S.C.C. File No. 38483

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

-and-

J.M.

Respondent
(Appellant)

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PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

A. Overview of Position

1. This is a Crown appeal as of right based on the dissenting judgment of Huscroft J.A. of the Court of Appeal for Ontario. It raises two questions, both related to the respondent's after-the-fact conduct: (i) Did the trial judge have the necessary factual foundation to determine the admissibility of the respondent's after-the-fact conduct? (ii) Was the trial judge required to provide a specific alternative explanation within the same portion of his charge that addressed the after-the-fact conduct?

2. The majority of the Court of Appeal (Norheimer and MacPherson JJ.A.) held that the trial judge did not have the necessary factual foundation to determine admissibility and that he provided insufficient instructions to the jury. Huscroft J.A., dissenting, disagreed on both grounds.

3. On December 22, 2016, a jury found the respondent guilty of two counts of sexual assault. The allegations were that the respondent had repeatedly sexually assaulted his step-sister and sexually assaulted her friend once. It was the third time this trial was scheduled to be heard. The respondent failed to attend his first trial scheduled for May 25, 2015. His next trial resulted in a hung jury on July 26, 2016. He was convicted at the third trial which is the subject matter of this appeal.

4. During the trial, the vast majority of the evidence came from the testimony of the two complainants. There was also some confirmatory narrative evidence and the Crown adduced evidence that the respondent had failed to attend his first trial.

5. The Crown brought an application to admit the evidence and a *voir dire* was conducted prior to the trial. The Crown provided an application record to provide a factual foundation to establish admissibility. The application record established that the respondent had been aware of his trial date and his duty to attend. He had lost contact with his lawyer. He was illegally at large and did not return to face his charges until he was arrested on unrelated matters. He had eluded the authorities for over a year.

6. The respondent's trial counsel did not file any material in response. Instead he argued that the respondent should be permitted to provide *viva voce* evidence. He informed the trial judge that the respondent would testify that he failed to attend because of his surety revoking and just being in emotional and financial dire straits.

7. The trial judge did not allow the respondent to testify. He found that failing to attend court was relevant evidence and that the respondent's alternative explanation was something for the jury to consider.

8. The Crown called the evidence of after-the-fact conduct at trial and the respondent did not testify. The trial judge provided a mid-trial and final caution to the jury regarding how to evaluate evidence of after-the-fact conduct. In both cautions, he instructed the jury to only use the evidence of after-the-fact conduct to support an inference of guilt if they had rejected any other explanation for the conduct. In his final charge to the jury, the trial judge provided a summary of the positions of both Crown and defence. Within those summaries, he provided the Crown's theory (that the respondent had evaded prosecution) and the defence theory (that the respondent did not attend his trial because his surety revoked bail and he wanted to avoid the possibility of pre-sentence custody).

9. The majority of the Court of Appeal for Ontario found that to determine admissibility, the trial judge was required to consider the *viva voce* evidence of the respondent or a summary of the evidence from counsel. They also found that the trial judge only considered relevance and did not weigh the probative value and prejudicial effect of the evidence. Additionally, they found that the trial judge's instruction did not provide any assistance to the jury because the trial judge did not include the specific alternative explanation within his caution on after-the-fact conduct.

10. In dissent, Huscroft J.A. found that there was no reason for the trial judge to hear evidence from the respondent at the *voir dire*. His testimony could not have rendered the after-the-fact conduct inadmissible; it could only have suggested another reasonable inference for the jury to consider. Huscroft J.A. found that the jury was properly charged. What the trial judge said mattered. It did not matter where in his instructions he said it.

B. Statement of Facts

(a) The Sexual Assaults

11. The respondent and T.L. first met when he was in his early 20s and she was 7 or 8 years old. They were related through their parents' common law relationship and were frequently together at family gatherings. They often slept in the same home.

> *Transcript of Proceedings at Trial dated 15 December 2016: Evidence of T.L.*, Appellant's Record [hereinafter cited as AR] Vol. VI, Tab 36 at pp. 55, 57

12. T.L. testified that the respondent had sexually assaulted her on a regular basis. All of the sexual assaults occurred during family gatherings at a family member's home. The respondent first sexually assaulted T.L. when she was 9 years old. The assault involved inappropriate touching of her vaginal area. The second sexual assault occurred when she was 11 years old and involved sexual intercourse. T.L. estimated that between the age of 11 and 13, the respondent had sexually assaulted her approximately 80 times. The assaults included vaginal, oral, and anal sex. On most occasions T.L. was compliant with the respondent's sexual demands as she was infatuated with him and believed they were in a loving relationship.

> *Transcript of Proceedings at Trial dated 15 December 2016: Evidence of T.L.*, AR Vol. VI, Tab 36 at pp. 112-120, 123, 127-133

13. On December 14, 2012, B.R. was interviewed by police on video. T.L. and B.R. were school friends. When they were 12 or 13 years old, B.R. slept over at T.L.'s house. During the sleep-over, the respondent sexually assaulted both girls through contact that included digital penetration of their vaginas on a couch in the basement. The respondent then continued the assault in T.L.'s bed through contact that included oral sex performed on B.R. Soon after the assaults, B.R. and T.L.'s friendship ceased.

> *R. v. J.M.*, 2017 ONSC 1803 AR Vol. I, Tab 1 at pp. 2-4**,** paras. 13-14 and 23
> *Transcript of Proceedings at Trial dated 16 December 2016: Evidence of T.L.*, AR Vol. VII, Tab 37 at pp. 16-17, 28, 34-38
> *Transcript of Proceedings at Trial dated 19 December 2016: Evidence of B.R.*, AR Vol. VIII, Tab 38 at pp. 80-82, 103-104

14. On March 23, 2017, the trial judge sentenced the respondent. He credited the respondent with 350 days of pre-sentence custody and gave him an additional sentence of 5 years and 6 months. The jury had convicted the respondent of the two counts of sexual assault on the indictment. At the sentencing hearing, the trial judge found beyond a reasonable doubt, that most if not all of the allegations of both complainants were true. He made no reference to the respondent's failure to attend his first trial in reaching this conclusion.

> *R. v. J.M.*, 2017 ONSC 1803 AR Vol. I, Tab 1 at pp. 3, 5, 8, paras. 20-21, 29, 45-47

15. The trial judge noted that B.R. did not disclose the sexual assault in the bed until the first trial had commenced. However, he accepted that her late disclosure was due to immaturity and embarrassment. B.R. was 19 at trial and 13 when she spoke to the police. She had matured and was not prone to exaggeration.

> *R. v. J.M.*, 2017 ONSC 1803 AR Vol. I, Tab 1 at pp. 3-4, paras. 15, 17, 23
> *Transcript of Proceedings at Trial dated 19 December 2016: Evidence of B.R.*, AR Vol. VIII, Tab 38 at pp. 71, 80, 83-85

16. The trial judge also found T.L.'s evidence substantially true. He found that she was consistent, patient, and not evasive. Initially, she did not want to disclose the sexual abuse. She was conflicted when interviewed by the police, but her answers sounded authentic. He accepted her evidence. He noted that T.L.'s cousin C.M. had a different recollection of details T.L. disclosed to her years earlier. However, T.L. was consistent and resolute when challenged with C.M.'s different recollection of details.

> *R. v. J.M.*, 2017 ONSC 1803 AR Vol. I, Tab 1 at p. 4, para. 24
> *Transcript of Proceedings at Trial dated 16 December 2016: Evidence of C.M.*, AR Vol. V, Tab 35 at pp. 16-18
> *Transcript of Proceedings at Trial dated 16 December 2016: Evidence of T.L.*, AR Vol. VII, Tab 37 at pp. 79-83

(b) Evidence on the Post-Offence Conduct Application

17. On October 31, 2016, the Crown brought an application to introduce evidence that the respondent failed to attend his first trial. The evidence was introduced through documents within

the Crown's application record. The record contained an affidavit setting out material facts along with transcripts from the respondent's earlier court proceedings. Counsel for the respondent admitted the evidence within the application record. The trial judge was well aware of most of the evidence as he had presided over many of the salient court dates including when the respondent failed to attend for his trial. Respondent's counsel did not provide responding materials and sought to call the respondent to give *viva voce* evidence.

> *Application Record with Respect to the Admissibility of Evidence of "The After the Fact Conduct of the Defendant"*, AR Vol II, Tab 12 at pp. 27-114
> *Transcript of In-Camera Proceedings dated 31 October 2016*, AR Vol IV, Tab 31 at pp. 22, 23

18. Soon after learning of the allegations in October 2012, the Renfrew Ontario Provincial Police (O.P.P.) made numerous attempts to locate the respondent. They contacted the respondent's father and uncle (who was also his employer). On February 8, 2013, the respondent contacted the O.P.P. who informed him of the outstanding warrant for his arrest and asked him to surrender. The respondent advised that he would surrender in a week after he got his affairs in order; however, he did not surrender at that time.

