpreted these words as a warning. The victim confided to a co-worker that this meeting was [translation] “weird” because she had not seen the appellant since high school.
14. On April 9, 2016, the appellant spent the evening with a friend. He did not seem worried or anxious.
15. On April 10, 2016, he went to the Maxi again. He headed towards the victim with his hands in his pockets. A Maxi customer saw the appellant put his arms around the victim, who had her back to him, and saw the appellant’s raised arm holding what she believed to be a machete. She saw the weapon protruding from the victim’s body.
16. The victim was stabbed about 14 times and died in the minutes that followed.
17. The appellant ran out of the Maxi. He hid in a nearby Tim Hortons restaurant. He walked in and went to the men’s washroom. He noticed that there was blood on his clothes and changed into the sports clothes that were in his backpack.
18. He then went to the women’s washroom where he spent seven hours locked in a toilet stall. During this time, he contacted some people to ask them to come pick him up. He wrote to his best friend, [translation] “Could you come right now? It’s important. I’m drowning my life”. The friend explained at trial that this expression means [translation] “I’m worried, I fear for my life”.
19. In addition, the appellant conducted several Internet searches, including “Evidence trash bag murder”, “It is possible to execute a perfect murder?” and “Why do murderers often find it difficult to...”. He also consulted web pages, including an article from *La Presse* entitled [translation] “Murder in a Montreal supermarket, Information Plus, the suspect is on the run”.
20. The appellant left the Tim Hortons at around 3 a.m. He spent the rest of the night travelling on public transportation and then went to the CEGEP he was attending at around 7 a.m. He left his backpack containing the bloodstained clothes and the knife in a locker in the locker room. Later that evening, he returned to the CEGEP to put this backpack in his own locker.
21. The appellant was arrested the next day at his home.

***OVERVIEW OF THE ISSUES AT TRIAL***

1. The trial lasted 33 days. The Crown called 23 witnesses. Seven witnesses were heard for the defence, including the accused and two psychiatrists.
2. The parties acknowledged during the trial that the appellant was suffering from a mental disorder. This position remains unchanged before the Court.[[4]](#footnote-4)
3. The issue was therefore whether the appellant had the ability to rationally decide whether the act committed was right or wrong and, if he had this ability, whether his mental disorder raised a reasonable doubt concerning the charge of first degree murder or second degree murder. The appellant’s defence of mental disorder is based on delusions of persecution that allegedly prevented him from knowing that the victim’s homicide was wrong.
4. According to the Crown, the appellant knew that his actions were wrong, and his mental disorder did not raise a doubt as to the requisite intent for second degree murder or first degree murder.
5. According to the appellant, this is not the case. He testified that, on April 10, 2016, he hesitated between going to the gym or returning to the Maxi to persuade the victim once again not to kill him. He decided to go see her at the Maxi, with spare sports clothes in his backpack and a knife in his pocket.
6. According to his testimony, when he met the victim, she said to him, [translation] “not you again, dirty nigger” and pointed at him with her index finger. The appellant then believed that she would take a gun from her pocket to kill him and the other customers. Believing he was doing a good deed, he stabbed her several times. He then hid in a Tim Hortons for seven hours, panicked at the idea that the victim and her friends would find him. He believed his life was in danger.
7. The two experts heard share the same opinion: the appellant was suffering from a mental disorder at the time of the events and was incapable of knowing that the act committed was wrong.
8. Part of the evidence presented by the Crown concerns the appellant’s behaviour after he killed the victim. This was of crucial importance in assessing the defence of mental disorder presented by the appellant. The jury could certainly draw contradictory inferences from it, but some supported the defence of mental disorder or could cast reasonable doubt on the appellant’s guilt.
9. It was therefore necessary to determine to what extent this evidence was relevant in determining the issue of the appellant’s intent when the homicide was committed and whether it could be used to determine whether the appellant was guilty of second degree murder or of first degree murder.

***GROUNDS OF APPEAL***

1. The appellant maintains that the verdict rendered is unreasonable and that the jury did not receive proper assistance to guide its deliberations in order to determine whether he was not criminally responsible or guilty. He says that the judge committed errors of law by allowing the Crown to ask the experts hypothetical questions in the absence of any factual basis and by allowing the Crown to rely on evidence favourable to its case that was not adduced.
2. For better understanding, it is appropriate to set out the grounds of appeal as follows:
3. Did the jury render an unreasonable verdict, in particular because of the uncontradicted conclusions of the two forensic psychiatry experts regarding the appellant’s mental state at the time of the events?
4. Did the judge commit an error of law by allowing the Crown to ask hypothetical questions of the psychiatric witnesses and by allowing the Crown to rely on elements favourable to its case, in the absence of any factual basis?
5. Did the judge commit an error of law in her instructions on the assessment of the post-offence conduct?
6. Did the judge commit an error of law by giving the jury the choice to hear her instructions again or to indicate what clarifications they needed?
7. Did the judge commit an error of law in her instructions by failing to mention to the jury the absence of a motive explaining why the act was committed?
8. Did the judge issue insufficient instructions concerning the characterization and use by the Crown of the words [translation] “*act in self-defence*” during the cross-examination of the appellant as well as during the cross-examination of Dr. Louis Morissette?

***FIRST GROUND: THE UNREASONABLE VERDICT***

1. Two psychiatrists testified about the appellant’s mental state at the time of the alleged events. Dr. Morissette diagnosed “persecutory” type delusional disorder, while Dr. Proulx instead diagnosed paranoid schizophrenia. The primary and central symptom in both cases is persecutory delusions. The Crown did not call any expert witness.
2. Both experts essentially drew the same conclusion regarding the appellant’s criminal responsibility: at the time of the events, the appellant had a serious mental disorder that prevented him from distinguishing right from wrong and from knowing that the acts committed were wrong.
3. According to the appellant, this evidence was uncontradicted, and there was no reasonable or rational basis for the jury to reject the experts’ conclusions. He relies on *Molodwic*[[5]](#footnote-5)and *Oommen*[[6]](#footnote-6) in support of the argument that the jury’s verdict was unreasonable. He asks the Court to set aside the conviction for first degree murder and to substitute a verdict of not criminally responsible on account of mental disorder.
4. The Crown is of the view that the verdict is reasonable. Assessing the credibility of witnesses is a question of fact. A jury can completely disregard expert testimony, even if it is uncontradicted. According to the Crown, there is evidence, namely the appellant’s conduct before and after the events, which led the jury to reject the expert testimony and subsequently the defence of mental disorder and find the appellant guilty of first degree murder.
5. The Court must determine “whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered”.[[7]](#footnote-7) For this purpose, “if it is to overturn the verdict [of the jury], [the Court] must articulate the basis upon which it concludes that the verdict is inconsistent with the requirements of a judicial appreciation of the evidence”.[[8]](#footnote-8)
6. Before examining this ground of appeal, two clarifications are necessary.
7. First, it is important to reiterate that it was not disputed that the appellant had a mental disorder.
8. Second, the issue at trial was whether the appellant’s mental disorder prevented him from distinguishing right from wrong and knowing that the acts committed were wrong.
9. In this regard, the Crown’s position, which is also the subject of separate grounds of appeal by the appellant, was mainly that the appellant’s mental disorder was in its early stages, that the symptoms were of low intensity, and that the appellant had rewritten the events during his detention. The Crown maintains that the appellant’s post-homicide conduct showed that he knew that his actions were wrong and that he was guilty of first degree murder.
10. In *Molodowic*,[[9]](#footnote-9) cited by the appellant, Arbour J. set out some guiding principles applicable to the grounds of appeal that he raises:
11. a jury is not bound by the expert psychiatric testimony and its probative value is to be assessed in the same manner as any other testimony;[[10]](#footnote-10)
12. in weighing expert evidence, a jury is entitled to examine the factual foundations of the opinion and is entitled to accord less weight to that opinion where it is not based on facts proved at trial or where it is based upon factual assumptions with which they disagree;[[11]](#footnote-11)
13. the jury may therefore reject the opinion of experts, even when the experts called are unanimous and uncontradicted by other experts;[[12]](#footnote-12) and
14. there must be a rational foundation in the evidence for the jury to reasonably reject the opinion of the experts.[[13]](#footnote-13)
15. Recently, in *Sorella*,[[14]](#footnote-14) the Court was faced with a similar question where, just as in this case, the Crown had not presented any expert psychiatric report. The Court wrote:

[translation]

[44]      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.

[45]      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.

[46]      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.

[47]      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.

1. After having examined the evidence supporting both hypotheses, the Court concluded its analysis as follows:

[translation]

[60]      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.

[61]      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.

