SCC File No. 38483

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

BETWEEN

HER MAJESTY THE QUEEN
Appellant
(Respondent)

and

J.M.
Respondent
(Appellant)

PUBLICATION BAN

Information regarding the identity of the complainant is **prohibited** from publication by any method pursuant to an order under section 486.4 of the *Criminal Code*

RESPONDENT'S FACTUM

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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RESPONDENT'S FACTUM

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PART I
OVERVIEW AND STATEMENT OF FACTS[1]

A Overview

1. The Respondent was charged with sexually assaulting his step-sister and her friend. The substance of the evidence against him was entirely testimonial. In the words of trial counsel, the evidence of the complainants was "improbable, inconsistent, uncorroborated, and tainted by collusion and dishonesty."[2] The Respondent failed to attend his original trial dates in May 2015. When the matter proceeded to a first jury trial in July 2016, the prosecution's case focused on the testimony of the complainants. After two days of deliberation, the jury was hung. When the matter proceeded to a second jury trial in December 2016, the prosecution bolstered their case by introducing evidence that the Respondent had failed to attend at his original trial dates, characterizing it as after-the-fact evidence of "consciousness-of-guilt." This time, the jury convicted the Respondent after two hours of deliberation.

2. A majority of the Court of Appeal for Ontario agreed that the trial judge erred in law procedurally and substantively when admitting the impugned after-the-fact conduct evidence and further erred in law by failing to provide an adequate instruction to the jury on that evidence. The decision of the majority was correct in law. The Respondent respectfully submits that this Appeal should be dismissed.

B Statement of facts

(a) Background and allegations

3. The Respondent was originally from Calgary, Alberta, but he and several members of his immediate family relocated to Eastern Ontario. The Respondent's sister, LM, began a relationship with a man named R*M*. Subsequently, the Respondent's father, TM, began a relationship with a woman named SL, who is R*M*'s sister and who had a daughter named TLD. (The M and *M* families were therefore joined by two relationships.[3]) As a result, the Respondent and TLD became *de facto* step-siblings. Although they did not live together, the families regularly held reunions.

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[1] **Note**: In this Factum, all page-references for transcripts refer to the original transcript page numbers in Courier New font (e.g. 34.) and not to the superimposed page numbers.
[2] AR, Vol XI, Tab 41: Transcripts from 22 December 2016 at page 152.
[3] AR, Vol III, Tab 19: Exhibit 3: "List of family members."

4. The Respondent allegedly sexually assaulted his step-sister, TLD, on multiple occasions when she was between the ages of nine and eleven and further sexually assaulted TLD with her friend BR on one occasion when they were eleven years old.[4] At the time of the alleged offences, the Respondent would have been in his early twenties.

5. The prosecution's substantive evidence consisted of the testimony of TLD and BR, supplemented by several witnesses who provided information about the history of the complaint and investigation, including SL, TLD's cousin C*M*, and the lead investigator Constable Juliana Desjardins.

6. Over the course of their investigation and prosecution, these allegations were marred by improbabilities, inconsistencies, absence of corroboration, and collusion or dishonesty:

a. TLD's testimony about her first sexual encounter with the Respondent, which allegedly involved digital penetration, differed substantially from her report to C*M*.[5]

b. TLD testified that another sexual encounter with the Respondent also involved digital penetration, but she had testified at the preliminary inquiry that this incident involved touching over her clothing and ultimately conceded that "I don't think I should be able to testify fully to what happened" when confronted with the contradiction.[6]

c. TLD testified that during the first instance of actual sexual intercourse she was sitting on a bathroom counter and that there was no bleeding, but she had told C*M* that the

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[4] Originally, the Respondent had been charged with seven offences under sections 151, 152, and 271 of the *Criminal Code* relating to different date-ranges. See AR, Vol I, Tab 3: Information 13-0019 and AR, Vol I, Tab 4: Indictment 13-0019 (original, abandoned before first trial). However, at the first trial, the prosecution preferred a simplified indictment with only two counts of sexual assault. See AR, Vol I, Tab 5: Indictment 13-0019 (re-laid, proceeded during first and second trial).
[5] AR, Vol VI, Tab 36: Transcripts from 15 December 2016 at pages 29-31 and AR, Vol VII, Tab 37: Transcripts from 16 December 2016 at pages 68-69 and 72.
[6] AR, Vol VII, Tab 37: Transcripts from 16 December 2016 at pages 77-79.

first instance of sexual intercourse happened in the missionary position and that there was substantial bleeding.[7]

d. TLD testified that she had eighty sexual encounters with the Respondent, but she could not say whether he was circumcised and no one else ever heard or saw any evidence of their relationship, even though more than one incident happened in close proximity to other family members and reportedly involved loud noises or yelling.[8]

e. TLD testified that the Respondent would regularly provide her with alcohol and marijuana, but SL testified that she had never seen her daughter intoxicated or impaired by drugs during this period.[9]

f. TLD testified that the Respondent locked her bedroom door by jamming a knife into the doorframe on two or three occasions and that there were still markings when she reported the allegations to police. However, in the course of the investigation, Constable Desjardins inspected the door and doorframe the day after the report and found no markings. The complainant later called the investigator to say she had checked and had indeed found markings, but the investigators decided not to re-attende because they already knew the markings were not there.[10]

g. TLD was hospitalized in October 2012 after a suicide attempt – she testified under oath at the preliminary inquiry that her hospitalization had nothing to do with the

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[7] AR, Vol V, Tab 35: Transcripts from 14 December 2016 at pages 32-33 and AR, Vol VII, Tab 37: Transcripts from 16 December 2016 at pages 80-83.
[8] AR, Vol VI, Tab 36: Transcripts from 15 December 2016 at page 114, AR, Vol VII, Tab 37: Transcripts from 16 December 2016 at pages 100-01 and 127, and AR, Vol VIII, Tab 38: Transcripts from 19 December 2016 at page 56-57.
[9] AR, Vol VI, Tab 36: Transcripts from 15 December 2016 at pages 117-19 and AR, Vol VIII, Tab 38: Transcripts from 19 December 2016 at pages 56-57.
[10] AR, Vol V, Tab 34: Transcripts from 13 December 2016 at pages 54-55 and 57-61 and AR, Vol VII, Tab 37: Transcripts from 16 December 2016 at pages 40-42 and 51-56.

Respondent, but later testified under oath at the trial that the allegations against the Respondent were a contributing cause to her hospitalization.[11]

h. TLD and BR testified that they had exchanged incriminating text or Facebook messages with the Respondent and between themselves – however, no messages were ever produced and the complainants only provided an unexaminable collection of now-inoperable phones to investigators between the two trials in autumn 2016.[12]

i. TLD spoke with BR through Facebook on the night of 21 July 2016, in the middle of her cross-examination at the first jury trial and after being confronted by with anticipated contradictions from BR's preliminary inquiry testimony. The following day, prior to testifying, BR produced a new written statement that changed her evidence to conform with TLD's allegation. The two complainants then disagreed in their testimony about whether this conversation was by Facebook's phone-call or text-messaging function.[13]

j. As a result of having provided conflicting evidence under oath, the trial judge provided a *Vetrovec*-style caution for BR: "The fact that [BR] has admitted that she said different things on different occasions while under oath, warrants careful consideration and special scrutiny of her evidence."[14]

(b) Investigation and prosecution

7. From October 2012 until April 2013, members of the Ontario Provincial Police attempted to arrange for the Respondent's arrest by communicating directly with the Respondent and / or

[11] AR, Vol VI, Tab 36: Transcripts from 15 December 2016 at pages 59-61 and AR, Vol VII, Tab 37: Transcripts from 16 December 2016 at pages 128-31.
[12] AR, Vol VII, Tab 37: Transcripts from 16 December 2016 pages 26-36, 42-44, 98, and 132-39 and AR, Vol VIII, Tab 38: Transcripts from 19 December 2016 at pages 81-82 and 115-18.
[13] AR, Vol IV, Tab 32: Transcripts from 23 November 2016 at pages 12 and 14-16, AR, Vol VII, Tab 37: Transcripts from 16 December 2016 at pages 104-05 and 108-109, and AR, Vol VIII, Tab 38: Transcripts from 19 December 2016 at pages 101-02, 106-07, and 109-11.
[14] AR, Vol XI, Tab 41: Transcripts from 22 December 2016 at page 132.

through the Respondent's father and uncle.[15] In early April 2013, the Respondent moved back to Calgary with his then-girlfriend, SL.[16]

8. The Respondent returned to Renfrew from Calgary, surrendered into custody, and was released on bail with SL as his surety on 10 April 2013.[17] His conditions of release included a requirement that he reside at SL's address in Calgary.[18]

9. The prosecution elected to proceed with trial by indictment and the Respondent elected to hold a preliminary inquiry and have a trial by judge and jury.

10. This matter proceeded to a preliminary inquiry on 22 January 2014. The Respondent returned from Calgary and was present in court for this proceeding.[19] The Respondent was committed to stand trial on all counts.

11. Between February 2014 and July 2014, this matter proceeded through remand and pre-trial motions in the Ontario Superior Court of Justice in Pembroke, Ontario.[20] The Respondent was not present for any of these court appearances,[21] nor was he required to be. The matter was scheduled for a two-week trial commencing on 25 May 2015.[22] The Respondent was notified by letter and by telephone about the trial dates and about his obligation to attend.[23]

12. There were two important developments between July 2014 and May 2015. First, the Respondent's relationship with SL ended and she terminated her suretyship, resulting in a surety revocation warrant being issued, but the Respondent did not voluntarily surrender himself into

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[15] AR, Vol II, Tab 12-D: Affidavit of Lauren Rock at pages 10-11.
[16] AR, Vol II, Tab 12-L: Transcript of Sentencing Hearing at pages 11 and 63.
[17] AR, Vol II, Tab 12-D: Affidavit of Lauren Rock at page 11.
[18] AR, Vol I, Tab 3: Information 13-0019, AR, Vol II, Tab 12-D: Affidavit of Lauren Rock at page 11, and AR, Vol II, Tab 12-F: Certified copy of Recognizance of Bail at page 55.
[19], Vol II, Tab 12-D: Affidavit of Lauren Rock at page 12.
[20] AR, Vol I, Tab 4: Indictment 13-0019 (original, abandoned before first trial)
[21] AR, Vol I, Tab 4: Indictment 13-0019 (original, abandoned before first trial) and AR, Vol II, Tab 12-D: Affidavit of Lauren Rock at pages 12-13.
[22] AR, Vol I, Tab 4: Indictment 13-0019 (original, abandoned before first trial)
[23] AR, Vol II, Tab 12-D: Affidavit of Lauren Rock at page 14 and AR, Vol II, Tab 12-H: Transcript of Proceedings in Superior Court of Justice at pages 41-42.

custody.[24] Second, the Respondent ceased communicating with his trial counsel, who brought a successful motion to be removed as counsel-of-record in February 2015 in the Respondent's absence.[25]

13. On 25 May 2015, the original trial dates, the Respondent did not appear for trial.[26] Consequently, the trial judge issued a bench warrant for the Respondent's arrest.[27] Three days later, an information was sworn charging the Respondent with failing to attend court pursuant to subsection 145(2) of the *Criminal Code*.[28]

14. In January 2016, while unlawfully at large on the surety revocation warrant, the bench warrant from 25 May 2015, and a further first-instance warrant for failing to appear on that date, the Respondent was arrested by the Calgary Police Service in relation to an unrelated charge in Alberta.[29] In February 2016, Constable Joseph Limlaw of the Ontario Provincial Police travelled to Calgary and brought the Appellant back to Ontario in custody. [30] The Respondent remained in custody thereafter, including throughout both jury trials.

