

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* White, 2011 SCC 13, [2011] 1 S.C.R. 433 | **Date:** 20110311  **Docket:** 33464 |

**Between:**

**Dennis Robert White**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 103)  **Concurring Reasons:**  (paras. 104 to 131)  **Dissenting Reasons:**  (paras. 132 to 198) | Rothstein J. (LeBel, Abella and Cromwell JJ. concurring)  Charron J. (Deschamps J. concurring)  Binnie J. (McLachlin C.J. and Fish J. concurring) |

R. *v.* White, 2011 SCC 13, [2011] 1 S.C.R. 433

**Dennis Robert White** *Appellant*

*v.*

**Her Majesty The Queen** *Respondent*

**Indexed as:** R. ***v.*** White

2011 SCC 13

File No.: 33464.

2010: May 14; 2011: March 11.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for british columbia

*Criminal law — Trial — Charge to jury — Post-offence conduct — Murder — Accused fleeing crime scene after shooting victim — Accused conceding at trial to having shot victim unlawfully but claiming lack of intent to kill — Crown stating in closing argument that accused fled with no hesitation, shock or uncertainty — Trial judge instructing jury to be “careful” in considering post-offence conduct — Whether lack of instruction stating that post-offence conduct had no probative value constituting error of law — If so, whether curative proviso applicable — Criminal Code, R.S.C. 1985, c. C‑46, s. 686(1)(b)(iii).*

The accused and the victim were engaged in a physical altercation when a loaded handgun in the accused’s possession was fired into the victim’s chest, killing him instantly. Immediately and without hesitation, the accused fled the scene. He was later apprehended by police and charged with second degree murder. Throughout the Crown’s case, the identity of the shooter was a live issue, but by trial’s end, the accused effectively admitted to manslaughter, and thus the only live issue before the jury was whether he had the requisite intent for murder. In response to the accused’s theory according to which he shot the victim accidently as the two grappled with one another, the Crown pointed out in its closing argument that the accused had fled with “no hesitation here, no shock, no uncertainty on his part” and that one would expect hesitation if the shot had been anything other than intended. In his charge to the jury, the trial judge referred to the accused’s post-offence conduct on two occasions, namely in the context of his instructions on the issue of intent where he stated: “You may consider [the accused’s] post-event conduct in fleeing the scene, but you should also be careful with it” and “it may not be of much assistance in assessing his precise state of mind at the time the gun was fired”, and in his summary of the Crown’s theory of the case. The accused was convicted as charged. On appeal, the accused argued that the trial judge should have specifically instructed the jury that the evidence concerning the circumstances of his flight had no probative value in relation to the issue of intent, because that evidence was consistent with both manslaughter and second degree murder. The majority of the Court of Appeal upheld the conviction, concluding that although the jury charge was deficient, the error was minor and could have no impact on the final verdict. The dissenting judge concluded that the trial judge had erred in failing to give a “no probative value” instruction. In his view, the error was serious such that it could not be saved by using the curative proviso found in s. 686(1)(*b*)(iii) of the *Criminal Code*.

*Held* (McLachlin C.J. and Binnie and Fish JJ. dissenting): The appeal should be dismissed.

*Per* LeBel, Abella, Rothstein and Cromwell JJ.: This case is distinguishable from *R. v.* *Arcangioli*, [1994] 1 S.C.R. 129, on the facts, and the jury charge was adequate. Even assuming that the trial judge erred in his instructions to the jury, the error was harmless and should be saved by the curative proviso in s. 686(1)(*b*)(iii) of the *Criminal Code*.

The principle that post-offence conduct may constitute circumstantial evidence of guilt remains good law. At its heart, the question of whether such evidence should be subject to a “no probative value” limiting instruction is simply a matter of relevance. As with all other evidence, the relevance and probative value of post-offence conduct must be assessed on a case-by-case basis. Given that post-offence conduct is not fundamentally different from other kinds of circumstantial evidence, its admissibility and the formulation of limiting instructions should be governed by the same principles of evidence that govern other circumstantial evidence. In particular, to be admissible, post-offence conduct evidence must be relevant to a live issue and must not be subject to a specific exclusionary rule; it may also be excluded pursuant to the exercise of a recognized judicial discretion. It is also possible, and often appropriate, for a trial judge to warn the jury of the risks associated with certain types of evidence. The purpose of such a caution is to alert the jury to the danger, which has been recognized through judicial experience, but then allow the properly informed jurors to evaluate the evidence with care. Moreover, there is an important distinction to be made between a limiting instruction and a warning or caution. A limiting instruction tells the jury they must not consider the evidence for one or several purposes, and a warning or caution leaves the evidence for the jury to consider, but warns them to be careful with it. In the present case, the judge did warn the jury to be careful with the evidence relating to the accused’s flight and that there may be one or more explanations for his conduct.

*Arcangioli* and its successor cases, such as *R. v.* *White*, [1998] 2 S.C.R. 72, do not support the very broad proposition that post-offence conduct is generally inadmissible in determining whether an accused is guilty of manslaughter or murder. Indeed, they stand for the proposition that a “no probative value” instruction will be required when an accused’s post-offence conduct is “equally explained by” or “equally consistent with” two or more offences. Those cases should be understood as a restatement, tailored to specific circumstances, of the established rule that circumstantial evidence must be relevant to the fact in issue. Whether or not a given instance of post-offence conduct has probative value with respect to an accused’s level of culpability depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial. Furthermore, when the question is whether certain evidence should be removed from the jury because it is irrelevant, it is enough to evaluate whether that evidence is relevant to the material fact at issue as a matter of logic and human experience. The risk that a jury will misuse or be misled by an item of evidence should not inform the relevance determination. Instead, this risk is appropriately addressed through the trial judge’s discretion to exclude evidence whose prejudicial effect outweighs its probative value or through a caution in the jury charge.

In this case, the trial judge’s instructions to the jury on the question of post-offence conduct were adequate and did not constitute an error of law. Indeed, the conduct alluded to by the Crown was not the flight itself, but rather the accused’s failure to hesitate after his gun was fired into the victim’s chest before he fled the scene. This is different from the question at issue in *Arcangioli*, which concerned the simple act of fleeing from the scene. The situation in the present case is no different from that in *R. v.* *Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, in that a jury could legitimately infer that the accused’s lack of hesitation after the gun was fired belied his claim that the shooting was accidental. Evidence of such a failure is thus relevant to the question of whether he had the requisite intent for second degree murder. Moreover, the evidence was not tainted by the hallmark flaws associated with demeanour evidence so as to be irrelevant, nor was it an invitation to infer a murderous intent from the way the accused looked just before he fled. Lack of hesitation prior to flight is an objective fact, from which the finder of fact, and not a witness is asked to draw an inference of no shock or surprise. While it is true that using evidence of lack of hesitation prior to flight presupposes a normal range of reactions, and while it may be that not everyone will respond in the same way, divergence from that norm, though not determinative, is more consistent with an intentional shooting than with an accident. It would therefore have been wrong for the trial judge to instruct the jury that this evidence had no probative value in determining intent. As well, while it is theoretically possible to read the trial judge’s statement as an invitation to consider the accused’s act of flight as evidence of consciousness of guilt, this would not be a reasonable interpretation given the context in which the statement was made.

It was, however, appropriate for the trial judge to warn the jury to be careful with the post-event conduct evidence and tell them that it might not be of much assistance. Indeed, there could have been other explanations for the accused’s failure to hesitate. While the notion that a person who accidentally shoots someone to death will normally have the immediate reaction of hesitating or showing some other sign of surprise is well founded, there may be exceptional individuals who do not respond in the normal way. The caution was adequate to alert the jury to the risk associated with that evidence and to allow them to properly weigh it.

Nevertheless, if there was an error in the trial judge’s instructions, it should be saved by the curative proviso in s. 686(1)(*b*)(iii). It would have been ideal for the trial judge, when instructing the jury on the matter of intent, to refer expressly and exclusively to the accused’s lack of hesitation, as opposed to his “conduct in fleeing the scene”. However, even assuming that the statement was persistently or intractably ambiguous and therefore constitutes an error, such an error is a minor one. There is no requirement for perfectly instructed juries, and given the nature of the purported error, it was unlikely to have had any effect on the jury’s deliberations.

*Per* Deschamps and Charron JJ.: There is agreement with Binnie J.’s analysis on the law concerning the use that may be made of evidence of post-offence conduct. As he stresses, it is definitely wrong to suggest that evidence of anything said or done by an accused after the commission of an offence gives rise to special rules of admissibility, or that it is subject to special warnings as to what use may be made of it by the trier of fact. There is also agreement with Binnie J. that judicial experience has taught us that in some cases jurors have found certain types of evidence more persuasive than warranted, thus making it necessary in appropriate cases to caution the jury accordingly or remove the evidence from their consideration altogether. Furthermore, it is agreed that inferences drawn by a witness, based on his or her observation of the accused’s demeanour, may well call for a special caution or be subject to an exclusion order.

However, there is disagreement with Binnie J. on the significance he attaches to Crown counsel’s reference in his closing address to the fact that the accused immediately fled the scene “with no hesitation here, no shock, no uncertainty”. The Crown did not invite the jury to draw an impermissible inference of guilt. Taken in context, Crown counsel’s comment could only have been understood by the jury as a rhetorical argument that no evidence supported the defence theory of accidental discharge of the firearm. The failure of defence counsel to raise any issue at trial regarding Crown counsel’s closing address or the trial judge’s instructions on the evidence of flight further supports this interpretation.

There is also no support in the record for the accused’s contention, accepted by Binnie J., that this case is a re-run of *Arcangioli*. In that case, the accused admitted to participating in the culpable event and the only issue at trial was his level of culpability. Conversely, in the present case, the identity of the shooter was a very live issue and the evidence of flight was highly relevant to the issue of identification. Moreover, it formed an inextricable part of the narrative as every witness to the event described the shooter, gun in hand, fleeing the scene. The evidence was therefore admissible at trial and properly left for the jury’s assessment. The trial judge’s instructions regarding this evidence contained no error. The evidence of flight was reviewed for the jury in this context and its significance would have been properly understood. In addition, on the question of intention, the trial judge took care to instruct the jury that they should “be careful with” the evidence in question, as it might not tell them “much more than that for any number of reasons he would be in some kind of trouble if he stayed at the scene and it may not be of much assistance in assessing his precise state of mind at the time the gun was fired”. In the context of this trial, no more was required. Accordingly, there is agreement with Rothstein J. that the jury charge contained no error, and there is no reason to interfere with the jury’s verdict.

*Per* McLachlin C.J. and Binnie and Fish JJ. (dissenting): The rules governing jury instructions where evidence relied on by the prosecution is not probative, or if probative is outweighed by unfair prejudice, are outlined in recent decisions in this Court in cases such as *Arcangioli* and *White*. The present case is not distinguishable in principle from *Arcangioli*. Indeed, as in *Arcangioli*, the conduct of the accused in the immediate aftermath of the offence was a significant element in the Crown’s argument to the jury, and in the trial judge’s final instructions. As well, there was the danger in this case that the jury might fail to take account of alternative explanations for the accused’s behaviour, and that they might mistakenly leap from such demeanour evidence to a conclusion of guilt. Had the issue of identity been put to the jury, undoubtedly evidence of flight would have been highly relevant. It might have been used by the jury, along with other evidence to find the accused to be the shooter. In the end, however, identity was admitted. Accordingly, the accused’s post-offence conduct was not simply put forward as part of the narrative; it was put forward as proof of guilt of second degree murder. On the basis of *Arcangioli*, that evidence was inadmissible to prove the specific intent necessary to support a conviction for murder.

Evidence of post-offence conduct is typical of many items of evidence adduced in a criminal trial: it is evidence of limited admissibility; the trier of fact may use it for one or more purposes but not for another. It follows that its introduction imposes on the trial judge in a jury trial the obligation to explain both the permitted and prohibited use of the evidence. The need will depend on the facts. One of the problems with evidence of post-offence conduct is that often the inferences sought are too equivocal for the evidence to be of any value. The question, as always, is the strength of the inferential link between the evidence in question and the fact sought to be established. If the evidence introduced in relation to a contentious issue has no probative value — or value that depends entirely on speculative or unreasonable inferences — it is irrelevant and should not be cluttering up the jury’s deliberations. In other situations, the inferences urged by the prosecution from post-offence conduct are impermissible for legal reasons rather than illogicality, and the evidence may be effectively withdrawn from the jury with a “no probative value” instruction. Whether or not a special caution is required with respect to post-offence conduct will depend not on whether that evidence alone can support an inference of guilt but on the court’s appreciation of the risk of impermissible inferences in relation to the issues on which the prosecution in its jury address places reliance.

There is no doubt that post-offence conduct is a type of circumstantial evidence and that when it comes to the need for a limiting instruction, much will depend on the facts. However, it is not enough simply to evaluate whether evidence as to, in this case, the accused’s “no hesitation here, no shock, no uncertainty on his part” might be portrayed as relevant to the issue of murderous intent merely as a matter of logic and human experience. Rather, relevance depends on the evidence having probative value in relation to a live issue. If the post-offence evidence of demeanour is not probative it is not relevant. As to probity, it is necessary to evaluate demeanour evidence having regard to the practical lessons that have accumulated in the courts over many years with respect to the potentially misleading nature of certain types of post-offence demeanour. While the bare fact of flight from the scene may be objective the same cannot be said of what a bystander interprets as a momentary lack of hesitation or absence of a demonstration of “shock” or “uncertainty”. This type of evidence depends on the unspoken assumptions that hesitation is normal whereas an immediate reaction is abnormal, and that the conduct of the accused fell below some assumed but unarticulated standard of procrastination. Moreover, this assumed departure from the assumed norm is said to give rise — potentially — to further inference of murderous intent. The double inference is problematic and relies on the type of subjective after-the-fact evaluation which experience has shown to be unreliable.

In this case, the Crown specifically urged the jury to infer murderous intent from “no hesitation here, no shock, no uncertainty on his part, just immediate flight”. The Crown emphasis was not on the act of flight (which was an objective fact) but on the alleged demeanour of the accused which was a matter of interpretation and opinion by a stranger necessarily calibrated according to the stranger’s own subjective expectation and cultural frame of reference about what would be expected. It seems equally plausible to conclude that a person in possession of an illegal handgun that has just shot a stranger — accidentally or otherwise — would run away as fast and far as he could without any hesitation at all. The use of such demeanour evidence in this case ought not to have been permitted to go to the jury on the critical, and virtually the only, issue in the case — murderous intent or accident. A jury should not be invited to draw unequivocal inferences from equivocal conduct based on attributed motives and subjective interpretations or misinterpretations of physical reactions. Moreover, because the accused’s lack of hesitation and instantaneous flight are equally explainable by the consciousness of more than one offence, the conduct has no probative value in relation to intent. The Crown asked the jury to draw speculative and unreasonable inferences on the issue of specific intent and the jury ought to have been instructed that the evidence of flight and the pre-flight demeanour was of no probative value on the issue of murderous intent. In addition, failure of the accused’s trial counsel to object to this aspect of the charge should not deny him relief.

Finally, the prosecution’s case against the accused for second degree murder was not overwhelming. The jury had little to work with in finding a way to choose between the hand to hand combat scenario suggesting manslaughter and the downwards shooting of an individual already on the ground which might suggest second degree murder. In these elusive circumstances, post-offence conduct of reaction time and demeanour took on considerable importance, which is why, no doubt, the Crown laid considerable emphasis on it in its closing argument. The error was therefore not harmless, and the curative proviso in s. 686(1)(*b*)(iii) should have no application.

**Cases Cited**

By Rothstein J.

**Distinguished:** *R. v. Arcangioli*, [1994] 1 S.C.R. 129; *R. v. White*, [1998] 2 S.C.R. 72; **discussed:** *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26; **referred to:** *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Peavoy* (1997), 34 O.R. (3d) 620; *Gudmondson v. The King* (1933), 60 C.C.C. 332; *R. v. J.‑L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600; *R. v. B. (L.)* (1997), 35 O.R. (3d) 35; *Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Nelles* (1982), 16 C.C.C. (3d) 97; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104; *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. Hurley*, 2010 SCC 18, [2010] 1 S.C.R. 637; *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445; *R. v. Curran* (2004), 188 O.A.C. 1; *R. v. Levert* (2001), 150 O.A.C. 208; *R. v. Trotta* (2004), 191 O.A.C. 322, rev’d 2007 SCC 49, [2007] 3 S.C.R. 453; *R. v. Anderson*, 2009 ABCA 67, 3 Alta. L.R. (5th) 29; *R. v. Paré*, [1987] 2 S.C.R. 618; *R. v. Chartrand*, [1994] 2 S.C.R. 864; *R. v. Mac*, 2002 SCC 24, [2002] 1 S.C.R. 856; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. Jacquard*, [1997] 1 S.C.R. 314.

By Charron J.

