COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Amin, 2024 ONCA 237
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2024 ONCA 237 (CanLII)

Tulloch C.J.O., Nordheimer and Gomery JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Najib Amin

Appellant

James Lockyer and Jeffery Couse, for the appellant

Michael S. Dunn, for the respondent

Heard: January 29, 2024

On appeal from the conviction entered on May 6, 2019 by Justice Suhail A.Q. Akhtar of the Superior Court of Justice, sitting with a jury.

Tulloch C.J.O.:

A. OVERVIEW

[1] Evidence that accused persons committed bad acts other than the crime they are charged with committing is dangerous. This evidence can poison the jury and lead them to convict accused persons because they appear to be bad people who keep bad company, rather than because the Crown has proved that they

committed the charged crime. The improper admission and misuse of such evidence can result in wrongful convictions. This risk is heightened where the Crown relies on similarities between the accused's bad acts other than the crime charged and that crime to prove that the accused is the person who committed the crime because there is a risk that such similarities are merely a coincidence.

[2] Police undercover operations intended to elicit confessions pose these and other dangers. These operations frequently induce the suspect to join a fictitious organization and participate in simulated crimes or bad actions, culminating in an interview in which the organization's boss asks the suspect to confess as the price of joining the organization. They inevitably elicit evidence of the suspect's bad acts other than the charged crime by showing the suspect's willingness to associate with bad people and/or perform simulated crimes or other wrongful acts that can be highly prejudicial. They also risk inducing false confessions because the suspect is motivated to join the organization and fears that failure to confess will result in rejection.

[3] The justice system has developed safeguards governing the admission and use of evidence of the accused's bad acts other than the crime charged and statements by the accused made during police undercover operations to protect against wrongful convictions. Where the Crown uses evidence of the accused's bad acts other than the crime charged to help prove the accused's identity as the perpetrator, it can only be admitted if it is very similar to how the charged crime

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was committed and its value outweighs the risks that the jury will misuse it. Trial judges who admit this evidence must warn jurors that they cannot use it to convict accused persons simply because they appear to be bad people. Further, trial judges must carefully evaluate the reliability of statements made to undercover officers to guard against the danger of false confessions.

[4] The appellant, Najib Amin, argues that his conviction for murder should be set aside because the trial judge did not comply with these safeguards. The appellant was charged with murdering Sylvia Consuelo and the only live issue at his trial was identity. During a Toronto Police Service undercover operation investigating his involvement in Ms. Consuelo's killing, he advised an undercover officer how to kill his girlfriend and evade detection, attempted to become business partners with undercover officers who claimed to have committed murder and concealed the evidence of it, and made other statements to them that the Crown sought to use against him at his trial. Crown counsel at trial argued that the appellant's murder advice was similar to how the deceased was killed and should be admitted to prove the appellant's identity as the killer. The trial judge admitted the murder advice to prove identity, and also admitted the other statements. He did not warn the jury about the dangers of misusing this evidence. The jury convicted the appellant of murder. On appeal, the appellant argues that the trial judge should not have admitted the appellant's murder advice and should have

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warned the jury about the dangers of misusing that advice and the other statements.

[5] We allowed the appeal on the day we heard it because we agree with the appellant that the safeguards I have described broke down in his case. The murder advice risked causing the jury to convict the appellant because he appeared to be a bad person who sought to partner with a criminal and advised him how to kill and evade detection. The trial judge should not have admitted this highly prejudicial evidence to prove identity because it was not very similar to how the deceased was killed. The trial judge also should have, but did not, warn the jury that it could not misuse the murder advice and other incriminating statements to convict the appellant for being a bad person. These twin errors created a real risk that the jury wrongfully convicted the appellant because he appeared to be a bad person and not because the Crown proved that he murdered the deceased. In addition, the trial judge failed to carefully analyze the risk that the appellant's statements to undercover officers were false or unreliable. We accordingly quashed the appellant's conviction for murder and ordered a new trial.

B. FACTUAL BACKGROUND

[6] Sylvia Consuelo was brutally killed in her apartment in the early hours of January 30, 2016 between 12:55 a.m. and 4:37 a.m. The killing was sexualized. When first responders arrived on the scene, they found her lying on the floor naked

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from the waist down and observed unopened condoms scattered on and around her body. The forensic pathologist who examined her body determined that her rectum was torn and that the insertion of a long, rigid object into her anus had likely caused that injury.

[7] The forensic pathologist determined that mechanical asphyxia caused Ms. Consuelo's death, meaning that physical force was applied to her to prevent her from breathing. He testified that it was possible that someone smothered her by placing their hands or an object over her mouth and nose, though he could not rule out that she was strangled with a soft ligature such as a towel or scarf. He also observed blunt injuries to her chest, which he testified could have been caused by someone bouncing up and down on her chest. He opined that the injuries he observed were consistent with "Burking," a method of suffocation in which the perpetrator kills the victim by sitting on their chest and smothering them with hands or an object.

[8] The police found security footage that showed a masked man entering and exiting Ms. Consuelo's apartment building during the window of time when she was killed. They identified the appellant as a person of interest because he was recorded entering another apartment building in the same apartment complex approximately one week before Ms. Consuelo's death while wearing similar clothing and shoes to the masked man.

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[9] In spring 2016, police launched an undercover operation to investigate the appellant. Two undercover officers, whom I will refer to as “Ryan” and “Raz”, met the appellant, and Ryan befriended him. They led the appellant to believe that Raz wanted to offer the appellant and Ryan lucrative business opportunities and attempted to induce him to make incriminating statements. The appellant made several statements to them that the Crown sought to admit at his criminal trial.

[10] First, during conversations on June 1 and 8, 2016, the appellant advised Ryan how to kill his girlfriend and evade detection. I will refer to these statements as the murder advice. Ryan told the appellant that he had been holding a gun for a cousin involved in organized crime, that his girlfriend “Jesse” had taken the gun, and that he needed to retrieve it before his cousin found out and became angry. Jesse was not a real person, but the appellant believed she was. After the appellant proposed and Ryan rejected several non-violent ways to retrieve the gun, the appellant stated that if he were Ryan, he would either flee or kill Jesse. He said that he would jump on top of her and either strangle her or smother her by putting his hand over her nose and mouth. He also suggested other methods of killing her. He advised Ryan to evade detection by covering his face, wearing a hat and gloves, looking down, and wiping down everything he touched.

[11] During the murder advice discussions, the appellant revealed that he had committed violent acts in the past and was willing to do so again. He told Ryan that

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he had sat on top of and strangled a friend in the past, although not fatally, and he offered to kill Jesse for Ryan.