15. From 18-28 July 2016, this matter proceeded to a first jury trial. The prosecution's evidence consisted of the testimony of TLD, BR, SL, C*M*, and Constable Desjardins. The prosecution did not lead evidence about the Respondent's failure to attend at his original trial date. The Respondent called no evidence. This trial resulted in a hung jury on the second day of deliberations.[31]

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[24] AR, Vol II, Tab 12-L: Transcript of Sentencing Hearing at pages 13-14 and 64.
[25] AR, Vol I, Tab 4: Indictment 13-0019 (original, abandoned before first trial), AR, Vol II, Tab 12-D: Affidavit of Lauren Rock at page 15, AR, Vol II, Tab 12-D: Affidavit of Lauren Rock at page 15, AR, Vol I, Tab 4: Indictment 13-0019 (original, abandoned before first trial) at page 47, and AR, Vol II, Tab 12-L: Transcript of Sentencing Hearing.
[26] AR, Vol II, Tab 12-D: Affidavit of Lauren Rock at page 15, AR, Vol I, Tab 4: Indictment 13-0019 (original, abandoned before first trial) at page 47, and AR, Vol II, Tab 12-J: Certified copy of Certificate of Non-Attendance of Superior Court.
[27] AR, Vol II, Tab 12-D: Affidavit of Lauren Rock at page 15, and AR, Vol II, Tab 12-H: Transcript of Proceedings in Superior Court of Justice
[28] AR, Vol II, Tab 12-D: Affidavit of Lauren Rock at page 15 and AR, Vol II, Tab 12-K: Certified copy of Information with endorsements.
[29] AR, Vol II, Tab 12-D: Affidavit of Lauren Rock at page 15
[30] AR, Vol II, Tab 12-D: Affidavit of Lauren Rock at page 16.
[31] AR, Vol I, Tab 5: Indictment 13-0019 (re-laid, proceeded during first and second trial).

16. On 2 August 2016, between the first and second jury trials in this matter, the Respondent pleaded guilty to failing to appear for his original trial dates.

17. This matter was re-scheduled with pre-trial motions on 31 October 2016 and a second jury trial beginning on 12 December 2016.

18. At one of the pre-trial motions, the prosecution brought an Application to adduce evidence that the Respondent **failed to attend his original trial dates** on 25 May 2015 (hereinafter "the impugned evidence") to support an inference to **consciousness-of-guilt** (hereinafter "the impugned inference"). The prosecution's evidence on the *voir dire* consisted of a written Application Record.[32] The Respondent sought to call evidence in the *voir dire* through his own testimony to establish that he "failed to appear at his trial because of his surety revoking [and] just being in an emotional and financial dire straits," but the trial judge ruled that the Respondent was **not permitted to testify** in the *voir dire* because this anticipated evidence "ought to be presented to the finders of fact and to the jury."[33] On 23 November 2016, the trial judge ruled that the failure to appear was **admissible** at trial as consciousness-of-guilt evidence.[34]

19. From 12-22 December 2016, this matter proceeded to a second jury trial. The prosecution's evidence on the after-the-fact conduct consisted of the testimony of Constable Desjardins, Crown Attorney Teresa James, and Constable Limlaw, which established that:

- Constable Desjardins obtained an arrest warrant for the substantive charges on 3 January 2013.[35] The Respondent returned from Calgary, surrendered on 10 April 2013, and was released on a recognizance with SL as his surety.[36]

- The Respondent had personally attended at his preliminary inquiry on 22 January 2014.[37]

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[32] AR, Vol II, Tab 12: Application Record with Respect to the Admissibility of Evidence of "The After the Fact Conduct of the Defendant."
[33] AR, Vol IV, Tab 31: Transcripts from 31 October 2016 at pages 32 and 65-69.
[34] AR, Vol IV, Tab 32: Transcripts from 23 November 2016 at pages 29-34.
[35] AR, Vol V, Tab 34: Transcripts from 13 December 2016 at page 56.
[36] AR, Vol V, Tab 34: Transcripts from 13 December 2016 at pages 75-76 and AR, Vol III, Tab 15: Exhibit 1: "Copy of certified copy of [JM's] Recognizance dated April 10, 2013."
[37] AR, Vol V, Tab 34: Transcripts from 13 December 2016 at page 100.

- The Respondent was subject to a surety warrant as of 21 August 2014.[38] Sometime in August 2014, the Respondent's counsel contacted Ms. James, advised her that the Respondent had financial difficulties and canvassed the possibility of changing sureties, but this was never pursued.[39]

- The Respondent failed to appear for his original trial dates on 25 May 2015.[40]

- The Respondent was arrested in Calgary on a separate matter and transported back to Renfrew by Constable Limlaw pursuant to the Ontario bench warrant in February 2015.[41]

(Importantly, despite not being able to fully articulate his alternative explanation for failing to attend, the Respondent was able to adduce some evidence to support that **alternative explanation** – specifically, that the Respondent's surety had revoked and that he was subject to arrest on the surety revocation warrant.[42]) The trial judge provided mid-trial instructions about this evidence.[43] As in the first trial, the prosecution's evidence on the substance of the allegations consisted of the testimony of TLD, BR, SL, C*M*,[44] and Constable Desjardins. The Respondent again called no evidence. The trial judge charged the jury on 22 December 2016, which included final **instructions** on the impugned evidence and the impugned inference.[45] After approximately two hours of deliberation, the jury convicted the Respondent of both counts of sexual assault.[46]

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[38] AR, Vol III, Tab 16: Exhibit 2: "Copy of Order for Committal (Surety Removal) dated August 21, 2014" (entered by Defence).
[39] AR, Vol V, Tab 34: Transcripts from 13 December 2016 at pages 101-02.
[40] AR, Vol V, Tab 34: Transcripts from 13 December 2016 at page 101.
[41] AR, Vol V, Tab 35: Transcripts from 14 December 2016 at pages 7-8.
[42] AR, Vol III, Tab 16: Exhibit 2: "Copy of Order for Committal (Surety Removal) dated August 21, 2014" (entered by Defence).
[43] AR, Vol V, Tab 35: Transcripts from 14 December 2016 at pages 8-10.
[44] The prosecution did not intend to call C*M* as a witness in the second trial. The Appellant brought an Application to compel the prosecution to call C*M*. The trial granted the Application and compelled the prosecution to call C*M*. Applicant's Record, Vol IV, Tab 33: Transcript from 12 December 2016 at pages 2-43 for submissions and 43-47 for the decision.
[45] AR, Vol XI, Tab 41: Transcripts from 22 December 2016 at pages 120-22, 151-52, and 154-55.
[46] AR, Vol I, Tab 5: Indictment 13-0019 (re-laid, proceeded during first and second trial).

(c) Appeal from conviction

20. The Respondent appealed his conviction to the Court of Appeal for Ontario, which framed the issues on appeal as follows:[47]

> **18** The only issue on this appeal is the trial judge's handling of the post-offence conduct evidence. In my view, the trial judge made two fundamental errors in that regard. The first revolves around the trial judge's decision to admit the evidence. The second has to do with how the trial judge instructed the jury on the use to which they could put this evidence, assuming it was properly admitted.

Justices Nordheimer and MacPherson held that the trial judge (A) erred in law by admitting the after-the-fact conduct evidence and (B) further erred in law by providing a deficient instruction to the jury.[48] In dissent, Justice Huscroft held that the trial judge did not err in law by admitting the after-the-fact conduct evidence and that the trial judge's instruction to the jury was not inadequate.[49]

PART II
RESPONDENT'S POSITION ON THE APPELLANT'S QUESTIONS

21. The Appellant has invited this Honourable Court to reconsider both questions addressed by Justices Nordheimer and MacPherson.

22. First, the Appellant asks "**Did the trial judge err in admitting the evidence that the Respondent failed to attend his trial"**? Yes. As noted, this overarching admissibility question raises two issues.

a. Procedurally, the trial judge erred in law by refusing to allow the Respondent to testify in the *voir dire* to determine the admissibility of the impugned after-the-fact conduct evidence. This procedural error prevented the Respondent from leading evidence on the substantive issues in the *voir dire*.

b. Substantively, the trial judge erred in law by erroneously concluding that the impugned evidence was relevant and by failing to go on to consider the exclusionary rule against extrinsic discreditable conduct evidence or the discretion to exclude evidence

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[47] AR, Vol I, Tab 2: *R v JM*, 2018 ONCA 1054 at paragraph 18.
[48] AR, Vol I, Tab 2: *R v JM*, 2018 ONCA 1054 at paragraphs 19-46.
[49] AR, Vol I, Tab 2: *R v JM*, 2018 ONCA 1054 at paragraphs 51-68.

whose probity is outweighed by the prejudice it would occasion. This substantive error permitted the Appellant to adduce highly prejudicial evidence for the jury to speculate upon.

23. Second, the Appellant asks "**Was the trial judge's caution to the jury about the appropriate use of after-the-fact conduct adequate?"** No. The trial judge's final instructions were deficient in two ways, only one of which was raised on appeal by the Appellant.

a. The instructions failed to articulate the alternative innocent inference as part of that instruction. This is the deficiency now challenged by the Appellant.

b. The instruction also failed to caution the jury against impermissibly using the discreditable conduct component of the after-the-fact conduct evidence. This deficiency was neither addressed by the court below nor addressed by the Appellant on appeal, but the Respondent invites this Honourable Court to consider it as well.

24. The Appellant also **"relies on the [curative] proviso [under subparagraph 686(1)(b)(iii) of the *Criminal Code*] to the extent reasonable.**" The proviso does not apply here. The impugned after-the-fact conduct evidence was the only new issue and only new body of evidence distinguishing the first jury trial, in which the jurors were hung after two days of deliberation, and the second jury trial, in which the jurors convicted the Respondent after two hours. The Respondent submits that Justices Nordheimer and MacPherson were correct in holding that theses errors were "neither minor nor harmless" and that the prosecution evidence "was not overwhelming."[50]

PART III
STATEMENT OF ARGUMENT

A Admissibility of the after-the-fact conduct evidence

25. The trial judge erred in law by admitting the impugned after-the-fact conduct evidence both as a matter of procedure, by denying the Respondent the right to testify in the *voir dire*, and as a matter of substance, by ruling that the impugned after-the-fact conduct was admissible at trial.

