Regina v. Peavoy
[Indexed as: R. v. Peavoy]

34 O.R. (3d) 620
[1997] O.J. No. 2788
Docket No. C20376

Court of Appeal for Ontario,
Doherty, Weiler and Moldaver JJ.A.
July 10, 1997

Criminal law -- Evidence -- Consciousness of guilt -- Accused admitting to stabbing deceased but claiming that he was deprived by intoxication of intent required for murder and that he acted in self-defence -- Trial judge failing to correct Crown counsel's misstatement that evidence of consciousness of guilt could be relied on in determining level of culpability between murder and manslaughter -- Trial judge should have told jury that evidence of consciousness of guilt relevant only to issues of whether Crown had proved beyond reasonable doubt that accused committed culpable homicide and did not act in self- defence and whether Crown had proved beyond reasonable doubt that accused had requisite intent for murder despite his intoxication.

Criminal law -- Trial -- Conduct of Crown -- Address to jury -- Crown counsel misstating evidence in his closing address and suggesting that accused had concocted his defence after he had received disclosure -- Trial judge failing to correct remarks -- Remarks so misleading and bearing so directly on central issues in case that accused deprived of fair trial.

The accused was charged with second degree murder. He admitted that he stabbed the deceased, but claimed that he acted in self-defence and that he was intoxicated. After the stabbing, the accused failed to respond to at least 22 police loudspeaker demands that he leave his apartment. The accused's conduct after the homicide was an important part of the Crown's case.

In his closing address, Crown counsel suggested that the accused concocted his defence after he received the prosecution's disclosure. The Crown led no evidence during the trial to substantiate his suggestion that, after receiving disclosure, the accused had tailored his evidence to conform to the disclosure. Dealing with the issue of evidence of consciousness of guilt in his closing address, Crown counsel suggested that the accused's after-the-fact conduct was evidence of his intention to kill. The accused was convicted. He appealed.

Held, the appeal should be allowed.

In his closing address, the Crown asked the jury to speculate on matters not in evidence before them and misstated the evidence. His comments about the accused concocting his defence after receiving disclosure were not only unfounded on the evidence, they were improper and unfair in that the Crown's concoction theory was raised for the first time in his closing address, so that the accused had no opportunity to respond to this allegation. Moreover, the comments made a trap of the accused's constitutional right to disclosure and suggested that his evidence was inherently suspect because the defence was disclosed only in the course of the accused's testimony. The remarks of the Crown were prejudicial to the degree that it was incumbent on the trial judge to comment. The transgressions of Crown counsel were so misleading and bore so directly on the central issues in the case that the accused was deprived of a fair trial.

The characterization of an accused's conduct following the crime with which he is charged as evidence of consciousness of guilt isolates it from other circumstantial evidence. To encourage the trier of fact to consider this evidence with other circumstantial evidence, the use of more neutral terminology, such as after-the-fact conduct, is desirable. Evidence of after-the-fact conduct is only some evidence which is to be weighed with all of the other evidence by the trier of fact in deciding whether or not the guilt of the accused has been proved beyond a reasonable doubt. Like other circumstantial evidence, evidence of after-the-fact conduct must be reasonably capable of supporting an inference which tends to make the existence of a fact in issue more or less likely.

Where a person admits committing an act which resulted in death, evidence that a person hid the murder weapon or fled the scene of a homicide may be viewed as more consistent with that person having committed a culpable homicide than with a non-culpable act, such as killing in self-defence or by accident. Although after-the-fact conduct cannot be used to determine the level of culpability with respect to included offences, it may be of assistance in determining whether the accused committed an unlawful act. The conduct of an accused person after the event in issue may also have some evidentiary value in rebutting defences put forward by an accused which are based on an alleged absence of the required culpable mental state.

