

CANADA / JUDGMENT

R. v. Beckett

2020 BCCA 262

COURT

British Columbia Court of Appeal

DECIDED

29 September 2020

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2020 BCCA 262 R. v. Beckett

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Beckett,

2020 BCCA 262

Date: 20200929

Docket: CA44755

Between:

Regina

Respondent

And

Peter Ernest Edward Beckett

Appellant

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Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated September 16, 2017 (R. v. Beckett, 2017 BCSC 1754, Kamloops Docket 96100-1).

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Place and Date of Hearing:

Vancouver, British Columbia

June 25-26, 2020

Written Submissions filed:

July 9, August 5, 12, 2020

Place and Date of Judgment:

Vancouver, British Columbia

September 29, 2020

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Butler

Summary:

The appellant was convicted by a jury of first degree murder after his wife drowned when they were boating. He appeals against conviction on the basis that (1) the judge erred in instructing the jury on fabrication with respect to his statement to police shortly after the drowning; (2) the judge erred in admitting speculative evidence and in her instruction on how that evidence could be used; (3) Crown counsel's submissions to the jury were improper; and (4) the verdict was unreasonable within the meaning of s. 686(1)(a)(i) of the Criminal Code.

Held: Appeal allowed, conviction quashed and a new trial ordered.

The judge erred in instructing the jury that they could use the appellant's statement to police as evidence of fabrication supporting a finding of guilt in the absence of independent evidence the accused intentionally concocted the story in order to mislead. The judge also erred in admitting certain evidence, including inherently unreliable demeanour evidence and evidence that invited the jury to engage in improper speculation. Crown counsel's submissions to the jury were improper insofar as Counsel adverted to unproven facts and gave evidence. Although the Crown's case was not strong, it could not be said that the jury's verdict was unreasonable. An acquittal is accordingly not warranted.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

Background

- [1] On a warm August evening in 2010, the appellant Peter Beckett and his wife, Laura Letts-Beckett, were boating on Arrow Lake near the provincial park where they were camping. At some point Ms. Letts-Beckett--who could not swim and was not wearing a life jacket--entered the water, and drowned. One year later, Mr. Beckett was charged with first-degree murder. The first trial concluded with a hung jury. A second jury convicted Mr. Beckett in September 2017.
- [2] The case against Mr. Beckett was entirely circumstantial; there was no forensic evidence that a crime had occurred. The central issue was whether Ms. Letts-Beckett's death was the result of a tragic accident or murder.
- [3] Mr. Beckett did not testify at the second trial, but the Crown put into evidence a statement he gave to the police within a few hours of his wife's drowning. The Crown in closing submissions described the statement as "the most important evidence of Mr. Beckett's guilt", submitting he had intentionally fabricated his version of events in order to mislead the police.
- [4] The full statement is attached to this judgment as Appendix "A", but I will highlight the statement here. Mr. Beckett was asked to describe everything that took place from the time he woke up that morning. He said he went out fishing alone in the couple's Zodiac at 5:30 a.m., visited with another camper, and then travelled into Revelstoke with his wife to run various errands. Mr. Beckett described returning to the campground, having lunch, the couple being sexually intimate, and then sometime before 4:00 p.m. the two of them going out in the Zodiac.
- [5] Mr. Beckett said his wife was sitting in the front of the boat on top of her life jacket, which she had placed on a cooler, with a cushion on top. She was holding an open sun umbrella. He sat at the back on another cooler, facing away from his wife and toward the motor with two fishing rods out. They proceeded slowly down the lake for 2-3 miles. It was very hot. As the sun began to go behind the hills they moved closer to the shore to take advantage of the shade. Ms. Letts-Beckett said that her back was sore. Mr. Beckett then heard a splash and his wife and the umbrella went over the side. He grabbed his rod and started winding it in, a

"stupid fisherman's instinct" response. He got further away from Ms. Letts-Beckett and she went under more, panicking. He grabbed the other rod, threw it in or let it go and spun the boat around. He could see her under the water, turned the engine off and went over the side of the boat. He could not get down far enough to reach her underwater--Mr. Beckett is about six foot seven and 400 pounds. He swam to the shore, got a rock and swam back but could not find her initially until he saw some bubbles coming up. He used the rock to get down to her and managed to grab her hands and pull her up to the surface. He attempted resuscitation on the surface of the water as he pulled her to shore and continued on shore but her only response was gurgling. Mr. Beckett was unsure whether to continue or to leave to get help. He swam out to the Zodiac which had drifted out and brought it back to shore but was unable to lift her into it. He left to get help but then decided he did not want to leave her and returned to shore where he continued resuscitation and held her. He left again, drove the Zodiac fast out to a pontoon boat in the distance, and struck it. He and the occupants returned to the shore where the two men again attempted resuscitation, realized it was futile, and then lifted Ms. Letts-Beckett's body into the pontoon boat to return to the campground.

- [6] In response to follow-up questions put to him by the officer, Mr. Beckett said he had been going faster than normal for trolling, that his wife was not wearing a life jacket and went into the water on her side and back, with her feet leaving the boat last. He described her travelling half under the boat and said she was "just arms and legs and screaming" and moving out the back of the boat quickly. He thought that if he could get the rod in he could get around to her; he was winding the rod in but she was getting further behind him; when he threw the rod she was submerged ten feet and was not swimming. He tried to get down to her ten times before he left to get a rock from the shore to counteract his buoyancy.
- [7] The Crown led evidence over six and a half days of trial. The Crown's case rested on what it described as the suspicious circumstances of Ms. Letts-Beckett's drowning on such a calm day, bolstered by evidence of motive and several items of post-offence conduct consistent with consciousness of guilt. The Crown's theory was that Mr. Beckett, having taken steps to acquire accidental death insurance several weeks before Ms. Letts-Beckett's death, likely knowing she was well-insured through her employer, and worried that she might decide to leave him in order to reconcile with her parents who had shunned her for marrying a divorced man, took her out on the Zodiac to a secluded cove, not visible from the highway or campground, with the intention of causing her to fall from the boat and drown. The Crown contended Mr. Beckett staged the scene to make it look as though her death was accidental, including recovering her body and attempting resuscitation and ultimately providing a fabricated exculpatory statement to police.
- [8] The Crown relied heavily on after-the-fact conduct including:
- Mr. Beckett's statement which was argued to contain odd features, such as Mr. Beckett reeling in his fishing line after realizing his wife was in the water;

- evidence that he believed he would be entitled to his wife's share of the estate of her wealthy parents when they died;
- Mr. Beckett's concern that his wife's will had been altered by Ray Barlow, the lawyer who prepared it;
- evidence that Mr. Beckett was concerned about how Google Earth worked and whether it recorded; and
- evidence that he wanted to retain an inmate he met while in pre-trial custody, Witness "A", to "take care" of witnesses before trial.

- [9] Mr. Beckett defended the charge on the basis that the Crown could not, and had not, proved beyond a reasonable doubt that Ms. Letts-Beckett's death was the result of an unlawful act, rather than a tragic accidental drowning. The defence asserted that Mr. Beckett's exculpatory statement to police that day was a true account of events. Nothing he said had been disproved--to the contrary, the buoyancy expert, autopsy and pathologist's evidence all supported his statement, and divers sent to the scene a year after he was charged found the fishing rods and umbrella in the location where he said they had gone overboard.
- [10] Close friends of the couple were called to speak to the strength of their marriage relationship, and Mr. Beckett's distraught reaction to losing his wife. A pathologist confirmed there was no evidence of trauma, and that the cause of death was likely drowning and "cold water shock" syndrome. An expert testified to the glacial temperature of the waters of Arrow Lake at that location. Another expert in buoyancy and diving confirmed that Mr. Beckett's description of using a rock to overcome his buoyancy was consistent with what is known about human buoyancy and diving (the Crown had made much of the implausibility of this part of Mr. Beckett's statement in the first trial). Evidence was led confirming that the purchase of additional insurance by the couple two months before the drowning replaced another form of insurance and put them in the same position they had been in previously.
- [11] Mr. Beckett submitted he had no motive to want his wife dead. Despite extensive police surveillance and search warrants, the Crown led no evidence to suggest he was in financial difficulty, no evidence he was concerned that his wife was about to leave him, nothing to underpin a motive for murdering her. The defence argued that the jailhouse informant's evidence was highly untrustworthy, should not be believed, and that the entire theory of the Crown's case was built on unreasonable speculation based on an assumption of murder.

