

IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

Cite as: R. v. M.S., 2012 NSPC 77

Date: August 31, 2012

Docket: 2257974

Registry: Sydney

BETWEEN:

Her Majesty The Queen

v.

M.S.

DECISION ON CHARGE OF SECOND DEGREE MURDER

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

JUDGE: The Honourable Anne S. Derrick

HEARD: July 9 - 20, and July 31, 2012

DECISION: August 31, 2012

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

COUNSEL: Daniel MacRury, Q.C. and Stephen Drake, for the Crown

Darlene MacRury, for M.S.

By the Court:

Introduction

[1] On the morning of December 3, 2010 M.S. and B.G., were just a teenage couple who spent much of their time together. By most accounts, their relationship was an affectionate one. There was nothing to foreshadow the later events of the day, that would leave B.G. dead and M.S. charged with her murder.

[2] This is a case of wrenching tragedy. B.G. was 17 when she died. M.S. was 16.

[3] As I will discuss, the evidence establishes beyond a reasonable doubt that on December 3, 2010 at X Street in Sydney, M.S. stabbed B.G. with the result that she bled to death. The essential issue to be determined is therefore not who killed B.G. but whether this case is one of murder or manslaughter: did M.S. specifically intend to kill B.G. or, as the Defence submits, did the cumulative effects of intoxication and provocation deprive him of the specific intent to commit murder?

[4] The Crown's position is that M.S. stabbed B.G. to death because he was angry, jealous and intoxicated. He intended to kill her or to cause her bodily harm that he knew was likely to result in her death. In the Crown's submission, M.S.'s drunken intent constituted a specific intent.

[5] M.S. has testified to having no recall of anything that led to B.G.'s death but he concedes the only reasonable inference from the evidence is that he must have

caused it. It is his submission that this is a case of manslaughter not second degree murder. He says he had no specific intent to kill B.G. or inflict bodily harm that he knew was likely to lead to her death. He submits that he was grossly impaired by alcohol and tipped over the edge by provocation, his reaction to a belief that B.G. had been unfaithful to him. M.S.'s deadly assault on B.G. was described by his counsel in final submissions as lacking forethought occasioned by an uncontrolled reaction.

[6] M.S. is presumed innocent of murdering B.G. To establish his guilt, the Crown must prove beyond a reasonable doubt that he intended to cause B.G.'s death (*Criminal Code*, section 229(a)(i)) or intended to cause her bodily harm that he knew was likely to cause death and was reckless whether death ensued or not. (*Criminal Code*, section 229(a)(ii)) These are the elements of intention and subjective foresight.

[7] Determining the issue of M.S.'s intent has required me to examine the evidence from twenty-three witnesses called during the two weeks of his trial. I will be recounting the testimony of witnesses present at the scene, and that of forensic investigators and DNA, blood spatter, and toxicology experts, the testimony of M.S. , and that of his grandfather, also named Mr. Y., and the expert opinions of forensic psychiatrists, Dr. Syed Akhtar, called by the Defence, and Dr. Stephen Hucker, called by the Crown. In addition to the witness testimony, the Crown tendered 131 exhibits.

[8] I want to note that in my assessment of the evidence, I can accept all, some, or none, of a witness' testimony. Also, to avoid confusion in these reasons, I refer to M.S. as M.S. and Mr. Y. as Mr. Y.

December 3, 2010 – The Morning

[9] M.S. stayed overnight on December 2, 2010 in Glace Bay at the home where B.G. lived with her grandmother, T. B. He and B.G. got up on the morning of December 3 with a plan to go into Sydney to M.S.'s grandfather's small house at X Street in Whitney Pier. T.B. would provide the transport, on her way to work at a local call centre.

[10] On the morning of December 3, T. B. did not notice anything unusual about the teenagers. M.S. was quiet and didn't say much but that was his usual demeanor. He often kept his head down and did not make much eye contact. Neither he nor B.G. seemed under the influence of any intoxicants.

[11] B.G. using drugs was not outside the realm of possibility. A drug problem had led to her attending the Choices programme in Halifax. She seemed to do well at Choices and T.B. felt confident she was abstaining from drugs, except marijuana. B.G. admitted to still smoking "a bit of weed", something T.B. disapproved of. But T.B. believed the worst of B.G.'s drug problem was over and she testified that after Choices, B.G. "came back to who she was; I didn't have to worry about her."

[12] Notwithstanding her belief that B.G.'s stint at Choices had turned things around, T.B. was on the alert for signs that B.G. and M.S. were using drugs. She testified she "watched them like a hawk." A couple of times when she picked B.G. up from visiting M.S. in Whitney Pier her eyes were "really watery" but when T.B. asked her granddaughter if "anything was going on there", B.G. said no.

Arriving at X Street, Whitney Pier

[13] T.B. recalls that she had to be at work for 1:30 p.m. on December 3. According to her testimony, she got M.S. and B.G. to X Street at about 1:05 p.m. Certain other witnesses would have been in a position to know when M.S. and B.G. arrived at the house but where their evidence differs from T.B.'s, I find T.B.'s recollection to be the most reliable. I find it unlikely that T.B. would be mistaken about the time she had to work that day or that she would have had the teenagers in Whitney Pier much in advance of the start of her shift.

[14] For a short while after M.S. and B.G. arrived at X Street there were a number of people in the house. A cousin of Mr. Y's, C.F., and his girlfriend, R.G., had come over, as they did 3 – 4 times a week, to visit and give Mr. Y. some help by tidying up the kitchen. They sat around the kitchen table with Mr. Y. and drank tea. Shortly before 1 p.m., R.G. and C.F. left X Street because R.G. was meeting her sister at the nearby Canadian Tire store. Mr. Y., M.S., and B.G. remained at the house.

[15] It was not long after the departure of R.G. and C.F. that Mr. Y. also went out. He was picked up by a friend of long-standing, D.M. Ms. M., who lives in Whitney Pier, has been friends with Mr. Y. for thirty years. She paid frequent visits to his house, taking him out for coffee and errands and bringing him meals. Ms. M. recalls taking Mr. Y. out on December 3 around 2 p.m. They went for coffee and to Membertou. They were gone for several hours.

[16] Mr. Y. remembers going out with Ms. M. on December 3, including to Membertou, but I find his memory about the timing and sequence of certain events on December 3, 2010 to be muddled and unreliable. As shown by the testimony of other witnesses and the forensic evidence, he did recall accurately other details of the events that day.

[17] I will be returning to the more crucial time-line for December 3, 2010 - the supertime period - after discussing other evidence first.

The Relationship Between M.S. and B.G.

[18] By December 2010, M.S. and B.G. had been going out together for about three months. Witnesses who had had the opportunity to observe the relationship were almost unanimous in their descriptions of what they saw. With the exception of Mr. Y., no one else claimed to have witnessed any disharmony. To the contrary, the accounts were of a close, affectionate, apparently devoted, teenage couple.

[19] M.S. testified that he and B.G. had a “pretty good” relationship. According to him, in the period of October to December 2010, he was seeing B.G. quite a bit, 4 – 5 times in a typical week. He testified that they were mostly at X Street, sitting around, watching movies, and hanging out with M.S.’s buddies. He said they had no fights and didn’t argue. No witnesses testified to overhearing or observing any arguing on December 3 until the critical supper-hour period.

[20] It is only Mr. Y. who described problems between M.S. and B.G. Although his recall of how often the teenagers were together in his home does not square with his grandson’s testimony, it does not seem to me that anything turns on this

discrepancy. Mr. Y. was asked in cross-examination to offer a description of the relationship between M.S. and B.G. He responded to this open-ended question without prompting by saying he found it to be “shaky.” He went on to say: “I didn’t find they got along all that great. They argued a lot.” He approved of the relationship at first and then he didn’t.

[21] Of course all of these observations can be true: if M.S. and B.G. were spending most of their time at X Street perhaps Mr. Y. saw a side to their relationship others did not. But in relation to what is essential in this case, it does not make any real difference that M.S. and B.G. may have had disagreements. One fact is clear: no one anticipated the relationship would end in catastrophic violence.