Where, as here, the accused is charged with second degree murder, evidence of after-the-fact conduct is equally consistent with the accused having committed manslaughter as it is with murder. Accordingly, as the after-the-fact conduct does not make it more likely that murder was committed as opposed to manslaughter, it cannot be used as proof of intent to commit murder. Crown counsel's submission in this case erroneously suggested that the evidence of the accused's after-the-fact conduct could

be relied on in determining the level of culpability. The trial judge should have corrected the misstatement. He failed to do so, and the jury may have taken his direction as an endorsement of the correctness of the Crown's position. The trial judge should have told the jury that the evidence of the accused's after-the-fact conduct was relevant only to two issues: whether the Crown had proved beyond a reasonable doubt that the accused committed a culpable homicide and did not act in self-defence; and whether the Crown had proved beyond a reasonable doubt that despite the accused's intoxication, he had the requisite intent for murder. The trial judge's non-direction combined with his failure to correct the misstatement by Crown counsel as to the use of the evidence resulted in reversible error.

APPEAL by the accused from his conviction for second degree murder.

Cases referred to *Boucher v. R.*, 1954 CanLII 3 (SCC), [1955] S.C.R. 16, 110 C.C.C. 263, 20 C.R. 1; *Pisani v. R.*, 1970 CanLII 30 (SCC), [1971] S.C.R. 738, 1 C.C.C. (2d) 477, 15 D.L.R. (3d) 1; *R. v. Arcangioli*, 1994 CanLII 107 (SCC), [1994] 1 S.C.R. 129, 111 D.L.R. (4th) 48, 162 N.R. 280, 87 C.C.C. (3d) 289, 27 C.R. (4th) 1; *R. v. Bardales*, 1996 CanLII 213 (SCC), [1996] 2 S.C.R. 461, 198 N.R. 235, 107 C.C.C. (3d) 194, 49 C.R. (4th) 290; *R. v. Carpenter* (1993), 1993 CanLII 8591 (ON CA), 14 O.R. (3d) 641, 83 C.C.C. (3d) 193 (C.A.); *R. v. Conway* (1995), 26 W.C.B. (2d) 121 (Ont. C.A.); *R. v. Dunn* (1990), 1990 CanLII 1027 (BC CA), 56 C.C.C. (3d) 538 (B.C.C.A.); *R. v. Jacquard*, 1997 CanLII 374 (SCC), [1997] 1 S.C.R. 314, 157 N.S.R. (2d) 161, 143 D.L.R. (4th) 433, 207 N.R. 246, 462 A.P.R. 161, 113 C.C.C. (3d) 1, 4 C.R. (5th) 280; *R. v. Jenkins* (1996), 1996 CanLII 2065 (ON CA), 29 O.R. (3d) 30, 107 C.C.C. (3d) 440, 48 C.R. (4th) 213 (C.A.); *R. v. Marinaro*, 1996 CanLII 222 (SCC), [1996] 1 S.C.R. 462, 197 N.R. 21, 105 C.C.C. (3d) 95, revg (1995), 1994 CanLII 1470 (ON CA), 76 O.A.C. 44, 95 C.C.C. (3d) 74 (C.A.); *R. v. Mulligan* (1997), 1997 CanLII 995 (ON CA), 34 O.R. (3d) 212, 115 C.C.C. (3d) 559 (C.A.); *R. v. Romeo*, 1991 CanLII 113 (SCC), [1991] 1 S.C.R. 86, 110 N.B.R. (2d) 57, 119 N.R. 309, 276 A.P.R. 57, 62 C.C.C. (3d) 1, 2 C.R. (4th) 307; *R. v. Seymour*, 1996 CanLII 201 (SCC), [1996] 2 S.C.R. 252, 135 D.L.R. (4th) 225, 197 N.R. 81, 106 C.C.C. (3d) 520, 49 C.R. (4th) 190; *R. v. Tzimopoulos* (1986), 1986 CanLII 152 (ON CA), 17 O.A.C. 1, 25 C.R.R. 125, 29 C.C.C. (3d) 304, 54 C.R. (3d) 1 (C.A.); *R. v. White* (1996), 1996 CanLII 3013 (ON CA), 29 O.R. (3d) 577, 108 C.C.C. (3d) 1, 49 C.R. (4th) 97 (C.A.), leave to appeal to S.C.C. granted June 19, 1997, [1997] S.C.C.A. No. 53; *R. v. Wiltse* (1994), 1994 CanLII 822 (ON CA), 19 O.R. (3d) 379 (C.A.), leave to appeal refused (1995) 188 N.R. 239n; *Yebes v. R.*, 1987 CanLII 17 (SCC), [1987] 2 S.C.R. 168, 17 B.C.L.R. (2d) 1, 43 D.L.R. (4th) 424, 78 N.R. 351, [1987] 6 W.W.R. 97, 36 C.C.C. (3d) 417, 59 C.R. (3d) 108

Brian D. Barrie, for appellant.
Lucy Anne Cecchetto, for the Crown, respondent.