Issues

- [12] Mr. Beckett raises the following grounds of appeal:
1. the judge erred in instructing the jury on fabrication;

2. the judge erred in admitting speculative evidence and in her instruction on how that evidence could be used;
3. Crown counsel's submissions to the jury were improper; and
4. the verdict was unreasonable and not supported by the evidence.

[13] For the reasons that follow I conclude that the appeal must be allowed, the conviction set aside, and a new trial ordered. I turn now to the first ground of appeal.

1. Did the trial judge err in instructing the jury on fabrication?

[14] It is settled law that an accused's conduct following a crime, such as flight from the scene, can constitute circumstantial evidence from which an inference of guilt may be drawn. False statements made by an accused are another type of post-offence conduct: *R. v. Arcangioli* (1994), 87 C.C.C. (3d) 289 at p. 299 (SCC); *R. v. Tessier* (1997), 113 C.C.C. (3d) 538 at para. 24 (BCCA). However, the law draws a firm distinction between statements that are disbelieved and therefore rejected by the trier of fact, and those that are proved to be intentionally fabricated. The former have no evidentiary value; the latter are evidence from which an inference of consciousness of guilt may be drawn. If that inference is drawn, the trier of fact can use it in deciding whether the Crown has proved beyond a reasonable doubt that the accused committed the crime: *R. v. O'Connor* (2002), 62 O.R. (3d) 263 at para. 17 (C.A.); *R. v. Witter*, 105 C.C.C. (3d) 44 at paras. 52-53 (Ont. C.A.). In essence, if the trier of fact finds a statement has been fabricated, that fabrication can be used against the accused.

[15] The distinction between a statement that is not believed and one that is found to be fabricated is a subtle one, because in both cases the statement is rejected by the trier of fact as untrue: *Ryan J.A. in Tessier* at para. 67. But the distinction is an important one. *Doherty J.A.* explained why that is so in *R. v. Coutts* (1998), 40 O.R. (3d) 198 (C.A.):

15 This distinction between statements which are disbelieved and, therefore, rejected and those which can be found to be concocted and capable of providing circumstantial evidence of guilt cannot be justified as a pure matter of logic. In many, if not most cases, the inference of concoction flows logically from the disbelief of an accused's statements or testimony. The distinction made in *Mahoney* is, however, fully justified and, indeed, essential to ensure that the trier of fact properly applies the burden of proof in cases where statements of an accused are tendered or an accused testifies. If triers of fact were routinely told that they could infer concoction from disbelief and use that finding of concoction as evidence of guilt, it would be far too easy to equate disbelief of an accused's version of events with guilt and to proceed automatically from disbelief of an accused to a guilty verdict. That line of reasoning ignores the Crown's obligation to prove an accused's guilt beyond reasonable doubt.

[Emphasis added.]

[16] Thus, even though it may be logical to infer, from an accused telling a story that is not true, that they have intentionally fabricated it, the law requires a further evidentiary step to safeguard against improper reasoning by the jury. In order to avoid convictions founded on disbelief of the accused's version of events, the Crown is permitted to rely on a rejected statement as circumstantial evidence of guilt only if it has led evidence that the accused intentionally concocted the story in order to mislead--sometimes referred to as "independent evidence of concoction": Tessier per Ryan J.A. at 556, per Southin J.A. at 561; Coutts at para. 15. The evidence supporting concoction must be "independent" in the sense that it is distinct from the evidence relied on to convince the jury that the accused's version of events should not be accepted. As stated in *R. v. Baltovich* (2004), 73 O.R. (3d) 481 at para. 99 (C.A.):

Having relied upon certain evidence to find that an alibi is false, the jury cannot, as a matter of course, turn around and use the same evidence to find that the alibi was fabricated ...

In short, the trier of fact cannot use the same evidence to find both falsity and concoction: *R. v. M.J.H.*, 2019 YKCA 15 at paras. 50-58; *R. v. Hibbert*, 2002 SCC 39 at para. 59; O'Connor at paras. 18, 19, 21, 23.

[17] As Ryan J.A. said in *Tessier* at para. 68, there are two reasons the law requires independent evidence of concoction. First, if the same evidence in support of falsity of the statement is used, the reasoning becomes impermissibly circular: the Crown's repudiation of the accused's version of events is convincing, so that must mean the accused is not telling the truth--if his version is not true, then the Crown's version of what occurred must be. Second, because intentional fabrication of a statement suggests consciousness of guilt and can be used as part of the Crown's case against an accused, there must be a solid evidentiary basis to support it. In Ryan J.A.'s words "it is not unreasonable to demand that this evidence be found independently of the other evidence of the proof of the crime."

[18] It is convenient at this point to address the appellant's first submission in support of his contention that a fabrication instruction should not have been given. He submits that, before a trier of fact can be invited to rely on fabrication as circumstantial evidence of guilt, the Crown must as a first step prove the statement is untrue by leading extrinsic evidence of falsity, before moving to the second step of proving concoction by way of independent evidence. "Extrinsic" evidence of falsity is used here in the sense of evidence other than the words of the statement itself which could be disbelieved simply because they are implausible. A good example of extrinsic evidence of falsity is found in *R. v. Clifford*, 2016 BCCA 336. In that case, police were investigating an act of arson in Cranbrook. The accused told the police he was at his home in Camrose, Alberta, when the events occurred. Cell phone records proved this statement to be false, as they established that he was in fact using his phone in Cranbrook at the critical time near the location of the blaze.

- [19] The defence contends the Crown in the present case failed to lead the requisite extrinsic evidence proving Mr. Beckett's version of events to be false. Instead, it relied on aspects of Mr. Beckett's statement that it contended were implausible enough to cause the jury to disbelieve it: taking the time to reel in a fishing line, turning off the motor when his wife was already in the water, and swimming to shore to get a rock. The defence notes that the only extrinsic evidence relating to Mr. Beckett's version of events supported it--police divers one year later recovered the very items Mr. Beckett said had gone overboard in the incident.
- [20] In my view the judge was correct to hold that it is not a prerequisite to a fabrication instruction for the Crown to prove by way of extrinsic evidence, that a statement is false. I acknowledge that, in most cases, direct evidence contradicting the accused's version of events given in an alibi or an exculpatory statement will be led as part of the Crown's case--but it need not be so. The jurisprudence does not distinguish between exculpatory statements or alibis that are "disbelieved", "rejected", or found to be "false"--these terms are used interchangeably to refer to the same legal concept--a finding that the accused's version of events is not true, or more precisely, does not raise a reasonable doubt in the jury's mind: O'Connor at para. 31; R. v. Stevenson, 2014 ONCA 842 at para. 93; R. v. Bradey, 2015 ONCA 738 at paras. 171, 179. The jury's finding that the accused's statement is not true may be made on the totality of the evidence, or simply based on the nature of the statement itself. The danger of improper reasoning--from disbelief of the accused's version of events to guilt--is addressed by the requirement that, before the Crown can invite the jury to use their disbelief of the statement as evidence against the accused, it must show by way of a different body of evidence that the statement was intentionally concocted by the accused. It is that requirement that is determinative of this ground of appeal.
- [21] In the present case, the prospect of charging the jury on fabrication first arose at the close of the Crown's case, when the defence brought an application for a directed verdict. It was also a central focus of pre-charge discussions. Defence counsel strongly objected to a fabrication charge on the basis that there was neither extrinsic evidence of falsity (a requirement I have now rejected) nor of concoction.
- [22] The trial judge expressed some uncertainty on the question, but eventually determined that a fabrication instruction was appropriate. She instructed the jury that they could find Mr. Beckett had intentionally fabricated his statement to police. She adopted the model language in the Canadian Criminal Jury Instructions, 4th ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2005 ("CRIMJI")), saying (in part):

I want to make an additional comment about how you can use the statement made by Mr. Beckett on August 18, 2010. A false or misleading statement made by a person after a crime has been committed will, in some circumstances, be evidence from which it can be inferred that the person is attempting to mislead the police or others, and deflect suspicion away from himself or herself because the person actually committed the offence. In order to use the statement in this manner, it is not enough that you simply disbelieve the statement or that you believe the statement was false. You must first find that the statement was false, meaning that you reject Mr.