**Referred to:** *R. v. Nelles* (1982), 16 C.C.C. (3d) 97; *R. v. Arcangioli*, [1994] 1 S.C.R. 129.

By Binnie J. (dissenting)

*R. v. Nelles* (1982), 16 C.C.C. (3d) 97; *R. v. Anderson*, 2009 ABCA 67, 3 Alta. L.R. (5th) 29; *R. v. Arcangioli*, [1994] 1 S.C.R. 129; *R. v. White*, [1998] 2 S.C.R. 72; *R. v. Ménard*, [1998] 2 S.C.R. 109; *R. v. Campbell* (1998), 122 C.C.C. (3d) 44; *Gudmondson v. The King* (1933), 60 C.C.C. 332; *R. v. Turcotte*, 2005 SCC 50, [2005] 2 S.C.R. 519; *R. v. Peavoy* (1997), 34 O.R. (3d) 620; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. MacKinnon* (1999), 43 O.R. (3d) 378; *R. v. Cudjoe*, 2009 ONCA 543, 68 C.R. (6th) 86; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26; *R. v. Figueroa*, 2008 ONCA 106, 58 C.R. (6th) 305; *R. v. Chambers*, [1990] 2 S.C.R. 1293; *R. v. Symonds* (1983), 9 C.C.C. (3d) 225; *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. B. (S.C.)* (1997), 36 O.R. (3d) 516; *R. v. Bisson* (1997), 114 C.C.C. (3d) 154; *R. v. Bennett* (2003), 67 O.R. (3d) 257; *R. v. Baltrusaitis* (2002), 58 O.R. (3d) 161; *R. v. Powell* (2006), 215 C.C.C. (3d) 274; *R. v. Marinaro*, [1996] 1 S.C.R. 462, rev’g (1994), 95 C.C.C. (3d) 74; *Thériault v. The Queen*, [1981] 1 S.C.R. 336; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Illes*, 2008 SCC 57, [2008] 3 S.C.R. 134; *R. v. Charlebois*, 2000 SCC 53, [2000] 2 S.C.R. 674; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239.

**Statutes and Regulations Cited**

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APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Ryan and Chiasson JJ.A.), 2009 BCCA 513, 278 B.C.A.C. 177, 248 C.C.C. (3d) 499, 71 C.R. (6th) 266, 471 W.A.C. 177, [2009] B.C.J. No. 2276 (QL), 2009 CarswellBC 3083, upholding the accused’s conviction for second degree murder. Appeal dismissed, McLachlin C.J. and Binnie and Fish JJ. dissenting.

Kathleen M. Bradley and Nikos Harris, for the appellant.

Wendy L. Rubin, Q.C., for the respondent.

The judgment of LeBel, Abella, Rothstein and Cromwell JJ. was delivered by

Rothstein J. —

# I. Introduction

1. In the early hours of December 3, 2005, Lee Matasi was killed by a gunshot to the heart. According to multiple eyewitnesses, he was shot by the appellant, Dennis Robert White. The two had been engaged in a physical altercation that began after Mr. Matasi made a disparaging remark to Mr. White, who was in possession of a loaded handgun. In the course of their struggle, the gun was fired into Mr. Matasi’s chest, killing him instantly. Mr. White immediately fled the scene, but was later apprehended by the police.
2. Mr. White was charged with second degree murder. Throughout the Crown’s case, the identity of the shooter was a live issue. However, by trial’s end, counsel for the defence had effectively (though not formally) conceded that Mr. White had shot Mr. Matasi unlawfully and was therefore guilty of manslaughter. Thus, the only live issue before the jury was whether Mr. White had the requisite intent for second degree murder. The jury found that he did and convicted him on that charge.
3. Mr. White appealed his conviction to the B.C. Court of Appeal, alleging that the trial judge erred in his instructions to the jury. A majority of the Court of Appeal (Finch C.J.B.C. dissenting) dismissed the appeal, and Mr. White now appeals that decision before this Court.
4. Mr. White’s complaint centres on a piece of circumstantial evidence used by the Crown in its prosecution. At trial, counsel for the defence had developed a theory of the case according to which Mr. White had shot the victim accidentally as the two angrily grappled with one another. As a small part of its response to this theory, the Crown pointed out in its closing argument:

Note as well that the accused ran immediately after the shooting. There is no hesitation here, no shock, no uncertainty on his part, just immediate flight. One would expect hesitancy if the shot was anything other than the intended action of Dennis White. [A.R., at p. 563]

1. Counsel for the defence did not object to — or attempt to rebut — this line of argument, nor did he object to the way in which the trial judge presented the issue to the jury. Nevertheless, Mr. White appealed his conviction on the grounds that the trial judge erred in his instruction to the jury in relation to the relevance of the Crown’s submission on this point.
2. Relying on this Court’s rulings in *R. v. Arcangioli*, [1994] 1 S.C.R. 129, and *R. v. White*, [1998] 2 S.C.R. 72 (“*White (1998)*”), Mr. White argued on appeal that the trial judge should have specifically instructed the jury that the evidence concerning the circumstances of his flight had no probative value in relation to the question before the jury. In his view, the evidence relied upon by the Crown was consistent with both manslaughter and second degree murder, and was therefore irrelevant to the only live issue in the case. Given the prejudicial nature of such evidence, the trial judge’s failure to provide a “no probative value” instruction was an error of law that irredeemably tainted the jury’s verdict and warranted the ordering of a new trial.
3. A majority of the Court of Appeal declined to order a new trial. It concluded that, although the jury charge was deficient, the error was a minor one and could have no impact on the final verdict.
4. For the reasons set out below, I would dismiss the appeal. This case is distinguishable from *Arcangioli* on the facts, and in my view the jury charge was adequate. In any case, even assuming that the trial judge erred in his instructions to the jury, I believe the error to be harmless and would uphold the verdict under s. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46.

# II. The Court of Appeal, 2009 BCCA 513, 278 B.C.A.C. 177

# A. *Ryan and Chiasson JJ.A.*

1. Ryan J.A., writing for the majority, dismissed the appeal. She found that the trial judge had erred, but that the error was so minor that it could not have influenced the jury’s verdict and therefore applied the curative proviso.
2. While she agreed that the trial judge had erred, Ryan J.A. appears to have disagreed with Finch C.J.B.C., who was in dissent, on the nature of the trial judge’s error. For her part, Ryan J.A. accepted the Crown’s contention that one may distinguish between evidence of flight, *per se*, and evidence concerning the “manner” of flight — in this case, Mr. White’s “failure to hesitate before fleeing” (para. 145).
3. However, Ryan J.A. took the view that the trial judge’s instruction on the matter of post-offence conduct was equivocal as to its meaning. On one reading, it could be taken to indicate that the trial judge was inviting the jury to consider Mr. White’s flight itself in determining whether he had the requisite intent for second degree murder. Such an invitation constituted an error of law. Nevertheless, Ryan J.A. concluded that, in the overall context of the case, the error was a minor one and it was unlikely to have affected the jury’s deliberations. She therefore dismissed the appeal.

# B. *Finch C.J.B.C.*

1. Finch C.J.B.C. would have allowed the appeal. In his view, the trial judge had erred in his instructions to the jury and that error could not be saved using the curative proviso found in s. 686(1)(*b*)(iii) of the *Criminal Code*.
2. After reviewing the relevant precedents, including *Arcangioli* and *White (1998)*, he concluded that, when an accused person has admitted the *actus reus* of a criminal act, but denies a specific level of intent, a “no probative value” instruction should be given in relation to post-offence conduct because such evidence is not relevant to the determination of the accused’s level of culpability. Applying this principle to the case at bar, he rejected the Crown’s contention that the manner of Mr. White’s flight was inconsistent with his theory of an accidental shooting, holding instead that his manner of flight was consistent with both manslaughter and murder. He explained that “[f]rom ‘instant’ flight without hesitation, murderous intent is not the only available reasonable inference”; rather, it “is as consistent with the awareness he would have had of his conduct in the violent course of events that culminated in Mr. Matasi’s being shot, even if unintentionally, as with his having intended to kill Mr. Matasi” (paras. 75-76).
3. In light of this, Finch C.J.B.C. concluded that the trial judge had erred in failing to give a “no probative value” instruction (para. 78). In fact, in his view the error was serious, because the trial judge had expressly instructed the jury that they couldconsider Mr. White’s “post-event conduct in fleeing the scene” in determining whether he had the requisite intent for second degree murder (paras. 80 and 93).
4. Finch C.J.B.C. took the view that this was not an appropriate case in which to apply the curative proviso. The only question before the jury was whether Mr. White had the requisite intent for second degree murder. Therefore, the error in the trial judge’s instruction could not be characterized as “minor”. Nor was the evidence against Mr. White “so overwhelming that any other verdict would have been impossible to obtain” (*R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34). Consequently, he would have ordered a new trial.

# III. Issues

1. In my view, this case raises three issues:

(1) How do the rules of evidence as they relate to admissibility, limiting instructions and cautions apply to post-offence conduct evidence?

(2) Did the trial judge’s charge to the jury in this case satisfy the requirements of the rules of evidence as they apply to limiting instructions and cautions?

(3) If not, is this an appropriate case in which to apply the curative proviso?

I will deal with each issue in turn.

# IV. Analysis

A. *How Do the Rules of Evidence as They Relate to Admissibility, Limiting Instructions and Cautions Apply to Post-Offence Conduct Evidence?*

(1) The Applicable Precedents

1. It has long been accepted that actions taken by an accused person after a crime has been committed can, under certain circumstances, provide circumstantial evidence of their culpability for that crime. Examples of such actions include flight, the destruction of evidence, or the fabrication of lies. However, in recent years the terminology used to refer to such evidence has undergone certain changes.
2. At one time, it was referred to as “consciousness of guilt” evidence. The value of such evidence was explained by Weiler J.A. in *R. v. Peavoy* (1997), 34 O.R. (3d) 620 (C.A.), at p. 629:

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 term “consciousness of guilt” evidence was used to describe such conduct because it was used to support an inference that the person in question believed themselves to be guilty of the crime of which they were accused. In some cases, certain aspects of a person’s after-the-fact conduct can best be explained by the theory that they are guilty of the crime of which they stand accused. For instance, if a person admits committing an act which resulted in death, evidence that the person hid the weapon or fled from the scene may (though not must) support an inference that they were guilty of culpable (as opposed to non-culpable) homicide (*Peavoy*, at p. 630). Such “after-the-fact” conduct is therefore admissible as circumstantial evidence.

1. However, in *White (1998)*, this Court abandoned the label “consciousness of guilt” when describing evidence of after-the-fact conduct because such a label was thought to be unduly narrow and somewhat misleading. After-the-fact conduct may in fact be put to a wide variety of uses and its utility is not confined to supporting an inference that the accused had a “guilty mind”. As Major J. noted for the Court, at para. 20:

“Consciousness of guilt” is simply one inference that may be drawn from the evidence of the accused’s conduct; it is not a special category of evidence in itself. Moreover, the words “consciousness of guilt” suggest a conclusion about the conduct in question which undermines the presumption of innocence and may prejudice the accused in the eyes of the jury.

Major J. went on to suggest that this general category of evidence should be referred to by a more neutral term, such as “post-offence conduct”. This label would avoid the twin pitfalls of confining the relevance of such conduct to questions concerning the accused’s state of mind and of subverting the presumption of innocence.

1. As Ryan J.A. pointed out, this change in nomenclature may have created conceptual difficulties that did not exist before. The reason is that “consciousness of guilt” evidence refers to a relatively narrow category of actions, usually attempts to evade detection or prosecution, that can support an inference of guilt when taken *alone* (C.A. reasons, at paras. 128-29). That is, evidence that a person considers themselves guilty of a crime can support an inference of guilt of that crime. Jurisprudence has grown up around the sort of warnings and limiting instructions that ought to be given to juries with respect to this relatively narrow category of evidence.
2. The category of “post-offence conduct” evidence is much broader as it refers to anything done by the accused after the commission of the offence. The shift in nomenclature may therefore have led some trial judges to believe that any evidence of the accused’s actions after the offence must be subject to special warnings and limiting instructions (see C.A. reasons, at para. 129, *per* Ryan J.A.). This is not the case.
3. The principle that after-the-fact conduct may constitute circumstantial evidence of guilt remains good law. At its heart, the question of whether such evidence is admissible is simply a matter of relevance (*White (1998)*, at para. 23). As Major J. noted in *White (1998)*, “[e]vidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence. In some cases it may be highly incriminating, while in others it might play only a minor corroborative role” (para. 21). As with all other evidence, the relevance and probative value of post-offence conduct must be assessed on a case-by-case basis (para. 26). Consequently, the formulation of limiting instructions with respect to the broad category of post-offence conduct is governed by the same principles as for all other circumstantial evidence. Thus, while the term “consciousness of guilt” may have fallen out of use, it is still permissible for the prosecution to introduce evidence of after-the-fact conduct in support of an inference that the accused had behaved as a person who is guilty of the offence alleged — provided that, as with all circumstantial evidence, its relevance to that inference can be demonstrated.
4. That being said, though the use of such evidence has an extensive history in our criminal jurisprudence, it has also long been recognized that the introduction of post-offence conduct for the purpose of establishing the accused’s “consciousness of guilt” carries with it a substantial risk of jury error (*Gudmondson v. The King* (1933), 60 C.C.C. 332 (S.C.C.)). Jurors may be tempted to “jump too quickly from evidence of post-offence conduct to an inference of guilt” (*White (1998)*, at para. 57) without giving proper consideration to alternate explanations for the conduct in question.
5. In most cases,

the best way for a trial judge to address that danger is simply to make sure that the jury are aware of any other explanations for the accused’s actions, and that they know they should reserve their final judgment about the meaning of the accused’s conduct until all the evidence has been considered in the normal course of their deliberations.  Beyond such a cautionary instruction, the members of jury should be left to draw whatever inferences they choose from the evidence at the end of the day. [Emphasis added; *White (1998)*, at para. 57.]

1. One instance in which the risk of jury error becomes especially acute arises when the accused has confessed to engaging in some form of criminal conduct related to the crime of which he stands accused. In such cases, post-offence conduct that supports an inference that the accused had a “guilty conscience” may be of little or no use in determining his level of culpability.
2. Such a set of circumstances arose in *Arcangioli*.Mr. Arcangioli had been accused of stabbing someone in the course of a large brawl, during which a number of individuals had combined to assault a single victim. Mr. Arcangioli had been seen fleeing the scene after the victim had been stabbed, and the prosecution sought to rely on this as circumstantial evidence of “consciousness of guilt”. The trial judge instructed the jury that such an inference was indeed available, and Mr. Arcangioli was convicted of the stabbing. His conviction was upheld by a majority in the Court of Appeal for Ontario.
3. However, on further appeal, this Court found that the jury charge was deficient and ordered a new trial. The accused had admitted to taking part in the group attack and punching the victim several times, making him guilty of common assault. Furthermore, he claimed to have fled the scene in panic after seeing someone else stab the victim, panic which was brought on by his having already committed a crime. The Court found that, even if Mr. Arcangioli’s flight were evidence of “consciousness of guilt”, that guilt was equally explained by either common assault or aggravated assault (i.e. the stabbing). The evidence concerning his flight therefore had no probative value in determining which offence he had committed, and the trial judge should have instructed the jury that this evidence could not support any inference concerning his level of culpability.

(2) Rules of Evidence as They Relate to Admissibility, Limiting Instructions and Cautions, and Their Application to Post-Offence Conduct Evidence

1. The issue in this case is whether the trial judge ought to have given the jury a limiting instruction to the effect that evidence of Mr. White’s post-offence conduct was not probative as between the *mens rea* for second degree murder and manslaughter. The purpose of a limiting instruction is to preclude the jury from considering certain evidence, either with respect to all the live issues in a case or with respect to one or more particular live issues.
2. Similarly, finding an item of evidence inadmissible serves to preclude the jury from considering that evidence at all, with respect to the entire case. Issues of admissibility will arise over the course of the trial as evidence is tendered and evidence that is found to be inadmissible is not allowed on the record. Conversely, a limiting instruction is provided in directions to the jury. For an item of evidence to be subject to a limiting instruction, it must have been admitted in the first place. Still, it may be that an item of evidence that was admissible at trial must be removed from the jury’s deliberations on some or all of the issues in the case. A limiting instruction will be necessary when, at the end of all the evidence and for the purposes of the charge to the jury, certain evidence that appeared unobjectionable when it was admitted should in fact be removed from the jury with respect to one or more of the issues in the case.
3. The goal of excluding evidence as inadmissible or providing a limiting instruction is essentially the same: to prevent the jury from considering the evidence, either with respect to the entire case (for admissibility) or with respect to one or more issues (for a limiting instruction). Moreover, the same rules of evidence govern admissibility and the need for limiting instructions.
4. Given that “[e]vidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence”, the admissibility of evidence of post-offence conduct and the formulation of limiting instructions should be governed by the same principles of evidence that govern other circumstantial evidence. In particular, to be admissible, such evidence must be relevant to a live issue and it must not be subject to a specific exclusionary rule (e.g. the hearsay rule); it may also be excluded pursuant to the exercise of a recognized judicial discretion (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at p. 26), such as the discretion to exclude evidence whose prejudicial effect outweighs its probative value. These same principles also determine the need for and scope of a limiting instruction.
5. I will next elaborate how these general principles of evidence apply when determining whether a limiting instruction is required in relation to post-offence conduct evidence. For clarity, I will discuss them under the following four headings: (a) relevance, (b) narrative (which is best understood as an attenuation of the rule of relevance), (c) specific exclusionary rules and (d) discretion.
6. Before I proceed, it is critical to bear in mind that removing evidence from the jury’s consideration is not the only way of dealing with evidence associated with a heightened risk of jury error. It is also possible, and often appropriate, for the trial judge to warn the jury of the risks associated with certain types of evidence. The purpose of such a caution is to alert the jury to the danger, which has been recognized through judicial experience, but then to allow the properly informed jurors to evaluate the evidence with care.
7. The terms “limiting instruction” and “caution” (or “warning”) are not narrowly defined terms of art which courts have consistently treated as distinct. Nevertheless, there is a distinction between the following two types of jury instruction: one that tells the jury they must not consider the evidence for one or several purposes, and the other that leaves evidence for the jury to consider, but warns them to be careful with it. For ease of reference, I will refer to the first type of instruction as a limiting instruction and to the second type as a warning or caution.
8. This distinction matters because, in the present case, the judge *did* warn the jury to be careful with the evidence relating to Mr. White‘s flight and that there may be one or more explanations for his conduct. What Mr. White argued here is that, beyond providing a warning, the judge ought to have told the jury that it was not allowed to consider evidence of his immediate flight in deciding as between a finding of second degree murder or manslaughter. Accordingly, after discussing the principles governing limiting instructions, I will address (e) how a caution can alleviate the risks associated with certain evidence that ought to be left with the jury.