The judgment of the court was delivered by

WEILER J.A.: -- The appellant was convicted of second degree murder. The main issues on this appeal are: (1) whether the Crown's address resulted in the appellant not receiving a fair trial; (2) whether the trial judge erred in his charge in failing to link the defence of intoxication to the intent required for murder; (3) whether the trial judge properly charged the jury in relation to the appellant's conduct following the murder; (4) whether the trial judge should have charged the jury on the issue of provocation; and (5) whether the verdict was unreasonable.

A brief summary of the appellant's evidence concerning the stabbing is necessary to appreciate the issues on this appeal. The appellant testified and admitted that he had stabbed the deceased with a sharp six-inch long filleting knife, but said that he had acted in self-defence. The appellant had been drinking throughout the day with the deceased, Mr. George, and they continued to drink in his apartment during the evening. Mr. George, who was a Native Canadian, turned the conversation to Indian land claims and an argument developed between the two which involved cursing and swearing. The argument escalated and Mr. George said, "[y]ous fucking white men stoled all our land" and the appellant responded, "[y]ou used to burn our fucking wagons". The swearing became so loud that the appellant moved to close the door. As he did so, the deceased grabbed at him. A pushing and shoving match ensued and the appellant testified that he fell backwards onto the coffee table with the deceased on top of him. As a result, the coffee table leg closest to the end of the sectional couch broke and one end fell to the floor, as did the contents of the coffee table. The appellant told Mr. George that if he was going to continue acting like that he had better leave. Mr. George then sat down on a chair and the appellant bent over to straighten the mess and fasten the leg back onto the table. Mr. George suddenly came towards him with an angry look on his face and a knife in his hand. The appellant evaded Mr. George by climbing over the sofa and he then grabbed for his fish knife which was on the kitchen counter. He made contact with Mr. George, saw blood on Mr. George's stomach, threw his knife into the sink, and, as Mr. George, still armed, was moving towards the balcony door, the appellant walked up behind him and gave him a shove to get him out. Mr. George tried to come back in and, after some further swearing, pushing and shoving on the balcony, the appellant hit Mr. George, re-entered his apartment, and locked the door.

It would appear that Mr. George then turned around and walked down the staircase. He collapsed in the laneway behind the apartment building and bled to death as a result of the stab wound to his abdomen. A three-inch pocket knife was found in Mr. George's pocket.

THE CROWN'S ADDRESS TO THE JURY

> 1. The Crown asked the jury to speculate on matters not in evidence before them and misstated the evidence.

In his address to the jury, the Crown took the position that the appellant did not act in self-defence and that he was never confronted by the deceased with a knife. In order to explain how the appellant would have known that the deceased had a knife, the Crown engaged in speculation and suggested that the two men probably had a conversation about fishing and displayed their knives. The Crown also invited the jury to speculate that any fight between the appellant and the deceased probably arose over a bottle of liquor. The trial judge corrected these errors in his charge to the jury and also cautioned the jury not to speculate on the evidence.

In his objection to the charge, defence counsel accepted that the charge adequately dealt with these two matters, but he reiterated his position that an admonition should be given for other specific matters which had earlier been drawn to the court's attention. Other misstatements by the Crown which served to undermine the appellant's defence of self-defence went uncorrected. A few examples will suffice.

The Crown stated that the stab wound made by the appellant was "a stab wound more consistent with being stabbed perhaps from the side or behind as you reach around but not from the front". The appellant's evidence was that he had stabbed the deceased from the front and the pathologist who testified at trial confirmed that the wound was consistent with the appellant's testimony. The Crown did not ask the pathologist whether it was more likely that the deceased's stab wound was consistent with having been stabbed from the side or behind. Yet he stated that the wound was more consistent with having been made in this manner.

