IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. Calnen 2014 NSPC 17

Date: April 17, 2014

Docket: 2609833

Registry: Halifax

BETWEEN:

Her Majesty The Queen

v.

Paul Trevor Calnen

DECISION ON COMMITTAL

JUDGE: The Honourable Anne S. Derrick

HEARD: April 14 – 16, 2014

DECISION: April 17, 2014

CHARGES: Sections 235(1) of the *Criminal Code*

COUNSEL: Eric Woodburn and Susan MacKay, for the Crown

DEFENCE: Peter Planetta, for Paul Calnen

By the Court:

Introduction

[1] Paul Calnen is charged with the second degree murder of Reita Jordan which is alleged to have occurred on March 18, 2013. He is also charged that between March 18 and June 16, 2013, he did indecently interfere with Reita Jordan's remains by burning, contrary to section 182(b) of the *Criminal Code*.

[2] Mr. Calnen's Preliminary Inquiry on these charges proceeded over two days and, at the end of the evidence, committal on the section 182(b) charge was conceded by the Defence. The issue to be determined therefore is whether Mr. Calnen should be committed to stand trial on the section 235(1) charge of second degree murder.

[3] Other than Mr. Calnen's statement to police on June 18, 2013, the Crown's case is a circumstantial one. This requires me to consider and apply the law as it relates to circumstantial evidence and committal to trial. In these reasons I will be discussing the applicable law, reviewing the relevant evidence, and engaging in a limited weighing of that evidence to determine whether the test for committal has been satisfied. That test is well-established: Is there any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilt, in this case on the charge of second degree murder.

Broad Overview of the Evidence

[4] Three witnesses were called by the Crown: Det/Cst. Stephen Langille, the lead homicide investigator; Wade Weeks, a friend of the deceased; and, Cpl. Sean Carson, the forensic IDENT investigator. In addition, other evidence was admitted by consent: a booklet of photographs taken by Cpl. Carson; phone records; and Mr. Calnen's video and audio-taped statement to police of June 18, 2013.

[5] I will discuss the testimony and exhibit evidence in greater detail later in these reasons. In brief, the following is a broad overview of the case against Mr. Calnen.

[6] On March 28, 2013, Reita Jordan was reported missing by a friend who had been unable to reach her. Ms. Jordan's mother and sister also contacted police. Ms. Jordan kept in regular contact with a number of people and it was very unusual for her to drop off the radar. On April 2, 2013 the missing person investigation was transferred to the Integrated Vice Unit of the Halifax Regional Police.

[7] Investigators obtained Ms. Jordan's phone records which led them to identify four persons of interest. Paul Calnen was one of them. Police learned that since December 2012 Ms. Jordan had been living with Mr. Calnen at his home at 21 Rising Sun Trail in Tantallon.

[8] In the course of the Integrated Vice Unit investigation, Mr. Calnen was interviewed by Cst. Trider. Mr. Calnen said he had last seen Ms. Jordan on the morning of March 18 when he left for work. March 18 was the last time anyone had heard from Ms. Jordan and the last date on which her phone showed any activity.

[9] The Integrated Vice Unit investigation exhausted its investigative leads. There was no trace of Ms. Jordan: she had disappeared. Police investigators believed she had to have met with foul play. The investigation was turned over to the homicide section of Major Crime.

[10] Major Crime was ultimately able to secure a statement from Mr. Calnen in which he admitted that Ms. Jordan had died at his home on March 18. He denied killing her. He told police she fell down the stairs in his house when she tried to take a swing at him after they had had an unpleasant exchange and she became physically aggressive. Mr. Calnen said he tried to revive Ms. Jordan after she fell but she was dead. He described how he then took her body and hid it, ultimately moving it and burning it. He also admitted to burning Ms. Jordan's personal belongings.

[11] Mr. Calnen's statement to police was on June 18, 2013. Prior to that, he had said and done a number of things to make it appear that Ms. Jordan had simply up and left.

The Test for Committal

[12] A preliminary inquiry is not a trial. Its primary function is to determine whether the Crown has sufficient evidence to warrant committing the accused to trial. The Supreme Court of Canada has said a preliminary inquiry is "a pre-trial screening procedure aimed at filtering out weak cases that do not merit trial." (*R. v. Hynes, [2001] S.C.J. No. 80, paragraph 30*) The Court has also said that, "The purpose of a preliminary inquiry is to protect the accused from a needless, and indeed, improper, exposure to a public trial where the enforcement agency is not in

possession of evidence to warrant the continuation of the process." (*Skogman v. The Queen, [1984] S.C.J. No. 32, page 8 (Q.L. version)*)

[13] Section 548(1) of the *Criminal Code* provides that an accused shall be committed to trial, following a preliminary inquiry, if there is sufficient evidence and shall be discharged if, on the whole of the evidence, "no sufficient case is made out." It is a jurisdictional error to commit an accused to trial where there is no evidence on an essential element of the charge. (*R. v. Savant, [2004] S.C.J. No. 74, paragraph 16*)

[14] The question that must be asked in considering the issue of committal is "whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty." (*United States of America v. Sheppard, [1977] 2 S.C.R. 1067*) In assessing this question, a preliminary inquiry judge is required to consider "the whole of the evidence" that has been taken at the preliminary inquiry. (*R. v. Deschamplain, [2004] S.C.J. No. 73, paragraph 18*)