Beckett's statement that his wife fell into the water. You must then also find that the statement was concocted or deliberately fabricated with the intention of avoiding suspicion or culpability.

You cannot come to that conclusion simply because you disbelieve the statement or because you are satisfied that the statement is false. There must be additional independent evidence that leads you to the conclusion that the statement was deliberately fabricated for the purpose of misleading the police or for the purpose of avoiding suspicion or culpability. That independent evidence may include the circumstances in which the statement was made. The circumstances in which the statement was given to Constable McLean, now Perreault, include the fact that at the time Mr. Beckett was not a suspect and had no reason to believe he was a suspect. You may also find that at least some of the information he provided was very detailed. Bear in mind also that the evidence that you heard from Constable Perrault that Mr. Beckett was sad, subdued and emotional when he gave the statement, and the evidence of Jacqueline Olsen, the retired staff sergeant, who described Mr. Beckett as shocky. [Emphasis added.]

- [23] There is no doubt that the circumstances in which a statement is made may be used as evidence of fabrication: O'Connor at para. 26. However, in my respectful view, the judge in the present case erred in concluding that the detailed nature of Mr. Beckett's statement and his status as a non-suspect were probative of concoction in the circumstances of this case. The context in which the statements were made in the two cases is quite different.
- [24] In O'Connor, the victim was shot to death on the shoulder of a highway near Fort Erie about 5:20 a.m. on November 7, 1996. Later that day, police started their investigation without a theory as to why the victim was killed or who had shot him. Several officers were assigned to investigate the victim's background and his movements prior to his death. The officers soon learned that the victim had played poker at a charity casino a few hours before his death and that Mr. O'Connor had also been at the same casino recruiting players for a poker game to be held after the charity casino closed at 4 a.m. The officers knew that O'Connor was involved in the gambling scene in Fort Erie and hoped he might have information about the victim's background--but they did not consider him to be a suspect. In response to police inquiries, O'Connor gave a statement which the Court of Appeal summarized this way:
- [9] At the police station, the appellant told [the officers] that he had gone to the charity casino at around 3:30 a.m. on November 7. He returned to the Social Club with several prospective poker players, arriving at about 4:15 a.m. There were too few players to hold a game and by 5:00 or 5:30 a.m. all the prospective players had left the Club. The appellant said that he stayed at the Club until between 6:00 and 6:10 a.m. (Grondin was shot at 5:20 a.m.). Three other persons, Paul Bailey, Jeff Newman and Tom Dimeo, were also present at the Social Club at the same time. The appellant said that when he left the Club, he drove his truck across the border to West Avenue in Buffalo, New York, where his friend and occasional roommate, Wayne Cross, lived. He said he crossed the border at about 6:30 a.m. and arrived at Cross's apartment at about 6:35 a.m. The appellant said that he sometimes stayed with Cross and sometimes stayed in Fort Erie with his then girlfriend, Diane Wolbert. After interviewing the appellant for forty-five minutes, Willette and Cudney drove the appellant

back to the Social Club. They asked to see his truck and the appellant let them examine it.

- [25] The timing and nature of O'Connor's statement was significant because, when asked general questions about the victim's background and whereabouts, he gave a highly detailed description of his own whereabouts around the time of the murder, putting himself well away from the scene of the crime--details which were proved through extrinsic evidence in that case to be false.
- [26] In contrast, in this case, Mr. Beckett was interviewed as the only witness to a drowning. Unlike O'Connor, he was asked to describe what he had been doing throughout the day. As to the amount of detail provided, the interview began with the police officer asking Mr. Beckett to explain "from the point that you guys woke up this morning everything that took place".
- [27] Mr. Beckett, who was consistently described by witnesses as a "talker" and "an open book" proceeded to do just that. He began his statement with waking up at five in the morning and then proceeded to outline everything that he and Ms. Letts-Beckett had done that day. In this context, a detailed description of what had occurred leading up to the drowning and beyond cannot logically be probative of fabrication.
- [28] As Ryan J.A. stated in Tessier, "there must be a solid evidentiary basis of fabrication" before a statement found to be untrue can be used as circumstantial evidence of guilt: at para. 68. The judge must bring a critical eye to assessment of the relevance and probity of the evidence the Crown relies on. Whether evidence is probative of deliberate fabrication will always depend on the context of the particular case.
- [29] The misdirection here was all the more significant because the judge identified the aspects of the statement which might lead the jury to believe it was fabricated--the provision of very detailed information when he was not a suspect--without providing the information that supported the statement being true. She reminded the jury that Mr. Beckett was "sad, subdued and emotional when he gave the statement" and that an officer had described him as "shocky", but she did not remind the jury that Mr. Beckett had been asked to "start in the morning when he woke up" and to provide a description of "everything that took place".
- [30] The ultimate question in assessing the adequacy of a charge is whether the jury has been properly instructed to avoid misuse of the post-offence conduct: *R. v. Trotman*, 2006 BCCA 366 at para. 82. In the present case, relying on the detail provided in circumstances in which the police had requested it resulted in an illogical instruction to the jury. As the appellant's counsel put it:

How could it ever be said that a man whose wife has just drowned in a boating accident would not provide detailed answers to police, and that doing so was independent evidence of concoction, from which guilt for a homicide could be inferred? And how does his not having been a suspect logically lead to an inference that detailed answers to questions by police suggest the death was a homicide rather than accident? Would not terse, vague or ambiguous answers be more suspicious? (*R. v. Hall*, 2010 ONCA 724, paras. 168-170; *R. v. Bradey*, 2015 ONCA 738, para.

17)

[31] The Crown submits that even if the circumstances of the statement to police do not constitute independent evidence of fabrication, the inconsistency between that statement and Mr. Beckett's statements to Witness "A", the jailhouse informant, filled the void. At trial, Witness "A" testified that on first meeting Mr. Beckett, he gave the following account of the events leading to Ms. Letts-Beckett's death:

[H]e explained to me that he was out boating in a Zodiac with his wife, and told me that he was positioned in a way where he was facing the stern of the boat, like, fishing. And his wife was up front, at the bow. And he said that he didn't notice that she'd fallen off. And then as the boat travelled, he could see her flailing underwater.

The Crown says there are significant differences between the two statements because in his police statement Mr. Beckett implies that he heard a splash and therefore noticed immediately that his wife had fallen off the Zodiac, whereas in the statement Witness "A" described, Mr. Beckett said he did not notice that she had fallen off and suggested she may have slid into the water "stealth-like". Since Mr. Beckett gave contradictory statements, says the Crown, one of them must have been intentionally fabricated.

[32] The Crown made the same submission to the judge during discussions about the charge, but she did not accede to the request to put the inconsistencies between the police statement and what was said to Witness "A" to the jury as proof of concoction. In my view that was the right decision because the differences in the two descriptions are not significant enough to support an inference of fabrication--the versions are substantially the same: *R. v. Hein*, 2008 BCCA 109 at para. 56; *R. v. Samuels* (2005), 196 C.C.C. (3d) 403 at para. 39 (Ont. C.A.); *R. v. Bennett* (2003), 67 O.R. (3d) 257 at para. 116 (C.A.).

[33] The Crown submits further that Mr. Beckett's statement contains such odd and implausible details that they suffice as proof of concoction. They are akin, says the Crown, to an accused saying an alien harmed the victim--there are some statements that are so inherently implausible that external evidence of concoction is unnecessary. In effect, the Crown says that in such cases the same evidence that leads a trier of fact to disbelieve a statement may also be used to establish intentional fabrication--despite the general rule to the contrary.

[34] The Crown points to *R. v. Polimac*, 2010 ONCA 346. In that case, the victim died after falling from a cliff while hiking with the accused, her common-law husband. There was strong evidence of motive as the husband had been having a long-time affair with another woman who had recently delivered their child, and he had promised her that they would soon move into the family home. Shortly after his wife's death, the accused made exculpatory statements to first responders to the effect that his wife had slipped and fallen from an outcropping while his back was turned. He described looking back and seeing her rolling down the incline before screaming to him for help; he scrambled and slid down the hill to her where she again asked him to go for help. On appeal, the Ontario Court of Appeal held that it was open to the jury to infer from the circumstances, that is "the proximity of many of

the statements to [the victim's] death, the detailed and precise narrative set out in the statements, the persons to whom the statements were made, and the fact that the appellant was not under any suspicion", that the statements, if false, were deliberately fabricated to avoid liability: Polimac at para. 92.