Again in relation to the wound, the Crown stated:

> In order for Mr. Peavoy and the description that he gives us of how this injury is inflicted to cause this wound, he has . . . to go from the right side of Mr. George to the left side of Mr. George, and to go down into his liver. It [the wound] didn't happen that way. It didn't happen the way Mr. Peavoy described. No words are spoken. He doesn't see the knife ever again. Never.

In his examination-in-chief the pathologist was asked to describe the direction of the wound. The relevant questions and answers are as follows:

> So when you say an oblique angle you're sort of pointing from your right to your left?

A. That's right.

> You pointed from right to left as being an oblique angle; was there any deviation from horizontal in the sense that it was going down?

A. It seemed to be going downwards.

Although the pathologist also indicated that there was a slight L- or V-shaped deviation of the wound due to a twisting motion either on the part of the person wielding the knife or the victim, he did not retreat from his description of how the wound had been made.

The evidence of the pathologist confirmed that the wound could have been caused in the manner described by the appellant. Moreover, he confirmed that the deceased would likely have been able to walk and fight after receiving the wound. Therefore, the Crown's comments are problematic because they were not supported by the evidence of the pathologist and the Crown had made no attempt to support them through his examination of the pathologist.

2. The Crown made inappropriate comments concerning disclosure

The Crown asked the jury to assess the appellant's credibility, bearing in mind that the appellant had "full knowledge of the evidence against him" after being furnished with the Crown brief. According to the Crown, armed with this disclosure, the appellant could shape a story without fear of being contradicted by any Crown witness. He stated:

> So Defence has full knowledge of everything that they're going to hear from the Crown. There are no surprises, there can be no surprises to the Defence. In addition and because of that, Mr. Peavoy knows that there is nobody at these proceedings that can contradict him on the very central issue of what took place in that apartment.

At another point in his address, the Crown stated that the appellant:

> . . . has after all had some several months to craft a story to exculpate himself or excuse himself from this crime.

In relation to a conversation the appellant had with his common-law spouse shortly after his arrest, the Crown commented:

> Or maybe self defence hadn't been fully developed to that point.

The comments of the Crown were part of a theory which, in a general way, suggested that the appellant had concocted his evidence after he had received the prosecution's disclosure. The Crown led no evidence during the trial to substantiate his suggestion that, after receiving disclosure, the appellant had tailored his evidence to conform to the disclosure. In addition to being unfounded on the evidence, the Crown's comments were improper in that they suggested that there was something suspect about the appellant's evidence because the defence position had not been revealed in the intervening months prior to trial.

In my view, Crown counsel's submissions were improper and unfair in that the Crown's concoction theory was raised for the first time in his closing address. The appellant had no opportunity to respond to the Crown's improper suggestion that he had tailored his evidence after receiving disclosure and the Crown's editorial comments as to when the defence of self- defence was put forward. Moreover, the comments made a trap of the appellant's constitutional right to disclosure and suggested that his evidence was inherently suspect because the defence was disclosed only in the course of the appellant's testimony.

When one considers the Crown's address in its entirety, the tone and style was not a fair and dispassionate presentation of the Crown's case according to the standard set in *Boucher v. R.*, 1954 CanLII 3 (SCC), [1955] S.C.R. 16 at p. 21, 110 C.C.C. 263, and recently confirmed in *R. v. Bardales*, 1996 CanLII 213 (SCC), [1996] 2 S.C.R. 461, 107 C.C.C. (3d) 194:

> [TRANSLATION] The position of Crown counsel is not that of counsel in a civil matter. His functions are quasi-judicial. He must not so much try to obtain a conviction as assist the judge and jury so that justice will be fully done. Moderation and impartiality must always characterize his conduct in court. He will have honestly carried out his duty and will be beyond reproach if, putting aside any appeal to the passions, in a dignified manner appropriate to his role, he presents the evidence to the jury without going beyond what is revealed.