Limited Weighing – Whether the Evidence if Believed Could Reasonably Support an Inference of Guilt

[15] Where there is direct evidence as to every element of the offence, the accused must be committed to trial. In a circumstantial case, the preliminary inquiry judge must engage in a limited weighing of the evidence in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. (*R. v. Arcuri, [2001] S.C.J. No. 52, paragraph 23*)

[16] In assessing the evidence tendered for committal, the preliminary inquiry judge does not assess credibility, the quality and reliability of the evidence, or make findings of fact, which are trial functions. The question to be asked is

whether the evidence if believed could reasonably support an inference of guilt. (*Arcuri, paragraphs 23 and 30*) The judge must recognize the possible inferences that could be drawn from the facts at a trial and assess their reasonableness. Where more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered. *(Sazant, paragraph 18*) It is a jurisdictional error for a preliminary inquiry judge to weigh the evidence and make a finding based on her view of the strength of the competing inferences. The preliminary inquiry "is not the forum for weighing competing inferences or selecting among them. That is the province of the trier of fact at trial." (*R. v. Campbell, [1999] O.J. No. 4041 (C.A.), paragraph 7, cited in R. v. Sazant, paragraph 23*)

[17] If the inferences urged by the Crown "are within the field of inferences that could reasonably be drawn, the preliminary inquiry judge must commit for trial even if those inferences are not the inferences that the preliminary inquiry judge would draw." (*R. v. Hawley, [2012] O.J. No. 4927(C.A.), paragraph 10*)

Inference versus Speculation

[18] There is a considerable difference between inference and speculation. Inferences are drawn from facts which are supposed or admitted to be true. Drawing an inference involves a process of reasoning: "…a fact or a proposition sought to be establish[ed] is deduced as a logical consequence from other facts…already proved or admitted." (*R. v. Latif, [2004] O.J. No. 5891 (Ont.S.C.J.), paragraph 4*) In the context of a preliminary inquiry, a fact or proposition sought to be established is deduced as a logical consequence from other facts, assumed to be true or admitted.

[19] An inference "which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation." (*R. v. Morrissey, [1995] O.J. No. 639(C.A.), paragraph 52*)

The Sufficiency of the Evidence and the Crown's Ultimate Burden

[20] In *R. v. Charemski*, McLachlin, J. (as she then was) in dissent tied the sufficiency of the evidence requirement in the context of a directed verdict to the ultimate burden on the Crown to prove the case beyond a reasonable doubt. The test on a directed verdict is the same as the test for a committal to trial. (*Arcuri, paragraph 21*) McLachlin, J.'s statements in *Charemski* have been applied in the preliminary inquiry committal to trial context, for example, by the Ontario Court of Appeal in *R. v. Turner, [2012] O.J. No. 4088*. As the Court in *Turner* noted, McLachlin, J. "made it clear that the sufficiency of evidence cannot be assessed without reference to the ultimate burden on the Crown to prove the case beyond a reasonable doubt." The *Turner* Court quoted McLachlin, J:

> … "sufficient evidence" must mean sufficient evidence to sustain a verdict of guilt beyond a reasonable doubt; merely to refer to "sufficient evidence" is incomplete since "sufficient" always relates to the goal or threshold of proof beyond a reasonable doubt. This must be constantly borne in mind when evaluating whether the evidence is capable of supporting the inferences necessary to establish the essential elements of the case. (*R. v. Charemski, [1998] S.C.J. No. 23, paragraph 35*)

[21] Although not quoting this precise paragraph from *Charemski*, our Court of Appeal has followed McLachlin, J.'s assessment of how "sufficient evidence" must be considered. In *R. v. Beals, [2011] N.S.J. No. 231*, the Court of Appeal upheld the trial judge's acquittal on a directed verdict motion and his description,

of the evidence as "really, really flimsy." The Court rejected the Crown's argument on appeal that the judge had stepped outside the bounds of his entitlement to engage only in a "limited weighing" of the evidence. It was the Court's view that it was "…perfectly appropriate for him to make reference to certain specific evidence and use meaningful descriptors to characterize it. Who better than he to assess the Crown's evidence and describe it as "really, really flimsy?" In *Charemski*, McLachlin, J. said, as the Court of Appeal in *Beals* noted: "…The accused should not be subjected to another trial on evidence as flimsy as this." (*Beals, paragraph 33*)

[22] The "limited weighing" exercise is not a formulaic or surgically precise one. This was made clear in *Beals*:

> There is no ready instrument one can use to gauge the parameters of "limited weighing" by preliminary inquiry judges when dealing with a committal decision, or by a trial judge on a motion for a directed verdict. No such assessment of the evidence can be plumbed with mathematical precision. Whether a motion will succeed or fail must depend upon the judge's evaluation of the evidence in that particular case. It seems to me that the approach we ought to take when such determinations are challenged on appeal, is to ask whether the trial judge stayed within the limited bounds of his or her assignment, or erroneously slid into the jury's exclusive preserve… (*Beals, paragraph 36*)

The Essential Elements of the Charge of Second Degree Murder

[23] I will turn to *Charemski* for one final purpose: its useful summary of the issues in a murder prosecution in relation to which the Crown must adduce sufficient evidence. These are identity, causation, the fact of death, and the

requisite mental state. (*Charemski, paragraph 5*) Mr. Calnen does not dispute that there is evidence of his identity and the fact that Ms. Jordan is dead. As I will be discussing, he says there is no evidence on the essential elements of causation and intent. I note that in a homicide case the Crown is not required to establish a medical cause of death nor is it required to show that a specific act or event caused the death. The Crown must prove that the death was caused by an unlawful act and that the accused is legally responsible for that act. (*R. v. Nette, [2001] S.C.J. No. 75, paragraph 77*)

The Evidence Adduced by the Crown

[24] At the start of these reasons I gave a very broad overview of the case. I will now go into the evidence in more detail.