> *Affidavit of Lauren Rock, Assistant Crown Attorney*, AR Vol. II, Tab 12D at p. 10, paras. 4-6

19. On April 2, 2013, the respondent's uncle contacted the O.P.P. and indicated that he and the respondent would travel together and surrender at 8:30 am. On the same day, the O.P.P. spoke to the respondent's girlfriend's father who indicated that the respondent had arrived in Calgary, Alberta a few days earlier. The next day, the O.P.P. spoke with the respondent. He confirmed that he was in Calgary and indicated that he would surrender himself in 2 weeks-time. He was advised that the Crown was considering returning him to Ontario with a warrant for his arrest. The respondent returned to Ontario and turned himself in on April 10, 2013. He was granted bail and ordered to live in Calgary with his girlfriend who was also his surety.

> *Affidavit of Lauren Rock, Assistant Crown Attorney*, AR Vol. II, Tab 12D at pp. 10-11, paras. 7-10

20. The respondent retained Michael Johnston who would eventually represent him at both of his trials. Mr. Johnston received disclosure of the Crown's brief in June 2013. The respondent was present for his preliminary inquiry which occurred on January 22, 2014. He was committed to stand trial on all charges. Ontario Superior Court pre-trial motions were argued on June 3 and 4, 2014 and the rulings were made on July 4, 2014 by James J. the eventual trial judge. Counsel attended these dates without the respondent, pursuant to a designation of counsel. On July 4, 2014, a trial date was set for two-weeks beginning on May 25, 2015.

> *Affidavit of Lauren Rock, Assistant Crown Attorney*, AR Vol. II, Tab 12D at pp. 11-13, paras. 11-16

21. In February 2015, Mr. Johnston brought an application to be removed as solicitor of record. On February 4, 2015, he advised the Crown that the respondent had separated from his girlfriend and was no longer living at the address specified on his recognizance. Counsel could not locate the respondent to serve him with the application to be removed as solicitor of record. The Crown notified the O.P.P. that the respondent might be in violation of his recognizance. Calgary police attended the respondent's girlfriend's address on February 5, 2015 and confirmed that the respondent no longer lived there.

> *Affidavit of Lauren Rock, Assistant Crown Attorney*, AR Vol. II, Tab 12D at pp. 13-14, paras. 17-19

22. On February 18, 2015, Mr. Johnston brought his application to be removed as solicitor of record before James J. At the hearing, Mr. Johnston informed the court that he had entirely lost contact with the respondent. He had sent a letter to the respondent on July 7, 2014 informing the respondent of his trial date and the necessity of attendance. He had a phone conversation with the respondent on the same day and informed him of the trial date and his obligation to attend. Mr. Johnston had no further contact with the respondent despite numerous attempts to contact him by phone, email, and registered mail. Mr. Johnston told the court that he was satisfied that the respondent was aware of the trial date and obligation to attend. He explained that the respondent's surety had revoked bail and that during the process of trying to arrange a new recognizance communication had ceased. The trial judge found that the respondent was

unlawfully at large. Mr. Johnston was discharged as counsel. Mr. Johnston undertook to facilitate communication between the respondent and the Crown if he was able to make contact.

> *Affidavit of Lauren Rock, Assistant Crown Attorney*, AR Vol. II, Tab 12D at pp. 12-13, paras. 21-23
> *Transcript of Proceedings in Superior Court of Justice dated 18 February 2015*, AR Vol. II, Tab 12H at pp. 32, 36, and 41-43

23. On May 25, 2015, the respondent failed to attend his trial and the trial judge ordered a bench warrant for his arrest. A nationwide bench warrant for his arrest was issued. The respondent was subsequently charged with failing to attend court on May 28, 2015.

> *Affidavit of Lauren Rock, Assistant Crown Attorney*, AR Vol. II, Tab 12D at p. 15, paras. 24-26
> *Transcript of Proceedings in Superior Court of Justice dated 25 May 2015*, AR Vol. II, Tab 12I at pp. 49-50

24. In late January 2016, Calgary Police contacted the Renfrew O.P.P. and advised them that the respondent had been arrested on unrelated matters. On February 9, 2016, Detective Constable Joseph Limlaw travelled to Calgary and executed the bench warrant and returned the respondent to Ontario.

> *Affidavit of Lauren Rock, Assistant Crown Attorney*, AR Vol. II, Tab 12D at pp. 15-16, paras. 27-28

25. On August 2, 2016, the respondent pled guilty to failing to attend court contrary to s.145(2)(b) of the *Criminal Code of Canada*. Counsel on behalf of Mr. Johnston, assisted the respondent with the guilty plea. Counsel explicitly informed the court that the respondent was not advancing "any sort of lawful excuse." She indicated that the respondent understood he had a legal obligation to return for his trial and had no justification for not coming back to court. She explained that the respondent had always intended to resolve his failure to attend court charge with a plea. They were simply waiting for the first trial on the sex assault charges to complete before resolving this matter. She further told the court:

> [The Respondent] explains to me, Your Honour, that his girlfriend, who was his surety when she revoked, obviously, under that their relationship, he lost his job

> and his life just sort of fell apart at that point, and unfortunately, he didn't take any steps to get himself back to court when he should have done so, Your Honour.
>
> *Affidavit of Lauren Rock, Assistant Crown Attorney*, AR Vol. II, Tab 12D at pp. 16-17, paras. 29-31
> *Transcript Sentencing Hearing of 2 August 2016*, AR Vol. II, Tab 12L at pp. 59-60; 64, ll. 5-12; 65-66; 70

(c) The After-the-fact Conduct *Voir Dire*

26. The *voir dire* to determine the admissibility of evidence that the respondent had failed to attend his first trial was held on October 31, 2016.

27. Counsel for the respondent sought to have the respondent provide *viva voce* evidence on the *voir dire*. He explained that the respondent would testify that he "failed to appear at his trial because of his surety revoking [and] just being in an emotional and financial dire straits". Counsel suggested that the respondent's evidence could amplify this explanation. He argued that this testimony would make the probative value of the evidence tenuous. In support of this argument he informed the Court that the Crown was prepared to admit that the respondent's girlfriend had removed herself as surety.

> *Transcript of In-Camera Proceedings dated 31 October 2016*, AR Vol. IV, Tab 31 at p. 34, ll. 24-26; p. 53

28. On the same day, the trial judge ruled that the respondent would not be permitted to testify. He found that failing to attend court was relevant evidence and the respondent's alternative explanation was something for the jury to consider. He noted that once after-the-fact conduct is deemed relevant, it is generally admissible and it is left to the jury to decide the weight and conclusions. He resolved to provide a caution to the jury to ensure they would not misuse the evidence.

> *Transcript of In-Camera Proceedings dated 31 October 2016*, AR Vol. IV, Tab 31 at p. 67 l. 21 – p. 71, l. 21

29. On November 23, 2016, the trial judge ruled that the evidence that the respondent had failed to attend his trial was admissible. He found that relevance and probative value had to be assessed on a case-by-case basis. He reviewed the evidence from the *voir dire* and determined

that in the context, it was for the jury to make an evaluation after hearing the evidence, an explanation from the respondent, if any, and a cautionary instruction which he would provide.

> *Transcript of Proceedings at Trial dated 23 November 2016,* AR Vol. IV, Tab 32 at p. 126, l. 6 – p. 131, l. 5

(d) Evidence of Post-Offence Conduct at Trial

(i) Provincial Constable Juliana Desjardins

30. At the trial, counsel for the respondent first elicited evidence of after-the-fact conduct during his cross-examination of the investigating officer, Juliana Desjardins. Officer Desjardins testified that the original arrest warrant for the respondent was issued on January 3, 2013. The respondent flew back from Calgary and surrendered himself on April 9, 2013. He had a bail hearing the next day and was released on a surety recognizance that included a term that he live at a specified address with his surety in Calgary. The respondent attended his preliminary inquiry on January 22, 2014 and failed to attend his trial on May 25, 2015. After counsel showed her the warrant of committal, Officer Desjardins confirmed that the document indicated that his surety had revoked her bail in August 2014. Counsel asked if she was aware that the respondent had lived in his car for many months during that time. Officer Desjardins did not know where the respondent lived after his surety revoked bail.

> *Transcript of Proceedings at Trial dated 13 December 2016: Testimony of P.C. Desjardins,* AR Vol. V, Tab 34 at pp. 81-85
> *Exhibit 1 at Trial, Copy of [the respondent's] Recognizance dated April 10, 2013,* AR Vol. III, Tab 15 at pp. 44-47
> *Exhibit 2 at Trial, Copy of Order for Committal (Surety Removal) dated August 21, 2014,* AR Vol. III, Tab 16 at pp. 48-49

31. In re-examination, Officer Desjardins testified that after the respondent was charged, the police made numerous attempts to locate him including contacting family members. Eventually the respondent contacted police and indicated he would surrender himself. However, he did not surrender on the agreed upon date. Instead, the police learned that he had moved to Alberta. He surrendered to the OPP approximately one month later.

> *Transcript of Proceedings at Trial dated 13 December 2016: Testimony of P.C. Desjardins,* AR Vol. V, Tab 34 at p. 95

(ii) Assistant Crown Attorney Teresa Marie James

32. Ms. James was the Assistant Crown Attorney originally assigned to prosecute the respondent's matter. She conducted the preliminary inquiry for the Crown on January 22, 2014. The respondent was in attendance for the preliminary inquiry. She testified that the respondent failed to attend his trial on May 25, 2015 and a bench warrant was issued for his arrest. In August 2014, she learned from the respondent's trial counsel that his surety had revoked bail. They discussed the issue of the respondent's recognizance and she invited counsel to provide details of a plan and she would consider it. She would certainly consider a substitution of surety.