3. Dealing with prejudicial remarks by Crown counsel

In *R. v. Romeo*, 1991 CanLII 113 (SCC), [1991] 1 S.C.R. 86 at p. 95, 62 C.C.C. (3d) 1 at p. 7, Lamer C.J.C. instructs us how an appellate court must approach the problem of prejudicial remarks by Crown counsel:

> There are two basic questions which must be addressed in order to resolve this issue. The first question is whether the trial judge erred in not commenting on the prejudicial remarks of Crown counsel in his charge to the jury. If the non-direction does amount to an error of law, the question arises whether the appeal should be

none the less dismissed under s. 686(1)(b)(iii) on the basis that no substantial wrong or miscarriage of justice has occurred.

The remarks of Crown counsel were prejudicial to the degree that it was incumbent on the trial judge to comment and thus to ensure that the position of the defence was fairly put to the jury. The failure of the trial judge to make additional comments on the Crown's improper remarks was an error of law. There is no general rule that an improper address to the jury by Crown counsel which the trial judge has not corrected is per se conclusive of the fact that there has been an unfair trial and that a conviction cannot stand: *Pisani v. R.*, 1970 CanLII 30 (SCC), [1971] S.C.R. 738 at p. 740, 1 C.C.C. (2d) 477 at p. 478. In the present case, I am satisfied that the transgressions of Crown counsel at trial were so misleading and bore so directly on the central issues in the case that the appellant was deprived of a fair trial and I would allow the appeal on this basis.

THE CHARGE RESPECTING INTOXICATION IN RELATION TO THE INTENT FOR MURDER

Early in his charge, the trial judge told the jury that "[y]our common sense will tell you and you may draw the inference that people normally intend the natural consequences of their actions". On two other occasions the trial judge stated in his charge that the jury was permitted to draw the inference that a sane and sober person intends the consequences of his acts.

The appellant submits that the trial judge committed an error in that he did not link the instruction on the common sense inference to an instruction that different considerations apply where there is evidence that the accused was intoxicated at the time of the offence: see *R. v. Seymour*, 1996 CanLII 201 (SCC), [1996] 2 S.C.R. 252, 106 C.C.C. (3d) 520. It would have been preferable for the trial judge to adhere more closely to the "natural flow" approach discussed in *Seymour*, at p. 264 S.C.R., p. 530 C.C.C. After defining intent and the burden on the Crown, he could have discussed the common sense inference, followed by an explanation of the defence of intoxication. The trial judge did, however, link his comments on common sense to the intent of the accused when he instructed the jury to determine the issue of intent from all the facts and circumstances surrounding the killing. At a later point in his charge, the trial judge made it clear that one of the circumstances they should consider was the consumption of alcohol.

I am satisfied that, reading the charge as a whole, the jury understood the two essential conditions referred to in *Seymour*, supra: (1) that the common sense inference was permissible for them to draw only after an assessment of all of the evidence, including the evidence of intoxication, and (2) that the common sense

inference could not apply if the jury was left in any reasonable doubt about the accused's intention. I am also satisfied that, in the circumstances, the trial judge's reference to capacity in relation to intoxication did not constitute reversible error. I would dismiss this ground of appeal.

THE CHARGE ON AFTER-THE-FACT CONDUCT

The appellant testified that, after stabbing the deceased, he washed the knife, put it away, straightened the apartment, mended the table and attempted to call his lawyer. A neighbour heard a conversation coming from the appellant's apartment about 2:00 a.m. which might have been a person talking on the phone. The conversation was excited and the tone of voice was scared. Ms. Moore, one of the appellant's girlfriends, testified that the appellant called her between 4:00 and 4:30 a.m. and that he said he was upset, and told her that he was sorry for everything that had happened. He told her that there must have been a stabbing. Police, after discovery of the body, cordoned off the apartment building and evacuated the other apartments. Because the fire escape was the only entranceway and was exposed, they decided not to attempt to enter the apartment. Instead, they used a loud hailer and made at least 22 separate loudspeaker demands between 2:10 and 2:30 a.m. asking the appellant to open his apartment door and step out onto the balcony. The appellant testified that he was asleep, had a hearing problem, and did not hear the police. The police officers testified, however, that the appellant was seen at his bedroom window between 2:45 and 4:00 a.m. about half a dozen times. The appellant exited his apartment at 5:10 a.m. He followed instructions and walked backwards down the fire escape steps.