[12] Second, on June 1, 2016, the appellant described a January 2016 murder in Ms. Consuelo's apartment building that resembled her killing. He stated that the female victim was beaten up, brutally raped, strangled and killed because she had AIDS and was transmitting it by having unprotected sex with men.[1] He commented that his friend had contracted AIDS after having unprotected sex with the woman and that the woman had also performed oral sex on the appellant's brother, who did not contract AIDS.

[13] Third, on June 27, the appellant stated that he wanted to be business partners with Ryan and Raz despite their disclosure that they had committed serious criminal acts. The June 27 discussion began when Ryan told the appellant that he had murdered Jesse in a hotel room and thrown her body in a river, and then called Raz to ask him to help conceal the killing. Raz said he would only help Ryan and the appellant if they agreed to be honest and loyal with him and be his partners, which they agreed to do. Raz then met with Ryan and the appellant in person and made a phone call in their presence in which he directed an associate to retrieve the body from the river, dispose of it, and erase hotel camera footage.

[1] The forensic pathologist determined that Ms. Consuelo did not have AIDS.

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He also indicated that he would transport a witness out of Canada beyond the reach of the police.

[14] During the June 27 discussion, the appellant admitted his presence at the apartment building and appeared to admit that he was the masked man. He made these admissions, which I will refer to as the June 27 statements, after Raz confronted him with a fake police bulletin showing that police believed that he was the masked man and was a suspect in Ms. Consuelo's killing. Raz rejected the appellant's claims that he did not remember what happened. He told the appellant that he knew the appellant was the masked man, that no one would believe the appellant was innocent, that the appellant needed to be honest if he wanted Raz's help, and that the appellant would lose the opportunity for a business partnership if he was not promptly forthcoming. The appellant ultimately stated that he had been in Ms. Consuelo's apartment building with four other men at the time of the killing but maintained that he could not remember what happened. After Raz left, Ryan suggested to the appellant that he was the masked man because he had earlier advised Ryan to cover his face to avoid detection. Later in the conversation, after Ryan referred to the police bulletin, the appellant appeared to admit that he was the masked man.

[15] However, the appellant never admitted to killing Ms. Consuelo during the June 27 discussion and denied even entering her apartment. In a subsequent conversation with Ryan in early November 2016, shortly before the police arrested

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him, the appellant again denied involvement in Ms. Consuelo's murder and said that he was not the masked man.

[16] The police never found forensic evidence linking the appellant to Ms. Consuelo's apartment. While they did find a shoeprint that matched the brand of shoe that the January 2016 camera footage showed the appellant and the masked man wearing, the appellant's sister testified that his shoe size was smaller than the shoeprint. They also did not find clothes similar to those worn by the masked man when they searched the appellant's apartment.

[17] At trial, the appellant pointed to another man, Lawrence Hibbert, as the likely killer. Mr. Hibbert lived in the same apartment building as Ms. Consuelo. Camera footage placed Mr. Hibbert in that building during the time she was killed and showed him holding a blue scratch lottery ticket that was similar to one found in her apartment. Further, a day or two before Ms. Consuelo was killed, another apartment complex resident witnessed Mr. Hibbert swear at and threaten to kill Ms. Consuelo unless she repaid money she owed him. The appellant argued that this evidence showed Mr. Hibbert's animus towards and motive to kill Ms. Consuelo. At trial, Mr. Hibbert denied killing Ms. Consuelo. However, he admitted that he was in the building on the night of her death and that she had not repaid some of the money she owed him. He claimed that he could not remember whether he visited her apartment that night.

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C. THE TRIAL JUDGE'S EVIDENTIARY RULING AND JURY CHARGE

[18] At trial, the Crown applied to admit the murder advice, the June 27 statements, and the appellant's June 1 description of Ms. Consuelo's killing pursuant to *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544. That case concerns the admissibility of statements made by the accused to undercover officers who recruited the accused into a fictitious criminal organization and attempted to elicit a confession from him. This is known as a "Mr. Big" operation. The Crown also relied on *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, a case concerning the admissibility of evidence of the accused's bad acts other than the charged crime. Citing *Handy*, the Crown argued that the murder advice should be admitted to prove the appellant's identity as the killer because the advice was so similar to how Ms. Consuelo was killed that it could not be a coincidence. The defence agreed that the murder advice and other statements engaged the principles in both *Hart* and *Handy* but argued that the appellant's statements should be excluded under the tests in those cases.

[19] The trial judge applied *Hart* but did not refer to *Handy*. In reasons reported at 2019 ONSC 3059, he concluded that *Hart* provided guidance about the reliability and probative value of the appellant's statements because police elicited them through an undercover operation. He found that the appellant's statements were sufficiently reliable to be admitted under *Hart*, including because Ryan and Raz had developed the appellant's trust and encouraged him to be honest with them.

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[20] The trial judge admitted the murder advice to prove identity. He reasoned that this advice was probative because it described a method that was both "unique" and "conspicuous[ly] similar" to how Ms. Consuelo was killed, and it supported an inference that the appellant knew of and advised Ryan to use this method because he had already used it to kill Ms. Consuelo and evade detection. The trial judge also admitted the portion of the advice concerning evading detection as context because Ryan referenced it during the June 27 discussions. In the trial judge's view, the only real risk of prejudice arose from the appellant's offer to kill Jesse. The trial judge addressed this by excluding any reference to this offer. The trial judge concluded that the portion of the murder advice concerning evading detection had minimal prejudicial effect because it was probative.

[21] The trial judge also admitted the appellant's June 1 description of Ms. Consuelo's death and June 27 statements. He concluded that the June 27 statements had no prejudicial effect but did not explain why.

[22] Because the trial judge admitted the murder advice and June 27 statements, the jury heard evidence that the appellant had committed bad acts other than killing Ms. Consuelo. This discredited his character. The jury learned that Ryan and Raz presented themselves to the appellant as dangerous people with criminal associations. It heard that Ryan told the appellant that he was holding a gun for a cousin in organized crime and had killed his girlfriend Jesse for taking the gun, and that Raz stated in the appellant's presence that he had powerful connections who

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could conceal a killing by erasing camera footage, retrieving bodies from the river, and spiriting a witness outside of Canada. The jury learned that the appellant not only continued to associate with Ryan and Raz, but even sought to become their business partners and advise Ryan how to murder Jesse and evade detection. Finally, the jury heard the appellant's statement that he had committed a violent act by strangling a friend in the past.

[23] Defence counsel acknowledged in her closing address to the jury that the murder advice discredited the appellant and asked the jury not to judge him based on his character. Defence counsel did not ask the trial judge to likewise warn the jury about misusing this evidence even though he gave her an opportunity to comment on the draft jury charge.

