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| R. c. Fera  English translation of the judgment of the Court | | | | | 2024 QCCA 1377 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
| No.: | 500-10-007731-225 | | | | |
| (700-01-183626-210) (540-01-091349-194) | | | | | |
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| DATE: | October 17, 2024 | | | | |
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| CORAM: | | THE HONOURABLE | | GENEVIÈVE MARCOTTE, J.A.  MARK SCHRAGER, J.A.  GUY COURNOYER, J.A. | |
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| HIS MAJESTY THE KING | | | | | |
| APPELLANT – Prosecutor | | | | | |
| v. | | | | | |
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| ERNESTO FERA | | | | | |
| RESPONDENT – Accused | | | | | |
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| JUDGMENT | | | | | |
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1. The prosecution appeals against an acquittal entered on December 15, 2023, by the Honourable Justice James L. Brunton of the Superior Court, Criminal Division, sitting without a jury. Mr. Fera had been charged with the first-degree murder of his wife.
2. For the reasons of Cournoyer, J.A., with which Marcotte and Schrager, JJ.A. concur, **THE COURT**:
3. **DISMISSES** the appeal;
4. **CONFIRMS** the acquittal.

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|  | | GENEVIÈVE MARCOTTE, J.A. |
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|  | | MARK SCHRAGER, J.A. |
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|  | | GUY COURNOYER, J.A. |
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| Mtre Alexandre Dubois | | |
| Mtre Steve Baribeau | | |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS | | |
| For the appellant | | |
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| Mtre Mylène Lareau | | |
| MYLÈNE LAREAU, AVOCATE | | |
| Mtre Isabelle Lamarche | | |
| L’ÉCUYER, ROULEAU, LAMARCHE & ASSOCIÉS | | |
| Mtre Joseph La Leggia | | |
| For the respondent | | |
|  | | |
| Date of hearing: | February 20, 2024 | |

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| MOTIFS DU JUGE COURNOYER, J.A. |
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**Overview**

1. Charged with the first-degree murder of his wife more than 15 years after her death, Mr. Fera was acquitted of that charge by a judge of the Superior Court sitting without a jury.[[1]](#footnote-1)
2. The trial judge succinctly summarized the case at the beginning of his judgment:

[2]   The prosecution submits that the accused murdered his wife sometime between 07h00 and 07h30 while she was preparing for work in the bathroom adjoining the master bedroom. While the couple’s 10-year old daughter was in the kitchen having breakfast, Mr. Fera would have struggled with his wife while stabbing her approximately 30 times. He would then have cleaned a body part or the murder weapon in a second bathroom located on the same floor as the master bedroom. He then would have descended, put the murder weapon in the dishwasher and started it. He then would have left with his daughter to take her to school.

[3]   The prosecution’s case relies heavily upon two propositions. First, Mr. Fera had a financial motive to commit the crime. The couple, and he more particularly, were facing serious financial difficulties. His wife’s death would relieve him of his money problems. Second, it is alleged that the events of February 12, 2004 establish that he had the exclusive opportunity to commit the crime.

1. In his decision, the trial judge carefully set out the evidence heard and his assessment thereof. In his view, five factors raised a reasonable doubt as to Mr. Fera’s guilt: 1) the prosecution’s failure to prove Mr. Fera’s exclusive opportunity to murder his wife; 2) an inadequate proposed motive; 3) the lack of physical evidence linking Mr. Fera to the crime; 4) Mr. Fera’s demeanour following his wife’s murder, which was consistent with his innocence; 5) gaps in the narrative of the facts, specifically the prosecution’s failure to call as a witness Mr. Fera’s youngest daughter, who was having breakfast in the kitchen at the time of her mother’s murder.
2. The prosecution is appealing the verdict. It alleges three separate errors of law: 1) the judge’s conclusion as to the absence of exclusive opportunity was not based on any evidence; 2) the judge approached the evidence in a piecemeal fashion, and not as a whole, which led him to erroneously entertain a reasonable doubt; 3) the trial judge placed an additional burden on the prosecution by requiring that it prove the respondent’s bad character which is presumptively inadmissible evidence.
3. The prosecution’s 29-page brief includes 222 footnotes, most of which refer to the evidence and to the trial judge’s assessment thereof. However, the prosecution’s right of appeal is limited to questions of law only.
4. In my view, the prosecution is essentially expressing disagreement with the trial judge’s conclusion and is proposing that this Court completely reassess the evidence, without however being able to establish that the judge committed a single error of law.
5. The prosecution is suggesting, in fact, but without being able to say it outright given its very limited right of appeal, that the verdict of acquittal was unreasonable. As is well known, the prosecution has no right to appeal what it considers to be an unreasonable acquittal.
6. For the reasons that follow, I would therefore dismiss the appeal and affirm the verdict of acquittal.

**Judgment Under Appeal**

1. In this case, the prosecution’s position rested on two premises: 1) Mr. Fera had a strong financial motive to murder his wife and 2) he had the exclusive opportunity to do so.[[2]](#footnote-2)
2. For his part, Mr. Fera countered the prosecution’s position with a series of submissions: 1) he had never been violent with his wife; 2) the alleged financial motive was less compelling than that suggested by the prosecution; 3) he did not have enough time to commit the crime; 4) if the crime had been committed in the manner proposed by the prosecution, there would have been physical evidence and the couple’s children would have been able to testify in the prosecution’s favour; 5) the inference that an unknown party killed Mr. Fera’s wife was reasonable; 6) Mr. Fera’s demeanour in the weeks following the crime was compatible with that of an innocent man in mourning.[[3]](#footnote-3)
3. According to Brunton, J., the trial judge, there were two issues in this case: 1) the murderer’s identity and 2) whether the murder was planned and deliberate.[[4]](#footnote-4)
4. Because the evidence was entirely circumstantial,[[5]](#footnote-5) the prosecution had to show that Mr. Fera’s guilt was the only reasonable inference that could be drawn from the evidence presented.[[6]](#footnote-6)

## Summary of the Evidence

1. I will broadly summarize the evidence considered by Brunton, J. in his decision, which was both comprehensive and carefully reasoned.