1. These principles apply to this case.
2. The question is whether there was a rational basis for rejecting the opinion of the two experts.
3. A first element warrants mention. The opinion expressed by the two psychiatrists is based on the appellant’s account of the events and his explanations. His testimony could be accepted or rejected, in whole or in part,[[15]](#footnote-15) however, just like the experts’ testimony.[[16]](#footnote-16)
4. A second element, the burden of proving the defence of mental disorder, rested on the appellant.
5. A third element, crucial in this case, is the appellant’s post-homicide conduct. Without analyzing it in detail, it suffices to note that this evidence was relevant in determining whether the appellant knew that what he was doing was wrong within the meaning of section 16. *Cr. C.*,[[17]](#footnote-17) and it could have caused the jury to reject the defence of mental disorder.
6. These elements therefore provide a rational basis for rejecting the defence of mental disorder, and the jury’s verdict cannot be characterized as unreasonable. The verdict of first degree murder could have been returned by a properly instructed jury, despite the difficulties raised by all of the evidence. Although this result appears less likely, the Court cannot exclude this possibility.
7. This ground must be rejected.

***SECOND GROUND: ERRORS COMMITTED BY THE JUDGE DURING THE PRESENTATION OF THE EVIDENCE AND DURING THE CROWN’S ORAL ARGUMENTS***

1. The appellant contends that the judge committed an error of law by allowing the Crown to ask hypothetical questions of the experts, when these questions were not justified by the evidence presented, and by allowing the Crown to argue unproven assumptions.
2. The Crown’s arguments were that the appellant’s illness was only in its early stages and that he subsequently rewrote the story and feigned the illness to doctors. In the appellant’s view, these assumptions contradicted the uncontradicted evidence of a mental disorder.
3. The Crown maintains that the judge did not err in allowing it to argue the lesser intensity of the mental disorder and the rewriting of the events, since the forensic psychiatry experts did not rule out these two possibilities. As for feigning the illness, the Crown considers that it did not make this argument in its submissions.
4. It is appropriate first to briefly review the legal principles that must govern the analysis of these grounds.
5. The authors of the sixth edition of *The Law of Evidence in Canada* summarize the principles that govern the use of hypothetical questions during the examination or cross-examination of an expert:

12.168 If the expert lacks personal knowledge of the matters in issue and is called to give an opinion upon certain disputed facts, evidence of which has been or will be led at trial, the opinion may be elicited only through the vehicle of a hypothetical question. Where the opinion sought is predicated upon contested facts, counsel are required to use a hypothetical question …

12.170 The trier of fact and not the experts determines whether a fact has been proven. Without a hypothetical question in which the expert is asked to assume that certain disputed facts given in evidence are true, there is the risk that the premise upon which the opinion is based will be accepted by the jury as conclusive or alternatively, the jury’s view of the evidence may be affected by the expert’s acceptance of a particular version of the facts.

12.171 The expert, in the absence of a hypothesis, would be placed in the untenable position of having to weigh evidence, assess credibility and choose amongst witnesses in order to determine the premise upon which the opinion is expressed. These matters are determined by the trier of fact and are not the responsibility or the proper role of the expert witness. If the expert bases her or his opinion on a global view of various pieces of evidence, it is difficult to determine the actual facts upon which the opinion was based. The trial judge must give careful directions to the jury to unravel the factual basis of an opinion when some of the facts are not proven or are rejected by them. If the trier of fact ultimately rejects the factual premises on which the opinion was based then, of course, the expert’s opinion must be rejected as well.[[18]](#footnote-18)

[Emphasis added; references omitted.]

1. Thus, if necessary, the jury must receive careful instructions that enable it to identify the evidence relevant to its determinations. The absence of any factual basis may require the trial judge to instruct the jury that the hypothesis presented has no weight and should be completely disregarded.[[19]](#footnote-19)
2. Moreover, the important distinction between an inference and speculation should be noted. It is the existence of a factual basis that allows an inference to be drawn, because, without such a basis, the inference simply gives way to speculation.[[20]](#footnote-20)
3. As Kasirer J. explained in *Sherman*, “[a]n inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation”.[[21]](#footnote-21)
4. It should also be noted that the closing arguments of the parties, particularly the Crown’s, are subject to a principle of fairness that was well defined by Gonthier J. in *Rose*:

In presenting closing arguments to the jury, Crown counsel must be accurate and dispassionate. Counsel should not advert to any unproven facts and cannot put before the jury as facts to be considered for conviction assertions in relation to which there is no evidence or which come from counsel's personal observations or experiences … Crown counsel is duty bound during its jury address to remain true to the evidence, and must limit his or her means of persuasion to facts found in the evidence presented to the jury … As is discussed in more detail below, the discretion of the trial judge to deal with those situations in which Crown counsel’s address oversteps the bounds of propriety is a sufficient safeguard against any potential unfairness to the accused.[[22]](#footnote-22)

 [References omitted.]

1. The Crown cannot therefore make observations that are not supported by the evidence.[[23]](#footnote-23)
2. Last, a distinction must be made between the questions asked of the experts during cross-examination by the Crown and its closing arguments. *Lyttle* recognizes that lawyers have wide latitude to use assumptions in cross-examination.[[24]](#footnote-24) However, if the basis for these assumptions proves too tenuous, an objection is likely to be made and sustained.[[25]](#footnote-25)
3. In this case, the questions asked of the experts in cross-examination, the arguments made during the Crown’s oral arguments, and the judge’s instructions are cause for concern.
4. In its oral arguments, the Crown referred to three “options” provided to the jury: to believe that the appellant’s delusions meant that he could not distinguish right from wrong, to believe that the appellant feigned the mental disorder or symptoms, or to believe that the appellant was in the early stages of his progressive illness and that after the incident he rewrote the story to make sense of his actions. The Crown invited the jury to choose this third option, which best matched the evidence, in its opinion.
5. **The appellant’s mental disorder was in its early stages**
6. The Crown identified *no evidence* supporting the hypothesis that the appellant’s mental disorder was in its early stages. Rather, it maintains that since the experts [translation] “did not rule out” this hypothesis and since the appellant’s illness was progressive, the jury could consider that the appellant’s mental disorder was in its early stages.
7. The Court, however, is of the view that the preponderant evidence presented by the only two experts heard, as well as the lay evidence, shows that the illness was well established at the time of the events. As the Crown was unable to indicate on which evidence its assumptions were based, this had the effect of inviting the jury to engage in inappropriate speculation.[[26]](#footnote-26)
8. Indeed, the response of an expert who simply refuses to rule out a possibility is of no use. An expert’s refusal to theoretically reject a hypothesis does not give it any factual basis if there are no independent factual elements supporting it. This is all the more true when the suggested hypothesis is rejected by the experts, as is the case here. Evoking a theoretical possibility without supporting evidence inevitably leads the jury down the path of speculation.[[27]](#footnote-27)
9. Although the judge correctly defined the concept of inference in her instructions, she did not warn the jury against the dangers of speculation as she should have.[[28]](#footnote-28)
10. **The intensity of the appellant’s mental disorder**
11. During the cross-examinations of the psychiatrists, the Crown developed a theme, echoed by the judge in her instructions, according to which the appellant’s mental disorder was not of sufficient intensity to render him incapable of knowing that the acts he had committed were wrong.
12. In her instructions, the judge used the following two formulations several times: [translation] “that the accused suffered from a mental disorder of such intensity that he cannot be held criminally responsible for acts that would otherwise constitute a criminal offence” and that [translation] “this mental disorder was of such intensity that he was incapable of appreciating the nature and quality of his acts or of knowing that his acts were wrong”.
13. The expression “of such intensity” is not found in the current wording of section 16 of the *Criminal Code*. The expression “*une intensité telle*” is used in the French version of Dickson J.’s opinion in Cooper.[[29]](#footnote-29) It appears to be a translation of the expression “to such an extent” found in *Watt’s Manual of Criminal Jury Instructions*.[[30]](#footnote-30) The Canadian Judicial Council’s model instructions do not use it.[[31]](#footnote-31)
14. According to the second branch of the defence of mental disorder, an accused who invokes it must establish on a balance of probabilities that their mental disorder deprived them of the capacity to know that the act committed was wrong, but not that the disorder was of such intensity that they were incapable of knowing this. Since the expression “such intensity” is likely to be interpreted as adding an additional persuasive burden, it is preferable to avoid it by relying on the instruction suggested by the Canadian Judicial Council, which does not use it. However, the appellant has not convinced the Court that its use here was problematic.
15. **Malingering**
16. In *Molodowic*, as stated above, the Court recognized that there is a “real danger … that a jury will be unduly skeptical of a “defence” that is often perceived as easy to fabricate and difficult to rebut”,[[32]](#footnote-32) which can be explained primarily by the many myths surrounding the defence of mental disorder.[[33]](#footnote-33)
17. Malingering is thus often an issue when there is a defence of mental disorder.[[34]](#footnote-34)
18. On the other hand, a competent expert can testify on the criteria used in psychiatry to detect the feigning of a mental illness.[[35]](#footnote-35) There is no such evidence in this case, however.
19. The Crown’s questions about malingering, without exploring with the experts the applicable criteria to assess this possibility, constituted an insinuation that could only be seriously prejudicial to the appellant’s defence.[[36]](#footnote-36) In fact, they led the jury down the path of speculation.
20. The problem is more serious if we consider the Crown’s arguments, which deal with malingering in a way that could only fuel the possibility of speculation:

[translation]

We talked about the issue of malingering. Again, I just want to warn you. We did in fact raise questions; we asked questions: was it possible that there was malingering? Malingering is not necessarily something that is an absolute whole. Mr. Tshilumba, I suggest to you, that it is possible that Mr. Tshilumba has been malingering from the outset, but considering the evidence we have heard from his parents, it is possible that he feigned or embellished certain symptoms or exaggerated certain symptoms afterwards.