(a) *Relevance*

1. Mr. White submits that the trial judge erred in not having given a limiting instruction that his post-offence conduct was of “no probative value” to the level of his culpability as between murder and manslaughter. At its heart, the requirement for a “no probative value” instruction is a question of relevance: if an item of evidence is not relevant to a live issue, then that item of evidence should be removed from consideration by the jury (*White (1998)*,at para. 26, explaining *Arcangioli*). I agree with Binnie J. that irrelevant evidence should be excluded or, if it is already on record, subject to a “no probative value” instruction (para. 169). In order for evidence to satisfy the standard of relevance, it must have “some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence” (Paciocco and Stuesser, at p. 31, approved in *R. v. J.-L.J.*,2000 SCC 51, [2000] 2 S.C.R. 600, at para. 47, and *R. v. B. (L.)* (1997), 35 O.R. (3d) 35, at p. 44 (C.A.); see also *Morris v. The Queen*, [1983] 2 S.C.R. 190, at pp. 199-201, *per* Lamer J. (as he then was; speaking in dissent on the issue of relevance)).
2. *Arcangioli*, and its successor case *White (1998)*, stand for the proposition that a “no probative value” instruction will be required when the accused’s post-offence conduct is “equally explained by” or “equally consistent with” two or more offences (*White (1998)*, at para. 28; *Arcangioli*,at pp. 145 and 147). This proposition neither complicates nor goes beyond the basic rule of relevance: to say that an item of evidence is not relevant; that it is not probative of a live issue; or that it is “equally explained by” or “equally consistent with” either determination of a live issue are three ways of saying the same thing.
3. As with all other evidence, the relevance or probative value of post-offence conduct “will depend on the facts of each case” (*White (1998)*, at para. 26). I agree with Binnie J. that there is no general rule applying to post-offence conduct: relevance must be assessed on a case-by-case basis.
4. In some cases, an item of evidence may be probative of one live issue, but not of another. For example, flight *per se* may be relevant in determining the identity of the assailant, but may not be relevant in determining the accused’s level of culpability as between murder and manslaughter. In such a case, the rules of evidence remain unchanged: the evidence is left with the jury, for it to weigh with respect to the issue of identity; the jury is precluded from considering the same evidence with respect to determining the *mens rea* for murder as opposed to manslaughter, by way of a limiting instruction to the effect that this evidence is not probative of this particular live issue. That judges must sometimes give limiting instructions as to appropriate and inappropriate inferences to be drawn from the evidence is merely an application of the rule of relevance tailored to different live issues in a single case.
5. Mr. White sought to have this Court accept that *Arcangioli* and its successor cases, such as *White (1998)*, stand for the very broad proposition that “post-offence conduct is generally inadmissible in determining whether an accused is guilty of manslaughter or murder” (A.F., at para. 46). *Arcangioli* did not have — nor was it intended to have — so far-reaching an effect. According to *Arcangioli* and *White (1998)*, the inquiry is fact-specific and a “no probative value” instruction is warranted when the evidence of post-offence conduct is “equally consistent with” or “equally explained by” either determination of the live issue in question (here, with a finding of murder or manslaughter); that is, when the evidence is not probative of that live issue, on the facts of the case.
6. It may sometimes be the case that, when the accused has admitted the *actus reus*, much of the accused’s post-offence conduct will be irrelevant to determining the level of culpability. Indeed, according to Major J., in *White (1998)*, a “no probative value” instruction is “most likely to be warranted” in precisely these circumstances (para. 28 (emphasis added)). However, this was not meant to be a free-standing principle governing admissibility or limiting instructions. *Arcangioli* and *White (1998)* make it clear that the basic test is always relevance in the ordinary sense:

. . . where an accused’s conduct may be equally explained byreference to consciousness of guilt of two or more offences, and where an accused has admitted culpability in respect of one or more of these offences, a trial judge should instruct a jury that such evidence has no probative value with respect to any particular offence. [Emphasis added; *Arcangioli*, at p. 145.]

. . . a jury should not be permitted to consider evidence of post-offence conduct when the accused has admitted culpability for another offence and the evidence cannot logically support an inference of guilt with respect to one crime rather than the other. [Emphasis added; *White (1998)*, at para. 23.]

1. Thus, *Arcangioli* and *White (1998)* should be understood as a restatement, tailored to specific circumstances, of the established rule that circumstantial evidence must be relevant to the fact in issue. In any given case, that determination remains a fact-driven exercise. Whether or not a given instance of post-offence conduct has probative value with respect to the accused’s level of culpability depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial. There will undoubtedly be cases where, as a matter of logic and human experience, certain aspects of the accused’s post-offence conduct support an inference regarding his level of culpability.
2. Binnie J. takes issue with my view that the general principles that apply to all circumstantial evidence should apply in this case (paras. 178-80). In his view, “it is not enough simply to evaluate whether evidence as to the appellant’s ‘no hesitation here, no shock, no uncertainty on his part’ might berelevant to the issue of murderous intent merely ‘as a matter of logic and human experience’” (para. 180). Binnie J. invokes the importance of “having regard to the practical lessons that have accumulated in the courts over many years with respect to the potentially misleading nature of certain types of post-offence conduct” (*ibid.*). He identifies the category of “post-offence demeanour” (*ibid.*) evidence as one type of evidence that should be treated with particular care.
3. With respect, I do not agree with two aspects of Binnie J.’s approach. First, when the question is “should the evidence be removed from the jury because it is *irrelevant*?”, it *is* enough to evaluate whether the item of evidence is relevant to the material fact at issue as a matter of logic and human experience. Of course, judges should avail themselves of the accumulated knowledge from courts and studies to the effect that certain types of evidence can appear probative when they are not. This knowledge can inform a determination that a particular item of evidence is too equivocal to meet the test of relevance. This is still the same test of whether a particular item of evidence tends to make a material fact in issue more or less likely, just with more information based upon judicial experience.
4. However, in his discussion of relevance, Binnie J. refers to these practical lessons of the courts with respect to the “potentially misleading nature of certain types of post-offence conduct” (para. 180 (emphasis added)). He also refers to the Kaufman Report, which says that “evidence of the accused’s ‘demeanour’ . . . can be overused and misused” (para. 182 (emphasis added)). I do not agree thatthe risk that a jury *will misuse or be misled* by an item of evidence, should inform the relevance determination. Instead, this risk is appropriately addressed through the trial judge’s discretion to exclude evidence whose prejudicial effect outweighs its probative value or through a caution in the jury charge to be careful with the evidence. I discuss both below.
5. Second, I do not agree that this case raises the sorts of concerns typically associated with demeanour evidence. This case simply does not engage concerns about evidence of facial expressions or failing to attend funerals leading to wrongful convictions. The Crown did not invite the jury to rely on Mr. White’s appearance in relation to shock or surprise, but on the fact that he did not hesitate before fleeing. As I elaborate below, the objective physical evidence that Mr. White failed to hesitate immediately after shooting Mr. Matasi has nothing to do with the serious problems identified by the Kaufman Inquiry into the Morin conviction or the *Nelles* case (*R. v. Nelles* (1982), 16 C.C.C. (3d) 97 (Ont. Prov. Ct. (Crim. Div.))).

(b) *Narrative*

1. The basic requirement of relevance is somewhat attenuated in the context of narrative evidence. Evidence that is not adduced to prove a live issue, or support the prosecution’s case, but that is merely provided to complete the narrative may be admitted even if it does not satisfy the strict requirements of relevance (Paciocco and Stuesser, at pp. 45-47). A trial judge need not provide specific limiting instructions with respect to each item of evidence that was merely presented to complete the narrative to the effect that it is “not probative” of the live issues in the case.
2. I should make clear that I am only here adverting to the attenuation of the requirement of relevance as it pertains to narrative evidence and not to the relationship between narrative evidence and other specific exclusionary rules (e.g. the hearsay rule).

(c) *Specific Exclusionary Rules*

1. Although not at issue in the present appeal, specific exclusionary rules can also operate to remove certain types of otherwise relevant evidence from consideration by the jury. Binnie J.’s discussion of the inadmissibility of evidence for “legal reasons” (para. 168) falls under this category.

(d) *Discretion to Exclude*

1. Otherwise admissible evidence may still be removed from consideration by the jury on the basis that it is more prejudicial than probative. This may be achieved by refusing to admit the evidence at trial. It can also happen that the disproportionately prejudicial nature of a certain item of evidence only becomes apparent in light of the evidence as a whole. The trial judge may then instruct the jury in his charge that they may not consider a certain item of evidence in their deliberations.
2. Exclusion on the basis that evidence is more prejudicial than probative does not ground a “no probative value” instruction: the evidence is by hypothesis at least minimally probative of a live issue. As noted in *White (1998)*, the decision in *Arcangioli* did not rest on the exercise of this discretion:

It bears emphasizing that in these sorts of cases, while the evidence cannot be said to be irrelevant to the issue in dispute, it might still be withdrawn from the jury by the trial judge on the basis that it is more prejudicial than probative. The same would be true in cases where two separate offences have been committed and the evidence of post-offence conduct provides scant basis for distinguishing between them. Such a decision would fall within the ordinary discretion of the trial judge, however, and would not be mandated by the result in *Arcangioli*. [para. 33]

Although the issue was not raised in the present appeal, there is a distinction to be made between removing post-offence conduct from consideration by the jury because it is not probative of a live issue and excluding it because its probative value is outweighed by its prejudicial effect. Some of the concerns about juries misusing evidence of post-offence conduct and “demeanour evidence” may be better addressed by the application of this discretion.

1. As I explained above, these concerns, do not justify applying a different test of relevance to post-offence conduct or “demeanour evidence” than that applied to any other circumstantial evidence. The trial judge’s discretion to exclude evidence that is more prejudicial than probative recognizes that jurors will sometimes misuse relevant evidence. However, since this discretion calls into question the jury’s competence in performing its fact-finding function, the excessive prejudicial effect should be invoked explicitly. It should not be disguised within a finding that the evidence is not probative at all. Where this discretion is not invoked, the jury should be trusted, often with a warning, to weigh the relevant evidence.
2. Although Binnie J. takes the position that evidence of Mr. White’s lack of hesitation prior to flight ought to have been removed from the jury as irrelevant, he would, in the alternative, have held that the trial judge ought to have exercised his discretion to exclude the evidence as more prejudicial than probative (para. 176). I do not agree. I would observe that the trial judge was not asked to exercise this discretion at any point in the proceedings in this case, nor was it ever suggested to the Court of Appeal or to this Court that he ought to have. In any event, as I discuss below, the evidence was probative and, based upon the record, I see no basis for determining it would have had a disproportionately prejudicial effect.

(e) *How a Caution Can Alleviate the Risks Associated With Certain Evidence That Ought to Be Left With the Jury*

1. Once evidence is found to be relevant, it is generally admissible and the jury is left to decide how much weight to give a particular item of evidence. Similarly, once evidence is determined to be relevant with respect to a particular live issue, the jury should normally be free to weigh the evidence in drawing conclusions about that live issue. This is subject to specific exclusionary rules and the judge’s discretion to exclude evidence that is more prejudicial than probative.
2. Still, judicial experience has shown that certain evidence that ought to be left with the jury, based on the ordinary rules of evidence, carries with it a heightened risk of misinterpretation or misuse. Certain types of evidence may appear more probative than they really are, may be systematically less reliable than they seem, or may be consistent with other less obvious explanations than the one advanced by a party (though not equally so). These potential dangers may not be immediately apparent to lay juries (see *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 4). Accordingly, courts have recognized that when leaving certain types of evidence with the jury, the trial judge should provide a caution that alerts the jury to the risks involved. The content and nature of the warning should address the risk and depend upon the severity of the danger.
3. A warning or caution does not serve to remove the evidence from the jury’s consideration. Instead, providing a caution allows for juries to benefit from judicial experience concerning the risks associated with certain types of evidence, while respecting the jury’s competence in fulfilling its fact-finding role. The point is that once jurors are alerted to the risks that are not necessarily apparent to the average citizen, they can be trusted to properly weigh the evidence. Our jury system is predicated on the conviction that jurors are intelligent and reasonable fact-finders. It is contrary to this fundamental premise to assume that properly instructed jurors will weigh the evidence unreasonably or draw irrational and speculative conclusions from relevant evidence. I agree with the view expressed by Dickson C.J., in *R. v. Corbett*, [1988] 1 S.C.R. 670, that “it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense” (p. 692 (emphasis in original)).
4. Binnie J. does not draw any clear distinction in his reasons between removing evidence from consideration by the jury and warning the jury to be careful with certain evidence. Indeed, in discussing “the need for a limiting instruction” (para. 178), he invokes judges’ instructions about evidence of jailhouse informants and eyewitness identification (para. 185). Yet, these two types of evidence are not systematically removed from the jury’s consideration by way of a limiting instruction, but are generally left with the jury along with a warning in the jury charge.
5. When leaving the jury with evidence of a jailhouse informant, the trial judge is to provide a *Vetrovec* warning. The instruction “must take into account the dual purpose of the *Vetrovec* warning: first, to alert the jury to the danger of relying on the unsupported evidence of unsavoury witnesses and to explain the reasons for special scrutiny of their testimony; and second, in appropriate cases, to give the jury the tools necessary to identify evidence capable of enhancing the trustworthiness of those witnesses” (*Khela*, at para. 47, *per* Fish J., cited in *R. v. Hurley*, 2010 SCC 18, [2010] 1 S.C.R. 637, at para. 11).
6. Eyewitness identification evidence provides an even more striking example of the importance of distinguishing a limiting instruction that removes evidence from the jury’s consideration from a warning that tells the jury to be careful with the evidence. In the vast majority of cases, eyewitness identification will be relevant to the issue of identity, i.e. whether the accused is the person who committed the offence. However, eyewitness identification can be “deceptively credible” because an honest and sincere witness may be mistaken (*R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445, at paras. 50-51, specifically referring to “eyewitness in-court identification”, but also discussing eyewitness identification generally; see also *R. v. Curran* (2004), 188 O.A.C. 1, at para. 29). The appropriate response is not to instruct the jury that they cannot consider eyewitness testimony in determining the issue of identity. Rather, it is to warn the jury that the evidence may not be as reliable as it seems. Indeed, this is what judges generally do.
7. In sum, it is important to remember that, when dealing with risky evidence, the trial judge is not left with a stark choice between removing the evidence from the jury’s consideration with respect to one or more live issues, and simply leaving the evidence with the jury without any guidance. It is also possible for the judge to warn the jury of the risks and thereby assist them in performing their fact-finding function. In my view, a limiting instruction is only appropriate when the evidence is not relevant to one or more live issues, is subject to a specific exclusionary rule or is explicitly found by the trial judge to be more prejudicial than probative. Otherwise, judicial experience about the risks associated with certain types of evidence should be communicated to the jury by way of a caution.

# B. *Did the Trial Judge’s Charge to the Jury in This Case Satisfy the Requirements of the Rules of Evidence as They Apply to Limiting Instructions and Cautions?*

(1) The Trial Judge Should Not Have Given a Limiting Instruction

1. In this case, the trial judge provided a caution. It was not argued that the warning was inadequate to alert the jury to the possibility that there might be other explanations for Mr. White’s lack of hesitation prior to flight. Similarly, it was not argued that the trial judge ought to have exercised his discretion to exclude the evidence or to have excluded the evidence based upon a specific exclusionary rule. None of these issues were before this Court. The only issue that was raised before this Court was whether the trial judge should have provided a limiting instruction that Mr. White’s lack of hesitation prior to flight was not probative as between murder and manslaughter; in other words, that it was irrelevant.

(a) *The Issue Was of Little Significance at Trial*

1. The issue in this appeal is whether the evidence of Mr. White’s lack of hesitation prior to flight was relevant in determining his level of culpability as between murder and manslaughter. At the outset, I should state that this issue was of little significance at trial. As Charron J.’s detailed review of the record shows (paras. 111-21), this issue was not a significant element in the Crown’s case.
2. Without repeating what Charron J. has said, I stress that three features of the record are particularly telling as to the minimal significance, at trial, of evidence of lack of hesitation prior to flight in relation to the issue of intent. First, throughout the Crown’s case, the identity of the shooter was a very live issue. Evidence of flight was of central importance to the Crown’s case on the issue of identity. Second, in making its case on intent, the Crown emphasized forensic evidence and eyewitness testimony. Mr. White’s lack of hesitation prior to flight was a very minor part of the Crown’s case on intent. Third, defence counsel did not respond to the Crown’s submissions about the evidence of lack of hesitation prior to flight in his closing argument nor did he raise any concerns about the use of this evidence with the trial judge.