### **The Financial Motive**

1. In February 2004, Mr. Fera owed around $120,000 on which he was no longer able to pay interest.[[7]](#footnote-7) Between February 5 and 10, 2004, Mr. Fera contacted Michel Trudel, a former customer of the restaurant that he used to operate before its bankruptcy.[[8]](#footnote-8) According to the latter’s testimony, Mr. Fera wished to obtain a $120,000 loan from him, which sum represented almost to the penny the total amount of the debts of the Fera-Panarello couple.[[9]](#footnote-9) To guarantee the loan, Mr. Fera told Mr. Trudel that he would soon be receiving a substantial amount from an inheritance. Trudel refused.
2. The judge held that that Mr. Fera had not been truthful when he spoke of an inheritance.[[10]](#footnote-10) However, despite the stress caused by the couple’s precarious financial situation, there was no indication that the couple was about to break up. The evidence did not disclose any arguments or violence between the couple.[[11]](#footnote-11)
3. Following Ms. Panarello’s murder, Mr. Fera’s financial situation changed considerably. The couple’s mortgage life insurance policy allowed the mortgage loan on the family residence to be repaid in full.[[12]](#footnote-12) The sale of the house allowed Mr. Fera to pay off the couple’s joint debts and his own,[[13]](#footnote-13) while leaving a balance.
4. Further, Mr. Fera also received two payments totalling approximately $200,000 from two life insurance policies held by Ms. Panarello through her employer.[[14]](#footnote-14) The judge found that Mr. Fera was unaware of the existence of those policies prior to his wife’s murder.[[15]](#footnote-15)

### **The Crime Scene**

#### The discovery of the victim’s body

1. At 10 a.m. on February 12, 2004, Mr. Fera received a call from one of his wife’s work colleagues informing him that she had not shown up for work. Therefore, he called his mother-in-law and asked her if his wife had any appointments scheduled that day. It was agreed that the mother-in-law would go to the couple’s residence to check on things.
2. When she arrived there at around 10:30 a.m., she noticed that there was an accumulation of snow on the first steps leading up to the front door. There was one set of footprints, but she could not tell in what direction they pointed. She could not say whether the door was locked when she arrived. She went upstairs and found that the door to the master bedroom was shut. There, she discovered her daughter’s body, bloodied and lying on the back between the bedroom and the adjoining bathroom. She left the bedroom in a state of extreme distress and called the police.[[16]](#footnote-16)

#### The conditions at the scene

1. The judge found that the evidence definitively excluded the possibility that the murderer had entered by one of the neighbouring yards. In his view, it would have been impossible to enter the house through the basement windows as all were equipped with metal bars. The crime scene technician submitted that the lock on front door did not appear to have been picked. The latter did however concede that there would have been no evidence of picking if the tools used were composed of a softer metal than the metal composition of the lock itself.[[17]](#footnote-17) Finally, an intruder could have left the residence by the garage door while leaving all the doors of the house locked.[[18]](#footnote-18)

#### The violence of the attack

1. At the time of the attack, Ms. Panarello had not yet finished getting ready for the day. A hard blow had thrown a bedside table-lamp to the ground and a clothes rack had been overturned. When police arrived at the scene, they noticed that water was still running from the bathroom faucet. The judge noted that the presence of diluted blood and a bloodied towel hanging behind the bathroom door permitted the inference that the murderer had washed himself after having killed the victim. The latter apparently stole a ring and a bracelet that the victim always wore. He apparently also stole other jewelry items and cash that were in one of the drawers of the bedroom dresser, the only drawer that had been removed. The intruder did not appear to have searched the other rooms of the house.[[19]](#footnote-19)
2. The pathologist concluded that the attack had been vicious. She noted the presence of 30 wounds inflicted by a sharp object. Five of those wounds (to the arms and fingers) were defensive in nature. According to that expert, the victim would have been able to scream or yell during the attack. The time of death could not be established with any degree of certainty.[[20]](#footnote-20)
3. For her part, the forensic biologist testified that the attack appeared to have occurred quickly, and that it was possible that the murderer had not been splattered by a large amount of blood.[[21]](#footnote-21) However, the judge concluded that it was highly unlikely that no trace of blood would have been left on the assailant’s clothing. In particular, he noted the existence of blood spatters everywhere in the bathroom, diluted blood and the bloodied towel. Further, he noted that the respondent’s blood had not been found in the bathroom and that the DNA found under the victim’s fingernails did not match the respondent’s DNA profile.[[22]](#footnote-22)

#### The knife

1. While inspecting the premises, a police officer noticed that the dishwasher had been recently used. Upon opening it, he observed that it contained a few dishes and some utensils. However, he noticed that the dishwasher contained a large knife for cutting meat. The dimensions of that knife matched those of the weapon that was likely used to commit the murder. The prosecution alleged that that was the weapon used to kill the victim, even though the forensic biologist concluded that there was no trace of blood on that knife.[[23]](#footnote-23) The judge concluded that he accorded no probative value to the police officer’s testimony[[24]](#footnote-24) and added that he could not conclude that that knife was the murder weapon.

#### Mr. Fera’s testimony

1. On the day of the murder, Mr. Fera and his wife got up between 6 a.m. and 6:15 a.m. They then woke up their two daughters. The eldest daughter left the house at 7 a.m. Mr. Fera left the house between 7:15 a.m. and 7:20 a.m. together with his youngest daughter.[[25]](#footnote-25) Approximately 10 minutes after leaving the residence, he called his wife to provide her with a traffic update. He tried to reach her on her cell phone and on the house’s land line. No one answered.
2. At 10 a.m., he received a phone call from his wife’s employer telling him that she had not shown up for work. He called her again, but she did not answer. Therefore, he called his mother-in-law and they agreed that she would go to the house. At 11 a.m., he received a call from her. She was in a state of distress. He immediately headed home.[[26]](#footnote-26)

