THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case No. IT-08-91-A

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding Judge**
Judge Carmel Agius
Judge Patrick Robinson
Judge Liu Daqun
Judge Arlette Ramaroson

Registrar: **Mr. John Hocking**

Date Filed: **11 November 2013**

THE PROSECUTOR

v.

MIĆO STANIŠIĆ

and

STOJAN ŽUPLJANIN

PUBLIC

ANNEX B (BOOK OF AUTHORITIES) TO THE BRIEF IN REPLY ON BEHALF OF MIĆO STANIŠIĆ

The Office of the Prosecutor:

Ms. Helen Brady

Counsel for the Defence:

Mr. Slobodan Zečević and Mr. Stéphane Bourgon for Mićo Stanišić

Mr. Dragan Krgović, Ms. Tatjana Čmerić and Mr. Christopher Gosnell for Stojan Župljanin

ANNEX B

BOOK OF AUTHORITIES FOR MIĆO STANIŠIĆ'S BRIEF IN REPLY

Pursuant to Rule 111(A) of the ICTY Rules of Procedure and Evidence ("Rules"), and Articles 7-10 of the Practice Direction (IT/201) of 7 March 2002, the Defence hereby submits this Book of Authorities as Annex B to Mićo Stanišić's Reply Brief.[1]

DECISIONS

Canada

1. *Samuels Case*

   The Queen. v. Samuels, (2005), 196, C.C.C. (3d) 403 (Ont. C.A.).

Word Count: 75 words

RESPECTFULLY SUBMITTED ON THIS 11th DAY OF NOVEMBER 2013

COUNSEL FOR THE APPLICANT

Slobodan Zečević **Stéphane Bourgon**

[1] *Prosecutor v. Stanišić and Župljanin* (IT-08-91-A), Mićo Stanišić's Reply to Prosecution Response Appeal Brief ("Reply Brief"), 11 November 2013.

1.

DATE: 20050512
DOCKET: C37067

COURT OF APPEAL FOR ONTARIO

CRONK, ARMSTRONG and BLAIR JJ.A.

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	**James Lockyer and Jennifer Budgell**
	)	**for the appellant**
	)	
Respondent	)	
	)	
- and -	)	
	)	
JOHN GARRY SAMUELS	)	**Jamie C. Klukach**
	)	**for the respondent**
	)	
Appellant	)	
	)	
	)	**Heard: December 1, 2004**

On appeal from a conviction for first degree murder before Justice Albert Roy of the Superior Court of Justice, sitting with a jury, at Perth on May 29, 2001.

ARMSTRONG J.A.:

[1] On the evening of November 10, 1994, the appellant was driving in his pick-up truck with his common-law wife, Barbara Lanthier, in the "back bridges" area of Carleton Place – a small town situated southwest of Ottawa. The truck left the roadway before it was to pass over a bridge on the Mississippi River. The truck ended up on its roof in the river.

[2] The appellant was found lying on the roadside shortly before 9:00 p.m. by two passers-by. Ms. Lanthier was found in the cab of the truck in the river and was subsequently removed and transported to the local hospital where she was pronounced dead.

[3] The appellant, some 19 months later, was charged with first-degree murder of Ms. Lanthier. The theory of the Crown was that the appellant planned the murder of Ms. Lanthier so that he could collect in excess of $2 million of life insurance. The issue at

trial was whether Ms. Lanthier died as the result of an accident or whether the appellant murdered his wife and staged an accident in order to conceal his involvement in her death.

[4] The appellant was convicted of first-degree murder on May 29, 2001 after a trial in Perth, Ontario before Justice Albert Roy and a jury. The appellant now appeals his conviction. For the reasons which follow, I would allow the appeal and order a new trial.

FACTS

The Relationship

[5] The appellant and Ms. Lanthier lived together from 1985 to the time of Ms. Lanthier's death. The evidence at trial was to the effect that the appellant and Ms. Lanthier were a happy couple. The appellant and Ms. Lanthier were affectionate with each other and there were no signs of strife in their relationship.

[6] The appellant and Ms. Lanthier were the owners of a number of life insurance policies, including accidental death policies. The appellant and Ms. Lanthier were the beneficiaries of each other's policies. At the time of her death on November 10, 1994, the insurance on Ms. Lanthier's life totalled $2,051,540. The accidental death coverage totalled $1,464,000 or 71.3% of the total coverage. Most of the accidental death insurance was purchased in the 10 months prior to her death. In the three months prior to Ms. Lanthier's death, the appellant purchased eight travel insurance policies for travel to Quebec for Ms. Lanthier and himself. Six of the policies included accidental death coverage in the amount of $125,000.

[7] On the day of Ms. Lanthier's death, the appellant purchased an insurance policy for Ms. Lanthier and himself from a local travel agent for travel to Shawville, Quebec.