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[50] AR, Vol I, Tab 2: *R v JM*, 2018 ONCA 1054 at paragraph 43.

(a) Procedural error – Denying the Respondent the right to testify in the *voir dire*

26. Justices Norheimer and MacPherson correctly held that the trial judge erred in law by refusing to allow the Respondent to testify at the *voir dire*:[51]

> **20** It was critical, to a proper decision on whether the evidence of the missed trial date ought to be admitted, for the trial judge to know the circumstances surrounding the appellant's failure to appear on that trial date. Central to those circumstances was the appellant's explanation for his failure to appear. Yet the trial judge refused to allow the appellant to give evidence on the *voir dire*, the whole purpose of which was to decide the admissibility question. Without hearing the appellant's explanation for his failure to attend, or at least a summary of the appellant's explanation from counsel, I am unable to understand how the trial judge purported to conduct a proper relevancy analysis or to properly exercise his discretion whether to admit the evidence.
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> **21** I appreciate that there is no rule regarding how a *voir dire* on the admissibility of evidence is to be conducted nor is there any requirement that viva voce evidence be heard: *R. v. Kematch*, 2010 MBCA 18, 252 C.C.C. (3d) 349, at para. 43; *United States of America v. Anderson*, 2007 ONCA 84, 85 O.R. (3d) 380, at para. 37. What is clear, however, is that before rendering a proper legal ruling, the trial judge must have the necessary factual foundation, in some form, on which to make an informed decision.

However, the Appellant argues (at paragraphs 50-64 of their Factum) that the trial judge "had the necessary factual foundation to make an informed decision on admissibility" and (at paragraph 65 of their Factum) that the majority "conflated the function of the trial judge and the function of the jury" by insisting that the trial judge should heard evidence in the *voir dire*. Respectfully, the Appellant has missed the majority's point and misunderstood the substantive legal tests.

27. The overall admissibility inquiry involved at least two sub-issues for which the Respondent's alternative explanation was an important consideration.

- First, as detailed in paragraph 39 of this Factum, below, an alternative explanation that is "equally explained by" or "equally consistent with" the inference to consciousness-of-guilt renders that evidence irrelevant and therefore inadmissible. For this reason, Justices Nordheimer and MacPherson held that the trial judge was unable to "conduct a proper relevancy analysis."

[51] AR, Vol I, Tab 2: *R v JM*, 2018 ONCA 1054 at paragraphs 20-21.

- Second, as detailed in paragraph 55 of this Factum, below, an alternative explanation that is less than "equally consistent" with the impugned inference can at least make that inference less persuasive, thereby reducing the probity of that evidence. For this reason, Justices Nordheimer and MacPherson were right to find that the trial judge was unable to "properly exercise his discretion whether to admit the evidence."

The trier of law must protect the trier of fact from inadmissible evidence. In order to determine whether evidence is admissible, the trier of law may need to hear other evidence in a *voir dire*. Hearing evidence at a *voir dire* and excluding inadmissible evidence from trial does not usurp the jury's function – that *is* the function of the trial judge.

(b) Substantive error – Admitting the impugned after-the-fact conduct evidence

28. In *R v Calnen*, Justice Martin confirmed that, in order for evidence to be substantively admissible at trial, the evidence (I) must be "relevant to a live, material issue in the case," (II) "must not offend any other exclusionary rule of evidence," and (III) must bear a "probative value [that] exceeds its prejudicial effects."[52] In the case-at-bar, the Respondent maintained at trial[53] and on appeal that the trial judge erred in law by admitting the impugned evidence – it was irrelevant, it contravened the rule against "bad character" / extrinsic discreditable conduct, and its probity was outweighed by its prejudice.

I <u>The trial judge erroneously concluded that the evidence was relevant</u>

29. In order to be admissible at trial, proffered evidence must be both material and relevant. In *R v Calnen*, Justice Martin reaffirmed that evidence is "material" if the proposition of fact that it is adduced to prove is at issue in the trial and "relevant" if the evidence tends to make that proposition of fact more likely.[54] In that same decision, Justice Martin reaffirmed that the rules and principles concerning "after-the-fact conduct" evidence are functions of the general rules and principles concerning the materiality and relevance of circumstantial evidence.[55]

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[52] *R v Calnen*, 2019 SCC 6 at paragraph 107 per Martin J.
[53] AR, Vol IV, Tab 31: Transcripts from 31 October 2016 at page 35.
[54] *R v Calnen*, 2019 SCC 6 at paragraphs 108-109 per Martin J.
[55] *R v Calnen*, 2019 SCC 6 at paragraph 111 per Martin J.

30. At trial and on appeal, the Respondent maintained that the impugned evidence was irrelevant both because (i) the evidence did not tend to make consciousness-of-guilt more likely as a matter of logic and human experience (hereinafter the "inferential chain" analysis) and (ii) the proffered alternative explanation was equally consistent with any inference to consciousness of guilt (hereinafter the "equally consistent explanation" analysis).

i *The inferential chain analysis*

31. There are multiple links in the inferential chain from after-the-fact conduct evidence to a conclusion of guilt.[56] Identifying each step of the inferential chain is important. In *R v Calnen*, Justice Martin held that:[57]

> **113** In addition to being aware of general principles, it is important for counsel and trial judges to specifically define the issue, purpose, and use for which such evidence is tendered and to articulate the reasonable and rational inferences which might be drawn from it. This often requires counsel and the court to expressly set out the chain of reasoning that supports the relevance and materiality of such evidence for its intended use.

Accordingly, the Respondent asks – "what are the links in the inferential chain from *failing to attend trial* to *consciousness-of-guilt*?" The Respondent submits that there are two mandatory logical links in that inferential chain – the *intentionality* of the conduct and a motivating evasive *purpose*. These logical links become obvious when considering related forms of "evasive" after-the-fact conduct and the jurisprudence under section 475 and subsection 803(2) of the *Criminal Code*. Importantly, these mandatory logical links were missing in the Respondent's case.

32. In a recent academic article, Justice Paciocco identifies "evasion cases" as the "paradigmatic example of 'post-offence conduct' evidence," where allegedly evasive after-the-fact conduct is adduced to advance an inference of consciousness-of-guilt:[58]

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[56] For example, in *R v Arcangioli*, [1994] 1 SCR 129 at paragraph 42 (SCC), Justice Major proposed the following inferential chain when dealing with evidence of after-the-fact flight: "(1) from the accused's behavior to flight, (2) from flight to consciousness of guilt, (3) from consciousness of guilt to consciousness of guilt concerning the offence in question, (4) from consciousness of guilt of the offence in question to actual guilt of the offence in question."

[57] *R v Calnen*, 2019 SCC 6 at paragraph 113 per Martin J.

[58] ABOA, Tab 1: David M. Paciocco, "Simply Complex: Applying the Law of 'Post-Offence Conduct' Evidence" (2016), 63 CLQ 276 at page 2, quoting from *R v White and Cote*, [1998] 2 SCR 72 at paragraph 19 (SCC) per Major J.

> In these cases the proposed evidence purports to show that accused persons are attempting to distance themselves from the crime. Examples include proof that "the accused fled the scene of the crime or the jurisdiction in which it was committed, attempted to resist arrest, or failed to appear at trial … [as well as evidence of] acts of concealment, for instance, where the accused has lied, assumed a false name, change his or her appearance, or attempted to hide or dispose of incriminating evidence." 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."

The *intentionality* and *purpose* links are explicitly required for some areas of evasive after-the-fact conduct. For example:

- "False alibis" only permit an inference to "consciousness-of-guilt" if there is "other evidence from which a reasonable jury could conclude that the alibi was deliberately fabricated" (in other words, an *intentional* falsehood) and that "the accused was involved in that attempt to mislead the jury" (in other words, for an evasive *purpose*).[59]

- "False statements / testimony" are "not affirmative evidence of the guilt of the accused unless they have been concocted" (in other words, an *intentional* falsehood) "and unless they were offered to evade responsibility" (in other words, for an evasive *purpose*).[60]

The Appellant submits that these two logical links also are implicitly required for other evasive after-the-fact conduct. For example:

- "Flight" from the scene necessarily implies an *intentional* departure for the *purpose* of avoiding apprehension.[61]

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[59] *R v Hibbert*, 2002 SCC 39 at paragraph 67 per Arbour J. See also ABOA, Tab 1: David M. Paciocco, "Simply Complex: Applying the Law of 'Post-Offence Conduct' Evidence" (2016), 63 CLQ 276 at page 11, citing *R v Ranger* (2003), 178 CCC (3d) 375 at paragraph 121 (Ont CA) per Charron J and *R v Hibbert*, *supra*.

[60] ABOA, Tab 1: David M. Paciocco, "Simply Complex: Applying the Law of 'Post-Offence Conduct' Evidence" (2016), 63 CLQ 276 at page 11-12, citing *R v Wood* (1989), 51 CCC (3d) 201 (Ont CA) per Charron J.

[61] For example, the elements of flight by vehicle contrary to subsection 249.1(1) of the *Criminal Code*, which implicitly includes an element that the defendant "fails … to stop the vehicle" *intentionally* and explicitly includes an element that the failure was "*in order to evade* the peace officer."

- "Hiding" or "disposing" evidence necessarily implies that the defendant *intentionally* relocated or destroyed the evidence for the *purpose* of preventing its discovery.

In short, as a matter of logic and principle, in order for a trier of law to admit evidence of evasive after-the-fact conduct to support an inference to consciousness-of-guilt, the trier of law must have a body of evidence that also permits an inference that the conduct was *intentional* and for an evasive *purpose*.

33. Comparing and contrasting section 475 and subsection 803(2) of the *Criminal Code* leads to the same conclusion – failing to appear for a trial can only support an "adverse inference" where there is evidence that the accused *intentionally* failed to appear and did so for an evasive *purpose*.

- Section 475 of the *Criminal Code* sets out the consequences when a defendant "absconds" from a trial by indictment.[62] In *R v Garofoli*, Justice Martin held that "the word 'absconds' means more than mere failure to appear" and that it "imports that the accused has voluntarily absented himself from his trial for the purpose of impeding or frustrating the trial, or with the intention of avoiding its consequences."[63] In *R v Tzimopoulos*, Justices Houlden, Robins, and Krever held that "[t]he question of whether the appellant had absconded was one for the trial judge and not the jury."[64] In *R v Taylor*, Justice Levine held that the trier of law errs by "failing to make any inquiries concerning whether the [defendant's] failure to appear was 'for the purpose of impeding or frustrating the trial, or with the intention of avoiding its consequences.'"[65] If the trier of law concludes that the defendant absconded during the course of the trial, then there are two important consequences. As a matter of procedure, the trier of law may "continue the trial" in the absence of the defendant pursuant to subsection 475(1). As a matter of evidence, the trier

[62] Section 544 of the *Criminal Code* is a nearly-identical provision that sets out the procedural and evidentiary consequences when a defendant "absconds" from a preliminary inquiry.
[63] *R v Garofoli* (1988), 41 CCC (3d) 97 at 141 (Ont CA) per Martin JA; affirmed on this point in *R v Garofoli*, [1990] 2 SCR 1421 at paragraph 99 (SCC) per Sopinka J.
[64] *R v Tzimopoulos* (1986), 29 CCC (3d) 304 at 326 (Ont CA) per Houlden, Robins, and Krever JJA.
[65] *R v Taylor*, 2010 BCCA 58 at paragraph 16 per Huddart JA.

of law can inform the trier of fact that the defendant has "absconded" and then instruct the trier of fact that they may draw an "adverse inference" pursuant to subsection 475(2).[66]

- In contrast, subsection 803(2) of the *Criminal Code* sets out the consequences when a defendant "does not appear" for a summary conviction trial. The words "does not appear" have been interpreted to include an element of intentionality, thereby excluding situations where the defendant fails to appear by mistake or due to circumstances beyond their control.[67] If the summary conviction court concludes that the defendant "did not appear" to a known trial date, then there is only one important consequence. As a matter of procedure, the court may "proceed *ex parte*" in the absence of the defendant pursuant to paragraph 803(2)(a). But as a matter of evidence, there is no provision permitting the court to draw an "adverse inference" against the defendant because they did not appear.