[24] The trial judge did not instruct the jury on the dangers of the murder advice and June 27 statements and the limits on how they could use this evidence. He did not tell the jury that they could not use this evidence to conclude that the appellant was a bad person and, for that reason, was more likely to have killed Ms. Consuelo. Instead, the relevant portions of the charge merely summarized the evidence and the parties' positions concerning it.

[25] The jury convicted the appellant of first-degree murder.

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D. ANALYSIS

[26] The appellant argues that there must be a new trial because the trial judge both erroneously admitted the murder advice and failed to warn the jury about the dangers of misusing that advice and the June 27 statements. I agree. As I will explain, the trial judge did not comply with the legal safeguards governing the admission and use of the murder advice and June 27 statements. These errors require a new trial because they create a real risk that the jury convicted the appellant because he appeared to be a bad and violent person rather than because the Crown proved its case.

(1) The Governing Legal Framework: *Handy* and *Hart*

[27] Admitting evidence that an accused has committed bad acts other than the offence charged is dangerous. The Supreme Court of Canada has described such bad act evidence as poisonous and warned that its admission and use without proper safeguards risks wrongful convictions: *Handy*, at paras. 58, 138-141, 146; *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, at p. 735.[2] This evidence triggers the danger of moral prejudice, which is the natural human tendency to judge people based on

[2] This evidence is variously referred to as other bad act, extrinsic misconduct, discreditable conduct, and/or similar fact evidence: *R. v. M.P.*, 2018 ONCA 608, 363 C.C.C. (3d) 61, at para. 99; David M. Paciocco, Palma Paciocco, & Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020), at pp. 71-72. I prefer the terms other bad act evidence or extrinsic misconduct evidence because *Handy* applies to evidence of bad acts other than the crime charged led by the Crown even if those acts are dissimilar to the facts underlying that charged crime: Paciocco, Paciocco, & Stuesser, at pp. 71-72. In these reasons, I refer to this evidence as bad act evidence for brevity.

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their character and convict accused persons because they are bad people. For instance, juries may reason that accused persons committed a violent crime because they are violent people: *Handy*, at paras. 39-40. This evidence also poses a second danger, reasoning prejudice, because it risks confusing the trier of fact and distracting from the facts underlying the actual charge against the accused: *Handy*, at para. 100.

[28] *Handy* adopted a test to guard against the dangers of bad act evidence. This test applies to bad act evidence led by the Crown, including both criminal acts and other conduct an ordinary person would disapprove of: *Handy*, at para. 34; *R. v. Johnson*, 2010 ONCA 646, 262 C.C.C. (3d) 404, at paras. 88, 90. The test makes bad act evidence presumptively inadmissible unless the Crown can show on a balance of probabilities that it is relevant to an issue other than the accused's general propensity to commit bad acts and that its probative value in relation to that issue outweighs the risks of moral and reasoning prejudice: *Handy*, at paras. 55, 69-75, 100.

[29] *Handy* provides guidance on how to assess the probative value of bad act evidence when the Crown tenders it as propensity evidence. Propensity evidence is bad act evidence that the Crown tenders to show that the accused has a disposition to act in a particular way and thus acted in that way by committing the charged offence: *R. v. Batte* (2000), 49 O.R. (3d) 321 (C.A.), at para. 97. Propensity evidence is either general or specific: *R. v. Dooley*, 2009 ONCA 910,

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249 C.C.C. (3d) 449, at para. 170. General propensity evidence merely shows that the accused has a general disposition for violence or other crime and is never admissible: *Handy*, at para. 31. Specific propensity evidence is more context-specific and is sometimes admissible but remains dangerous because it still poses the risks of moral and reasoning prejudice: *Dooley*, at para. 170; *Handy*, at paras. 59-68. The degree of similarity between the bad acts and the facts of the charged crime determines the probative value of specific propensity evidence. A greater degree of similarity makes it unlikely that the similarities are a coincidence: *Handy*, at paras. 41-48, 76.

[30] The *Handy* test includes a special rule, which I will refer to as the identity rule. This rule guards against the special dangers of propensity evidence that the Crown seeks to use to prove the accused's identity as the perpetrator: *R. v. Perrier*, 2004 SCC 56, [2004] 3 S.C.R. 228, at para. 20. Under this rule, propensity evidence is only admissible to prove identity if it has a high degree of similarity to the charged crime that negates the possibility of coincidence: *Perrier*, at paras. 19, 44. The rule's high threshold protects against the risk that the similarities are coincidental: *Perrier*, at para. 20, citing *Handy*, at para. 91. To meet it, the Crown must establish on a balance of probabilities that the same person committed both the other bad acts and the charged crime: *Perrier*, at para. 20. The Crown can do so by either showing a "'unique trademark or signature'" or a number of significant

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similarities that cumulatively preclude coincidence: *Perrier*, at para. 19, quoting *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 45; see also *Handy*, at para. 77.

[31] Evidence obtained in police undercover operations designed to induce confessions can also risk wrongful convictions. These operations frequently involve undercover officers offering a suspect incentives to join a fictitious organization and then telling the suspect that to become a member the suspect must first confess to having committed the crime to the organization's leader: *Hart*, at paras. 1-2. These operations often, but not always, take the form of a classic "Mr. Big" investigation in which undercover officers elicit a confession during an interview-like meeting between the suspect and the boss of a fictitious criminal organization, who is known as Mr. Big: *Hart*, at paras. 1-2. These operations pose three dangers: they risk resulting in unreliable confessions; they may prejudice accused persons in the eyes of the trier of fact by showing their willingness to join a criminal organization and engage in simulated crimes; and, they may become abusive and unduly coercive: *Hart*, at paras. 5-9. Like bad act evidence, the admission of confessions deriving from these types of operations can create a risk of wrongful convictions: *Hart*, at para. 8.

[32] The *Hart* test guards against the dangers posed by undercover police operations undertaken to obtain confessions. *Hart* applies to two types of police operations designed to elicit confessions: (1) those in which undercover officers recruit the accused into a fictitious criminal organization, and (2) other undercover

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operations not involving a fictitious criminal organization that still pose the three dangers *Hart* identified: *Hart*, at paras. 10, 85; *R. v. Quinton*, 2021 ONCA 44, 399 C.C.C. (3d) 514, at paras. 40-42; *R. v. Zvolensky*, 2017 ONCA 273, 135 O.R. (3d) 401, at paras. 83-85, leave to appeal refused, [2017] S.C.C.A. No. 403. If *Hart* applies, any confession the accused makes to undercover officers during the operation is presumptively inadmissible unless the Crown establishes on a balance of probabilities that its probative value outweighs its prejudicial effect: *Hart*, at para. 85. Even if the Crown makes this showing, the trial judge may still exclude the confession if the police conduct is an abuse of process, as may be the case where the police use unacceptably coercive tactics: *Hart*, at paras. 86, 113-118. *Hart* uses but does not define the term “confession,” a point to which I will return later.