[8] The Crown led evidence at trial that the couple were in debt and that they were experiencing cash flow problems.

The Mishap

[9] The appellant spoke to a number of people on the night of the death of Ms. Lanthier and on the following days. The Crown relies on the inconsistencies in the different versions of the appellant's account of what happened. I shall return to this subject later. However, the essence of the appellant's story is that he and his wife were travelling in his truck to have dinner with friends in Almonte, a neighbouring town. As they approached a bridge at a three-way intersection in the back bridges area of Carleton Place, they were faced with a car or truck approaching them without any lights and, as a result, the appellant had to swerve his truck in order to avoid a collision. This resulted in

the truck leaving the road and ending upside down in the river. The appellant was unable to free his wife from the cab of the truck. After a considerable period of time, he was able to exit the cab and make his way to the bank of the river. The river was not deep – approximately waist high.

[10] As already mentioned, two passers-by, a brother and sister, were driving in the area and came upon the appellant lying on the side of the road, soaking wet and shaking from the cold. The appellant directed them to his truck in the river and said that his wife was in the truck. Within minutes, the police and other emergency response people arrived.

[11] One of the police officers, Sergeant Birtch, pulled Ms. Lanthier's body from the cab of the truck. He testified that it took him approximately 20 seconds to free her from the truck.

The Injuries to Ms. Lanthier and the Cause of Death

[12] Ms. Lanthier was taken to the hospital in a fire equipment van. She was pronounced dead at 9:38 p.m.

[13] The local coroner examined Ms. Lanthier's body at the hospital. He observed an abrasion on her forehead which he attributed to the apparent accident. The emergency department physician advised the coroner that water had been found in the windpipe of the deceased. The coroner concluded that the cause of death was drowning.

[14] Dr. Wenckebach, a pathologist, conducted an autopsy on the body of Ms. Lanthier. He observed a number of superficial cuts and abrasions on her face, as well as her left elbow and wrists. There was no evidence of "wet drowning". He concluded that this was a case of "dry drowning", which can apparently result when a person falls into very cold water.

[15] At trial, the Crown called another pathologist, Dr. Chiasson, who examined Dr. Wenckebach's findings. Dr. Chiasson testified that he could not say that this was definitely a case of drowning. He concluded:

> In my view, there is no definitive anatomic cause of death that has been established, no definitive cause of death has been established. I don't think anyone can say with certainty whether the individual did in fact die of an asphyxial death due to drowning or from some other form of asphyxial death. There's no clear cut evidence, in my mind, of any of those being a definitive cause of death.

> Certainly the body being recovered from the water makes drowning seem to be a reasonable conclusion. However, in the context of facial injuries, blunt force facial injuries of this nature, I think it's important that one needs to consider other possibilities, and that would include smothering or strangulation or drowning at some other site, and then the body going into the water.

[16] However, Dr. Chiasson agreed that the injuries suffered by Ms. Lanthier could have resulted from the kind of accident portrayed by the appellant.

The Injuries to the Appellant

[17] The appellant was also taken to the hospital where he was examined and released. When he was examined by the emergency room physician, she observed superficial abrasions to his right cheek and neck and a two centimetre contusion on the back of his head at the base of his skull. She diagnosed him as suffering from mild hypothermia.

[18] A number of witnesses testified that they observed scratch marks on the appellant's face after the accident. The Crown's theory was that the scratch marks were likely caused by Ms. Lanthier during a struggle with the appellant. On November 18, eight days after the mishap, scrapings were taken from underneath Ms. Lanthier's fingernails. The scrapings contained no DNA other than that of the deceased.

After the Fact Conduct

[19] Initially, the appellant planned to proceed with the cremation of Ms. Lanthier's body on the day following the mishap in accordance with a provision in her will. When the funeral director notified the investigating officers of this intention, the officers met with the coroner to express their concerns about the proposed cremation and what they thought was "an unusual accident". After hearing the police officers, the coroner ordered an autopsy.

[20] On the morning following the mishap, the appellant called his insurance broker to discuss the storage of his damaged truck. He said that the storage fees at Ralph's Towing in Carleton Place were quite high and he wanted the truck moved as soon as possible. The insurance broker told the appellant that he should not move the truck because the insurance adjuster would need to inspect it before it was destroyed. The appellant agreed.

[21] On the same morning, the appellant called the co-owner of Ralph's Towing and asked if the truck could be transferred to a wrecking yard. The owner responded that the police would have to authorize such a move. The appellant then advised that he had already spoken to his insurance broker, who said that "it had already been taken care of".

[22] The appellant spoke to the police on November 13, 1994 and asked if they had any information on the vehicle that forced him off the road. On the night of the incident, he could not recall whether it was a car or truck. A policeman told the appellant on November 13 that he was working on a couple of leads.