Importantly, the legislature only provided for an "adverse inference" against the defendant when he or she "absconds" under subsection 475(2) of the *Criminal Code*, but did not provide for an "adverse inference" when he or she simply "does not appear" under section 803 of the *Criminal Code*. This is a sensible distinction, based on whether or not the intentional failure to appear was motivated by an evasive purpose. The Respondent has found only one reported Ontario jury trial ruling on this area – in *R v Dessouza*, Justice Ricchetti held that the defendant's failure to appear at a preliminary inquiry was "not relevant" without evidence of an evasive purpose:[68]

> **18** It is not know[n] why Mr. Dessouza did not attend the preliminary hearing. There is no evidence as to whether Mr. Dessouza left Canada prior to or after the preliminary hearing. There is no evidence why Mr. Dessouza left Canada. There is no evidence why he would have returned [to Canada] if he had decided to flee to avoid these charges. This would result in a great deal of speculation on the part of the jury, none of which has to do with the essential elements of the two offences [they] are to decide. As a result, there is no connection between the failure to appear at the preliminary inquiry and leaving Canada with this offence…

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[66] In *R v DDB*, 2006 ABPC 31 at paragraph 55, Cook-Stanhope J recognized that "[t]his inference appears to be an inference of knowledge or consciousness of guilt on the part of the accused."

[67] On the one hand, the requirement of notice in the chapeau of subsection 803(2) excludes situations where the defendant did not know about the proceeding. On the other hand, the importance of the right to be present at trial has excluded situations where the defendant knows about the proceeding but is unable to attend for a legitimate reason. In *R v Tarrant* (1984), 13 CCC (3d) 219 at paragraph 16 (BC CA), Justice Craig approved trial judge's conclusion that the provision applied when "by his own conduct [the defendant] chooses not to attend."

[68] *R v Dessouza*, 2012 ONSC 208 at paragraph 18 per Ricchetti J.

Both the *Criminal Code* and *R v Dessouza* demonstrate that a failure to appear only permits an inference to consciousness of guilt when the failure is *intentional* and for an evasive *purpose*.

34. In the case-at-bar, the Respondent conceded that he failed to appear and that his failure to appear was intentional. However, the Respondent argued that the impugned evidence still did not permit the inference to consciousness of guilt[69] because there was no evidence suggesting that this intentional failure to appear was for an evasive purpose, such as frustrating the trial or avoiding the consequences of a trial:[70]

> MR. JOHNSTON: Because on its own, when we're just even looking at the relevance of this and I conceded that paragraph 19 says that in *R. and White* that, "Under certain circumstances." Are we in that circumstance? Is this gentleman's failure to appear, and again, the Crown has – had concerned this, correct me if I'm wrong, that his surety revoked.
>
> And so are we in in a situation knowing even just on the basis of – of what the Crown's evidentiary record is, to say that this is one of the circumstances where:
>
> - A person who flew back and attend at their bail hearing;
> - Flew back and attended at the preliminary inquiry;
> - Who ultimately had their surety revoke;
> - That didn't attend at his trial.
>
> Is this that circumstance where failing to appear at trial is evidence of consciousness of guilt? That his actions are – are possibly, consistent with somebody who is guilty of the offence as indicted.
>
> I would respectfully submit that the relevance even on that record without the amplification of [JM's] *viva voce* evidence is tenuous at best.

Like in *R v Dessouza*, the jury would have had to speculate about how the Respondent's failure to appear tended to make it more likely that he was conscious that he was guilty.

35. Notwithstanding Justice Martin's injunction in *R v Calnen* to be precise and notwithstanding the lessons learned from analogous cases and *Criminal Code* provisions, Justice Huscroft and the Appellant both prefer a simpler, categorical approach – failing to attend court always betrays a consciousness of guilt. Justice Huscroft held that:[71]

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[69] AR, Vol IV, Tab 31: Transcripts from 31 October 2016 at pages 31-32 and 42-47.
[70] AR, Vol IV, Tab 31: Transcripts from 31 October 2016 at pages 50.
[71] AR, Vol I, Tab 2: *R v JM*, 2018 ONCA 1054 at paragraphs 51-52.

> **51** Post-offence conduct evidence is simply a form of circumstantial evidence, albeit one that has frequently given rise to difficulties. Plainly, the appellant's failure to appear at his first trial was evidence from which an inference of guilt could be drawn.
>
> **52** Nordheimer J.A. does not say that this inference could not be drawn, nor could he. It is one of the examples set out by the Supreme Court in *White* (1998), at para. 19, where Major J. wrote: "an inference of guilt may be drawn from the fact that the accused fled from the scene of the crime or the jurisdiction in which it was committed, attempted to resist arrest, or failed to appear at trial" (emphasis added). My colleague's concern is that the trial judge did not allow the appellant to testify on the *voir dire* before deciding to admit the evidence of his failure to appear.

Similarly, the Appellant (at paragraphs 50-58 of their Factum) argues that the impugned evidence was relevant to consciousness-of-guilt because the evidence was "listed as an example of evasive conduct" by Justice Major in *R v White and Cote*. Justice Huscroft and the Appellant are both wrong to adopt this approach. In *R v White and Cote*, Justice Major did not offer a list of examples, including failing to appear for trial, as automatically-relevant categories of after-the-fact conduct. Further, in the preceding sentence, Justice Major made clear that such after-the-fact conduct "may" be relevant "[u]nder certain circumstances," signalling the indisputable proposition that relevance is a fact-specific determination and not amenable to simple categorical analysis.[72] Finally, to the extent that Justice Major can be taken to have proposed a categorical approach, that approach has been disavowed by in *R v Calnen*, wherein Justice Martin held that, "[a]s there are also no automatic labels which make certain kinds of after-the-fact conduct always or never relevant to a particular issue, 'we must consider all the circumstances of a case to determine whether the post-offence conduct is probative and, if so, what use the jury may properly make of it.'"[73]

36. The error of this categorical approach becomes all the more obvious when considering the contrapositive. *Attending trial* does not tend to prove *consciousness of innocence*. The Respondent raised this with the trial judge:[74]

> MR. JOHNSTON: Your Honour, does attending at one's trial provide evidence of innocence?
>
> THE COURT: I'm not – I'm not sure….

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[72] *R v White and Cote*, [1998] 2 SCR 72 at paragraph 19 (SCC) per Major J.
[73] *R v Calnen*, 2019 SCC 6 at paragraph 119 per Martin J.
[74] AR, Vol IV, Tab 31: Transcripts from 31 October 2016 at page 50.

> MR. JOHNSTON: Do we ever instruct juries that because people attend at their trials they should infer that the person is not guilty?
>
> Because logically, we're trying to do the opposite and if we're engaging in logic [there] would have – have to be an axiom that people that are innocent attend their trials and people that are not guilt – or that are guilty don't come to their trials.
>
> THE COURT: Hmph.

Paradoxically, the Appellant has adopted this proposition (at paragraph 64 of their Factum), suggesting that "[a] person who was not possessed of a guilt 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." Notwithstanding the benefit that this consciousness-of-innocence evidence would afford to so many accused persons who attend their trials, counsel for the Respondent must submit that this, too, is not an axiom borne out by judicial experience.

37. For their part, Justices Nordheimer and MacPherson ultimately did not consider these issues, having found that the evidentiary record at the *voir dire* did not provide the "necessary factual foundation … to make an informed decision" about relevance.[75]

ii *The equally-consistent explanation analysis*

38. In addition to the incomplete inferential chain from failing to appear to consciousness of guilt, the Respondent specifically argued that his alternative explanation was so equally consistent with the inference to guilt that it made the impugned evidence irrelevant and therefore inadmissible.

39. In a recent academic article, Justice Paciocco reviewed the jurisprudence and concluded that after-the-fact conduct evidence "is not relevant to a material issue where the evidence supports competing inferences that are equally as persuasive as the inference the evidence is being presented to establish."[76] In *R v Calnen*, Justice Martin cited this article with approval and confirmed that even if there is a complete inferential chain between the proffered after-the-fact conduct evidence

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[75] AR, Vol I, Tab 2: *R v JM*, 2018 ONCA 1054 at paragraphs 20-21.
[76] ABOA, Tab 1: David M. Paciocco, "Simply Complex: Applying the Law of 'Post-Offence Conduct' Evidence" (2016), 63 CLQ 276 at page 19.

and the desired conclusion, the evidence will be irrelevant if it is "equally explained by" or "equally consistent with" an alternative inference:[77]

> **124** … The overall conduct and context must be such that it is not possible to choose between the available inferences as a matter of common sense, experience and logic. This is a composite standard in which the three considerations interact and one may take on greater significance in a particular case. For example, when hypothetically it could be one offence or another, common sense and experience may support one inference over the other. Pure logic is not the only, or even primary consideration. 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.

In other words, if the inferential chain also leads to a different but equally consistent conclusion , then the trier of law should not put the supporting evidence before the trier of fact (or, if it has already been tendered, then the trier of law should instruct the trier of fact to disregard or assign no probative value to that evidence).

40. At trial and on appeal, the Respondent argued that his failure to attend at the original trial date was equally consistent with an alternative explanation: The Appellant's intentional failure to appear for the original trial dates on 25 May 2015 was motivated by a fear of being arrested under the surety revocation warrant, having no surety and being denied judicial interim release, and proceeding through a self-represented jury trial while still in custody.[78] As a matter of common sense and human experience, an innocent person would fear and loathe the prospect of pre-sentence incarceration, especially during a self-represented jury trial. The trial judge failed to recognize this as an equally consistent explanation when ruling that the impugned evidence was admissible, chiefly because the trial judge refused to allow the Respondent to testify in the *voir dire* to fully articulate that explanation.[79] On appeal, Justices Nordheimer and MacPherson ultimately agreed that, by denying the Respondent the right to testify in the *voir dire*, the trial judge lacked the "necessary factual foundation" to make an "informed decision" about this part of the relevancy inquiry.[80]

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[77] *R v Calnen*, 2019 SCC 6 at paragraph 124 per Martin J.
[78] AR, Vol IV, Tab 31: Transcripts from 31 October 2016 at page 86.
[79] AR, Vol IV, Tab 32: Transcripts from 23 November 2016 at pages 29-34.
[80] AR, Vol I, Tab 2: *R v JM*, 2019 ONCA 1054 at paragraphs 20-21 per Nordheimer JA.