Transcript of Proceedings at Trial dated 13 December 2016: Testimony of Teresa James, AR Vol. V, Tab 34 at pp. 98, 101-105

(iii) Detective Constable James Limlaw

33. Officer Limlaw is an O.P.P. officer who worked out of the Renfrew Detachment. He testified that in January of 2016, he received information that the respondent had been arrested by the Calgary police. There was a warrant for his arrest outstanding in the Renfrew OPP Detachment. Accordingly, on February 9, 2016, he and another officer flew to Calgary to arrest the respondent and bring him back to Ontario to answer to the charges before the court.

Transcript of Proceedings at Trial dated 14 December 2016: Testimony of Officer Limlaw, AR Vol. V, Tab 35 at pp. 121-122

(e) Cautionary Instructions and Submissions on After-the-Fact Conduct

34. At the start of the second day of evidence, December 14, 2016, the trial judge indicated that he would provide a mid-trial caution on after-the-fact conduct. He proposed issuing the caution immediately after Officer Limlaw's evidence as he would be testifying to after-the-fact conduct. The trial judge indicated that he would provide an abridged version of the Watt's manual instruction. He explained that since there was no indication as to whether defence would provide an explanation for the conduct he would leave out the corresponding section.

Transcript of Proceedings at Trial dated 13 December 2016, AR Vol. V, Tab 34 at pp. 110-111
Transcript of Proceedings at Trial dated 14 December 2016, AR Vol. V, Tab 35 at p. 115; p. 116, ll. 4-7.

> Watt, David. "Final 27-A Post-Offence Conduct (General Instruction)", *Watt's Manual of Criminal Jury Instructions*, 2nd ed (Toronto: Thomson Reuters Canada Ltd., 2015) at pp. 337-343.

35. The trial judge provided the jury with the mid-trial instruction following Officer Limlaw's testimony. It functionally tracked the language in Watt's Manual. He concluded the instruction by indicating:

> As circumstantial evidence, evidence of after-the-fact conduct has only an indirect bearing on the issue of [the respondent's] guilt. You must be careful about inferring that [the respondent] is guilty on the basis of evidence of after-the-fact conduct. Because there might be other explanations for that conduct, something unconnected with his participation in the offence charged. You may use this evidence of after-the-fact conduct along with other evidence to support an inference of guilt only if you had rejected any other explanation for this conduct.
>
> *Transcript of Proceedings at Trial dated 14 December 2016*, AR Vol. V, Tab 35 at p. 122, l. 28 – p. 124, l. 5
> Watt, David. "Final 27-A Post-Offence Conduct (General Instruction)", *Watt's Manual of Criminal Jury Instructions*, 2nd ed (Toronto: Thomson Reuters Canada Ltd., 2015) at pp. 337-343.

36. On December 19, 2016, counsel and the trial judge commenced the first of a two day pre-charge conference. The trial judge indicated that he would rely on his charge from the respondent's last trial with some necessary modifications. The trial judge explained that the after-the-fact conduct instruction would follow Watt's manual's specimen instruction similar to the mid-trial instruction. The trial judge indicated that he would not include the entire instruction as there had been no competing theory put forth by the defence in the evidence at trial.

> *Transcript of Proceedings at Trial dated 19 and 20 December 2016*, AR Vol. IX, Tab 39 at pp. 1,3-4, 6

37. The pre-charge conference continued on December 20th, 2016. During the conference, the respondent's counsel indicated that he wanted the trial judge to provide the jury with an alternate explanation for the respondent's failure to attend his trial. He suggested that there was evidence that the respondent had failed to attend his trial because his surety revoked bail. The trial judge asked counsel to clarify how the revocation led to him not showing up for trial. Counsel explained that the jury could consider that his life was in a state of dire straits such that

he just was not able to attend. He also suggested the respondent may have been concerned about pre-sentence custody. The trial judge indicated he would consider counsel's request. Counsel reiterated the request at the conclusion of the trial judge's charge on December 22, 2016 and the trial judge indicated he would not add the instruction.

> *Transcript of Proceedings at Trial dated 19 and 20 December 2016,* AR Vol. IX, Tab 39 at pp. 85-87
> *Transcript of Charge to the Jury, Submissions of Counsel, Further Charge, and Verdict dated 22 December 2016*, AR Vol. XI, Tab 41 at pp. 59-60

38. On December 21, 2016, both counsel made their final submissions to the jury. Both referenced the after-the-fact conduct in their submissions to the jury. The Crown reviewed the evidence and submitted that it would be reasonable to find that after the respondent heard the evidence of T.L. and B.R. at the preliminary inquiry, "he had no interest in coming back and standing – standing trial." He told the jury that they had to consider all the evidence and decide whether there were other reasonable explanations before they could make use of this evidence.

> *Transcript of Proceedings at Trial dated 21 December 2016,* AR Vol. X, Tab 40 at pp. 78-79; p. 80, l. 7-8

39. The respondent's lawyer submitted that the after the fact conduct added nothing to the Crown's case. He reminded the jury that the respondent had attended court until his surety revoked her bail. He submitted, "[i]s his failure to attend perhaps have something to do with bail and whether he would get bail if he flew back? It's for you to consider." He concluded by indicating that not attending a trial does not mean an accused person is guilty just as attending does not mean that an accused person is innocent.

> *Transcript of Proceedings at Trial dated 21 December 2016,* AR Vol. X, Tab 40 at pp. 128-129; p. 130, ll. 26-29

40. On December 22, 2016, the trial judge delivered his final charge to the jury. The trial judge provided a second caution on the appropriate use of after-the-fact conduct within his final charge. Once again, he specified that the jury could only use the evidence of after-the-fact conduct with other evidence to support an inference of guilt if they had rejected any other explanation for the conduct. He then added:

> On the other hand, if you find that [the respondent's] failure to return to Ontario for his trial was related to the commission of the offences charged, not to something else, you may consider this evidence, together with all the other evidence in reaching your verdict.
>
> *Transcript of Proceedings at Trial dated 21 December 2016*, AR Vol. XI, Tab 41 at pp. 18, l. 32 – p. 20, l. 11

41. Later in the charge, the trial judge informed the jury of the specific inferences sought by each party and the evidence in support of those inferences. The Crown's position was that the failure to attend trial provided a circumstantial inference of guilt.

> *Transcript of Proceedings at Trial dated 21 December 2016*, AR Vol. XI, Tab 41 at pp. 49-50

42. Concerning the defence position, the trial judge stated:

> Finally, the after-the-fact conduct: [the respondent] always attended for court when he had a surety. His surety was revoked on August 21st, 2014. Exhibit two is a copy of the order for [the respondent's] committal because of that surety revocation. [The respondent] was subject to arrest from August 21st, 2014 onward. Had he attended at the original trial date of May 25th, 2015, he was subject to being arrested on the spot. You may find that [the respondent's] failure to attend his original trial date is explained by his not wanting to be arrested and committed to custody while allegations to which he has always pled not guilty remained before the court.
>
> *Transcript of Proceedings at Trial dated 21 December 2016*, AR Vol. XI, Tab 41 at p. 154, l. 21 – p. 155, l. 2

43. Following the charge, the jury was provided with paper copies to assist with their deliberations. The charge contains the trial judge's caution on after-the-fact conduct and his summaries of counsels' respective positions.

> *Exhibit N at Trial, Charge to the Jury as given to the Jury*, AR Vol. XI, Tab 41 at pp. 154-155, 173-174, and 176
> *Transcript of Proceedings at Trial dated 21 December 2016*, AR Vol. XI, Tab 41 at p. 104

PART II – QUESTIONS IN ISSUE

44. This appeal as of right by the Attorney General for Ontario raises the following two questions of law:

(1) Did the trial judge err in admitting the evidence that the respondent failed to attend his first trial?

45. The Crown submits that the trial judge had the necessary factual foundation to determine admissibility. Failing to attend trial is a paradigmatic example of an attempt to evade prosecution which can support an inference of guilt. The respondent's counsel told the trial judge that he failed to attend court because his surety had revoked bail and he was in dire straits. At most, further evidence from the respondent on this issue could have provided another reasonable inference. Circumstantial evidence is not excluded from the jury on that basis. Rather, it is for the jury to determine whether an inference is drawn and what weight to accord a piece of circumstantial evidence.

(2) Was the trial judge's caution to the jury about the appropriate use of after-the-fact conduct adequate?

46. The Crown submits that the trial judge properly instructed the jury on how to evaluate after-the-fact conduct evidence. A caution on after the fact conduct must tell the jury to take into account alternative explanations. The trial judge told the jury they could only use after-the-fact conduct to support an inference of guilt if they had rejected any other explanation for the conduct. The trial judge alerted the jury to the respondent's specific alternative explanation. The fact that he did not provide the alternative explanation directly following the after-the-fact conduct instruction was not a legal error. Appellate courts must take a functional approach to assess the adequacy of jury instructions.