[23] There was no contact with the police after November 13 until March 3, 1995 when two police officers met with the appellant at the house of friends in Kanata, Ontario, a suburb of Ottawa. The appellant advised the police that he had been wanting to talk to them about errors he had found in the accident report. He also said that he thought that the vehicle that forced him off the road was a truck with a plough in the front.

[24] The appellant corrected some matters in respect of the diagram on the accident report and discussed his original statement to the police. It was at this meeting that the appellant was cautioned in respect of a charge of first-degree murder.

THE APPEAL

[25] The appellant raises the following grounds of appeal:

(1) misdirection to the jury on the appellant's statements;

(2) misdirection to the jury on reasonable doubt;

(3) misdirection to the jury on the appellant's after the fact conduct;

(4) misdirection to the jury regarding the Crown's jury address; and

(5) the admissibility of photographs of the scene in respect of another automobile accident – taken some years later (the "Foote photographs").

ANALYSIS

(1) Misdirection to the Jury on the Appellant's Statements

[26] The appellant argues that the trial judge made three errors in his instructions to the jury concerning the appellant's out of court statements:

(i) the trial judge wrongly characterized the appellant's out of court statements as containing "confessions", "admissions" or "excuses" and then instructed the jury

that the exculpatory portions of the statements were not entitled to the same weight as the inculpatory portions, thereby diminishing the appellant's defence of accident;

(ii) any alleged inconsistencies in the appellant's description of the mishap were incapable of giving rise to an inference of guilt and the jury should have been told as much; and,

(iii) the trial judge failed to give a *Parrington*[1] instruction to the jury concerning the exculpatory statements of the appellant and their relationship to the requisite burden of proof.

(i) The Characterization of the Appellant's Statements

[27] The trial judge instructed the jury as follows:

> In this case, the statements of the accused Samuels contain both admissions or confessions as well as excuses which tend to exonerate him. In the ordinary course of human behaviour, it often occurs that statements of an incriminating nature, such as admissions or confessions, are likely to be true, otherwise why say them? On the other hand, excuses for one's behaviour do not necessarily carry the same persuasive weight. You will recall I told you earlier that you do not have to accept or reject anything a witness says. The same thing applies to statements made by the accused Samuels. You may believe all or part of the statements, but please keep in mind that Mr. Samuels is entitled to the benefit of any reasonable doubt you may have, including a reasonable doubt about the truth of the statements or any part of them.

[28] In my view, the above instruction is seriously flawed. The statements of the appellant are largely exculpatory and support his defence of accident. It is therefore wrong and prejudicial to describe the statements as containing "admissions" or "confessions". The reference to "excuses for one's behaviour" not carrying the same persuasive weight suggests a reversal of the onus which, in my view, exacerbates the problem.

[1] *R. v. Parrington* (1985), 20 C.C.C. (3d) 184 (Ont. C.A.).

[29] Once a statement of any witness, including an accused, is admitted into evidence, the jury is to consider the entirety of that statement as original evidence. The jury may accept some, part or none of the statement. However, it is simply wrong to instruct the jury to use a different burden of proof (or presumption) before accepting the exculpatory portions of a statement than it does concerning the inculpatory aspects of a statement. In short, the trial judge told the jury that the parts of Samuels' statements that are incriminating are more likely to be true than the portions of the statement that exonerate him. Certainly the trial judge's comments bear some relationship to the origins of the hearsay exception that permits all out of court statements of an accused to be admitted for their truth. However, that is of no concern to the jury. Once the out of court statements of any witness are admitted into evidence, it is wrong to submit a different burden of proof to some parts and not to others. Further, it is prejudicial and a reversal of the burden of proof to suggest a presumption of truthfulness for incriminating statements made by *an accused* and a presumption against truthfulness for exculpatory aspects of those same statements.

[30] The question then becomes whether the charge, read as a whole, is capable of rehabilitating the offending instruction. There are a number of points to be made in favour of rehabilitation:

(a) the trial judge told the jury that the appellant's statements supported a defence of accident and that the Crown must prove beyond a reasonable doubt that the defence of accident cannot succeed;

(b) when discussing the defence of accident, the trial judge (contrary to the submission of the appellant) expressly instructed the jury in accord with the *Parrington* formula;

(c) at the conclusion of the offending passage, the trial judge told the jury to "keep in mind that Mr. Samuels is entitled to the benefit of any reasonable doubt you may have, including a reasonable doubt about the truth of the statements or any part of them"; and

(d) experienced counsel made no objection.

[31] Against either the application of the proviso, or alternatively, a characterization of the charge as adequate in its entirety, are the following points:

(a) the appellant's defence of accident was presented solely through his out of court statements as he did not testify;

(b) although the statements contained a number of inconsistencies in detail, the appellant consistently maintained that his truck was forced off the road and into the river by a vehicle ahead of him. If the jury believed or had a reasonable doubt that the mishap occurred as described by the appellant in his statements, he was entitled to an acquittal;

(c) the trial judge, in error, told the jury that they should apply the burden of proof to determine whether the statements were made; and

(d) there is nothing in the statements that supports the notion that they contained confessions, admissions or excuses.