[33] *Handy* and *Hart* both address some of the same concerns, adopt a similar balancing test, and are subject to a deferential standard of appellate review. Both determine the evidence’s prejudicial effect by assessing the risks of moral and reasoning prejudice: *Hart*, at paras. 73-74; *Handy*, at para. 42. Further, both tests make the evidence presumptively inadmissible unless the Crown can prove on a balance of probabilities that the evidence’s probative value outweighs its potential prejudice: *Hart*, at para. 85; *Handy*, at para. 55. Finally, appellate courts will defer to trial judges’ balancing of probative value and prejudicial effect under both tests unless the trial judge errs in law, misapprehends the evidence, or reaches an

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unreasonable result: *Hart*, at para. 110; *Handy*, at para. 153; *R. v. McDonald*, 2017 ONCA 568, 351 C.C.C. (3d) 486, at para. 85.

[34] However, the two tests focus on different types of evidence, take different approaches to assessing probative value, and vary in their approach to police misconduct. *Hart* addresses confessions by the accused accompanied by bad act evidence as context for the accused's confession, while *Handy* solely concerns bad act evidence: *Hart*, at paras. 2, 73, 76; *Handy*, at para. 34. Because *Hart* concerns confessions that are often highly probative of guilt if reliable, its assessment of probative value focuses on reliability factors: *Hart*, at paras. 99-105. In contrast, when the Crown seeks to use other bad act evidence as propensity evidence, *Handy* assesses probative value principally by whether the bad acts other than the crime charged are similar enough to the facts of the charged offences to negate the possibility of coincidence: *Handy*, at para. 76. Finally, *Hart* addresses the risk of police misconduct while *Handy* does not: *Hart*, at para. 86.

(2) The Trial Judge Erred by Admitting the Murder Advice

[35] The trial judge erred in law by not analyzing the probative value of the murder advice under *Handy* and admitting it to prove identity even though it lacked the high degree of similarity with the killing of Ms. Consuelo that *Handy* requires. These legal errors permit this court to intervene despite the deferential standard of review: *McDonald*, at para. 85. I first explain why the trial judge erred by failing to

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apply *Handy* to the admissibility of the murder advice, and next address why that error led him to wrongly admit it.

(a) The Trial Judge Should Have Applied *Handy*

[36] The trial judge should have applied the *Handy* test and its identity rule to the murder advice because it triggered them. First, the murder advice triggered the *Handy* test because it was bad act evidence adduced by the Crown. Specifically, the murder advice was an act other than the charged crime of killing Ms. Consuelo that was likely criminal and would likely horrify an ordinary person: *Handy*, at para. 33; *Johnson*, at para. 90. Second, the murder advice also triggered *Handy*'s identity rule because the Crown sought to use it as propensity evidence to prove identity. Crown counsel at trial argued that the murder advice was specific propensity evidence and sought to use alleged similarities between the murder advice and the killing of Ms. Consuelo to prove the appellant's identity as the perpetrator.

[37] The trial judge did not, however, apply *Handy* and its identity rule. He did not analyze, as the identity rule required, whether the Crown showed that the murder advice revealed a unique trademark or signature or a number of significant similarities to the killing of Ms. Consuelo that cumulatively precluded coincidence: *Perrier*, at paras. 19-20. I disagree with the Crown's arguments that he need not have applied this rule.

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[38] First, I disagree with the Crown's argument that the trial judge need not have applied *Handy* because *Hart* applies to the murder advice. This argument's premise that *Hart* applies is correct, but the Crown draws the wrong conclusion from that premise.

[39] As the Crown submits, *Hart* applied to the murder advice because the appellant gave that advice to undercover officers during a police operation that posed the three dangers *Hart* identified. The operation was not a classic Mr. Big investigation; although it did involve an interview-like meeting with a boss of the fictitious organization who engaged in criminal acts, that organization was not wholly criminal and did engage in some legitimate business. The police nonetheless sought to obtain a confession from the appellant by holding out an inducement, namely becoming business partners with two men who held themselves as having either committed murder or successfully concealed it. The operation thus triggered the three dangers of unreliable statements, prejudicial evidence, and police misconduct. Because it triggered those dangers, *Hart* applied: *Quinton*, at para. 41; *R. v. Kelly*, 2017 ONCA 621, 387 C.R.R. (2d) 93, at paras. 35-36, 79, leave to appeal refused, [2017] S.C.C.A. No. 474; *Zvolensky*, at paras. 83-85.

[40] It follows that I reject the appellant's argument that *Hart* did not apply to the murder advice because he never admitted that he killed Ms. Consuelo. This argument assumes that *Hart* only applies to confessions that are full admissions

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of guilt. This assumption is incorrect. While *Hart* did not define the term confession, the related common law confessions rule defines that term broadly as any statement that an accused makes to a person in authority that the Crown seeks to introduce as part of its case: *R. v. Pearce (M.L.)*, 2014 MBCA 70, 318 C.C.C. (3d) 372, at para. 48, citing *Piché v. The Queen*, [1971] S.C.R. 23, at pp. 36-37. I would apply this definition to *Hart* with slight modifications to account for its different context: under *Hart*, a confession is any statement that an accused makes to an officer during an undercover operation that the Crown seeks to introduce as part of its case. The appellant's murder advice meets the definition I have set out because he gave that advice to an officer during an undercover police operation.

[41] This broader definition is appropriate because it furthers *Hart*'s purposes of ensuring protections consistent with the confessions rule and avoiding legal vacuums: *Hart*, at paras. 72, 79, 123. The appellant's narrower definition is inappropriate. It would both create legal vacuums and reintroduce a distinction between full admissions of guilt and other statements by the accused that the confessions rule caselaw has long rejected: *Piché*, at pp. 36-37; Sidney N. Lederman, Michelle K. Fuerst, & Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis Canada, 2022) at paras. 8.1, 8.3-8.6.

[42] However, the Crown wrongly assumes that because *Hart* applies, *Handy* cannot also apply. The tests are not mutually exclusive. Rather, as I have

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explained, they both engage a shared concern about the dangers of moral and reasoning prejudice and adopt a similar rule of presumptive inadmissibility that the Crown must rebut by showing that the evidence's probative value exceeds its prejudicial effect. And while *Hart*'s discussion of probative value focuses on reliability, it nowhere forbids courts from assessing probative value pursuant to *Handy* principles when the statement in question is bad act evidence that the Crown adduces as propensity evidence. There is thus no reason in principle not to apply both tests where they are each triggered.