PART III – STATEMENT OF ARGUMENT

A. Admissibility of the After-the-Fact Conduct

47. The trial judge had the necessary factual foundation to determine admissibility. The trial Crown's application record provided evidence that the respondent had intentionally failed to attend his trial. An attempt to evade prosecution can support an inference of guilt. The respondent's counsel informed the trial judge that the respondent failed to attend because his surety revoked and he was in emotional and financial dire straits. There was no reason to hear any further evidence at the *voir dire* where admissibility is the only issue. At most, the respondent's testimony could have provided another reasonable inference. Like all circumstantial evidence, after-the-fact conduct is not excluded on the basis that there is more than one reasonable inference.

48. The majority of the Court of Appeal for Ontario found that the trial judge did not have the necessary factual foundation to determine admissibility. They found that the trial judge had to hear *viva voce* evidence, or a summary of the anticipated evidence from counsel. They also found that the trial judge erred by admitting the after-the-fact conduct on the basis of relevance without weighing the probative value and prejudicial effect of the evidence. Huscroft J.A. disagreed on both grounds.

> *R. v. J.M.*, 2018 ONCA 1054, AR Vol. I, Tab 2, pp. 18-20, paras. 20-23 (*per* Nordheimer J.A.)

49. Huscroft J.A. was right. The majority's erroneous conclusion was the result of three errors:

(a) They misconstrued the standard of admissibility when they determined that the trial judge lacked the necessary factual foundation;
(b) They conflated the function of the trial judge at a *voir dire* with the function of the jury on the trial proper; and
(c) They did not consider the totality of the record before determining that the trial judge failed to consider his residual discretion.

(a) The trial judge had the necessary factual foundation to make an informed decision on admissibility

50. At the *voir dire*, the Crown's application record established that the evidence was relevant. Failing to attend trial is a paradigmatic example of an attempt to evade prosecution which can support an inference of guilt. The summary of the respondent's proposed evidence was sufficient to inform the trial judge that his potential testimony could impact weight, but not admissibility.

> D. M. Paciocco, "Simply Complex: Applying the Law of 'Post-Offence Conduct' Evidence" (2016), 63 Crim. L.Q. 275 at p. 2

51. After-the-fact conduct, such as the respondent's failure to attend trial, is simply a form of circumstantial evidence. The trier of fact is asked to infer the existence of some fact in issue from something said or done by an accused after the commission of an offence. There are no special rules attached to evidence of after-the-fact conduct. Proper legal treatment is highly context and fact specific.

> *R. v. Calnen*, 2019 SCC 6 at para. 111
> *R. v. White,* 2011 SCC 13 at paras. 21, 31, 40, 105-106, 137
> *R. v. Rosen*, 2018 ONCA 246 at para. 50
> *R. v. Salah,* 2015 ONCA 23 at paras. 223, 225

52. Since after-the-fact conduct is not fundamentally different from other kinds of circumstantial evidence, the admissibility is governed by the same principles as other circumstantial evidence. All evidence that is relevant to a live issue is admissible with some exceptions. Relevant evidence may be excluded where it contravenes a rule of exclusion or where the trier of law exercises his or her discretionary power to exclude evidence where the prejudicial effect outweighs the probative value.

> *R. v. Calnen*, 2019 SCC 6 at para. 107
> *R. v. White,* 2011 SCC 13 at para. 31
> *R. v. Zeolkowski,* [1989] 1 SCR 1378 at para. 18

53. The trial Crown's application record established that the respondent's failure to attend trial was circumstantial evidence of guilt. The label "consciousness of guilt" has been

abandoned. However, the principle that post-offence conduct may constitute circumstantial evidence of guilt remains good law. It is open to the prosecution to introduce post-offence conduct to support an inference that the accused behaved as a person who is guilty of the offence alleged. The conduct usually consists of an "attempt to evade detection or prosecution that can support an inference of guilt when taken alone." This inference may be highly incriminating or only play a minor corroborative role. In *R. v. White (1998)*, this Court provided examples of circumstantial evidence of guilt which included flight from the scene or jurisdiction, an attempt to resist arrest, attempts to hide, or failing to appear at trial.

R. v. White, 2011 SCC 13 at paras. 20, 22
R. v. White [1998] 2 SCR 72 at paras. 12, 19, 23
R. v. Calnen, 2019 SCC 6 at para. 119

54. The respondent was evasive from the beginning of the investigation. In October 2012, the O.P.P. made numerous attempts to locate and arrest the respondent. They finally contacted him in February 2013 and he advised he would surrender. The respondent did not surrender; he moved to Calgary and only returned to Ontario in April 2013, when he was threatened with an arrest warrant. He attended his preliminary inquiry in January 2014 where he heard the complainants testify to allegations of serious sexual abuse over a prolonged period of time; he was committed to stand trial on all charges. Following the preliminary inquiry, the respondent never again came to court by choice.

Affidavit of Lauren Rock, Assistant Crown Attorney, AR Vol. II, Tab 12D, pp. 10-12, paras. 4-10 and 12

55. The respondent chose not to attend his trial on May 25, 2015 and chose to remain illegally at large after his surety revoked bail on August 21, 2014. Over ten months prior to the date it was set to commence, the respondent was informed of the trial date and his legal obligation to attend. The respondent ceased contact with his lawyer and evaded authorities until he was arrested on unrelated charges in January of 2016; over eight months after he had failed to attend for his original trial. On August 2, 2016, the respondent pleaded guilty to failing to attend his trial.

Affidavit of Lauren Rock, Assistant Crown Attorney, AR Vol. II, Tab 12D, pp. 13-16, paras. 18, 22, 27, 29

Exhibit 2 at Trial, Copy of Order for Committal (Surety Removal) dated August 21, 2014, AR Vol. III, Tab 16, pp. 48-49

56. This evidence establishes that there was probative value to the respondent's failure to attend his trial. *R. v. White (1998)* identified failing to appear as evasion evidence that can support an inference of guilt when taken alone. However, there are no automatic labels which make certain after-the-fact conduct always or never relevant. Still, the evidence of the conscious and continuing behaviour of the respondent would logically be the type of conduct this Court considered when 'failing to appear at trial' was listed as an example of evasive conduct. The respondent was informed of his trial date well in advance, informed of the compulsion to attend, was illegally at large, and did not return to court until he was arrested months after the trial date had passed.

R. v. Calnen, 2019 SCC 6 at para. 119
R. v. White, [1998] 2 SCR 72 at paras. 19

57. Paciocco J.A. explains the relevance of evasion cases in his paper "Simply Complex: Applying the Law of 'Post-Offence Conduct' Evidence". Evasion cases, including failing to appear at trial are the paradigmatic example of after-the-fact conduct. Paciocco J.A. expounds:

> In effect, this kind of "post-offence conduct" evidence can show that the accused person, "aware of having committed a crime," acted as they did to evade responsibility. Put another way, the post-offence conduct betrays a "consciousness of guilt."

D. M. Paciocco, "Simply Complex: Applying the Law of 'Post-Offence Conduct' Evidence" (2016), 63 Crim. L.Q. 275 at p. 2

58. This Court has found that, at its heart, the admissibility of after-the-fact conduct is one of relevance. As with any piece of circumstantial evidence, post offence conduct will be relevant where it has some tendency as a matter of logic, common sense, and human experience to make the position for which it is advanced more likely than the proposition would be in the absence of that evidence. It is a low threshold.

R. v. Calnen, 2019 SCC 6 at para. 108
R. v. White, 2011 SCC 13 at paras. 22, 36, 38

59. Further, as a general rule, it will be for the jury to consider the evidence as a whole and determine whether the post-offence conduct relates to the crime before them rather than some other act. The evidence will only have no probative value when an accused's after-the-fact conduct is equally consistent with two or more inferences. This is clearly not the situation in the present case.

> *R. v. Calnen*, 2019 SCC 6 at paras. 121-124
> *R. v. White,* 2011 SCC 13 at para. 37
> *R. v. White,* [1998] 2 SCR 72 at paras. 28-29
> *R. v. Rosen*, 2018 ONCA 246 at para. 50

60. The evidence before the trial judge was that the respondent had:

- Failed to attend a trial of serious allegations of sexual assaults on children, and
- Evaded authorities for over a year.

61. In the face of this evidence, the respondent's counsel explained to the trial judge that the probative value would be tenuous as the respondent would testify that he "failed to appear at his trial because of his surety revoking [and] just being in an emotional and financial dire straits". Counsel later explained that the respondent's testimony would amplify this explanation.

> *Transcript of In-Camera Proceedings dated 31 October 2016,* AR Vol. IV, Tab 31 at p. 34, ll. 24-26; p. 53, ll. 17-20

62. The evidentiary record precluded the respondent from offering any other credible explanation. The respondent had pleaded guilty to failing to attend court. During sentencing submissions, the respondent's lawyer told the Court that the respondent had explained that when his girlfriend revoked bail, his life "just sort of fell apart". She also told the Court that he took no steps to get himself to his trial, that he understood he had a legal obligation to attend his trial, and that he was not offering an excuse for failing to attend his trial.

> *Transcript Sentencing Hearing dated 2 August 2016,* AR Vol. II, Tab 12L at pp. 64, ll. 5-12

63. As Huscroft J.A. found in dissent, at most, the respondent's testimony could have provided an alternate inference for his failure to attend his trial. The existence of another plausible explanation does negative the probative force of the evidence. It is not to be excluded on that

basis. Individual pieces of evidence are not to be weighed piecemeal using the criminal standard of proof. Any threshold determination of relevance must respect that it is normally the function of the trier of fact to determine what inference is accepted and the weight to be given to it.