#### Mr. Fera’s demeanour on the morning of his wife’s death and afterward

1. Many people testified about their interactions with Mr. Fera following the murder.
2. The people who met Mr. Fera when he took his daughter to school at around 7:52 a.m. did not notice anything unusual in his demeanour.[[27]](#footnote-27)
3. When she arrived at work, Sylvie Roy, a colleague who had worked with Mr. Fera for approximately 15 years and whom Mr. Fera described as a confidante, did not notice anything in particular until he received a call from one of his wife’s work colleagues. When he returned, he seemed worried. He called the Sûreté du Québec to inquire whether any accident involving his wife had occurred. He decided to phone his mother-in-law. At 11 a.m., he received a call from her. It is then that Mr. Fera became “white as a sheet”, “literally jumped over his desk” and left work in his car.[[28]](#footnote-28)
4. While driving home, Mr. Fera called a police officer to find out what had happened to his wife. The officer replied that his wife was injured and that ambulance technicians were taking care of her. Shortly afterward, Agent Bellemare saw Mr. Fera arrive at full speed. According to Agent Bellemare, Mr. Fera *made a scene*, fell to his knees and screamed “No, no my wife!” in the direction of the residence. He was escorted to the ambulance with his mother-in-law. Both were crying and the police were not able to speak to them. They were taken to hospital.[[29]](#footnote-29)
5. At the hospital, Mr. Fera gave a statement to agent Perreault.[[30]](#footnote-30) At 1:35 p.m., a nurse informed him that his wife was dead. Mr. Fera fell into a state of acute hyperventilation that required medical attention (including blood tests and an electrocardiogram). Following those treatments, Mr. Fera was driven to a police station where he provided several statements.[[31]](#footnote-31)
6. Three witnesses — the victim’s sister, one of the victim’s colleagues and Sylvie Roy — confirmed that Mr. Fera was distraught following the murder. His relationship with his in-laws strengthened after the murder.[[32]](#footnote-32)

## The Judge’s Analysis

### **a)** Exclusive opportunity

1. The judge noted that the prosecution failed to prove that all the doors were locked.
2. In addition, the judge observed that the lack of footsteps in the snow was of importance to the prosecution’s theory. However, the police investigation in that regard was inadequate. The judge concluded that he could not exclude the possibility that a third party was able to gain access to the house by the patio door without leaving footprints in the snow.[[33]](#footnote-33)

### **b)** The financial motive

1. According to Brunton, J., the motive alleged by the prosecution was very weak.
2. The judge accepted that the couple’s financial situation was especially precarious, and that Mr. Fera had not hesitated to lie to secure a loan from Mr. Trudel.
3. On the other hand, the equity in the family residence was high enough to pay off all the couple’s and Mr. Fera’s debts, while leaving a balance available to make a down payment to purchase a new home.
4. Moreover, there was no evidence of any disagreements within the couple or any climate of violence, nor any evidence that Mr. Fera would have been cruel enough to have his mother-in-law discover her own daughter’s body. Finally, at the time of the murder, according to the evidence, Mr. Fera was unaware of the existence of the life insurance policies taken out by his wife’s employer.[[34]](#footnote-34)

### **The absence of physical evidence**

1. No physical evidence linked Mr. Fera to the crime. According to the judge’s findings, it was unlikely that the murderer could have killed the victim without his clothes being spattered with blood. However, notwithstanding the fact that Mr. Fera was the last person to have seen his wife and to have left the house, the police had not seen fit to seize or analyse the clothes he was wearing.[[35]](#footnote-35)

### **Mr. Fera’s demeanour after his wife’s death**

1. In the judge’s opinion, Mr. Fera’s demeanour was compatible with that of a grieving husband who was not involved in his wife’s murder. The inconsistencies between his testimony and the words recounted by the victim’s sister and Sylvie Roy did not support the inference of a culpable state of mind.[[36]](#footnote-36)

### **e) The absence of the testimony of the youngest daughter**

1. Finally, according to the judge, the prosecution’s failure to call the youngest daughter as a witness was detrimental to the prosecution’s case. She could have provided evidence essential to the prosecution. Indeed, *if the prosecution was right*, the daughter’s testimony would have likely contradicted her father’s on several points.[[37]](#footnote-37)

## The Judge’s Conclusion

1. The judge concluded that reasonable doubt arose from a combination of five factors: the lack of exclusive opportunity, an inadequate financial motive, the lack of physical evidence linking Mr. Fera to the crime, after-the-fact conduct which was consistent with innocence and the failure to call the couple’s youngest daughter as a witness.[[38]](#footnote-38)
2. Therefore, he acquitted Mr. Fera.

# Issues

1. The appellant raises three grounds of appeal that I restate slightly:
2. Did the judge err by making findings of fact essential to the verdict that were not supported by any evidence?
3. Did the judge err by separately analysing various items of evidence?
4. Did the judge err by faulting the appellant for not having led inadmissible bad character evidence?

# Analysis

### **a) The prosecution’s limited right of appeal**

1. In *Hodgson*, the Supreme Court recently examined the historical foundations of the prosecution’s limited right of appeal under s. 676(1)(a) of the *Criminal Code* and the rationales thereof*.*[[39]](#footnote-39) In that judgment, it also summarized the very limited scope of that right of appeal.
2. Two passages in *Hodgson* aptly articulate the reasons which explain both the prosecution’s limited right of appeal and the dangers of expanding its scope:

[22] The restricted nature of the Crown’s ability to appeal from an acquittal has deep roots in the principles that underlie our criminal justice system and was [translation] “[d]eveloped in a particular historical context characterized by the reluctance of Anglo-Canadian law to allow for [it]” (*LSJPA – 151*,2015 QCCA 35, at para. 57 (CanLII), per Kasirer J.A., as he then was). Indeed, “[t]here is a historical aversion to Crown appeals that grounds the differing limitations placed on appellate access as between the Crown and a convicted person” (*R. v. Budai*,2001 BCCA 349, 153 B.C.A.C. 98, at para. 123, per Ryan J.A.).

[…]

[31] Thus, expanding the Crown’s right of appeal beyond its proper scope would have a profound impact on the interests of accused persons, especially due to the considerable anxiety created by the prospect of a new trial after a person has been acquitted (see *Budai*,at para. 125, quoting *R. v. Potvin*,[1993] 2 S.C.R. 880, at p. 890, per McLachlin J., concurring in the result). Allowing the Crown’s restricted right of appeal to expand beyond its scope would undermine the provision’s protection against wrongful convictions and double jeopardy.

1. Consequently, when it seeks to reverse an acquittal, the prosecution is limited to questions of law only.[[40]](#footnote-40) That said, there exist at least four situations in which a “trial judge’s alleged shortcomings in assessing the evidence constitute an error of law giving rise to a Crown appeal of an acquittal”:[[41]](#footnote-41)

1) Making a finding of fact for which there is no evidence — however, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule;

2) The legal effect of findings of fact or of undisputed facts;

3) An assessment of the evidence based on a wrong legal principle;

4) A failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence.

1. In this appeal, the prosecutor is arguing the first and the fourth scenarios.
2. Finally, and significantly, a new trial will only be ordered if the prosecution is able to “convince the appellate court, to a reasonable degree of certainty, that the verdict of acquittal would not necessarily have been the same had the error not occurred.”[[42]](#footnote-42)
3. I am of the view that in this case, the prosecution is simply questioning the trial judge’s assessment of the evidence and the five reasons he invoked for explaining the reasonable doubt that he entertained.