(b) *The Relevance of Lack of Hesitation Prior to Flight*

1. Having noted the context in which the issue arose at trial, I now consider whether lack of hesitation prior to flight was relevant to determining Mr. White’s level of culpability as between murder and manslaughter.
2. The Crown sought to convince the jury that Mr. White’s conduct in the immediate aftermath of the gunshot was not reconcilable with the theory that the gun was fired accidentally. In Mr. White’s view, this submission “breached the well-established rule that post-offence conduct, such as flight, is not admissible to determine an accused’s level of culpability” (A.F., at para. 58). Relying on *Arcangioli*, and its successor cases, he argues that the Crown invited the jury to draw an impermissible inference of “consciousness of guilt” of second degree murder from his “immediate flight”.
3. However, this case is distinguished from *Arcangioli* on the facts. The conduct alluded to by the Crown is not the *flight itself*, but rather Mr. White’s failure to hesitate after his gun was fired into Mr. Matasi’s chest before he fled the scene. This is different from the question at issue in *Arcangioli*, which concerned the simple act of fleeing from the scene. In that case — as, indeed, in this one — the mere fact that the accused fled the scene did not provide any information as to whether he was guilty of the lesser or the greater charge. However, in this case, the fact that Mr. White failed to hesitate at the discharge of his firearm into another person’s chest *does* potentially provide such information.
4. As a matter of logic and human experience, one would expect an ordinary person to present some physical manifestation, such as hesitation, at a gun in their hand accidentally discharging into someone’s chest, thereby killing them. It was open to the jury to infer that a failure to react in this way was incongruous with the theory, advanced by the defence, that the gun went off by accident as the two men struggled with each other. To use the language of *Arcangioli* and *White (1998)*, lack of hesitation was not “equally consistent with” or “equally explained by” accidentally as opposed to intentionally shooting the victim. It is less consistent with accident. Thus, the evidence that Mr. White did not hesitate when the gun was fired in response to this unexpected and calamitous turn of events supports an inference that he deliberately pulled the trigger.
5. Again, this case is not simply a replay of *Arcangioli*. In my view, there is a meaningful difference between the following two questions:

Would the accused have been *equally* likely to flee the scene whether he was guilty of murder or of manslaughter? (in *Arcangioli*)

Would the accused have been *equally* likely to hesitate before fleeing had he shot the victim intentionally or accidentally? (in this case)

1. The two questions raise distinct sets of considerations. On the one hand, logic and human experience suggest that there is no reason to think that a person who has committed manslaughter would be more likely to stay at the scene of the crime than one who has committed murder. In both cases the person has committed a very serious offence by unlawfully killing someone and will be just as likely to flee. In both cases, the person may flee for a host of reasons, such as to avoid arrest, to minimize evidence of that person’s connection with the crime, or to buy additional time. Indeed, flight is a response equally consistent with a wide range of much less serious offences, such as theft, vandalism, or common assault (as discussed in *Arcangioli*).
2. On the other hand, logic and human experience suggest that people are more likely to show some outward sign, such as hesitation, before continuing on with their actions, when they do something accidentally than when they do it on purpose. This is all the more so when the accident involves a sharp physical effect on the person (the discharge of a gun in one’s hand) and results in a terrible consequence, such as having killed another person. As I have discussed, lack of hesitation prior to flight, is less consistent with shooting and killing someone accidentally than it is with doing so intentionally. Thus, in the context of determining relevance, evidence of flight *per se* is different from evidence of lack of hesitation prior to flight.
3. In *R. v.* *Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, LeBel J., in his reasons for the majority, addressed an issue similar to the one being discussed here, albeit in *obiter*.
4. In that case, a man was accused of shooting and killing a police officer who had entered his home in order to deal with a domestic dispute between the accused and his wife. The accused claimed that the shooting was accidental, and testified that he could not remember the events leading up to the shooting because of the effects of the pepper spray used on him by the police officer. In order to impugn the accused’s credibility, the Crown had referred to the fact that, moments after the shooting, the accused had reloaded his gun and told his wife that he intended to commit suicide, all without bothering to verify if the officer was dead. In the Crown’s view, these actions were inconsistent with the accused’s testimony that he had virtually no memory of the shooting itself, and so it sought to weaken the credibility of that testimony by drawing attention to the discrepancy.
5. Although the Crown only used evidence of his post-offence conduct to impugn the credibility of the accused, LeBel J. believed that an argument could have been made that his conduct supported an inference concerning the state of mind of the accused at the time of the shooting:

Post-offence conduct may also be used to discredit a defence that relates to the accused person’s state of mind at the time of the offence and that is therefore relevant to his or her ability to form the requisite intent for the offence, such as intoxication (*R. v. Pharr*, 2007 ONCA 551, 227 O.A.C. 112, at paras. 8-15; *Peavoy*, at pp. 630-31) or the “not criminally responsible” defence under s. 16 (*R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 42-53). In the case at bar, the Crown could have pursued the argument that the appellant’s sense of awareness immediately after the shooting was relevant circumstantial evidence that he had the requisite intent, since it belied his claim to have been completely disoriented by the pepper spray. If the Crown had done so, then the jury should have been instructed on the limited probative value of the appellant’s post-offence conduct. [Emphasis added; para. 40.]

1. In my view, the situation in the present case is no different. A jury could legitimately infer that Mr. White’s lack of hesitation after the gun was fired belied his claim that the shooting was accidental. Evidence of such a failure is thus relevant to the question of whether he had the requisite intent for second degree murder.
2. This evidence was not tainted by the hallmark flaws associated with “demeanour evidence” so as to be irrelevant. Such hallmark flaws are generally associated with evidence in the form of a witness’s impression of the accused’s mental or emotional state (e.g. appeared calm or nervous), as inferred by the witness from the accused’s outward appearance or behaviour. The accused’s mental or emotional state is then submitted as suspect and probative of guilt (see *Nelles*; *R. v. Levert* (2001), 150 O.A.C. 208, at paras. 24-27; *R. v. Trotta* (2004), 191 O.A.C. 322, at paras. 40-43 (an appeal was allowed by this Court and a new trial was ordered, but solely on the basis of fresh evidence, 2007 SCC 49, [2007] 3 S.C.R. 453)).
3. A problem with such evidence is that the inferential link between the witness’s perception of the accused’s behaviour and the accused’s mental state can be tenuous (*Trotta*, at para. 40). The witness’s assessment depends on a subjective impression and interpretation of the accused’s behaviour (*Levert*,at para. 27). Moreover, it appears to involve an element of mind reading (*R. v. Anderson*, 2009 ABCA 67, 3 Alta. L.R. (5th) 29, at para. 51). Additionally, insofar as the witness is inferring the accused’s state of mind from the accused’s outward appearance, there may be a legitimate concern that this is inadmissible lay opinion evidence. This is to be contrasted with evidence of objective conduct that allows the jury to draw its own inferences about the accused’s state of mind.
4. Lack of hesitation prior to flight is an objective fact, from which the finder of fact (and not the witness) is asked to draw an inference of no shock or surprise. This was not a case where the accused’s outward behaviour was adduced to prove that an awareness of guilt was boiling under the surface. The evidence here is not analogous to a doctor’s testimony that a nurse had “a very strange expression” and displayed no signs of grief when she was “writing up the final death note as part of her other difficult duties on the occasion of the death of a baby in her care” (*Nelles*, at p. 125, cited in Binnie J.’s reasons, at para. 142); nor is it analogous to testimony that the accused seemed “unusually quiet” in the area of a crime scene and turned his head away (*Anderson*, at para. 50, cited in Binnie J.’s reasons, at para. 143). Instead, the evidence was in the nature of the absence of an immediate reflex.
5. Indeed, I agree with Charron J. that Crown counsel’s comment was certainly not “an invitation to infer a murderous intent from the way Mr. White ‘looked’ just before he fled” (para. 122). As her discussion of the record shows, “while every witness to the event testified that the shooter immediately fled, *no witness* was asked by the Crown how the shooter ‘looked’ at the time he fled” (para. 122 (emphasis in original)). Rather, if any examples of “demeanour evidence” were at issue in this case, it was counsel for the defence who attempted to introduce them. I further agree that, had defence counsel successfully shown that there was evidence that Mr. White did look surprised or shocked after the shooting, the jury would have been entitled to the benefit of this evidence (Charron J.’s reasons, at para. 126).
6. It is true that the Crown’s use of evidence of lack of hesitation prior to flight presupposes a normal range of reactions: it assumes that most people will hesitate or show some other outward sign of surprise when something dramatic and horrible accidentally happens. Of course, it may be that not everyone will respond in this way. However, I consider this view of a normal almost reflexive or involuntary response to be well founded. I have no doubt that had there been evidence of hesitation, defence counsel would have submitted it as probative of an accident. Divergence from this norm, though not determinative, is more consistent with an intentional shooting than with an accident. It would therefore have been wrong for the trial judge to instruct the jury that this evidence had no probative value in determining intent, as Mr. White suggests he should have. It was not irrelevant.

(2) The Trial Judge’s Instructions to the Jury Did Not Invite the Jury to Consider Evidence of Flight *per se* in Determining the Appellant’s Level of Culpability as Between Murder and Manslaughter

1. Mr. White submits that, even if the Crown’s argument concerning his lack of surprise was permissible, the trial judge nonetheless erred in his instructions to the jury because he invited them to consider *the flight itself* as evidence that he intended to shoot Mr. Matasi.
2. The trial judge referred to post-offence conduct in relation to Mr. White’s flight from the scene on two occasions. The first reference came in the context of his instructions to the jury on the issue of intent. Near the end of his instructions on that point, he stated the following:

You may consider Mr. White’s post-event conduct in fleeing the scene, but you should also be careful with it. It may not tell you much more than that for any number of reasons he would be in some kind of trouble if he stayed at the scene and it may not be of much assistance in assessing his precise state of mind at the time the gun was fired. That is for you to assess and consider. [A.R., at p. 606]

He next referred to the manner of Mr. White’s flight in summarizing the Crown’s theory of the case:

The Crown submits that what is most compelling is the forensic evidence. It submits that the location of the bullet fragments is significant and suggests that Mr. Matasi could not have been standing up because with the elevation drop, a bullet shot north, when passing through Mr. Matasi’s body would have ended up not on the ground but in a building somewhere on Water Street. The Crown lastly noted that the accused ran away with no apparent hesitation or confusion, which suggests that what happened is what he intended to happen. This, the Crown suggested, indicates intention by one of the two ways possible for murder. [Emphasis added; A.R., p. 609.]

1. The first of these references may, if taken entirely out of context, appear to be equivocal. Read in isolation, it is not entirely clear whether the statement constitutes an invitation to the jury to consider the flight itself, or rather circumstances surrounding the flight. Nevertheless, this Court need not automatically adopt the interpretation most favourable to Mr. White. When reviewing a trial judge’s instructions to the jury, appellate courts must not immediately adopt a restrictive interpretation any time an isolated word or phrase presents an apparent ambiguity. Rather, they must first ascertain whether the ambiguity can be resolved by applying the general principles of interpretation and placing the statement in its proper context. As LeBel J. noted in *Jaw*, the adoption of a restrictive interpretation of a jury charge is “a principle of last resort that does not supersede a purposive and contextual approach to interpretation” (para. 38, citing *R. v. Paré*, [1987] 2 S.C.R. 618; *R. v. Chartrand*, [1994] 2 S.C.R. 864, at pp. 881-82; *R. v. Mac*, 2002 SCC 24, [2002] 1 S.C.R. 856, at para. 4; R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 472-74).
2. In *Jaw*, LeBel J. declined to resolve the ambiguity in the accused’s favour because that was not a case in which “the trial judge used a word or phrase that was reasonably capable of more than one meaning and the jury was left to discern which of the possible meanings was intended” (para. 37). In his view, when read in the context of the charge as a whole and the evidence presented at trial, the impugned statement had only one reasonable meaning. The fact that an appellate court might “divine” another interpretation “does not mean that the charge created uncertainty for the jury” (*Jaw*, at para. 37).
3. These comments are apposite to the present case. While it is theoretically possible to read the trial judge’s statement as an invitation to consider Mr. White’s act of flight as evidence of “consciousness of guilt”, this would not be a reasonable interpretation given the context in which the statement was made. For the purpose of proving identity and as part of the narrative, flight *per se* was clearly admissible. Indeed, it would have been impossible for the Crown to provide a full account of what transpired at the scene and of the events leading up to Mr. White’s arrest without mentioning that he had fled the scene. However, by the time the trial judge was instructing the jury, flight *per se* was not important; it was merely collateral to other evidence upon which the Crown relied. The Crown itself had never suggested that Mr. White’s decision to flee the scene was indicative of his level of culpability. Furthermore, not much later in the charge, the trial judge correctly summarized the use to which the Crown had put the evidence of Mr. White’s post-event conduct.
4. In light of this, I do not believe that the jury would have understood him to be suggesting that Mr. White’s flight alone was relevant to its verdict. To paraphrase LeBel J., this was not a case in which the jury was left guessing whether it was to consider the flight alone or the circumstances surrounding the flight in assessing the accused’s level of culpability.

(3) The Trial Judge’s Caution to the Jury Was Sufficient

1. In my view, Mr. White’s lack of hesitation prior to fleeing the scene was relevant to the issue of his level of culpability. Accordingly, I consider that this evidence was properly left with the jury.
2. Nevertheless, the evidence was not without its risks. There could have been explanations for Mr. White’s failure to hesitate or evince any physical signs of surprise other than that he intentionally pulled the trigger. The notion that a person who accidentally shoots someone to death will normally have the immediate reaction of hesitating or showing some other sign of surprise is well founded. Still, there may be exceptional individuals who do not respond in the normal way. While the existence of other, less likely explanations does not render this evidence irrelevant, the possibility of other explanations might not have been immediately apparent to the jury. Thus, it was appropriate for the trial judge to warn the jury to be careful with this evidence and that it might not be of much assistance to them. So he did. This caution was adequate to alert the jury to the risk associated with this evidence and to allow them to properly weigh the evidence.
3. Thus, I would answer the second question in the affirmative: in my view, the trial judge’s instructions to the jury on the question of post-offence conduct were adequate and did not constitute an error of law.

# C. *Is This an Appropriate Case in Which to Apply the Curative Proviso?*

1. Notwithstanding that I believe the jury charge to have been error-free, I briefly address the question of whether this would be an appropriate case to apply the so-called “curative proviso”, s. 686(1)(*b*)(iii) of the *Criminal Code*.In my opinion it would be. Even assuming that the trial judge committed an error of law in his instructions to the jury, this error is a minor one that is harmless on its face.
2. Section 686(1) provides:

**686.** (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(*a*) may allow the appeal where it is of the opinion that

. . .

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law . . .

. . .

(*b*) may dismiss the appeal where

. . .

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred . . . .

1. This Court recently reviewed the principles governing the application of the curative proviso in *Van*. LeBel J., writing for the majority, noted that there are two categories of errors that satisfy the requirements of s. 686(1)(*b*)(iii):

An error falling into the first category is an error that is harmless on its face or in its effect. The proviso ensures that an appellate court does not need to overturn a conviction solely on the basis of an error so trivial that it could not have caused any prejudice to the accused, and thus could not have affected the verdict. Indeed, it would detract from society’s perception of trial fairness and the proper administration of justice if errors such as these could too readily lead to an acquittal or a new trial (e.g. *Chibok v. The Queen* (1956), 24 C.R. 354 (S.C.C.), at p. 359). . . . Errors might also be characterized as having a minor effect if they relate to an issue that was not central to the overall determination of guilt or innocence, or if they benefit the defence, such as by imposing a more onerous burden on the Crown (*Khan*, at para. 30). The question of whether an error or its effect is minor should be answered without reference to the strength of the other evidence presented at trial. The overriding question is whether the error on its face or in its effect was so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial, that any reasonable judge or jury could not possibly have rendered a different verdict if the error had not been made. [para. 35]

1. An appellate court can also uphold a conviction under s. 686(1)(*b*)(iii) in the event of an error that was *not* minor and that *cannot* be said to have caused no prejudice to the accused, if the case against the accused was so overwhelming that a reasonable and properly instructed jury would inevitably have convicted (*R. v.* *Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 31).
2. Thus, the first category of error that satisfies the requirements of the curative proviso is that of “minor” or “harmless” errors. In determining whether or not an error had only a minor effect, the court may look at the entirety of the case for context, but should not assess the strength of the evidence against the accused (*Van*, at paras. 35 and 37). For example, an error that appears significant in isolation may be minor because, in context, it only related to “a very minor aspect of the case that could not have had any effect on the outcome” or concerned “issues that the jury was otherwise necessarily aware of” (*Khan*, at para. 30).
3. By contrast, the second category consists of errors that, while serious and prejudicial, can have had no impact on the verdict because the case against the accused was overwhelming. Here, the appellate court must evaluate the strength of the other evidence to determine whether a conviction would have been inevitable even if the serious error had not been made. If a properly instructed jury would inevitably have convicted, upholding the conviction produces no significant injustice to the accused (*Van*, at para. 36). It is also in the public interest to avoid the cost and delay of a new trial that could not realistically produce a different result (*Van*, at para. 36, citing *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 46, *per* Binnie J.). Still, “given the difficult task for an appellate court of evaluating the strength of the Crown’s case retroactively, without the benefit of hearing the witnesses’ testimony and experiencing the trial as it unfolded”, the high standard of invariable or inevitable conviction must be met to cure serious errors (*Van*, at para. 36, citing *R. v.* *Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, at para. 82).
4. In my view, the error in question, if error there was, falls into the first category. It would have been ideal for the trial judge, when instructing the jury on the matter of intent, to refer expressly and exclusively to Mr. White’s lack of hesitation or shock, as opposed to his “conduct in fleeing the scene”. Although, as I explained above, I believe that any ambiguity would immediately have been resolved by the context in which the statement was made, even assuming, *arguendo*, that the statement was persistently or intractably ambiguous and therefore constitutes an error, such an error is a minor one.
5. The statement in question was not an express invitation to consider the flight *per se* in determining intent. At worst, the jury was provided with less than ideally clear instructions concerning what it could consider in determining intent. Given that the flight itself was never put directly in issue by the Crown, and given that the trial judge correctly summarized the Crown’s position on this point, the effect of the error on the jury can only be characterized as trivial and insignificant. There was no serious possibility that the jury would be induced to consider the flight *per se* as a relevant circumstance in determining whether Mr. White had the requisite intent for second degree murder.
6. In *R. v. Jacquard*, [1997] 1 S.C.R. 314, Lamer C.J. noted that, in respect of errors in a trial judge’s charge to the jury, “accused individuals are entitled to properly instructed juries. There is, however, no requirement for perfectly instructed juries” (para. 2 (emphasis in original)). If the instructions in the present case were not perfect, they were certainly adequate to the task at hand. Given the nature of the purported error, it was unlikely to have any effect on the jury’s deliberations. Thus, even assuming that the trial judge erred, that error was, in the words of LeBel J., “clearly non-prejudicial” (*Van*, at para. 35).
7. Moreover, in the context of the case as a whole, the trial judge’s imperfectly worded instructions on evidence of hesitation before flight could only have had a very minor effect. Though relevant and appropriate for the jury to consider, evidence of Mr. White’s lack of hesitation prior to flight was by no means central to the Crown’s case on the issue of the level of culpability and *mens rea*. With respect, the record does not support Binnie J.’s position that this evidence was “a significant element in the Crown’s argument to the jury, and in the trial judge’s final instructions” on the issue of murderous intent (para. 160). The section of the Crown’s closing address to the jury dealing with intention took up a full eight pages of transcript in total. Of this, only the following six lines of transcript dealt with Mr. White’s hesitation before flight:

Note as well that the accused ran immediately after the shooting. There is no hesitation here, no shock, no uncertainty on his part, just immediate flight. One would expect hesitancy if the shot was anything other than the intended action of Dennis White. [A.R., at p. 563]

This was the Crown’s only mention of Mr. White’s post-offence conduct in relation to intent.