R. v. J.M., 2018 ONCA 1054, AR Vol. I, Tab 2 at p. 31, para. 54 (*per* Huscroft J.A.)
R. v. Calnen, 2019 SCC 6 at paras. 112, 124, 144
R. v. White, 2011 SCC 13 at paras. 40-42
R. v. White, [1998] 2 SCR 72 at para. 27
R. v. Salah, 2015 ONCA 23 at paras. 226-227

64. If accepted, the alternate explanation articulated by counsel for the respondent might not even exclude the circumstantial inference that he was guilty. Whether he was in dire straits or sought to avoid pre-sentence custody, there is a logical inference that he would be more apt to evade authorities and his trial date if he knew he was guilty of the offence. A criminal charge such as the sexual assault of two underage girls carries stigmatization, stress, anxiety, disruption of family, social life and work. A person who was not possessed of a guilty mind, would be more likely to remain in contact with his counsel, attempt to get a new recognizance, and face his trial with the presumption of innocence to clear his name.

R. v. Askov, [1990] 2 SCR 1199 at para. 5
Transcript of In-Camera Proceedings dated 31 October 2016, AR Vol. IV, Tab 31 at p. 34, ll. 24-26

(b) The majority conflated the function of the trial judge and the function of the jury

65. The trial judge had a sufficient evidentiary record to determine the respondent's alternate explanation would not impact admissibility. The only utility in hearing further details would be to consider the weight to assign to the respondent's explanation. To weigh the evidence misconceives the purpose of the *voir dire* and confuses the functions of the judge and jury in a criminal trial.

R. v. Terceira, [1998] O.J. No. 428 (CA), at para. 50

66. This Court and appellate courts have consistently held that other inferences that may be drawn from after-the-fact conduct do not render the evidence inadmissible. As Martin J. (dissenting on other grounds) stated for this Court in *R. v. Calnen*, at paragraph 145:

> As long as the evidence is more capable of supporting the inference sought than the alternative inferences, then it is up to the fact finder, after considering all explanations, to determine what, if any, inference is accepted, and the weight, if any, to be provided to a piece of circumstantial evidence.

R. v. Calnen, 2019 SCC 6 at paras. 112, 124, 142, 145
R. v. Sodhi, (2003) 175 OAC 107 at paras. 52-54
R. v. White, [1998] 2 SCR 72 at paras. 27-29
R. v. Salah, 2015 ONCA 23 at para. 227

67. The majority of the Court of appeal conceded that had the trial judge heard the respondent's explanation for his failure to attend, "he might nonetheless have concluded that the evidence was relevant." However, they determined that if the respondent had testified or counsel had provided a summary of his evidence, the circumstances surrounding his failure to attend could have a bearing on the weighing of the probative value and prejudicial effect of the evidence. The majority provided an example to demonstrate how an alternate explanation could have impacted the probative value. They suggested the respondent could have testified that he missed his trial because of an illness.

> *R. v. J.M.*, 2018 ONCA 1054, AR Vol. I, Tab 2 at pp. 19-20, paras. 22-23 (*per* Nordheimer J.A.)

68. The majority's analysis discloses two errors: (i) the evidentiary record established that the respondent chose not to attend his trial – he had no lawful excuse; (ii) considering the alternate inference to weigh the probative value conflates the function of the trier of law with the function of the trier of fact.

(i) <u>The evidentiary record established that the respondent had no lawful excuse</u>

69. At the *voir dire*, the respondent's counsel did not suggest that the respondent had a lawful excuse for failing to appear at his trial such as an illness. He indicated that the respondent's explanation was that his surety had revoked and he faced emotional and financial issues. Counsel

provided this alternate explanation at the pre-trial *voir dire* and he provided it over a month later on December 20, 2016 at the pre-charge conference. In requesting an instruction on the after-the-fact conduct, counsel indicated the jury could consider that the respondent's "life was in a state of dire straits or in a downward spiral, such that he just wasn't able to attend." The respondent chose not to testify at trial, nor did he supplement the record in the Ontario Court of Appeal as to what his testimony would have been. It is unreasonable to suggest the respondent had an alternate lawful excuse that was inconsistent with counsel's representations.

> *Transcript of In-Camera Proceedings dated 31 October 2016*, AR Vol. IV, Tab 31 at pp. 34, 36, 46, 52, 53
> *Transcript of Proceedings at Trial dated 21 December 2016*, AR Vol. X, Tab 40 at p. 89, ll. 20-22

(ii) Conflating the function of the trier of law with the function of the trier of fact

70. It is clear that a trial judge has a residual discretion to exclude any piece of circumstantial evidence where the prejudicial effect outweighs the probative value. After-the-fact conduct is no exception. However, the majority of the Court of Appeal's finding that the trial judge should have considered *viva voce* evidence, conflates the function of the judge with that of the jury. It suggests the trial judge should first usurp the jury's function by weighing the alternate inference and then consider his residual discretion.

71. The majority's suggestion that the respondent may have testified that he was ill illustrates this point. Had the respondent testified to a lawful explanation such as an illness, his testimony would create significant credibility issues that would be a proper consideration for the jury. Any lawful explanation would be contradicted by the respondent's guilty plea to failing to attend his trial date. The guilty plea precludes a lawful excuse. Further, during the guilty plea, his counsel informed the Court that the respondent admitted he was aware of his trial date and the obligation to attend, and simply "didn't take any steps to get himself back to court when he should have done so".

> *Transcript of Sentencing Hearing dated 2 August 2016*, AR Vol. II, Tab 12L at pp. 59-60; p. 64, ll. 5-12

72. As with any piece of circumstantial evidence considering all explanations and determining what, if any, inference is accepted is for the trier of fact. Pieces of circumstantial

evidence must be considered and a verdict rendered based on the record as a whole. The process cannot be divided into two stages. Neither individual pieces of evidence, nor categories of evidence should be assessed in isolation or piecemeal. Evidence takes on its full significance and probative value only in the context of the other evidence in the case.

R. v. Calnen, 2019 SCC 6 at para. 134
R. v. Morin, [1992] 1 SCR 771 at paras. 33-39
R. v. White, [1998] 2 SCR 72 at paras. 39, 41-43

73. Had the trial judge further considered and weighed other inferences he would have usurped the function of the jury. As stated by Martin J. in *R. v. Calnen*:

> Any threshold determination of relevance must also respect that it is normally the function of the trier of fact to determine what inference is accepted and the weight to be given to it, and "[f]or the trial judge to interfere in that process will in most cases constitute a usurpation of the jury's exclusive fact-finding role": *White (1998)*, at para. 27.

R. v. Calnen, 2019 SCC 6, at para. 124
R. v. J.M., 2018 ONCA 1054, AR Vol. I, Tab 2 at pp. 31-32, para. 55 (*per* Huscroft J.A.)

74. The trial judge did not permit the respondent to testify at the *voir dire*. This decision was open to the trial judge in his gatekeeper function. Neither the common law nor the *Charter* requires a specific procedure be followed in determining the admissibility of evidence. The trial judge correctly found that any explanation for the respondent's failure to attend "ought to be presented to the finders of fact".

Transcript of In-Camera Proceedings dated 31 October 2016, AR Vol. IV, Tab 31, p. 67, l. 21 – p. 71, l. 21
R. v. White, 2011 SCC 13 at paras. 54-56
R. v. Darrach, [1998] O.J. No. 397 (CA) at para. 74, aff'd on other grounds [2000] 2 SCR 443
United States of America v. Anderson, 2007 ONCA 84 at para. 37

(c) The record demonstrated that the trial judge did consider more than simply relevance prior to admitting the evidence

75. The majority erroneously concluded that the trial judge appeared "to have proceeded on the basis that, if the evidence was relevant, it was automatically admissible." The majority did

not consider the entire record in reaching this conclusion. As Huscroft J.A. found in dissent, when the reasons are read as a whole and in the context of the parties' submissions it is clear that the issue of possible prejudice was addressed.

> *R. v. J.M.*, 2018 ONCA 1054, AR Vol. I, Tab 2 at pp. 19-20, paras. 22-23 (*per* Nordheimer J.A.); p. 32, para. 56 (*per* Huscroft J.A.)

76. The sufficiency of a trial judge's reasons is to be considered in the context of the record, the issues and the submissions of counsel. The task for the appellate court is simply to ensure that, read in context of the entire record, the trial judge's reasons demonstrate that he or she was alive to and resolved the central issues before the court. Subject to a duty of procedural fairness, there is no general duty to provide reasons for an evidentiary ruling. The failure to give reasons on an evidentiary ruling is not fatal provided that the decision is supportable on the evidence or the basis for the decision is apparent from the circumstances. Where the foundations for the trial judge's conclusions are discernable, he is presumed to know the law.

> *R. v. R.E.M.*, 2008 SCC 51 at paras. 37, 54
> *R v. H.S.B.*, 2008 SCC 52 at para. 8
> *R. v. Tsekouras*, 2017 ONCA 290 at paras. 155-156

77. A review of salient portions of the *voir dire*, the trial judge's reasons for not allowing the respondent to testify, and his reasons regarding admissibility clearly demonstrate that the trial judge was alive to and resolved the issue of balancing prejudice and probative value.