[32] In my view, the charge when read as a whole does not save the offending instruction. The characterization of the appellant's statements as containing "confessions", "admissions" or "excuses" and the implied reversal of the burden of proof denigrated the defence of accident to such an extent that the remaining instructions in the charge are unable to substantiate a case for rehabilitation.

(ii) The Inconsistencies in the Appellant's Description of the Mishap were Incapable of Giving Rise to an Inference of Guilt and the Jury should have been so Instructed

[33] Immediately after the mishap the appellant provided statements to police and civilian witnesses explaining what happened. The appellant's account furnished a complete explanation of accident which, if true, exonerated him of any criminal responsibility for Ms. Lanthier's death. The statements were fairly precise and specific in detail as to the timing and circumstances of the alleged accident. Counsel for the Crown at trial relied on a number of inconsistencies in the appellant's statements that they submitted gave rise to an inference of guilt. These included:

(a) *how long the appellant had been in the truck before he escaped.*

The appellant told different people various periods of time ranging from 45 minutes to an hour and one half. In his closing address, Crown counsel stated the following:

"45 minutes to an hour and a half Mr. Samuels would have you believe, would have those individuals believe that he was in that truck. What was he doing in there? He wasn't in there that length of time if he was in there at all."

(b) *how his face got scratched*.

The appellant provided different explanations to different people as to how he got scratched: under the dashboard, and Barb scratched him.

(c) *the appellant's description of the other vehicle*.

At first the appellant could not provide any description of the "car" or "truck" that he said caused the accident and the death of his wife. He told some people (including the insurance adjuster) it was a car, he told others it was a truck. The police conducted an extensive search for this other vehicle. Then, on March 3, 1995, almost four months after the mishap, the appellant told the officers that he had recently remembered that it was a truck with a plough on the front that had caused the accident.

(d) *contradictions as to the direction from which the other vehicle was coming*.

The appellant told some people that the vehicle that caused the accident came towards them head-on, from across the bridge. To others he stated that the other vehicle approached the three-way intersection from the right of his truck.

(e) *the deceased's last words.*

The appellant told one police officer that Barbara screamed when she saw the other vehicle. He told other people that Barbara screamed "there's a car coming without its headlights on". He told various other witnesses that "Barb yelled and said that the car was gonna hit them" or "look out" or "oh shit".

[34] In his closing address to the jury Crown counsel reviewed the internal inconsistencies in the appellant's various statements about the "accident" and the inconsistency of his account with extrinsic evidence that showed it to be implausible. Counsel concluded by inviting the jury to find that "his explanations with respect to what happened in that truck, where he was in the truck, how long he was in the truck, what he did with respect to Barbara Lanthier is nonsense." The trial judge included reference to the appellant's statements in his charge to the jury in the context of itemizing various aspects of his "conduct after the occurrence". He described these items of evidence as pieces of circumstantial evidence from which they could infer guilt.

[35] The appellant argues that the alleged inconsistencies in the appellant's statements were incapable of giving rise to an inference of guilt. Any apparent discrepancies in those statements were simply too minor and/or readily explainable to provide evidence from which guilt could be inferred. Further, there was an absence of independent evidence of concoction. The Crown on appeal responds that the circumstances surrounding the making of the appellant's statements, and the nature of the statements themselves, were such that disbelief of those statements inescapably correlated to a finding of fabrication.

[36] In light of the decision to order a new trial it is not strictly necessary to consider the appellant's arguments in relation to this ground of appeal. However, I do so in order to provide some guidance to the trial judge presiding over the retrial of this matter, although I recognize that the evidence in the new trial may not unfold in exactly the same manner.

[37] In *R. v. Bennett* (2003), 179 C.C.C. (3d) 244 this Court considered the circumstances under which the inconsistencies in an accused's out of court statements could be left with a jury as evidence from which they could infer guilt. On behalf of the Court, McMurtry C.J.O. stated the following at p. 281:

> In my view, if an instruction permitting a jury to find concoction and to infer guilt based on that finding is to be given, the trial judge is required to identify for the jury what inconsistency in the accused's statements could warrant a finding of concoction. *The inconsistency must be compelling in the sense, for example, that there is an indication that the accused was attempting to mislead investigators by fabricating an alibi*. As Martin J.A. stated in *R. v. Andrade*, *supra*, at p. 67: "the giving of contradictory statements by an accused with respect to his whereabouts at the critical time may in some circumstances constitute evidence upon which

> the jury is entitled to find that one or both statements are fabricated" [emphasis added].