The Text Messages

[25] The police obtained phone records for Mr. Calnen and Ms. Jordan and also for a friend of Ms. Jordan's, Wade Weeks. (*Exhibits 4, 1, and 3, respectively*) The text exchanges in the records for Mr. Calnen and Ms. Jordan indicate an affectionate and sexual relationship. The suggestion of domesticity is indicated in a text from Ms. Jordan to Mr. Calnen on March 1, 2013 where she asked him to "pick up some milk and bread on your way home today."

[26] Ms. Jordan was not sexually exclusive with Mr. Calnen. This is indicated in Mr. Calnen's June 18 statement to police and Mr. Week's testimony which is supported by certain texts. The evidence indicates that Mr. Weeks visited Ms. Jordan at Mr. Calnen's residence on March 5 when he got his EI cheque. Crack cocaine was consumed and there was sexual activity that included, once Mr. Calnen arrived home from work, Mr. Calnen and Mr. Weeks with Ms. Jordan. A

text to Ms. Jordan on March 5 at 6:15 p.m. indicates that Mr. Calnen was interested in sexual activity with her once he got home and that he knew "Wade" was still visiting, something he had been told by Ms. Jordan earlier. He indicated to Ms. Jordan that "Wade can watch or join in" which according to Mr. Weeks' testimony is what happened.

[27] There is nothing in the evidence to indicate that Mr. Calnen was jealous of Ms. Jordan's involvement with other men. According to the police investigation he facilitated Ms. Jordan continuing her sex work while she was living at his house.

[28] There is evidence that Ms. Jordan had a temper and could be violent. She had a criminal record for violence. The friend who reported her missing told police it would not be like her to just leave a boyfriend: she would be more likely to steal and damage as much as she could on the way out. Mr. Calnen told police she was jealous and this can be inferred from certain of the text messages.

[29] There are signs of Ms. Jordan's temperament in the texts. For example, on March 13, from 8:14 a.m. to 9:09 a.m. Ms. Jordan tried to reach Mr. Calnen by text, telling him she will "call the cops if u don't cal me" and "Whare r u" and "Dont keep hurting me pls" and "Fuckin cal me." Several days later, on March 17 the relationship showed signs of unravelling. Ms. Jordan texted Mr. Calnen: "A true friend doesnt lie or deceive and a true friend wouldnt make me feel as worthless as i do right now." Mr. Calnen was conciliatory: "Reita i now it s the same thing I don t need 2 have anything 2 do with anybody U r my solmate believe me I love u with all my heart" Ms. Jordan was cutting in reply: "Well ur not my sole mate I know that 4 sure 100", from which it can be reasonably inferred that she meant "100 percent." She went on to say: "ur nuttin but a trick that's all u will

ever be" and "if I was ur sole mate u wouldnt need anyone else nor would u share me end of story."

[30] Mr. Calnen's texts to Ms. Jordan say that he has done whatever she wanted and more and doesn't that mean anything to her. Mr. Jordan told him "End of story good night" and said he is too phony for her when Mr. Calnen said he is not sharing her with anybody, that she satisfies him totally, and he wishes she would believe him.

[31] These texts were exchanged shortly after midnight on March 18, 2013.

[32] The next morning at 6:54 a.m. Ms. Jordan texted Mr. Calnen to say she thought he would have come down to say hi. Mr. Calnen texted her back to point out that the night before she had told him "end of story" and goes on to say that she won't have to worry because he plans on taking his life on Friday. He says he has nothing to live for. Ms. Jordan responded: "Yes u do for fuck sakes." Mr. Calnen persists with his gloomy view of things telling Ms. Jordan that he doesn't have it in him to go on because he is losing her, in debt, and has no one to turn to.

[33] At 10:15 a.m. on March 18 Ms. Jordan told Mr. Calnen that as much as he has hurt her he was there for her and she'll be there for him. She says she will talk to him when he gets home, calling him "asshole" and signing off with a hug and a kiss. Ms. Jordan followed this up by telling Mr. Calnen that he was the one who was supposed to be strong for her and that he needs to be tough like her. When she got no reply she wondered if he was busy and Mr. Calnen replied he was. Ms. Jordan told him: "U must b ok then get busy ttyl [talk to you later]" At 2:24 p.m. on March 18, Ms. Jordan texted Mr. Calnen to ask when he finished work. He replied, "3 oo" At 2:27 p.m. Ms. Jordan asked Mr. Calnen to call her and at 3:26

p.m. she texted him to say he needed a "crew" to put "this place in order i was in the garage 4 an hour and it doesnt look touched."

[34] This marks the end of the texts between Ms. Jordan and Mr. Calnen.

[35] The Crown has submitted that the evidence supports an inference that there was *animus* between Mr. Calnen and Ms. Jordan. In addition to the grievances expressed by Ms. Jordan in her March 18 post-midnight texts to Mr. Calnen, the Crown points to an earlier text she sent to Wade Weeks and what Mr. Calnen told police about what happened when he arrived home at suppertime on March 18. I will review the evidence about Mr. Weeks first.