Alcohol and Drugs on December 3, 2010

[22] I am satisfied that by approximately 2 p.m. on December 3, 2010, M.S. and B.G. were alone at X Street. There is only M.S.’s evidence to fill in the blanks of how he and B.G. occupied themselves over the several hours that Mr. Y. was out with D. M.. According to M.S., he and B.G. went looking for drugs, specifically, pills. This is credible. There is no dispute about the fact that in December 2010 M.S. had a serious and long-standing drug and alcohol problem. As I noted earlier in this narrative, B.G. too had had problems with drugs. It was M.S.’s evidence that he and B.G. had taken some pills while still in Glace Bay. B.G. supplied them: according to M.S.’s description, little white ones and ones in capsules. M.S. testified that he took “at least two” of each of these pills and that B.G. took the same. The pills made M.S. “right drowsy” although he said: “You probably couldn’t tell I was under the influence.” And no one seems to have noticed that he was, if he was, at this time.

[23] It is a reasonable inference that the pills M.S. and B.G. took in Glace Bay were from her prescriptions, obtained at Choices, for Zopiclone, which is used to treat insomnia, and Fluoxetine (Prozac), an antidepressant. A post-mortem toxicology screen found evidence of both drugs in B.G.'s system.

[24] M.S. testified that once Mr. Y. had left with D. M. for Membertou, he went into a cabinet in the living room and got a forty-ounce bottle of what was referred to in the evidence as "moonshine". He retrieved a shot glass from the kitchen and a drinking glass which he filled with water for "chasing" the moonshine. He and B.G. each took two shots of liquor in the main bedroom of the house. Although a shot glass was not seized from the bedroom at X Street, a drinking glass was. This is Exhibit 101, depicted in Exhibit 1, Tab 9, photographs 28 and 29.

[25] A search of the bedroom by police also turned up a 40 ounce whisky bottle with the brand name "Golden Wedding". It contained a clear liquid. M.S. was shown this exhibit (Exhibit 10) and said he recognized it. Although Mr. Y. said he did not recognize Exhibit 10, he acknowledged he did keep moonshine in his home in 40 ounce liquor bottles.

[26] After drinking the moonshine, M.S. and B.G. left X Street to go and get some pills. With nothing available at their first stop, they were referred to another source. This source, only identified in testimony by a first name, gave M.S. three different kinds of pills: Rivotril [Clonazepam – a benzodiazepine] and Tylenol 3's, and some unspecified pill - a green pill – that M.S. cannot identify. Of the "at least five" Rivotril he got, M.S. testified he took "at least 2" and a green pill. He took

none of the Tylenol 3's which he gave to B.G. He testified that there were "a lot, a handful, I didn't count them."

[27] At this point, M.S. and B.G. headed back to X Street. On the way M.S. encountered a young man whom he knew as the son of a friend of his mother's. M.S. admits to seeing an opportunity. He decided he would rob the man - he had bear spray on him which he always carried - but discovered the man had no money. The robbery plan evaporated.

[28] M.S. testified that this is his last memory of December 3 until being awakened by police at the Central Division station. Sometime between returning to X Street and the police station he has a memory of "a popping sound" but has no idea where he was when he heard it.

B.G.'s Telephone Calls to G.W. and T. B.

[29] By late in the day on December 3, B.G. was likely under the influence of alcohol and pills. This seemed apparent to T.B. who received a cell phone call from B.G. during her supper break from work. B.G. wanted to know if M.S. could come out to Glace Bay for the night. T.B. told her "We'll see." T.B. thought B.G. sounded "okay" if "a little bit different." T.B. testified that she could tell when B.G. was under the influence and this is how she sounded.

[30] I find that the call to T.B. occurred very shortly after 5:50 p.m. on December 3. It had been preceded by a call from B.G. to G.W. in Glace Bay. I accept G.W.'s evidence that when he took the call, he looked at the big kitchen clock above the phone and saw that it was 5:50 p.m. B.G. had a request. G.W. told her she would

have to ask her grandmother if M.S. could come for a visit. He recalls B.G.'s demeanor being "normal, perfectly okay until the end." The call ended abruptly after 30 – 40 seconds either because B.G. hung up or the line "went dead." I find that after this B.G. called T.B. The sudden termination of the call to G.W. remains a mystery.

X Street around 6 p.m. on December 3, 2010

[31] B.G. was at X Street when she made the calls to G.W. and T.B. Mr. Y. had come back home by then, dropped off after their outing by D. M.. Ms. M. testified that she brought Mr. Y. back to X Street around 4:30 – 5 p.m. She had dinner already cooked at home and went to get it for Mr. Y. who is quite disabled by [...]. Although it was her evidence that she returned to X Street around 5 – 5:30 p.m., I find that it was much closer to 6 p.m., after the calls made by B.G. to G.W. and T.B. I note that the timelines for the late afternoon/supper-hour events can be fairly reliably estimated on the basis of times that are known, for example, the 911 call that came from the Mr. Y.'s residence. I will be coming back to that shortly.

[32] While D. M. was collecting his supper, Mr. Y. was alone in the house with M.S. and B.G. in the main bedroom. He sat in the living room on the sofa which was set against the west wall of the room. On the other side of the wall was the main bedroom. Mr. Y. testified that he could hear M.S. and B.G. in that bedroom. They were arguing. The evidence establishes that X Street is a very small house, with all the rooms located very close to each other. I have seen a schematic of the floor plan of the house prepared by Sgt. Adrian Butler, the blood spatter expert, as part of his report, Exhibit 56, and also forensic IDENT video and photographs. I have no doubt that Mr. Y. would have been able to hear arguing from the next-door

room that shared a wall with the room in which he was sitting. Exhibit 1, Tab 5, Photograph 7 shows where Mr. Y. was in relation to the wall of the main bedroom. The arguing was sufficiently loud that Mr. Y. “hollered” at M.S. and B.G. to keep it down. At one point he heard M.S. say: “I love you too, B.G.” When asked if he had heard any other sounds, Mr. Y. said: “Just a bit of banging off the wall.” He does not know what happened then. It would be a few more minutes before he saw his grandson.

[33] At 6:06:22 p.m. on December 3, 2010, a 911 call was made from X Street. I find that it was Mr. Y. who made that call. Having heard him testify, I can identify his voice on the 911 recording (Exhibits 40 and 41) and furthermore, M.S. identified the voice as his grandfather’s when the call was played for him during his cross-examination.

[34] There was only one 911 call from X Street on December 3, 2010. Paul Perry, the communications coordinator for the Cape Breton Regional Municipality, confirmed this following his review of the relevant records.

[35] B.G. was alive at 5:50 p.m. on December 3 and in the brief moments that followed when she spoke on the phone with her grandmother. I find that sometime in the minutes leading up to Mr. Y.’s 911 call, she was stabbed to death in the main bedroom at X Street. I will note that the forensic pathologist, Dr. Marnie Wood, cannot precisely pinpoint B. G.’s time of death in this timeframe.

The Return to X Street of D. M.

[36] Close to 6 p.m. on December 3, D. M. returned to X Street with supper for Mr. Y. She had her * year old grandson, *, with her. It was to be his job to deliver the food as Ms. M. had some mobility problems and planned to wait in her van outside the house. I find that by this time, B.G. was likely dead or dying.

[37] Ms. M. watched as * went into Mr. Y.'s residence with the supper. As she waited, M.S. dashed out of the house and jumped into the van's back seat. According to Ms. M., he was crying, saying to her: "You gotta come, you gotta come, come see..."

[38] Ms. M. followed M.S. into Mr. Y.'s residence, thinking that his grandfather was hurt. By the time she got into the house, M.S. was in the main bedroom "hollering" for her. Mr. Y. was sitting in the living room. Ms. M. went down the short hallway to the door of the main bedroom which was slightly ajar. When she pushed the door open wider, she was confronted by the horrific scene of B.G.'s body, motionless on the bedroom floor, covered in stab wounds and blood.

[39] A few minutes later, Ms. M. got out of the house. After fumbling to put the key into the ignition, she drove to a nearby Needs store where she asked for 911 to be called. She was distraught and frantic. This was confirmed by the evidence of Linda Sivret, the Needs store clerk. The 911 call was made at 6:13:58 p.m. (Exhibit 124) According to Ms. M. she had only been at X Street for maybe five minutes. "It all happened instantly."

[40] Although there is no basis for determining conclusively whether Mr. Y. had already placed the 911 from X Street by the time Ms. M. went into the house, nothing that D. M. reported observing inside Mr. Y.'s residence suggests that a

911 call had already been made. During the time Ms. M. was in the home, Mr. Y. appears not to have moved from the sofa where he said he had been sitting when he heard the noises from the bedroom.