### **b) Did the judge err by making findings of fact essential to the verdict that were not supported by any evidence?**

#### i) Positions of the parties

#### 1. The prosecution

1. The prosecution argues that [translation] “some of the trial judge’s findings of fact were based on an absence of evidence or disclose a failure to consider all of the evidence”. According to the prosecution, these errors were [translation] “central to the analysis required in relation the exclusive opportunity theory.”
2. Here is how the prosecution framed its grievances in its brief:

[translation]

[17] Two findings of fact were, in the appellant’s view, based on an absence of evidence and show that the trial judge failed to consider all of that evidence. First **(1)**, the trial judge’s finding as to a continuous path along the east side between the rear patio door and the front door of the residence, and second **(2)** that a distinction had to be made between *virgin snow* and the dog prints. In the appellant’s view, those findings clearly affected the trial judge’s conclusion that there was a reasonable inference to the effect that an unknown third party was able to enter the residence by the patio door because of the lack of recent snow accumulation. Those findings being essential to the verdict of acquittal, the Court’s intervention is required. Based on the trial judge’s findings, a verdict of second-degree murder should be substituted.

1. As can be seen, the prosecution claims that the judge’s findings, as to the footprints, 1) were not supported by the evidence; 2) were speculative; and 3) did not consider all of the evidence.
2. All those arguments were therefore related to the assumption implying that a third party could have entered the house by the patio door, after having followed the path along the east side of the couple’s house. In the prosecution’s opinion, that assumption was essential to Mr. Fera’s acquittal, because were it to be accepted as reasonable, one could reject the exclusive opportunity theory which suffices, on its own, according to the prosecution, to prove Mr. Fera’s guilt.[[43]](#footnote-43)
3. Essentially, the prosecution disagrees with the judge’s finding that the photos of the snow-covered property were not clear enough to determine the presence or lack of human footprints around the patio. Because the photos did not allow him to draw definite conclusions in that regard, the judge found that the prosecution had failed to exclude the possibility that an unknown third party had entered by the patio door by walking through the snow. In my view, that was the fundamental issue which simply involved an assessment of the evidence, and not a question of law.
4. Although the prosecution’s right of appeal was limited to questions of law only, the prosecution advanced a reinterpretation of the evidence that would have established that Mr. Fera had the exclusive opportunity to murder his wife. However, to do so, the prosecution “finely parsed the trial judge’s reasons in a search for error”[[44]](#footnote-44) and ignored the real substance of the trial judge’s decision.
5. It was at the behest of the prosecution, who relied emphatically on the exclusive opportunity that Mr. Fera purportedly had, that the judge carefully examined that issue. He considered both the entry points to the house and the presence of footsteps in the snow surrounding it.
6. Regarding the entry points, the judge held that the prosecution had failed to prove that all the doors of the house were locked when Mr. Fera left the residence with his daughter on the morning of the murder.[[45]](#footnote-45) After having found that only four of the doors had been locked, the judge focussed on the patio door:

[134] There remains the patio door. As the Court has stated, Agent Bellemare testified that the patio door was locked when he conducted his cursory, summary inspection of the residence. With respect, the Court does not accept that testimony.

[135] To begin with, Mr. Fera was less certain of the status of the patio door as compared to the front door. In a statement, he explained that the youngest daughter was responsible for letting the family dog outside in the morning through the patio door. He assumed that she had locked the door when the dog re-entered the house (exhibit P-6a).

[136] As for Agent Bellemare’s testimony concerning the patio door, the Court finds it unreliable for the following reasons.

[137] First, while he was tasked with checking for signs of forced entry, he has no recollection that there was a door which gave access to the house through the garage and was located on the east side of the house. If he has no recollection of this door, how can he remember checking the patio door 17 years ago?

[138] Second, his powers of observation appeared to be sketchy at best. While stating that he saw no signs of the house having been searched, he admits that he has no recollection of having noted the upturned dresser drawer which was on the bed in the master bedroom. He has no recollection of the presence of a bedside lamp in the bathroom.

[139] Third, Agent Charette testified that he saw his colleague, Sgt. Det. Lacoste, step out of the patio door at 15h30. The crime scene technician Grenier only began filming and taking pictures inside the residence after a search warrant was issued at around 18h30. The Court holds that it is inconceivable that Sgt. Det. Lacoste would have disturbed the crime scene prior to the crime scene technician even beginning his work. He would not have unlocked the patio door to step outside at 15h30 as witnessed by Agent Charette. The patio door must have been unlocked and Agent Bellemare must have been mistaken in his assertion to the contrary.

1. The judge’s finding on the reliability of Agent Bellemare’s testimony was within his discretion regarding testimonial assessment.[[46]](#footnote-46) The prosecution has not identified any error of law that would allow the Court to intervene in regard to the judge’s conclusion that the prosecution had failed to prove that the patio door was locked.
2. The judge then addressed the issue of the footsteps in the snow surrounding the residence and access to the patio door.
3. On that point, the prosecution argues that the judge’s analysis was speculative, given the lack of evidence in support of the implication that an unknown third party purportedly walked in a non-existent path. The prosecution further claims that the amount of snow led the judge to establish speculative distinctions in his assessment of the evidence. The prosecution then proceeds to completely reconstruct the facts, in light of the evidence, seeking to establish that some of the judge’s findings of fact were either inconsistent or else that he failed to consider certain facts.
4. The prosecution is mistaken, as it ignores a fundamental aspect of the judgment rendered.
5. The judge acknowledged the importance of the presence of footsteps in the snow in addressing the issue of exclusive opportunity as argued by the prosecution. However, he concluded that the police investigation was inadequate. Here is how he articulated his finding:

[140] The issue of the presence of snow was also of some importance to the exclusive opportunity theory. It was argued that there were no signs of forced entry into the residence which included the absence of unexplained human footsteps although there had been a recent dusting of snow. The Court is of the opinion that the presence or lack of footsteps was not dealt with adequately during the investigation.

[Emphasis added]

1. He explained his assessment in the following manner:

[141] As the Court has noted (paragr. 57 and 58 of the present judgement), there appeared to be a conflict between the testimony of Mr. Belmonte and certain admissions filed by the parties (exhibit P-3 – re weather on February 12, 2004). While Mr. Belmonte passed by the Fera residence at 07h00 on the morning of February 12th and the crime scene technician’s pictures of the outside of the residence only began at 14h25, the photographic evidence does not support the former’s testimony to the effect it had snowed that morning.