- [35] The Crown also relies on Trotman, a case in which the appellant was charged with murder after the victim was stabbed to death in his tenth storey apartment. Shortly after her death, the appellant made a series of 9-1-1 calls in which he made statements indicating that an unknown third party had committed the offence. At trial, the Crown argued that these calls were fabricated as part of an attempted cover-up by the accused. On appeal, this Court held that it was open to the jury to find that the appellant's exculpatory statements--if disbelieved--were fabricated as "the possibility of error by the appellant did not arise. Either the appellant was truthful during the 9-1-1 calls when he said that a person other than himself was the killer or he invented those assertions in an attempt to divert suspicion from himself": Trotman at para. 69.
- [36] The Crown argues that Trotman and Polimac are analogous to the present case in which a detailed, disbelieved statement is given to police immediately after the alleged offence occurs. I concede that these cases are on their facts difficult to reconcile with "the bulk of the case law which requires independent proof that an alibi has been concocted by an accused before the notion of consciousness of guilt may be left with the jury": Ryan J.A. in Tessier commenting on R. v. Michaud, [1996] 2 S.C.R. 458, and R. v. Letourneau (1994), 87 C.C.C. (3d) 481 (BCCA). Ryan J.A. postulated that it may be that in some cases the accused's version of events standing alone is so improbable that it is safe for a jury to infer that the alibi has been concocted. The cases relied on by the Crown in the present case involve facts of that kind.
- [37] In Polimac, there was clear forensic evidence that the victim's neck had been broken on impact, that she died instantly, and that she would have been incapable of speaking, let alone screaming for help as described by the accused. Similarly, in Trotman, there were many witnesses, none of whom saw a third person, and the crime scene and forensic evidence strongly implicated the accused.
- [38] Stevenson is another case in which the implausibility of the statement itself appears to have been the basis of a finding of concoction justifying a fabrication instruction. In that case, the accused's ex-wife was shot at 7:20 p.m. The accused was arrested within four and a half hours of the killing. When asked by the police to describe his whereabouts that evening, and in particular around the time in issue, the accused said he could not remember where he had been "because of the trauma of being arrested at gunpoint by police". Over time, he repeated the assertion that he had no memory of where he was that evening at all: Stevenson at para. 93.

- [39] In my view Polimac, Trotman, and Stevenson and the "alien" scenario are examples of statements and alibis in which the accused's version of events was so implausible that an inference of concoction arguably could "be safely drawn": Tessier at para. 66. However, if there is an exception to the general rule that independent evidence of concoction is required before the jury can be invited to use the disbelieved statement as evidence of guilt, this is not such a case. There was nothing in Mr. Beckett's version of events that was impossible or even highly improbable.
- [40] Although I have attempted to reconcile these cases that do not seem to fit easily into the framework requiring independent evidence of concoction, it is an uneasy exercise given the unequivocal direction in the jurisprudence that the same evidence that causes the jury to disbelieve the statement cannot be used to establish concoction. In Hibbert the Supreme Court of Canada in rejecting a suggestion that it had in Michaud departed from the well-settled rule, said:
- [59] Michaud should not be taken as a departure from the well-established position expressed and followed by the courts of appeal in the cases cited above. It is unnecessary in this case to determine the nature and scope of evidence necessary to show concoction so as to permit the instructions inviting the inference of consciousness of guilt. Suffice it to say that the cases have consistently pointed out that there must be evidence linking the accused to fabrication and that such evidence cannot emerge from a mere rejection of the alibi tendered. Many have spoken of the need for independent evidence of fabrication above and beyond a finding that the alibi is false. (See Ryan J.A. in Tessier, supra, at p. 556.)
- [Emphasis added.]
- [41] In this case, it was certainly open to the jury to disbelieve Mr. Beckett's description of what occurred on the water that day. However, if they made that finding they would have been left with the direction in R. v. W.(D.), [1991] 1 S.C.R. 742, to consider whether it nonetheless raised a reasonable doubt and if not, to move on to consideration of the rest of the evidence. In the absence of a fabrication instruction, they could not have used their disbelief of the statement as evidence supporting a finding of guilt.
- [42] In most cases, the danger of a jury's improper use of a disbelieved statement leading to a miscarriage of justice is more theoretical than real because of the strength of other evidence led by the Crown: per Southin J.A. in Tessier at para. 91. But it is a real danger where the central issue is whether a murder has occurred at all, the Crown's case is entirely circumstantial, and the other main pillar, in addition to the impugned statement, is the evidence of a witness of "doubtful veracity" (Southin J.A.'s words) such as Witness A--who had a strikingly long record of offences involving dishonesty, and admitted to making up stories to mislead police and create "deflections".

- [43] In summary on this ground of appeal, and with respect, I conclude that the judge erred in giving the jury a fabrication instruction inviting them to use Mr. Beckett's statement as evidence of after-the-fact consciousness of guilt.
- [44] Before turning to the curative proviso, I wish to address an alternative submission raised by the appellant at the hearing of the appeal. Mr. Fowler contended that a judge instructing a jury on fabrication must tell them that they must be satisfied beyond a reasonable doubt both that the appellant's statement was false and that it had been concocted before they go on to consider the statement as evidence of guilt. The parties were granted leave to file supplemental submissions on this issue.
- [45] The appellant's submission is contrary to the well-accepted general principle that the standard of proof beyond a reasonable doubt does not apply to individual pieces of evidence: *R. v. Morin*, [1988] 2 S.C.R. 345. However, he argued that an exception to the principle is warranted in relation to a fabricated statement, because, although it is a form of after-the-fact conduct evidence, it is unique in that one of its essential elements is that the accused's intention or purpose was to deflect suspicion away from himself because they actually committed the offence: *R. v. White*, [1998] 2 S.C.R. 72 at para. 20. The appellant argues that guilt is thus embedded within the legal test and provides a direct reasoning path to a finding that the accused is guilty of the offence.
- [46] In a circumstantial case in which the fabrication of the statement is the main pillar of the Crown's case, the appellant says there is a very real risk that an accused could be convicted on a balance of probabilities. To avoid that, if the Crown wishes to ground its theory of culpability on the finding that the accused fabricated a statement to avoid guilt, then it is entirely consistent with the Crown's burden and standard of proof that it be required to prove falsity and concoction beyond a reasonable doubt. Counsel for the appellant put it this way:

Simply telling a jury they can "find" a statement was false, and "find" a statement was fabricated to avoid culpability, without instructing the jury on the degree of proof required to make such a finding, undermines the most important principle of criminal law - that culpability be proven beyond a reasonable doubt. Furthermore, what is required, consistent with the law of circumstantial evidence, is that the jury be satisfied that the only reasonable inference is that the exculpatory statement was fabricated to avoid culpability. Relying on a concocted false statement is in exceptional circumstances a permitted shortcut to proving guilt. However, it must never be a shortcut to reducing the standard or burden of proving guilt.

- [47] The appellant relies on para. 55 of *White* in which Major J. said:
- [55] This does not mean that a jury may never be instructed to apply the reasonable doubt standard to evidence of post-offence conduct. In the rare case where evidence of flight or concealment is the only evidence or constitutes substantially all of the evidence of the Crown, it follows that such evidence must be proven beyond a reasonable doubt in order to support a conclusion of guilt, and it would not be error for the trial judge to make this clear

to the jury. In addition, where evidence of post-offence conduct is so crucial to the Crown's case that the final determination of guilt necessarily turns upon it, and the evidence is subject to two directly conflicting interpretations, the trial judge would be justified in telling the jury that in choosing which theory to believe with respect to that evidence, they should consider the record as a whole and give the benefit of the doubt to the accused. As in MacKenzie, however, such a charge would only be proper if it did not involve any significant departure from the standard of proof that the jury would properly apply in any event by virtue of the general instruction on reasonable doubt.

[Emphasis added.]