78. The *voir dire* and decision regarding whether the respondent could testify occurred on October 31, 2016. The decision to admit the evidence that the respondent failed to attend his trial occurred on November 23, 2016. During the *voir dire*, counsel for the respondent articulated several times that the conduct should not be admitted as it was irrelevant, it was discreditable conduct, and its prejudicial effect outweighed its probative value. He argued that the Crown must clear the 'first hurdle' of relevance. The trial judge demonstrated he was concerned with more than just relevance when he asked "if the Supreme Court has said that it is or may be relevant to culpability, then doesn't that clear the <u>first hurdle</u>, relevance?"

> *Transcript of In-Camera Proceedings dated 31 October 2016,* AR Vol. IV, Tab 31 at pp. 30-31; p. 34, l. 19; p. 35; p. 44, ll. 1-3; p. 50-51; p. 71-72 [Emphasis added]

79. The trial judge also demonstrated that relevance was not his only concern during his decision not to allow the respondent to testify. He began his reasons by indicating that the after-the-fact conduct was relevant. Yet he did not decide admissibility until 3 weeks later after hearing further submissions. Following the trial judge's determination that the evidence was relevant, counsel for the respondent indicated that he had mistakenly believed that the trial judge had determined admissibility when he considered the evidence relevant. The mistake was clarified and counsel made further submissions on the probative value and prejudicial effect. The trial judge then requested further submissions from the Crown to address the value and utility of the evidence.

> *Transcript of In-Camera Proceedings dated 31 October 2016,* AR Vol. IV, Tab 31, pp. 66, ll. 1-3; p. 70-72; p. 78; p. 87

80. Finally, the trial judge's reasons on the admissibility further demonstrated his concerns regarding prejudice. He addressed potentially prejudicial aspects of the evidence by resolving only to admit the evidence with a cautionary instruction. He also demonstrated his concern regarding the prejudicial impact of the evidence by quoting Dickson C.J. in *R. v. Corbett*, for the proposition that:

> [I]t would be quite wrong to make too much of the risk that the jury <u>might</u> use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense.

> *R. v. Corbett,* [1988] 1 S.C.R. 670 at para. 39
> *Transcript of Proceedings at Trial dated 23 November 2016,* AR Vol. IV, Tab 32 at p. 130, l. 26 – p. 131, l. 3
> *R. v. White,* 2011 SCC 13 at paras. 18, 22, 56

81. The quote from *R. v. Corbett*, addresses the issue of the introduction of an accused's criminal record. The quote relates to the issue of providing the jury with a caution as opposed to depriving the jury of relevant evidence that may have potential to cause prejudicial reasoning.

The trial judge read this quote and admitted the evidence with a caution to the jury. He demonstrated his appreciation of any potential prejudice prior to admitting the evidence.

82. As the trial judge considered the probative value and prejudicial effect, his decision to admit the evidence is entitled to appellate deference.

R. v. Araya, 2015 SCC 11 at para. 31

B. The Sufficiency of the Instruction Regarding After-the-Fact Conduct

83. The trial judge properly informed the jury how to evaluate the evidence that the respondent failed to attend his trial. A caution on after the fact conduct must tell the jury to take into account alternative explanations for an accused's behaviour. The trial judge told the jury they could only use after-the-fact conduct to support an inference of guilt if they had rejected any other explanation for the conduct. He told them when they heard the evidence and in his final charge. He also provided the respondent's specific alternative explanation within his charge

84. The fundamental disagreement between the majority and dissent at the Ontario Court of Appeal was the placement of the respondent's specific alternative explanation within the trial judge's charge to the jury. In dissent, Huscroft J.A. found that what mattered was what the trial judge said – not where in his charge he said it. The majority of the Court of Appeal found that "the trial judge did not provide any assistance to the jury as to how to weigh the post offence conduct evidence in the context of the evidence as a whole." The majority's erroneous conclusion was the result of two errors:

(a) They did not take a functional approach in assessing the adequacy of the trial judge's charge to the jury; and
(b) They placed an overly onerous standard on the trial judge's charge.

R. v. J.M., 2018 ONCA 1054, AR Vol. I, Tab 2 at p. 22, para. 29 (*per* Nordheimer J.A.); pp. 35-36, paras. 65 and 67-68 (*per* Huscroft J.A.)

(a) The trial judge's charge to the jury was functionally proper

85. This Court has provided clear direction regarding the approach to assessing the adequacy of jury instructions. An appellate court must take a functional approach and consider the jury charge in its entirety and in the greater context of the trial. The charge must be sufficient to inform the jurors on the issues involved, the law relating to the charge the accused is facing, and

the evidence they should consider in resolving the issues. The order of the charge and the words chosen are within the discretion of the trial judge. In reviewing the charge, what counts is its substance, not its adherence to prescriptive formulas. A jury must be properly - not - perfectly instructed.

> *R. v. Calnen*, 2019 SCC 6 at paras. 8-9, 153
> *R. v. Jacquard*, [1997] 1 S.C.R. 314 at paras. 2, 14, 20, 33 and 62
> *R. v. Jaw*, 2009 SCC 42 at para. 32.
> *R. v. Daley*, 2007 SCC 53 at para. 30
> *R. v. Mack*, 2014 SCC 58 at para. 48
> *R. v. Cooper*, [1993] 1 S.C.R. 146 at p. 163

86. Huscroft J.A. took a functional approach to assessing the adequacy of the trial judge's instruction. He referenced this Court's decision in *R. v. Jacquard* and listed the essential factors a charge must contain for an appellate court to find it sufficient. This analysis led to his conclusion that the charge revealed no errors and was adequate in the circumstances.

> *R. v. J.M.*, 2018 ONCA 1054, AR Vol. I, Tab 2 at pp. 33-34, 36, paras. 60-61, 63, 67-68 (*per* Huscroft J.A.)

87. The majority of the Court of Appeal did not take a functional approach. They did not consider the jury charge in its entirety and in the greater context of the trial. They focussed on where the trial judge included the respondent's alternative explanation for failing to attend trial. This erroneous analysis led them to find that the trial judge provided no assistance and that the trial judge failed to alert the jury to the respondent's specific alternative explanation.

> *R. v. J.M.*, 2018 ONCA 1054, AR Vol. I, Tab 2 at pp. 22-23, paras. 29, 32-33 (*per* Nordheimer J.A.)

88. In fact, the trial judge did alert the jury to the respondent's specific alternative explanation. He simply provided the explanation within the section of his charge that contained the summaries of the positions of the parties. A review of the trial judge's cautions and his entire charge establishes that the jury was properly instructed on how to assess the respondent's failure to attend his trial. As Huscroft J.A. reasoned, "[w]hat matters is what the trial judge said -- not where in his instructions he said it -- and that what he said was clear."

Transcript of Proceedings at Trial dated 22 December 2016, AR Vol. XI, Tab 41 at, pp. 49-53
R. v. J.M., 2018 ONCA 1054, AR Vol. I, Tab 2 at p. 36, para. 68 (*per* Huscroft J.A.)

89. In *R. v. Calnen*, Martin J. explained the reasons a caution regarding after-the-fact conduct should be included in a final charge to the jury and what the caution must include. Where after-the-fact conduct is removed in time from the events giving rise to the charge, it may make it more difficult to draw appropriate inferences. It may also appear more probative than it is and may encourage speculation. Accordingly, it may give rise to imprecise reasoning and may encourage the jury to jump to questionable conclusions.

R. v. Calnen, 2019 SCC 6, at para. 116

90. To address these concerns, the jury must be told to take into account alternative explanations for the accused's behaviour. In this way, jurors are instructed to avoid a mistaken leap from such evidence to a conclusion of guilt when the conduct may be motivated by panic, embarrassment, fear of a false accusation, or some other innocent explanation.

R. v. Calnen, 2019 SCC 6, at para. 117
See also, *R. v. White (1998) supra.*, at para. 57
R. v. White, 2011 SCC 13 at para. 24

91. In accord with this Court's standard; the trial judge did ensure the jury was instructed to take into account alternative explanations. He did so through a mid-trial and final caution. Both instructions functionally tracked the language of the specimen instruction. The trial judge concluded the mid-trial instruction as follows:

> As circumstantial evidence, evidence of after-the-fact conduct has only an indirect bearing on the issue of [the respondent's] guilt. You must be careful about inferring that [the respondent] is guilty on the basis of evidence of after-the-fact conduct. Because there might be other explanations for that conduct, something unconnected with his participation in the offence charged. <u>You may use this evidence of after-the-fact conduct along with other evidence to support an inference of guilt only if you had rejected any other explanation for this conduct.</u>

Transcript of Proceedings at Trial dated 14 December 2016, AR Vol. V, Tab 35 at p. 122, l. 28 - p. 123, ll. 32

92. The timing of the mid-trial caution ensured that it effectively informed the jury. The caution was provided on December 14, 2016; the second day of evidence. The caution immediately followed Officer Limlaw's evidence that he had flown to Calgary to bring the respondent back to Ontario to answer to the charges before the Court. The trial judge had informed counsel of the proposed caution and the timing prior to delivering it. The respondent's counsel responded, "I think that would be appropriate as well, Your Honour, because that's directly responsive to the evidence that they would have just heard."