The Police Response to the X Street 911 Call

[41] In any event, Cst. Terrence Martell of the Cape Breton Regional Police Service responded at 6:07 p.m. to the X Street 911 call and after driving directly to Whitney Pier and turning onto X Street , encountered M.S. M.S. was walking along the street dressed only in a pair of shorts. He was approximately 100 feet from his grandfather's house.

[42] I will go into more detail about Cst. Martell's encounter with M.S. shortly. The result of Cst. Martell spotting M.S. on the street was M.S.'s arrest at 6:17 p.m. for breaching the house arrest conditions of a recognizance. Cst. Martell noticed fresh, wet blood on M.S.'s hands and blood on his chest.

[43] Cst. Martell testified that as a result of utterances made by M.S. while handcuffed in the back of the patrol car, he went to X Street. He noticed a smear of blood on the front screen door of the residence. Mr. Y. came to the door in response to police commands and when asked if anyone else was in the house, he said "She's in there", pointing to the main bedroom. Cst. Martell looked into the bedroom from the threshold of the door and saw B.G. on the floor, the same harrowing scene D. M. had witnessed.

[44] At 6:21 p.m. Cst. Martell was back at his patrol vehicle arresting M.S. for B.G.'s murder.

Forensic Evidence Seized at X Street

[45] The police investigation located significant forensic evidence at Mr. Y.'s residence. In my view of the case, the following are the principle fruits of the forensic examination of the scene: blood spatter (throughout the house); the DNA of B.G. and M.S. (on various objects and surfaces); five (5) intact knives, including a large butcher knife found in the kitchen sink; one (1) knife blade and its detached handle; an overturned kitchen drawer; blood-soaked socks (in the hallway of the home, near the entrances to the living room and kitchen); a pair of men's jeans, with blood on them, turned inside out (in the main bedroom); two teeth belonging to B.G. (in the main bedroom); and a 40 ounce bottle labeled Golden Wedding whisky containing clear liquid that was not tested (in the main bedroom).

[46] As I mentioned earlier, the police investigators also took extensive photographs and a video of the interior of X Street. (Exhibits 1 and 2, and Exhibit 48)

Cause of Death

[47] According to Dr. Wood who performed the autopsy, B.G. was stabbed 104 times and died as a result of a fatal amount of bleeding from multiple sharp force injuries. Her head and face also showed evidence of blunt force trauma that split the skin and fractured her right orbital bone and her nose. Two of her front teeth had been knocked out with their roots intact.

[48] Dr. Wood confirmed that B.G. had no bruising or signs of sharp force injury on her hands. In Dr. Wood's opinion the complete absence of defensive injuries suggests that B.G. was not conscious "when the sharp force was applied." As Dr. Wood explained, a conscious person will often put their hands and forearms up to defend themselves. B.G. was found flat on her back, with her arms splayed out beside her head.

[49] In Dr. Wood's opinion the blunt force to B.G.'s mouth alone could have knocked her unconscious. However the evidence that blunt force did not kill B.G. was found in the condition of her brain at autopsy: there was no bleeding around the brain and no swelling.

[50] Dr. Wood also eliminated as a cause of death B.G.'s ingestion of drugs and alcohol. A toxicological analysis of B.G.'s blood and urine indicated concentrations of ethyl alcohol, codeine, and morphine, which is a metabolite, in other words, a break-down product, of codeine. These levels were not toxic. In the opinion of Christopher Keddy, a civilian member of the RCMP and a forensic toxicologist, B.G. had a blood alcohol concentration (BAC) at the time of her death of 150 – 200 milligrams percent. He testified this would produce, even in a very experienced drinker, balance problems, blurred vision, possibly some confusion, and drowsiness. He explained that a more pronounced degree of intoxication would be obtained from the combination of alcohol and codeine. I find that the alcohol and drugs in B.G.'s system could have impaired her but I am satisfied they played no role in her death.

[51] I find that B.G. was knocked out with enough force to dislodge two front teeth and fracture bones and then stabbed multiple times which led, in short order,

to her bleeding to death. I will be discussing B.G.'s injuries more fully later in these reasons.

DNA and Blood Spatter Evidence

[52] The Crown called evidence from two experts about DNA and blood spatter found at X Street. The Defence accepted the qualifications of Joy Kearsey, a DNA expert, and Sgt. Adrian Butler, a bloodstain pattern analyst with the RCMP lab in Halifax. Significant blood spattering and smearing was found throughout the small house and detailed in Sgt. Butler's testimony, his report (Exhibit 56), and photographs (Exhibit 2). Sgt. Butler also examined various exhibits, including, notably: a pair of blue cargo shorts seized from M.S. (Exhibit 15); a pair of pajama shorts seized from B.G. (Exhibit 17); a pair of men's blue jeans found inside out on the floor of the main bedroom (Exhibit 12); and two white socks found in the hallway of the house (Exhibits 13 and 14). Joy Kearsey found blood on all of these items, and was able to identify the presence of either or both of M.S.'s and B.G.'s DNA. Swabs from various locations in the house at X Street were also analyzed for the presence of blood, and subject to DNA typing.

[53] B.G. was found with two knives protruding from her right side. One knife had a 4.5 inch blade and was intact. (Exhibit 6) Also lodged in her side was a broken 4 inch knife blade. (Exhibit 7) The handle belonging to that blade was located nearby on the bedroom floor. (Exhibit 8) It has been admitted by the Defence (Exhibit 122) that the knife handle found in the main bedroom and the knife blade lodged in a wound in B.G.'s side are the broken components of each other, a fact established through forensic analysis. (Exhibit 52) A large butcher knife was found lying in the kitchen sink. (Exhibit 5) DNA analysis was done on

the butcher knife and the intact knife from B.G.'s side, and the broken-off knife handle. That analysis established that the knife handle (Exhibit 8) has M.S.'s blood on it. The handle of the intact knife in B.G.'s side has both M.S.'s and B.G.'s blood on it.

[54] Although Dr. Wood cannot match any of the found sharp objects to B.G.'s sharp injury wounds - something she said is very difficult to do - she was able to say that the large butcher knife (Exhibit 5) with its 8 inch long and 2 inch wide blade is consistent with wounds she observed at autopsy. This knife has M.S.'s and B.G.'s blood on it. The left side of the blade near the tip has B.G.'s blood on it. The upper/front right side of the handle has both B.G.'s and M.S.'s blood on it. I find it was used to stab B.G.

What the Forensic Evidence Says About How B.G. Died

[55] Although I will be returning to various aspects of the evidence later in these reasons, it is useful to indicate here that I am satisfied beyond a reasonable doubt of certain facts. In the main bedroom of X Street, sometime after 5:50 p.m. and before 6:06 p.m. on December 3, 2010, M.S. knocked B.G. unconscious with a blow or blows to the face, including at least one blow that dislodged two of her front teeth, such a powerful blow that the teeth flew out with their roots still attached. I find that B.G. being struck or falling to the floor or both is the noise that Mr. Y. heard while sitting in the living room on the other side of the wall from where she was being assaulted. I find that the only reasonable inference to be drawn from the condition of B.G.'s body and its position is that B.G. did not try to defend herself and that she did not do so because she was out cold. I find that she did not move once she fell to the floor. This conclusion is further supported by Sgt.

Butler's testimony that the blood spatter evidence showed no indication of a struggle.

[56] I do not know if M.S. used his fist and punched B.G. or if she was hit with Exhibit 10, the Golden Wedding whisky bottle containing the clear liquid. The outside of this exhibit was examined forensically and found by Ms. Kearsey to have B.G.'s blood on it, both on the outside upper front of the bottle, the entire surface of the outside neck, and the outside bottom of the bottle. The major DNA component on the bottle was B.G.'s. A minor component was M.S.'s. I was not told if that DNA had to have originated from M.S.'s blood or could have been transferred to the bottle by handling, as it would have been when the shots were being poured. I also do not know if the blood on the bottle came from its proximity to B.G.'s bleeding body. There was a high probability of contamination by blood in that small bedroom. I am not satisfied I can say with confidence that Exhibit 10 was used as a weapon.

[57] None of the uncertainty about how the Golden Wedding whisky bottle got blood on it and DNA from both B.G., in the majority, and M.S., to a lesser extent, matters in this case. It does not matter that I cannot determine what M.S. used to knock B.G. out as I am satisfied beyond a reasonable doubt that he did so.