[38] In his direction to the jury, the trial judge included the apparent inconsistencies in the appellant's statements among the items of evidence that constituted "post-offence" conduct. The trial Judge correctly instructed the jury that the Appellant's various statements could support an inference of guilt. The discrepancies in these statements taken cumulatively (with the exception of the statements concerning the deceased's last words) were significant enough to meet the standard in *Bennett*.

[39] The inconsistencies in the appellant's statements in relation to the amount of time the appellant spent in the truck in the water, and the implausibility of those accounts when viewed in the context of other evidence adduced at trial, rendered those statements properly left with the jury as evidence from which they could infer guilt. As for the appellant's various explanations for the "raking" type injury on his face, sustained at a time proximate to the mishap, those too were significant enough to warrant admission as circumstantial evidence of guilt. In my view, the discrepancies in the appellant's first few statements concerning the vehicle said to have caused the mishap were not, on their own, so significant as to warrant consideration as consciousness of guilt. However, when seen in conjunction with the appellant's final revelation to police investigators, made several months after the mishap, that the vehicle that caused the accident was a truck with a plough, they were significant enough cumulatively to warrant being left with the jury as evidence from which it could infer guilt. As for the appellant's statements concerning the last words of the deceased, these discrepancies were simply too minor to warrant being left with the jury as circumstantial evidence of guilt.

(iii) Failure to Give a *Parrington* Instruction

[40] As indicated above, I am satisfied that the trial judge charged the jury in accordance with this court's direction in *R. v. Parrington*. In this case, the trial judge instructed the jury as follows:

> The Crown must prove beyond a reasonable doubt that the defence of accident cannot succeed. The accused does not have to prove anything. Keep in mind three things. If you accept the evidence in support of the defence of accident, you must return a verdict of not guilty. If you do not accept the evidence in support of the defence of accident but you are left with a reasonable doubt, you must also return a verdict of not guilty. Even if you are not left with a reasonable doubt by the evidence in support of the defence of accident, you must still go on to determine whether or not on the basis of all of the evidence the accused Samuels is guilty.

(2) Misdirection to the Jury on Reasonable Doubt

[41] The trial judge charged the jury on the meaning of "beyond a reasonable doubt" in accordance with the direction of Cory J. in *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 at 14 (S.C.C.). The appellant submits that the trial judge should have told the jury that proof beyond a reasonable doubt is closer to absolute certainty than to proof on a balance of probabilities. He further submits that the trial judge erred by instructing the jury that they should convict if they were "sure" that the accused committed the offence without first providing a proper definition of proof beyond a reasonable doubt.

[42] The trial judge told the jury that they could not convict if they believed that the appellant was "probably guilty" and that the Crown did not need to prove the case to "an absolute certainty". The appellant submits that by stating the two ends of the "spectrum of doubt", that this was insufficient to properly convey the meaning of beyond a reasonable doubt to a jury. The appellant relies upon the statement of Iacoboucci J. in *R. v. Starr* (2000), 147 C.C.C. (3d) 449 at 545 (S.C.C.): "In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities."

[43] The above statement of Iacoboucci J. in *Starr* is made in reference to the meaning of beyond a reasonable doubt as articulated in *Lifchus*. While it may be said that *Starr* contains a further refinement of the concept, I do not take it in any measure to suggest that a *Lifchus* charge without such refinement is deficient. I agree with the submission of counsel for the respondent that *Starr* simply illustrates another way of achieving the objective set forth in *Lifchus*. It is worth observing that defence counsel made no objection to this aspect of the charge. Indeed, he agreed with the Crown's submission that the trial judge should charge the jury in accordance with the recommended instructions in *Lifchus*.

(3) Misdirection to the Jury on After the Fact Conduct

[44] During his charge, the trial judge made numerous references to "post-offence conduct" in reference to the evidence of certain actions of the appellant following the death of his wife on November 10, 1994. I agree with the observation of Weiler J.A. in *R. v. Peavoy* (1997), 117 C.C.C. (3d) 226 at 237 (Ont. C.A.) that it is preferable to characterize such evidence in more neutral terminology. In *Peavoy*, Weiler J.A. said at p. 237:

> 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.

However, the failure to abide by the direction in *Peavoy*, in my view, does not provide a basis for interfering with the jury's verdict.

[45] The Crown relied upon the inconsistencies in the appellant's statements as after the fact conduct. I have already discussed the use of this evidence and the trial judge's treatment of it and I have nothing further to add to that discussion.

[46] The Crown relied upon the expressed intention of the appellant to proceed with the cremation of Ms. Lanthier's body on the day following her death as evidence of after the fact conduct from which an inference of guilt could be drawn. Similarly, the Crown relied upon the appellant's efforts to have his truck moved from storage at Ralph's Towing to a wrecking yard where it would be destroyed.

[47] The appellant submits that the evidence concerning cremation and the removal of the truck to the wrecking yard should not have been left with the jury.