Wade Weeks

[36] Mr. Weeks knew Ms. Jordan for about eight years although there had been a hiatus in their relationship when he went out West to work. In January 2013 he was back in Nova Scotia living with his parents in Sheet Harbour. Ms. Jordan called their number out of the blue and she and Mr. Weeks reconnected. Mr. Weeks testified he adored Ms. Jordan and would have done anything for her. They communicated by phone and text but only saw each other twice after she called him in January. They first got together later in February and then on a second occasion on March 5 when Mr. Weeks came to Halifax with his recently cashed EI cheque to buy some crack cocaine and visit Ms. Jordan.

[37] Ms. Jordan told Mr. Weeks that she was dating Mr. Calnen and that it would be okay for them to see each other. On both occasions that Mr. Weeks saw Ms. Jordan it was at Mr. Calnen's home at 21 Rising Sun Trail. On the first occasion Mr. Weeks got to the house around 10:30 a.m. and spent the day, hanging out with Ms. Jordan, smoking crack cocaine with her and enjoying her company.

[38] Mr. Weeks saw Mr. Calnen during his visit and noticed nothing untoward. He testified that Mr. Calnen seemed comfortable with what was going on between him and Ms. Jordan. According to Mr. Weeks, Mr. Calnen "didn't seem out of sorts". He was coherent and in a "fine" mood. Mr. Weeks left around 3 a.m. that following morning and drove back to Sheet Harbour.

[39] On Mr. Weeks' second and last visit to Ms. Jordan on March 5, he arrived in the morning, hung out, got high and "had fun." When Mr. Calnen came home, Mr. Weeks testified "it turned into a three-some", they had some rum and "everything was fine." There was a lot of drug use that time. Mr. Weeks had $500 worth of crack cocaine with him to share with Ms. Jordan. Mr. Calnen also had drugs.

[40] Mr. Weeks testified that on this visit as well Mr. Calnen seemed fine with what was going on. It was Mr. Weeks' evidence that "Everybody was getting along."

[41] March 5, actually the early morning hours of March 6 was the last time Mr. Weeks saw Ms. Jordan although they kept in touch by text.

[42] The evidence indicates that after this Ms. Jordan began scheming to steal as much as she could from Mr. Calnen. It is a reasonable inference that this is what Ms. Jordan was referring to when she texted Mr. Weeks on March 10 at 7:09 a.m. to say, "I got a plan i just need wheels can u help" She told Mr. Weeks: "I gotta get out of here" which she followed with "He put his hands on me i don't think im safe here." Mr. Weeks testified he knew Ms. Jordan was referring to Mr. Calnen.

[43] On March 10 Ms. Jordan alternately said in texts to Mr. Weeks that she was thinking of going to her mother's and that she wanted to come and stay with him for "the weekend or something." Mr. Weeks texted he could come and get her on

Tuesday or Wednesday night but he didn't have much money. He asked Ms. Jordan on March 10 at 11:21 p.m.: "Cant wait to see u did he hurt u." Ms. Jordan replied: "He tried im tough tho." It is a reasonable inference that these texts were in relation to Ms. Jordan's earlier text that said "He put his hands on me…"

[44] On March 11, Ms. Jordan wanted to know when Mr. Weeks could come for her. Money for gas is an issue; Mr. Weeks didn't get paid until he started back lobster fishing. By March 12 at 11:59 a.m. Ms. Jordan was again thinking of going to her mother's and told Mr. Weeks she will go there "tomorrow." Mr. Weeks told her he couldn't do anything about his lack of funds and says he'll have money on the 19th and can come for her then. March 19 was when Mr. Weeks was due to receive his next EI cheque.

[45] The texts then indicate that Ms. Jordan wanted Mr. Weeks to come for her the next day, March 13. She told him at 7:27 p.m. on March 12 that she was "packin my shit." However by 11:35 a.m. on March 13, Ms. Jordan is telling Mr. Weeks she can't leave "him", which it can be reasonably inferred means Mr. Calnen, "he's suicidal because he dosnt want me to go hes a mess." And although on March 14 at 6:07 a.m. Ms. Jordan told Mr. Weeks she was "ready to go anytime u wanna cum get me", by 10:21 a.m. she was saying: "Dont come today il call u tonight."

[46] On March 15 at 8:59 a.m. Mr. Weeks texted Ms. Jordan and asked her: "Have u had any more probblems". She told him: "Nothin major." The only reasonable inference is that this exchange relates to Ms. Jordan's March 10 "He put his hands on me…" text.

[47] Mr. Weeks and Ms. Jordan kept in touch between March 15 and March 17 by text but there were no imminent plans for Mr. Weeks to come and get her. Then on March 17 at 11:20 p.m. Ms. Jordan texted Mr. Weeks: "I want to fuck paul over so bad i already got all his gold jewelry but i want to get him good i got to get out of here." Mr. Weeks told her to let him know what she needs and he'll help. He will have gas money on Tuesday.