1. Raising the possibility of partial malingering by the appellant without a factual basis was likely to fuel speculation among the jury, even though this was not the position formally adopted by the Crown in its arguments.
2. Regarding the rewriting of the events, Dr. Morissette says that it is not impossible that the appellant invented the idea of the attack by the victim to protect himself from the idea that he could have committed a murder. According to the psychiatrist, even if this hypothesis was not impossible, it is not the one he retained, considering the evidence. In cross-examination, Dr. Proulx responded to this hypothesis by stating, [translation] “Well, it’s always possible”.
3. It is true that the judge clearly stated that both psychiatrists believed that the appellant could not know whether his act was wrong because of his mental disorder, while noting that the Crown’s position was that the mental disorder was not intense enough to impede the ability to morally distinguish right from wrong. The judge also reviewed the expert testimony, including that of Dr. Morissette, who stated that there was no explanation for the murder other than mental disorder. The judge also discussed the hypothetical questions posed by the Crown and the answers given by the psychiatrists, some of which contradicted the Crown’s position.
4. Nevertheless, the dangers posed by the risk of speculation required that a firm caution be given to the jury and that the notions of inference and speculation be well defined.[[37]](#footnote-37) In the absence of such a caution, the appellant rightly maintains that several elements could have led the jury down the inappropriate path of speculation.
5. Several elements of the evidence, in particular the appellant’s post-homicide conduct, allowed the Crown to suggest to the jury that the appellant knew that the acts committed were wrong and that his mental disorder did not deprive him of his capacity to know this. It was up to the jury to assess this evidence and the divergent inferences it could draw from it in light of appropriate instructions.[[38]](#footnote-38)
6. Due to the inevitable risk of speculation associated with the myth that the defence of mental disorder is “perceived as easy to fabricate and difficult to rebut”,[[39]](#footnote-39) however, it was imprudent and inappropriate for the Crown, in the absence of a sufficient factual basis, to allude to malingering, even after having explained that this was not the interpretation that it proposed.
7. This conclusion is a further reason to order a new trial, in addition to the appellant’s main argument concerning the instructions with respect to his post-homicide conduct, as we will see.

***THIRD GROUND: THE INSTRUCTIONS CONCERNING THE POST-HOMICIDE CONDUCT AND THEIR CONFUSION***

1. The appellant criticizes the undue complexity and contradictory nature of the instructions given by the judge concerning his post-homicide conduct.[[40]](#footnote-40) This is in addition to the confusion that emerged from the instructions as a whole.
2. Like the appellant, the Court notes that the instructions given by the judge were complex, unduly lengthy, and contradictory – a situation exacerbated by the corrective instructions requested by the parties on the appellant’s post-homicide conduct.
3. The evidence summarized by the judge in her instructions regarding the appellant’s post-event conduct included: (1) fleeing from the Maxi after stabbing the victim multiple times; (2) picking up his knife, after dropping it, and then putting it in his pocket; (3) hiding in the Tim Hortons for seven hours; (4) changing clothes when he arrived there; (5) the text messages sent to his friends and family members from that location; (6) the Internet searches he did while he was at the Tim Hortons and the following day; (7) his comings and goings the following morning and evening at CEGEP André-Laurendeau; (8) placing his backpack containing his clothes and the knife in his locker; (9) meeting his sister in the metro the morning after the events but not returning home with her; (10) his travel by bus and metro.
4. The Court will first address the instructions concerning the appellant’s post-homicide conduct and particularly the corrections made by the judge at the request of the parties. The result of these corrective instructions was that the jury could not consider that the appellant’s post-homicide conduct raised a reasonable doubt regarding the essential elements of second degree murder or first degree murder.
5. Because the appellant maintained that his post-homicide conduct was due to his mental disorder – an argument supported by the psychiatrists who testified – the correction made by the judge at the request of the parties prevented the jury from considering the mental disorder at all stages of their deliberations. In this case, the appellant's post-homicide conduct should not have been considered in a piecemeal fashion, but as a whole.
6. This ground of appeal first requires a description of the exchanges during the discussions preceding the jury instructions, the instructions that were given, and the correction made by the judge.

**The pre-charge conference**

1. The judge initiated the discussion regarding the instruction that must be given concerning the after-the-fact conduct as follows:

[translation]

The other is post-offence conduct. My intention was to give an instruction on post-offence conduct, but naturally, to give it with both sides of the coin, because post-offence conduct, I’m going to list what can be part of post-offence conduct. We have ... if it was just fleeing, naturally, we wouldn’t give the instruction, because you can flee for both homicide and murder, but as for ... since we are in a context of mental disorder, the fleeing is explained by Mr. Tshilumba, could be considered otherwise than I’m fleeing because I’m in danger from the girls, so of course you’re going to take it into account. Hiding in the Tim Hortons for, was it six hours? … Seven hours, around seven hours. The Internet searches, the two visits to the CEGEP, having hidden the weapon in two different lockers.

[Emphasis added.]

1. The resulting exchange between the parties and the judge makes it possible to list certain after-the-fact conduct.
2. The judge added the following:

[translation]

Because fleeing alone is not … does not result in an instruction. However, here, it is all ... because we have an explanation. So, I am going to return to this briefly, briefly on the post-offence conduct. I am going to see how I’m going to frame it because this post-offence conduct cuts both ways, in the sense that, according to your theory, he knew very well what he had just done, he wanted to cover up the crime, and according to the defence’s theory, all this is consistent, is compatible with the defence of mental disorder. So, I will definitely give this instruction, but nevertheless say look at all the evidence, the post-offence conduct can be explained as much by, not as much because I do not want to give my opinion, but as much by one as by the other, but this post-offence conduct can be ... is interpreted by the psychiatrists as being consistent with the mental disorder, whereas on cross-examination, the psychiatrist did not rule out the possibility of other explanations for all this conduct. So that’s it.

[Emphasis added.]

1. The Crown then expressed concern about the different applicable burdens and the need to make the necessary distinctions when giving instructions on the appellant’s post-homicide conduct.
2. This comment led to the following clarifications by the judge, which elicited the agreement of the parties:

[translation]

THE COURT:

No, when I get to the mental disorder ... Just give me a second. It’s like a warning that I’m going to give them that for the post-offence conduct, that there can be two interpretations and that I’m going to return, during the instructions on mental disorder, to this post-offence evidence, but that they should keep in mind that this conduct is not only for the Crown’s theory, nor is it only for the defence’s theory.

…

THE COURT:

That’s fine. So, I’ll give it generally. I’ll focus on the post-offence conduct, but tell them, however, to bear in mind that these are circumstantial elements, that they take, that they can take into consideration with regard to ... regarding the accused’s intent, planning, but that they should consider when assessing all the evidence, whether it is ... it can also be consistent with murder. But, basically, it’s first degree murder, second degree murder, or homicide.

…

THE COURT:

So, I'll see how I describe it, but it can also be ... they will also have to consider it when they assess the defence of mental disorder, which I will return to later.

1. The judge discussed on two other occasions the instructions she was going to give to the members of the jury. Before the start of final arguments, she explained the substance of what she would say to the jury during her charge:

[translation]

The other thing, I’m referring to the instructions, naturally. When we talked about the post-offence conduct, I said that I gave it, I gave it by modifying it, and this will be very brief, that they can consider Mr. Tshilumba’s conduct afterwards, when they assess the defence of mental disorder, whether or not it is consistent with a mental disorder. However, the way I wrote it, I’m not going to give it generally, because, whether it’s murder or manslaughter, fleeing the scene, changing clothes, hiding the weapon at [CEGEP André-Laurendeau], all these acts could apply to either manslaughter or murder. So, however, I will say it, they have to consider the evidence as a whole, and it’s part of the evidence as a whole, but I will not give the post-offence conduct instruction that, as for intent, is rarely given, much more often for identity, which is not a problem here.

