Case No. 38483

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

–and–

J.M.

Respondent

–and–

THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

Intervener

FACTUM OF THE INTERVENER
THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)
(Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I — OVERVIEW AND STATEMENT OF FACTS

1 Anything said or done by an accused after the commission of an offence may be labelled as evidence of "post-offence conduct" or "after-the-fact conduct".[1] It is often adduced at trial as part of the narrative, in an unremarkable way[2], and is then relied on by the Crown to show that the accused acted or said something in such a way that, based on logic and human experience, the accused's conduct "is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person".[3]

2 There are two primary challenges with this kind of evidence. It is "often highly ambiguous". And at the same time, it presents a high risk of misuse by jurors.[4] This risk is of course elevated if the evidence of post-offence conduct is also evidence of some extrinsic misconduct.[5]

3 This appeal provides this Court with an opportunity to define the scope of the required jury instruction where the Crown tenders evidence of post-offence conduct.

PART II — THE CLA'S POSITION ON THE ISSUE

4 The inherent dangers associated with evidence of post-offence conduct warrant a case-specific cautionary instruction to the jury that clearly makes jurors aware of alternate explanations for the accused's actions, in accordance with this Court's jurisprudence.

5 In addition, the functional approach to reviewing the adequacy of a jury instruction with respect to post-offence conduct evidence must take into account the specific dangers posed by the use, and misuse, of post-offence conduct evidence.

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[1] *R. v. White*, 2011 SCC 13, at para. 21; *R. v. Bains*, 2015 ONCA 677, at para. 124.
[2] *R. v. White*, 2011 SCC 13, at para. 140; *R. v. Bains*, 2015 ONCA 677, at para. 124.
[3] *R. v. Peavoy* (1997), 101 OAC 304 (ONCA), at para. 11.
[4] *R. v. Diu* (2000), 133 OAC 201 (ONCA), at para. 120; *R. v. Wall* (2005), 208 OAC 111 (ONCA), at paras. 45-59.
[5] *R. v. J.M.*, 2018 ONCA 1054, at para. 45; *R. v. Calnen*, 2019 SCC 6, at para. 118.

PART III — ARGUMENT

1. The Inherent Dangers of Post-Offence Conduct

6 Evidence of post-offence conduct is not a separate category of evidence.[6] It is not subject to any "blanket rules".[7] It is circumstantial evidence which may or may not provide an inference of guilt.[8] Its relevance and probative value will depend on the nature of the evidence, the issues at trial, and the parties' positions on the issues.[9]

7 To be admissible, evidence of post-offence conduct is treated like any other piece of evidence: it must be relevant and material[10]; it must not contravene any exclusionary rule of evidence; and the prejudicial effects of the evidence must not outweigh its probative value.[11]

8 If evidence of post-offence conduct is admissible, it will be left to the jury to determine, on the whole of the evidence, whether the post-offence conduct is related to the crime charged, and how much weight to assign it.[12]

9 Post-offence conduct evidence is not necessarily criminal or otherwise discreditable conduct. Oftentimes, it will be ambiguous or equivocal[13] – *i.e.* talking about whether garbage has been picked up[14]; failing to inquire about someone's whereabouts[15]; driving someone to a hospital that was out of town instead of the closest one[16]; or the accused's home being vacant

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[6] *R. v. Bains*, 2015 ONCA 677, at para. 125.

[7] *R. v. Angelis*, 2013 ONCA 70, at para. 55.

[8] *R. v. Trochym* (2004), 188 OAC 330 (ONCA), at para. 16; *R. v. Polimac*, 2010 ONCA 346, at para. 109, leave to appeal ref'd (2010) 3 SCR vi; *R. v. White*, 2011 SCC 13, at paras. 17-22.

[9] *R. v. Angelis*, 2013 ONCA 70, at para. 55; *R. v. McLellan*, 2018 ONCA 510, at para 46.

[10] *R. v. Trochym* (2004), 188 OAC 330 (ONCA), at paras. 17-18; *R. v. White*, 2011 SCC 13, at paras. 22, 31, 52.

[11] *R. v. White*, 2011 SCC 13, at paras. 31, 50-52; *R. v. Trochym* (2004), 188 OAC 330 (ONCA), at para. 19, reversed on other grounds 2007 SCC 6.

[12] *R. v. White*, [1998] 2 SCR 72, at para. 27; *R. v. White*, 2011 SCC 13, at para. 42.

[13] *R. v. White*, 2011 SCC 13, at para. 106.