[58] The Crown has suggested that M.S. hit B.G. in the face with a beer bottle as the shattered pieces of a smashed beer bottle were found around her head. It is a supposition but that is all that can be said. I do not find there is any evidence to support a finding that the beer bottle was used to assault B.G. The broken pieces were not tested for DNA and no broken glass was found in B.G.'s face.

[59] I know from photographs taken by police investigators of M.S.'s hands (Exhibit 1, Tab 17, photographs 15, 16 and 17) that on December 3 his right knuckle area (M.S. is right-handed) had a fresh, minor wound. The area was slightly swollen. I do not know how M.S. sustained this fresh wound. There were knives at the scene and broken glass. However the cut occurred, it explains the presence of M.S.'s blood on exhibits associated with B.G.'s death, such as the knives, and on surface areas in the house, and on B.G.'s pajama shorts (Exhibit 17) which was the only article of clothing she had on when she was found. M.S.'s blood also dripped on to the floor of the small bathroom and the floor of living room.

[60] The DNA and blood spatter evidence establishes that M.S., as well as B.G., was a blood source and deposited small amounts of his DNA in the house. This is evidence further ties M.S. into the death of B.G.

[61] I find that after knocking her out, M.S. then stabbed B.G. as she lay motionless on the floor with at least three (3) knives: Exhibit 5, the butcher knife, Exhibit 6, the intact knife, and Exhibit 7, the knife blade (with Exhibit 8, its handle, attached.) I find that blood spatter in the main bedroom, (Area J) identified as B.G.'s blood, emanated from B.G. as she lay on the floor being stabbed. Sgt. Butler's report explains that a spatter stain is "a bloodstain resulting from a blood drop dispersed through the air due to an external force applied to a source of liquid blood." There was a lot of blood spatter in the main bedroom on the east and south walls which is not at all surprising given the number of wounds inflicted on B.G. The spatter would have occurred when a bleeding B.G. was stabbed repeatedly. According to Sgt. Butler, the blood source for the blood spatters in the bedroom was no higher than 28 centimeters above the floor. This is consistent with the main

blood source, B.G., being prone due to unconsciousness while she was being stabbed by M.S.

Intent and Intoxication – An Introduction

[62] M.S. has testified that he has no recollection of anything that happened at X Street after he and B.G. returned from their drug excursion. I know from his evidence that he drank moonshine and took Rivotril in the mid-afternoon of December 3. As I will be discussing, there is clear evidence that M.S. became intoxicated. To secure a conviction for second degree murder, the Crown has to satisfy me beyond a reasonable doubt that M.S. still had the specific intent required for murder notwithstanding his intoxication.

The Meaning of Reasonable Doubt

[63] The Crown bears the heavy onus of proving M.S.'s guilt beyond a reasonable doubt, an onus that never shifts to M.S. The standard of proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence, a presumption that applies to M.S. throughout these criminal proceedings.

[64] A reasonable doubt is not a doubt based on sympathy or prejudice; it is based on reason and common sense. It is logically connected to the evidence or absence of evidence. It does not require proof to an absolute certainty nor is it proof beyond any doubt. It is not proof beyond an imaginary or frivolous doubt. A determination that an accused "probably" had the requisite intent falls far short of proof beyond a reasonable doubt. (*R. v. Lifchus*, [1997] S.C.J. No. 77, paragraph 36) The reasonable doubt standard "falls much closer to absolute certainty than to

proof on a balance of probabilities.” (*R. v. Starr*, [2000] S.C.J. No. 40, paragraph 242)

The Responsibility to Assess the Cumulative Circumstances

[65] In final submissions, the Defence did not contest that the Crown has proven beyond a reasonable doubt that M.S. stabbed B.G. on December 3, 2010 at X Street in Sydney, and that this caused her death. It is the Defence position that M.S.’s intoxication at the time and the provocation of B.G.’s infidelity or at least M.S.’s belief in it, operated to deprive him of the specific intent to kill her.

[66] Ultimately it will be necessary for me to consider the cumulative effect of all the circumstances (*R. v. Nealy*, [1986] O.J. No. 997 (C.A.) that were in play when M.S. stabbed B.G., including his intoxicated and “highly aroused” state, to use the language employed by the Crown’s forensic psychiatrist, Dr. Stephen Hucker. I must assess whether an intoxicated and agitated M.S. reacted instinctively to a belief – based either on his assumptions or what B.G. may have told him – that B.G. had been seeing other boys, and stabbed B.G. in the “sudden excitement” of the moment without thinking about the consequences of what he was doing and without either state of mind necessary to make the killing of B.G. murder. (*R. v. Cudjoe*, [2009] O.J. No. 2761 (Ont. C.A.), paragraphs 115) I will be reviewing a good deal of evidence and various legal issues before I tackle that ultimate question of intent.

[67] At this point, I am going to discuss the law as it relates to the partial defence of provocation which I find the Crown has proven beyond a reasonable doubt does

not apply in this case. Doing so now is slightly out of sequence but best suits my analytical approach. In the end, my assessment of whether the prosecution has proven either state of mind necessary to make an unlawful killing murder, must take into account “all the evidence that sheds light on that issue, even if [I] have rejected the specific defences, justifications or excuses in play to which that evidence also relates.” (*Cudjoe, paragraph 109*)

Provocation

[68] Section 232 of the *Criminal Code* provides that “Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.” (Section 232(1)) Provocation is defined in section 232(2) as “A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control...if the person acted on it on the sudden and before there was time for his passion to cool.”

[69] It must be understood that provocation is “not itself a state of mind.” It consists of “words and conduct by one person that produce a reaction in another.” The Ontario Court of Appeal has described provocation as involving “a loss of self-control, due to anger or excitement.” (*Cudjoe, paragraph 101*)

[70] Provocation is a partial defence to murder. It “does not negate either the act or the fault component of the crime of murder, but becomes germane only where the Crown has proved all the elements of murder beyond a reasonable doubt.” (*R. v. Humaid, [2006] O.J. No. 1507 (C.A.), paragraph 63; Cudjoe, paragraph 105*) There is an objective and a subjective component. Even if there is “ample evidence

that the accused was provoked”, the subjective aspect, the defence can only be considered if the trier of fact finds the objective aspect has been met; in other words that there is “a reasonable doubt as to whether the alleged insult was sufficient to deprive an ordinary person of self-control...” (*Humaid, paragraph 80*)

[71] The objective component of the test for provocation reflects societal norms and values that seek to encourage non-violent behaviour and restraint. The law expects responsible behaviour. The Supreme Court of Canada has repeatedly emphasized this, most recently in *R. v. Mayuran, [2012] S.C.J. No. 31*. The principle has also been described in this clear statement from *R. v. Hill, [1986] S.C.J. No. 25*:

...It is society's concern that reasonable and non-violent behaviour be encouraged that prompts the law to endorse the objective standard. The criminal law is concerned among other things with fixing standards for human behaviour. We seek to encourage conduct that complies with certain societal standards of reasonableness and responsibility. In doing this, the law quite logically employs the objective standard of the reasonable person.

[72] The standard is the ordinary person. Cory, J. for the majority of the Supreme Court of Canada in *R. v. Thibert, [1996] S.C.J. No. 2* explained how the ordinary person standard should be interpreted:

...the objective element should be taken as an attempt to weigh in the balance those very human frailties which sometimes lead people to act irrationally and impulsively against the need to protect society by discouraging acts of homicidal violence. (*paragraph 4*)

[73] The ordinary person “has a normal temperament and level of self-control.” The standard is a person who “is not exceptionally excitable, pugnacious, or in a state of drunkenness.” (*Hill, paragraph 34*) “A propensity to drunken rages or

short-tempered violence cannot be taken into account.” (*Thibert, paragraph 15*) The “ordinary person” is understood to be a person with the particular characteristics of the accused such as age, gender, and race. “The particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test of provocation.” (*Hill, paragraph 35*) Applying these established principles to the context of this case, the ordinary person I must factor into my analysis is a sixteen year old boyfriend. (*Hill, paragraph 40*)

[74] In the assessment by the trier of fact of what an ordinary person “would have done if subjected to the same circumstances as the accused, the young age of an accused will be an important contextual consideration.” (*Hill, paragraph 36*) The “acknowledged importance of the law’s compassion to human infirmity” underpinning the defence of provocation, requires that age is a relevant contextual factor in applying the objective test. (*Hill, paragraph 27*)

[75] Therefore, the components of the objective test for provocation in this case are: a wrongful act or insult that is sufficient to deprive the ordinary sixteen year old boyfriend of the power of self-control.