1. After counsel for the appellant had presented his arguments, the judge revisited with the parties the content of the instruction concerning the after-the-fact conduct:

[translation]

There was one other thing I wanted to discuss. I spoke to you about the post-offence conduct. When I discuss the psychiatrists, naturally, I’m going to tell them that they must assess the testimony of the psychiatrists separately; it does not form a whole. So they can accept the testimony of both psychiatrists or one of them or neither of them, but it does not form a whole. It is a defence of mental disorder, but presented by two witnesses who are separate, because I’m going to give a fairly exhaustive summary of the evidence. I will do this regarding the mental disorder, and I will not repeat it when I return to intent, because I will tell them, I refer you to this evidence, which also goes to mental disorder, but most of the witnesses for the defence, so all the family members and the friend, Mr. Louis, were for the mental disorder, but as for the testimony of the accused, naturally, as for intent, and I don’t summarize all the documentation, I refer to D-11, P-59, P-60; it will be up to them to verify what they need to verify in that documentation.

1. At this stage, it is not easy to discern the exact substance of the instruction that the judge would give to the jury regarding the relevance of the after-the-fact conduct to the requisite intent for second degree murder and for first degree murder. The judge stated her intentions, but the parties did not have written draft instructions allowing them to precisely understand the instructions that would be given to the jury.

**The instructions**

1. In her instructions, the judge addressed the after-the-fact conduct three times before making the correction requested by the parties.
2. She first addressed this conduct as part of her instructions concerning the defence of mental disorder:

[translation]

So then the second requirement: you must decide whether Mr. Tshilumba has established, on a balance of probabilities, that his mental disorder, because if you have reached this second requirement, it is because you have been ... he convinced you, on a balance of probabilities, that he was in fact suffering from a mental disorder, that this illness rendered him incapable of appreciating the nature and quality of his acts or of knowing that the act was wrong. I was talking about the conduct after the events. You have heard the evidence concerning the accused’s conduct after the events at the Maxi. This is circumstantial evidence. You can consider what inference you might draw from this evidence. A fact is established by inference when it can be logically and reasonably deduced from another fact or set of facts presented at trial.

So the accused raises a defence of mental disorder. You can consider this evidence when analyzing this defence. Your assessment of this circumstantial evidence must always be made in light of the evidence as a whole. It will be up to you to decide what inferences, if any, you can draw from this evidence, and whether these inferences can help you decide whether or not the accused knew that the acts committed at the time of the events were wrong. So, a fact is established by inference when it can be deduced logically and reasonably from another fact or set of facts presented at trial. The accused’s conduct after the events, I’m suggesting a few of them to you, it’s up to you to decide, perhaps I have forgotten some or you want to add some, it will be up to you to decide.

 [Emphasis added.]

1. After summarizing the evidence concerning the appellant’s post-homicide conduct, the judge made the following observations:

[translation]

So you must consider the accused’s testimony. He gave you some explanations concerning these facts. I refer you to his testimony – I’m not going to summarize it again – where he stated, among other things, that he was at the Maxi and ... that he fled the Maxi and hid in the Tim Hortons, because he was afraid that the girls would find him. They wanted to kill him, wanted to hurt him. He hid the knife; he didn’t want his mother to find it and confiscate it. He changed his clothes for the same reason. He gave you explanations for his Internet searches, for example, because he wanted to know if Clémence had killed people, if the police had arrested the girls. How to get rid of the clothes and the ... with the blood on it, so his mother would not find them, so that she would not find the knife. So he maintains that he did all this because he was afraid of Clémence and the girls and because he had to hide. This is just a short summary.

Both psychiatrists, Dr. Morissette and Dr. Proulx, explained that this conduct may be consistent with the mental disorder afflicting the accused at the time of the events. However, you must also look at other inferences or explanations that you can draw from this evidence. For example, the accused fled the Maxi. Did he do this because he knew he had done something wrong and didn’t want to be arrested by the police? When he hid for hours in the Tim Hortons, was it to hide from the girls because of his delusion of persecution or was he hiding from the police? When he hid his knife at the CEGEP, was it to prevent his mother from finding it and confiscating it, although he needed it for his safety, or was it because he ... he knew that he had committed a wrongful act and because the knife was the weapon used in the crime, and he did not want it to be found in his possession? These are only possibilities; these are only possible ways of summarizing the events. It is up to you to decide whether these acts were committed and what inferences and explanations you can draw from this conduct, if any. And when you have ... if you do draw inferences, what ... those inferences or explanations then become part of the body of evidence. So you decide whether or not you can draw any inference from this evidence, and if so, whether this evidence can help you. It is ... can this circumstantial evidence help you when you consider the second requirement of section 16? It is up to you to decide what conclusions you draw from this circumstantial evidence.

[Emphasis added.]

1. It should be noted that at that time, the judge did not issue the caution required by the case law, which aims to prevent the risk associated with the accused’s after-the-fact conduct, that is, to jump too quickly to a finding of guilt.[[41]](#footnote-41)
2. When addressing the requisite intent for the offence of second degree murder, the judge then explained, correctly according to the applicable law,[[42]](#footnote-42) that evidence of a mental disorder must also be considered, because it may raise a reasonable doubt as to the requisite intent for second degree murder:

[translation]

So now I come to intent. We are on the second page of the tree.[[[43]](#footnote-43)] Did Mr. Tshilumba mean to cause the death of Ms. Beaulieu-Patry or did he mean to cause her bodily harm that he knew was likely to cause her death and was reckless as to whether or not death would ensue? I will now summarize the evidence concerning this essential element of intent. If you have come to this question, that of the requisite intent for murder, it is because you have concluded that the defence of mental disorder presented by the accused did not meet the requirements of section 16, and you have rejected this defence.

Even ... but even if you are not convinced on a balance of probabilities that Mr. Tshilumba had a mental disorder justifying a verdict of not criminally responsible, you must still consider the evidence of his mental state, as well as any other evidence, to determine whether the accused had the requisite intent to commit the offence of first degree murder. The burden of proof is very different. In other words, if you have concluded that the accused was probably not suffering from a mental disorder or that he was probably suffering from a mental disorder, but it did not prevent him from knowing that the act was wrong, you must still consider the evidence of a mental disorder, along with all the other evidence, to decide whether the Crown has proved intent beyond a reasonable doubt. Now, having come to this essential element, you must bear in mind the accused’s testimony and what the psychiatrists said. That is part of the body of evidence. You still have to consider it. Evidence that cannot convince you on a balance of probabilities could nevertheless raise a reasonable doubt as to the element of intent for there to be murder, which the Crown must prove beyond a reasonable doubt.

If the evidence as a whole creates a reasonable doubt that Mr. Tshilumba did not have the necessary intent to commit first degree murder, you will have to find him guilty ... you will have to find Mr. Tshilumba guilty, not guilty of first degree murder degree, pardon, but guilty of manslaughter, and I will return to this.

So if the evidence as a whole creates a reasonable doubt that Mr. Tshilumba did not have the necessary intent to commit first degree murder, then you will have to find Mr. Tshilumba not guilty of first degree murder, but guilty of manslaughter, and I will return to this.[[44]](#footnote-44)

[Emphasis added.]

1. The judge then spoke to the jury about after-the-fact conduct and its relevance in determining the appellant’s intent:

[translation]

To determine whether, in the circumstances, you can make the common sense inference that the accused intended the natural and probable consequences of his acts, you must weigh all the evidence, including that of diminished mental capacity at the time of the events. I already reviewed this evidence when I summarized the evidence on the defence of mental disorder for you. Naturally, I won’t go over it again. This evidence could refute the common sense inference. If, after weighing all the evidence, there remains a reasonable doubt as to whether you can apply the common sense inference that the accused intended the natural and probable consequences of his acts, then you will not be able to apply this inference. Evidence of the accused’s mental state at the time of the events is relevant to determining whether he had the requisite intent to commit the murder.

…

Also, when you are considering the issue of intent, you must watch the Tim Hortons video, the accused’s conduct after the events. He is hiding in the Tim Hortons. He leaves the knife at the CEGEP. You must consider the accused’s explanation that he was hiding from the girls and not from the police. It will be up to you to decide. It will be up to you to infer from the evidence. It is up to you to see what explanations can be drawn from this evidence. These elements could perhaps lead you to infer that he was hiding from the police or that he was convinced, in his delusion, that the girls ... or in his illness, that the girls still wanted to harm him. It will be up to you to decide.

[Emphasis added.]

1. At this stage, this instruction is appropriate. The jury had to consider other possible explanations for the appellant’s post-homicide conduct, including the appellant’s belief, due to his delusion or illness, that his life was still in danger.
2. Finally, the judge stated her instructions regarding first degree murder and the planning element:

[translation]

To decide this question, you will once again need to consider the evidence as a whole. Among other things, you will consider what the accused did or did not do, the manner in which the accused did or did not do those things, and what he said or did not say. The situation in which the accused was in and the accused’s state of mind, including any evidence of diminished mental capacity. Concerning the evidence relating to a mental disorder, I remind you of what I told you earlier: if you have decided that Mr. Tshilumba was probably not afflicted with a mental disorder or that if he was so afflicted ... if he probably was so afflicted, that did not pre ... that did not prevent him from knowing that the act was wrong, then you are going to reject the defence of mental disorder. You must still examine the evidence of a mental disorder with all the other evidence in order to decide whether the Crown has proved this essential element beyond a reasonable doubt. In other words, the evidence of a mental disorder may not have convinced you **on a strong balance of probabilities**[[45]](#footnote-45) that the accused should be found not criminally responsible but could raise a reasonable doubt as to the essential element of planning and deliberation for there to be first degree murder, which the Crown must prove beyond a reasonable doubt. Once again, I will not revisit all the evidence presented in regard to the defence of mental disorder.