1. Furthermore, in charging the jury, the trial judge briefly mentioned the Crown’s reference to Mr. White’s flight as going to identity, which had by that time already been conceded by the defence. Then the trial judge referred to the evidence of flight once more, in a manner that reflected how peripheral the evidence was to the Crown’s overall case, which I repeat here for ease of reference:

The Crown submits that what is most compelling is the forensic evidence. It submits that the location of the bullet fragments is significant and suggests that Mr. Matasi could not have been standing up because with the elevation drop, a bullet shot north, when passing through Mr. Matasi’s body would have ended up not on the ground but in a building somewhere on Water Street. The Crown lastly noted that the accused ran away with no apparent hesitation or confusion, which suggests that what happened is what he intended to happen. This, the Crown suggested, indicates intention by one of the two ways possible for murder. [Emphasis added.]

Thus, the Crown’s reliance on Mr. White’s hesitation prior to flight in making its case for second degree murder, as well as the trial judge’s treatment of the flight issue in his summary of Crown’s arguments, were far from taking on a central importance.

1. Instead, what was central to the Crown’s case on the issue of *mens rea* was forensic evidence and eyewitness testimony of Mr. White’s conduct prior to and during his commission of the offence. I solely review this evidence here to demonstrate how minor a role the issue of post-offence conduct was in the context of the case as a whole.
2. Much of the Crown’s case was devoted to refuting the theory of accidental discharge. Evidence of Mr. White’s lack of hesitation prior to flight was only a very minor part of that case. More important were the numerous other items of evidence including: eyewitness testimony of Mr. White’s pre-offence bravado and dexterity in handling the gun; forensic firearms evidence that the Glock firearm in this case had various safety features to prevent it from firing accidentally; expert testimony that the only way to make this gun fire is to pull the trigger using five and a half pounds of pressure, which an expert likened to lifting a two litre jug of milk with one’s finger; forensic evidence that the angle at which the bullet entered the victim’s chest suggested that Mr. White had fired the gun down at the seated victim; Mr. McRitchie’s testimony that he saw Mr. White towering over the victim and holding him down by his shirt immediately prior to hearing the fatal gunshot; admissions from witnesses whose testimony supported the defence’s version of events to the effect that they had not seen Mr. White and the victim struggling at the moment of the fatal gunshot, that many had been drinking and that some were quite intoxicated.
3. In light of the case as a whole, the evidence of post-offence conduct was of minor importance. Therefore, though I do not consider there was any error in the trial judge’s instruction, if there was, it should be saved by the s. 686(1) curative proviso: it was harmless on its face and it affected only a minor aspect of the case.

# V. Conclusion

1. In light of the forgoing, I would dismiss the appeal.

The reasons of Deschamps and Charron JJ. were delivered by

Charron J. —

1. Introduction

1. I have considered the reasons of Binnie J. and I am in substantial agreement with his analysis on the law concerning the use that may be made of evidence of post-offence conduct. However, I disagree with the significance he attaches to Crown counsel’s reference in his closing address to the fact that Mr. White immediately fled the scene with “no hesitation here, no shock, no uncertainty”. As I will explain, when considered in context, this comment could only have been understood by the jury as a rhetorical observation by Crown counsel that there was no evidence to support the defence theory that the gun had gone off accidentally. I therefore agree with Rothstein J. that there is no reason to interfere with the jury’s verdict. I come to this conclusion, however, by a different route. I will begin with a brief discussion of the points I share in common with Binnie J. before discussing in detail the points on which I diverge.
2. I agree with Binnie J. that evidence of post-offence conduct is not subject to any special rule. As Binnie J. stresses, it is definitely wrong to suggest that evidence of anything said or done by an accused after the commission of an offence gives rise to special rules of admissibility, or that it is subject to special warnings as to what use may be made of it by the trier of fact. As he aptly puts it:

The general rule is now, as in the past, that it is for the jury to decide, on the basis of the evidence as a whole, whether the post-offence conduct put in evidence against the accused is related to the commission of the crime before them rather than to something else, and if so, how much weight, if any, such evidence should be accorded in the final determination of guilt or innocence. For the trial judge to interfere in that process will in most cases constitute a usurpation of the jury’s exclusive fact-finding role. [para. 137]

1. I also agree with Binnie J. that judicial experience has taught us that in some cases jurors have found certain types of evidence more persuasive than warranted, thus making it necessary in appropriate cases to caution the jury accordingly. As he notes, eyewitness identification and jailhouse confessions to police informants are examples that readily come to mind. Likewise, some evidence of post-offence conduct may seem quite suggestive of guilt though, in reality, the conduct is essentially equivocal in nature. For example, evidence that an accused lied to the police about the offence in question may lead jurors to leap too quickly to infer guilt without considering other reasons why he or she may have lied. A special caution may therefore be required. In some situations, the probative value of the evidence may be slight and far outweighed by its prejudicial effect, in which case it may be best to remove it from the jury’s consideration altogether. My colleague Rothstein J. explains how these general principles call for a case-by-case assessment.
2. Further, I agree with Binnie J. that inferences drawn by a witness, based on his or her observation of the accused’s demeanour, may well call for a special caution or be subject to an exclusion order in accordance with these principles. By way of example, Binnie J. recalls the infamous prosecutions of Susan Nelles and Guy Paul Morin for crimes they did not commit. He rightly notes that the case against each was built in part on inferences of guilt drawn from equivocal post-offence conduct. For example, one witness testified that Ms. Nelles had a “very strange expression on her face and no sign at all of grief” following the death of the fourth baby (*R. v. Nelles* (1982), 16 C.C.C. (3d) 97 (Ont. Prov. Ct. (Crim. Div.)), at p. 124). In the case of Guy Paul Morin, police witnesses drew a negative inference of guilt, for example, from the fact that Mr. Morin came out to greet them rather than wait for them to reach his door. In his report on the wrongful conviction of Mr. Morin, Commissioner Kaufman found that this was an innocuous event which only became “coloured” by the officers’ own perceptions of Mr. Morin (the Honourable Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998), at p. 786).
3. However, I disagree with Binnie J. that Crown counsel’s reference in his closing address to the fact that Mr. White immediately fled the scene with “no hesitation here, no shock, no uncertainty” falls in this category of cases. In my view, the Crown did not invite the jury to draw an impermissible inference of guilt, as contended by Mr. White. As I will explain, when read in the context of the evidence and issues at trial, Crown counsel’s comment could only have been understood by the jury as a rhetorical argument that no evidence supported the defence theory of accidental discharge of the firearm. The failure of defence counsel to raise any issue at trial regarding Crown counsel’s closing address or the trial judge’s instructions on the evidence of flight further supports this interpretation.
4. With respect, I also find no support in the record for the contention, accepted by Binnie J., that this case is essentially a rerun of *R. v. Arcangioli*,[1994] 1 S.C.R. 129. In *Arcangioli*, the accused admitted to participating in the culpable event and the only issue at trial was his level of culpability. Conversely, as I will explain, the identity of the shooter was a very live issue in Mr. White’s trial and the evidence of flight was highly relevant to the issue of identification. Further, it formed an inextricable part of the narrative as every witness to the event described the shooter, gun in hand, fleeing the scene. Therefore the evidence was admissible at trial and properly left for the jury’s assessment. It is not open to Mr. White on appeal to rewrite the script of his trial. In addition, on the question of intention, the trial judge took care to instruct the jury that they should “be careful with” this evidence, as it may not tell them “much more than that for any number of reasons he would be in some kind of trouble if he stayed at the scene and it may not be of much assistance in assessing his precise state of mind at the time the gun was fired” (A.R., at p. 606). In the context of this trial, no more was required.
5. I thus agree with Rothstein J. that there is no reason to interfere with the jury’s verdict. I come to this conclusion, however, by following a somewhat different route.

2. The Proceedings Below

1. Binnie J. has summarized the facts related to the fatal shooting. There is no need to repeat those facts here. However, in light of the conclusion I reach, I find it necessary to describe what transpired at trial in some detail.
2. It was the Crown’s position at trial that Mr. White was the shooter, that he intentionally shot Mr. Matasi in the chest, and that he should be found guilty of second degree murder. The Crown’s case included the eyewitness evidence of the three young men who were with Mr. Matasi on the street corner, the young men who were in the company of Mr. White, and others who had witnessed part of the events leading up to or immediately following the shooting. Many of the witnesses had been drinking on the night in question, some of them quite heavily. Although their accounts differed in some respects and there were discrepancies between their trial testimony and previous statements, they were generally consistent in describing the deceased and one other person as being involved in a close physical altercation just prior to the fatal shot being fired. The witnesses were also consistent in testifying that the shooter immediately fled the scene, gun in hand.
3. It is important to note that throughout the Crown’s case, the identity of the shooter was a very live issue. In addition to eliciting details about what each witness had observed about the scuffle, much of the Crown’s direct examination of the witnesses was spent on the question of identification. Some witnesses knew Mr. White before the evening in question and could readily identify him as the person they had seen involved in the scuffle. Other witnesses who did not know Mr. White were asked to provide as much detail as they could about the physical appearance of the person they saw on the fateful evening. In addition, those witnesses who had been shown a police photo line-up were asked details about their participation in that procedure. In cross-examination, defence counsel challenged the accuracy and reliability of each witness’s testimony, not only about what they had observed happening, but also concerning the identity of the shooter. The defence called no evidence. The defence strategy that developed during the course of the trial consisted of challenging the reliability of the Crown’s evidence arguing that, in the end analysis, the most that could be established was that the gun had somehow discharged unintentionally during the course of the struggle.
4. I stress the fact that identification was a live issue throughout the presentation of the evidence as it is clear on reviewing the record that the evidence of flight was properly introduced for the purpose of establishing the identity of the shooter. The evidence of flight also formed an inextricable part of the narrative: every witness to the event testified that the killer, gun in hand, immediately ran away after the fatal shot was fired. Further, to the extent that the evidence of flight established that *Mr. White* was the person who fled the scene, the evidence was highly probative of the issue of identification. Indeed, the record reveals that it was the evidence of flight that ultimately sealed Mr. White’s fate on the issue of identity. Crown counsel (who addressed the jury first before there was any suggestion from the defence that Mr. White’s involvement in the altercation may be conceded) effectively marshalled this evidence in his closing address, suggesting to the jury that they would “have little difficulty in coming to the conclusion, beyond a reasonable doubt, that Dennis White is the person who fired the shot that killed Lee Matasi” (A.R., at p. 555). After referring to the direct eyewitness identification evidence, Crown counsel summarized the flight evidence as follows:

You will recall that some of Lee Matasi’s friends chased after the fleeing person. You will recall that that person went past John Vandanya [*sic*] and then Chris Price in the café. He was carrying the gun. You have the route taken by the gunman, from the evidence, up Richards to Pender, right on Pender and then left on Seymour, where, you will recall, that Michael Fyfe and Jesse DeChamplain [phonetic], chasing Mr. White, were stopped by Sergeant Mitchell.

You know that the entrance to the laneway on Seymour Street, just off Pender, leads to the laneway running south to Dunsmuir Street, and you have the laneway video images under Exhibit 11 DVD IA06, of the person running east on the Pender lane and curving to the right to go south into the laneway leading to Dunsmuir. And again, images of him, from the Dunsmuir stretch of alleyway, carrying, in his right hand, what I suggest to you is the gun, as he runs towards Dunsmuir, and in a moment, his encounter with Constables MacLean [phonetic] and Tellabanyen [phonetic]. You have the admission that Dennis White is the person they arrested. He is the person who dropped the firearm that killed Lee Matasi into a dumpster.

The above, I suggest, can leave you with certainty that Dennis White was the person who shot Lee Matasi that night. As one would expect, in witnessing this traumatic event, some of the witnesses were not able to recognize the accused. Nothing, given the other evidence, turns on this. [A.R., pp. 555-56]

1. Defence counsel commenced his final address by saying: “There is no question in this case that our client has committed a crime” (A.R., at p. 564), but made no formal admission that Mr. White was the shooter. The trial judge therefore sought direction from defence counsel on how he should charge the jury on the question of identification. Counsel indicated that the defence did *not* concede identification and agreed with Crown counsel that the trial judge should instruct the jury on identification, but could tell them that they probably would not have much difficulty on that issue (A.R., at p. 582).
2. Neither at trial nor on appeal did Mr. White complain about the evidence of flight or the use to which it was put in proving that he was the shooter, nor could any such complaint have been sustained. This appeal is focussed, rather, on a *comment* made by Crown counsel, at the conclusion of his address to the jury, about the fact that there was no evidence showing that Mr. White hesitated before leaving the scene of the shooting. After reviewing at some length the evidence the prosecution relied upon to prove a murderous intent, Crown counsel concluded with the following:

Note as well that the accused ran immediately after the shooting. There is no hesitation here, no shock, no uncertainty on his part, just immediate flight. One would expect hesitancy if the shot was anything other than the intended action of Dennis White.

If you accept that Lee Matasi was shot in this fashion, you will conclude that the accused murdered Lee Matasi by either of the two avenues described. I suggest that the evidence affords no other conclusions. There is no evidence or reasonable view of the evidence that can lead you to any lesser culpability than murder. Thank you. [Emphasis added; A.R., at p. 563.]

1. Counsel for Mr. White in his closing address did not respond to this final argument by the Crown on the lack of hesitation, shock or uncertainty. Nor did he mention it during the pre-charge discussion that followed, although he was specifically asked by the trial judge: “Do either of you, to begin with, have any concerns about what the other said yesterday?” (A.R., at p. 580). Indeed, neither counsel suggested in the pre-charge conferences with the trial judge that any special warning or instruction be given at all concerning the evidence of flight. Only before the Court of Appeal was the argument first advanced by Mr. White that Crown counsel, by this remark, improperly invited the jury to make an impermissible inference of guilt from the evidence of flight to convict him of murder instead of manslaughter.
2. In order to appreciate the potential impact of Crown counsel’s comment on the jury, it is necessary to put it in the context of the entirety of the Crown’s submissions on the question of intention and the evidence at trial. As I will explain, the reference to the lack of hesitation, shock or uncertainty in the evidence played a peripheral role in the Crown’s theory on intention.
3. In support of its theory that Mr. White intentionally shot Mr. Matasi with the requisite intention to kill him, the Crown first addressed the jury on the evidence of motive, explaining to them that while it was not necessary for the Crown to prove a motive for the offence “it is helpful to have some sense of why something happened” (A.R., at p. 556). Crown counsel reviewed the evidence in some detail about Mr. White’s behaviour earlier in the evening which suggested that he “wanted to be a big man, and to show others that he was a big man” (*ibid.*). This evidence culminated in Mr. White showing off his gun and, in response to someone expressing the view that it was a fake, firing it, “again, to impress” (*ibid.*), the Crown suggested. The Crown then put it to the jury that when Mr. Matasi, in front of others, “dissed” Mr. White, showed him disrespect, called him down, told him that having a gun was not cool, Mr. White “couldn’t back down; he was the big man with the gun” (A.R., at p. 557). Crown counsel went on to describe how the evidence showed that the struggle ended with Mr. White intentionally shooting Mr. Matasi in anger.
4. Crown counsel then reviewed the forensic evidence which, he argued, rebutted any suggestion that the gun could have accidentally discharged. This included evidence that five and a half pounds of pressure was required to fire the gun, and that the manner in which the gun was loaded and reloaded required some knowledge and dexterity. Crown counsel also placed much reliance on the “compelling” testimony of Dale McRitchie, the manager of a nearby nightclub who had observed part of the altercation. The Crown stressed that, unlike many of the other witnesses, this witness was not under the influence of alcohol when he observed the altercation; nor was he involved with either party. Mr. McRitchie’s testimony was reviewed in some detail. In essence, he testified that upon hearing a gunshot, he stepped outside his nightclub and saw the victim on the ground with Mr. White, anger in his face, holding the victim by his shirtfront and pointing a gun down at him. Mr. McRitchie then heard the word “bitch”, immediately followed by another gunshot (A.R., at p. 487).
5. Crown counsel then undertook a detailed review of the evidence that supported Mr. McRitchie’s version of the events, including the forensic evidence which, he argued, indicated that “the bullet was fired down, in this case, into a reclined Lee Matasi” (A.R., at p. 563). It is at the end of these submissions on the question of intent that Crown counsel added the impugned remark, which now forms the basis of Mr. White’s appeal.
6. In my view, Crown counsel’s comment could not reasonably have been interpreted by the jury as an invitation to infer a murderous intent from the evidence of flight. It was crystal clear from Crown counsel’s address that the evidence of flight properly went to the issue of identification. Nor could the jury have taken Crown counsel’s comment as an invitation to infer a murderous intent from the way Mr. White “looked” just before he fled. Crown counsel had just spent considerable time outlining what evidence went to the issue of intent, none of it at issue in this appeal. Further, while every witness to the event testified that the shooter immediately fled, *no witness* was asked by the Crown how the shooter “looked” at the time he fled. The only evidence along those lines elicited by the Crown was given by Mr. McRitchie in describing the shooting itself. The witness stated the following in examination-in-chief (A.R., at p. 488):

Q. Did you notice his face?

A. Yeah, his face did stand out to me because he was in a -- definitely in a fit of rage.

Q. What -- what led you to believe he was in a fit of rage?

A. Well, he was having a scuffle with the gentleman below him.

Q. What about his face at that point?

A. He had sharp features.

Q. Mm-hmm?

A. Pointed face sort of.

Q. I’m sorry?

A. A pointed face.

1. In only two instances were questions asked about how the shooter looked after the fatal shot was fired; both were posed in *cross-examination by the defence*. Michael Fyfe was asked the following (A.R., at p. 377):

Q. Okay. But I’m going to suggest because you were so intoxicated that’s -- you weren’t really thinking when you chased after this man with a gun. Why weren’t you afraid?