[76] I do not find that a suspicion that a girlfriend has been seeing someone else, or even the fact of it, can be regarded as provocation of the kind that engages the compassion of the law reducing what otherwise would be a murder to manslaughter. Feelings of anger and frustration do not constitute provocation of the kind that will achieve such a result. (*R. v. Young, [1993] N.S.J. No. 14 (C.A.)*; *R. v. Lees, [2001] B.C.J. No. 249 (C.A.), paragraph 23*)

[77] Permitting a perceived threat to a relationship, or its actual breakdown to constitute an insult or wrongful act capable of amounting to provocation to kill “...would set a dangerous precedent...” (*Young, page 4 (Q.L. version)*) It would not accord with the law’s emphasis on discouraging homicidal violence, an emphasis that must have special resonance in the context of intimate relationships where women and girls are acknowledged to be particularly vulnerable. (*R. v. Lavallee, [1990] S.C.J. No. 36, paragraph 32; R. v. Malott, [1998] S.C.J. No. 12, paragraph 44: “...the reality of our society is that typically, it is women who are victims of domestic violence, at the hands of their male intimate partners.”*)

[78] The Supreme Court of Canada has recognized that, “prevailing social mores and judicial attitudes have played an important part in defining what amounts to provocation at law.” (*R. v. Tran, [2010] S.C.J. No. 58, paragraph 12*) It is understood that the law of provocation must reflect “contemporary social norms, and in particular, Charter values.” Such norms and values “necessarily” inform the objective element of the defence. (*Tran, paragraph 19*)

...Not all instances of loss of self-control will be excused. Rather, the requisite elements of the defence, taken together, make clear that the accused must have a *justifiable* sense of being wronged. This does not mean, and in no way should be taken as suggesting, that the victim is to be blamed for the accused’s act, nor that he or she deserved the consequences of the provocation. Nor does it mean that the law sanctions the accused’s conduct. Instead, the law recognizes that, as a result of human frailties, the accused reacted inappropriately and disproportionately, but understandably to a sufficiently serious wrongful act or insult. (*Tran, paragraph 22*)

[79] It can only be behaviour “that comports with contemporary society’s norms and values that will attract the law’s compassion”, its willingness to excuse a loss

of control, reducing a culpable homicide that is murder to manslaughter. Killing a girlfriend because of suspected, or actual, infidelity does not comport with the “fundamental values such as the commitment to equality provided for in the..*Charter*.” There is “no place in this objective standard for antiquated beliefs” about women as the sexual “property” of men. (*Tran, paragraph 34*) A homicidal loss of control as an expression of an emotional or proprietary right over a girlfriend cannot be justified under the partial defence of provocation. And whereas,

...Personal circumstances may be relevant to determining whether the accused was in fact provoked -- the subjective element of the defence -- but they do not shift the ordinary person standard to suit the individual accused. In other words, there is an important distinction between contextualizing the objective standard, which is necessary and proper, and individualizing it, which only serves to defeat its purpose. (*Tran, paragraph 35*)

[80] I find that on the facts of this case, there is no provocation defence available to M.S. as it fails at the objective standard stage.

Anger

[81] I will now make a few comments about anger. While anger may form part of the partial defence of provocation when all the requirements of the defence are met, anger alone, even if intense, is not a defence to murder and cannot reduce murder to manslaughter. (*R. v. Parent, [2001] S.C.J. No. 31, paragraphs 9 and 10*) This much is crystal clear from the cases. Some disagreement seems to emerge with respect to whether anger can be considered a relevant factor in combination with other factors. It seems that the Ontario Court of Appeal, applying the “rolled-up” charge approach developed through its earlier cases and reflected in *Nealy*,

views anger as a legitimate part of the mix to be assessed when determining if specific intent to murder has been proven. (*see, for example, Cudjoe, paragraph 101*)

[82] The Alberta Court of Appeal in *R. v. Walle*, [2007] A.J. No. 1195 rejects the notion that “the rolled-up charge has survived *Parent*.” (*paragraph 30*) The Court has held:

After *Parent*, anger felt by an accused, short of provocation, cannot negative the intent to commit murder. It is an irrelevant factor under s. 229(a) and it is an error of law to consider it, whether alone or in combination with other factors. (*paragraph 31*)

[83] The Alberta Court of Appeal’s decision in *Walle* has been upheld by the Supreme Court of Canada without any comment on the passages that discuss anger. (*R. v. Walle*, [2012] S.C.J. No. 41) The Supreme Court in *Walle* did affirm that it is critical for the trier of fact in assessing the specific intent required for murder to “...consider the whole of the evidence that could realistically bear on the accused's mental state at the time of the alleged offence.” (*Walle, paragraph 65*) I have done so in this case.

The Defence of Intoxication

[84] As noted by the Supreme Court of Canada, “it is common knowledge that a significant degree of intoxication may affect a person’s state of mind and thus the ability to foresee the consequences of actions.” (*R. v. Seymour*, [1996] S.C.J. No. 64, *paragraph 23*) “Mild” intoxication, an “alcohol-induced relaxation of inhibitions and socially acceptable behaviour...has never been accepted as a factor

or excuse in determining whether the accused possessed the requisite *mens rea*.” (*R. v. Daley*, [2007] S.C.J. No. 53, paragraph 41) It is “advanced” intoxication that has been recognized as depriving an accused of specific intent by impairing foresight of consequences. (*Daley*, paragraph 41) In homicides where death is the obvious consequence of an accused’s act, a particularly advanced degree of intoxication will be necessary to establish an intoxication defence. (*Daley*, paragraph 42) Not just any degree of intoxication will negative the intent to kill:

...The intoxicating effect of alcohol and drugs is well known. Intoxication which causes a person to cast off restraint and act in a manner in which he/she would not have acted if sober affords no excuse for the commission of an offence while in that state if he/she had the intent required to constitute the offence. A drunken intent is nonetheless an intent. (*R. v. Canute*, [1993] B.C.J. No. 713 (C.A.), paragraph 49)

[85] Where an accused charged with murder raises the issue of his intoxication, the Crown must prove beyond a reasonable doubt that he was not so impaired by alcohol that he could not form the specific intent to kill or cause bodily harm with a reckless disregard for the likelihood of death ensuing; that despite his consumption of alcohol he knew what he was doing was likely to cause death. (*Daley*, paragraph 53, referring with approval to *R. v. Simpson*, [1999] B.C.J. No. 110 (C.A.), paragraph 38)

[86] If, after taking into account the evidence of M.S.’s consumption of alcohol or drugs, along with the other facts which throw light on his intent, I am left with a reasonable doubt that M.S. had the required intent, then I must find him not guilty of murder and guilty instead of manslaughter. However, if notwithstanding the evidence of M.S.’s consumption of alcohol or drugs, I am satisfied beyond a

reasonable doubt that at the time he stabbed B.G., he had the intent to kill her, that will lead to a conviction for murder. (*Daley, paragraph 48*)

The Credibility of the Accused - R. v. W.D., [1991] S.C.J. No. 26

[87] I want to note that this is not a case where the caution in *R. v. W.(D.)* is applicable. M.S. testified but his credibility is not a central or significant issue. There is no conflict between his evidence and that of other witnesses. He simply cannot remember. M.S. gave no evidence on the key element in the trial – whether he had the requisite intent to kill or cause bodily harm with the foresight that the likely consequence was death. (*Daley, paragraph 106*)

M.S.'s Ingestion of Alcohol and Drugs

[88] As I noted, M.S. testified to having taken pills before leaving Glace Bay on December 3, drinking two shots of moonshine at X Street sometime in the afternoon, and taking some more pills after that. The drugs he took included Rivotril, the known effects of which I will be discussing.

[89] Although according to the expert report of Dr. Akhtar (Exhibit 129, page 4), he formed the understanding that M.S. had taken ten Rivotril, M.S. in his evidence disputed that, saying that number “would kill you.” I am satisfied that on December 3 M.S. would have taken enough Rivotril to get high but, as a seasoned drug abuser, would have known enough not to take a toxic dose.