[43] The trial judge thus should have assessed the murder advice's probative value and prejudicial effect by applying principles from both *Hart* and *Handy*. Consistent with both tests, the murder advice is presumptively inadmissible unless the Crown shows that its probative value exceeds the prejudicial effect of the risks of moral and reasoning prejudice. The trial judge should have applied both *Hart* reliability principles and *Handy* similarity principles to assess the advice's probative effect. The trial judge could have properly analyzed the reliability of factual assertions contained in the murder advice under *Hart*, such as the appellant's statement that he had previously strangled a friend. But because the Crown sought to use the murder advice as propensity evidence to prove identity, the trial judge should also have asked whether the Crown had met *Handy*'s identity rule governing the admissibility of such evidence. The trial judge could not admit the

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statement to prove identity if it lacked the high degree of similarity that rule required, even if it was sufficiently reliable under *Hart*.

[44] Second, I disagree with the trial judge's conclusion, which the Crown defends on appeal, that the murder advice was not propensity evidence because it went to the appellant's knowledge of Ms. Consuelo's killing. This conclusion contradicts the position of Crown counsel at trial, who characterized the murder advice as specific propensity evidence. That characterization was accurate. Crown counsel at trial relied on the murder advice's similarities with Ms. Consuelo's killing to prove the appellant's identity as the killer. Such use of similarities to prove identity is specific propensity evidence that triggers *Handy* and its identity rule: *Handy*, at paras. 62-63, 77, 91. Contrary to the Crown's submission, this specific propensity evidence remains propensity evidence even if it goes beyond the appellant's general disposition for violence or crime: *Handy*, at paras. 59, 68; *Dooley*, at para. 170.

[45] It matters not that the trial judge labeled the murder advice as going to knowledge rather than propensity because that label did not accurately characterize the true basis on which he admitted it: *McDonald*, at para. 103. Rather, his reasons show that he viewed the advice as probative to the issue of identity because it appeared similar to how the deceased was killed.

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[46] Finally, I disagree with the Crown's argument that *Handy* did not apply because the murder advice consists of statements made by the appellant. This argument overlooks that statements can trigger *Handy*, even when they are made by the accused. Statements like the murder advice trigger *Handy* because they constitute discreditable conduct by the accused other than the charged offence: David Tanovich, Louis Strezos, & The Honourable S. Casey Hill, *McWilliams' Canadian Criminal Evidence*, 5th ed. (Toronto: Thomson Reuters, 2013) (Release 2023 – No. 5), § 10:29. The fact that the appellant made the statements does not exempt them from *Handy*. Rather, as the Crown notes, that fact establishes that the statements are party admissions that do not violate the hearsay rule: *Hart*, at para. 63. Bad act evidence adduced by the Crown that does not meet the test in *Handy* is inadmissible, even if it does not also violate the hearsay rule: *R. v. Benham*, 2008 BCSC 1906, at para. 55.

(b) The Murder Advice Was Inadmissible Under *Handy*

[47] Because the trial judge failed to apply *Handy* and its identity rule to the murder advice, he erred in law by admitting this evidence. The advice was inadmissible to prove identity because it did not meet the identity rule's high bar. The trial judge also failed to assess the serious prejudicial effects of the murder advice concerning avoiding detection, which outweighed its minimal probative value as context. He should have excluded the murder advice.

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[48] Under the identity rule, the murder advice was only admissible to prove identity if the Crown showed on a balance of probabilities that it disclosed (1) a unique trademark or signature, or (2) a number of significant similarities with Ms. Consuelo's killing that cumulatively precluded coincidence: *Perrier*, at para. 19. The murder advice was inadmissible to prove identity because the Crown showed neither.

[49] First, the Crown failed to show that any of the murder advice revealed a unique trademark or signature. The appellant suggested that Ryan could kill Jesse by jumping on top of her and either strangling her or smothering her by putting his hands over her nose and mouth. The trial judge, who did not apply *Handy*, characterized this as a unique killing method. But it does not constitute a unique trademark or signature. This was incorrect under *Handy*. Rather, strangling someone, including with a ligature as the forensic pathologist opined might have occurred, is a common method of killing: *R. v. Paul*, (2002) 62 O.R. (3d) 617 (C.A.), at paras. 41-42; *R. v. Wood*, 1987 ABCA 230, 39 C.C.C. (3d) 212, at para. 72. The same is true of jumping on top of the victim and smothering her by putting hands over the nose and mouth. As the appellant submits, this method is not distinctive but is merely an exercise of superior strength. The Crown has not argued otherwise or pointed to any evidence that this constitutes a unique method of killing someone.

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[50] The appellant's advice on how to evade detection likewise failed to disclose a unique trademark or signature. The appellant advised Ryan to evade detection by covering his face, wearing a hat and gloves, looking down and wiping down everything he touched. The Crown has not suggested that covering one's face and wearing a hat and gloves is a unique criminal signature. Likewise, looking down and wiping items down are common criminal methods of avoiding detection, not a specialized method or unique signature: *R. v. Cole*, 2021 ONCA 759, 158 O.R. (3d) 680, at paras. 92-96, leave to appeal refused, [2021] S.C.C.A. 465.

[51] Second, the Crown also failed to show enough significant similarities between the murder advice and Ms. Consuelo's killing to cumulatively preclude coincidence. This court has held that the presence of a few generic or commonplace similarities between a single bad act other than the charged crime and that crime does not establish enough significant similarities to preclude coincidence: *R. v. Durant*, 2019 ONCA 74, 144 O.R. (3d) 465, at paras. 42-43, 103-104; *McDonald*, at para. 104. This was the situation in this case. While the trial judge characterized the murder advice as conspicuously similar to the killing of Ms. Consuelo, the similarities were generic and limited to the perpetrator jumping on top of the victim and using common methods of killing such as strangling or smothering. The murder advice lacked any of the potentially distinctive features of Ms. Consuelo's killing, such as the bouncing up and down on the victim's chest, the scattering of unopened condoms at the crime scene, or

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the penetration of the rectum with an object. The few generic, commonplace similarities that did exist could not negate the possibility of coincidence.

[52] The appellant's advice on how to evade detection also lacked enough significant similarities to the way the masked man dressed and acted to preclude coincidence. The appellant suggested to Ryan that a perpetrator should wear a hat, cover his face, look down, and wear gloves. These were ways of dressing and behaving used by the masked man. However, these similarities are generic. The Crown has not suggested that covering one's face and wearing a hat and gloves is an uncommon way of dressing, and looking down is not a specialized method. Like the portion of the murder advice concerning how to kill Jesse, the advice on evading detection is a single instance with only a few generic or commonplace similarities that does not meet *Handy*'s high bar: *Durant*, at para. 104; *McDonald*, at para. 104.