[14] *R. v. Curran* (2004), 188 OAC 1 (ONCA), at para. 122.

[15] *R. v. Wall* (2005), 208 OAC 111 (ONCA), at paras. 45-59.

[16] *R. v. Maugey* (2000), 133 OAC 255 (ONCA), at paras. 55-57.

when police arrive.[17] Yet our law recognizes that there is a "substantial risk of jury error" associated with even the most mundane post-offence conduct.[18]

10 The main concern is that jurors will find this evidence more persuasive than what is warranted, jumping "too quickly from evidence of post-offence conduct to an inference of guilt".[19] This may be because the jury fails to give proper consideration to alternate explanations for an accused's conduct,[20] or because they engage in prohibited propensity reasoning.[21]

11 In some cases, the risk of jurors misusing evidence of post-offence conduct is so high that it must be removed from the jury's consideration altogether, either ahead of time through a *voir dire*[22] or by a specific limiting instruction.[23] This will be necessary when the circumstantial evidence has no probative value,[24] or when the evidence's probative value is outweighed by its prejudicial effect – for example, where the probative value is low and the evidence of post-offence conduct is also evidence of extrinsic misconduct.

12 When evidence of post-offence conduct is admissible, the way to mitigate the risk of it

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[17] *R. v. Curran* (2004), 188 OAC 1, at para. 122.

[18] *R. v. White*, [1998] 2 SCR 72, at para. 57; *R. v. White*, 2011 SCC 13, at paras. 23, 31; *R. v. Calnen*, 2019 SCC 6, at para. 117.

[19] *R. v. White*, [1998] 2 SCR 72, at para. 57; *R. v. White*, 2011 SCC 13, at paras. 23, 106; *R. v. Calnen*, 2019 SCC 6, at para. 116.

[20] *R. v. Diu* (2000), 133 OAC 201 (ONCA), at para. 120; *R. v. White*, [1998] 2 SCR 72, at para. 22.

[21] *R. v. White*, 2011 SCC 13, at paras. 23, 31; *R. v. White*, [1998] 2 SCR 72, at para. 57.

[22] *R. v. B. (S.C.)* (1997), 104 OAC 81 (ONCA), at para. 36; *R. v. Diu* (2000), 133 OAC 201 (ONCA), at paras. 113-132; *R. v. Levert* (2001), 150 OAC 208 (ONCA), at paras. 24-28; *R. v. Baltrusaitis* (2002), 155 OAC 249, (ONCA) at paras 73-78; *R. v. Bennett* (2003), 177 OAC 71 (ONCA), at para. 146; *R. v. Curran* (2004), 188 OAC 1 (ONCA), at paras. 16-22; *R. v. Wall* (2005), 208 OAC 111 (ONCA), at paras. 45-59.

[23] *R. v. White*, 2011 SCC 13, at paras. 55, 106; *R. v. McLellan*, 2018 ONCA 510, at paras. 35-49; *R. v. Wiltse* (1994), 72 OAC 226 (ONCA), at paras. 24-30; Justice Michael Dambrot and Gary A. Ferguson, *Canadian Criminal Jury Instructions (CRIMJI)*, (November 2018), 4.21 After the Fact Conduct, paras. 2, 2A.

[24] *R. v. White*, 2011 SCC 13, at paras. 55, 106; *R. v. McLellan*, 2018 ONCA 510, at paras. 35-49; *R. v. Wiltse* (1994), 72 OAC 226, at paras. 24-30; Justice Michael Dambrot and Gary A. Ferguson, *Canadian Criminal Jury Instructions (CRIMJI)*, (November 2018), 4.21 After the Fact Conduct, paras. 2, 2A.

being misused by jurors is to provide specific limiting instructions.[25]

2. Model Jury Instructions on Post-Offence Conduct

13 As cautioned by Justice Watt, "instructions about evidence of post-offence conduct are difficult."[26] Sometimes post-offence conduct instructions are sought without an adequate evidentiary foundation; sometimes the instructions are given an undeserved place of prominence in the charge; sometimes additional instructions are required in light of the type of post-offence conduct evidence.[27]

14 In reviewing the three main models for jury instructions,[28] there are four components that ought to be included in a final instruction on evidence of post-offence conduct:

(i) An explanation of what evidence of post-offence conduct is, including its characterization as circumstantial evidence, a caution about the use of this type of evidence, and a caution that this evidence must be considered along with all of the other evidence in the case.[29]

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[25] *R. v. White*, 2011 SCC 13, at paras. 31-32, 55; *R. v. White*, [1998] 2 SCR 72, at para. 57.