[90] M.S. may have had more to drink than the two shots of moonshine he recalled in his testimony. In his direct examination, he was shown the Golden

Wedding whisky bottle. He testified that it was full when he took it from the cabinet. He described the remaining contents as “a little less than half left.” If it was full when he and B.G. opened it, there is now more than four ounces missing. This does suggest that M.S. and B.G. may have had more than just two shots each.

Consumption of Alcohol and Drugs – B.G.’s Toxicological Analysis

[91] There is no toxicological screen for M.S. to indicate what or how much he consumed. The codeine in B.G.’s bloodstream supports M.S.’s testimony about getting pills, including Tylenol 3’s, on the afternoon of December 3. Twenty-three Tylenol 3 pills (Exhibit 24) were found by police in the pocket of a pair of jeans on the floor of the bedroom where B.G.’s body was lying. Their presence suggests that B.G. did not take the full “handful” of Tylenol 3’s that M.S. says he obtained.

[92] B.G.’s post-mortem toxicological analysis also located Zopiclone and Fluoxetine in her system. While of minimal pharmacological significance according to Mr. Keddy, their presence supports M.S.’s testimony about having taken some of B.G.’s drugs on the morning of December 3, before they left Glace Bay.

The Relevance of B.G.’s Post-Mortem Toxicological Profile

[93] The toxicological evidence supports M.S.’s claim that B.G. consumed pills and alcohol on December 3. This lends credibility to his evidence about the drinking and drug-taking that afternoon which is relevant to the issue of his intoxication. While I cannot infer a BAC for M.S. from the levels of alcohol and codeine in B.G.’s system, there is evidence that he was intoxicated. The only

logical inference is that his intoxication was due to the alcohol and drugs he said he consumed.

The Evidence of M.S.'s Intoxication

[94] The witnesses who offered the most information about M.S.'s intoxication were the police officers who came into contact with him on December 3. Cst. Martell thought M.S. seemed confused and under the influence. Upon returning to the patrol car to arrest him for B.G.'s murder, Cst. Martell found M.S. was unresponsive when asked if he understood his rights and the police caution. Instead, he asked Cst. Martell: "Where did you pick me up at, where was I at?" as though he had already forgotten the circumstances of his initial arrest.

[95] In Booking at Central Division, M.S. was observed by Csts. Martell and Power to have slurred speech and be unsteady on his feet. He emitted an odour of alcohol. The lock-up officer, Cst. Kirk Oliver, thought M.S. was highly intoxicated. He too observed M.S. to be unsteady, with slurred speech, and a strong odour of alcohol.

[96] M.S.'s condition is vividly portrayed in Exhibit 44, the "lock-up video". There M.S. can be seen swaying in front of the Booking counter and being propped up by Cst. Martell. Cst. Martell stands behind M.S. with his hand on his back to keep him steady and prevent him from falling down. M.S. slumps forward, resting his head on the counter. Cst. Martell has to grip his shoulder and straighten him back up to a standing position. While being read his rights, M.S. starts to vomit on the Booking desk and is propelled over to a wastebasket where he continues to throw up.

[97] In the lock-up video, M.S. seems incredulous at the news that he is being charged with murder. When he is told by Cst. Oliver that the charge is murder, he responds, with considerable emphasis: “What? Me on murder? Nooo! Are you serious? For who?” When the officers tell him they are not going to discuss it, M.S. reacts forcefully: “No, I wanna know, man!” he says.

[98] M.S.’s utterances at the Booking desk show him to be confused and disoriented. His speech is very slurred. Csts. Martel and Oliver heard him say he wanted to speak to his girlfriend. He said she was pregnant. (As an aside, the autopsy revealed this not to be so.) The police officers did not respond to M.S. saying, “I have to call my girlfriend, B.G.”

[99] Although M.S. had to be prompted by Cst. Oliver who knew him, he was able to supply the information the police officers wanted - his middle name and his street address.

[100] After being processed at the Booking counter, M.S. was taken to an interview room. He is guided there by Cst. Martell and shows unsteadiness with a tendency to weave. He tells the officers he would like to know what’s going on. He soon passes out. About 45 minutes later at 7:30 p.m. Cst. James Taylor, of the Cape Breton Regional Police Forensic IDENT unit, comes in to take photographs and swab his bloody hands. He can be seen in Exhibit 45 (showing M.S. in the main floor interview room) trying to jostle M.S. into consciousness without success. M.S. starts to slide onto the floor and has to be propped up by Csts. Taylor and Martell. Cst. Martell described M.S.’s body as limp. He had to be held up so he would not slip off the chair.

[101] In addition to the main floor interview room video, the photographs taken by Cst. Taylor (Exhibit 1, Tab 17, photographs 1 – 5) show M.S. to be unconscious or asleep. His eyes are closed. Cst. Taylor had to physically move M.S.'s head in order to get the different angles he wanted to photograph.

[102] Cst. David Morrison, the officer in charge of the Cape Breton Regional Police Service Forensic IDENT unit, also saw M.S. in the main floor interview room. He noted that M.S. became a little more responsive after Cst. Taylor took the photographs and while the swabbing was being done. He answered the officers' questions by mumbling responses in a not very audible fashion. The video shows him to be in an obviously impaired condition.

[103] At this point M.S. was taken to a cell where he went to sleep. It was about 7:37 p.m. on December 3. He was awakened by the police for questioning about 4:36 a.m. the following morning.

M.S.'s Police Interrogation

[104] M.S.'s police interrogation was lengthy. It was video/audiotaped (Exhibit 46 – 3 CD's) and transcribed. (Exhibit 127) With some interruptions, including for M.S. to consult on the telephone and in person with counsel, it lasted until 2:14 p.m. Two police officers were involved; for most of the interview, Cst. Adam Campbell, and latterly, Cst. Phillip Ross. In the interview M.S. is clearly no longer intoxicated. He answers and asks questions in a coherent, if often sullen, hostile manner. Initially he asks to call his girlfriend and says he can't believe he is charged with murder, which he denies. "I didn't commit no murder, man." He has

a spot-on understanding that he does not have to make a statement: when asked to explain the police caution he has just been read, he says, “It means I have the right to remain silent.” It is a right he exercised in a remarkably resolute and disciplined way as the interrogation proceeded, with the result that the statement-taking really netted nothing for the investigators.

[105] The only response by M.S. that bears on the subject-matter of the investigation comes some time into the interview. Cst. Ross, conducting the final segment of the interview starting at about 11:39 a.m., tries to extract a reason for B.G.’s killing and tells M.S.: “Obviously this girl was cheating on you. We know that.” M.S. is unequivocal: “No, she wasn’t”, he says flatly. He otherwise essentially ignores the concerted efforts by Csts. Campbell and Ross to get him to talk, variously studying and pushing aside the gruesome forensic photographs the police officers want him to look at.

[106] In a series of admissions entered as Exhibit 122, M.S. agreed that his police statement was free and voluntary. I was satisfied after submissions by Crown and Defence that the statement also complied with section 146(2)(b) of the *Youth Criminal Justice Act* and is therefore admissible. Both Crown and Defence wanted the statement in evidence. The Defence relies on M.S.’s statement as evidence of his intoxication having been so advanced on December 3 that even early the next day he was still asking for B.G., apparently unaware that she was dead, and even more significantly, that he had killed her.

Additional Evidence Relevant to the Extent of M.S.’s Intoxication

[107] Christopher Keddy, the forensic toxicologist called by the Crown, indicated in his evidence that it is possible to become progressively more intoxicated. He noted that in the case of codeine ingested orally, it would take 30 – 40 minutes before an effect would be seen. Mr. Keddy testified that if the effect of the drug taken is drowsiness the drowsiness will increase until maximum drowsiness is reached. The effect could last for several hours and progress over time. When discussing B.G.'s blood alcohol concentration, Mr. Keddy noted that, in forming his opinion, he did not know if he was dealing with a person who was in a rising or falling blood alcohol concentration phase.

[108] I mention this evidence because it indicates that the effects of drugs and alcohol can increase over time as their concentrations in the blood become elevated. Both Dr. Hucker and Dr. Akhtar were of the opinion that on the evening of December 3, 2010, M.S. was under the influence of substances. And while there is no evidence that M.S. took any of the Tylenol 3's, the codeine itself is not the point. The testimony of Christopher Keddy about codeine in B.G.'s bloodstream illustrates that alcohol and drugs concentrate and then dissipate in a person's system. This is a well understood fact.