[Emphasis added.]

1. Although the judge instructed the jury to consider [translation] “the evidence that confirms a mental disorder”, it should nevertheless be noted that there was no specific instruction, similar to that given when she discussed second degree murder, on the jury’s obligation to consider the appellant’s testimony that he believed his life was still in danger after the commission of the homicide.
2. After completing the instructions concerning first degree murder, the judge reviewed the various elements of the decision tree with the jury.
3. The parties then addressed the judge to ask her to make a correction and to instruct the jury that the appellant’s post-homicide conduct had no probative value. The judge agreed to do so except with regard to the fact that the appellant had brought a change of clothes, an element she considered relevant to the planned and deliberate nature of the murder.
4. Here is the correction made by the judge:

[translation]

I will go over the facts. I want this to be clear. I spoke with the lawyers. As for intent, everything that happened after the events, so from the time that the accused started running and left the Maxi ... you know, I listed ten (10) things that happened after the events. So all those facts, the fact that he ran away, that he hid the weapon, that he hid in the Tim Hortons, that he went to the CEGEP, that he hid his backpack in the locker, etc., all that evidence is irrelevant when you consider the issue of intent, simply because someone can commit manslaughter and have the same flight response as if it were murder. That won't help you with intent. So you should not consider what happened after the events when you consider the issue of intent. Is ... is that clear? However, there is one piece of evidence, the accused arrived with a change of clothes and changed afterwards. So he had ... did he intend to stab Ms. Clémence Beaulieu-Patry? Is that why he brought a change of clothes and changed afterwards? Perhaps this piece of evidence will help you when you consider the issue of intent, perhaps not. Is that clear? What I just told you also goes for planning and deliberation. Everything that happened after the events, from the time that Mr. Tshilumba ran away, so the fleeing, the fact that he hid and everything else will not help you and is not relevant to planning, because you can commit homicide or first ... second degree murder and flee the scene and hide evidence and try to get rid of the evidence. So it’s not ... all that behaviour or the actions taken by Mr. Tshilumba, after stabbing Ms. Beaulieu-Patry, are not relevant to deciding the essential element of planning and deliberation. Do you understand? You can commit manslaughter, so you do not intend to kill someone, and you can run away. However, here too, the fact that he had a change of clothes and the fact that he changed, that is an element that could perhaps be relevant if you accept that piece of evidence. So if he had planned and deliberated to go to the Maxi to kill Clémence that evening and brought ... and you conclude that he brought clothes to change into because he had planned to kill and that he changed afterwards, that could perhaps be a piece of evidence that could help you. Is that clear?

[Emphasis added.]

1. After this correction was provided to the jury, the parties said that they were satisfied.
2. The Court is of the view that the judge and the parties were wrong. As already noted, the instruction given by the judge concerning the essential elements of second degree murder, which required the jury to consider the appellant’s explanation of his post-homicide conduct, namely his fear, rooted in his mental disorder, that his life was in danger, was impeccable and irreproachable.
3. Unfortunately, the corrective instruction, according to which the appellant’s post-homicide conduct had no probative value with respect to the requisite intent for murder or its planned and deliberate nature, prevented the jury from considering all the evidence that could support the other possible explanation for the appellant’s behaviour, that is, his perception, fuelled by his mental disorder, that his life was still in danger, as he explained in a text message to his best friend while he was hiding in the Tim Hortons in which he stated, [translation] “I’m drowning my life”, meaning that he feared for his life.
4. These corrections are fatal and require that a new trial be held.
5. In defence of the trial judge, it should be noted that the case law and commentary recognize that instructions concerning after-the-fact conduct present several difficulties.[[46]](#footnote-46) Moreover, she was unable to benefit from the lessons of *Calnen*, in which Martin J. explained that after-the-fact conduct evidence may be relevant to the issue of intent and may be used to distinguish between different levels of culpability.[[47]](#footnote-47)
6. As Martin J. wrote, “[t]hat there may be a range of potential inferences does not render the after-the-fact conduct null”.[[48]](#footnote-48) However, it will be for the jury to determine which inferences they accept and the weight they ascribe to them.[[49]](#footnote-49) *Calnen* thus favours a nuanced analysis of this issue and establishes that there is no absolute rule that precludes the use of the accused’s after-the-fact conduct to determine the accused’s intent or to distinguish between different levels of culpability.[[50]](#footnote-50) It is the overall picture that matters.[[51]](#footnote-51)
7. Here, only such an assessment would have allowed the jury to adequately consider whether the appellant’s post-homicide conduct raised a reasonable doubt as to his guilt. The corrective instruction formulated by the judge at the request of the parties explicitly closed the door to such an analysis by limiting the evidence that the jury could consider, such as fleeing the Maxi and hiding in the Tim Hortons for seven hours. However, the judge had identified these two elements in her discussions with counsel on the defence of mental disorder as supporting an inference that the appellant’s behaviour could be explained by his desire to flee the victim and her friends who were putting his life in danger.
8. This case presented a double challenge.
9. First, the evidence concerning the appellant’s mental disorder required nuanced instructions on assessing issues where the parties’ burden of proof was different: (1) the appellant had the burden of establishing on a balance of probabilities that his mental disorder prevented him from knowing that the acts he had committed were wrong; (2) the Crown had to establish beyond a reasonable doubt that the appellant’s mental disorder did not raise a reasonable doubt as to his intent to kill the victim or the planned and deliberate nature of the murder.
10. Second, the instructions concerning the appellant’s post-homicide conduct also had to make the necessary nuances in this context, in particular because fleeing and hiding in the Tim Hortons for over seven hours could be interpreted in light of his delusional thoughts.
11. Because the jury had to consider any other possible explanation for the appellant’s post-homicide conduct at all stages of its deliberations (defence of mental disorder, second degree murder, and first degree murder), this assessment could not be carried out in a piecemeal manner by isolating certain evidence, such as the change of clothes. A comprehensive approach to assessing such evidence could have assisted the jury in determining whether a reasonable doubt existed with respect to the accused’s guilt.[[52]](#footnote-52)
12. Furthermore, the agreement of the appellant’s counsel with the correction made by the judge is not decisive,[[53]](#footnote-53) because it was up to the trial judge to give instructions consistent with the law.[[54]](#footnote-54) In an attempt to counter the risk associated with the evidence of the appellant’s post-homicide conduct, the appellant’s counsel requested an instruction that this evidence had no probative value without fully realizing, however, that because of this instruction, the jury could no longer consider several elements of this evidence that could confirm the fact that he had a mental disorder and give rise to a reasonable doubt.
13. In any event, the judge had a duty to instruct the jury that the analysis of the evidence as a whole, including evidence of the appellant’s mental disorder and of his post-homicide conduct, could raise a reasonable doubt as to his guilt for the offence of first degree murder or for the included offence of second degree murder.[[55]](#footnote-55) The judge had in fact told counsel that she would instruct the jury accordingly before oral arguments.
14. The judge and the parties then discussed the instructions that should be given to the jury, on the basis that the appellant’s after-the-fact conduct did not make it possible to distinguish between guilt of second degree murder and guilt of first degree murder. This consensus can only be explained by a misapplication of *Arcangioli*[[56]](#footnote-56) in the circumstances and to the evidence adduced in this case.

***The confusion arising from the contradictory instructions***

1. The appellant rightly argues that it is almost impossible for the jury to have understood how it was to assess the evidence of his post-homicide conduct. Indeed, the instructions were contradictory and inconsistent.
2. A fragmented and piecemeal analysis of the evidence of the appellant’s post-homicide conduct was impossible. The jury could not both consider the evidence of the appellant’s post-homicide conduct when assessing the defence of mental disorder and exclude it when considering the appellant’s guilt for the offence with which he was charged.
3. Moreover, as the appellant rightly suggests, the jury’s confusion could only have increased when the judge summarized the Crown’s position almost immediately after issuing the corrective instruction.
4. Here is how the judge summarized the Crown’s position:

[translation]

Now, as for the Crown’s theory of the case:[[[57]](#footnote-57)] on April 10, 2016, at around 8:30 p.m., the accused arrived at the Maxi, located at 8305 Papineau in Montreal, with the pre-planned intent to kill Clémence Beaulieu-Patry. He walked to the back of the store and reached the Joe Fresh clothing section from the back. The victim had her back to him. She was folding clothes when the accused stabbed her multiple times. He then fled the scene with his knife to avoid being arrested and headed to the nearby Tim Hortons, where he hid for nearly seven hours. He changed clothes there and texted friends to come pick him up. He was forced to leave the Tim Hortons when he was discovered and then went to CEGEP André-Laurendeau, where he left his bloodstained clothes and his knife in a locker. During the ensuing hours, Mr. Tshilumba conducted several web searches and consulted websites to find out if he was wanted and to find the best way to get rid of the murder weapon and destroy the evidence linking him to the murder. When he went to the Maxi on April 10, 2016, Mr. Tshilumba had planned to kill Clémence Beaulieu-Patry, and he stabbed her deliberately. Although he may have been experiencing the first symptoms of a mental disorder at this time, this did not render him incapable of distinguishing between right and wrong.