> *Transcript of Proceedings at Trial dated 14 December 2016,* AR Vol. V, Tab 35 at pp. 115-116; p. 116, ll. 4-7

93. The trial judge repeated the concept that the jury must consider alternative explanations through a second caution within his final charge. He repeated the instructions from the mid-trial caution and provided additional information. He linked the concept of after-the-fact conduct with the evidence that the respondent had not attended his trial date in May 2015 and was taken into custody in Calgary and returned to Ontario in early 2016. Once again, he specified that the jury could only use the evidence of after-the-fact conduct with other evidence to support an inference of guilt if they had rejected any other explanation for the conduct. He then added:

> On the other hand, if you find that [the respondent's] failure to return to Ontario for his trial was related to the commission of the offences charged, not to something else, you may consider this evidence, together with all the other evidence in reaching your verdict.
>
> *Transcript of Proceedings at Trial dated 22 December 2016,* AR Vol. XI, Tab 41 at pp. 120, l. 32 – 122, l. 11

94. Later in the charge, the trial judge informed the jury of the specific inferences sought by each party and the evidence in support of those inferences. The Crown's position was that the respondent had attended his preliminary inquiry in January 2014 where he heard the testimony of the complainants. The respondent subsequently failed to attend his trial in May 2015 and did not advise the authorities of his whereabouts or make arrangements to attend court until he was arrested in February 2016. The trial judge then informed the jury:

> The position of the Crown is that this evidence should be considered by you that [the respondent] wished to avoid being tried on these charges and that [the respondent] possessed a guilty state of mind with respect to the charges that are before you.
>
> *Transcript of Proceedings at Trial dated 22 December 2016,* AR Vol. XI, Tab 41 at, p. 49, l. 18 – p. 50, l. 5

95. Concerning the defence position, the trial judge stated:

> Finally, the after-the-fact conduct: [the respondent] always attended for court when he had a surety. His surety was revoked on August 21st, 2014. Exhibit two is a copy of the order for [the respondent's] committal because of that surety revocation. [The respondent] was subject to arrest from August 21st, 2014 onward. Had he attended at the original trial date of May 25th, 2015, he was subject to being arrested on the spot. You may find that [the respondent's] failure to attend his original trial date is explained by his not wanting to be arrested and committed to custody while allegations to which he has always pled not guilty remained before the court.
>
> *Transcript of Proceedings at Trial dated 22 December 2016,* AR Vol. XI, Tab 41 at p. 52, l. 21 – p. 53, l. 2

96. Following the charge, the jury was provided with copies of the trial judge's charge to assist with their deliberations. The charge contains the trial judge's caution on after-the-fact conduct and his summaries of counsels' respective positions.

> *Exhibit N at Trial, Charge to the Jury as given to the Jury*, AR Vol. XI, Tab 41 at pp. 154-155, 175-176
> *Transcript of Proceedings at Trial dated 22 December 2016,* AR Vol. XI, Tab 41 at p. 104

97. The trial judge's charge, considered from a functional perspective, establishes that he charged the jury in accordance with the criteria articulated by this Court in *R. v. Calnen, R. v. White (2011),* and *R. v. White (1998).* The jury was told in no uncertain terms to take into account any alternative explanations. He also provided the specific alternative explanation suggested by the respondent's counsel.

> *R. v. Calnen*, 2019 SCC 6, at para. 117
> *R. v. White,* [1998] 2 SCR 72 at para. 57
> *R. v. White,* 2011 SCC 13 at para. 24

98. As Huscroft J.A. noted in dissent, the specific alternative explanation provide by the trial judge was the only alternative possible inference that was available on the evidence before the jury. The respondent did not testify or call any other evidence. The only evidence supportive of the position that the respondent sought to avoid pre-sentence custody, was the committal order that had been issued when his surety revoked.

> *R. v. J.M.*, 2018 ONCA 1054, AR Vol. I, Tab 2 at pp. 33, 36, para. 60 and 68 (*per* Huscroft J.A.)
> *Exhibit 2 at Trial, Copy of Order for Committal (Surety Removal) dated Augsut21, 2014*, AR Vol III, Tab 16.

99. The sufficiency of the trial judge's charge is also evident as it was neutral, fair, and balanced. The trial judge did not provide the inference the Crown sought or the alternative inference suggested by the defence within his caution on the use of after-the-fact conduct evidence. Both inferences, and the facts which supported them, were provided to the jury within the section of the charge that relayed the positions of the parties.

> *R. v. Calnen*, 2019 SCC 6 at para. 20
> *Transcript of Proceedings at Trial dated 22 December 2016,* AR Vol. XI, Tab 41 at pp. 18, l. 32 – 20, l. 11
> *Transcript of Proceedings at Trial dated 22 December 2016,* AR Vol. XI, Tab 41 at p. 49, l. 18 – p. 50, l. 5
> *Transcript of Proceedings at Trial dated 22 December 2016,* AR Vol. XI, Tab 41 at p. 52, l. 21 – p. 53, l. 2

100. The majority of the Court of Appeal found the trial judge's charge insufficient because he did not provide the specific alternative explanation suggested by the defence. They based the necessity of this instruction on this Court's decisions in *R. v White (1998)* and *R. v. White (2011)*. However, the jury caution that Rothstein J. found adequate in *R. v. White (2011)*. Did not include reference to a specific alternative explanation. The trial judge in that case cautioned the jury as follows:

> You may consider Mr. White's post-event conduct in fleeing the scene, but you should also be careful with it. It may not tell you much more than that for any number of reasons he would be in some kind of trouble if he stayed at the scene and it may not be of much assistance in assessing his precise state of mind at the time the gun was fired. That is for you to assess and consider.

R. v. J.M., 2018 ONCA 1054, AR Vol. I, Tab 2 at pp. 22, 24-25, para. 29, 36 (*per* Nordheimer J.A.)
R. v. White, 2011 SCC 13 at paras. 24, 81, 87-88

101. The trial judge's charge in the present case was more restrictive and detailed than the charge Rothstein J. found adequate in *R. v. White (2011)*. In the present case, the charge was more restrictive as he informed the jury that they could only use the after-the-fact conduct along with any other evidence to support an inference of guilt if they had rejected any other explanation for this conduct. The instruction considered in *R. v. White (2011)* simply indicated the jury should be careful and that the conduct might not tell them much. In the present case, the charge was more detailed as he provided the jury with a specific alternative explanation to consider – that the respondent failed to attend to avoid the potential of pre-sentence custody. The instruction considered in *R. v. White (2011)* simply indicated that the accused may have fled for any number of reasons associated to some kind of trouble.

Transcript of Proceedings at Trial dated 22 December 2016, AR Vol. XI, Tab 41 at p. 52, l. 21 – p. 53, l. 2
Transcript of Proceedings at Trial dated 22 December 2016, AR Vol. V, Tab 35 at p. 122, l. 28 - p. 123, ll. 32

102. Finally, there are significant inferential gaps in the suggestion that the respondent failed to attend his trial to avoid pre-sentence custody. The only evidence that supports the inference is the surety revocation. There was no evidence to conclude that the surety revocation was actually the respondent's motive for not attending his trial. There was no evidence that the respondent could not find another surety. In fact, Teresa James, the Assistant Crown Attorney who had carriage of the respondent's case at the material time, testified that she invited counsel to provide details of a plan and she would consider it. She indicated that she was open to a substitution of surety. The carefully worded submissions of defence counsel, on this issue, demonstrate how tenuous the inference was. In his final submissions to the jury, counsel submitted, "[i]s his failure to attend perhaps have something to do with bail and whether he would get bail if he flew back? It's for you to consider."

Transcript of Proceedings at Trial dated 13 December 2016: *Evidence of Teresa James,* AR Vol. V, Tab 34 at p. 105

Transcript of Proceedings at Trial dated 21 December 2016, AR Vol. X, Tab 40 at p. 129-131; p. 130, ll. 26-29

(b) The majority placed an overly onerous standard on the trial judge's charge

103. The majority found that the trial judge's charge did not provide any assistance to the jury regarding how to weigh the after-the-fact conduct. They found that the trial judge's reference to the alternative explanation within the summary of defence counsel's position did not cure the problem. The majority found the reference insufficient for two reasons: (i) it was separated from the original instruction, and (ii) it would carry more weight if the trial judge was not simply repeating what defence counsel had said.

R. v. J.M., 2018 ONCA 1054, AR Vol. I, pp. 22, 24, 26, para. 29, 34, 39 (*per* Nordheimer J.A.)

(i) <u>The alternative explanation was included in the trial judge's charge</u>

104. The majority placed an overly onerous standard on the trial judge's jury charge by finding that it was insufficient because the alternate explanation was separated from the after-the-fact caution. Jury charges need not adhere to prescriptive formulas; rather, the charge as a whole must leave the jury with a sufficient understanding of the facts as they relate to the relevant issues. The order of the charge is within the trial judge's discretion.