[142] Photos 1 and 13 of exhibit P-14 show dry, snow-free patches in the driveway to the residence. There was no proof that members of the Fera-Panarello family had shoveled that morning or that a snow removal company had passed by. The bare, dry patches could not have been produced through melting during the day.

[143] Photo 3 of exhibit P-14 reveals that the center of Michel-Gamelin street appears dry and snow-free.

[144] Photos of two cigarette butts found near the residence’s garage door (exhibit P-14, photos 13, 14, 15 and 16) do not reveal a recent snow accumulation. During the Crown’s pleadings, it was submitted that the presence of the cigarette butts, which were linked to the victim and Mr. Fera by DNA analysis, indicated that they had been discarded in the early morning hours of February 12, 2004. The Court believes that conclusion is based upon speculation. An equally valid inference is that the butts had been discarded the night before and there had been no snowfall overnight as per the parties’ admissions.

[145] Finally, the Court does not believe that Madam Zompa’s description of an accumulation of snow on the bottom steps leading to the front door can be relied upon to conclude that it had recently snowed. Besides her distraught state that day, photo 1 of exhibit P-14 does not support this aspect of her testimony.

[146] Turning to the issue of footprints, as the Court has discussed, the proof established that, if one were to exclude the various paths observed in the backyard of the residence (exhibit P-14, photos 5, 6 and 7), there were no footprints observed in the deeper snow (testimony of Agent Simon Charette). This would exclude the possibility that someone had hopped a neighbor’s fence or had crept through the cedar hedge which formed a boundary in the backyard.

[147] As the Court has written, the crime scene technician testified that he saw no human footsteps during his search of the property. Due to the Court’s factual conclusion that there was no recent overnight snowfall, the crime scene technician’s conclusion would not exclude the presence of a third party intruder who entered the residence through an unlocked patio door. As the Court has already mentioned, when the crime scene technician stated that he had left prints in the backyard, he did not indicate whether he was walking in the visible paths as opposed to the virgin snow.

1. He summarized his final conclusion in these terms:

[148] Due to the lack of clear photos, the proof did not establish to the Court’s satisfaction that, due to the lack of recent snow, that footprints would have been visible on the patio door gallery or steps leading up to it; in the paths visible in the backyard; in the path alongside the east side of the residence (exhibit P-14, photos 1, 5, 6, 7, 8, 9, 13 and 14).

[149] As a result of these conclusions, the Court concludes that there is a reasonable possibility available to the effect that an unknown third party committed the crime by entering through an unlocked rear patio door.

[150] While this conclusion could end the Court’s analysis, it has determined that there are many other aspects of the proof which undermine the prosecution’s theory.

1. According to the prosecution, those conclusions lacked an evidentiary basis, were speculative and indicated a piecemeal analysis of the evidence.
2. It is true that reasonable doubt “cannot arise from speculation or conjecture”,[[47]](#footnote-47) because “a reasonable doubt must not be imaginary or frivolous.”[[48]](#footnote-48)
3. However, a reasonable doubt may be “logically connected to the evidence or absence of evidence.”[[49]](#footnote-49) This means that reasonable doubt based upon lack of evidence is not speculative, as Cromwell, J. noted in *Villaroman*:

[36]  I agree with the respondent’s position that a reasonable doubt, or theory alternative to guilt, is not rendered “speculative” by the mere fact that it arises from a lack of evidence.  As stated by this Court in *Lifchus*,a reasonable doubt “is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence”: para. 30 (emphasis added).  A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[Emphasis in the original]

1. That is the essence of the judge’s findings on the prosecution’s failure to prove that Mr. Fera had the exclusive opportunity to murder his wife and the reasonable doubt that arose therefrom.[[50]](#footnote-50)
2. The prosecution’s demonstration is flawed from the outset. The prosecution seeks to show that the trial judge’s acquittal was unreasonable, given the existence of one or several errors in the assessment of the evidence and the inherent contradictions in the judgment. At the risk of repeating myself, such an approach is not open to the prosecution, given that the judge focused on the lack of evidence and evidentiary gaps.
3. Moreover, *J.M.H.*, which discussed the limited scope of the prosecution’s right of appeal, highlighted an important point, i.e., that reasonable doubt is not a finding of fact. In that regard, here are the relevant portions of Cromwell, J.’s observations in that case:

[25]  It has long been recognized that it is an error of law to make a finding of fact for which there is no supporting evidence: *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at p. 604.  It does not follow from this principle, however, that an acquittal can be set aside on the basis that it is not supported by the evidence.  An acquittal (absent some fact or element on which the accused bears the burden of proof) is not a finding of fact but instead a conclusion that the standard of persuasion beyond a reasonable doubt has not been met.  Moreover, as pointed out in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 39, a reasonable doubt is logically derived from the evidence or absence of evidence.  Juries are properly so instructed and told that they may accept some, all or none of a witness’s evidence: *Lifchus*, at paras. 30 and 36; Canadian Judicial Council, Model Jury Instructions, Part III, Final Instructions, 9.4 Assessment of Evidence (online).

[26] The principle that it is an error of law to make a finding of fact for which there is no supporting evidence **does not, in general, apply to a decision to acquit based on a reasonable doubt**.  As Binnie J. put it in *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, at para. 22:

A major difference between the position of the Crown and the accused in a criminal trial, of course, is that the accused benefits from the presumption of innocence. […] [W]hereas a conviction requires the prosecution to establish each of the factual elements of the offence beyond a reasonable doubt, no such requirement applies to an acquittal which, unlike a conviction, can rest simply on the absence of proof. [Emphasis deleted.]

[27] The point was expressed very clearly in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 33: “. . . as a matter of law, the concept of ‘unreasonable acquittal’ is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt.”