A. Why wasn’t I afraid?

Q. Yeah.

A. ’Cause I wasn’t, I wanted to catch him.

Q. He looked scared, didn’t he, when he ran away?

A. I looked scared?

Q. He looked scared.

A. I didn’t see his face when he ran away, I just saw the back of him, trying to catch up to him. [Emphasis added.]

1. Much along the same lines, Kennedy Kirk was asked the following in cross-examination by the defence (A.R., at pp. 460-61):

Q. You heard this shot went off at Shine and you saw this person -- you didn’t see him fire the gun though, did you?

A. No.

Q. But you did see the person you believe was -- you saw later picking up a gun off the street in front of Shine?

A. Mm-hmm.

Q. And leaving?

A. Yeah.

Q. Okay. I’m going to suggest to you he looked scared.

A. I wouldn’t say scared, I would say purposeful.

Q. Oh, now you would say purposeful?

A. Well, I mean, he certainly looked like maybe he did not want to be there anymore. [Emphasis added.]

1. Defence counsel then proceeded to cross-examine Mr. Kirk at length (without much apparent success) on his prior statement to the police in which he had stated “I guess he scared himself, whatever, dropped his gun when he was walking away across the concrete, went and picked it up and went around the corner” (A.R., at p. 462).
2. In short, there was no evidence to speak of one way or the other about the shooter’s demeanour as he immediately fled from the scene. To suggest that the Crown’s comment about the *lack* of such evidence might have caused the jury to mistakenly leap from the evidence of demeanour to a finding of guilt, in my respectful view, has no air of reality on this record. In any event, even if there had been significant evidence about the look on the shooter’s face immediately after the fatal shot was fired, I would see no basis for excluding it from the jury’s consideration. Consider, for example, if the witnesses had indeed described the shooter looking surprised or shocked at the time the last shot went off, or stooping down to check on Mr. Matasi’s condition and hesitated for a few seconds before taking off. The jury would be entitled to the benefit of these observations. Indeed, given the defence’s strategy in this case, such evidence would have played a central role in the case for the defence. In my view, when considered in context, the Crown’s comment that there was “no hesitation here, no shock, no uncertainty” could only have been understood by everyone present as a rhetorical observation that there was no evidence of this nature and hence that the *defence theory* that the gun had gone off accidentally should not be given any credence.
3. Mr. White further argued that the trial judge erred in two respects. First, rather than correcting the erroneous Crown submission (about which there was no complaint at trial), he repeated it for the jury when he summarized the theory of the Crown. Second, instead of giving an *Arcangioli* “no probative value” instruction as he should have, the trial judge effectively left the evidence of flight for the jury’s consideration on the question of intent by stating the following:

You may consider Mr. White’s post-event conduct in fleeing the scene, but you should also be careful with it. It may not tell you much more than that for any number of reasons he would be in some kind of trouble if he stayed at the scene and it may not be of much assistance in assessing his precise state of mind at the time the gun was fired. That is for you to assess and consider. [A.R., at p. 606]

1. Just as Crown counsel’s closing address to the jury, the trial judge’s repetition of Crown counsel’s argument must be read in context. In reiterating the theory of the Crown for the jury, the trial judge followed essentially the same sequence as Crown counsel in his final address, describing in some detail over the course of several pages of transcript what evidence the Crown relied upon in support of its case on both issues of identification and intention. He then concluded his review of the Crown’s theory as follows:

The Crown lastly noted that the accused ran away with no apparent hesitation or confusion, which suggests that what happened is what he intended to happen. This, the Crown suggested, indicates intention by one of the two ways possible for murder. [A.R., at p. 609]

1. In my view, the jury would have understood these two sentences no differently than the parts of Crown counsel’s closing address they were intended to summarize. The first sentence simply repeated Crown counsel’s rhetorical observation on the absence of evidence to support the theory of accidental shooting, and the final sentence referred to the *entirety* of the evidence relied upon by the Crown on the question of intention.
2. Finally, in the context of the evidence and the issues at trial, the trial judge’s instructions regarding the evidence of flight contained no error. As it formed an inextricable part of the narrative and was highly relevant to the issue of identification, it was properly left for the jury’s assessment. The evidence of flight was reviewed for the jury in this context and its significance would have been properly understood. On the question of intention, the trial judge’s added caution that this evidence was of limited value in determining Mr. White’s state of mind was adequate. Indeed, on the facts of this case, the instruction that “for any number of reasons [Mr. White] would be in some kind of trouble if he stayed at the scene”, was a common sense inference that the jury would have been well able to make on its own.
3. I therefore agree with Rothstein J. that the jury charge contained no error and I would dismiss the appeal.

The reasons of McLachlin C.J. and Binnie and Fish JJ. were delivered by

1. Binnie J. (dissenting) — This appeal again raises the question of what guidance a judge should give to a jury concerning the use that may be made of evidence of post-offence conduct. Generally speaking, of course, evidence of what an accused did or said before, during and after the alleged offence, may all be potentially relevant to the issue of guilt or innocence. If admissible, it will be for the jury to determine what use to make of it in deciding about the facts. In this respect, evidence of post-offence conduct is treated as any other circumstantial evidence. It is not to be considered in isolation, but together with the rest of the evidence in its entirety.
2. Yet experience has shown that prosecutors will occasionally put forward as evidence of guilt, post-offence conduct that is essentially equivocal — such as the accused’s strange behaviour when first spoken to by the police or the fact he failed to render assistance to the victim. Even where considered of some slight probative value in relation to an issue in the case, its persuasive value in the hands of a skilled prosecutor may create unfair prejudice to an accused. Thus, in some situations, it has been found necessary to withdraw such evidence from the jury’s consideration, or to give an instruction pointing out the danger and limiting the use that may be made of it.
3. In this appeal, the appellant stands convicted of second degree murder. The dispute is whether the jury might have drawn an impermissible inference of guilt from the Crown’s characterization of his flight from the scene of a Vancouver homicide with “no hesitation here, no shock, no uncertainty on his part” when it convicted him of murder instead of manslaughter. The defence responded that a quick flight was not surprising. The appellant knew that — accident or not — his illegal Glock handgun had been fired during a street fight with a stranger. The victim had crumpled to the street.
4. In closing argument, the defence conceded that the appellant shot the victim, but eyewitness accounts of the street fight preceding the gunshot were conflicting. The appellant says the jury should have been told that the Crown’s argument about his demeanour could not be used as a basis for inferring the *specific* intent necessary to support a murder conviction, because both his flight and his pre-flight demeanour were equally consistent with an accidental shooting and thus manslaughter. The trial judge did not rein in the Crown’s approach. He told the jury in relation to the issue of murderous intent that “[y]ou may consider Mr. White’s post-event conduct in fleeing the scene, but you should also be careful with it.”
5. A majority of the British Columbia Court of Appeal, Finch C.J.B.C. dissenting, held that “while the charge to the jury was wrong in that it was not complete, the error was harmless and could not have affected the jury’s verdict” (2009 BCCA 513, 278 B.C.A.C. 177, at para. 146). I agree with the unanimous view of that court that “the charge to the jury was wrong” but unlike the majority I would not apply the curative proviso under s. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46. I agree with Finch C.J.B.C. that the error was not harmless. The case for a murder conviction, apart from the evidence of post-offence demeanour, was far from overwhelming. I would allow the appeal.

I. Overview

1. Juries find the facts and trial judges are careful not to usurp their function. A concern about excessive and unnecessary judicial micromanagement is evident in the reasons of Ryan J.A., for the majority in the court below, who commented:

. . . the case law seems to have drifted to the point where anything done by an accused after the commission of an offence is now classified as “post-offence conduct” or “after-the-offence conduct” and, whether used as part of the Crown’s case or not, [is] subject to special warnings. [para. 129]

With respect, it is definitely *not* the case that evidence of “anything done by an accused after the commission of an offence . . ., whether used as part of the Crown’s case or not, [is] subject to special warnings”. The general rule is now, as in the past, that it is for the jury to decide, on the basis of the evidence as a whole, whether the post-offence conduct put in evidence against the accused is related to the commission of the crime before them rather than to something else, and if so, how much weight, if any, such evidence should be accorded in the final determination of guilt or innocence. For the trial judge to interfere in that process will in most cases constitute a usurpation of the jury’s exclusive fact-finding role.

1. At the same time, trial judges spend more of their working life in and around courtrooms than people summonsed from work or home to jury duty, and experience has taught the judiciary that in some cases jurors have found certain types of evidence (e.g. eyewitness identification and jailhouse confessions) more persuasive than was warranted. Misuse of such evidence has on occasion resulted in wrongful convictions. This risk exists with respect to some types of post-offence conduct relied upon by the Crown and in those cases it only makes sense for the judges to alert the jurors to what the courts have collectively learned over the years, especially when that learning may for some jurors be counter-intuitive.
2. When a jury hears that an accused was seen running from the crime scene, or gave a statement to the police that turned out to be false in some particulars, its members may jump to the conclusion of a guilty mind, and thence to an inference of guilt of the offence as charged. The inference may be quite wrong. The running away may be due not to a flight from justice, but simple panic, and the false particulars may have been given innocently. The evidence of post-offence demeanour will often be equivocal. The police evidence that Guy Paul Morin reacted strangely to the abduction and death of the little girl next door played a role in his wrongful conviction for murder.
3. The bulk of evidence of post-offence conduct will simply flow into the record as an unremarkable part of the narrative. Where it is put forward as an element of the prosecution case, it will, of course, be relevant and admissible where it has some tendency, as a matter of logic, common sense and human experience (as the expression goes) to help resolve a live issue in the case.
4. In this appeal my colleague Rothstein J. finds that the Crown’s argument about post-offence demeanour was properly left with the jury as evidence probative of an intent to kill rather than accident. He writes:

. . . the mere fact that the accused fled the scene did not provide any information as to whether he was guilty of the lesser or the greater charge. However, in this case, the fact that Mr. White failed to hesitate at the discharge of his firearm into another person’s chest *does* potentially provide such information. [Emphasis in original; para. 66.]

The courts have long recognized (though jurors may have no reason to know this unless they are told) that the subjective interpretation placed by a witness on the post-offence demeanour evinced by an accused is fraught with danger. These dangers were annotated and persuasively explained in *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998), by the Honourable Fred Kaufman, at pp. 1142-50, as will be discussed.

1. Such demeanour evidence relies too heavily on the witnesses’ power of observation and interpretation, and will often involve a series of speculative inferences from a failure to perform as the onlooker thinks “normal” to a conclusion of guilt of a particular offence. In one of the most harrowing criminal cases of recent years, a nurse at Toronto’s Hospital for Sick Children was discharged at her preliminary hearing into the alleged murder of four babies in her care. His Honour Judge Vanek rejected the demeanour evidence as worthless:

I am unable to find any evidence of guilt from what a doctor thought from a passing glance was “a very strange expression” on the face of a young woman he barely knew, who had suffered a most harrowing experience, and was engaged in the very emotionally disturbing duty she was bound to perform of writing up the final death note as part of her other difficult duties on the occasion of the death of a baby in her care.

(*R. v. Nelles* (1982), 16 C.C.C. (3d) 97 (Ont. Prov. Ct. (Crim. Div.)), at p. 125)

1. Similarly, in *R. v. Anderson*,2009 ABCA 67, 3 Alta. L.R. (5th) 29, the accused was charged with first degree murder. The Crown adduced evidence that a friend of the accused who gave him a ride after the killing noticed that he was “unusually quiet” in the area of the crime scene, and another witness noted that the accused turned his head away from the crime scene being investigated as they drove by. The court concluded that the trial judge erred in leaving the evidence to the jury (para. 52).
2. In this case, the Crown specifically urged the jury to infer murderous intent from “no hesitation here, no shock, no uncertainty on his part, just immediate flight”. The Crown’s emphasis was not on the act of flight (which is an objective fact) but on the alleged demeanour of the appellant (which here was a matter of interpretation and opinion by a stranger necessarily calibrated according to the stranger’s own subjective expectation and cultural frame of reference about what would be expected).
3. For the reasons which follow, I agree with Finch C.J.B.C. that the use of such demeanour evidence in this case ought not to have been permitted to go to the jury on the critical (and virtually the only) issue in the case — murderous intent or accident. No one whose illegal handgun had just discharged in the middle of a street fight could be expected to stick around to ponder the consequences.

II. Facts

1. This case involves the senseless killing of a stranger by the appellant who was out on the town in Vancouver in the early hours of the morning of December 3, 2005. He was carrying and showing off a Glock firearm. The victim, Lee Matasi, was shot and killed after a scuffle outside a nightclub. Earlier that evening, Mr. Matasi had been drinking in Gastown with some friends. On his way home, he encountered the appellant on the street outside another club. As stated, they were unknown to each other.
2. According to the appellant’s ex-girlfriend, he was being loud, he was “in the party mode”, and according to another witness he seemed “very aggravated”. At one point, the appellant lifted up his shirt to show some people he had a gun. Other witnesses heard someone question whether the gun was real, and watched as the appellant shot at a building to prove that it was, saying “It’s not real, right”, in a sarcastic voice.
3. During this exchange, Mr. Matasi volunteered the comment that said, “It’s not cool shooting a gun”. Mr. Matasi and his friends were intoxicated. One witness heard them yell something to the effect of: “Why don’t you shoot the gun again?” or “Shoot the window out”. Another said they yelled “Smash the window, smash that truck”. The appellant yelled back at Mr. Matasi’s group and went up the hill in their direction. When the appellant reached the Matasi group he picked a fight with Mr. Matasi. A scuffle ensued. At one point the gun went off. It came loose on the ground but was recovered by the appellant. The struggle continued.
4. At this point accounts diverge. Some witnesses said that before the second — fatal — shot went off, both men were standing grappling with each other. However, the Crown’s main witness, who had not been drinking, described seeing a person he identified as the appellant holding up another man who had his rear end on the ground, and had his legs splayed out in front of him. The appellant was standing uphill from the first, was holding the other up by the scruff of his neck, and was in a fit of rage. He was pointing a firearm down at the other man. This witness said he heard the word “bitch”, just before he heard a shot being fired. The Crown urged the jury to believe the second version and return a verdict of murder. The defence urged acceptance of the first version and a finding of manslaughter. Mr. Matasi died from a single gunshot wound to the chest.
5. After the shot was fired, the appellant immediately fled the scene, and ran into an alley. The police watched as he deposited something into a dumpster. The appellant was arrested, and a Glock firearm was retrieved from amongst the rubbish. At trial, he did not testify. Crown counsel in his closing submissions stated to the jury that they could draw an inference from the appellant’s “immediate flight” after the shooting that the appellant was guilty of murder. The Crown submitted that the appellant’s lack of hesitation before fleeing indicated that he acted with an intent to kill. The permissible use of evidence of the post-gunshot demeanour and flight of the appellant forms the subject matter of the appeal. If the trial judge is found to have erred (as unanimously found by the B.C. Court of Appeal), the Crown nevertheless argues that the conviction of second degree murder should be upheld by the application of the curative proviso in s. 686(1)(*b*)(iii) of the *Criminal Code*.

III. Judicial History

A. *Supreme Court of British Columbia (McEwan J.)*

1. On the issue of intent, the trial judge instructed the jury as follows:

The next question is therefore, did Mr. White have the necessary intention or state of mind for murder. The crime of murder requires a particular state of mind. For an unlawful killing to be murder, the Crown must establish that Mr. White intended either A, to kill Mr. Matasi. Or B, to cause Mr. Matasi bodily harm that he knew was likely to kill Mr. Matasi and was reckless whether Mr. Matasi died or not. Reckless in this context means that Mr. White could see or foresee the risk that Mr. Matasi could die from the injury but went ahead anyway and took that chance.

. . .

To determine Mr. White’s state of mind, that is what he actually meant to do, you must consider all the evidence. You should consider what you conclude Mr. White did throughout the course of the events leading up to and following the shooting of Mr. Matasi. You should consider what you conclude happened at the time of the shooting itself, if you can tell. You should consider what you conclude from what Mr. White said at any time and what that meant.