[48] The Crown says that the instruction proposed by the appellant does not accord with legal principles relating to the probative value of evidence of conduct after an offence, or consideration of circumstantial evidence by a trier of fact--in addition to being contrary to the principle in Morin. The respondent argues that guilt is not embedded within the legal test for a fabrication instruction. Rather, the jury is told that it can, but is not required to, use fabrication as evidence suggesting guilt. Further, the instruction specifically provides that people lie for entirely innocent reasons other than to mislead the police or to avoid suspicion or culpability.

[49] The Crown argues it would be an unjustified benefit to an accused if a jury is not entitled to consider, in assessing whether the Crown has proven the elements of the offence beyond a reasonable doubt, a false statement that was deliberately fabricated for the purpose of misleading the police or for the purpose of avoiding suspicion or culpability on the basis that they are not satisfied beyond a reasonable doubt of these factual conclusions. The Crown says:

The appellant's proposed instruction essentially guts the availability or consideration of a fabricated statement until after the trier of fact has already found the accused guilty of the offence. Yet, a conclusion by the trier of fact that an accused individual has provided a false statement to the police can certainly have probative value. The result is that the statement is then either of no probative value or superfluous. Again, this is a manifestation of the appellant's fundamental disagreement with a fabrication instruction being available at all. It does not justify importing a burden of proof to the instruction.

[50] The Crown submits that the passage in White is obiter and would in any event not apply to any case in which other evidence is available to support a conviction.

[51] Given my conclusion that a fabrication instruction should not have been given at all, it is not necessary to decide this interesting issue in the present case. The issue may be of some consequence in other cases, however, and for that reason I have summarized the arguments at some length.

[52] I return now to the consequence of the misdirection on fabrication. For the following reasons, I conclude that this is not a case in which the curative proviso can be applied to uphold the verdict despite the error of law.

[53] The Crown's case was not strong. The inference of consciousness of guilt from concoction was presented to the jury as the most important piece of evidence in the case. In closing submissions to the jury, Crown said:

- i. Mr. Beckett's statement is the most important piece of evidence in the case.
- ii. You don't need to go very far in the statement to get to that point" [proof beyond a reasonable doubt.]
- iii. [You] can disbelieve what [Mr. Beckett] says in this statement and you can use that as independent evidence against him, as evidence supporting the crown's theory that Mr. Beckett killed his wife.
- iv. But, no, then you can find that this is concocted. This is fabricated. This is a purposeful lie intended to deceive the police to deceive her into thinking that he was not guilty on [sic] offence when in fact he was, that he in fact had committed murder.
- v. The circumstances of the statement lead to an inescapable inference. If you believe that Mr. Beckett isn't telling the truth .the only inference you can draw, the only conclusion you can draw is that Mr. Beckett is purposeful [sic] not telling the truth.
- vi. [Y]ou may be wondering why does Mr. Beckett give all these details which I've suggested to you are true, and indicative of guilt, right. They lead to the inference that he was guilty.
- vii. [A]nd then think about what Mr. -- doesn't Mr. Beckett say -- what he says in his statement could even hypothetically, even possibly be true in this context, and I'm going to suggest to you that you will find that what Mr. Becket says to you is -- what he says to the -- sorry, to Constable McLean who went through that statement, he says is a lie because he killed his wife, because he pushed her out and watched her drown.

[Internal footnotes omitted.]

Given the Crown's emphasis on the statement as a fabrication, it cannot be said that the verdict necessarily would have been the same had the fabrication instruction not been given.

2. Did the judge err in admitting speculative evidence in her instruction on how the statement could be used?

[54] The appellant argues that the trial judge erred in admitting evidence that had no probative value, and as a result, the jury was improperly invited to engage in speculation and conjecture: *District of West Vancouver (Corporation of) v. Liu*, 2016 BCCA 96; *R. v. Rodgeron*, 2015 SCC 38. This ground of appeal turns on whether the impugned evidence could logically support the inferences the Crown asked the jury to draw.

- [55] An inference is a deduction of fact which may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. It is a conclusion that might, not must, be drawn in the circumstances. As Justice Watt has observed, "the boundary which separates permissible inference from impermissible speculation in relation to circumstantial evidence is often a very difficult one to locate": *R. v. Munoz* (2006), 86 O.R. (3d) 134 at para. 24 (S.C.J.), citing D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 2005) at p. 108.
- [56] A trial judge's decision to exclude or admit evidence based on the balancing of probative value and prejudicial effect is a discretionary one that is entitled to a high degree of deference on appellate review. This Court must be mindful that the judge's rulings are based on evidentiary assessments made within the context of the case as a whole.
- [57] With those general principles in mind, I turn now to the five categories of impugned evidence identified by the appellant.
- (a) Evidence of Mr. Titsworth
- [58] Mr. Titsworth was the campground manager at Shelter Bay. He knew the Becketts from previous year's visits to the campground. He was called by the Crown to give evidence about his dealings with the Becketts in the days leading to Ms. Letts-Beckett's death. He described an initial friendly exchange with the couple. The next evening when he delivered firewood to the campsite, he found Mr. Beckett apparently intoxicated and unhappy about the amount of firewood they had received. Mr. Titsworth said Mr. Beckett also complained about Mr. Titsworth failing to provide a weather report. The next night, Mr. Titsworth brought a "personal weather report" for Mr. Beckett to "get him back" for his earlier tone. Later, he observed Mr. Beckett driving his boat about 50 feet off shore, standing on the bow and "staring him down". Mr. Titsworth said he felt uncomfortable and told the staff to avoid Mr. Beckett. In cross-examination he acknowledged that for the most part, other than the firewood discussion and the dirty look, Mr. Beckett's actions that August were completely consistent with his normal behaviour: socializing and boating with other campers, acting as an unofficial host, jovial and a big talker who liked to have a drink.
- [59] The defence objected to this evidence on the basis that it was prejudicial evidence of bad character without any probative value. The trial judge ruled that the evidence was admissible because it was possible, from Mr. Beckett's atypical demeanour, to draw an inference about the state of his marriage. In closing, the Crown submitted that the jury should take from this evidence that Mr. Beckett was acting differently because things were going badly in his relationship with his wife, or that he was fearful that his wife was going to leave him.
- [60] In my view, the judge erred in admitting this evidence. A disagreement over firewood and a dirty look or stare down cannot logically lead to an inference about the state of the Becketts' marital relationship.

(b) Mr. and Mrs. Hawkins' evidence about the Becketts' relationship

[61] Mr. and Mrs. Hawkins were friends of the Becketts who testified for the Crown. They had spent time with the Becketts in the days leading up to Ms. Letts-Beckett's death. Mr. Hawkins testified that he "didn't think [the Becketts] seemed quite as close as they used to be". Mrs. Hawkins was asked how the Becketts were dealing with one another and said "I think they were dealing with each other okay, but this--as I said before the visit was--had a different feel to it. It's nothing you can actually put your finger on, but it was--I do not know, it was different than the other visits we had".

[62] An objection to this evidence was not raised at trial, but that failure is not determinative. The judge must nonetheless act as a gatekeeper of admissible evidence. In prosecutions for domestic homicide, evidence is frequently admitted to elucidate the nature of the relationship between the accused and the deceased, but that evidence generally involves misconduct to demonstrate the nature of the relationship between the parties. Here, there was no evidence of conduct giving rise to an inference of marital disharmony. Indeed, Crown counsel acknowledged in closing submissions to the jury that this evidence on its own was "worthless" unless considered with other evidence that could lead them to infer the marriage was troubled.

[63] In my view, this evidence should not have been admitted. At most it amounts to a witness's interpretation of demeanour and the kind of mind reading that courts routinely caution against: *R. v. Anderson*, 2009 ABCA 67 at para. 51; *R. v. Trotta*, [2004] O.J. No. 4366 at paras. 40-41 (C.A.); *R. v. Levert*, [2001] O.J. No. 3907 at para. 27 (C.A.). Such evidence is inherently unreliable and cannot be made reliable by pointing to other probative evidence.

[64] The admission of the evidence of Mr. Titsworth and Mr. and Ms. Hawkins appears to have been of some import. The jury made only one request, and that was to have the evidence of Mr. Titsworth and the Hawkins replayed for them on the third day of their deliberations. Five hours later, the jury returned a verdict of guilty.