[53] Because the murder advice was inadmissible to prove identity, the trial judge should have excluded the portion of that advice concerning how to kill Jesse. I reach this conclusion because the only purpose for which he admitted that portion was to prove identity.

[54] The trial judge should have likewise excluded the portion of the murder advice concerning evading detection. This portion was inadmissible to prove identity. The trial judge also admitted it to provide context for the June 27

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statements, but he erred in law in doing so. As I will explain, he failed to assess both how probative it was and its prejudicial effect.

[55] The trial judge first erred in law by failing to assess how probative the advice about evading detection was as context for the June 27 statements. Because probative value is a matter of degree (*Magonza v. Canada (Citizenship and Immigration*), 2019 FC 14, at paras. 21, 23), trial judges must first assess the degree of probative value of the evidence to properly balance that probative value and any prejudicial effect: *R. v J.W.*, 2022 ONCA 306, 161 O.R. (3d) 609, at paras. 20-22, 36, 39, leave to appeal refused, [2022] S.C.C.A. No. 220. The trial judge did not do this. Instead, he simply labeled the advice as probative. This was conclusory and insufficient: *J.W.*, at para. 46.

[56] Had the trial judge engaged in the proper analysis, he would have concluded that this advice had minimal probative value as context because it would not significantly help the jury to understand the June 27 statements: *R. v. Z.W.C.*, 2021 ONCA 116, 115 O.R. (3d) 129, at para. 109. As the trial judge found, the June 8 discussion provided context for Ryan's June 27 suggestion to the appellant that he was the masked man because he had advised Ryan to cover his face to evade detection. But it was the appellant's apparent acknowledgement that he was the masked man, not Ryan's suggestion, that was probative of identity. Ryan's reference to the advice about evading detection was not necessary context for this acknowledgement because, as the trial judge noted, the appellant made that

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acknowledgment in response to another comment by Ryan concerning the picture of the masked man in the police bulletin. The trial judge thus could have excluded the advice about evading detection and edited out the portion of the June 27 discussions that mentioned it without eliminating the necessary context for the acknowledgment.

[57] The trial judge further erred in law by failing to assess the prejudicial effect of the advice concerning evading detection. As *Handy* and *Hart* emphasize, trial judges must rigorously assess the prejudicial effect of bad act evidence, especially where such evidence is obtained in undercover police investigations that implicate the accused in criminality: *Handy*, at paras. 64, 137-147; *Hart*, at para. 106. Such a rigorous assessment is necessary to ensure that *Handy*'s narrow exception to the inadmissibility of bad act evidence remains narrow and that courts heed *Hart*'s caution against the routine admission of bad act evidence as context: *Handy*, at para. 41; *Hart*, at paras. 76-77. Failing to rigorously assess bad act evidence's prejudicial effects can result in wrongful convictions: *Handy*, at para. 139; *Hart*, at paras. 8, 77.

[58] Unfortunately, the trial judge did not conduct the rigorous assessment that *Handy* and *Hart* require. Instead, he concluded that the appellant's advice on avoiding detection had minimal prejudicial effect because it was probative. His assumption that probative evidence has low prejudice is incorrect. Rather, prejudicial effect does not necessarily decline as probative value increases and

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highly probative evidence can also be highly prejudicial: *Handy*, at para. 149. Because the trial judge overlooked this principle, he did not assess two serious risks of moral prejudice that the advice about evading detection posed.

[59] First, the trial judge failed to consider that the appellant's association with a man who was holding a gun for a relative involved in organized crime and contemplating killing his girlfriend was highly prejudicial. This evidence created a risk that the jury would convict the appellant because he associated with a bad person: *R. v. Riley*, 2017 ONCA 650, 137 O.R. (3d) 1, at para. 221, leave to appeal refused, [2019] S.C.C.A. 412. This mode of reasoning was a serious risk because, as this court has held, it "offends one of the most fundamental principles of the criminal law," namely that "[p]eople can only be convicted for what they do, not for the company they keep": *R. v. Ejiofor* (2002), 156 O.A.C. 147 (C.A.), at para. 8.

[60] Second, the trial judge overlooked that the appellant's advice to Ryan on how to evade detection for murder was itself highly prejudicial. As this court has held, discussions concerning the commission of violent acts other than the charged crime are highly prejudicial even where, unlike here, only the accused's associates and not the accused participated in them: *Riley*, at para. 221.

[61] These two highly prejudicial risks outweigh the advice's minimal probative value as context. Hearing the murder advice did not significantly help the jury assess the appellant's apparent admission that he was the masked man. Instead,

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it opened a gateway to impermissible propensity reasoning and increased the risk that the jury would convict the appellant because he was a bad person who associated with bad people: *Riley*, at paras. 220-221; *McDonald*, at para. 106.

[62] To provide guidance for future cases, I note that the trial judge made similar errors when he assessed the prejudicial effect of the portion of the murder advice concerning how to kill Jesse. By only identifying the appellant's offer to kill Jesse for Ryan as prejudicial, he overlooked the risks of moral prejudice that the appellant's association with Ryan and willingness to advise Ryan on how to kill Jesse caused: *Riley*, at para. 221; *Ejiofor*, at para. 8. Further he did not address the prejudicial effect of allowing the jury to hear the appellant's description of strangling his friend, a prior criminal act that created a real risk that the jury would convict the appellant because he was a violent person: *Handy*, at para. 39.

(3) The Trial Judge Erred by Failing to Warn the Jury

[63] The trial judge also erred in law by not warning the jury about the dangers that the murder advice and the June 27 statements posed. This failure deprived the jury of a fundamental warning they needed to properly decide the case.

[64] The appellant has the right to have a properly instructed jury decide whether he is guilty or not guilty. This right required the trial judge to give the jury a sufficient understanding of the law. To do so, the trial judge had to give the jury necessary instructions on the law with enough detail to enable the jury to decide the case. He

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erred in law because he was required to warn the jury about the dangers of bad act evidence but did not do so: *R. v. Abdullahi*, 2023 SCC 19, 483 D.L.R. (4th) 1, at paras. 35, 45-46, 49.

[65] The trial judge was required to warn the jury about the murder advice and the June 27 statements. Because bad act evidence is so dangerous, the general rule is that trial judges who admit such evidence must instruct the jury about its limited use and dangers: *Handy*, at para. 70; *B. (F.F.)*, at pp. 733-735; *R. v. D. (L.E.)*, [1989] 2 S.C.R. 111, at p. 128; *R. v. M.T.*, 2012 ONCA 511, 294 O.A.C. 111, at para. 82. The trial judge must tell the jury that they can only use other bad act evidence for the legitimate purpose for which it was admitted and cannot use it to infer that the accused is the type of person who likely committed the charged crime: *Handy*, at para. 70; *R. v. Bomberry*, 2010 ONCA 542, 267 O.A.C. 235, at para. 33. Juries need these warnings because they lack the benefit of judicial experience about this evidence's dangers and might otherwise engage in the natural human tendency to judge people based on their bad character: *Abdullahi*, at para. 32; *Handy*, at paras. 39-40; *Z.W.C.*, at para. 94. Failing to warn the jury risks causing it to unfairly and wrongfully convict the accused based on prejudice rather than proof: *B. (F.F.)*, at p. 735; *D. (L.E.)*, at pp. 127-128; *Handy*, at para. 139.

