Flight and other Post Offence Conduct as Demonstrating Consciousness of Guilt

The prosecution asks you to have regard to the fact that the defendant departed[1] after the events in question [during the trial]. However, before you could use that as indicative of guilt, you would first have to find that the defendant departed because he knew he was guilty of the offence charged, not for any other reason.

You must remember that people do not always act rationally and that conduct of this sort can often be explained in other ways - for example as the result of panic, fear or other reasons having nothing to do with the offence charged. You must have regard to what has been said to you by the defendant / his counsel as to other explanations for his departure [specify]. All of these matters must be considered by you in deciding whether you can safely draw any inference from the fact of his departure.

Moreover, before the evidence of the defendant's departure can assist the prosecution, you would have to find, not only that it was motivated by a consciousness of guilt on his part, but also that what was in his mind was guilt of the offence charged, not some other misconduct. If, and only if, you reach the conclusion that there is no other explanation for his departure, such as panic or fear of wrongful accusation, you are entitled to use that finding as a circumstance pointing to the guilt of the defendant, to be considered with all the other evidence in the case. Standing by itself it could not prove guilt.

Flight by a defendant, whether before or during trial[2], may be led as indicative of a consciousness of guilt,[3] with it being left to the jury to consider whether the inference of consciousness of guilt can be safely drawn. It is not essential that the jury be told in so many words that flight is not necessarily conclusive of guilt[4]. The fact that a credible explanation is advanced by the defendant, does not require the exclusion of the evidence[5]; although questions of admissibility having regard to the probative value and prejudicial effect of the evidence may arise.

In *Melrose*, Shepherdson J expressed the view that the jury should be told that they must be satisfied beyond reasonable doubt of the inference of consciousness of guilt before drawing

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1 The relatively neutral word "departed" has been used. It may be a question of degree, depending on the evidence and whether issue is taken, as to whether stronger terms such as "absconded" or "fled" are warranted; and there may arise a question of fact about which the jury will have to be directed in the first instance as to whether there has been a flight at all.

2 For an example of the latter, see *Festa* (2000) 111 A Crim R 60.

3 *R v Melrose* [1989] 1 Qd R 572 at 574-575.

4 *R v El Adl* [1993] 2 Qd R 195 at 198.

5 *R v Power & Power* (1996) 87 A Crim R 407.

it.[6] His formulation was endorsed in *Power & Power.*[7] However, since the fact of flight could seldom, if ever, constitute "an indispensable link in a chain of evidence necessary to prove guilt", it follows that the reasoning applied by the majority in *Edwards* to the use of lies applies equally to flight: "The jury do not have to conclude that the defendant is guilty beyond reasonable doubt in order to accept that a lie told by him exhibits a consciousness of guilt. They may accept that evidence without applying any particular standard of proof and conclude that, when they consider it together with the other evidence, the defendant is or is not guilty beyond reasonable doubt".[8]

Post offence conduct (apart from lies) is sometimes capable of demonstrating consciousness of guilt. For example; flight, an assault on a policeman, the laying of a false trail, concealment of evidence, and raising a false alibi[9] may be such conduct. A trial judge in such cases is required to give an Edward's type direction moulded to the facts of the case in question.[10]

Whether post-offence conduct is capable of demonstrating consciousness of guilt of murder rather than manslaughter will turn on the nature of the evidence and its relevance to the real issue in dispute. There is no hard and fast rule that evidence of post-offence concealment and lies is always intractably neutral as between murder and manslaughter.[11] There may be cases where an accused goes to such lengths to conceal the death or to distance himself or herself from it as to provide a basis on which the jury might conclude that the accused had committed an extremely serious crime and so warrant a conclusion beyond reasonable doubt as to the responsibility of the accused for the death and the concurrent existence in the accused of the intent necessary for murder.[12] See also as stated in *R v Andres*:[13]

> *Whilst… matters, individually, may have been equally consistent with the death of the deceased not occurring with the requisite intent by the appellant, the jury was entitled to draw the necessary inference of intent from the circumstances as a whole. As was observed by Dawson J (with whom Toohey and Gaudron JJ agreed) in Shepherd v The Queen: 'Intent… apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence… the probative force of [which] may be cumulative.'*

It is impermissible to take a piecemeal approach to particular neutral post-offence conduct. Rather, all of the circumstances established by the evidence should be considered and weighed.[14]

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6 *Melrose* at 579.

7 *Power & Power* at 409.

8 *Edwards v The Queen* (1992) 173 CLR 653; 107 ALR 190. It should be noted however, that the distinction between "indispensable links" and others is not always a clear one; see, for example *Gipp v The Queen* (1998) 194 CLR 106 and *Penney v The Queen* (1998) 155 ALR 605; 72 ALJR 1316.

9 See *Graham* (2000) 116 A Crim R 108 at 119.

10 *R v SBB* (2007) 175 A Crim R 449; *R v Lennox* [2007] QCA 383; *R v Chang* (2003) 7 VR 236. See footnote 1, No 28.1.

11 *R v Baden-Clay* (2016) 90 ALJR 1013 at [74].

12 *Baden-Clay* at [74], citing *R v Ciantar* (2006) 16 VR 26 at [38] – [40], [65] – [67]; *R v DAN* [2007] QCA 66 at [89], [99].

13 [2015] QCA 167 at [131]. But see *R v Oliver* [2016] QCA 27 at [55], [58], [63].

14 *Baden-Clay* at [77].