1. As to the appellant’s post-offence conduct in relation to the specific intent required for murder, and his state of mind, the trial judge said:

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

Defence counsel did not object to this aspect of the charge.

B. *The British Columbia Court of Appeal (Finch C.J.B.C. (dissenting) and Ryan and Chiasson JJ.A.)*

(1) The Majority — Ryan J.A.

1. The critical issue was whether the Crown had proven that the appellant had the requisite intent for murder when he shot Mr. Matasi. The Crown did not rely on the evidence of flight *per se* to show a consciousness on the part of the appellant that he had committed murder. Rather, the Crown focussed on the lack of hesitation before the appellant fled. In the view of Ryan J.A., this area of the law is now “fraught with as much, if not more difficulty as it was before the decisions of *Arcangioli* [*R. v. Arcangioli*, [1994] 1 S.C.R. 129] and *White* [*R. v. White*, [1998] 2 S.C.R. 72 (“*White (1998)*”)]” (para. 145). In particular,

*Arcangioli* does not stand for the proposition that in every case where the accused has admitted to committing the *actus reus* of a criminal act but has denied a specific level of culpability for that act, or has denied committing some related offence arising from the same operative set of facts, post offence conduct such as flight or destruction of evidence will have no probative value with respect to intent. There will be cases in which such evidence can be probative of intent. [para. 126]

While it would have been better for the trial judge to mention the lack of hesitation as a circumstance in the Crown’s case and then give the *Arcangioli* warning about flight, the error was harmless and could not have affected the verdict. The trial judge did not tell the jury that flight, on its own, could support an inference of guilt (para. 145). The majority applied the curative proviso and dismissed the appeal.

(2) Finch C.J.B.C., Dissenting

1. Chief Justice Finch would have allowed the appeal and ordered a new trial. In this case, the only live issue was the *mens rea*, since the *actus reus* was conceded by defence counsel in closing submissions (para. 69). The appellant’s immediate flight was not conduct out of all proportion to the admitted level of culpability, and “[f]rom ‘instant’ flight without hesitation, murderous intent is not the only available reasonable inference” (para. 75).

The appellant’s failure to hesitate before fleeing is as consistent with the awareness he would have had of his conduct in the violent course of events that culminated in Mr. Matasi’s being shot, even if unintentionally, as with his having intended to kill Mr. Matasi. Put another way, in this case, fleeing without hesitation is consistent with both manslaughter and murder.

Because the accused’s lack of hesitation and instantaneous flight are equally explainable by the consciousness of more than one offence, the conduct has no probative value in relation to intent. The jury should therefore have been instructed that they could not make use of that evidence to determine the appellant’s level of culpability, as between murder and manslaughter. [paras. 76-77]

1. Far from being given a “no probative value” instruction, the jury was told that they could consider the post-offence conduct in determining intent, first by the Crown and then by the judge. While the trial judge told the jury that the post-offence conduct may not be very helpful in determining the appellant’s intent, he nevertheless left that determination for them “to assess and consider”. The trial judge gave the jury the opportunity to use the post-offence conduct to infer intent. He should have explicitly instructed them that they could not make such an inference. Failing to do so was an error of law which was not harmless and could not be made subject to the curative proviso — s. 686(1)(*b*)(iii).

IV. Relevant Statutory Provisions

1. The *Criminal Code* states:

**686.** (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(*a*) may allow the appeal where it is of the opinion that

. . .

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

. . .

(*b*) may dismiss the appeal where

. . .

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred . . . .

V. Analysis

1. In the unfolding narrative of a trial there is no curtain that drops at the moment the elements of the offence are complete. Evidence of subsequent conduct often throws useful light on what happened earlier, and the trier of fact is entitled to as much help as may be made available. In most cases, the evidence of post-offence conduct will be probative and unobjectionable. In *R. v. Ménard*, [1998] 2 S.C.R. 109, for example, the case against the accused on a charge of second degree murder was largely circumstantial. The sole issue at trial was identity. The evidence of post-offence conduct included false statements made to the police by the accused after the murder, evidence that the accused tried to dispose of the victim’s bloodstained car and his own bloodstained clothing and that he attempted to flee from the area where he concealed the evidence. The accused argued that he acted solely out of fear that he would be linked to the stolen property and denied any involvement with the murder. His post-offence conduct seemed entirely disproportionate to an alleged concern about stolen property. There was no limiting instruction. The trial judge had simply emphasized that the evidence of post-offence conduct “may or may not point to guilt” (para. 24). The Court held that it was for the jury to determine which of the competing interpretations, if either, to accept. This, then, is the general rule.
2. In this case, unlike *Ménard*, the appellant ultimately admitted his physical involvement in the killing. The Crown itself concedes that the mere fact the appellant ran from the crime scene is consistent both with panic consequent on an accidental shooting and, in the alternative, a strategy to avoid responsibility for an intentional killing. The Crown’s argument is that the absence of a look of shock and uncertainty — demeanour evidence — as well as the lack of momentary hesitation in taking flight permitted the jury to infer the required specific murderous intent. On the facts of this case I believe the Crown was attempting to fashion bricks without straw. As Hall J.A. aptly remarked in *R. v. Campbell* (1998), 122 C.C.C. (3d) 44 (B.C.C.A.), “There can be a host of reasons why people may do stupid things after being involved in a traumatic experience” (para. 23). See also *Gudmondson v. The King* (1933), 60 C.C.C. 332 (S.C.C.).
3. The rules governing jury instructions where evidence relied on by the prosecution is not probative, or if probative is outweighed by unfair prejudice, are outlined in recent decisions in this Court in *Arcangioli*, *White (1998*) and *Ménard*. Like Finch C.J.B.C. I do not think this case is distinguishable in principle from *Arcangioli*. I would apply *Arcangioli* and allow the appeal.

A. *The Crown’s Argument*

1. In this case, the conduct of the appellant in the immediate aftermath of the offence was not simply put forward “as an inextricable part of the narrative”: *R. v. Turcotte*, 2005 SCC 50, [2005] 2 S.C.R. 519, at para. 58. The Crown tried to use it to show murderous intent. Here, as in *Arcangioli*, it was a significant element in the Crown’s argument to the jury, and in the trial judge’s final instructions. The Crown’s attempt to use the demeanour evidence to the advantage of the prosecution was one of the last things the jury heard before beginning its deliberation. Here, as in *Arcangioli*, “the danger exists that a jury may fail to take account of alternative explanations for the accused’s behaviour, and may mistakenly leap from such evidence to a conclusion of guilt” (*White (1998)*, at para. 22). The evidence in question was admitted at a point in the trial where the identity of the shooter was still in issue, but the problem arose when the Crown fastened on it in its final address when identity was no longer a live issue to urge the jury to use the lack of “shock” or “hesitation” to find murder rather than manslaughter. The problem was aggravated when the trial judge told the jury it was open to them to act on flight *simpliciter*, i.e. “Mr. White’s post-event conduct in fleeing the scene”, in considering intent. The Crown was talking about the demeanour of the appellant following the gun blast but distinct from the flight itself. The trial judge appears to have gone beyond the Crown’s more nuanced position and emphasized to the jury the act of flight itself.
2. Had the issue of identity been put to the jury, undoubtedly evidence of flight would have been highly relevant. It might have been used by the jury, along with the other evidence to find the appellant to be the shooter. In the end, however, identity was admitted. The suggested use was not narrative but proof of guilt of second degree murder. On the basis of *Arcangioli*, it was inadmissible to prove the specific intent necessary to support a conviction for murder, in my opinion.

B. *Relevant Post-Offence Conduct Is Not Limited to Consciousness of Guilt*

1. Ryan J.A. in the court below suggested that prior to *White (1998)* “it was only conduct said to have been done by the accused for the purpose of evading detection and prosecution or something akin to it that attracted the special caution. This is because once the accused is thought to have tried to evade detection or avoid prosecution, that act alone can support an inference of guilt” (para. 129 (emphasis in original)). To the extent the issue of post-offence conduct is coming more frequently before the courts in a variety of forms, this may be a function of a more aggressive resort to such evidence by creative prosecutors. As one defence commentator has remarked, somewhat ruefully, “[t]here was a time when evidence of flight was the only meaningful after-the-fact conduct for which defence counsel had to seek damage control at trial” but more recently, he points out, post-offence conduct evidence has spread to all manner of things: V. Rondinelli, “The Probative Force: Getting Inside the Guilty Mind and Keeping Out Equivocal Conduct” (2005), 26:3 *Criminal Lawyers’ Association Newsletter*, at p. 38. Whether or not a “special caution” is required will depend not on whether that evidence *alone* can support an inference of guilt but on the court’s appreciation of the risk of impermissible inferences in relation to the issues on which the prosecution in its jury address places reliance. As Weiler J.A. observed in *R. v. Peavoy* (1997), 34 O.R. (3d) 620 (C.A.): “The primary question is, ‘How is the after-the-fact conduct relevant?’” (p. 629).
2. Evidence may be probative of one live issue but not another. In *R. v. Jacquard*, [1997] 1 S.C.R. 314, for example, the accused was charged with first degree murder in connection with the killing of his stepfather. He was also charged with attempted murder for the shooting of his stepfather’s companion. His defence raised two issues: (i) he was not criminally responsible (“NCR”) because at the time of the shooting he was suffering from a mental disorder and (ii) he lacked the requisite intent to kill the victim. Part of the evidence at trial demonstrated that the accused had hidden the murder weapon (a shotgun) which, when recovered by police, was free of any fingerprints. Lamer C.J., recognizing that two “live” issues were in play, held with respect to the intent to murder that a “no probative value” instruction was required to avoid the risk of an impermissible inference. On the other hand, he considered the same post-offence evidence to be relevant to an assessment of the accused’s NCR defence. The evidence, he said,

had no probative value in relation to [the *actus reus* or identity issues]; it was, in effect, irrelevant to them.

However, unlike *Arcangioli*, *Marinaro*, or *Charlette*, [(1992), 83 Man. R. (2d) 187 (C.A.)], the alleged attempt to hide the murder weapon and destroy evidence was relevant circumstantial evidence for the jury to consider in evaluating the appellant’s “not criminally responsible” s. 16 defence. [Emphasis in original; paras. 49-50.]

See also *R. v. MacKinnon* (1999), 43 O.R. (3d) 378 (C.A.), at pp. 383-84.

1. In *R. v. Cudjoe*, 2009 ONCA 543, 68 C.R. (6th) 86, Watt J.A. observed that “[e]vidence of after-the-fact conduct is typical of many items of evidence adduced in a criminal trial: it is evidence of limited admissibility. The trier of fact may use this evidence for one or more purposes but not for another or others. It follows that its introduction imposes on the trial judge in a jury trial the obligation to explain both the permitted and prohibited use of the evidence” (para. 81). This does not mean that in *all* instances of post-offence conduct such a limiting instruction is obligatory. The need will depend on the facts. Nevertheless, the cautionary point taken by Watt J.A., who had extensive practical experience as a trial judge dealing with criminal juries, is well taken.

C. *Evidence of Post-Offence Conduct, Where Urged by the Crown in Its Closing Address as Indicative of Guilt, Must Properly Relate to a Live Issue*

1. For the most part, relevance should be considered in terms of “live issues”. As Major J. commented in *White (1998)*, at para. 26: “*Arcangioli* stands for the proposition that a piece of evidence should not be put to the jury unless it is relevant to the determination of a live issue in the case.”
2. In *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, LeBel J. noted that “[p]ost-offence conduct may also be used to discredit a defence that relates to the accused person’s state of mind at the time of the offence and that is therefore relevant to his or her ability to form the requisite intent for the offence, such as intoxication or the ‘not criminally responsible’ defence under s. 16” of the *Criminal Code* (para. 40 (citations omitted)). In *Jaw*, the post-offence conduct consisted of objective physical actions — the accused, after the killing, had reloaded his gun and told his common-law spouse as he headed outdoors that he intended to kill himself. Demeanour was not in issue.
3. However, one of the problems with evidence of post-offence conduct of the sort we are dealing with here is that often the “inference sought . . . may be too equivocal for the evidence to be of any value” (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at p. 33). In *R. v. Figueroa*, 2008 ONCA 106, 58 C.R. (6th) 305, Doherty J.A. observed that “[w]hile it is for the jury to choose among reasonable inferences available from the evidence, the jury cannot be invited to draw speculative or unreasonable inferences” (para. 35). See also *Jaw*, at para. 39.
4. The same thing, of course, could be said of circumstantial evidence provided by *pre*-offence conduct. If the evidence introduced in relation to a contentious issue has no probative value — or “value” that depends entirely on “speculative or unreasonable inferences” — it is irrelevant and should not be cluttering up the jury’s deliberations. The question, as always, is what is the strength of the inferential link between the evidence in question and the fact sought to be established (*Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (3rd ed. 2009), at §2.58). In other situations the inferences urged by the prosecution from post-offence conduct are impermissible for legal reasons rather than illogicality. The right of a suspect to remain silent is a frequent instance. *Turcotte* is one example. Another is *R. v. Chambers*, [1990] 2 S.C.R. 1293, where evidence was led that the accused refused to speak to police following his arrest on charges of conspiring to import cocaine. The Crown asked the accused, “[W]hy did you not tell the authorities as soon as you were arrested that it may look bad, but you have an explanation for why it looks so bad. Why didn’t you?” (p. 1312). Cory J., for the majority, held, citing Martin J.A. in an earlier case, “that a person charged with a criminal offence has the rightto remain silent and a jury is not entitled to draw any inference against an accused because he chooses to exercise that right” (p. 1316 (emphasis added)). See *R. v. Symonds* (1983), 9 C.C.C. (3d) 225 (Ont. C.A.), at p. 227. The majority declined to apply the curative proviso and a new trial was ordered.
5. In short, if the evidence is not capable of (or cannot as a matter of law be used for the purpose of) justifying the inference sought by the prosecution, the evidence should be excluded or, if already in the record, effectively withdrawn from the jury with a “no probative value” instruction.

D. *This Case Is Covered by Arcangioli*

1. The question is whether this case has become a rerun of *Arcangioli* because the *actus reus* of the homicide was ultimately conceded. The only “live issue” before the jury was the intent (or lack of it) of the appellant to commit murder. In *Arcangioli*, the accused was charged with aggravated assault in connection with a stabbing which occurred during a fight. The accused admitted to punching the victim several times but testified that he fled when he saw another person on the scene stab the victim in the back. The trial judge instructed the jury that the evidence of the accused’s flight was a factor to be considered in reaching their verdict but that this evidence was not conclusive. Innocent people sometimes flee the scene of a crime. The accused was convicted. Defence counsel had not objected to the charge on this issue but this Court nevertheless ordered a new trial. The presiding judge should have told the jury that the accused’s flight was equally consistent with both common assault and aggravated assault. Accordingly, the evidence was not logically probative of the only “live issue” and the “jury should have been warned against drawing any inference from the fact of flight” (p. 145 (emphasis added)).
2. Where, as here and in *Arcangioli* itself, the participation of the accused in the killing is not a live issue for the jury, but it is only the “extent or legal significance of that participation” to which the Crown seeks to relate the evidence of post-offence conduct, a no probative value instruction may be warranted. As Major J. put it:

Such an instruction is most likely to be warranted where, as in *Arcangioli* itself, the accused has admitted to committing the *actus reus* of a criminal act but has denied a specific level of culpability for that act, or has denied committing some related offence arising from the same operative set of facts.

(*White (1998)*, at para. 28)

Thus a “no probative value” instruction like the one required in *Arcangioli* will be called for only “in limited circumstances” (*White (1998)*, at para. 27), i.e. where the post-offence conduct evidence urged by the Crown is not probative of a “live issue”. In my view, the Crown’s use of “no hesitation here, no shock, no uncertainty on his part” invited the jury to draw “speculative or unreasonable inferences” (*Figueroa*, at para. 35). I therefore conclude that a limiting instruction was necessary, as in *Arcangioli*, on the basis of lack of probative value of the evidence in relation to a “live issue”. Although *Arcangioli* did not deal with demeanour evidence, both this case and *Arcangioli* dealt with the evidence of post-offence conduct that was incapable of supporting the inference urged on the jury by the Crown.

1. In any event, despite the Crown’s reliance on demeanour prior to flight, the trial judge instructed the jury that they could make use of the evidence of flight itself as probative of intent, an inference directly prohibited by *Arcangioli*.

E. *Where the Post-Offence Conduct Is Relevant but the Prejudicial Effect Outweighs the Probative Value the Trial Judge Ought to Provide a Limiting Instruction*

1. Where the prosecution oversteps the bounds of fairness by pushing evidence of post-offence conduct that is of arguable but peripheral probative value and unfairly prejudices an accused — in the sense that it is likely to distort the jury’s fact-finding process by distracting it from the proper focus of its deliberations, or by simply blackening the character of the accused — the trial judge may exclude it or, if it is already admitted, give a no probative value instruction. In *White (1998)*, Major J. noted that where the “evidence cannot be said to be irrelevant to the issue in dispute, it might still be withdrawn from the jury by the trial judge on the basis that it is more prejudicial than probative” (para. 33). See also *R. v. Corbett*, [1988] 1 S.C.R. 670, and *R. v. B. (S.C.)* (1997), 36 O.R. (3d) 516 (C.A.).
2. Fish J.A. (as he then was) emphasized the trial judge’s discretion to direct the jury to disregard unfairly prejudicial evidence in his dissenting judgment in *R. v. Bisson* (1997), 114 C.C.C. (3d) 154 (Que. C.A.):

If the judge is satisfied that the probative value of the evidence is outweighed by its prejudicial effect — for example, because the risk of mistaken reliance is especially acute — the evidence should likewise be excluded or withdrawn from the jury’s consideration . . . . [p. 211]

Doherty and Rosenberg JJ.A. made a similar point in *B. (S.C.)*:

Conduct which is no more than unusual, rash or thoughtless can take on an unwarranted significance when viewed in hindsight at trial. The danger that after-the-fact conduct will be overemphasized by a trier of fact exists whether evidence of that conduct is offered by the Crown or the defence. That risk is best avoided by a judicious use of the power to exclude prejudicial evidence even though it has some probative value. [Emphasis added; p. 527.]