[66] The general rule that trial judges must warn the jury about bad act evidence's dangers and limited uses is subject to a narrow exception: A warning is not required if the facts of the case negate any realistic possibility that the trier of fact

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will use bad act evidence improperly: *R. v. Beausoleil*, 2011 ONCA 471, 277 C.C.C. (3d) 50, at paras. 20-21, 26. This may be the case if the bad act evidence has low prejudicial effect *(R. v. C.B.*, 2008 ONCA 486, 237 O.A.C. 387, at para. 35), is not adduced by the Crown as propensity evidence (*Beausoleil*, at paras. 21-22), is primarily used by the accused rather than the Crown (*R. v. A.G.* (2004), 190 C.C.C. (3d) 508 (Ont. C.A.), at para. 8), and/or where warning the jury would prejudice the appellant by drawing attention to the bad act evidence (*C.B.*, at para. 35). These factors are not a checklist and the presence of one or more of them will not always negate a realistic possibility of misuse.

[67] Because the murder advice was bad act evidence and the June 27 statements contained such evidence, the general rule that the trial judge was required to warn the jury about this evidence's dangers and limited uses applies. As I have explained, the murder advice showed that the appellant had committed a violent act in the past, was associating with a person with a connection to organized crime who was contemplating killing his girlfriend, and was actively advising that person how to commit that killing and avoid detection. The June 27 statements were also highly prejudicial because they showed that the appellant wanted to be partners with a man who had killed his girlfriend and thrown her body in the river and another man who was willing to cover up that crime by concealing the body, destroying evidence, and relocating a key witness out of the police's reach. This evidence showed that the appellant had committed appalling acts other

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than the charged crime and was associating with reprehensible people. It was poisonous and created a real risk that, unless properly instructed, the jury would convict the appellant because, as a violent person with violent associates, he was the type of person who would murder Ms. Consuelo.

[68] The trial judge should have recognized the need to warn the jury about this evidence when he admitted it. He did not recognize its dangers. As I have explained, he did not rigorously assess the prejudicial effect of the murder advice and thus overlooked the moral prejudice flowing from the appellant's association with Ryan, his advice to Ryan on how to kill Jesse, and his admission to committing a prior violent act. The trial judge also failed to properly assess the prejudicial effect of the June 27 statements. Instead, he simply concluded without explanation that they had no prejudicial effect. But the statements were prejudicial. By disclosing the appellant's desire to partner with violent and murderous associates, they created a serious risk that the jury could convict him for keeping bad company: *Riley*, at para. 221; *Ejiofor*, at para. 8.

[69] I disagree with the Crown's argument that the trial judge had discretion not to instruct the jury on these dangers. The narrow exception to the general rule that this instruction is required does not apply because, as I have explained, there was a real risk that the jury would misuse the bad act evidence. Unlike the cases where this court has applied that exception, the bad act evidence in this case was highly prejudicial and was primarily used by the Crown, including for propensity purposes.

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Further, warning the jury about that evidence would not have prejudiced the appellant by repeating that evidence later in the charge because the trial judge could have given the warning immediately after summarizing that evidence.

[70] I also disagree with the Crown's argument that recent Supreme Court cases demonstrate that an instruction is not required. The Crown relied on the Supreme Court's comment in *Abdullahi* that warning the jury of these dangers is a contingent instruction, meaning one that is triggered by the circumstances of the case: *Abdullahi*, at para. 49. But *Abdullahi* held that trial judges must give contingent instructions if the circumstances of the case, including the evidence at trial, so require: *Abdullahi*, at paras. 49, 60. As the Supreme Court and this court have clarified, the general rule is that the Crown's introduction of bad act evidence is a circumstance that triggers an obligation to warn the jury about its misuse: *Handy*, at para. 70; *B. (F.F.)*, at pp. 733-735; *D. (L.E.)*, at p. 128; *Bomberry*, at para. 33; *Z.W.C.*, at para. 109. The Crown's reliance on *R. v. Calnen* is also misplaced. *Calnen* does not overturn the caselaw that generally requires such warnings when the Crown adduces bad act evidence. Instead, the majority merely held that the trial judge's warning in that case was sufficient: *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 26; see also Paciocco, Paciocco, & Stuesser, at p. 69.

[71] Because the warning was required, the trial judge erred in law by not giving it. He did not tell the jurors that they could only use the murder advice and the June 27 incriminating statements for the purposes for which they were admitted. He did

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not warn them against using this evidence to convict the appellant because he was a bad person or the type of person who would kill Ms. Consuelo. Instead, his instructions concerning this other bad act evidence merely summarized the appellant's statements and the parties' arguments concerning it. This was not enough because the trial judge was required to instruct the jury on the law, not merely summarize the evidence and arguments: *R. v. Duran*, 2013 ONCA 343, 306 O.A.C. 301, at paras. 48-49; *Abdullahi*, at paras. 18, 91-94.

[72] The trial judge's failure to warn the jury about the dangers of this evidence creates a real risk that the jury wrongfully convicted the appellant because he appeared to have a bad character and bad associates: *Handy*, at para. 139; *B. (F.F.)*, at p. 735; *D. (L.E.)*, at pp. 127-128. Defence counsel's warning to the jury of these dangers cannot remedy the trial judge's failure to give a similar warning because juries take direction on the law from the trial judge, not defense counsel: *Abdullahi*, at paras. 65, 94.

[73] Contrary to the Crown's submission, reading the charge as a whole does not salvage it because nothing elsewhere in the charge adequately warned the jury of the dangers of the bad act evidence. The trial judge's instructions to the jurors that they should not be swayed by prejudice and that it was not their role to punish the appellant are standard opening elements of criminal jury charges. These instructions did not address the bad act evidence and thus were not sufficient to warn about that evidence's special dangers and limited use.

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[74] I also reject the Crown's argument that defense counsel's failure to request these warnings shows that the trial judge's instructions were sufficient. Defence counsel's silence is relevant but not determinative. It did not absolve the trial judge of his responsibility to instruct the jury on the law: *Abdullahi*, at para. 67. That is why, as the Supreme Court and this court have ruled, the general rule that trial judges must warn the jury about the special dangers of bad act evidence adduced by the Crown applies even when defence counsel do not request a warning if there is a real possibility that the jury will misuse it: *B. (F.F.)*, at pp. 735-736; *Bomberry*, at para. 37. The trial judge should have warned the jury here. It was his responsibility to guard against the risk that the jury would misuse the highly prejudicial evidence of the appellant's bad acts other than the crime charged to wrongfully convict him.