It will be recalled that the appellant admitted stabbing the deceased but testified that he had acted in self-defence. Alternatively, the defence submitted that, at the time of the stabbing, the appellant was too intoxicated to form the intent to commit second degree murder.

The trial judge's review of the conduct following the stabbing began as follows:

> Now some words on consciousness of guilt. It is often thought, sometimes erroneously, that the commission of a crime stamps its perpetrator with a psychological mark, a so- called consciousness of guilt which displays itself in later conduct. Sometimes however, those whom the law holds blameless engage in similar behaviour for any number of reasons. In the present case the Crown asks you, and you may consider certain of the evidence as evidence from which you may infer a consciousness of guilt if you find that these actions were done to avoid detection.

In his charge, the trial judge used the term "consciousness of guilt" and that is the term which has been commonly used to describe this kind of evidence. As this court held in *R. v. White* (1996), 1996 CanLII 3013 (ONCA), 29 O.R. (3d) 577, 108 C.C.C. (3d) 1 (C.A.), leave to appeal to the Supreme Court granted June 19, 1997, [1997] S.C.C.A. No. 53, and as the trial judge stated, evidence of an accused person's acts following the crime with which he is charged should be considered together with all of the other evidence in determining whether the Crown has proven the guilt of the accused. The characterization of the conduct in question as evidence of consciousness of guilt isolates it from other circumstantial evidence. To encourage the trier of fact to consider after-the-fact conduct with other circumstantial evidence and not to isolate it, the use of more neutral terminology is desirable. The use of neutral terminology, such as the term, after-the-fact conduct, also avoids labelling the evidence with a conclusion which the jury might not wish to draw and is therefore more accurate.

There is nothing magical or unique about evidence of after- the-fact conduct. It is not necessary for the Crown to prove that an item of after-the-fact evidence, or even all of the items, in themselves, establish the guilt of the accused person. It is only some evidence which is to be weighed with all of the other evidence by the trier of fact in deciding whether or not the guilt of the accused has been proved beyond a reasonable doubt.

Evidence of after-the-fact conduct must be relevant to a fact in issue [See Note 1 at end of document.] and it may be relevant to more than one fact in issue in a trial. Like other circumstantial evidence, evidence of after-the-fact conduct must be reasonably capable of supporting an inference which tends to make the existence of a fact in issue more or less likely. The primary question is, "How is the after-the-fact conduct relevant?" This question cannot be determined in the abstract or by regard only to the evidence of after-the-fact conduct. It will depend on the nature of the conduct and the factual context of the case, particularly the context of the position advanced by the appellant at trial: R. v. Conway, a judgment of the Ontario Court of Appeal delivered January 17, 1995 (summarized 26 W.C.B. (2d) 121. Relevance is, of course, addressed when the evidence is tendered. The relevance of after-the-fact conduct should be used to shape the instruction given to the jury in any particular case where that kind of evidence forms part of the case.

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. The after-the-fact conduct is said to indicate an awareness on the part of the accused person that he or she has acted unlawfully and without a valid defence for the conduct in question. It can only be used by the trier of fact in this manner if any innocent explanation for the conduct is rejected. That explanation may be

expressly stated in the evidence, such as when the accused testifies, or it may arise from the trier of fact's appreciation of human nature and how people react to unusual and stressful situations. It is for the trier of fact to determine what inference, if any, should be drawn from the evidence.

Often, after-the-fact conduct may be relevant to the issue of the identity of the person who committed the crime: *White, supra*; *R. v. Dunn* (1990), 1990 CanLII 1027 (BCCA), 56 C.C.C. (3d) 538 (B.C.C.A.); *R. v. Tzimopoulos* (1986), 1986 CanLII 152 (ONCA), 29 C.C.C. (3d) 304, 54 C.R. (3d) 1 (Ont. C.A.). Where, for example, a person denies being the person who engaged in an assault on another person, but was seen fleeing from the scene of the crime by someone who knew him, the trier of fact may (not must) conclude that flight from the scene was more consistent with a person who had committed a culpable act. The evidence is, therefore, relevant to the question of the identity of the person who committed the assault. On the other hand, where the accused admits being the person engaged in a fight, after-the-fact conduct will add nothing to the issue of identity and has no relevance in that regard.

