Flight and other Post Offence Conduct as Demonstrating Consciousness of Guilt

Commentary

The *conduct* of a defendant *after* the commission of an alleged offence (often called "post-offence conduct") *may* be used by the prosecution as demonstrating a consciousness of guilt (or, in "older" terms, an admission by conduct).

Examples include flight, an assault on a policeman, the laying of a false trail, the concealment of evidence, or the raising of a false alibi.

Other examples are mentioned by Dr JRS Forbes in *Evidence Law in Queensland* 14th edition at [Q 56] (most footnotes omitted):

> Other forms of conduct that may amount to an admission are flight, tampering with evidence, fabricating or concealing it, displaying shock when misconduct is revealed [see *R v Y, DB* (2006) 94 SASR 141 (charge of indecent dealing; shocked reaction by accused when complainant's father mentioned that the complainant "had shared a secret with the family")], failing to stop after an accident, expressing regret to the victim of one's crime [see *R v Solomon* [2006] QCA 244], or failing to make an early complaint about alleged ill-treatment by police. There was an admission in a Queensland case when the suspect, knowing police were looking for him, suddenly deserted his favourite hotel [*R v Bitossi* [1984] 2 Qd R 51]. *R v Chang* [(2003) 7 VR 236; [2003] VSCA 149] displays several forms of consciousness of guilt of murder. Few admissions can be more comical than the conduct of an American fraudster, caught desperately masticating forged banknotes as the police arrived.

See *Graham* (2000) 116 A Crim R 108 at 119 for the raising of a false alibi.

Where the Crown seeks to rely on post-offence conduct as revealing consciousness of guilt, a trial judge may be required to give an *Edward's*-type direction moulded to the facts of the case in question: see *Edwards v The Queen* (1992) 173 CLR 653; *R v SBB* (2007) 175 A Crim R 449; *R v Lennox* [2007] QCA 383; *R v Chang* (2003) 7 VR 236.

Not all such conduct will require a direction. In *R v WBS* [2022] QCA 180, Dalton JA said at [20], citing *R v Wildy* (2011) 111 SASR 189, 195 [20], about lies and other conduct:

> It is not all inculpatory post-offence conduct which will attract the need for an *Edwards*-type direction. When the concern is with statements, it is only deliberately untrue statements which will attract an *Edwards* direction, and then, only statements which are capable of being probative of guilt because they might show that the accused lied because he "knew that the truth of the matter would implicate him in the offence". In a similar vein it is "deceitful acts" or conduct "designed to paint a false picture" or perhaps conduct which is "inherently discreditable" which is conduct capable of attracting an *Edwards*-type direction. In the extract from *R v Watt* [(1905) 20 Cox CC 852] [in para [19] of her Honour's

> judgment] the conduct [attracting such a direction] was characterised as conduct "such as to lead to the reasonable inference that [the defendant] disbelieves his own case.

Also in that case, her Honour said that the danger of a jury mis-using post-offence conduct designed to paint a false picture was described well in the Canadian case of *R v White* [1998] 2 SCR 71; [1998] CanLII 789 as follows:

> It has been recognised, 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. … 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. In particular, a jury might impute a guilty conscience to an accused you has fled or lied for an entirely innocent reason, such as panic, embarrassment or fear of false accusation. Alternatively, the jury might determine that the conduct of the accused arose from a feeling of guilt, but might fail to consider whether that guilt relates specifically to the crime at issue, rather than to some other culpable act.

Her Honour added that the jury therefore needs "Judicial instruction of [the] need to consider other possible explanations for conduct, consistent with innocence, to prevent that automatic leap …"

In that same case, Davis J referred to the decision of *R v Reid* [2019] 1 Qd R 63 and the observations of Sofronoff P about the necessity to analyse the precise relevance of the post-offence conduct to issues in the case. That analysis informs the admissibility of the evidence and the necessity for, and content of, directions.

In *R v WBS*, the Crown was <u>not</u> relying on certain evidence (Snapchat messages) as consciousness of guilt evidence. At [121], his Honour set out the appropriate direction in those circumstances:

> Given that the Crown did not rely on the Snapchat messages as consciousness of guilt evidence, the jury should have been instructed to the effect that:
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> 1 the use of the Snapchat messages was limited to (a) consideration of whether the appellant's relationship with the complainant was controlling, thus explaining the complaiant's limited cooperation with the offending and her failure to complain earlier; and (b) credit assessment.
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> 2 That they ought not to engage in consciousness of guilt reasoning.

The fact that a credible explanation is advanced by the defendant does not require the exclusion of the evidence (see *R v Power & Power* (1996) 87 A Crim R 407); although

questions of admissibility having regard to the probative value and prejudicial effect of the evidence may arise.

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. *R v Baden-Clay* (2016) 90 ALJR 1013 at [77].

In the case of murder

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

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: *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]

See also as stated in *R v Andres* [2015] QCA 167 at [131]. But see *R v Oliver* [2016] QCA 27 at [55], [58], [63]:

> 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.'

Flight

Flight by a defendant, whether before or during trial, may be led as indicative of a consciousness of guilt, with it being left to the jury to consider whether the inference of consciousness of guilt can be safely drawn. See *R v Melrose* [1989] 1 Qd R 572 at 574-575. For an example of flight during trial see *Festa* (2000) 111 A Crim R 60,

It is not essential that the jury be told in so many words that flight is not necessarily conclusive of guilt: see *R v El Adl* [1993] 2 Qd R 195 at 198.

In *Melrose* at 579, 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 it. His formulation was endorsed in *R v Power & Power* (1996) 87 A Crim R 407.

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" : *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.

Suggested direction for flight – to be adapted for other conduct.

[Note the use of relatively neutral word "departed". 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.]

> **The prosecution asks you to have regard to the fact that the defendant departed after the events in question [**during the trial**]. However, before you could use his departure as indicative of his guilt, you would first have to find that the defendant departed because he knew he was guilty of the offence charged, and not for any other reason.**
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> **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.**
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> **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 <u>not only</u> that it was motivated by a consciousness of guilt on his part, <u>but also</u> 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, and that it was *not* motivated by, for example, matters like panic or fear of wrongful accusation or a consciousness of guilt of other misconduct, then 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.