[48] In respect of the cremation, the appellant relies upon the wish of Ms. Lanthier expressed in her will. The appellant also submits that the cremation did not in fact take place the following day. He was persuaded to wait for Ms. Lanthier's sons to arrive in Carleton Place so that they and others could pay their respects to the deceased. In light of this evidence, the appellant submits that his desire to have Ms. Lanthier's body cremated does not raise an inference of guilt and should not have been treated as evidence of after the fact conduct.

[49] In respect of the request to have his truck moved to a wrecking yard, the appellant submits that his explanation for wanting the truck destroyed, given to three different witnesses, was perfectly reasonable, i.e. the truck was a write-off and he did not wish to pay the mounting storage fees. It was therefore not appropriate to leave such evidence with the jury as after the fact conduct.

[50] In my view, the cremation evidence and the truck evidence were properly put to the jury as after the fact conduct capable of giving rise to an inference of guilt. It is, of course, important that the trial judge tell the jury that there are also innocent explanations for the appellant's conduct. While the trial judge's review of the evidence may have appeared to stress the guilty inferences as opposed to the innocent explanations, I cannot conclude that he committed reversible error. On a new trial, it will be for the trial judge to determine if such evidence is admissible. If such evidence is admitted, it will be

necessary that it be given balanced treatment as between the defence and the Crown in the charge to the jury.

[51] The Crown at trial also relied upon the appellant's failure to contact the police from November 1994 to March 1995 and to inform them of his whereabouts as evidence of after the fact conduct. In his address to the jury, Crown counsel said:

> Why did he not run to the police with information that this was a truck with a plow? Why did he wait for the police to find him in March of 1995 and then tell them? If this vehicle was true, if this truck, as he claimed in March, was truthful, [*sic*] why isn't he beating down the door, helping the police find this person who killed his wife? Why isn't he calling the police saying 'What's going on? What's up? I've got information to help you. Find this person that killed my wife, and what are you doing? What's up?' There's none of that.

[52] In ruling on the admissibility of this evidence, the trial judge said that it was relevant to present an accurate picture of the appellant's relationship with the deceased. The jury might regard his apparent indifference to the progress of the investigation into her death as being inconsistent with his professed love for her and upset over her death. It was also relevant to the appellant's claim of accident as a circumstance bearing on the veracity of that claim.

[53] The trial judge told the jury that the appellant's failure to contact the police in order to inquire about the investigation and his failure to tell the police that he remembered that the vehicle that forced him off the road was a truck with a plough constituted evidence of after the fact conduct.

[54] The appellant submits that the failure to contact the police constitutes evidence of demeanour, the use of which was criticized by the Hon. Fred Kaufman in the *Report of the Commission on Proceedings Involving Guy Paul Morin*:

> Purported evidence of the accused's 'demeanour' as circumstantial evidence of guilt can be overused and misused. Crown counsel and the courts should adopt a cautious approach to the tendering and reception of this kind of evidence, which brings with it dangers which may be disproportionate to the probative value, if any, that it has.

[55] The appellant further submits that one of the inferences to be drawn from his failure to contact the police was that he failed to assist in the police investigation. The appellant argues that this is similar to the *Morin* case in which Guy Paul Morin's failure

to participate in the search for the deceased was relied on as evidence of after the fact conduct. The appellant also argues that the treatment of this evidence as evidence of after the fact conduct compromised his right to remain silent.

[56] Having admitted the police evidence, the trial judge gave the following confusing instruction to the jury:

> There is no duty on Mr. Samuels to help the police. There is no principle in our law that says there is a duty on an individual to help the police. *When you consider post-offence conduct, such conduct is only relevant up until March 3, 1995. You recall that when he was visited by the two police officers and gave a statement in March 1995, he was given a warning about his rights and so on. So that anything that happens after that point in time would not be any evidence that you should consider.* Let me put it another way. It would be cynical in the extreme if an individual was told that he had a right to silence and so on, principles that are guaranteed by the *Charter*, and then you were asked to draw inferences if he remained silent. That is so totally inconsistent [emphasis added].

[57] I agree with the submission of appellant's counsel that the above instruction was rendered meaningless by the suggestion that the appellant's conduct was "only relevant up to March 3, 1995".

[58] I also agree with the appellant's submission that there may have been many reasons why the appellant did not contact the police. The jury should at least have been told that the appellant's conduct could be considered consistent with his position that his wife died in an accident and that there was no evidence until the meeting of March 3, 1995 that the appellant knew that the investigation had turned into a criminal investigation and that the police wanted to speak to him.

[59] That said, I think there was a basis upon which the evidence was admissible as after the fact evidence. I do not agree with the appellant that the evidence was demeanour evidence. Rather, it was evidence of seemingly counter-intuitive behaviour engaged in by an accused after the fact that was capable of properly giving rise to an inference of guilt. However, such evidence requires a careful instruction to the jury of what use they may make of such evidence and that they must fully consider the innocent inferences to be drawn from such evidence.