1. As summarized, the Crown’s position directly contradicted the corrective instruction that the judge had just given to the jury. In fact, this position was based on evidence that the jury could not consider according to the corrective instruction.
2. In addition, as previously explained, the Crown could not rely on the argument that the appellant was experiencing the first symptoms of a mental disorder when the irrefutable evidence identified that the existence of a mental disorder had been confirmed several months earlier.
3. Of course, the judge had the obligation to summarize the positions of the parties,[[58]](#footnote-58) but she could not simply repeat the summary suggested by the Crown without regard to the plausibility of the position expressed or its consistency with the evidence heard by the jury.[[59]](#footnote-59) The judge’s role included an editorial aspect,[[60]](#footnote-60) because she had to correct the statement contained in the Crown’s summary about the fact that he was experiencing [translation] “the first symptoms of a mental disorder”, an assertion that was not consistent with the evidence.
4. This argument is well founded and requires that a new trial be held.

***The instructions as a whole***

1. When we consider the instructions as a whole, however, there is more.
2. Several factors increased the complexity of the instructions: (1) their length; (2) the unnecessary elements; (3) the summary of the evidence that was both too lengthy and unclear, and (4) the lack of written instructions.
3. Although the charge to the jury does not have to be perfect, the judge must clarify and simplify it as much as possible. As Bich and Hamilton JJ.A. explained in *Primeau*, [translation] “[t]he judge’s task is therefore eminently educational, requiring structure, clarity, coherence, and objectivity, but also a certain ability to simplify without betraying the requirements of the law”.[[61]](#footnote-61) In short, the instructions need not be perfect, but they must be appropriate to the circumstances of the case.[[62]](#footnote-62)
4. Instructions to the jury must therefore be as complete as necessary, but also as succinct as possible. In pursuit of this objective,“[a] trial judge must strike a crucial balance by crafting a jury charge that is both comprehensive and comprehensible”.[[63]](#footnote-63) As Binnie J. pointed out in *Royz*, “[b]revity is the soul of a jury charge that actually helps the jurors to focus on their job provided its members are given an adequate understanding of the relationship between the essential elements of the evidence and the issues they are required to resolve”.[[64]](#footnote-64) That said, when it comes to simplifying the jury charge, “[o]ver-charging is just as incompatible with this duty as is under-charging”.[[65]](#footnote-65)
5. In this case, the instructions were too lengthy given the issue that had to be defined. In her charge, the judge spoke at length about the appellant’s mental disorder and gave a long summary of the evidence on this subject. However, in the judge’s own opinion, which she communicated to the jury, this element was not contested by the Crown. Its treatment made the instructions needlessly onerous and only increased their length and complexity.
6. It would have been better to simplify this aspect and focus the jury’s attention on the real issue: did the appellant know that what he was doing was wrong? If not, did his mental disorder raise a reasonable doubt concerning any of the essential elements of the charge against him?
7. In addition, the judge referred several times in her instructions to the jury to the first branch of the second requirement of the defence of mental disorder, that is, whether the appellant’s mental disorder deprived him of the capacity to appreciate the nature and quality of the act committed, even though the appellant did not rely on the first branch of this defence.
8. It is recognized that model jury instructions “must be molded to reflect the intricacies of each case”.[[66]](#footnote-66) Accordingly, “[t]o the extent that pattern instructions are inapplicable to the facts or law at issue, they must be adjusted”.[[67]](#footnote-67) If one of the branches of the defence of mental disorder is inapplicable, it must be deleted from the instructions given to the jury.[[68]](#footnote-68) An “overreliance on the rote reproduction of excerpts from model jury instructions”[[69]](#footnote-69) entails the risk of using superfluous instructions for the case in question.[[70]](#footnote-70)
9. Moreover, the fact that the instructions were given orally by the judge was likely to make the jury’s task even more difficult. Although it is not an obligation, providing written instructions would certainly have made the jury’s task easier.
10. Recently, in *Sorella*, the Court noted that giving the jury a written copy of the instructions is [translation] “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”.[[71]](#footnote-71) This was certainly the case here.
11. Furthermore, a clear advantage arises from holding pre-charge conferences and preparing a written draft charge: it can be revised by the judge in light of the submissions of the parties before the charge to the jury is given.[[72]](#footnote-72) Preparing a written draft charge ensures respect for the right of the parties to be heard on the substance of the charge that will be given to the jury. This process minimizes the risk of errors.
12. That said, it should be noted that the lack of written instructions does not, in itself, warrant a new trial. Written instructions are preferable because the advantages clearly outweigh the disadvantages.[[73]](#footnote-73) However, what matters is the content of the instructions, that is, “the general sense which the words used must have conveyed … to the mind of the jury”,[[74]](#footnote-74) not the method used to convey them.
13. The increase in the use of written instructions goes hand in hand with the wish explicitly expressed by the Supreme Court for over 25 years to simplify jury charges. In *Hebert*, Cory J. noted that the charge to the jury can be “so unnecessarily confusing that it constitute[s] an error of law”.[[75]](#footnote-75) In *Jacquard*, Lamer C.J. stated, “I cannot emphasize enough that the role of a trial judge in charging the jury is to decant and simplify”.[[76]](#footnote-76) These calls for organized and structured conciseness in jury charges were reiterated in *Rodgerson.*[[77]](#footnote-77)
14. Another element contributed to the onerousness and length of the charge. The judge’s instructions included a lengthy summary of the evidence, sometimes on uncontested issues. This added an additional layer of difficulty that was unnecessary in many respects. It should be recalled that the Supreme Court discourages unnecessarily lengthy summaries of evidence and encourages brevity.[[78]](#footnote-78) A summary of each witness’s testimony is almost always ineffective and unnecessary.[[79]](#footnote-79) The evidence presented at trial must be organized for the jury according to its relevance to the issues to be decided. Otherwise, the jury may not appreciate its importance.[[80]](#footnote-80)
15. Although the trial judge had considerable leeway in preparing her charge,[[81]](#footnote-81) her summary of the evidence was overly exhaustive, which would not necessarily be problematic in itself, if its structure had nonetheless allowed the jury to readily identify the connection between the relevant evidence and the issues it had to determine.[[82]](#footnote-82)
16. The consequence of all of this was to increase the confusion.

***FOURTH GROUND: THE REQUEST TO LISTEN TO THE INSTRUCTIONS AGAIN***

1. The appellant states that the trial judge erred in offering the jury the choice of hearing her instructions again or asking specific questions. The Crown maintains that the judge consulted both parties and then asked the jury whether they wanted to hear all the instructions again or whether they wanted additional explanations on a specific issue. Given the complexity and confusion of the instructions, it is hardly surprising that the jury asked to hear them again.
2. Assuming that the jury did not want to hear all the instructions again, the trial judge conferred with the parties and informed them of her intention to ask the jury if they really wanted all the instructions, on a CD, or if they instead needed clarifications on her instructions. Both parties agreed. She then offered these two choices to the jury. She said that if the jury wanted an audio recording of all the instructions, it would have to listen to the instructions in a way that was fair to both parties by considering all the instructions on a given issue. The jury requested an audio recording of the instructions.
3. Essentially, the judge adapted the principles formulated by the Court in *Robert*[[83]](#footnote-83) in response to the request to hear her instructions again. She made sure that the jury re-listened to all the instructions on a given subject. This very fair instruction is consistent with the teachings of *Robert* and the discretionary power recognized therein.

***CONCLUSION***

1. In conclusion, the instructions concerning the appellant’s post-homicide conduct alone warrant a new trial. Their length and the resulting confusion do as well. In addition, the assumptions advanced by the Crown in the absence of independent evidence accentuate the need for a new trial.
2. It will therefore not be necessary to rule on the appellant’s last two grounds of appeal.

**FOR THESE REASONS, THE COURT**:

1. **ALLOWS** the appeal;
2. **ORDERS** a new trial.