[109] This point is relevant to M.S.'s evidence about ingesting Rivotril. Dr. Hucker testified about the effects of Rivotril on memory, noting that M.S.'s loss of memory, even on December 3, is consistent with having Rivotril in his system. Dr. Hucker explained that the half-life of Rivotril can go up to 50 hours. He said that M.S.'s incredulous reaction at the police station to being told he was charged with murder is explicable on the basis of the memory impairment that can occur with Rivotril. Dr. Hucker described what could have been happening: "He's forgetting because the drug is having that effect on his brain."

[110] While M.S.'s lack of memory could be a fabrication, I accept Dr. Hucker's evidence that it is consistent with the ingestion of Rivotril. Having watched the various videotapes of M.S. on December 3 and 4 – at Booking (Exhibit 44), in the police interrogation (Exhibit 46) – and having seen him testify, I am of the view that his memory loss is likely genuine.

[111] It is apparent on the evidence that the impairment of M.S.'s ability to recall events was increasing as the evening of December 3 wore on: by approximately 6:30 p.m. he reacts with complete surprise at the news that he is being charged with murder when at 6:17 p.m. he was able to tell Cst. Martell that his girlfriend was at X Street, dead. As I will be discussing, the evidence shows that earlier on, around 6 p.m., his awareness was even less impaired.

Examining the Evidence to Determine Intent

[112] In my examination of M.S.'s state of mind at the time he stabbed B.G. I will be discussing the nature and extent of the force used against B.G., the weapons, the presence of clothing at the scene, utterances made by M.S. at the scene and to Cst. Martell, the X Street 911 call, M.S.'s after-the-event conduct, and the evidence of motive. I will also be reviewing the opinions of the forensic psychiatrists, Drs. Akhtar and Hucker.

B.G.'s Injuries

[113] The main bedroom at X Street was a scene of carnage. B.G. bled to death from multiple sharp force injuries. Eleven of the one hundred and four (104) stab

wounds were continuous through her body, this being discernible from the fact that eleven injuries in B.G.'s back were very small, suggesting just the tip of a sharp object. One of the injuries penetrated orbital tissue to bone at the base of B.G.'s skull. Two of the stab wounds to B.G.'s right side still had knives lodged in them. In one of these wounds, the knife blade had broken off from the handle which was found lying on the bedroom floor.

[114] B.G. was observed in the main bedroom lying on her back in only a pair of shorts, her arms splayed out at right angles to her body, with her forearms lying parallel to her head. On the left side of her torso, a large amount of blood had pooled. Dr. Wood testified that the amount of blood present suggests that when the injuries were inflicted, B.G. was alive and had circulation to cause the bleeding that was in evidence. Bleeding would have occurred at a fairly rapid rate from B.G.'s jugular vein, intercostal muscles, her severed aorta, and abdominal organs, most of which, including her lungs, had been penetrated. B.G. received sharp force injuries to her kidneys, stomach, various structures of the bowel, her liver, her spleen, and her pancreas. In Dr. Wood's opinion some injuries were inflicted when B.G.'s blood pressure was low, or occurred post-mortem, after circulation had ceased.

[115] Dr. Wood was unable to determine the order or sequence of the sharp force injuries inflicted on B.G. Some of the injuries were "incised" wounds which are of less depth and some were stabs wounds which are deeper. Dr. Wood could not tell the positioning of the assailant in relation to B.G. other than to say that whoever stabbed her had to have been in close proximity.

[116] It is a common sense inference that B.G.'s extensive injuries would have taken some moments to inflict. The blood spatter in the bedroom is indicative of multiple strikes at B.G.'s prone, bleeding body. I infer from the evidence that M.S. had to be in close proximity to B.G.'s body to create the injuries she sustained. He had to have both focus and coordination to undertake such a sustained attack.

The Number of Knives and Their Origin

[117] I am left in no doubt that the knives used to stab B.G. came from X Street. At least three knives are implicated: the two knives removed from B.G.'s side and the butcher knife found in the kitchen sink. The knife next to B.G.'s head (Exhibit 9 – a 6.5 inch blade) may have been used on her as well: I could see from examining it that it is stained with a substance that looks like blood, but it was not tested. Two other knives, both located in the small hallway leading from the kitchen to the bedroom have not been tied to B.G.'s injuries. As I will discuss, even though not used, they are relevant.

[118] M.S. testified that he was paranoid about people coming after him and kept knives and pepper spray in the main bedroom where he stayed while living with his grandfather. Pepper spray was seized from the floor of that bedroom. (Exhibit 100) And, as noted, three knives were found in the bedroom as well – one by B.G.'s head and two embedded in her side.

[119] It is possible that one or all of these knives - Exhibits 6, 7 and 9 (and Exhibit 8, the knife handle for Exhibit 7) - were already in the bedroom when M.S. knocked B.G. unconscious and began stabbing her. However there is nothing to suggest M.S. had been stashing them there. When shown these particular knives

during his direct examination, M.S. only recognized Exhibit 9, the knife found by B.G.'s head. He said he had seen Exhibit 9 in the kitchen at X Street. It was used for cutting potatoes and he had used it for this purpose himself. He gave no evidence about any knives he may have kept in his bedroom and was not asked to describe them.

[120] As I have noted, DNA links Exhibit 5, the butcher knife, to B.G.'s stabbing by M.S. In his direct examination, M.S. said he recognized this knife as a knife from his grandfather's home. He identified it as a kitchen knife which he said was used "for cooking and stuff." He did not think he had ever used the knife. On cross-examination his evidence changed and he testified that he did not recall if he had seen the knife before. It is not reasonable to infer from the evidence, including M.S.'s testimony, that Exhibit 5 was a knife he kept in his bedroom.

[121] Even if on December 3 M.S. had knives in his bedroom and had used them to stab B.G., he would still have had to focus on locating and using them. I do not think the implicated knives came from that room. There is evidence to indicate M.S. searched out knives from the kitchen: that is the blood spatter/DNA evidence, the evidence of the overturned kitchen drawer, and the knives in the hallway.

[122] Blood spatter and DNA analysis confirm that a diluted blood smear, with a major component of M.S.'s DNA and a minor component of B.G.'s, was found on a kitchen drawer near the kitchen sink. The neighbouring drawer was a drawer that had been pulled out and dumped onto the kitchen floor. This upended drawer can be viewed in Exhibit 1, Tab 4, Photograph 4 and Tab 10, Photographs 7 and 15. This drawer was never examined for blood or swabbed. There is no blood/DNA evidence to help explain who threw it onto the kitchen floor. The drawer was

certainly not on the floor when C.F. and R.G. cleaned up the kitchen or they would have noticed it. It is unreasonable to infer that either Mr. Y. or B.G. upended the drawer.

[123] Mr. Y. testified that M.S. dumped the drawer. I accept that evidence. Mr. Y. would have been able to see that happen from his perch in the living room. And while Mr. Y.'s memory proved to be unreliable about times for events on December 3, his recall of what happened while he was home around suppertime that day can be accepted as largely accurate. It is corroborated by the blood spatter and DNA evidence and the testimony of D. M. whom I find to be a reliable and credible witness.

[124] There is no way to tell when the diluted blood got deposited in the area of the kitchen sink. As I will mention shortly, D. M. testified she had urged M.S. to wash his bloody hands and face. This could have left diluted blood and B.G.'s and M.S.'s DNA at the kitchen sink area, where it was found. The evidence does not tell me that the blood had already been placed there before Ms. M. entered the house, in other words, while M.S. was still in the process of stabbing B.G.

[125] While the diluted blood by the sink does not provide me with a basis to infer that M.S. was in the kitchen after starting to stab B.G. but before D. M. arrived, I am satisfied that there is only one reasonable inference to be drawn from the presence of the two knives in the hallway. They had to have come from the knife drawer, the drawer that M.S. dumped on the kitchen floor.