[60] There was one further piece of after the fact evidence that was led by the Crown but did not form part of the trial judge's charge. Ms. Lanthier's aunt testified that she

prepared a draft "obituary" on the day following the death of Ms. Lanthier while at the appellant's house. The draft referred to Ms. Lanthier as having "died suddenly". The appellant requested the aunt to change it to read "died accidentally". The Crown made reference to this evidence in both his opening and closing addresses at trial.

[61] It will be for the judge presiding at the new trial to decide whether such evidence is admissible and on what basis. On the record of the first trial, it is my view that such evidence was properly admitted as evidence of after the fact conduct.

(4) Misdirection to the Jury Regarding the Crown's Jury Address

[62] Counsel for the defence, in his closing address, observed that the Crown failed to call three accident reconstruction experts who had been referred to during the course of the evidence of other Crown witnesses. Defence counsel said that there was no expert evidence to contradict the defence of accident put forward by the appellant in his statements to the police.

[63] In response to the comments made by defence counsel, counsel for the Crown, in his address to the jury, said that it was disappointing and inappropriate for defence counsel to comment on the failure to call the three expert witnesses. The Crown went on to give his own theory of the likelihood of the mishap occurring in the manner suggested by defence counsel.

[64] Both the defence and Crown objected to each other's jury address. In respect of defence counsel's comments concerning the Crown's failure to call the three experts, the trial judge told the jury that no adverse inference should be drawn because such an inference involves speculation. Counsel for the appellant submits that while the trial judge's instruction was correct, it was unnecessary as it was appropriate for defence counsel to have made the observation that he did and to point out that there was a gap in the Crown's case. I agree.

[65] In respect of the theory of how the mishap may or may not have occurred, the trial judge instructed the jury that there was simply no evidence to support the Crown's theory.

[66] In the result, I cannot conclude that the trial judge committed any reversible error in regard to the comments that he made concerning either the defence or the Crown closings.

(5) The Admissibility of the Foote Photographs

[67] A number of police and civilian witnesses testified about parallel tire tracks that they had observed at the scene in the days following the mishap. However, the tracks

were not visible in police photographs taken of the scene. Following a *voir dire*, the trial judge allowed the Crown to introduce photographs from an unrelated accident that occurred at the same site four years later. The photographs in question were taken after a man named Foote drove his car into the river following a diabetic seizure. The trial judge admitted the Foote photos to show that it was possible that tire tracks existed after the appellant's mishap but did not appear in some of the photographs taken by police. The appellant argues that the Foote photographs were irrelevant and not probative of any issue to be determined by the jury, and that the admission of such evidence was prejudicial to the appellant.

[68] Prior to the *voir dire* concerning the admissibility of the Foote photographs, the Crown called several witnesses who testified that they saw tire tracks at the scene of the mishap. The issue of the tire tracks not appearing in the photographs was raised for the first time in the trial proceedings during defence counsel's cross-examination of a police witness. It would seem that the thrust of that cross-examination was that the officer did not in fact see tire track marks. Defence counsel conducted a similar cross-examination of a second Crown witness. A *voir dire* was then held to determine the admissibility of the Foote photographs.

[69] On the *voir dire*, the Crown argued that a number of witnesses had already testified and had been questioned about the fact that the tire tracks that they had testified to seeing did not appear in the photographs. The Crown argued that the "existence of these tracks is obviously a critical issue in the case for the jury" and that, in light of the legitimate tactic of the defence to cross-examine these witnesses using the photographs, the Crown ought to be able to counter the attack on credibility with the Foote photographs. In particular, the Crown proposed to call the evidence of Constable Smith, the investigating officer concerning the 1998 Foote accident, and Constable Christink, the identification officer who photographed the tracks left by the Foote accident. It was anticipated that both officers would testify that they saw and measured tire track marks following the Foote accident, but that these same tire track marks did not show up on some of the photographs taken by the identification officer. The Crown submitted that the evidence was admissible not to establish that, because there were marks created in the Foote accident, it was therefore likely that there would have been tracks created in the Samuels' mishap. Rather, the evidence was proffered to show that it is possible that there were tire tracks at the scene of the mishap, as testified to by the various Crown witnesses, even though those tracks could not be seen in the photographs.

[70] Defence counsel at trial opposed the admission of the evidence on the basis that it lacked sufficient probative value. In particular, counsel pointed to various distinctions between the circumstances under which the photographs were taken following the Foote incident and those taken following the Samuels' mishap. Defence counsel argued that, unlike in the appellant's case, the scene of the Foote incident was properly secured

against contamination immediately after the event. Indeed, the Foote vehicle was still in the river when the pictures were taken approximately 12 hours after the incident. In contrast, the Samuels vehicle had already been removed from the river, and the scene left unsecured, prior to the taking of the photographs in this case some 40 hours after the event. The defence argued (mistakenly) that it was the Crown who first raised the issue with the witnesses that the tire tracks do not appear in the photographs and whether that was done in anticipation of blunting cross-examination on the point was unclear and irrelevant. Because of the various distinctions between how the Foote photographs were created and the photographs in the instant case, the evidence lacked probative value and had the potential to distort the fact-finding process.