41. In contrast, Justice Huscroft and the Appellant argue that no evidence was required from the Respondent on the *voir dire* because his proffered explanation could not have been "equally consistent" with the inference to consciousness-of-guilt. Justice Huscroft held that:[81]

> **55** The appellant does not say that had he been permitted to testify at the *voir dire*, the Crown's evidence would have been rendered inadmissible. Nor could he: at most, evidence from the appellant might have suggested another reasonable inference that could be drawn to explain his failure to appear for his first trial -- one not consistent with guilt. It would still be for the jury to decide on the basis of the evidence as a whole -- including any evidence the appellant chose to call in the trial proper -- whether that inference should be drawn: *White* (1998), at para. 27.

Similarly, the Appellant argues (at paragraphs 59 and 63-64 of their Factum) that, based on the representations made by trial counsel in the *voir dire*, the proffered explanation was "clearly" incapable of constituting an "equally consistent" inference. Respectfully, Justice Huscroft and the Appellant are both demonstrably wrong. To be clear, the Respondent has always contended that his explanation was so equally consistent with the impugned inference that it rendered the supporting evidence irrelevant and therefore inadmissible. In support of that contention at trial, the Respondent cited and submitted two Ontario decisions directly on point.[82]

- In *R v Davies*, the accused was involved in an automobile accident. After he was advised by investigators that charges were pending, he left the country. A warrant for his arrest was issued and he was eventually extradited back to Canada. The matter proceeded to a judge-alone trial. The accused testified that he went abroad to get relief from the emotional stress he was experiencing after the accident, not because he was evading the charges. The trial judge nevertheless held that the accused fled to evade the charges and that guilt could be inferred from that evidence. However, on appeal, Justice Moldaver held that:[83]

  > **27** With respect, I am of the view that the trial judge erred in treating the appellant's departure from Canada as post-offence conduct from which guilt could be inferred. In drawing that conclusion, the trial judge made no mention whatsoever of the evidence, including that of the investigating officer, that lent credence to the appellant's account of his activities and his explanation for leaving. In the face of the appellant's communication with the investigating officer and his continuous cooperation, the inference drawn by the trial judge was at best tenuous and, in my view, unwarranted. In short, the departure

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[81] AR, Vol I, Tab 2: *R v JM*, 2018 ONCA 1054 at paragraph 55 per Huscroft JA (in dissent).
[82] AR, Vol IV, Tab 31: Transcripts from 31 October 2016 at pages 46-48 and 80-81.
[83] *R v Davies*, 2008 ONCA 209 at paragraph 27 per Moldaver JA.

evidence should not have been used as a basis for inferring the appellant's guilt; nor should it have been used to discredit him.

- In *R v Minoose*, the accused was charged with a robbery in Kemptville. At the same time, the accused was charged with a robbery in Ottawa. Arrest warrants for both robberies existed at the same time. The accused allegedly evaded those simultaneous warrants. The Kemptville matter was set for a judge-and-jury trial. In a pre-trial motion, the prosecution sought to tender the accused's evasion of the Kemptville warrant as evidence of consciousness of guilt. However, Justice Kane dismissed that application, holding that:[84]

  71 Even if Mr. Minoose was avoiding police because of the charges, that is not determinative whether he was avoiding police at the same time because of the outstanding charges by the police in Ottawa. If Mr. Minoose was avoiding police because of these charges and the Ottawa charges, it seems to me that it is virtually impossible to distinguish such flight and any associated consciousness of guilt between the Ottawa and Kemptville charges. If Mr. Minoose at the time knew that he was innocent of these Kemptville charges, he knew the outstanding Ottawa charges and his criminal record would favour his incarceration until trial on these charges were two reasons to avoid police. Even though the facts are different, this analysis brings this application squarely back within the principles enunciated by the Supreme Court of Canada in *R. v. Arcangioli*, *supra*, and *R. v. White*.

These cases establish unequivocally that the Respondent's explanation in the case-at-bar is precisely the kind of explanation that can be so "equally consistent" with the impugned inference that it renders that evidence irrelevant and therefore inadmissible. To adapt the words of Justice Martin in *R v Calnen*, "[t]he overall conduct and context [is] such that it is not possible to choose between the available inferences as a matter of common sense, experience and logic."[85] Respectfully, Justice Huscroft and the Appellant are wrong to say that the proffered explanation has no impact on relevance or admissibility.

42. Finally, the Appellant (at paragraph 69 of their Factum) conflates two independent issues – a lawful excuse, which is a defence under section 145 of the *Criminal Code*, and an alternative explanation, which is a response to a proffered inference from circumstantial evidence. However, the fact that a person's reason for failing to appear does not amount to a lawful excuse does not mean that the reason cannot explain away an inference to consciousness-of-guilt. A guilty person

[84] *R v Minoose*, 2010 ONSC 7005 at paragraph 71 per Kane J.
[85] *R v Calnen*, 2019 SCC 6 at paragraph 124 per Martin J.

can get sick and have a lawful excuse for failing to appear. An innocent person can be negligent about court dates and have no lawful excuse for failing to appear. There is no relationship between lawful excuse and alternative explanation. The Appellant's analysis on this point is unresponsive to the issues they have raised for this Honourable Court's consideration.

II The trial judge failed to consider the rule against extrinsic discreditable conduct

43. In order for evidence to be admissible at trial, it must not contravene any exclusionary rules or it must engage an exception to such rules. One such rule is the rule against extrinsic discreditable conduct – or "bad character" – evidence. In *R v Johnson*, Justice Rouleau held that:[86]

> **83** **…** Evidence of the accused's bad character cannot be adduced simply to show that the accused is the sort of person likely to commit the offence charged. While this evidence might arguably be relevant, it is inherently prejudicial when used in this fashion: *Morris*, at pp. 201-202; R. v. G.(S.G.), [1997] 2 S.C.R. 716, at para 63.
>
> **84** One particularly prejudicial form of bad character evidence is evidence that establishes past criminal conduct on the part of the accused that does not form the basis of the charges before the court. This type of past misconduct evidence has been identified as raising two forms of prejudice that will generally outweigh any probative value that might exist in the evidence itself. They are commonly referred to as moral prejudice and reasoning prejudice: *R. v. Handy*, [2002] 2 S.C.R. 908, at paras. 31, 139-147.
>
> …
>
> **90** The trial judge must determine whether the evidence in question is "discreditable" to the accused, in the sense that an ordinary person would disapprove of their conduct: *Handy*, at para. 34; S. Casey Hill, David M. Tanovich & Louis P. Strezos, *McWilliams' Canadian Criminal Evidence*, 4th ed. Loose-leaf (Aurora: Canada Law Book, 2003), at para. 10:40.10.10. If the evidence is not discreditable, the bad character justification for the exclusionary rule is never engaged in the first place. The evidence, if relevant, will be admissible, unless excluded by some other rule.

The Respondent has always maintained that the impugned evidence is presumptively inadmissible as extrinsic discreditable conduct evidence – specifically, the failure to attend court was a criminal offence under subsection 145(2) of the *Criminal Code*,[87] for which the Respondent was found guilty, was sentenced to jail, and has a criminal record.

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[86] *R v Johnson*, 2010 ONCA 646 at paragraphs 83-84 and 90 per Rouleau J.

[87] AR, Vol IV, Tab 31: Transcripts from 31 October 2016 at pages 32-33 and AR, Vol IV, Tab 32: Transcripts from 23 November 2016 at page 40.

44. In concluding that the proffered evidence was admissible, neither the trial judge nor Justice Huscroft properly addressed this exclusionary rule. At the trial, the trial judge seemingly dealt with this by suggesting that leading the underlying facts of the conviction without mentioning the legal conviction itself would avoid the rule against discreditable conduct evidence:[88]

> [MR. JOHNSTON:] As a general rule, you are not allowed to adduce evidence of an individual's criminal record unless they put their character in issue. That's exactly what's happening here. Evidence would be called about this individual's criminal record, a criminal conviction that has been entered before the trial.
>
> MR. BARNES: No. That's not the Crown's intention, Your Honour. No.
>
> THE COURT: I have – I hadn't heard that from the Crown.
>
> MR. JOHNSTON: But that's what they're doing Your Honour.
>
> THE COURT: Well that's – that's the material that's before me. It's not material that's before the trier of fact at – at the trial.
>
> MR. JOHNSTON: I understand, but in – in some ways are we not engaging in a – in a legal fiction knowing that his failure to appear is entirely the subject matter of a criminal conviction. He was arrested for that and he was ultimately found guilty and ascribed some time served for that transgression. So….
>
> THE COURT: Yeah. I'm not sure that:
>
> 1. Mr. Barnes intends to go there; or
> 2. That he needs to go there.
>
> It's – his pitch is that it's relevant to the *mens rea* element and whether there was a criminal conviction or not, I'm not sure it is relevant to that – that issue.
>
> It's the – it's the failure to appear at trial and its role, if any, in – in the *mens rea* assessment.

Justice Huscroft makes no mention at all of the rule against discreditable conduct, moving from relevance to prejudice and probity.[89] No exception to the rule against discreditable conduct evidence, such as similar fact evidence or good-character rebuttal evidence, has ever been offered to explain why this evidence is admissible. The Respondent respectfully asks that this Honourable Court to confirm that the impugned evidence is presumptively inadmissible and that no exception to this rule of exclusion was engaged.

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[88] AR, Vol IV, Tab 31: Transcripts from 31 October 2016 at pages 49-50.
[89] AR, Vol I, Tab 2: *R v JM*, 2018 ONCA 1054 at paragraphs 54-57.

III The trial judge failed to consider the exclusionary discretion

45. In order for evidence to be admissible at trial, it must not be excluded by the trier of law pursuant to an "exclusionary discretion." In *R v Buhay*, Justice Arbour recognized that the trier of law has the discretion at common law to exclude otherwise admissible evidence that was "obtained in circumstances such that it would result in unfairness if the evidence was admitted at trial" or if "the prejudicial effect of admitting the evidence outweighs its probative value."[90]

46. At trial, the Respondent invited the trial judge to exercise the court's discretion to exclude the impugned evidence because its probity was outweighed by its prejudice.[91] In the court below, the Respondent argued that the trial judge failed to consider this discretion. Justices Nordheimer and MacPherson:[92]

> **22** … There is still the question of whether the prejudicial effect of the evidence outweighs its probative value. That is a separate inquiry that the trial judge was obliged to consider…
>
> **23** The trial judge provided no such analysis in this case despite trial counsel's urging that he do so. Rather, he appears to have proceeded on the basis that, if the evidence was relevant, it was automatically admissible. That conclusion ignores the second stage of the admissibility inquiry. The failure to engage in that second stage is an error of law. Given the state of the record before us, I cannot reach a proper conclusion on that second stage, especially absent the appellant's evidence on the issue, or at least counsel's summary of what that evidence would have been. I do note, however, that the circumstances surrounding the appellant's failure to attend on his first trial date could certainly have a bearing on the probative value/prejudicial effect test. For example, if the appellant had been unable to attend the first trial date because of illness, that would cast a very different light on the probative value of the evidence.
>
> **24** The probative value/prejudicial effect test is of particular importance when considering post-offence conduct evidence because of the recognized concern regarding its potential misuse by jurors…

This analysis is correct. Plainly, the trial judge never considered whether to apply his discretion to exclude the impugned evidence.