[26] Justice David Watt, *Watt's Manual of Criminal Jury Instructions, Second Edition*, (2015) Thomson Reuters Canada Limited: Toronto, Final 27-A, p. 339.

[27] Justice David Watt, *Watt's Manual of Criminal Jury Instructions, Second Edition*, (2015) Thomson Reuters Canada Limited: Toronto, Final 27-A, pp. 339-340.

[28] Justice David Watt, *Watt's Manual of Criminal Jury Instructions, Second Edition*, (2015) Thomson Reuters Canada Limited: Toronto, Final 27-A; Canadian Judicial Council – National Judicial institute, *Model Jury Instructions*, (November 2015) <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/>, 11.14 After-the-Fact of Post-Offence Conduct (Consciousness of Guilt); Justice Michael Dambrot and Gary A. Ferguson, *Canadian Criminal Jury Instructions (CRIMJI)*, (November 2018), 4.21 After the Fact Conduct.

[29] Justice David Watt, *Watt's Manual of Criminal Jury Instructions, Second Edition*, (2015) Thomson Reuters Canada Limited: Toronto, Final 27-A, p. 337, paras. 1-3; Canadian Judicial Council – National Judicial institute, *Model Jury Instructions*, (November 2015) <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/>, 11.14 After-the-Fact of Post-Offence Conduct (Consciousness of Guilt), paras. 1-3; Justice Michael Dambrot and Gary A. Ferguson, *Canadian Criminal Jury Instructions (CRIMJI)*, (November 2018), 4.21 After the Fact Conduct, paras. 1, 8-9; *R. v. Diu* (2000), 133 OAC 201 (ONCA), at paras. 120-121; *R. v. Curran* (2004), 188 OAC 1 (ONCA), at para. 122; *R. v. Gould*, 2008 ONCA 855, at paras. 4-12.

(ii) An instruction that jurors must first decide whether the accused actually did or said what is alleged as post-offence conduct, followed by the trial judge reviewing the relevant evidence pertaining to the post-offence conduct to allow jurors to draw a conclusion on this point.[30]

(iii) If jurors accept that the accused did or said the conduct in issue, they must be counselled against rushing to any judgments from that initial finding, and must cautiously take into account any explanations for the conduct other than the accused's participation in the charged offence. Trial judges must review the relevant evidence about explanations for the post-offence conduct.[31]

(iv) Finally, jurors must be told that they cannot use this evidence to support an inference of guilt unless they have rejected any innocent explanation for the conduct. Jurors must be cautioned that if they cannot find that what the accused did or said afterwards was related to the offence charged, they cannot use this evidence in determining that the accused committed the charged offence. Jurors can only use the evidence if they determine that it was related to the offence charged, and can then only use it with all the other evidence in reaching their verdict.[32]

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[30] Justice David Watt, *Watt's Manual of Criminal Jury Instructions, Second Edition*, (2015) Thomson Reuters Canada Limited: Toronto, Final 27-A, pp. 338-339, paras. 6-8.

[31] Justice David Watt, *Watt's Manual of Criminal Jury Instructions, Second Edition*, (2015) Thomson Reuters Canada Limited: Toronto, Final 27-A, pp. 338-339, paras. 6-9; Canadian Judicial Council – National Judicial institute, *Model Jury Instructions*, (November 2015) <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/>, 11.14 After-the-Fact of Post-Offence Conduct (Consciousness of Guilt), paras. 4-7; Justice Michael Dambrot and Gary A. Ferguson, *Canadian Criminal Jury Instructions (CRIMJI)*, (November 2018), 4.21 After the Fact Conduct, paras. 2, 2A, 4, 5, 6, 7; *R. v. Diu* (2000), 133 OAC 201 (ONCA), at para. 121; *R. v. Hall*, 2010 ONCA 724, at para. 136; *R. v. White*, [1998] 2 SCR 72, at para. 54-57; *R. v. Bennett*, [2003] 177 OAC 71 (ONCA), at paras., 144-146, leave to appeal refused [2003] SCCA 534 (SCC); *R. v. Calnen*, 2019 SCC 6, at para. 117; Justice David Watt, *Watt's Manual of Criminal Evidence, 2018*, (2018) Thomson Reuters Canada Limited: Toronto, at 89.