[71] In his ruling concerning the admissibility of the Foote photographs, the trial judge articulated the purpose for their admission as follows:

> The Crown is attempting to show the photographs of an accident which took place in 1998. It is introducing the evidence for a very limited purpose. The purpose, of course, is not to tell the trier of fact, the jury, that because tracks are visible in the Foote accident, therefore, it is quite possible and it is likely that they were visible for the Samuels' incident back in November 1994. Obviously, that kind of evidence has no probative value; it would not be admissible for that purpose.
>
> But the reason that the evidence may well have relevancy is as follows. Witnesses have testified, and apparently other witnesses will testify, that they have seen tire tracks following the date of this accident. Witnesses have been cross-examined extensively and have been shown photographs, including blowups, to show that there are no tracks visible on the photographs. Therefore, the trier of fact in those circumstances will be asked to conclude that, if the tracks are not showing on the photographs, therefore they did not exist and the witnesses are wrong about having seen tire tracks.
>
> The Crown in introducing the photographs of the Foote incident, is attempting to show that it is possible that there are tracks at that site and that those tracks are visible on some photographs and not visible on other photographs. It would be open for the trier of fact to conclude that possibly there were tracks but they are not visible on the photographs.

[72] In his ruling the trial judge further instructed the Crown to call the evidence in a manner that reflected that limited purpose. He also adverted to the fact that the jury would have to be instructed in relation to the discrepancies between the taking of the Foote photographs and the photographs taken in the instant case. After the trial judge's ruling, several other witnesses testified about their observations of the tire marks, including the identification officer who took the photographs and the coroner.

[73] The appellant argues in his factum that "the Foote photographs were unrelated to the appellant's case and therefore irrelevant to determining whether tire tracks existed at the scene." He further argues that the jury may have misused the Foote photographs and considered that because tire tracks existed in some of them, they must have been present when the appellant's truck went into the river. He submits that the risk of misuse existed despite the trial judge's caution to the jury.

[74] Trial judges retain broad discretion to determine the admissibility of evidence. In this case, the trial judge did not err in the exercise of his discretion to admit the Foote photographs. The photographs were relevant, albeit for a limited purpose. Defence counsel relied on the absence of tire marks in the photographs to impugn the reliability of various Crown witnesses' evidence. The Foote photographs, by showing that it was possible for tracks visible to the eye not to show up in photographs, are responsive to the defence's attempt to impugn the credibility of the evidence of these witnesses. Without the impugned evidence there was the danger that the jury would be left with the potentially mistaken impression that, because the tire tracks could not be seen in the photographs, they did not exist. The admission of the Foote photographs did not amount to improper oath-helping because their relevance related to the truth of the witnesses' evidence; not their truthfulness as witnesses. The rule against oath-helping prohibits a party from presenting evidence solely for the purpose of bolstering a witness' credibility before that witness' credibility is attacked. That was not the case here. Here, the issue was raised first in cross-examination by defence counsel. The trial judge understood the limited purpose for which the evidence was admitted and was careful to warn the jury about its proper use.

[75] Neither the Crown in its closing address to the jury nor the trial judge misstated the limited purpose for which the evidence was properly admitted. The possibility of tire tracks being present, despite what was depicted in the photographs, was a circumstance that ultimately bore on whether the tracks were in fact present in this case through a chain of inferential reasoning. The trial judge carefully instructed the jury as to how this evidence factored into that chain and limited its use to its true evidentiary value. There is no reason to believe that the jury was incapable of grasping the distinction.

CONCLUSION

[76] It is my conclusion that the trial judge erred in his charge to the jury in respect of his characterization of the appellant's statements as containing "confessions", "admissions" or "excuses". I have already said that I do not believe that the balance of the charge rehabilitates the offending instruction. For the same reason I do not believe that this is an appropriate case to apply the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46. I have also concluded that the trial judge erred in his instruction to the jury in respect of the appellant's lack of contact with the police, particularly in respect of his failure to contact the police between November 13, 1994 and March 3, 1995. In view of the conclusion I have come to in respect of the trial judge's charge on the appellant's statements, I need not consider the effect of this latter error in terms of the curative proviso.

DISPOSITION

[77] In the result, I would allow the appeal, set aside the conviction and order a new trial.

RELEASED: "MAY 12 2005"

"EAC"

"Robert P. Armstrong J.A."
"I agree E.A. Cronk J.A."
"I agree R. A. Blair J.A."