(c) The Google Earth evidence

[65] After his wife's death, Mr. Beckett stayed with the Hawkins. That night or the night following, Mr. Hawkins described the following exchange. (By way of explanation, Shelter Bay is the location of the campground on Arrow Lake, but is not the unnamed cove at which Ms. Letts-Beckett drowned):

When we got back to my house, he did ask me what you can see on Google Earth, and I said I can show you, if you like on my computer because I had Google Earth on my computer. So I started to show him places in England where when we go to holiday, where you can kind of zoom in on to the town wherever you live in, and you can do a street view, you don't see the houses and everything. And he said well I'm not, you know, I don't really want to see that, he said I'd like - what can you see at Shelter Bay? So I went to Shelter Bay and you can't really see very little of Shelter Bay, there isn't much to see at all. So he asked me, he said well, he said, is that basically

all you see at Shelter Bay. I said well, yeah. He said well is it being recorded or filmed, you know, all the time or is it just like a single - single shot. And I said well it might only be once a year or once every five years, as far as I know, of what picture they take. And he said oh, all right, so okay then. And that's basically all he wanted to know.

Q: And how did he seem when you told him that it was a photo every few years?

A: I think he seemed - oh - how to put that - I think he felt comfortable about that.

[66] The defence in a voir dire prior to Mr. Hawkins' testimony, argued that the Google Earth inquiry, made after the appellant said his wife fell into the water for unknown reasons while seated in the boat behind him, was not evidence of after-the-fact conduct that could reasonably lead to an inference of guilt. The defence objected, as it did at the hearing before this Court, that it would be just as likely that an innocent man would want to know how his wife came to fall into the water as that a guilty man would want to know if there was a record of his crime.

[67] In my view, although the question about how Google Earth works is equivocal, the evidence of the witness as to Mr. Beckett's reaction to the news that Google Earth wasn't recording video -- "comfortable" -- could have some probative value if it was construed as relief rather than disappointment that he would not be able to determine how his wife came to fall into the water. I see no error in the judge's decision to admit that evidence.

(d) Ray Barlow and the falsified will evidence

[68] Ray Barlow was the lawyer who acted for Laura Letts-Beckett's parents and, unbeknownst to Mr. Beckett, had prepared a will for her when the couple were briefly separated in 2007. That will left everything to her parents. The Crown led a great deal of evidence about the appellant's unhappiness with Mr. Barlow and his belief that Ms. Letts-Beckett's will had been altered. There were no assets in the estate that would pass through the will as the couple's assets were in joint names. The will was never probated, but Mr. Beckett made a complaint to the Law Society about Mr. Barlow and had consulted a lawyer about suing him over what he saw as a fraudulent will. A defence witness, Dolores English, testified that after Laura Letts-Beckett died, she suggested to Mr. Beckett that he would be entitled to receive Laura's share of her parents' estate when they died. She said he was surprised by that. There was evidence that Ms. Letts-Beckett's parents were ranchers with some land holdings.

[69] The jailhouse informant, Witness "A", described Mr. Beckett telling him there was "a lot of money involved", complaining about Ray Barlow altering the will, and blaming Mr. Barlow and Laura Letts-Beckett's family members. Witness "A" said that Mr. Beckett asked him to "shake up Barlow, trunk him, and have the will brought back to its original state" suggesting they "could live comfortably for life" and that "it was a \$4.5 million issue."

[70] On a voir dire to determine whether Witness "A"'s evidence was admissible, the defence argued that evidence Mr. Beckett had come to believe Mr. Barlow was involved with the Letts in forging Laura Letts-Beckett's will, and had allegedly told Witness "A" two years after her

death that he wanted Mr. Barlow harmed, should not be admitted because the evidence was of no probative value and would distract the jury from the real issues in the case. The defence emphasized that the evidence was prejudicial because it suggested bad character. The Crown's theory of admissibility was that the appellant murdered his wife because he believed he would thereby inherit a portion of her parents' estate and that he was angry with Mr. Barlow because he believed that he and the Letts were involved in doctoring his wife's will, thereby impeding his potential inheritance.

- [71] The Crown led no evidence at trial that Mr. Beckett held this mistaken view of estate law before his wife's death. The only direct evidence was that Mr. Beckett had come to this mistaken belief that he would inherit his wife's share of her parents' estate after the drowning. The Crown argued that the jury could disbelieve that evidence of timing, and find Mr. Beckett held that view prior to his wife's death.
- [72] While I agree with the appellant that the evidence of Witness "A" regarding Mr. Barlow and the will was prejudicial as it implied that Mr. Beckett was a violent man, evidence to that effect was already before the jury with respect to Witness "A's" evidence that Mr. Beckett wanted other witnesses who would testify against him "taken care of". The Crown's theory surrounding the will and Mr. Barlow was tenuous, but in my view it cannot be said that it lacked any probative value, and I see no basis on which this Court could interfere with the judge's decision to admit it.
- (e) The letter to the Bank of Montréal
- [73] To establish motive, the Crown also relied on the Becketts taking out accidental death insurance about two months before Ms. Letts-Beckett's death. The Crown's case established that the insurance had been purchased following a sequence of promotional material sent to them by the Bank of Montréal advertising various insurance products. About a month after his wife's death, Mr. Beckett wrote to the bank, advised of his wife's death, stated that his wife had talked him into one of their insurance products and that he had not been able to identify, in the piles of mail, the policy with a premium that matched the amount being debited from his account. He asked about the type of insurance, and in particular whether it was disability insurance.
- [74] The Crown submitted to the jury in closing that they should conclude that the letter was a contrivance, that the appellant could not have been confused about the nature of the policy, that it was written to divert suspicion and therefore was evidence of guilt. The Crown also suggested that junk mail flyers from the bank found in a briefcase in the appellant's car had been saved by Mr. Beckett so that after he killed his wife he would have evidence to make it look like they only purchased the insurance policy because they had been inundated with advertisements for life insurance. Crown counsel submitted to the jury that "the only inference to be drawn" was that the appellant kept the flyers because he "well-knew" how the purchase of life insurance would look, and he wanted a record of the mail-outs as part of the planning for his wife's murder.

[75] In my view, the problem here lies not with the admissibility of the letter and flyers, but with the inference the Crown asked the jury to draw. The letter to the bank and the flyers were admissible as evidence of how the insurance was obtained and Mr. Beckett's understanding of that insurance. However, a logical inference could not be drawn from the letter or the retention of flyers relating to insurance products that a murder was being planned and a cover-up effected. The Crown's reasoning is premised on a presumption of guilt and the evidence can only be relevant if interpreted from that perspective. In my opinion, the Crown's argument was an invitation to the jury to engage in improper speculation.

[76] In summary, I conclude that the judge erred in admitting the evidence of Mr. Titsworth, the evidence of the Hawkins relating to the couple's relationship, and in permitting the argument based on the letter to the bank and retention of junk mail. I find no error in the judge admitting the Google Earth evidence, the evidence relating to Mr. Beckett's dealings with Mr. Barlow in relation to his wife's will, or Witness "A"'s evidence in this regard.

3. Crown counsel's submissions to the jury were improper

[77] On appeal, Mr. Beckett raises a number of improprieties in Crown counsel's closing submissions to the jury--issues that were not raised with the judge when she invited comments on her draft charge. Although that omission is a factor for an appellate court to consider in assessing whether the matters now complained of amounted to anything of significance in the context of the trial as a whole, it does not preclude review. The impugned conduct can be grouped loosely into two categories: first, asking the jury to draw inferences from facts that had not been proved at trial; and second, giving evidence.

[78] It is common ground that it is improper for Crown counsel to ask the jury to make findings of fact, or to draw inferences of fact for which there is no foundation in the evidence: *R. v. Quinn*, 2009 BCCA 267 at para. 105. In presenting closing submissions to the jury, Crown counsel must be accurate and dispassionate; counsel should not advert to any unproven facts and cannot put before the jury as facts to be considered for conviction, assertions which come from counsel's personal observations or experiences: *R. v. Rose*, [1998] 3 S.C.R. 262 at para. 107.

(a) Counsel adverted to unproven facts

i. The location where Laura Letts-Beckett went into the water

[79] In opening submissions, Crown counsel stated that the location where Laura Letts-Beckett went into the water was not visible from the adjacent highway. No evidence was led to support that allegation. The Crown did not ask any of the witnesses about boat traffic on the day in question, visibility of the location from other locations onshore, or from the water, or its seclusion in relation to other spots along the lake generally.