[75] The fact that defence counsel's silence was an oversight and not a tactical decision reinforces this conclusion. I infer this fact because, as I have explained, a warning would not have prejudiced the appellant: *Abdullahi*, at paras. 69, 95. Rather, a warning would have benefited him by addressing the danger that the jury would convict him because he appeared to have a bad character.

(4) The Trial Judge's Errors in Assessing the June 27 Statements

[76] The appellant initially challenged the trial judge's admission of the June 27 statements but later abandoned this argument. I nonetheless address the trial

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judge's ruling on these statements to provide guidance for the new trial and correct several errors the trial judge made.

[77] First, I am troubled by the trial judge's conclusion that the June 27 statements were reliable and probative because Ryan and Raz encouraged the appellant to be honest with and loyal to them. This conclusion was an error because it overlooks *Hart*'s holding that undercover police officers urging a suspect to be honest is a reliability risk factor, not a safeguard. Emphasizing the importance of honesty and loyalty is a common feature of the undercover operations which *Hart* considered: *Hart*, at paras. 30, 59, 78. At the close of such operations, undercover officers often attempt to capitalize on their emphasis on honesty and loyalty to elicit a confession. They tell the suspect that they know he committed the crime, that denying it will show that the suspect is untrustworthy and unworthy of joining their organization, and that the suspect will then lose the opportunities that membership offers: at para. 60. *Hart* held that this emphasis on honesty and loyalty casts doubt on the reliability of confessions by creating a risk that the accused would falsely confess to avoid being deemed a liar by the undercover officers and losing those opportunities: at paras. 139-141.

[78] The trial judge should have but did not analyze that risk here. Instead of confirming the reliability of the appellant's statements, as the trial judge reasoned, Ryan and Raz's preaching of honesty and loyalty created a risk that the appellant might falsely make admissions so that they did not perceive him as untrustworthy

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and refuse to partner with him. Raz's statements that he would only partner with honest and loyal people, that he knew the appellant was the masked man, that the appellant needed to be honest if he wanted Raz's help, and that the appellant had to do so promptly or lose out on the opportunity for partnership, heightened this risk. The trial judge should have recognized and properly assessed this risk. By not doing so, he failed to give effect to *Hart*'s promise of protecting accused persons who confess during undercover police operations from the risk of wrongful convictions: *Hart*, at paras. 8, 67.

[79] Second, I am equally concerned by the trial judge's conclusion that the opportunities Raz offered to the appellant would not have incentivized him to falsely confess. The trial judge justified this conclusion by distinguishing the police investigation into the appellant from the operation in *Hart*, reasoning that the former involved legitimate business opportunities while the latter involved criminal opportunities. This distinction was erroneous because it overlooked that in both cases, the undercover officers offered financial opportunities and friendship, which *Hart* recognized could pose a powerful incentive to falsely confess: at paras. 134-140. The trial judge further overlooked that, while Raz's organization was not wholly criminal and did engage in some legitimate business, it also engaged in criminal business, as evidenced by Raz's apparent use of an associate to cover up the killing of Jesse.

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[80] Third, the trial judge erred by reasoning that the appellant had no reason to falsely confess because Raz's offer of help would only be of value if he was guilty. The trial judge overlooked that Raz did not merely offer to help, but also told the appellant that he needed to be honest without delay or lose the opportunity for business partnership. This posed a risk that the appellant would falsely confess to avoid losing that opportunity.

[81] Fourth, the trial judge erred by concluding that the June 27 statements had no prejudicial value. As I have explained, they were highly prejudicial because they disclosed the appellant's desire to partner with violent and murderous associates.

[82] To ensure that these errors are not repeated, I stress that the police, the Crown, and trial judges cannot evade the need to robustly assess *Hart*'s dangers simply because of tweaks to one or more features of the classic Mr. Big operation. This operation shared many core features of the Mr. Big operation in *Hart*. As in *Hart*, the undercover officers befriended the suspect, lured him into a fictitious organization of their own making that values honesty and loyalty, offered him financial opportunities and friendship through membership, and then held an interview-like meeting in which the organization's boss told the suspect that membership and opportunities in the organization were contingent on him confessing to the crime for which he was later charged. These features created a risk that the appellant would falsely confess. The principal difference the trial judge identified, that the organization was not wholly criminal, had little significance

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because the organization had criminal members and engaged in criminality as well as business. While the trial judge correctly recognized that the operation triggered *Hart* despite this difference because it posed the three dangers *Hart* identified, he erroneously discounted those dangers when he actually applied *Hart*'s test. The trial judge was wrong to dismiss those dangers and should have fully analyzed them.

[83] If the Crown seeks to admit the June 27 statements in the new trial, the trial judge should conduct a fresh and rigorous assessment of whether the Crown has met its burden to show that their probative value outweighs their prejudicial effect. This assessment should properly account both for the reliability risks posed by the undercover officers' emphasis on honesty and loyalty and the financial and other incentives they offered to the appellant, as well as the prejudicial effect of the appellant's desire to partner with them despite his knowledge of their criminal acts.

E. CONCLUSION

[84] These reasons explain why we allowed the appeal and ordered a new trial.

[85] The Crown has discretion whether to hold that trial. In exercising that discretion, I would expect the Crown to reassess the strength of its case. Because this court has ruled that the murder advice is inadmissible, the Crown's case rests on limited circumstantial evidence such as the appellant's similar clothing to the masked man and his knowledge of certain details of Ms. Consuelo's death, as well

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as potentially his June 27 statement that he was in the building and apparent admission that he was the masked man if this evidence is admitted at the new trial.

[86] This circumstantial evidence is limited because the appellant never confessed to the charged crime and there is no forensic evidence linking him to it. He denied even being in Ms. Consuelo's apartment, the police never found forensic evidence placing him there or otherwise linking him to the murder, and the police also did not find clothes similar to those the masked man wore when they searched the appellant's apartment.

[87] Against the Crown's circumstantial case, there is evidence that a third-party suspect had motive, animus, and opportunity to kill Ms. Consuelo, and was recorded on the night of her death holding an item similar to one found in her apartment. These weaknesses could jeopardize the Crown's ability to show that the appellant's guilt is the only reasonable inference that the evidence permits.

Released: April 3, 2024 "M.T."

"M. Tulloch C.J.O."
"I agree. I.V.B. Nordheimer J.A."
"I agree. S. Gomery J.A."

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