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[90] *R v Buhay*, 2003 SCC 30 at paragraph 40 per Arbour J.
[91] AR, Vol IV, Tab 31: Transcripts from: 31 October 2017 at pages 51-52.
[92] AR, Vol I, Tab 2: *R v JM*, 2018 ONCA 1054 at paragraphs 22-24.

i *Reasons why the Appellant is wrong*

47. The Appellant now engages in a strained exercise in judicial archeology in order to show why, despite saying nothing about it, the trial judge actually did consider this exclusionary discretion. None of the Appellant's reasons should be accepted.

48. The Appellant argues (at paragraph 78 of their Factum) that since the trial judge referred to "relevance" as the "first hurdle," then the trial judge must have known about and considered the further "hurdles" to admissibility. This proposition is wrong for two reasons. First, the trial judge never articulated what the other "hurdles" were, so it is not clear that the trial judge knew what the other hurdles were. Second, even if the trial judge knew that the other hurdles were the rule against extrinsic discreditable conduct and the exclusionary discretion, there is nothing in the two *voir dire* rulings that shows that the trial judge actually jumped these other hurdles.

49. The Appellant further argues (at paragraph 79 of their Factum) that the admissibility ruling had been accidentally bifurcated such that the trial judge separately considered and ruled upon relevance and the exclusionary discretion. This misstates what happened. The after-the-fact conduct motion was bifurcated into a procedural inquiry into whether the Respondent would testify in the *voir dire* and then into a substantive inquiry into whether the impugned evidence was admissible.[93] Incidentally, in the procedural ruling on 31 October 2016, the trial judge rushed to judgment on the first part of the relevance inquiry, seemingly concluding that there was a complete inferential chain from the impugned evidence to consciousness of guilt:[94]

> I start from the proposition that in the context of the facts as they are apparent at this time, the after-the-fact conduct is relevant.
>
> The value of such evidence was explained by Justice Wheeler in the *Peavoy*, 1997 CanLII 3028 (ON CA), case which is quoted at paragraph 18 of the second *White* decision. And her explanation of the value of this evidence is as follows:
>
> > Evidence of after-the-fact conduct is commonly admitted to show that an accused person has acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person.

[93] AR, Vol IV, Tab 31: Transcripts from 31 October 2016 and AR, Vol IV, Tab 32: Transcripts from 23 November 2016.
[94] AR, Vol IV, Tab 31: Transcripts from 31 October 2016 at page 66.

> So I take from that that the Court of Appeal has recognized that after-the-fact conduct can be relevant in the terms expressed by Justice Wheeler.

After that ruling, when submissions resumed, the Respondent maintained that, regardless of whether the Respondent actually testified in the *voir dire*, the trial judge still needed to conduct the second part of the relevance inquiry to determine whether the alternative explanation offered is equally consistent with consciousness of guilt such that the evidence is irrelevant (i.e. drawing an analogy to *R v Arcangioli*), as well as conduct the probity-versus-prejudice analysis under the exclusionary discretion (i.e. "the question then becomes is – is the probity, if there is relevance more significant than the prejudice?").[95] However, in the final ruling provided on 23 November 2016, while the trial judge did address the alternative explanation (citing and distinguishing "*R v Arcangioli* and its successor cases"), the trial judge made no reference at all to any probity-versus-prejudice analysis. In other words, the bifurcation of the rulings does not establish that the trial judge actually considered the probity and prejudice of the impugned evidence – each ruling only considered relevance, albeit two different parts of the relevance inquiry.

50. The Appellant finally argues (at paragraph 80 of their Factum) that the trial judge's quotation from *R v Corbett* implies that he considered the probity-versus-prejudice inquiry. At the end of the ruling, the trial judge held:[96]

> In the context we are dealing with here, I am of the view that it is a matter for the jury to decide. After hearing the evidence and the explanation, if any, of the accused, as well as a cautionary instruction from the trial judge.
>
> In conclusion, I adopt the statement of Chief – Chief Justice Dickson in *R. v. Corbett* that,
>
> > It would be quite improper to make too much of the risk the jury might 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 to innocence is detrained by a group of ordinary citizens who are not legal specialists and to bring to the legal process a healthy measure of common sense.

The Appellant's position is pure speculation. The quote from *R v Corbett* does not mention the missing analysis and it was obviously included for other reasons. While the actual decision in *R v Corbett* does indeed concern the admissibility of criminal records and the application of the

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[95] AR, Vol IV, Tab 31: Transcripts from 31 October 2016 at pages 78-79 and 87.
[96] AR, Vol IV, Tab 32: Transcripts from 23 November 2016 at pages 33-34.

exclusionary discretion,[97] the narrow quotation adopted by the trial judge from that decision mentions neither criminal records nor the probity-versus-prejudice analysis. Further, since every paragraph leading up to that quotation in the trial judge's ruling addressed the second part of the relevance inquiry, being the equally-consistent-inference argument advanced by the Respondent, the trial judge clearly included the quote from *R v Corbett* as a means of assuring the Respondent that the jury will follow any "cautionary instruction" after "hearing the evidence and the explanation, if any, of the accused." It strains credulity to suggest that this trial judge conducted a probity-versus-prejudice analysis for this body of evidence, but that he chose to convey both his analysis and his decision only indirectly by providing an unresponsive quote by way of conclusion on a separate part of the admissibility inquiry.

ii *Reasons why the majority is correct*

51. In contrast, there are at least four reasons to conclude that the trial judge did not conduct a probity-versus-prejudice analysis.

52. At trial, counsel for the Appellant actually told the trial judge not to consider the court's exclusionary discretion:[98]

> MR. BARNES: I – I just have one – one response that touches on that Your Honour. It may clarify a couple of matters.
>
> My friend has – has said – and I say, absolutely incorrectly that this is – we recognize as a piece of cir – circumstantial evidence and that as a piece of circumstantial evidence that on a *voir dire* the Crown must show on a balance of probabilities that its relevance exceeds its pro – its prejudicial effect.
>
> Absolutely incorrect with respect to pieces of circumstantial evidence. You don't treat pieces of circumstantial evidence individually.

53. Accordingly. the trial judge's rulings only addressed relevance. In the procedural ruling on 31 October 2016, the trial judge addressed the inferential chain analysis. In the substantive ruling on 23 November 2016, the trial judge addressed the equally consistent explanation analysis.

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[97] *R v Corbett*, [1988] 1 SCR 670 at e.g. paragraph 60 (SCC) per McIntyre J.
[98] AR, Vol IV, Tab 31: Transcripts from 31 October 2016 at page 52.

Justices Nordheimer and MacPherson are patently correct in noting that the trial judge "appears to have proceeded on the basis that, if the evidence was relevant, it was automatically admissible."[99]

54. As a corollary, neither ruling ever mentioned the trial judge's discretion to exclude evidence whose probity is outweighed by its prejudice. The trial judge never referenced that power (e.g. by saying "I have the discretion…"). The trial judge never suggested that he exercised this power (e.g. by saying "I have considered the submissions of counsel about…"). Justices Nordheimer and McPherson are again patently correct in noting that "[t]he trial judge provided no such analysis in this case despite trial counsel's urging that he do so."[100]

55. Finally, the fact that this evidence was even admitted proves that the probity-versus-prejudice analysis never happened. The conclusion is inescapable – the prejudice overwhelmed the probity. On the one hand, assuming that the evidence was even relevant, the probity of that evidence was weak.

- For the reasons provided at paragraphs 31-37 above, the inferential chain from the Respondent's failure to appear to his consciousness of guilt was, at best, extremely tenuous.

- Further, even if the proffered alternative explanation was not "equally consistent" with the inference to consciousness-of-guilt, it was still at least consistent enough to rob the evidence of much of its remaining probative value. In *R v Calnen*, Justice Martin held that, "[w]hen assessing the actions of an accused and the inferences that may be drawn from the after-the-fact conduct at the admissibility or no probative value stage, the trial judge may take into account the disproportionality between the explanation proffered and the conduct at issue."[101]

On the other hand, the prejudice of the impugned evidence was extremely high, engaging reasoning prejudice, moral prejudice, and procedural prejudices.

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[99] AR, Vol I, Tab 2: *R v JM*, 2019 ONCA 1054 at paragraph 23.
[100] AR, Vol I, Tab 2: *R v JM*, 2019 ONCA 1054 at paragraph 23.
[101] *R v Calnen*, 2019 SCC 6 at paragraph 126 per Martin J (emphasis added).

- In *R v Martel*, Justice Ritter noted that after-the-fact conduct evidence may engage "stereotypical expectations leading to wrongful convictions because someone who does not comport to the norm behaves differently from how the stereotype would behave."[102] In *R v White and Cote*, Justice Major recognized that "when evidence of post-offence conduct is introduced to support an inference of consciousness of guilt it is highly ambiguous and susceptible to jury error," in part because "a jury may fail to take account of alternative explanations for the accused's behaviour, and may mistakenly leap from such evidence to a conclusion of guilt."[103]

- In *R v Johnson*, Justice Rouleau acknowledged that extrinsic discreditable conduct is "particularly prejudicial" because it engages "moral prejudice," insofar as a jury might "substitute punishment" for the extrinsic conduct or engage in propensity reasoning, and "reasoning prejudice," insofar as a jury may be distracted by the extrinsic conduct.[104]

- The admission of the impugned evidence expanded the scope of the trial, both in terms of the issues and in terms of the evidence.

- Moreover, the admission of this evidence put the Respondent in a preposterously prejudicial position. In order to contextualize this evidence, the Respondent was challenged to testify and offer his explanation to the jury. However, the Respondent's explanation for failing to attend involved the commission of two separate offences – failing to surrender on the revocation warrant and committing the unspecified offence in Alberta. If the Respondent had testified, then his conviction for failing to attend contrary to subsection 145(2) of the *Criminal Code* would then become admissible on the issue of his credibility, thereby doubling the prejudice of that evidence.[105] Further, by testifying at all, the Respondent would also need to testify about the substantive charges, even though he had clearly chosen not to lead evidence. Finally, the Respondent would lose his right to address

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[102] *R v Martel*, 2011 ABCA 114 at paragraph 20 per Ritter JA.
[103] *R v White and Cote*, [1998] 2 SCR 72 at paragraph 22 (SCC) per Major J.
[104] *R v Johnson*, 2010 ONCA 646 at paragraphs 84-87.
[105] *Criminal Code*, RSC 1985 c C-46, s. 12(1): "A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the *Contraventions Act*, but including such an offence where the conviction was entered after a trial on an indictment."