[80] In his closing address to the jury, Crown counsel made much of the location, saying:

As we have to begin somewhere, I am going to begin with suspicion. Now, let me just begin by saying, let's just agree that suspicion is - is not enough. Suspicion is nowhere near enough. If at the end of the case you aren't past suspicion you will acquit. If you aren't far past suspicion you will acquit. The case has to take you all the way past suspicion to proof beyond a reasonable doubt and as we have to begin somewhere, let's begin with suspicion. And let's begin with an unnamed cove on Upper Arrow Lake. I say the cove should make you suspicious. I don't know if you have Exhibit number 34, which is the -- which are the aerial photographs. My friend suggested that I would point out to you, to suggest that this was a significant cove and I am going to do exactly that and ask you to look at the photographs and look at the maps and take a look perhaps at photograph number 6 might describe it best, not photograph, it's a -- it's a Google map and that is the Google map version and then there's some satellite versions next to it as number 5. I do say there is something unique about this cove. That someone sets out from Shelter Bay. You can, of course, go in -- in two directions. You could go, you can go south which if you're going into the spine, up is down in the -- in the photograph, south towards Nakusp which of course take you around that point and that is perhaps the least private point, or area, because that is where the ferry leaves if you go from Shelter Bay to Galena, to Galena point on the other side of the - other side of the Arrow Lake. But if you go north in the direction that Mr. Beckett chose to go you are met by a relatively straight coastline. If you're looking at the map that is number 6 you'll see there's the -- the highway marker 23 just on that line on the map. And relatively straight and so a person, for example, Mr. Beckett, travelling --travelling north, travelling towards Revelstoke fishing, looking out the back, looking out by the outboard motor can see from this vantage point who is coming out, if there was any boats at Shelter Bay coming out from Shelter Bay. And the first place where you meet some obstruction is that little cove. You'll see it there. It's the first bump on the map as you're heading north. It's the first place that you can, if you're hugging the shore, or if you're moving in as Mr. Beckett says he was towards, to follow the shoreline into that little cove, it's the first place where you can't be seen. It's the first place where you can't be detected. Accidents happen by chance, randomly in all sorts of circumstances. Planned and deliberate murder happens at a place and time of the killer's choosing. Now, I don't want to put too -- to dwell on this point, or put too much into the suspicion of where Laura Beckett went into the water. It's just suspicious. It's nothing more at this stage.

[Emphasis added.]

[81] He returned to this subject later in his address to the jury saying:

And then you have the unnamed cove. We started there, in fact that was one of the first things that Mr. Goulet said to you in the Crown's opening statement, the unnamed cove on Upper Arrow Lake, right. And what does that tell you? Well, it tells you that when there were a -- for this to be an accident, there would have to be a number of unusual circumstances that aligned in order for this to be an accident, and Laura to die. Right. I'm going to suggest to you those include this circumstance where there was no one around and no one could see. No one for Mr. Beckett to call out to. This unnamed cove is the perfect place for a murder. It is a very, very inconvenient place for an accident, an unexpected and tragic accident.

[Emphasis added.]

[82] The Crown submits that evidence from witnesses about the secluded nature of the cove was unnecessary because that fact was apparent from the maps and aerial photographs entered at trial. However, the aerial photographs and other exhibits of the lake suggest that the cove was shallow and open to the rest of the lake. In addition, the claimed "suspiciousness" of the location where Ms. Letts-Beckett went into the water was based on the selection of an arbitrary geographical marker (the entry to Shelter Bay) and visibility of the Zodiac relative to that marker as an assertion that the location was particularly secluded. That is an illogical premise since, if the location is said to have been selected as secluded and thereby a good place to commit murder, what matters is its visibility to observers generally, not its visibility with respect to persons at some arbitrarily chosen location. As I have already noted, there was no evidence that the location where Ms. Letts-Beckett went into the water was more secluded than most locations on the lake from the perspective of boaters, those on the shore, or those using the nearby highway.

ii Mr. Beckett convinced his wife to sign the accidental death insurance policy

[83] In closing submissions, Crown counsel turned to proof of planning and deliberation, and said:

So planning and deliberation, that's where I was going next. So listen to what Her Ladyship tells you also about planning and deliberation. But it's important, the Crown doesn't have to prove that it was a complicated plan or a plot. We don't have to prove that Mr. Beckett on the 12th of June, when he started filling out the insurance -- the accidental death insurance, that he had in mind that he was going to kill his wife. We don't have to -- certainly don't have to - it certainly assists the Crown and I do make the submission that getting accidental death policy and the process of negotiating that with Laura Letts Beckett, and getting her to sign on and convincing her to do that and sending in the cheque, I am going to suggest to you that Mr. Beckett had in mind that there was -- that is part of the motive. That is, that Mr. Beckett wanted his wife dead but we don't have to prove that at that moment Mr. Beckett had a plan in mind, and this is what it was.

[Emphasis added.]

[84] There was no evidence that Mr. Beckett negotiated with his wife, "got her to sign on" or convinced her to do so. The only direct evidence was that both of them had taken out the same policy. This submission was entirely speculative and should not have been made.

iii The use of the Zodiac was highly suspicious

[85] In addressing planning and deliberation, the Crown also relied heavily on Mr. Beckett's decision to go out in the Zodiac that day, rather than in the speed boat. Crown counsel began by referring to the absence of evidence that Ms. Letts-Beckett ever went out in the Zodiac:

The whole -- what I'm suggesting is just the suspicious circumstance of her going into the water at all on this sunny, flat, calm day on the water is some evidence. And combining that with motive is some evidence but you've got much more evidence than that.

None of the witnesses, none of the witnesses who went boating with the Becketts - and that was a common theme of the witnesses who knew the Becketts, that they're invited on the boat, and invited -- as far as I can tell, with the exception of Ms. Breeuwsma who had been in the motorhome and I don't think she'd ever been on the boat, and I don't recall if she'd ever seen them in the boat, I don't recall -- every other witness had only seen, exclusively seen Laura in the ski boat -- the speedboat, not the zodiac. No witness ever saw her in the zodiac.

[Emphasis added.]

[86] Crown called into question the veracity of Ms. English's testimony to the effect that Ms. Letts-Beckett liked boating in the Zodiac, then concluded, "but regardless of that, none of the witnesses saw her in the Zodiac."

[87] Next Crown counsel suggested to the jury how improbable it was that the couple would choose to use the Zodiac that day, saying:

If you wanted to bring a cooler with you, what would you -- which would you rather go on? Would you rather go on the boat where the cooler would be -- I don't know how many places you could tuck it. If it's just the two of you, presumably it could almost go anywhere on the boat. If you're just trolling, it could even go back on the back where Mr. Beckett's standing in this photograph if you didn't want it to be in the way. If you didn't want it to be in the way as you were standing up.

Can you think of any particular reason why they took the zodiac that day? I can. Yes, we know the speed boat was in the water because Mr. Titsworth, right -- Mr. Titsworth saw Mr. Beckett a couple nights before on the speed boat, jumped -went and jumped in the speed boat. It was on the shore and then roared out in the lake and roared around and did a doughnut in the lake. A trivial matter for Mr. Beckett to get into his boat and start it going and head out. Can you think of a reason why they went in the zodiac?

Mr. Beckett said that he -- suggested in his statement -- you can -- you're going to listen to it and so you can see this part where he talks about how they -- this is what they do. They usually get back about eight o'clock or something like that is his words about what they usually do in the zodiac. Well, isn't it curious that none of the witnesses at either of these lakes that hung out with the Becketts ever saw Laura in the zodiac. Why would you go in the zodiac? Can you think of a reason why someone who's afraid of the water would love the zodi, as Mr. Beckett talks about, would love the zodiac? Does that even make any sense whatsoever?

[Emphasis added.]

[88] Crown then suggested that the Zodiac made it easier for Mr. Beckett to push his wife into the water, saying:

By the time they get to this unnamed cove, by the time she stands up at least from what Mr. Beckett tells you, she's got her life jacket off. In other words, the opportunity has -- it's the perfect opportunity. It requires a -- Mr. Beckett again is a very tall man in this very small boat filled with out objects that are occupying space. She's within arm's reach. A push is a matter -- a trivial matter to accomplish.