[48] What follows are texts between Ms. Jordan and Mr. Weeks about stealing Mr. Calnen's four-wheelers which will require a vehicle to transport them off the property. Mr. Weeks looked into where they can be sold and how much he could get for them. Mr. Weeks testified there was nothing in this scheme for him, he was just trying to help Ms. Jordan and would have turned over any money from selling the vehicles to her. Mr. Weeks told Ms. Jordan at 8:56 a.m. on March 18 that he needed to know if "it's a go tomorrow." Ms. Jordan was quite unresponsive and then told Mr. Weeks at 12:17 p.m.: "Cancel 4 now the shit is hittin the fan 4 me right now pls understand i just need 2 do whats right 4 myself il cal u when im alone."

[49] This text from Ms. Jordan was sent at lunchtime on March 18. There is no evidence that Mr. Calnen was at home at that time. There is evidence that another man, Paul Moulton, was with Ms. Jordan then and had been for some hours. Ms. Jordan had texted Mr. Calnen before he went to work that it was Mr. Moulton's car in the driveway. Mr. Moulton told police investigators that he left Ms. Jordan at 2:45 p.m. that day. At that time, she was fine.

[50] There is evidence from Wade Weeks that on the two occasions when he was visiting Ms. Jordan at 21 Rising Sun Trail, Mr. Calnen came home at lunchtime.

However this is not evidence that he was home on March 18 when Ms. Jordan sent Mr. Weeks the "shit is hittin the fan 4 me right now" email.

[51] D/Cst. Langille, the lead homicide investigator testified that around noon on March 18, Mr. Calnen made a phone call to Ms. Jordan that lasted approximately 1000 seconds. A 1000 second phone call is nearly 17 minutes. It was right after the call with Mr. Calnen that Ms. Jordan sends the "shit hittin the fan" text to Mr. Weeks.

[52] On March 18, at 12:20 p.m., only five minutes after Ms. Jordan's "the shit is hittin the fan 4 me right now" email, she was texting Mr. Weeks to say: "How can I live down there with no job or income", an obvious reference to relocating to Sheet Harbour to be with him. Mr. Weeks reassured her that he had EI and would be going back to fishing. He also told her that "buddy" really wants the four wheelers Ms. Jordan had been planning to steal from Mr. Calnen.

[53] Mr. Weeks' "buddy really wants them" email went to Ms. Jordan at 12:35 p.m. on March 18. He doesn't hear back from her by text for four hours. At 4:28 p.m. Ms. Jordan texted Mr. Weeks to say: "Its on 4 tomorrow." She wants him to call her. He texts: "Whats on" and then, "Can u talk"

[54] Mr. Weeks then texted Ms. Jordan, - it is now 27 minutes since she texted him to say it was "on tomorrow" – to tell her he will be out for a half hour and has had to leave his phone home to charge. He tells her: "…u need to anser next time i call…"

[55] During the afternoon of March 18, Mr. Weeks received one brief telephone call from Ms. Jordan. The call was about her wanting to get out of Mr. Calnen's and moving the four wheelers. Mr. Weeks testified that he could tell she "wanted

out of there, she sounded frustrated and upset." He also described her as sounding "sad."

[56] Mr. Weeks gets one final text from Ms. Jordan's phone. It comes in at 6:02 p.m. on March 18. All it says is: "Gone to town."

[57] After this, between 7:15 p.m. on March 18 and into the small hours of March 19, Mr. Weeks kept texting Ms. Jordan to ask her what is going on.

Mr. Calnen's Statement to Police on April 5

[58] As I noted at the start of these reasons, Ms. Jordan's disappearance was the subject of three investigations – a missing person investigation, an Integrated Vice Unit investigation, and ultimately, a homicide investigation. Mr. Calnen told investigators on the missing person and the Vice Unit investigations that he had not seen Ms. Jordan since he left for work on March 18.

[59] On April 5, Cst. Trider attended at Mr. Calnen's home because Mr. Calnen's son had been unable to contact him. Mr. Calnen came to the door and told Cst. Trider he had struck his head earlier in the week and had been off work. When, with Mr. Calnen's permission, Cst. Trider looked around the home, he saw a pair of women's boots outside the basement bedroom Ms. Jordan had used. Mr. Calnen confirmed these were Ms. Jordan's. There were also articles of Ms. Jordan's clothing in the laundry room.

[60] Cst. Trider asked Mr. Calnen to accompany him to the Tantallon Detachment where they spoke for over two hours. Mr. Calnen told Cst. Trider he last saw Ms. Jordan around 5 to 6 a.m. on the morning of March 18 before he left for work. Mr. Calnen said he had finished work at 3 p.m. and then attended to a plumbing job, a claim the police were later able to confirm. Mr. Calnen's next stop

was Sobeys. Subsequently the homicide investigators seized videotape from the store and were unable to locate Mr. Calnen on it.

[61] Mr. Calnen told Cst. Trider that when he came home from work around 6 p.m. on March 18, Ms. Jordan was not there and her bags were packed. Cst. Trider noticed that Mr. Calnen then self-corrected, saying Ms. Jordan's belongings were gone from the house so he assumed her bags must have been packed.

[62] When questioned by Cst. Trider about his relationship with Ms. Jordan, Mr. Calnen was quite dismissive, saying it was sexual only and he had not loved her. He met Ms. Jordan when she was working in the street sex trade about seven years earlier and had engaged her services on occasion. Ms. Jordan continued to work as a sex worker when she moved into Mr. Calnen's home, with Mr. Calnen's knowledge and consent, and used the basement bedroom for her clients. He told Cst. Trider about Ms. Jordan's drug use and said he knew Ms. Jordan would move out eventually.