When an accused person has been charged with aggravated assault and admits to having committed common assault, evidence of flight does not make it more or less likely that the assault was aggravated assault as opposed to common assault. The evidence, therefore, has no relevance to that issue. Where culpability for one offence is admitted but culpability for another offence is denied, evidence of flight cannot be used to draw an inference of guilt because it does not relate to a particular offence. It cannot be used to determine the degree of culpability of the accused person: *R. v. Arcangioli*, 1994 CanLII 107 (SCC), [1994] 1 S.C.R. 129, 87 C.C.C. (3d) 289.

Where a person admits committing an act which resulted in death, evidence that a person hid the murder weapon or fled the scene of a homicide may, as a matter of human experience or logic, be viewed as more consistent with that person having committed a culpable homicide than with a non-culpable act. In *R. v. Marinaro* (1995), 1994 CanLII 1470 (ONCA), 95 C.C.C. (3d) 74, 76 O.A.C. 44, Dubin C.J.O., whose dissenting opinion was upheld by the Supreme Court at 1996 CanLII 222 (SCC), [1996] 1 S.C.R. 462, 105 C.C.C. (3d) 95, referred to the opinion of Doherty J.A. in *R. v. Wiltse* (1994), 1994 CanLII 822 (ONCA), 19 O.R. (3d) 379 at p. 384 (C.A.), and cited a passage with approval which I shall also reproduce in part:

> In so far as Yarema's acts after the homicide demonstrated a consciousness of guilt, they could do no more than point to his culpability in the homicide. They could not help in determining the level of his culpability, that is, whether he was guilty of manslaughter, second degree murder or first degree murder . . .

The above passage indicates that, although after-the-fact conduct cannot be used to determine the level of culpability with respect to included offences, it may, nevertheless, be of assistance in determining whether the accused committed an unlawful act. In other words, after-the-fact conduct cannot be used to determine whether the accused committed manslaughter or murder but, depending on the circumstances, it may be of some assistance in determining whether he committed a culpable homicide.

The conduct of an accused person after the event in issue may also, depending on the circumstances of the case, have some evidentiary value in rebutting defences put forward by an accused which are based on an alleged absence of the required culpable mental state: *R. v. Wiltse*, supra, at p. 384 (honest but mistaken belief deceased was already dead); *R. v. Jenkins* (1996), 1996 CanLII 2065 (ONCA), 29 O.R. (3d) 30 at p. 63, 107 C.C.C. (3d) 440 (C.A.) (unaware caused injury to the deceased), leave to appeal to the Supreme Court refused February 27, 1997; *R. v. Carpenter* (1993), 1993 CanLII 8591 (ONCA), 14 O.R. (3d) 641, 83 C.C.C. (3d) 193 (C.A.); *R. v. Mulligan*, a decision of this court released May 29, 1997 [now reported at p. 212 ante, 1997 CanLII 995 (ONCA), 115 C.C.C. (3d) 559] at p. 16 [p. 222 ante] (intoxication); and *R. v. Jacquard*, 1997 CanLII 374 (SCC), [1997] 1 S.C.R. 314, 113 C.C.C. (3d) 1 (mental disorder). In these cases, the after- the-fact conduct is potentially relevant because it is circumstantial evidence with respect to the accused's state of mind. In other words the conduct is not consistent with the actions of a person who had the state of mind now alleged at trial. If the accused's explanation of the after-the-fact conduct is rejected by the jury, it is evidence from which an inference may be drawn that the accused person did have the requisite cognitive mental state, or level of mental awareness, to commit the crime alleged.

I turn now to the application of these principles in this case. Where, as here, the accused is charged with second degree murder, evidence of after-the-fact conduct is equally consistent with the accused having committed manslaughter as it is with murder. Accordingly, as the after-the-fact conduct does not make it more likely that murder was committed as opposed to manslaughter, it cannot be used as proof of intent to commit murder. Unfortunately, in reviewing the position of the Crown in his charge to the jury, the trial judge stated:

> The Crown argues some of the other actions [after-the-fact conduct] of Mr. Peavoy are evidence of his intention to kill and not consistent with his version of the events as he describes them.