[32] Justice David Watt, *Watt's Manual of Criminal Jury Instructions, Second Edition*, (2015) Thomson Reuters Canada Limited: Toronto, Final 27-A, pp. 338-339, paras. 6-9; Canadian Judicial Council – National Judicial institute, *Model Jury Instructions*, (November 2015) <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/>, 11.14 After-the-Fact of Post-Offence Conduct (Consciousness of Guilt), paras. 4-7; Justice Michael

15 But as this Court has aptly observed, "model charge manuals do not necessarily translate into model charges".[33] Jury charges must be modified to fit the facts of the specific case.[34] Additional instructions are required if the post-offence conduct involved a false alibi or fabrication by the accused.[35]

16 Moreover, this Court has encouraged trial judges to do more, by further cautioning jurors about the specific risk that evidence of post-offence conduct may appear to be more probative or more reliable than it really is.[36] This danger ought to be underscored in every jury instruction about post-offence conduct evidence.

3. Applying a Functional Approach to Assessing Instructions

17 Applying a functional approach to assessing the adequacy of jury instructions on the issue of post-offence conduct is not a new concept.[37] Context must guide the analysis, based on the particular dangers presented by the post-offence conduct in the case.

18 The question is whether the instruction *adequately addresses* the dangers it seeks to quell. As this Court has cautioned, there is an important distinction between a trial judge *providing* the generic post-offence conduct instructions with a summary of the relevant facts, and a trial judge *assisting* jurors in understanding the permissible inferences that can be drawn from the post-

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Dambrot and Gary A. Ferguson, *Canadian Criminal Jury Instructions (CRIMJI)*, (November 2018), 4.21 After the Fact Conduct, paras. 2, 2A, 4, 5, 6, 7, 10, 11, 12; *R. v. Diu* (2000), 133 OAC 201 (ONCA), at para. 122; *R. v Bennett* (2003), 177 OAC 71 (ONCA), at paras. 142-152; *R. v. Wall* (2005), 208 OAC 111 (ONCA), at paras. 45-59; *R. v. Gould*, 2008 ONCA 855, at paras. 4-12.

[33] *R. v. Rodgerson*, 2015 SCC 38, at para. 51.

[34] *R. v. McNeil* (2006), 216 OAC 97 (ONCA), at para. 21; *R. v. Rodgerson*, 2015 SCC 38, at paras. 52-53.

[35] Justice David Watt, *Watt's Manual of Criminal Jury Instructions, Second Edition*, (2015) Thomson Reuters Canada Limited: Toronto, Final 27-B; Justice Michael Dambrot and Gary A. Ferguson, *Canadian Criminal Jury Instructions (CRIMJI)*, (November 2018), 4.21 After the Fact Conduct, paras. 1A-1D.

[36] *R. v. Rodgerson*, 2015 SCC 38, at para. 25.

[37] *R. v. Jacquard*, [1997] 1 SCR 314 (SCC), at paras. 2, 52-54; *R. v. Daley*, 2007 SCC 53, at para. 58; *R. v. Gould*, 2008 ONCA 855, at paras. 4-12. *R. v. Rodgerson*, 2015 SCC 38, at paras. 35, 50; *R. v. McLellan*, 2018 ONCA 510, at paras. 50-57; *R. v. Calnen*, 2019 SCC 6, at para. 163.

offence conduct evidence, which in turn can be used in reaching a determination on an issue at trial – *i.e.* the accused's intent, or the accused's guilt.[38]

19 This Court has made clear that the concern is the substance of the charge, rather than the specific words that are used.[39] There are nevertheless situations were only a specific instruction on a given issue will suffice. This Court's decision in *Calnen* is a recent example where an instruction on post-offence conduct was required.

20 In the context of post-offence conduct evidence, regardless of form, the instruction must address the two inherent dangers associated with this evidence: failure to give proper consideration to alternate explanations for an accused's conduct[40]; and improperly engaging in prohibited propensity reasoning.[41]

21 In reviewing the Court of Appeal for Ontario's jurisprudence on evidence of post-offence conduct, it is clear that the trial judge's duty to provide jurors with alternate explanations includes both the accused's specific explanation, as well as any general alternatives that are appropriate in the given case. For example:

(i) With respect to post-offence conduct evidence of the accused fleeing the scene, jurors were told that a person may flee a scene because they are simply frightened, or they are not sure if they did anything wrong, or they feel they may not be believed by police, "and they may act this way because they are afraid of being accused when they are not guilty of anything".[42]

(ii) With respect to evidence of the accused's apparent disinterest in his ex-girlfriend's disappearance and failure to become involved in the police investigation concerning her whereabouts, the trial judge specifically reviewed the relevant evidence with the jury, including the accused's possible innocent explanation, and then suggested other