Mr. Calnen's Statement to Police on June 18

[63] By June 18 the police had information they felt didn't square with Ms. Jordan just leaving Mr. Calnen's house with her belongings. Friends and family of Ms. Jordan said it was not customary for her to move on from a relationship and take her things with her. Typically she would leave everything behind. (There is a text that is inconsistent with this. I note that on March 12 in a text from Ms. Jordan to Mr. Weeks she said she was "packin' my shit.")

[64] By June 18, the police also had information about Ms. Jordan's cell phone. Notwithstanding what Mr. Calnen had said about Ms. Jordan being gone from his home when he returned around 6 p.m. on March 18, the police knew her cell phone

had continued to access a cell phone tower in Westwood, which is in Tantallon near 21 Rising Sun Trail. When Ms. Jordan's phone received a text message at 11:45 p.m on March 18, it was accessing a cell tower near Queensland.

[65] On Mr. Calnen's second day in police custody, he broke down during the interview in the presence of Ms. Jordan's mother who had been pleading with him to tell her where Ms. Jordan was. Mr. Calnen then gave a statement about what happened when he arrived home from work on March 18.

[66] In Mr. Calnen's police statement of June 18 he said the following: that when he got home on March 18 Ms. Jordan's bags were packed and she was downstairs in her bedroom. She was being unresponsive. They got into a discussion that was "not nice". Mr. Calnen went back upstairs and saw his laptop in her bag. That "kind of got [him] pissed off" and he looked in her purse and found his gold ring. He did not know about the texts Ms. Jordan had exchanged with Wade Weeks about stealing the four wheelers. Ms. Jordan started demanding that Mr. Calnen get her a taxi, telling him "I got to get out of here." She insisted that he give her a thousand dollars. He told her he did not have it to give her. While he is looking for a chequebook and walking towards the front window, Ms. Jordan threw an open Pepsi bottle at him. Pepsi went all over the floor. Mr. Calnen tried to get away from her because he said, "…when she gets mad, she gets mad and I don't want to be anywhere around her." Ms. Jordan threatened to trash his house. She kicked his bureau in his room and knocked a lamp over. He described Ms. Jordan as "in a destructive mode, she was going right off the deep end." He left his room and headed toward the front door.

[67] Mr. Calnen told the police what happened next: "Anyway, I'm at the front door now and her bags are there, so I got to kind of step over her bags and she's

got her back to the steps and when I was going by her she took a swing at me and I ducked, got out of the way, and when I ducked the momentum of her swing sent her down the steps. And when she got to the bottom of the steps I went down and I tried mouth-to-mouth on her…she was dead then. So, now what do I do?"

[68] According to Mr. Calnen's statement, no blood came from Ms. Jordan's head after she fell down the stairs.

[69] Mr. Calnen said he was in a panicky state. He put Ms. Jordan's body, wrapped in a blanket, in his truck and drove around. He then went along Highway 103 to a logging road in Ingramport where he put her in the woods. He went home and to work the next day. After work on March 19 he went back to Ingramport, saw that Ms. Jordan's elbow was visible from the logging road and put her further into the woods with a covering of boughs.

[70] After depositing Ms. Jordan's body in the words, Mr. Calnen burned her belongings about a thousand feet away off the same logging road. Anything that did not burn, Ms. Jordan's crack pipe, earrings, perfume bottles, and her cell phone, he threw farther into the woods.

[71] On April 11, police had spoken with Mr. Calnen about the transition of the file to a homicide investigation. On April 12, the night before police searched his house on April 13, Mr. Calnen retrieved Ms. Jordan's body from the Ingramport logging road and drove to Pleasant Valley in Musquodobit. Driving down a logging road there he got stuck and used his CAA membership to get towed. (Police located the tow truck driver confirming Mr. Calnen's claim.) It was daylight by the time he was on his way down another logging road where he partially burned Ms. Jordan's remains. Meanwhile the police were calling him to

arrange for a meeting, at which they intended to serve him with the search warrant for his house. Mr. Calnen told the officer he was at a plumbing job in Porter's Lake. He removed the unburned portion of Ms. Jordan's body, secured it in a canvas sack, and drove to Bedford for the meeting with the constable who had been calling him.

[72] On the Sunday after the warrant was executed at his house, Mr. Calnen finished burning Ms. Jordan's remains using the fire pit behind his home. He then drove to the lake in Sherbrook near the Jordan family cottage and deposited Ms. Jordan's ashes in the lake.

[73] Five pieces of what appeared to police to be human bones, showing some charring, were found by divers in the lake.

[74] At the end of his statement, Mr. Calnen, who had been very emotional throughout, said: "Now, I've been on drugs like it's nobody's business and – but I did not kill her." After Ms. Jordan's mother left the room, Mr. Calnen said: "I just didn't want them to think I was an animal for what I did."

The Forensic Investigation

[75] The forensic investigation turned up little in the way of evidence. Nothing was found in Mr. Calnen's house, no blood nor any damage in the entire area of the stairwell. No evidence was found of an attempted clean up or use of chemicals. Cpl. Carson, the forensic IDENT specialist, testified that a sticky substance was found on the television screen, the wall behind and the floor in the upstairs living room which is where Mr. Calnen told police Ms. Jordan threw the open Pepsi bottle at him.

[76] An investigation of a burn area off a logging road in Ingramport and the surrounding woods located items consistent with the incineration and scattering of Ms. Jordan's belongings. Cpl. Carson identified and photographed what he believed to be underwire from a bra, clasps from a bra or halter top, grommets from jeans, a button, and unburned clothing debris. Pieces of metal believed to be the remnants of a cell phone were found.