[Emphasis added]

1. The judge’s conclusion was grounded in his assessment of the evidence, as to both the points of entry and the footsteps in the snow surrounding the house. The judge’s finding on the inadequacy of the police investigation was determinative and inescapable. Such a finding could ground a reasonable doubt as to the guilt of an accused.[[51]](#footnote-51)
2. Moreover, the opinion expressed by the judge regarding the clarity of the photos was within his exclusive province and I agree with his conclusion. Of course, other judges could have drawn a different conclusion but, as we know, that is beside the point.
3. Finally, as Moldaver, J. explained in *Walle*,[[52]](#footnote-52)it should not be presumed that the judge failed to consider all the evidence unless the reasons for judgment suggest otherwise:

[46] I would not give effect to this submission. The appellant’s chief complaint is that the trial judge failed to consider all the evidence relevant to intent before deciding on that issue. A failure of a judge to consider all the evidence relating to an ultimate issue of guilt or innocence constitutes an error of law: *R. v. Morin*, [1992] 3 S.C.R. 286, at p. 296; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 31-32. However, as Sopinka J. made clear in *Morin*, there is “no obligation in law on a trial judge to record all or any specific part of the process of deliberation on the facts”, and “unless the reasons demonstrate that [a consideration of all the evidence in relation to the ultimate issue] was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was error in law in this respect” (p. 296). I see no failure to consider all the relevant evidence in this case.

1. I see nothing in the judgment that leads to believe that the judge failed to consider all the evidence.
2. The prosecution’s first ground therefore fails.

### **c) Did the judge err by approaching the various items of evidence in a piecemeal fashion?**

1. It is trite law to say that the assessment of the evidence is generally a question of fact or a question of mixed fact and law. As I noted earlier, certain errors related to the assessment of the evidence may constitute errors of law.
2. According to *J.M.H.*, a piecemeal approach or a “silo” assessment of the evidence constitutes an error of law, given that the judge must ultimately determine if the evidence, as a whole, establishes the accused’s guilt beyond a reasonable doubt.[[53]](#footnote-53)
3. That being said, it should be recalled however that judges do not have to review each and every piece of evidence and they do not err by failing to address evidence that has but little probative value or that relates only to peripheral issues.[[54]](#footnote-54)
4. The prosecution claims that the trial judge adopted a piecemeal approach in assessing the evidence and that this was an error of law in the case at bar.
5. In its view, the adoption of such an approach by the trial judge in effect annihilated the cumulative persuasive force of the evidence adduced, whereas all the evidence should have led him to find Mr. Fera guilty. The judge purportedly failed to analyze the evidence as a whole[[55]](#footnote-55) and assessed it in a piecemeal fashion.
6. The prosecution criticizes the trial judge for stating, at paragraph 149 of his reasons, that, given his conclusion on the absence of exclusive opportunity, he could be justified in ending his analysis. The purportedly problematic passage is as follows:

[149] As a result of these conclusions, the Court concludes that there is a reasonable possibility available to the effect that an unknown third party committed the crime by entering through an unlocked rear patio door.

[150] While this conclusion could end the Court’s analysis, it has determined that there are many other aspects of the proof which undermine the prosecution’s theory.

1. While the prosecution claims that the judge [translation] “adopted instead a piecemeal approach that is apparent in the very form of his reasons”, it can hardly fault the judge for having failed to consider all the evidence given the latter’s explanation that other items of evidence undermined the prosecution’s theory. It seems to me that that remark undoubtedly shows that the judge considered all the evidence.
2. Moreover, the judge’s final conclusion indicates that he considered all the evidence in determining that a reasonable doubt existed:

[165] To summarize, the prosecution has not proven beyond a reasonable doubt that Mr. Fera killed Nadia Panarello on February 12, 2004. The reasonable doubt arises from a combination of the following factors:

1.   the failure to prove exclusive opportunity;

2.   an inadequate proposed motive;

3.   the lack of physical evidence linking the accused to the crime;

4.   the demeanor evidence of the accused which is consistent with innocence;

5.   the gap in the narrative evidence.

[166] While the Court has not referred to them specifically, it did consider the prosecution’s invitation to draw negative inferences against Mr. Fera due to various facts, notably:

• that the assailant chose to use a towel hidden behind the daughters’ bathroom door (exhibit P-14, photo 71). The prosecution suggested Mr. Fera would know the towel was there while a stranger would not;

• that Mr. Fera did not look in the ambulance when he first arrived on the scene at 1630, Michel-Gamelin. The prosecution argued he would not have looked because he knew Nadia was dead, having killed her;

• when he leapt over his desk at work as described by Guylaine Nadeau, this was all staged by Mr. Fera to feign concern.

[167] With respect, these submissions were speculative and fanciful and did not cause the Court to alter its analysis.

1. The factors considered by the judge in his conclusion were all relevant and were within the ambit of the trial judge’s assessment of the evidence. The first two have been discussed in the analysis of the first ground. The others, i.e., the lack of physical evidence linking the accused to his wife’s murder, Mr. Fera’s demeanour following his wife’s murder, which was consistent with his innocence,[[56]](#footnote-56) and the absence of the couple’s youngest daughter’s testimony[[57]](#footnote-57) added to the reasons that grounded the reasonable doubt that the judge entertained as to Mr. Fera’s guilt.
2. In addition, as regards the narrow time frame, the prosecution claims that [translation] “it is difficult to argue that the respondent did not have the opportunity to commit the crime when a third party would have had 10 minutes to act.”
3. Upon a reading of the judgment, the argument raised is unfounded. The judge did not find that Mr. Fera did not have the opportunity to kill his wife, but simply that that opportunity was not exclusive, which raised a reasonable doubt in his mind.[[58]](#footnote-58) Such a finding was consistent with applicable law.
4. Indeed, the circumstances surrounding an accused’s opportunity to commit an offence will vary on a case-by-case basis. Evidence of a mere opportunity will not suffice to support a finding of guilt beyond a reasonable doubt, although it could satisfy that burden upon consideration of other circumstantial evidence. However, evidence of exclusive opportunity can establish an accused’s guilt beyond a reasonable doubt.[[59]](#footnote-59)
5. Next, the prosecution faults the trial judge for having found that [translation] “there was a lack of evidence of motive.” The judge did not find that there was no evidence of a financial motive. He determined, rather, that “[a] close examination of the proof presented to prove a financial motive reveals an extremely weak foundation.”[[60]](#footnote-60) However, an appellate court cannot intervene simply because it would have made a different assessment of the probative value of evidence of motive.[[61]](#footnote-61) This argument must also fail.
6. Finally, the prosecution suggests that the trial judge made an error similar to that alleged in *Rudge*.[[62]](#footnote-62) In that case, the Court of appeal for Ontario held that the trial judge had erred by approaching the evidence in a piecemeal fashion. Epstein, J.A., writing on behalf of the Court, noted:

[T]he errors here arise from the trial judge’s departure from the legally correct approach to the evidence that bears upon the ultimate question of guilt: *H. (J.M.)*, at para. 31; *B. (G.)*, at paras. 31-39. The strength of the Crown's case lay in the persuasive effect of the totality of the evidence, but the trial judge never considered whether the doubt he amassed, looking separately at Rudge’s response to each part of the Crown’s case, would survive an examination of those explanations considered in the context of the Crown’s case as a whole[[63]](#footnote-63).