1. In *R. v. Bennett* (2003), 67 O.R. (3d) 257 (C.A.), for example, an accused was charged with the first degree murder of an 18-year-old woman. The case against him was entirely circumstantial. The prosecution led extensive post-offence conduct evidence including the accused’s anger at being described as someone capable of killing the victim, his failure to make certain phone calls upon learning of the victim’s death and his failure to ask police about the identity of the victim (p. 259). McMurtry C.J.O. found that the trial judge erred in allowing the jury to consider post-offence conduct of such tenuous nature as simply to invite speculation to the prejudice of the accused. For this and other reasons the court ordered a new trial. See also *R. v. Baltrusaitis* (2002), 58 O.R. (3d) 161 (C.A.), and *R. v. Powell* (2006), 215 C.C.C. (3d) 274 (Ont. S.C.J.), at para. 35.
2. Although in my view the demeanour description of “no hesitation here, no shock, no uncertainty on his part” should have been the subject of a no probative value instruction, I would in the alternative have held that the trial judge ought to have done so based on prejudice exceeding probative value.
3. It might be argued that the Court ought not to consider this aspect of the rules governing jury instructions on an appeal as of right because Finch C.J.B.C.’s dissent concluded that the evidence was not probative at all, not that it was more prejudicial than probative. I do not think the Court should thus tie its hands in this way on an appeal as of right. I would characterize the scope of Finch C.J.B.C.’s dissent more broadly, as it is recorded in the order of the court below: “The nature of the error by the learned trial judge in his instructions to the jury regarding the circumstances of the Appellant’s flight”. Finch C.J.B.C. held that a limiting instruction ought to have been given in relation to the evidence of the “circumstances of the Appellant’s flight”. It is open to the appellant to support the legal conclusion of the dissent on any ground permitted by the circumstances of the case.

F. *The Disagreement With Rothstein J.*

1. There is no doubt that post-offence conduct is a type of circumstantial evidence and that when it comes to the need for a limiting instruction much will depend on the facts. Rothstein J. concludes that the “admissibility of evidence of post-offence conduct and the formulation of limiting instructions should be governed by the same principles of evidencethat govern other circumstantial evidence” (para. 31). In support of this proposition, Rothstein J. invokes the following passage from Major J. in *White (1998)*: “Evidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence” (para. 21). Crucially, however, this passage from *White (1998)* is qualified as follows:

It has been recognized, however, that when evidence of post-offence conduct is introduced to support an inference of consciousness of guilt it is highly ambiguous and susceptible to jury error. As this Court observed in *Arcangioli*, the danger exists that a jury may fail to take account of alternative explanations for the accused’s behaviour, and may mistakenly leap from such evidence to a conclusion of guilt. [para. 22]

1. Major J. then goes on at para. 23 to describe the legal rules that have been adopted in specific response to these concerns. These rules may indeed be derivatives of the basic principles of circumstantial evidence applied to a particular context, but it is the particular area of concern identified in *Arcangioli* — not the general principles governing circumstantial evidence — that is at issue on this appeal.
2. Put differently, it is not enough simply to evaluate whether evidence as to the appellant’s “no hesitation here, no shock, no uncertainty on his part” might beportrayed as relevant to the issue of murderous intent merely “as a matter of logic and human experience” (reasons of Rothstein J., at para. 36, see also para. 42). Rather, as already discussed, relevance depends on the evidence having probative value in relation to a live issue. If the post-offence evidence of demeanour is not probative, it is not relevant. As to probity, it is necessary to evaluate demeanour evidence having regardtothe practical lessons that have accumulated in the courts over many years with respect to the potentially misleading nature of certain types of post-offence conduct. As a subset of post-offence conduct, use of evidence of post-offence demeanour (“outward behaviour or bearing”, *Canadian Oxford Dictionary* (2nd ed. 2004), at p. 400 “demeanour”) has led to serious practical difficulties in cases such as the wrongful conviction of Guy Paul Morin and the Crown’s ultimately unsuccessful prosecution of the nurse Susan Nelles.
3. In this case, my colleague Rothstein J. acknowledges as irrelevant the fact of flight but he supports the Crown’s argument about the appellant’s demeanour (“no hesitation here, no shock, no uncertainty on his part”) as relevant and appropriate. This, in my view, invites the jury to draw a speculative and unreasonable inference of guilt of second degree murder. It seems to me every bit as plausible to conclude that a person in possession of an illegal handgun that has just shot a stranger — accidentally or otherwise — would run away as fast and far as he could without any hesitation at all.
4. The bare fact of flight from the scene may be an objective fact. The same cannot be said of what a bystander interprets as a momentary lack of hesitation or absence of a demonstration of “shock” or “uncertainty”. This type of evidence depends on the unspoken assumptions that hesitation is normal whereas an immediate reaction is abnormal, and that the conduct of the appellant fell below some assumed but unarticulated standard of procrastination (whatever the “standard” is). Moreover, this assumed departure from the assumed norm is said to give rise — potentially — to the further inference of murderous intent. The double inference is problematic, and relies on the type of subjective after-the-fact evaluation which experience has shown to be unreliable. As stated in the Kaufman Report, “[p]urported evidence of the accused’s ‘demeanour’ as circumstantial evidence of guilt can be overused and misused. . . . The most innocent conduct and demeanour may appear suspicious to those predisposed by other events to view it that way” (pp. 1142-43).
5. Attempting to ascertain an accused’s state of mind from second-hand accounts of his or her demeanour after a traumatic event may well turn too much on subjective factors such as the accused’s particular personality, his level of awareness of the circumstances and the cultural background of both the observer and the observed. One commentator cited with approval in the Kaufman Report, at pp. 1145-46,makes the point as follows:

. . . while departure from the stereotype might legitimately arouse the suspicions of investigators, an inference of guilt can not be safely drawn from it. . . . The most that can be said is that the accused’s emotional responses to the event appeared to be unusual. Guilt would, of course, be one explanation for the apparently unusual nature of the accused’s responses; but another equally plausible one would be that the accused’s *general* emotional responses or levels of expressiveness differed from the norm. Without recourse to a battery of psychological testing, or the admission of a host of evidence about how the accused had responded in other, comparable, situations (if indeed any could be found), it is difficult to see how the jury could ever eliminate this possible explanation.

(A. Palmer, “Guilt and the Consciousness of Guilt: The Use of Lies, Flight and other ‘Guilty Behaviour’ in the Investigation and Prosecution of Crime” (1997), 21 *Melbourne U. L. Rev.* 95, at p. 142 (underlining added))

1. In support of his position to leave it all to the jury’s good sense, Rothstein J., at para. 56, cites *Corbett*, but of course in *Corbett* it was held by Dickson C.J. that the use the Crown could make of an accused’s criminal record *should* be limited by a “clear instruction”:

In my view, the best way to balance and alleviate these risks is to give the jury all the information, but at the same time give a clear direction as to the limited use they are to make of such information. Rules which put blinders over the eyes of the trier of fact should be avoided except as a last resort. It is preferable to trust the good sense of the jury and to give the jury all relevant information, so long as it is accompanied by a clear instruction in law from the trial judge regarding the extent of its probative value. [Emphasis added; p. 691.]

There was no such “clear direction” in this case.

1. In summary, my view is that the courts should continue to draw on their experience with evidence of post-offence conduct — especially where it involves post-offence “demeanour evidence” — and instruct juries with this experience in mind, just as is done by judges with the evidence of jailhouse informants, criminal records, eyewitness identification and evidence of uncharged misconduct (i.e. similar fact evidence). Of course, every argument about the need (or not) of a limiting instruction turns on the facts of the case. I therefore turn to the application of these principles to the facts here.

VI. Application to the Facts

1. The evidence of the appellant’s conduct after the shooting was certainly not used simply as part of the narrative: *Turcotte*, at para. 58. It was directed to a clear issue. Did the purported observation of “no hesitation here, no shock, no uncertainty on his part” tend to make more likely or less likely the existence of the specific intent necessary to support a verdict of second degree murder? The trial judge correctly charged the jury about the intent required:

. . . the Crown must establish that Mr. White intended either A, to kill Mr. Matasi. Or B, to cause Mr. Matasi bodily harm that he knew was likely to kill Mr. Matasi and was reckless whether Mr. Matasi died or not. Reckless in this context means that Mr. White could see or foresee the risk that Mr. Matasi could die from the injury but went ahead anyway and took that chance.

The appellant, having conceded his unlawful killing of Mr. Matasi, was guilty at least of manslaughter. The step up from manslaughter to second degree murder is a serious matter. The appellant was entitled to have the jury charged fairly with respect to the evidence available to the Crown to prove murderous intent beyond a reasonable doubt.

1. In these circumstances the applicable approach was set out by this Court in *Arcangioli* and in *R. v. Marinaro*, [1996] 1 S.C.R. 462, where the Court explicitly adopted the dissenting judgment of Dubin C.J.O. in the court below ((1994), 95 C.C.C. (3d) 74), who wrote:

Once the appellant had admitted at trial that he had caused the death of the deceased, however, such evidence [of post-offence conduct] had very limited application. It had no application in determining whether the offence committed by the appellant was either murder or manslaughter. [Emphasis added; p. 81.]

1. Nevertheless, Crown counsel sought to distinguish *Arcangioli* and *Marinaro* by urging the jury to rely on some subjective observations about “no hesitation here, no shock, no uncertainty”. He put his point to the jury in this way:

Note as well that the accused ran immediately after the shooting. There is no hesitation here, no shock, no uncertainty on his part, just immediate flight. One would expect hesitancy if the shot was anything other than the intended action of Dennis White. [Emphasis added.]

The Crown’s confident pronouncement that “[o]ne would expect hesitancy” presupposes some sort of “normal” reaction time for the appellant in the circumstances of an accident. However, the appellant’s alleged failure to register shock or uncertainty is entirely subjective and open to interpretation (unlike the physical actions and statements at issue in *Jaw*). The trial judge paraphrased but did not correct the Crown’s exhortation:

The Crown lastly noted that the accused ran away with no apparent hesitation or confusion, which suggests that what happened is what he intended to happen. This, the Crown suggested, indicates intention by one of the two ways possible for murder.

In fact, far from limiting the Crown’s submission, the trial judge seemingly endorsed the possibility of the jury drawing a legitimate inference of murderous intent from the simple fact of flight itself:

To determine Mr. White’s state of mind, that is what he actually meant to do, you must consider all the evidence. You should consider what you conclude Mr. White did throughout the course of the events leading up to and following the shooting of Mr. Matasi. . . .

. . .

You may consider Mr. White’s post-event conduct in fleeing the scene, but you should also be careful with it. [Emphasis added.]

At this point, the trial judge does not allude to the distinction made by the Crown between the simple fact of flight and the demeanour of the appellant immediately *prior* to flight (“no hesitation here, no shock, no uncertainty”). The trial judge refers to the fact of “flight” generally. He continues:

[Fleeing the scene] may not tell you much more than that for any number of reasons he would be in some kind of trouble if he stayed at the scene and it may not be of much assistance in assessing his precise state of mind at the time the gun was fired. That is for you to assess and consider. [Emphasis added.]

1. The instruction was incorrect, in my opinion. It was *not* open to the jury to leap from “fleeing the scene” to murderous intent. As to the demeanour argument relied on by the Crown, in my view it invited a speculative and unreasonable finding of murderous intent. It was not probative of intent and was therefore irrelevant.
2. On this point, Rothstein J. (at para. 77) argues that lack of hesitation is actually not demeanour evidence at all, but an objective fact from which a subjective interpretation, i.e. lack of shock or surprise, is an available inference. With respect, the issue is not whether there is an objective component but whether the evidence taken in context is probative of the prosecution’s case. In *Bennett*, for example, the Ontario Court of Appeal characterized a series of “objective facts” as “demeanour evidence that is highly suspect and easily misinterpreted” as follows:

. . . the trial judge should not have left three of these items of evidence with the jury as evidence from which they could infer consciousness of guilt: the appellant’s anger at being described as someone capable of killing the victim, his failure to make certain phone calls and his failure to ask police if Jennifer was thevictim. These forms of conduct are examples of demeanour evidence that is highly suspect and easily misinterpreted. [Emphasis added; para. 118.]

While this decision treats the idea of demeanour evidence rather broadly, it usefully reinforces the underlying principle that is of concern here, namely that the jury should not be invited to draw unequivocal inferences from equivocal conduct based on attributed motives and subjective interpretations (or misinterpretations) of (in this case) physical reactions. Such evidence does not provide a safe hook on which to hang a conviction for second degree murder.

1. Moreover, as Finch C.J.B.C. observed in his dissent, “[b]ecause the accused’s lack of hesitation and instantaneous flight are equally explainable by the consciousness of more than one offence, the conduct has no probative value in relation to intent” (para. 77). I agree with this conclusion. Different people react differently to traumatic events. It is entirely speculative to suggest that everyone who intends to commit murder will immediately flee, while everyone who accidentally kills another through unlawful acts without murderous intent will hesitate before fleeing despite being in flagrant possession of the unlawful handgun that did the killing. The Crown asked the jury to draw “speculative or unreasonable inferences” on the issue of the specific intent (*Figueroa*, at para. 35) and, in my view, the jury ought to have been instructed that the evidence of flight *and* the pre-flight demeanour was of no probative value on the issue of murderous intent.

A. *Failure of Defence Counsel to Object to the Judge’s Jury Instruction*

1. The Crown urges in this case, as it did in *Arcangioli* and *Jacquard*, the significance of the failure of defence counsel to object to this aspect of the charge at trial. In some circumstances this is a cogent consideration. In *Thériault v. The Queen*, [1981] 1 S.C.R. 336, Dickson J. (as he then was) expressed the view at pp. 343-44 that “[a]lthough by no means determinative, it is not irrelevant that counsel for the accused did not comment, at the conclusion of the charge, upon the failure of the trial judge to direct the attention of the jury to the evidence”.
2. There are certainly cases in which the impact of events unfolding at trial is not clear from a transcript, and the failure of experienced defence counsel to object may suggest that the errors now alleged were seen, in context, as harmless. In other situations the failure to object may of course be tactical, as where in the defence counsel’s view a correction may be more damaging than letting the error pass in silence. Nevertheless, “the jury charge is the responsibility of the trial judge and not defence counsel” (*Jacquard*, at para. 37). The gravity of the error is a valid consideration for appellate interference.
3. The appellant was not entitled to a perfect trial but he was entitled to a fair trial, and the failure of his trial counsel to object should not deny him relief. The error went to the heart of the only “live issue” remaining in the case.

B. *The Curative Proviso Is Not Applicable*

1. While the B.C. Court of Appeal (unlike my colleague Rothstein J.) was unanimous in its view that the trial judge had erred in his instruction to the jury, the majority applied the curative proviso in s. 686(1)(*b*)(iii) on the basis that the error of law did not occasion any substantial wrong or miscarriage of justice.
2. The case law under the curative proviso was recently reviewed by the Court in *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, and *R. v. Illes*, 2008 SCC 57, [2008] 3 S.C.R. 134. The general rule is that the proviso can only be invoked with respect to “errors of a minor nature having no impact on the verdict” or “serious errors which would justify a new trial, but for the fact that the evidence adduced was seen as so overwhelming that the reviewing court concludes that there was no substantial wrong or miscarriage of justice”. By “overwhelming” it is meant that “a trier of fact would inevitably convict” (*Illes*, at para. 21): see *R. v. Charlebois*, 2000 SCC 53, [2000] 2 S.C.R. 674, at para. 11; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 26; and *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, at para. 81.
3. It cannot, in my respectful view, be said that the prosecution’s case for second degree murder was overwhelming. The evidence of eyewitnesses was conflicting, both in detail and even in their general recollections of the fight that preceded the shooting. The forensic evidence of the angle at which the fatal bullet entered the victim was helpful to the Crown but was scarcely decisive. In summary, the jury had little to work with in finding a way to choose between the hand to hand combat scenario (suggesting manslaughter) and the downwards shooting of an individual already on the ground with his legs “splayed out in front” (which might suggest second degree murder). In these elusive circumstances, post-offence conduct of reaction time and demeanour took on considerable importance, which is why, no doubt, the Crown laid emphasis on it in its closing argument. Finch C.J.B.C. succinctly summarized his reasons for declining to apply the curative proviso as follows:

I am unable to say that there is no reasonable possibility that the verdict would have been different had the jury been told that the evidence of the appellant’s post-offence conduct could not be used to resolve the issue of intent. That issue was, I repeat, in effect, the only live issue the jury had to consider. It cannot safely be concluded that the uncorrected invitation by the Crown to infer intent on the basis of the appellant’s immediate flight, combined with the judge’s review of the Crown’s position, his failure to give a “no probative value” instruction, and his instruction linking the evidence of post-offence conduct to the mental element, could not have affected the outcome of the appellant’s trial. [para. 100]

I agree the error was not harmless. The curative proviso should have no application.

VII. Disposition

1. I would allow the appeal and order a new trial.

*Appeal dismissed,* McLachlin C.J. *and* Binnie *and* Fish JJ. *dissenting.*

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