[77] The only evidence about what happened to Ms. Jordan is Mr. Calnen's exculpatory statement. A painstaking examination of his house was undertaken by Cpl. Carson and his associates and no forensic evidence was found there. No items at any site were swabbed for DNA.

Other Relevant Evidence

[78] I earlier noted that on March 17 at 11:20 p.m. Ms. Jordan sent Mr. Weeks a text saying she wanted "to fuck paul over so bad" and get out of there. She communicated this not only to Mr. Weeks. At 11:23 p.m. on March 17, Ms. Jordan texted Bonnie Tramble saying: "This is pauls woman. I need a reason to leave him. When were u with him last? I m not mad at u." Ms. Tramble responded about ten minutes later encouraging Ms. Jordan not to leave Mr. Calnen, saying it was she who had called him and apologizing. "I should not have called im so sorry Don't leave him love him Again except [accept] my apology."

[79] In Mr. Calnen's June 18 statement to police he said that when he came home from work on March 18 Ms. Jordan asked him "about a girl, Bonnie, and like we already had this talk way back when she wanted to see her men, that I can see women or whatever but like she was more jealous than I thought she would be, anyway."

Could a Reasonable Jury, Properly Instructed Return a Verdict of Guilt?

[80] The Crown has submitted that there is some evidence on all the essential elements of the offence of second degree murder. As I noted earlier in these reasons, identity and death are not in issue. Causation and the requisite mental intent for second degree murder are in issue. For the Crown to obtain a committal on the charge of second degree murder, there has to be some evidence that Mr. Calnen caused Ms. Jordan's death and that he did so intentionally or that he intended to cause Ms. Jordan bodily harm that he knew was likely to cause her death, and was reckless. (section 229(a)(i) and (ii), *Criminal Code*)

[81] In the Crown's submission there is evidence that Mr. Calnen had an *animus* toward Ms. Jordan and a motive to kill her. As I noted earlier in these reasons, the Crown points to Ms. Jordan's cutting remarks on March 17 indicating her indifference toward Mr. Calnen and her desire to leave him and on March 18, they had an acrimonious argument when he returned from work. Mr. Calnen said in his statement he was "kind of pissed off" when he saw that Ms. Jordan was fixing to leave with his laptop and gold ring. This is against the background of Ms. Jordan telling Mr. Weeks on March 10 that Mr. Calnen had put his hands on her and she thought she wasn't safe. Later that day when Mr. Weeks asks if "he hurt u", Ms. Jordan says "he tried im tough tho."

[82] The Crown submits that it is Mr. Calnen's after-the-fact conduct that supports the strongest inferences of his guilt for murder. The Crown cites the following evidence:

- Mr. Calnen did not call 911 after, according to his police statement, Ms. Jordan fell down the stairs at his home;

- At 6:02 p.m. on March 18, Ms. Jordan's cell phone sent a text message to Wade Weeks' phone that said "Gone in town";

- Despite saying in his statement that he panicked after Ms. Jordan fell, Mr. Calnen calmly called Mr. Weeks at around 7:41 p.m. on March 18 to ask if Mr. Weeks had seen Ms. Jordan and was she with him. Mr. Weeks testified that Mr. Calnen seemed "normal" and not "high" – he was coherent and not mumbling;

- Mr. Calnen engaged in various deceptions with police and others - maintaining that Ms. Jordan had simply up and left, which was untrue according to his subsequent admissions, and minimizing the relationship with Ms. Jordan. He lied to the police, including on April 12 when he claimed to be at a plumbing job but was actually in Pleasant Valley trying to dispose of Ms. Jordan's body;

- Once Mr. Calnen learned the investigation had become a homicide investigation, he retrieved Ms. Jordan's body and burned it;

- Mr. Calnen went to very considerable lengths to destroy potentially incriminating evidence, most notably Ms. Jordan's body. The Crown says the inference to be drawn is that this is the conduct of a killer, not someone who had just witnessed a tragic accident.

[83] All of this evidence is after-the-fact evidence. It is necessary for me, at this stage of my reasons, to review the law as it relates to after-the-fact conduct.

After-the-Fact Conduct and a Properly Instructed Jury

[84] After-the-fact conduct is circumstantial evidence. A properly instructed jury will be told that after-the-fact conduct must be examined in light of all the evidence and not in isolation. (*R. v. White, [1998] S.C.J. No. 57, paragraph 21*)

[85] "Evidence of after-the-fact conduct is commonly admitted to show that an accused person has acted in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person." (*R. v. Peavoy, [1997] O.J. No. 2788 (C.A.), paragraph 26, cited with approval in White, paragraph 19*)

[86] For after-the-fact conduct to be useful, it must support a chain of inferential reasoning that leads to the jury being able to draw an inference of consciousness of guilt in regard to a specific offence. (*R. v. Arcangioli, [1994] S.C.J. No. 5, paragraph 42*) Where an accused's conduct "may be equally explained by reference to consciousness of guilt of two or more offences, and where an accused has admitted culpability in respect of one or more of these offences, a trial judge should instruct a jury that such evidence has no probative value with respect to any particular offence." (*Arcangioli, paragraph 43*)

[87] In *Arcangioli*, the Supreme Court of Canada held that Mr. Arcangioli's jury should have been given the instruction that because his flight from the scene of a stabbing after he had punched the victim was equally consistent with both common assault and aggravated assault, it could not be evidence of guilt of the offence with which he was charged, aggravated assault. The Court said: "Any inference to be drawn from flight disappears when an explanation for such flight is available, as it is here." (*Arcangioli, paragraph 44*) That is, there were two equally reasonable inferences available to the jury: Mr. Arcangioli fled because he had punched the victim, committing common assault – which he admitted to - and, in the

alternative, he fled because he had stabbed the victim, committing aggravated assault – which he denied.