In my submission, the zodiac, the circumstances combined with the evidence of motive is evidence of planning and deliberation.

[Emphasis added.]

[89] The evidence established the Zodiac was 12-14 feet long. Setting aside for a moment the illogical premise that there was no innocent explanation for choosing to troll and fish from the Zodiac rather than a speedboat on a calm day, it was not the case that no one had seen Ms. Letts-Beckett in the Zodiac before that day. In fact, Mr. Titsworth testified that he saw the couple using both boats.

(b) Crown counsel gave evidence

[90] Crown counsel urged the jury to find that Mr. Beckett's ability to adhere to a chronological narrative in his statement to police was unnatural, submitting that it was "remarkable" that he answered questions coherently and completely and resumed the narrative after an interruption. It was suggested that as a matter of common sense, this was incompatible with innocence. In making this submission, Crown counsel contrasted Mr. Beckett's conduct with his own saying:

What I am suggesting is at 9:35 in the evening, shortly after his wife had died, drowned, Mr. Beckett was able to coherently and completely, and chronologically outline everything he had done that day. He remembered. He was responsive to questions and he was able to do something remarkable. You've seen me several times. I tend to lose my way, right. I tend to go off on tangents and then I -- and I'm doing it right now, right? And sometimes I sort of physically drift over to one side of the courtroom because I'm thinking about something. And it takes me an effort to get back to the point where I started. And I think where I started the sentence is talking about what Mr. Beckett was able to do which is exactly what I struggle to do all the time

[Emphasis added.]

[91] Crown counsel also submitted to the jury that Mr. Beckett's failure to immediately reach out to his wife or throw her something when she fell into the water was inconsistent with innocence. Crown counsel again drew on his personal experience, suggesting that it is human instinct to reach out to help someone who is in danger, relating his own experience as a child, being in a car with his mother who, when she had to brake suddenly, would put her hand out to protect him even after airbags and seat belts were commonplace.

[92] On appeal, the Crown acknowledges that these submissions were "unnecessary rhetoric", but asserts they were innocuous. The Crown points out that just as perfection is not required in a jury charge, so too it is not required in a closing address: *R. v. Sodhi* (2003), 66 O.R. (3d) 641 at para. 89 (C.A.); *R. v. Karaibrahinovic*, 2002 ABCA 102 at para. 51; *R. v. Taylor*, 2015 ONCA 448 at para. 132.

[93] I would accede to this ground of appeal. Although these instances of the Crown giving evidence were not egregious, it cannot be said that they were not prejudicial--they related to two key elements of the offence of first degree murder (intent and planning and deliberation) with respect to which there was a paucity of evidence.

4. Was the verdict unreasonable?

[94] The appellant submits that the verdict is unreasonable within the meaning of s. 686(1)(a)(i) of the Criminal Code, and that this Court should therefore enter an acquittal rather than remitting the case for a third trial.

[95] A verdict is unreasonable if, on the whole of the evidence, it is one that a properly instructed jury, acting judicially, could not reasonably have rendered: *Villaroman* at para. 55. The function of a court of appeal in considering whether a verdict is unreasonable goes beyond merely asking whether there is some evidence to support a conviction; the court must re-examine and to some extent reweigh and consider the effect of the evidence: *R. v. Yebe*s, [1987] 2 S.C.R. 168 at p. 186. In carrying out that exercise, the reviewing court is to give "due weight to the advantages of the jury who saw and heard the evidence as it unfolded". The court is not to act as a "13th juror," give effect to "vague unease" or "find that a verdict is unreasonable simply because the reviewing court has a reasonable doubt based on its review of the record": *R. v. W.H.*, 2013 SCC 22 at para. 27. In *W.H.* at para. 28, Cromwell J. summarized the court's direction in *R. v. Biniaris*, 2000 SCC 15, that an appellate court is to:

consider through the lens of judicial experience, whether "judicial fact-finding precludes the conclusion reached by the jury": para. 39 (emphasis added). Thus, in deciding whether the verdict is one which a properly instructed jury acting judicially could reasonably have rendered, the reviewing court must ask not only whether there is evidence in the record to support the verdict, but also whether the jury's conclusion conflicts with the bulk of judicial experience: *Biniaris* at para. 40.

[Emphasis in original.]

[96] This limited weighing must be done in light of the standard of proof in a criminal case and is an important safeguard against the risk of an unjust conviction: *Villaroman* at para. 55; *WH* at para. 29. Where, as in the present case, the Crown's case depends on circumstantial evidence, the question becomes whether the jury could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on a totality of the evidence: *Villaroman* at para. 55. This is the nub of the appellant's submission. Mr. Beckett contends that the jury could not have been satisfied, on the evidence in this case, that guilt was the

only conclusion available because the circumstantial evidence was completely capable of supporting an inference of accidental death.

[97] I would not accede to this submission. Circumstantial evidence does not have to totally exclude other conceivable inferences; a verdict is not unreasonable simply because the alternatives do not raise a doubt in the jury's mind: Villaroman at para. 56. That is so because a finding that there is no other rational explanation for the circumstantial evidence other than the accused's guilt is essentially a factual matter arising from an evaluation of the evidence, and it is still fundamentally for the trier of fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt: Villaroman at para. 56.

[98] This deferential approach to the jury's assessment of the circumstantial evidence assumes, necessarily, that the jury has been properly instructed on the rule in Hodge's case. The charge in a case involving circumstantial evidence must instill in the jury the understanding that, in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty: Villaroman at para. 18.

[99] In my view, the judge in the present case correctly charged the jury on this point. She said:

The case against Mr. Beckett is a circumstantial case. There were no independent witnesses to the death of Laura Letts Beckett. From the direct evidence you have heard, together with the circumstantial evidence you have heard, the Crown asks you to draw inferences which support a finding of guilt of Mr. Beckett. You must be careful when dealing with circumstantial evidence. You cannot reach a verdict of guilty based on circumstantial evidence unless you are satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable and rational conclusion to be drawn from the whole of the evidence. I should also caution you that an inference is a much stronger kind of belief than conjecture or speculation. If there are no proven facts from which an inference can be logically drawn, it is impossible to draw an inference. At best, you would be speculating or guessing, and that is not good enough. An accused must not be convicted on a guess, no matter how shrewd that the guess may be.

[Emphasis added.]

She repeated that caution when addressing the element of unlawful act, reminding the jury that the Crown had led no direct evidence of that element of the offence and instead, was asking them to draw an inference from circumstantial evidence, which was not open to them unless they were satisfied beyond a reasonable doubt that Mr. Beckett's guilt was the only rational or reasonable conclusion to be drawn from the whole of the evidence.

[100] If an appeal court is to overturn a verdict on the basis that it is unreasonable, it must articulate the basis upon which it concludes that the verdict is inconsistent with the requirements of a judicial appreciation of the evidence: Biniaris at para. 38. In this case, the potential inconsistency comes down to whether a trier of fact could reasonably reject

the alternative inference of accident. Although the verdict raises concern and unease, I cannot find that the jury's conclusion that there was no other rational or reasonable conclusion to be drawn other than first degree murder was precluded by the evidence before them. They may have found the appellant's exculpatory statement to contain admissions against interest in the sense that it described actions which they found to be inconsistent with a desire to rescue his wife; they could have found financial motive despite the relatively weak evidence to that effect, and in particular, they could have chosen to accept the evidence of the highly unreliable jailhouse informant that Mr. Beckett wished to have witnesses "taken care of".

[101] It follows that I would not enter an acquittal on the basis of an unreasonable verdict.

[102] As I have noted, the other grounds of appeal compel the quashing of the conviction and a direction for a new trial. In that regard, having thoroughly reviewed the evidence, I am of the view that the Crown's case was not a strong one, and is likely to be less so on retrial given the conclusions I have reached on admissibility of evidence, Crown submissions, and the inability of a jury to rely on fabrication as circumstantial evidence of guilt. In these circumstances, a very real question arises as to whether it is in the interests of justice to proceed with yet a third trial. That decision, however, ultimately lies with the Crown.

Disposition

[103] The appeal is allowed; the conviction is quashed and a new trial ordered.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Butler"

APPENDIX 'A'

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Prepared on 29 October 2026 · Esheria