> the jury last, a concern which this trial judge found so compelling that he ordered the prosecutor to call C*M* as their witness in a separate pre-trial motion.[106]

None of these heads of prejudice were even mentioned by the trial judge in any part of either of his rulings on the impugned evidence.

B The sufficiency of the instruction regarding after-the-fact conduct

56. In the court below, the Respondent argued that the trial judge's instructions on the impugned after-the-fact conduct evidence were deficient in two respects – (a) the instruction failed relate the alternative explanation to the instruction on after-the-fact conduct evidence (hereinafter the "after-the-fact conduct instruction") and (b) the instruction failed to caution the jury against the impermissible use of the discreditable nature of that evidence (hereinafter the "extrinsic discreditable conduct instruction"). Both deficiencies remain at-issue in this Honourable Court.

(a) The after-the-fact conduct instruction was deficient

57. After-the-fact conduct evidence requires a special jury instruction because it is recognized as being highly ambiguous and susceptible to jury error. In *R v White and Cote*, Justice Major held that:[107]

> **36** In cases where a "no probative value" instruction is not required and the post-offence conduct of an accused is put before the jury, the trial judge should nevertheless provide an instruction regarding the proper use of that evidence. The purpose of such a charge is to counter the jury's natural tendency to leap from evidence of flight or concealment to a conclusion of guilt, and to ensure that alternative explanations for the accused's conduct are given full consideration. In particular, the trial judge should remind the jury that people sometimes flee or lie for entirely innocent reasons, and that even if the accused was motivated by a feeling of guilt, that feeling might be attributable to some culpable act other than the offence for which the accused is being tried. The jury should be instructed to keep these principles in mind when deciding how much weight, if any, to give such evidence in the final evaluation of guilt or innocence.
>
> …
>
> **57** … As previously noted, there is a risk that juries might jump too quickly from evidence of post-offence conduct to an inference of guilt. However, the best way for a trial judge to address that danger is simply to make sure that the jury are aware of any other explanations for the accused's actions, and that they know they should reserve their final

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[106] Applicant's Record, Vol IV, Tab 33: Transcript from 12 December 2016 at pages 45-46.
[107] *R v White and Cote,* [1998] 2 SCR 72 at paragraph 26 (SCC) per Major J.

> judgment about the meaning of the accused's conduct until all the evidence has been considered in the normal course of their deliberations.

In *R v Hall*, Justices Feldman and Simmons held that "[t]he trial judge must provide a clear cautionary instruction to the jury against drawing incriminating inferences from post-offence conduct without considering alternate explanations for the impugned conduct."[108] Importantly, in *R v Peavoy*, Justice Weiler noted that an alternative innocent explanation "may be expressly stated in the evidence" or "it may arise from the trier of fact's appreciation of human nature and how people react to unusual and stressful situations."[109] In *R v Calnen,* Justice Martin held that:[110]

> **116** Even if admitted for a particular purpose, after-the-fact conduct may pose some unique reasoning risks: see D. M. Paciocco, "Simply Complex: Applying the Law of 'Post-Offence Conduct' Evidence" (2016), 63 Crim. L.Q. 275. Conduct that is "after-the-fact", and therefore removed in time from the events giving rise to the charge, carries with it a temporal element that may make it more difficult to draw an appropriate inference. This evidence may also appear more probative than it is, it may be inaccurate, and it may encourage speculation. After-the-fact conduct evidence may thus give rise to imprecise reasoning and may encourage decision makers to jump to questionable conclusions.
>
> **117** To meet the general concern that such evidence may be highly ambiguous and susceptible to jury error, 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 and attributable to panic, embarrassment, fear of a false accusation, or some other innocent explanation: see *White* (1998), at para. 22; *White* (2011), at paras. 23-25; *R. v. Arcangioli*, [1994] 1 S.C.R. 129, at p. 143.
>
> **118** However, in addition to this general instruction, trial judges should consider whether any further specific limiting instructions or cautions may be required to counter any of the specific reasoning risks associated with the particular after-the-fact conduct at issue. In some cases, courts have recognized that certain types of evidence have other reasoning risks associated with them. For example, additional guidance may be necessary where after-the-fact conduct relates to the accused's demeanour, false alibis or lies put forward by the accused, or the silence or refusal (or, conversely, the readiness) of an accused to take part in an investigation: see Paciocco. Individual attention to the actual evidence at issue is necessary because any caution or limiting instruction is also context and fact specific, and needs to be fashioned to meet the specific risks posed by the particular type of after-the-fact conduct at issue in any given case.

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[108] *R v Hall*, 2010 ONCA 724 at paragraph 136 per Feldman and Simmons JJ.
[109] *R v Peavoy* (1997), 117 CCC (3d) 226 at paragraph 26 (Ont CA) per Weiler J.
[110] *R v Calnen*, 2019 SCC 6 at paragraphs 116-118 per Martin J.

In *Watt's Manual of Criminal Jury Instructions*, the model final instruction on after-the-fact conduct includes a caution regarding innocent explanations.[111]

58. Despite offering no defence evidence, the Respondent still adduced evidence of his explanation for failing to appear for his original trial date. Specifically, the Respondent proved that, at the time, he was subject to a surety revocation warrant and no longer had a lawyer. [112] In other words, there was some evidence that Respondent may have failed to appear at his trial because he did not want to be arrested and put on trial while in custody and while self-represented.

59. The trial judge refused to refer to this evidence when instructing the jury on their duty to consider alternative explanations before relying on the impugned evidence to support a finding of guilt. This is not a case where the appeal courts can forgive this deficiency as an oversight. It was a deliberate choice by the trial judge. In the pre-charge conference, the Respondent urged the trial judge to refer to the actual alternative explanation offered when cautioning the jury on after-the-fact conduct:[113]

> MR. JOHNSTON: … there is, in my respectful submission, on the evidence of Constable Desjardins, an alternate explanation for his failure to attend, that related to the revocation of his surety…
>
> …
>
> THE COURT: How does the revocation of his surety tie into him not showing up at his trial?
>
> MR. JOHNSTON: Well, the revocation of his surety made it such that he was a wanted person, that he had to fly back. I'm just trying to relegate this to the evidence that they've heard. It was a very different set of circumstances when his surety revoked. He flew back on two previous occasions when [he] had a surety. All of a sudden he loses his surety, who's also his girlfriend and the person he's living with. And he doesn't come back. So his failure to attend, I'm sure Mr. Barnes will say, you know, you can consider it as a function of his having heard the evidence at the preliminary inquiry and not wishing to return, but it could also be that his life was in a state of dire straits or in a downward spiral, such that he just wasn't able to attend.

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[111] David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed (Toronto: Carswell, 2015) – see Final 27-A (Post-offence conduct (General instruction)) at paragraphs 8.
[112] AR, Vol III, Tab 16: Exhibit 2: "Copy of Order for Committal (Surety Removal) dated August 21, 2014" (entered by Defence).
[113] AR, Vol IX, Tab 39: Transcripts from 20 December 2016 at pages 86-87.

…

THE COURT: I'm just having trouble why that means you don't show up for your trial. You have to connect the dots for me. Yes, his surety's revoked; he's looking at the prospect of pre-trial incarceration, that's right there in front of him.

MR. JOHNSTON: Mm-hmm.

THE COURT: 'Do I wanna go in or maybe just disappear?' Or…

MR. JOHNSTON: Isn't that enough, that he subsequently didn't find another surety and he's been in custody since he's been arrested? That he ran a bail hearing without a surety and was detained? I mean, this isn't evidence that's before the jury but you might not want to come back 'cause you know you're not gonna get released. It's just that simple.

THE COURT: Okay, I'll take your point.

MR. JOHNSTN: Thank you, sir.

THE COURT: I'll consider that.

After considering it, the trial judge decided not to relate that evidence to the instruction, simply telling the jury:[114]

> Evidence about what a person did after an offence is alleged against him may help you decide whether the person actually committed the offence. It may help, it may not. What a person said or did after an offence is alleged to have been committed is a type of circumstantial evidence. Like any circumstantial evidence, it is for you to say what inference should be drawn from this evidence. You may use this evidence, along with all the other evidence in the case, in deciding whether Crown counsel has proven [JM's] guilt beyond a reasonable doubt. But you must not infer his guilt from this evidence unless, when you consider this evidence together with the rest of the evidence, you are satisfied beyond a reasonable doubt that his guilt is the only rational inference that can be drawn from all the evidence.
>
> As circumstantial evidence, evidence of after-the-fact conduct has only an indirect bearing on the issue of [JM's] guilt. You must be careful about inferring that [JM] is guilty on the basis of after-the-fact conduct because there might be other explanations for that conduct, something unconnected with his participation in the offences 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 have rejected any other explanation for this conduct.</u> On the other hand, if you find that [JM'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.

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[114] AR, Vol XI, Tab 41: Transcripts from 22 December 2016 at page 121.

After this charge was delivered, the Respondent urged the trial judge to correct this error:[115]

> [MR. JOHNSTON:] The next matter, paragraph 80, Your Honour, relates to section on after-the-fact conduct. And I had mentioned it at our last pre-charge conference, I'm just wondering if….
>
> THE COURT: The bail revocation?
>
> MR. JOHNSTON: That's correct.
>
> THE COURT: I'm not going to put it in.
>
> MR. JOHNSTON: I understand, sir. And again, just if I might, just for the purposes of the record, indicate that in our respectful submission, it provides a total answer to [JM's] failure to appear on May the 25th, 201, because there was a warrant outstanding for his arrest.
>
> THE COURT: I understand. Same submission you made before.
>
> MR. JOHNSTON: Yes, sir.
>
> THE COURT: And I don't agree.

The trial judge deliberately chose not to refer to the evidence supporting the alternative explanation when instructing the jury on how to handle that very evidence.

60. Justice Nordheimers and MacPherson held that this was a fatal error in light of the clear jurisprudence from *R v White and Cote* and *R v Hall*:[116]

> **28** … What is crucial, however, is that the legal proposition that underlies the instruction must be recognized and communicated in a proper fashion and it must be related to the evidence. That did not happen in this case. Specifically, the trial judge did not advise the jury about any alternative explanations for the appellant's conduct. He failed to do so notwithstanding the express direction, in the specimen instruction, to "review relevant evidence about explanations."
>
> **29** As a consequence, the trial judge did not provide any assistance to the jury as to how to weigh that post-offence conduct evidence in the context of the evidence as a whole. In particular, the trial judge failed to alert the jury to other explanations that there might be for the appellant's failure to appear at his first trial that were unrelated to the question of the appellant's guilt respecting the charges that he faced.
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> …

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[115] AR, Vol XI, Tab 41: Transcripts from 22 December 2016 at pages 161-162.
[116] AR, Vol I, Tab 2: *R v JM*, 2018 ONCA 1054 at paragraphs 28-29, 32, and 36.