R. v. Calnen, 2019 SCC 6, at para. 163
R. v. Mack, [1988] 2 SCR 903 at para. 48

105. In *R. v. Jacquard*, Lamar C.J. considered the need to refer to evidence at the appropriate time within a charge. The accused argued that trial judge had erred by not relating mental disorder evidence to the issue of intention when the issue arose. The trial judge included the issue later in the charge as part of his instructions regarding manslaughter and attempted murder. Lamer C.J. found that the accused's position was too onerous. He indicated that when considered in its entirety, the trial judge's charge made it clear to the jury, prior to their deliberations, that intention could be negatived by the evidence of the accused's mental disorder. The trial judge was not guilty of misdirection. The charge was proper and fair.

R. v. Jacquard, [1997] 1 SCR 314 at paras. 14, 19-20

106. Similarly, in the present case the trial judge made it clear to the jury, prior to deliberations, that the jury could only use the respondent's failure to attend trial to support an inference of guilt if they rejected the respondent's explanation that he sought to avoid pre-trial detention. Although the specific explanation was not included within the caution on the use of after-the-fact conduct evidence, the jury was provided with the caution and the explanation when they were charged. They also received a copy of the trial judge's charge. Both the caution and the alternative explanation emphasized the words 'after the fact conduct' with bold type and quotation marks respectively.

Transcript of Proceedings at Trial dated 22 December 2016, AR Vol. XI, Tab 41 at pp. 18, l. 32 – 20, l. 11
Transcript of Proceedings at Trial dated 22 December 2016, AR Vol. XI, Tab 41 at p. 52, l. 21 – p. 53, l. 2
Exhibit N at Trial, Charge to the Jury as given to the Jury, AR Vol. III, Tab 29 at pp. 154-155, 176

107. The majority of the Court of Appeal's finding on this issue is contrary to this Court's statements on jurors and the jury system. The jury system is predicated on the conviction that jurors are intelligent and reasonable fact-finders. One of the strengths of the jury system is that a group of ordinary citizens bring a healthy measure of common sense. Yet the majority found that the jury would be unable to link the after-the-fact caution with the alternative explanation because they were separated within the charge.

R. v. White, 2011 SCC 13 at para. 56
R. v. Corbett, [1988] 1 SCR 670, at para. 38
R. v. J.M., 2018 ONCA 1054, AR Vol. I, Tab 2 at p. 26, para. 39 (*per* Nordheimer J.A.)

108. As demonstrated by the following facts, it is reasonable to accept that the jury would understand that the respondent's failure to attend court could not support an inference of guilt if his sole motivation was to avoid potential pre-sentence custody:

- When the jury heard evidence that the respondent had failed to attend his trial, they were cautioned to only use the respondent's after-the-fact to support an inference of guilt if they had rejected any other explanation for this conduct;

- During the final charge to the jury, they were again cautioned to only use the respondent's after-the-fact conduct to support an inference of guilt if they had rejected any other explanation for this conduct;
- During the final charge to the jury, they were informed that defence counsel's position on the 'after the fact conduct' was that the respondent failed to attend court because he did not want to face the possibility of pre-sentence custody; and
- The jury was provided with copies of the trial judge's final charge.

109. As a group of intelligent and reasonable fact-finders with a healthy measure of common sense, it is unreasonable to suggest the jury would not appreciate that they had to consider defence counsel's explanation for the conduct before they used it to support an inference of guilt.

110. Further, in *R. v. Jacquard*, Lamer C.J. noted that there is no need to state evidence twice where once will do. A proper charge informs a jury of the issues involved and the evidence they should consider in resolving those issues. The trial judge's role in charging a jury is to decant and simplify.

R. v. Jacquard, [1997] 1 SCR 314 at paras. 1, 14
See also, R. v. Calnen, 2019 SCC 6 at para. 153
R. v. Daley, 2007 SCC 53 at paras. 57, 68

(ii) <u>The alternative explanation came from the trial judge:</u>

111. The majority's second issue with the alternative explanation within the trial judge's charge also placed an overly onerous standard on the trial judge's charge. The issue was that the alternative explanation was a part of a summary prepared by defence counsel. The majority found that the explanation would carry more weight if it came directly from the trial judge.

R. v. J.M., 2018 ONCA 1054, AR Vol. I, Tab 2 at p. 26, para. 39 (*per* Nordheimer J.A.)

112. This criticism does not speak to the functional standard of review that simply requires that a jury must be left with a sufficient understanding of the facts as they relate to the relevant issues. With respect to after-the-fact conduct, they "must be told to take into account alternative

explanations for the accused's behaviour." In this case, the jury was told to take into account alternative explanations within the after-the-fact instruction. The specific alternative explanation was simply conveyed within the section of the charge relating to the positions of counsel. It bears repeating, that the jury must be properly, not perfectly instructed.

R. v. Calnen, 2019 SCC 6 at paras. 9, 161-162
R. v. Jaw, 2009 SCC 42 at para. 44
R. v. Jacquard, [1997] 1 SCR 314 at paras. 14, 37, 62

113. In *R. v. Daley*, Bastarche J., on behalf of the majority of this Court found that a jury trial takes place in the context of the trial as a whole. Accordingly he found that "[a]ppellate review of the trial judge's charge will encompass the addresses of counsel as they may fill gaps left in the charge."

R. v. Daley, 2007 SCC 53 at para. 58
See also, *R. v. Jacquard*, [1997] 1 SCR 314 at para. 34

114. In this case, the trial judge ensured the jury had much more than just counsel's submissions to instruct them on the proper consideration of after-the-fact conduct. Twice, he cautioned them to only use the respondent's after-the-fact conduct to support an inference of guilt if they had rejected any other explanation for this conduct. He provided the explanations of both the Crown and defence within his charge. Finally, he provided the jury with copies of his charge. Beyond the trial judge's careful instructions, the Crown's submissions did assist. He told the jury that before they could make use of the evidence they had "to consider all the evidence and decide whether or not there are other reasonable explanations for [the respondent's] failure to appear."

Transcript of Proceedings at Trial dated 21 December 2016, AR Vol. X, Tab 40 at pp. 78-79; p. 80, ll. 7-8

C. The Curative Proviso

115. The Appellant relies on the proviso to the extent reasonable.

PART IV – SUBMISSIONS ON COSTS

116. The Appellant has no submission as to costs.

PART V – ORDER SOUGHT

117. The appellant requests that the appeal be allowed and the conviction be restored.

PART VI – SUBMISSIONS ON PUBLICATION BAN

118. The Court of Appeal for Ontario ordered that the publication ban in this case shall continue pursuant to s.486.4 of the *Criminal Code of Canada*. Any information that would reveal the identity of the complainants in this case is prohibited from publication. It is the appellant's position that the respondent's name should not be published. Given his relationship with the complainant, his name could reveal her identity.

ALL OF WHICH is respectfully submitted by:

FOR _____

Luke Schwalm
Counsel for the Appellant,
Attorney General of Ontario

DATED this 11th day of March, 2019.

PART VI – TABLE OF AUTHORITIES

JURISPRUDENCE

R. v. Araya, 2015 SCC 11 at para. 82.

R. v. Askov, [1990] 2 SCR 1199 at para. 64.

R. v. Calnen, 2019 SCC 6, at paras. 51, 52, 53, 56, 58, 59, 63, 66, 72, 73, 88, 92, 93, 100, 102, 107, 113, 115.

R. v. Cooper, [1993] 1 SCR 146 at para. 88.

R. v. Corbett, [1988] 1 SCR 670 at paras. 80, 110.

R. v. Daley, 2007 SCC 53 at paras. 88, 113, 116.

R. v. Darrach, [1998] O.J. No. 397 (CA), aff'd on other grounds [2000] 2 SCR 443 at para. 74.

R v. H.S.B., 2008 SCC 52 at para.76.

R. v. Jacquard, [1997] 1 SCR 314 at paras. 88, 108, 113, 115, 116.

R. v. Jaw, 2009 SCC 42 at paras. 88, 115.

R. v. Mack, [1988] 2 SCR 903 at paras. 88, 107.

R. v. Morin, [1992] 1 SCR 771 at para. 72.

R. v. R.E.M., 2008 SCC 51 at para. 75.

R. v. Rosen, 2018 ONCA 246 at paras. 51, 59.

R. v. Salah, 2015 ONCA 23 at paras. 51, 63, 66.

R. v. Sodhi, (2003) OJ No. 3397 at para. 61.

R. v. Terceira, [1998] OJ No. 428 (CA) at para. 65.

R. v. Tsekouras, 2017 ONCA 290 at para. 76.

R. v. White, [1998] 2 SCR 72 at paras. 51, 52, 53, 58, 59, 63, 74, 80, 93, 100, 104, 110, 122.

R. v. White, 2011 SCC 13 at paras. 56, 59, 63, 66, 72, 100.

R. v. Zeolkowski, [1989] 1 SCR 1378 at para. 52.

United States of America v. Anderson, 2007 ONCA 84 at para. 74.

SECONDARY MATERIALS

Paciocco, David. “Simply Complex: Applying the Law of ‘Post-Offence Conduct’ Evidence” (2016) 63 Crim LQ 275 at paras. 50, 57.

Watt, David. “Final 27-A Post-Offence Conduct (General Instruction)”, *Watt’s Manual of Criminal Jury Instructions*, 2nd ed (Toronto: Thomson Reuters Canada Ltd., 2015), pp. 337-343 at paras. 34-35.