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|  | JULIE DUTIL, J.A. |
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|  | DOMINIQUE BÉLANGER, J.A. |
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|  | GUY COURNOYER, J.A. |
|  |
| Mtre Julie Giroux |
| LABELLE, CÔTÉ, TABAH ET ASSOCIÉS |
| For the appellant |
|  |
| Mtre Robert Benoit |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS |
| For the respondent |
|  |
| Date of hearing: | August 30, 2022 |

1. *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at para. 1. [↑](#footnote-ref-1)
2. *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301. [↑](#footnote-ref-2)
3. *R. v. White*, [1998] 2 S.C.R. 72 at para. 27. [↑](#footnote-ref-3)
4. Although the Crown’s position during its closing address appeared ambivalent and equivocal, the judge instructed the jury, as was necessary in our opinion, that the Crown did not dispute the fact that the appellant had a mental disorder. In this regard, as Watt J. explains in his book *Helping Jurors Understand*, Thomson, 2007: “Where the evidence plainly establishes some essential elements of the defence, P should be invited to acknowledge this in order to narrow the contested ground and reduce the volume of instructions required, hence their complexity” [Emphasis added] (at 71). [↑](#footnote-ref-4)
5. *R. v. Molodowic,* [2000] 1 S.C.R. 420, 2000 SCC 16. [↑](#footnote-ref-5)
6. *R. v. Oommen*, [1994] 2 S.C.R. 507. [↑](#footnote-ref-6)
7. *R. v. Molodowic*, [2000] 1 S.C.R. 420, 2000 SCC 16 at para. 1. [↑](#footnote-ref-7)
8. *Ibid.* [↑](#footnote-ref-8)
9. *R. v. Molodowic,* [2000] 1 S.C.R. 420, 2000 SCC 16. [↑](#footnote-ref-9)
10. *R. v. Molodowic,* [2000] 1 S.C.R. 420, 2000 SCC 16 at para. 7. [↑](#footnote-ref-10)
11. *Ibid.* [↑](#footnote-ref-11)
12. *Ibid.* at para. 8. [↑](#footnote-ref-12)
13. *Ibid.* See also *R. v. Worrie*, 2022 ONCA 471 at para. 102. [↑](#footnote-ref-13)
14. *Sorella c. R.,* 2022 QCCA 383. [↑](#footnote-ref-14)
15. *R. v. François*, [1994] 2 S.C.R. 827 at 837; *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180 at para. 32; *LSJPA — 1710*, 2017 QCCA 757 at para. 60. [↑](#footnote-ref-15)
16. *R. v. Molodowic*, [2000] 1 S.C.R. 420, 2000 SCC 16 at paras. 7–8; *R. v. Worrie*, 2022 ONCA 471 at paras. 98 and 102; *R. v. Luciano*, 2011 ONCA 89 at para. 88. [↑](#footnote-ref-16)
17. *R. v. Jacquard*, [1997] 1 S.C.R. 314 at paras. 42–53; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26 at para. 40; *Lebrun v. R.*, 2021 QCCA 610 at para. 12; *R. v. Chretien*, 2014 ONCA 403 at para. 105. [↑](#footnote-ref-17)
18. S. Lederman, M. Fuerst & H. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. (LexisNexis, 2022) at 949–950. See also Peter Sankoff, *The Law of Witnesses and Evidence in Canada*, 2nd ed., vol. 1 (Thomson Reuters, 2019) (loose-leaf, updated September 2022, release 3), §16:35. [↑](#footnote-ref-18)
19. Eric V. Gottardi et al., *Qualifying and Challenging Expert Evidence* (Emond Montgomery Publications, 2022) at 89–90. As Sopinka J. noted in his concurring opinion in *R. v. Lavallee*, [1990] 1 S.C.R. 852 at 900, in some circumstances, the absence of independent evidence may deprive an expert’s opinion of all probative value. [↑](#footnote-ref-19)
20. *R. v. Chanmany*, 2016 ONCA 576 at para. 45. [↑](#footnote-ref-20)
21. *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 97. [↑](#footnote-ref-21)
22. *R. v. Rose*, [1998] 3 S.C.R. 262 at para. 107. [↑](#footnote-ref-22)
23. *Ibid.* at para. 127; Robert J. Frater, *Prosecutorial Misconduct*, 2nd ed. (Canada Law Book, 2017) at 268. [↑](#footnote-ref-23)
24. *R. v. Lyttle*, [2004] 1 S.C.R. 193, 2004 SCC 5 at paras. 48–55. [↑](#footnote-ref-24)
25. *Ibid.*, at para. 52; D. Paciocco, P. Paciocco & L. Stuesser, *The Law of Evidence*, 8th ed. (Irwin Law, 2020) at 551–552. [↑](#footnote-ref-25)
26. *R. v. Chanmany*, 2016 ONCA 576 at para. 45; *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 97. See Robert J. Frater, *Prosecutorial Misconduct*, 2nd ed. (Canada Law Book, 2017) at 268. [↑](#footnote-ref-26)
27. Although this discussion usually arises with respect to possibilities that do or do not give rise to reasonable doubt, following the same principles is essential. See e.g., *Bélanger c. R.*, 2020 QCCA 431 at para. 44; S. Casey Hill, D. M. Tanovich & L. Strezos, *McWilliams’ Canadian Criminal Evidence*, 5th ed., vol. 2 (Thomson Reuters, 2013) (loose-leaf, updated July 2022, release 3), § 31:17, in particular the footnote on page 5. [↑](#footnote-ref-27)
28. *Delisle c. R.*, 2013 QCCA 952 at paras. 96–101. [↑](#footnote-ref-28)
29. *Cooper v. R.*, [1980] 1 S.C.R. 1149 at 1159. [↑](#footnote-ref-29)
30. D. Watt, *Watt’s Manual of Criminal Jury Instructions,* 2nd ed. (Carswell, 2015) at 1219–1220. [↑](#footnote-ref-30)
31. Canadian Judicial Council. *Model Jury Instructions*, “Defence 16.1: Mental disorder – Raised during the trial before finding of guilt (s. 16)” (updated June 2014) (online). [↑](#footnote-ref-31)
32. *R. v. Molodowic*, [2000] 1 S.C.R. 420, 2000 SCC 16 at para. 13; *Labrie c. R.*, 2014 QCCA 309 at para. 50; *R. v. Richmond*, 2016 ONCA 134 at para. 59. [↑](#footnote-ref-32)
33. Hy Bloom, “Not Criminally Responsible on Account of Mental Disorder (NCRMD)”, in Hy Bloom & Richard D. Schneider, eds., *Law and Mental Disorder: a Comprehensive and Practical Approach* (Irwin Law, 2013) at 264–265; M.L. Perlin, “*The Insanity Defense: Nine Myths That Will Not Go Away*” in M.D. White, ed., *The Insanity Defense: Multidisciplinary Views on Its History, Trends, and Controversies* (Praeger, 2017) at 3–22. [↑](#footnote-ref-33)
34. *Labrie c. R.*, 2014 QCCA 309 at para. 37; *Demontigny c. R.*, 2022 QCCA 2 at para. 65. [↑](#footnote-ref-34)
35. *Ibid.* at para. 37. [↑](#footnote-ref-35)
36. See D. Paciocco, P. Paciocco & L. Stuesser, *The Law of Evidence*, 8th ed. (Irwin, 2020), in which the authors write: “While it is true that the questions asked are not evidence – only the answers given are – simply asking a question may be prejudicial. There is power in innuendo” at 551. See also S. Casey Hill, D. M. Tanovich & L. Strezos, *McWilliams’ Canadian Criminal Evidence*, 5th ed., vol. 2, (Thomson Reuters, 2013) (loose-leaf, updated July 2022, release 3), § 12.39. [↑](#footnote-ref-36)
37. *Delisle c. R.*, 2013 QCCA 952 at paras. 96–101; *R. v. Khan*, (1998), 126 CCC (3d) 353 (Man. C.A.) at para. 71. [↑](#footnote-ref-37)
38. *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301 at para. 112. [↑](#footnote-ref-38)
39. *R. v. Molodowic*, [2000] 1 S.C.R. 420 at para. 13. [↑](#footnote-ref-39)
40. The more neutral expression [translation] “after-the-fact conduct” is gradually replacing [translation] “post-offence conduct”, the expression generally used previously. This is a particularly desirable development for jury instructions. [↑](#footnote-ref-40)
41. *R. v. Arcangioli*, [1994] 1 S.C.R. 129 at 143; *R. v. White*, [1998] 2 S.C.R. 72 at paras. 22 and 57; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433 at paras. 23–25; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301 at paras. 25 and 117. See paras. 4 to 6 of Model Instruction 11.4 of the Canadian Judicial Council’s National Committee on Jury Instructions on after-the-fact conduct, to the same effect. [↑](#footnote-ref-41)
42. *Sorella c. R.,* 2017 QCCA 1908 at para. 81. [↑](#footnote-ref-42)