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[38] *R. v. Rodgerson*, 2015 SCC 38, at paras. 26-30, 41.
[39] *R. v. Calnen*, 2019 SCC 6, at paras. 8-9.
[40] *R. v. Diu* (2000), 133 OAC 201 (ONCA), at para. 120; *R. v. White*, [1998] 2 SCR 72, at para. 22.
[41] *R. v. White*, 2011 SCC 13, at paras. 23, 31; *R. v. White*, [1998] 2 SCR 72, at para. 57.
[42] *R. v. Jenkins* (1996), 90 OAC 263 (ONCA), at para. 98.

possible innocuous reasons for the accused's behaviour, such as exhaustion, or the fact of his recent break-up with the missing ex-girlfriend.[43]

(iii) With respect to evidence of telephone and in-person conversations about garbage, moving garbage, and whether garbage had been picked up, the trial judge asked jurors to think about whether this evidence was of any significance, or if it was just a man who was about to move out of the jurisdiction who didn't have any garbage cans and wanted to be tidy.[44]

(iv) With respect to evidence of the accused's home being vacant when police arrived, the trial judge asked jurors to consider whether this had any significance, or if it was simply a man who had made prior arrangements to move to the east coast because his wife had cancer and was dying.[45]

(v) With respect to evidence that the accused threatened a number of children who had witnessed the stabbing that she would kill them if they didn't keep quiet, and that she threw the knife into the sewer, ran away, and later returned to the scene and made efforts to help the victim, the trial judge explained that the accused's actions could indicate that she intentionally committed a crime, or that she was an innocent person who wanted to avoid involvement at the police station, or who was frightened and needed time to think about this traumatic experience, or someone who was panicked.[46]

22 Once the trial judge has reviewed the relevant evidence pertaining to the accused's after-the-fact conduct and alternate explanations, the trial judge must then address the risk of jurors finding this evidence more probative than it really is, which will necessarily depend on the nature of the evidence of post-offence conduct, the issues in the case, and the parties' positions on the issues.[47]

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[43] *R. v. Wall* (2005), 208 OAC 111, at paras. 45-59.
[44] *R. v. Curran* (2004), 188 OAC 1, at para. 122.
[45] *R. v. Curran* (2004), 188 OAC 1, at para. 122.
[46] *R. v. Gould*, 2008 ONA 855, at paras. 4-12.
[47] *R. v. Rodgerson*, 2015 SCC 38, at paras. 26-30, 41; *R. v. Diu* (2000), 133 OAC 201 (ONCA), at paras. 113-132; *R. v Bennett* (2003), 177 OAC 71 (ONCA), at paras. 149-151;

23 Applying a functional approach to the instruction provided in J.M.'s case, the trial judge failed to provide the jury with an instruction addressing either of the inherent dangers of post-offence conduct. The trial judge's charge on this issue, both mid-trial and in the final instructions, did not review the relevant evidence; it did not instruct jurors that they had to be satisfied that J.M. did what was alleged as post-offence conduct; it did not caution jurors against rushing to any judgments from that initial finding; and it did not review any alternate explanations – either generally, or specific to J.M. Importantly, it did not address the fact the this evidence amounted to otherwise inadmissible extrinsic misconduct.

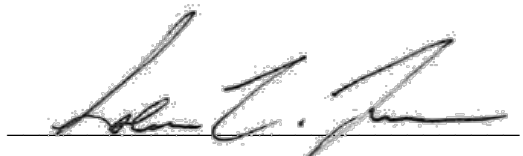
24 Indeed, in J.M.'s case, the post-offence conduct evidence at issue was the only evidentiary difference between a hung jury at the end of J.M.'s first trial, and a conviction after two hours of deliberation at the end of J.M.'s second trial.[48]

25 This present case underscores just how dangerous post-offence conduct evidence can be, and how it must be handled with care by trial judges from admission to final jury instruction.

PART IV & V & VI — COSTS, ORDER SOUGHT, CASE SENSITIVITY

26 The CLA does not seeks costs, asks that no costs be awarded against it, and makes no submissions on case sensitivity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of April, 2019.



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R. v. Hill, 2015 ONCA 616, at paras. 51-62; *R. v. Wiltse* (1994), 72 OAC 226, at paras. 24-30; *R. v. Jenkins* (1996), 90 OAC 263 (ONCA), at paras. 95-112.

[48] *R. v. J.M.*, 2018 ONCA 1054, at paras. 8, 14, 17.

PART VII — TABLE OF AUTHORITIES