Crown counsel's submission erroneously suggested that the evidence could be relied on in determining the level of culpability. The trial judge should have corrected this

misstatement. Unfortunately he did not do so and the jury may well have taken the trial judge's direction as an endorsement of the correctness of the Crown's position.

This is not to say that the after-the-fact evidence was not relevant and had no application. Unlike the situation in *Arcangioli*, *supra*, the appellant did not admit culpability for any act. Given the appellant's admission that he had stabbed Mr. George, the after-the-fact circumstantial evidence had no relevance with respect to the commission of the physical act. Although the appellant admitted to stabbing the deceased, he did not admit that he had committed any culpable act but testified that he had acted in self-defence. In these circumstances, the after-the-fact conduct was some evidence from which, along with other evidence, the jury could infer that the appellant was aware he had committed a culpable act and had not acted in self-defence. If the jury concluded that the appellant had committed a culpable homicide, the evidence could not be used as evidence that the appellant intended to commit murder as opposed to manslaughter. However, because the defence contended that the Crown had not proven the requisite intent for murder due to the appellant's drinking throughout the day and at the time of the killing, the after-the-fact conduct could be used in support of the inference that, despite the appellant's intoxication, he had sufficient awareness to have formed the requisite intent for murder. The evidence suggested a relatively high level of cognitive functioning and purposeful conduct which could be viewed as antithetical to intoxication.

It may not be necessary in all cases for a trial judge to instruct a jury as to the permissible uses of after-the-fact conduct. In the present case, however, the evidence of the after-the-fact conduct formed a significant part of the case against the appellant and there was a danger that the evidence would be misused unless the jury were properly instructed. The trial judge should have specifically told the jury that the evidence was relevant to only two issues:

> -- Had the Crown proved beyond a reasonable doubt that the appellant committed a culpable homicide and did not act in self-defence.
>
> -- Had the Crown proved beyond a reasonable doubt that, despite the appellant's intoxication, he had the requisite intent for murder.

The trial judge's non-direction combined with his failure to correct the misstatement by Crown counsel as to the use of the evidence resulted in reversible error.

THE CHARGE ON PROVOCATION

Defence counsel did not want the trial judge to charge the jury on the issue of provocation because he was of the view that it undermined the defence of self-defence

which was being put forward. The Crown took no position on this question. The trial judge charged the jury on provocation. On the appellant's evidence that Mr. George became belligerent, attacked him, knocking him over the table, and then attacked him with a knife while he was attempting to fix it, there was some basis in the evidence for the defence to be left to the jury.

A trial judge is required to leave every defence to the jury for which there is an air of reality on the evidence. In his instructions, it would have been highly preferable for the trial judge to explain to the jury that provocation was not a position being advanced by the defence but one about which he felt he was required to charge them. I am not, however, persuaded that the trial judge's failure to introduce his remarks on provocation with this preface undermined the appellant's primary defence to an appreciable extent. I would dismiss this ground of appeal.

THE REASONABLENESS OF THE VERDICT

Regarding this ground of appeal, the test to be applied is whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered: *Yebes v. R.*, 1987 CanLII 17 (SCC), [1987] 2 S.C.R. 168, 36 C.C.C. (3d) 417. The reasonableness of the verdict is not affected by errors in the Crown's address or the judge's charge to the jury. I would dismiss this ground of appeal.

DISPOSITION

For the reasons I have given, I would allow the appeal, set aside the conviction for second degree murder and order a new trial.

Appeal allowed.

Notes

Note 1: Relevance is a condition precedent to admissibility, but it does not determine admissibility. Apart from specific exclusionary rules, relevant evidence may be excluded where its probative value is outweighed by its prejudicial effect. This power to exclude otherwise relevant evidence applies to after-the-fact conduct just as to other forms of evidence. The exclusionary power will be particularly important where the after-the-fact conduct is discreditable and the connection between that conduct and a fact in issue debatable.