43. The decision trees were not filed in the record, *R. v. McNeil* (2006), 213 C.C.C. (3d) 365 at para. 27 (Ont. C.A.); *R. v. Almarales*, 2008 ONCA 692 at para. 97; Martin Vauclair & Tristan Desjardins, *Traité général de preuve et de procédure pénales*, 29th ed. (Yvon Blais, 2022) at para. 33.8; E.G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, 2nd ed., vol. 2 (Thomson Reuters, 1987) (loose-leaf, updated July 2022, release 5), § 17:111. [↑](#footnote-ref-43)
44. In this excerpt, the judge mistakenly refers to the offence of first degree murder five times; it is obvious that she is addressing the requisite intent for the offence of second degree murder. She formulates the guidelines on first degree murder a little later in her charge. [↑](#footnote-ref-44)
45. There is only one balance of probabilities standard in Canadian law, which does not involve any degree of probability: *F.H. v. McDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53; E.G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, 2nd ed., vol. 2 (Thomson Reuters, 1987) (loose-leaf, updated July 2022, release 5), § 16:520; S. Casey Hill, D. M. Tanovich & L. Strezos, *McWilliams’ Canadian Criminal Evidence*, 5th ed., vol. 2 (Thomson Reuters, 2013) (loose-leaf, updated July 2022, release 3), § 19:12, footnote 2. [↑](#footnote-ref-45)
46. D. Paciocco, “Simply Complex: Applying the Law of ‘Post‑Offence Conduct’ Evidence” (2016), 63 C.L.Q.275 at 276. [↑](#footnote-ref-46)
47. *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301 at paras. 119–140 (dissenting, but not on this issue). See also *R. v. McGregor*, 2019 ONCA 307 at para. 102; *R. v. Café*, 2019 ONCA 775 at para. 55; *R. v. Jackson*, 2016 ONCA 736 at para. 20; *R. v. S.B.1*, 2018 ONCA 807 at para. 71. [↑](#footnote-ref-47)
48. *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301 at para. 112. [↑](#footnote-ref-48)
49. *Ibid.* [↑](#footnote-ref-49)
50. *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301 at paras. 119–120; *R. v. Adan*, 2019 ONCA 709 at para. 69; *R. v. McGregor*, 2019 ONCA 307 at para. 102; *R. v. Café*, 2019 ONCA 775 at para. 55; *R. v. Morin*, 2021 ONCA 307 at para. 49; *R. v. Wood*, 2022 ONCA 87 at para. 123; *R. v. Reddick*, 2021 ONCA 418 at para. 120. [↑](#footnote-ref-50)
51. *R. v. White*, [1998] 2 S.C.R. 72 at para. 45. [↑](#footnote-ref-51)
52. *R. v. White*, [1998] 2 S.C.R. 72 at para. 43. See also *R. v. Kler*, 2017 ONCA 64 at para. 126; *Saillant-O'Hare c. R.*, 2022 QCCA 1187 at para. 20. [↑](#footnote-ref-52)
53. *R. v. Daley*, [2007] 3 S.C.R. 523, 2007 SCC 53 at para. 58. [↑](#footnote-ref-53)
54. *R. v. Khill*, 2021 SCC 37 at para. 144; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301 at para. 189. [↑](#footnote-ref-54)
55. *R. v. Jacquard*, [1997] 1 S.C.R. 314 at para. 27; *R. c. Leblanc*, [1991] R.J.Q. 686, 4 C.R. (4th) 98 (C.A.); *R. c. Allard*, [1990] R.J.Q. 1847, 57 C.C.C. (3d) 397 (C.A.); *Sorella c. R.*, 2017 QCCA 1908. [↑](#footnote-ref-55)
56. *R. v. Arcangioli*, [1994] 1 S.C.R. 129; regarding that decision, Martin J. stated in *Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301 at para. 120 that, “This Court’s decision in *Arcangioli* does not stand for the proposition that after-the-fact conduct cannot, as a matter of law, be used to establish intent or levels of culpability as between different offences”. See *R. v. Adan*, 2019 ONCA 709 at para. 69; *R. v. McGregor*, 2019 ONCA 307 at para. 102; *R. v. Café*, 2019 ONCA 775 at para. 55; *R. v. Morin*, 2021 ONCA 307 at para. 49; *R. v. Wood*, 2022 ONCA 87 at para. 123; *R. v. Reddick*, 2021 ONCA 418 at para. 120. [↑](#footnote-ref-56)
57. In his work, *Helping Jurors Understand*, Watt J. suggests that it is preferable to use the term “position” rather than “theory” (Thomson Carswell, 2007) at 178–179. [↑](#footnote-ref-57)
58. D. Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) at 178–180. [↑](#footnote-ref-58)
59. *R. v. Rose*, [1998] 3 S.C.R. 262 at para. 107. [↑](#footnote-ref-59)
60. E.G. Ewaschuck, *Criminal Pleadings & Practice in Canada*, 2nd ed. (loose-leaf, updated July 2022, release 5) at paras. 17:106–17:107; D. Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) at 180. [↑](#footnote-ref-60)
61. *Primeau c. R.,* 2021 QCCA 544 at para. 49. [↑](#footnote-ref-61)
62. *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301 at para. 9; *Primeau c. R.*, 2021 QCCA 544 at para. 53; *Beauchamp c. R.*, 2022 QCCA 339 at para. 24. [↑](#footnote-ref-62)
63. *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760 at para. 50. [↑](#footnote-ref-63)
64. *R. v. Royz*, 2009 SCC 13, [2009] 1 S.C.R. 423 at para. 2. [↑](#footnote-ref-64)
65. *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760 at para. 50; *Duchaussoy c. R.*, 2020 QCCA 380 at para. 36; *Palma c. R.*, 2019 QCCA 762 at para. 45. [↑](#footnote-ref-65)
66. *R. v. R.V.*, 2021 SCC 10 at para. 64. [↑](#footnote-ref-66)
67. *Ibid.* [↑](#footnote-ref-67)
68. D. Watt, *Watt’s Manual of Criminal Jury Instructions*, 2nd ed.(Carswell, 2015) at 1220: “In some cases, it may be necessary only to instruct one branch of the test. In those cases, delete the other branch here and elsewhere in the instructions.” [↑](#footnote-ref-68)
69. *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760 at para. 51. [↑](#footnote-ref-69)
70. In his work, *Helping Jurors Understand*, Watt J. makes the following observation on this subject: “Unnecessary instructions add complexity and create confusion. Comprehension and justice suffer.” D. Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) at 71. [↑](#footnote-ref-70)
71. *Sorella c. R.*, 2022 QCCA 383 at para. 132. See also *De Leto c. R.*, 2022 QCCA 413 at para. 55; *Accurso c. R*., 2022 QCCA 752 at para. 143, note 46. [↑](#footnote-ref-71)
72. *R. v. Baker*, 2019 BCCA 199 at para. 39. [↑](#footnote-ref-72)
73. D. Watt, *Helping Jurors Understand* (Thomson Carswell, 2007) at 86–89. [↑](#footnote-ref-73)
74. *R. v. Daley*, [2007] 3 S.C.R. 523, 2007 SCC 53, at para. 30; *R. v. Goforth*, 2022 SCC 25 at para. 30. [↑](#footnote-ref-74)
75. *R. v. Hebert*, [1996] 2 S.C.R. 272 at 277. See also *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760 at para. 42; *R. v. Khill*, 2021 SCC 37 at para. 34. See also *R. v. P.J.B.*, 2012 ONCA 730 at paras. 50–52. [↑](#footnote-ref-75)
76. *R. v. Jacquard,* [1997] 1 S.C.R. 314 at para. 13. See also *R. v. Royz*, [2009] 1 S.C.R. 423, 2009 SCC 13 at para. 2. [↑](#footnote-ref-76)
77. *R. v. Rodgerson*, 2015 SCC 38, [2015] 2 S.C.R. 760 at paras. 50–51. [↑](#footnote-ref-77)
78. See *R. v. Daley*, [2007] 3 S.C.R. 523, 2007 SCC 53 at para. 58, where the Supreme Court adopted the observations of Proulx J. in *R. v. Girard*, [1996] R.J.Q. 1585 (Que. C.A.), at 1598. [↑](#footnote-ref-78)
79. *R. v. MacKay*, [2005] 3 S.C.R. 607, 2005 75 at para. 1; *R. v. Newton*, 2017 ONCA 496 at paras. 15–19; *R. v. Cudjoe,* 2009 ONCA 543 at para. 160; *R. v. Headley*, 2018 ONCA 915 at para. 48; *R. v. R.C.*, 2020 ONCA 159 at para. 78; *R. v. Theodore*, 2020 SKCA 131 at para. 158. [↑](#footnote-ref-79)
80. *R. v. Saleh*, 2013 ONCA 742 at para. 145. [↑](#footnote-ref-80)
81. *R. v. Bouchard*, 2013 ONCA 791 at para. 40, appeal dismissed 2014 SCC 64, [2014] 3 S.C.R. 283. [↑](#footnote-ref-81)
82. In *R. v. Cudjoe*, 2009 ONCA 543 at para. 152, Watt J. stated, “The trial judge should not simply leave the evidence in bulk for the jury, assigning to them responsibility for determining the relationship between the evidence and the issues that arise for their decision”. [↑](#footnote-ref-82)
83. *R. c. Robert* (2004), 25 C.R. (6th) 55 (Que. C.A.). [↑](#footnote-ref-83)