1. According to the prosecution, the judge made a similar error by analyzing each item of evidence in isolation and not as whole. A global analysis of the evidence would have inevitably led the judge to find Mr. Fera guilty, since that was the only reasonable inference.
2. I have already indicated why a reading of the judgment does not show that the judge assessed the evidence in a piecemeal fashion. I nevertheless continue the assessment of the arguments presented.
3. The prosecution highlights the following items of evidence in particular: 1) only one drawer had been taken out of the dresser; 2) other searches had not been conducted elsewhere in the house; 3) the victim had not sustained defensive wounds at the beginning of the altercation; 4) the bedroom door was closed; 5) the murderer would have washed his hands in another bathroom; 6) the knife in the dishwasher matched the type of weapon used; and 7) the attack was especially brutal, even though the victim did not have any known enemies.
4. According to the prosecution, the above items of evidence, assessed with the surrounding evidence, could have and should have let to a guilty verdict.
5. That is not the role of an appellate court. I reject the prosecution’s invitation to re-evaluate the evidence, which is in the same vein as that suggested by the first ground of appeal.

#### Did the judge err by blaming the prosecution for not having led otherwise inadmissible bad character evidence?

1. I will consider and deal with this ground briefly. The prosecution faults the judge for having imposed an additional evidentiary burden on it, i.e, to prove Mr. Fera’s bad character.
2. That error was all the more serious, it submits, given that such evidence is presumptively inadmissible. Indeed, as Mr. Fera had not sought to invoke his good reputation or lead evidence of his good character, the prosecution could not adduce evidence of his bad character.
3. In his judgment, Brunton, J. noted the following:

[I]t makes no sense that Mr. Fera decided that his plan B, having failed to secure a loan from Mr. Trudel, was to kill his wife. The proof reveals that there was enough remaining equity in the family residence to pay off all of the family’s and Mr. Fera’s debts and to have a tidy lump sum available to make a down payment to purchase a new home. It makes no sense that a man who, according to the proof, was in an ordinary, loving marriage wherein there was no evidence of arguments or violence, would suddenly viciously murder his wife. There was no evidence to explain the cruelty which Mr. Fera would have had to have exhibited by staging the discovery of Nadia by her 70-year old mother.[[64]](#footnote-64)

1. In my opinion, the judge did not reproach the prosecution for failing to prove Mr. Fera’s bad character. Rather, he considered as being improbable the theory of guilt in light of the circumstances disclosed by the evidence led at trial.
2. In a criminal trial, the probability or plausibility of testimony or even of the case presented by the prosecution constitutes a factor that can be assessed by the judge.[[65]](#footnote-65)
3. In the case at bar, the judge’s findings were based on a rational analysis of the evidence and common sense, which calls for deference where these do not disclose any palpable and overriding errors. In any event, such errors cannot be invoked on appeal by the prosecution, although “a trial judge’s use of common sense will be vulnerable to appellate review because it discloses recognized errors of law.”[[66]](#footnote-66) Because I do not detect any such error in this case, this ground must also fail.
4. The judge was entitled to find, in light of the evidence heard, that it was implausible that Mr. Fera committed the crime in the manner proposed by the prosecution.
5. For all these reasons, I would dismiss the appeal.