[88] It is well-established that after-the-fact conduct cannot be used to determine the level of culpability. For example, a jury cannot use after-the-fact conduct to decide whether an accused is guilty of manslaughter, second degree or first degree murder. It may, nevertheless, "be of assistance in determining whether the accused committed an unlawful act…depending on the circumstances it may be of some assistance in determining whether [the accused] committed a culpable homicide." (*Peavoy, paragraphs 28, 29, and 30*)

[89] I have found the Ontario Court of Appeal's decision in *R. v. Mujuk, [2011] O.J. No. 284,* to be helpful. In addressing a submission on after-the-fact conduct, the Court said the following:

> With respect to Nop's alternative argument, in our view the trial judge's jury charge on this issue was entirely appropriate. The trial judge said, correctly, that the jury could consider evidence of after-the-fact conduct in deciding whether any of the accused "participated in the unlawful act that caused death". However, in the next sentence, he also said, again correctly, that after-the-fact conduct evidence
>
> > cannot be used by you to determine what the accused's intention or state of mind was at the time of the participation in the unlawful act that caused death. ... [N]one of this evidence of what an accused said or did after the killing can be used to determine the accused's level of culpability. ... In other words this evidence cannot be used to advance the Crown's case beyond manslaughter for any of the accused.

[90] In this case the Crown is asking me to find that Mr. Calnen's after-the-fact conduct supports an inference that he intended to kill Ms. Jordan and did so. Based on the law I have just reviewed, I find that the after-the-fact conduct in this case cannot be used for this purpose. A properly instructed jury would have to be told this.

[91] I find that the question I must ask is whether Mr. Calnen's after-the-fact conduct could reasonably support the inference that he was conscious he had committed a culpable act in relation to Ms. Jordan's death and had not merely been a witness to her accidental fall. (*White, paragraph 32*)

[92] Before it is thought that I have isolated the after-the-fact conduct evidence and have failed to look at the evidence as a whole I wish to say that I have examined the whole of the evidence and am not satisfied that any reasonable inference can be drawn that Mr. Calnen either had *animus* toward Ms. Jordan or a motive to kill her. I find there is no evidence that Mr. Calnen held any *animus* toward Ms. Jordan: to the contrary, his March 17 texts express love for her and desperation at the thought of losing her. There is ample evidence that Ms. Jordan was anxious to move on but no evidence that on March 18 she was at any risk from Mr. Calnen. On March 17 she told Bonnie Tramble she needed a reason to leave Mr. Calnen. I find no evidence of motive: it would be pure speculation to suggest that Mr. Calnen would murder Ms. Jordan because she was trying to steal his laptop and a ring.

[93] This then leaves the after-the-fact conduct which does support an inference that Mr. Calnen was trying to avoid anyone finding out that Ms. Jordan had died in his house and not simply left. Can Mr. Calnen's after-the-fact conduct support the

reasonable inference that he was conscious he had committed a culpable act in relation to Ms. Jordan's death?

[94] I find that the evidence of Mr. Calnen's actions in presumably sending the "Gone in town" text to Wade Weeks and then calling Mr. Weeks inquiring if he knew where Ms. Jordan was, and his deceptive statements to the police can support the inference that he did not want anyone to suspect that Ms. Jordan was dead, but that is as far as this evidence can go. It cannot support the inference, required for a committal of Mr. Calnen for trial, that he engaged in these behaviours to cover up his killing of Ms. Jordan.

[95] I find the same goes for Mr. Calnen's actions with respect to Ms. Jordan's body. It amounts to pure speculation that Mr. Calnen hid and then burned Ms. Jordan's remains in order to cover up the fact that he killed her by an unlawful act. I find that the evidence of Mr. Calnen's disposal of Ms. Jordan's body is not capable of giving rise to the inference that he was covering up a culpable homicide. There is no evidence to support an inference that Mr. Calnen caused Ms. Jordan's death. The Crown's submission that Mr. Calnen was eliminating any trace of culpability discernible from Ms. Jordan's body is conjecture. The inferences the Crown says are raised on the evidence in this case are not within "the field of inferences that could be reasonably drawn…" (*Hawley, paragraph 10*)

[96] I must determine the issue of committal based on all the evidence. I find on an examination, and limited weighing of the whole of the evidence presented by the Crown that a jury properly instructed on the application of the relevant law to the evidence proffered could not return a verdict of guilt against Mr. Calnen for second degree murder or manslaughter.

[97] This is a tragic case. Ms. Jordan's family and friends bear the terrible loss of someone they loved whose remains could not be recovered. I acknowledge that ongoing pain and grief.

[98] I am satisfied there is no evidence on which a reasonable jury properly instructed could return a verdict of guilt against Mr. Calnen and I am discharging him on the charge of murder and the included charge of manslaughter of Reita Jordan.

Anne S. Derrick, P.C.J.