> **32** On that point, there was evidence, albeit limited, before the jury regarding other explanations for the appellant's failure to appear on his first trial date. The defence entered into evidence the recognizance that the appellant had been granted on April 10, 2013. The defence also entered into evidence the order for committal dated August 21, 2014, that authorized the arrest of the appellant after his then girlfriend was relieved of her duty as his surety.
>
> …
>
> **36** In my view, the trial judge did not meet his obligation, as enunciated in both *White* (1998) and *White* (2011), to ensure that the jury was aware of, and considered, specific alternative explanations for the appellant's post-offence conduct. This failure arose first from his decision to bar the appellant from giving evidence on the voir dire. It then continued when the trial judge failed to fully obtain the alternative explanations and include them in his charge. The absence of these alternative explanations raised the very real risk that the jury would misuse the post-offence conduct evidence, which is precisely the concern that underlies the requirement for the necessary caution in the first place.

The Respondent maintains that this is more than just a "functional approach in assessing the adequacy" of trial judge's instructions. It is a principled approach. It is the promise of a proper instruction, including the alternative explanations, that justifies the admission of inherently-risky after-the-fact conduct evidence – a promise made, but not kept, by the trial judge in this case.

61. Justice Huscroft and the Appellant argue that the trial judge made no error because he referred to the alternative explanation when summarizing the defence position. Justices Nordheimer and MacPherson considered this suggestion:[117]

> **39** I do not agree with the suggestion that the trial judge's reference to the alternative explanation offered by the defence in closing submissions is sufficient, in this instance, to cure the problem. I say that for two reasons. One is the salient reality that explanations coming directly from the judge will carry more weight with the jury than will simply repeating what defence counsel has said. The other is that the reference itself was completely detached from the trial judge's original post-offence conduct instruction. Articulated in isolation, it did not serve to remind the jury that they could only use this evidence in relation to the guilt of the appellant if they rejected any other explanation for his conduct.

Contrary to what the Appellant argues (at paragraph 104 of their Factum), this is not an "overly onerous" standard. The "functional approach" can only go so far, especially where the trial judge's

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[117] AR, Vol I, Tab 2: *R v JM*, 2018 ONCS 1054 at paragraph 39.

error was made deliberately and in the face of specific, repeated requests from the Respondent to provide an instruction that conformed to binding jurisprudence.

62. In support of Justices Nordheimer and MacPherson, the Respondent invites this Honourable Court to draw a distinction between placing a particular instruction somewhere within the broader binding legal *instructions*, on the one hand, and placing a particular instruction only in the *summation* of the parties' positions, on the other hand. There is an obvious difference between the binding legal instructions of the trial judge and the non-binding positions taken by the parties. As part of the general instructions to jurors, the trial judge said:[118]

> Your second duty is to accept all the rules of law that I tell you apply in this case. If you disagree with or do not understand the reasons for the law, you are required to follow what I say about it. You are not allowed to pick and choose among my instructions on the law. You must not consult other sources or substitute your own views about what the law is or what it should be…

In contrast, the jury is free to dismiss the positions of the parties. Counsel for the Respondent made that point during closing submissions:[119]

> [MR. JOHNSTON] …My address is just kind of my suggestions, it's my understanding of the evidence. My suggestions about things that you might consider when determining whether or not the Crown has proven its case beyond a reasonable doubt. And at all times, please recall, the defence has to prove nothing.
>
> But again, it's just my interpretation, just like Mr. Barnes' remarks are his interpretation. And when His Honour speaks about the facts, that's just his interpretation….

There is nothing "overly onerous" about asking trial judges to include the necessary instructions within the part of their charge that is actually binding on the jury.

63. For their part, the Appellant has not identified any binding or persuasive authority contradicting the sensible conclusions reached by Justices Nordheimer and MacPherson. The Appellant's reliance on *R v Jacquard* as an analogy (at paragraph 108 of their Factum) is misplaced. In that case, the instruction on mental disorder had not been provided when "the trial judge introduced the subject of intention in a general way," but had still been provided as part of the more specific binding legal instruction on manslaughter and attempted murder – it was not

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[118] AR, Vol XI, Tab 41: Transcripts from 22 December 2016 at page 107.
[119] AR, Vol XI, Tab 41: Transcripts from 22 December 2016 at page 89

relegated to the trial judge's summation of the accused's position.[120] This analogy does not respond to the point made by Justices Nordheimer and MacPherson.

64. Finally, the Appellant (at paragraph 99 of their Factum) argues that the charge was "neutral, fair, and balanced" because "[t]he trial judge did not provide the inference the Crown sought to the alternative inference suggested by the defence within his caution on the use of after-the-fact conduce evidence. This again misses the point. On the one hand, to the benefit of the Appellant, the trial judge's instruction included the law on after-the-fact conduct as well as the supporting evidence, though the trial judge did not spell out their proffered inference. On the other hand, to the detriment of the Respondent, the trial judge's instruction went on to include the law on alternative explanations but neither referenced the supporting evidence nor spelled out the proffered inference. Palpably, this was neither neutral, fair, nor balanced.

(b) An extrinsic discreditable conduct instruction should have been given

65. Extrinsic discreditable conduct evidence requires a special jury instruction because it is recognized as being highly prejudicial and susceptible to jury misuse. In *R v Calnen*, Justice Moldaver held that:

> **42** … [An extrinsic discreditable conduct instruction] would have included three main components: *R. v. T. (J.A.)*, 2012 ONCA 177, 288 C.C.C. (3d) 1, at para. 53. First, it would have identified the extrinsic discreditable conduct evidence. Second, it would have articulated the forbidden use of that evidence — namely, drawing an inference based on general propensity reasoning. Third, and importantly, it would also have identified the permissible uses of that evidence…

In *Watt's Manual of Criminal Jury Instructions*, the model final instruction on each of the recognized exceptions to extrinsic conduct evidence includes a caution regarding the "prohibited uses" of the evidence.[121]

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[120] *R v Jacquard*, [1997] 1 SCR 314 at paragraphs 17-30 (SCC) per Lamer CJ.

[121] David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed (Toronto: Carswell, 2015) – see Final 23-C (Previous convictions of accused witness (impeachment/credibility only)) at paragraph 4, Final 23-D (Previous convictions of accused witness to impeach and rebut evidence of good character) at paragraph 5, Final 28-A (Evidence of extrinsic similar acts to prove identity of perpetrator) at paragraphs 5-6, Final 28-B (Evidence of other count(s) similar acts to prove identity of perpetrator) at paragraphs 5-6, Final 28-C (Evidence of extrinsic similar acts to prove conduct occurred) at paragraphs 7-8, and Final 28-D (Evidence of other counts similar acts to prove conduct occurred) at paragraphs 7-8.

66. In the court below, Justices Nordheimer and MacPherson provided the following "observation" about discreditable after-the-fact conduct evidence:[122]

> **45** ... If post-offence conduct is properly admitted at trial, and that post-offence conduct by itself constitutes a criminal offence, then it seems to me that trial judges should consider, in appropriate cases, including the equivalent of a "bad character" instruction. In such cases, the jury would be additionally instructed that, even if they do not view the post-offence conduct as evidence tending to show the accused is guilty of the offence being tried, they must also ensure that they do not use the evidence to conclude that the accused person is the type of person who would have committed the offence… I appreciate that the trial judge was not asked to provide that instruction in this case.

Effectively, Justices Nordheimer and MacPherson concluded that, as a matter of general principle, cautionary instructions should be given for discreditable after-the-fact conduct evidence, but they did not conclude, one way or the other, whether such an instruction should have been given in the case-at-bar. In dissent, Justice Huscroft went further, holding that "the appellant did not request an instruction on discreditable conduct, and in my view none was necessary."[123]

67. The Respondent still respectfully maintains that the trial judge's failure to provide any extrinsic discreditable conduct is indeed an error of law in the case-at-bar. First, the instruction is mandatory, not discretionary. Second, there is no basis to conclude that the Appellant failed to request this mandatory instruction for tactical reasons.[124] In *R v Calnen*, which can be distinguished, Justice Moldaver concluded that "in all likelihood defence counsel made a deliberate and conscious tactical decision to marshal the discreditable conduct evidence in an attempt to bolter the truthfulness of [the accused's evidence], upon which his defence rested," and that such that an extrinsic discreditable conduct instruction might actually "undermine [the accused's] credibility and thereby undercut his defence."[125] In contrast, in the case-at-bar, the Respondent consistently sought to have the impugned evidence excluded entirely and never proffered other defence evidence whose credibility was bolstered by the impugned evidence. Third, as noted above, although the Respondent argued in the *voir dire* that the impugned evidence was presumptively inadmissible as extrinsic discreditable conduct evidence, the trial judge never

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[122] Applicant's Record, Vol I, Tab 2: *R v JM*, 2018 ONCA 1054 at paragraph 45.
[123] Applicant's Record, Vol I, Tab 2: *R v JM*, 2018 ONCA 1054 at paragraph 67.
[124] For a statement of principles, see *R v Austin* (2006), 214 CCC (3d) 38 at paragraphs 14-15 (Ont CA) per Doherty JA. For an example relating to "bad character" / extrinsic discreditable conduct instructions, see *R v Samuels*, 2013 ONCA 551 at paragraphs 49-52 per Strathy JA.
[125] *R v Calnen*, 2019 SCC 6 at paragraph 18 per Moldaver J.

even responded to this objection, thereby signalling to the Respondent that his complaints about the discreditable nature of the impugned evidence were lost on the trial judge. In these circumstances, the Appellant submits that the trial judge's failure to include instructions that cautioned the jury against prohibited "bad character" reasoning constituted an error of law. Fundamentally, the jury was asked to treat a temporally-removed criminal offence as circumstantial evidence of the Respondent's guilt on these charges, but they were offered no guidance to ensure they did not descend into propensity reasoning.

PART IV
SUBMISSIONS ON COSTS

68. The Respondent has no submission as to costs.

PART V
ORDER SOUGHT

69. The Respondent requests that this Appeal be dismissed and the matter remitted for a new trial.

PART VI
SUBMISSIONS ON PUBLICATION BANS

70. The Respondent agrees with the Appellant's submissions (at paragraph 118 of their Factum).

All of which is respectfully submitted by:

_____

Michael A. Johnston
Counsel for the Respondent

_____

Matthew B. Day
Counsel for the Respondent

Dated this 5th day of April. 2019.

PART VII
TABLE OF AUTHORITIES

A Jurisprudence

R v Arcangioli, [1994] 1 SCR 129 (SCC) at paragraphs 31 and 49

R v Austin (2006), 214 CCC (3d) 38 (Ont CA) at paragraph 66

R v Calnen, 2019 SCC 6 at paragraphs 28, 29, 31, 35, 39, 41, 55, 64, and 66

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