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| GUY COURNOYER, J.A. |

1. *R. c. Fera*, 2021 QCCS 5209. [↑](#footnote-ref-1)
2. *R. c. Fera*, 2021 QCCS 5209, paras. 2-3. [↑](#footnote-ref-2)
3. *Id.*, para. 4. [↑](#footnote-ref-3)
4. *Id.*, para. 6. [↑](#footnote-ref-4)
5. *R. c. Fera*, 2021 QCCS 5209*.*, para. 10. [↑](#footnote-ref-5)
6. *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, para. 30. [↑](#footnote-ref-6)
7. *R. c. Fera*, 2021 QCCS 5209, paras. 16-17. [↑](#footnote-ref-7)
8. *Id.*, para. 29. [↑](#footnote-ref-8)
9. *Id.*, para. 24. [↑](#footnote-ref-9)
10. *Id.*, para. 21, 25. [↑](#footnote-ref-10)
11. *Id.*, para. 33. [↑](#footnote-ref-11)
12. *Id.*, para. 34; Exhibit I-1, paras. 39-41. [↑](#footnote-ref-12)
13. *Id.*, para. 34, 153; Exhibit I-1, paras. 42-44. [↑](#footnote-ref-13)
14. *Id.*, para. 34; Exhibit I-1, paras. 45-46. [↑](#footnote-ref-14)
15. *Id.*, paras. 35-36, 154. [↑](#footnote-ref-15)
16. *R. c. Fera*, 2021 QCCS 5209, paras. 38-48. [↑](#footnote-ref-16)
17. *Id.*, paras. 56-62. [↑](#footnote-ref-17)
18. *Id.*, para. 82. [↑](#footnote-ref-18)
19. *R. c. Fera*, 2021 QCCS 5209, paras. 64-68. [↑](#footnote-ref-19)
20. *Id.*, para. 84. [↑](#footnote-ref-20)
21. *Id.*, para. 85. [↑](#footnote-ref-21)
22. *Id.*, paras. 86-88. [↑](#footnote-ref-22)
23. *R. c. Fera*, 2021 QCCS 5209, paras. 72-76. [↑](#footnote-ref-23)
24. *Id.*, paras. 77-79. [↑](#footnote-ref-24)
25. *Id.*, paras. 89-92. [↑](#footnote-ref-25)
26. *Id.*, paras. 96-100. [↑](#footnote-ref-26)
27. *R. c. Fera*, 2021 QCCS 5209, paras. 101-102. [↑](#footnote-ref-27)
28. *Id.*, paras. 103-111. [↑](#footnote-ref-28)
29. *Id.*, paras. 112-117. [↑](#footnote-ref-29)
30. *Id.*, paras. 118-119. [↑](#footnote-ref-30)
31. *Id.*, paras. 119-122. [↑](#footnote-ref-31)
32. *R. c. Fera*, 2021 QCCS 5209, paras. 123-126. [↑](#footnote-ref-32)
33. *Id.*, paras. 140-150. [↑](#footnote-ref-33)
34. *R. c. Fera*, 2021 QCCS 5209, paras. 151-155. [↑](#footnote-ref-34)
35. *Id.*, para. 156. [↑](#footnote-ref-35)
36. *Id.*, paras. 157-158. [↑](#footnote-ref-36)
37. *Id.*, paras. 159-164. [↑](#footnote-ref-37)
38. *R. c. Fera*, 2021 QCCS 5209, para. 165. [↑](#footnote-ref-38)
39. *R. v. Hodgson*, 2024 SCC 25, paras. 21-22. See also the Court’s recent decision in *R. c. Spezzano*, 2024 QCCA 714. [↑](#footnote-ref-39)
40. *R. v. Hodgson*, 2024 SCC 25, paras. 32-33. [↑](#footnote-ref-40)
41. *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, para. 24, cited in *R. v. Hodgson*, 2024 SCC 25, para. 34. [↑](#footnote-ref-41)
42. *R. v. Hodgson*, 2024 SCC 25, para. 36; *R. v. Cowan*, 2021 SCC 45, [2021] 3 S.C.R. 323, para. 46; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, para. 135; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, para. 14. [↑](#footnote-ref-42)
43. *R. c. Fera*, 2021 QCCS 5209, para. 127. [↑](#footnote-ref-43)
44. *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, para. 69; *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405, para. 33; *S.J. c. R.*, 2024 QCCA 253, para. 144. [↑](#footnote-ref-44)
45. *R. c. Fera*, 2021 QCCS 5209, para. 128. [↑](#footnote-ref-45)
46. *R. v. Kruk*, 2024 SCC 7, paras. 81-83. [↑](#footnote-ref-46)
47. *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, para. 50. [↑](#footnote-ref-47)
48. *Ibid.*, citing *R. v. Lifchus*, [1997] 3 S.C.R. 320, para. 31. [↑](#footnote-ref-48)
49. *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, para. 28, citing *Lifchus*, para. 36. [↑](#footnote-ref-49)
50. *R. c. Fera*, 2021 QCCS 5209, paras. 149, 165. [↑](#footnote-ref-50)
51. In *McWilliams’ Criminal Canadian Evidence*, 5th ed., Thomson Reuters, 2022 (Release 2024-3, July 2024), § 9:20, Hill, Tanovich and Strezos make the following comments on the issue of inadequate police investigation: “An accused may allege that the investigation conducted by the police was inadequate and thereby seek to raise a reasonable doubt about the existence of other non-indicted individuals who committed the offence and not the accused” (§ 9:20). See also David Watt, *Watt’s Manual of Criminal Jury Instructions*, 3rd ed., Thomson Reuters, 2023, pp. 1225-1227; *R. v. Dhillon* (2002), 166 C.C.C. (3d) 262 (Ont. C.A.); *R. v. Mallory*, 2007 ONCA 46; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716. [↑](#footnote-ref-51)
52. *R. v. Walle*, 2012 SCC 41, [2012] 2 S.C.R. 438. [↑](#footnote-ref-52)
53. *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, paras. 31-32. [↑](#footnote-ref-53)
54. *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, para. 56. [↑](#footnote-ref-54)
55. *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *R. c. Leblanc*, 2021 QCCA 1283, paras. 159-161, 175-181; *R. v. Rudge*, 2011 ONCA 791, paras. 65-69, leave to appeal denied [2012] 2 S.C.R. ix. [↑](#footnote-ref-55)
56. Evidence of the accused’s after-the-fact conduct may support an inference of innocence: *R. v. B.(S.C.)* (1997), 119 C.C.C. (3d) 530 (Ont. C.A.), paras. 34-37; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, para. 161 (Bastarache J., dissenting but not on this point). In “Simply Complex: Applying the Law of ‘Post‑Offence Conduct’ Evidence” (2016), 63 C.L.Q. 275, Paciocco explains the rationale behind the relevance of such evidence and the inferences that can be drawn from it: “Post-conduct evidence by accused persons can even be admitted as ‘consciousness of innocence’ evidence, by showing that the accused person acted as an innocent person would” (p. 290). [↑](#footnote-ref-56)
57. Failure to tender a witness may leave a gap in the prosecution’s case such as to raise a reasonable doubt as to the accused’s guilt: *R. v. Yebes*, [1987] 2 S.C.R. 168, pp. 190-191; *R. v. Cook*, [1997] 1 S.C.R. 1113, paras. 30-31. [↑](#footnote-ref-57)
58. *R. c. Fera*, 2021 QCCS 5209, paras. 149, 165. [↑](#footnote-ref-58)
59. *R. v. Doodnaught*, 2017 ONCA 781, paras. 66-70; *Dion c. R.*, 2010 QCCA 941, paras. 56-58; Matthew Gourlay *et al.*, *Modern Criminal Evidence*, Emond, 2021, pp. 168-169; S. Casey Hill, David M. Tanovich & Louis P. Strezos, *McWilliams’ Criminal Canadian Evidence*, 5th ed., Thomson Reuters, 2022 (loose-leaf, Update 2024-3, July 2024), § 31:41; Eugene G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, 3re ed., Thomson Reuters, 2022 (loose-leaf, release No. 6, August 2024), § 16:688. [↑](#footnote-ref-59)
60. *R. c. Fera*, 2021 QCCS 5209, para. 151. [↑](#footnote-ref-60)
61. *R. v. Turner*, 2023 MBCA 40, para. 46. [↑](#footnote-ref-61)
62. *R. v. Rudge*, 2011 ONCA 791, leave to appeal denied [2012] 2 S.C.R. ix. [↑](#footnote-ref-62)
63. *Id.*, para. 65. [↑](#footnote-ref-63)
64. *R. c. Fera*, 2021 QCCS 5209, para. 153. [↑](#footnote-ref-64)
65. *R. v. Kruk*, 2024 SCC 7, para. 81, footnote 4; *R. v. Schneider*, 2022 SCC 34, para. 63 *in fine*; *S.J. c. R.*, 2024 QCCA 253, para. 193; *Foomani c. R.*, 2023 QCCA 232, para. 73; David M. Paciocco, “Doubt about Doubt: Coping with *R. v. W.(D.)* and Credibility Assessment” (2017), 22 Can. Crim. L. Rev. 31, p. 65. [↑](#footnote-ref-65)
66. *R. v. Kruk*, 2024 SCC 7, para. 3. [↑](#footnote-ref-66)