[126] Explosive violence erupted inside X Street in under 16 minutes on December 3. I find that the upended drawer was part of that violence. The clues to

the significance of this lie in Exhibit 1, Tab 12, Photographs 23, 24, 25 and 26. These photographs show two knives lying in the small hallway. Mr. Y. and M.S. both testified that the knives were kept in the drawer that ended up on the kitchen floor. One of the knives in the hallway is lying beside a slotted spoon (Exhibit 1, Tab 12, Photographs 25 and 26), obviously a utensil that would have come from the kitchen. It is apparent from photographs of the upended drawer that a variety of utensils, not just knives, spilled from it when it was dumped. The only reasonable inference is that the knife and the slotted spoon came from the kitchen at the same time, and were dropped, near the door to the main bedroom. I find the knife and spoon combination, and the knife lying by itself in the hallway, came from the drawer that ended up overturned on the kitchen floor. I am satisfied that Exhibit 5, the butcher knife, also came from that drawer and that either M.S. got all six knives I have referenced in these reasons at one time from that drawer, dropping some on the way to the bedroom, or he went to that drawer to get additional knives after the knives he had been using to stab B.G. either broke or got embedded. The inference I draw from this evidence is that M.S. was focused on getting knives or getting more knives for the purpose of stabbing B.G.

The Bloody Sock Print Patterns

[127] As I have noted there was a considerable amount of blood found on objects and surfaces in the X Street house. Some of it was in the kitchen. Sgt. Butler, the blood spatter expert, testified that he could not determine a traffic pattern from the blood: in other words, he could not say, based on the bloodstains, smears, transfers, wipes, swipes, drips, and spatters, how the bloody, blood-letting person travelled through the house. A foot transfer was observed on the kitchen floor making an impression in front of the kitchen counter pointing toward the kitchen cabinets. It

was consistent with a bloody sock as the toes and textured pattern were visible. This would place M.S., wearing at least one sock soaked in blood, in front of the kitchen cabinets, at some point, in close proximity to the overturned drawer.

[128] Two white, athletic socks, their soles saturated with blood, were found discarded in the hallway near the kitchen. (Exhibits 13 and 14) They were subject to DNA testing. One sock on its top near the opening had a major DNA component that was B.G.'s, with a minor component of M.S.'s DNA. The sole of the other sock was tested and the major DNA component was B.G.'s.

[129] Sgt. Butler testified that the saturation stain on the bottom of the socks was consistent with a person wearing the socks and stepping in B.G.'s blood. It was "outside/in" saturation. There is only one reasonable inference to be drawn from the bloody sock print in the kitchen and the blood-soaked socks found in the hallway. M.S., wearing these socks stepped in B.G.'s blood and tracked it into the kitchen. Although it is possible the kitchen sock print was made when M.S. went to get more knives, I cannot be certain about this. Sgt. Butler's evidence of bloody swipe patterns and transfer stains consistent with sock prints indicates that M.S. still had the bloody socks on when he went into the living room which happened once D. M. had arrived, therefore after M.S. had stopped stabbing B.G. As I am about to discuss, the only reasonable inference to be drawn from the evidence is that M.S. removed those bloody socks and discarded them before he left the house and was arrested, at which point he was barefoot.

Removal of Clothing

[130] Two items of discarded clothing are of particular interest: the bloody socks I was just discussing and a pair of men's blue jeans. I will continue with the socks.

[131] As I have noted, M.S. not only walked in the kitchen wearing socks saturated with B.G.'s blood, he also had them on in the living room, as a bloody sock print was identified there too. D. M. observed M.S. go into the living room where Mr. Y. was still sitting. Mr. Y. testified to M.S. being in the living room. M.S.'s DNA was swabbed from the floor where Sgt. Butler observed drips of blood. It was while he was in the living room, dripping blood and leaving a bloody sock print transfer that Ms. M. saw him drop the butcher knife he had been carrying. It must have been after this that M.S. removed the bloody socks and left them in the hallway, in all likelihood, just before he left the house.

[132] Also found by police searching the house was a pair of blue jeans, inside out on the main bedroom floor. (Exhibit 12) When M.S. got into Ms. M.'s van outside X Street, she saw that he was wearing shorts and no shirt. T.B. described M.S. wearing a long sleeved shirt and long pants when they left Glace Bay on December 3. G.W. has a different recollection – that M.S. was wearing “blue shorts”. I find that he either saw M.S. before he put pants on, as we know that M.S. was wearing blue shorts when he was arrested, or his memory on this detail is faulty. It was December and although the photographic evidence indicates no snow on the ground, it still is not reasonable to think M.S. would have been leaving the T.B./G.W. residence in shorts. And furthermore, M.S. certainly would not have been wandering around Sydney looking for pills with B.G., dressed only in shorts.

[133] Various items of clothing were found in the messy main bedroom at X Street. The men's blue jeans offer a piece of the puzzle of what happened in that

bedroom. The jeans were found inside out on the bedroom floor near the doorway. They were men's size 32/30. M.S. acknowledged in cross-examination that the blue jeans could have fit him in December 2010 because his waist was smaller then. He confirmed that although he now has a waist size of 38, in December 2010 he weighed about 140 pounds, some 70 pounds less than he does now. He kept his clothes in the main bedroom and agreed that he normally wears jeans, not dress pants.

[134] Another piece of evidence ties the blue jeans to M.S. Twenty-three Tylenol 3 pills were seized from a pocket of the jeans. As I have noted M.S. testified to having obtained "a lot" of Tylenol 3's, "a handful." Although it was M.S.'s evidence that he gave the Tylenol 3's to B.G., I am satisfied that at least some of the Tylenol 3's stayed in the pocket of the jeans M.S. was wearing that day.

[135] The jeans have blood on them. It is B.G.'s blood. The front right knee area is saturated with B.G.'s blood and the back bottom of the right leg has B.G.'s blood on it. Sgt. Butler viewed it as a possibility that the knee area of the blue jeans got saturated in B.G.'s blood when someone wearing the jeans knelt in the pooled blood. The pooled blood was on B.G.'s left side. No other pooled blood was located in the house.

[136] When D. M., responding to M.S.'s entreaties to "come here", looked into the main bedroom, she saw M.S. lying on B.G.'s right side, "kinda on his knees." By now he was dressed only in shorts. This was obviously not when the jeans soaked up B.G.'s blood.

[137] I am satisfied that the only reasonable inference to be drawn from the bloodied jeans is that they were worn by M.S. when he knelt in B.G.'s pooled blood before D. M. came into the house. M.S. had removed them by the time she saw him. To have placed only his right knee in B.G.'s pooled blood, M.S. had to have been facing her head when this blood transfer occurred. I have already noted that he would have had to be close to her body to have inflicted the stab wounds she received. This supports the inference that M.S. was kneeling close to B.G.'s body as he stabbed her in what had to have been a concentrated and focused attack. I find that after it was over, M.S. pulled off the jeans and socks, leaving the jeans inside-out near B.G.'s body.

Utterances Heard By D. M.

[138] When D. M. pushed open the door to the main bedroom at X Street she saw M.S. lying on B.G.'s right side, saying: "I killed her, I think I killed her, I don't want to go to jail, she cheated on me."

[139] Shocked by the scene, Ms. M. backed out and headed for the kitchen. M.S. followed her. Mr. Y. had not moved from the front living room. Ms. M. saw that M.S. was bloody and had a big butcher knife in his hand. It was her evidence that the knife looked like the one police later seized from the kitchen sink at X Street – Exhibit 5. In the kitchen, Ms. M. had her grandson positioned behind her so that she was between him and M.S. while they all circled around the room. Ms. M. testified that M.S. was telling her he would have to kill them all because they were witnesses. He sat down at one point, cried, and rubbed his head. She saw him go into the living room, saying: "I had to, I had to, she cheated on me." He was still holding the knife.

[140] Ms. M. told M.S. he should wash his hands and face and run. He complied with this suggestion by going to the kitchen sink. He must have put the butcher knife down when he washed himself off as the knife was not found to have diluted blood on it. He then repeated what he had been doing before, circling around. Ms. M. stayed in the kitchen. M.S. went into the living room and dropped the knife. She saw Mr. Y. pick it up and she heard M.S. say: "Give it back to me." Mr. Y. testified that he threw the knife into the sink: however it got there, that is where it was found.

Utterances Heard By Mr. Y.

[141] The X Street 911 call, placed by Mr. Y., and D. M.'s 911 call from the Needs store happened 7 minutes apart. Despite being so shaken that she initially had trouble getting the key into the van's ignition, Ms. M. would have made it to the nearby Needs store very soon after leaving Mr. Y.'s residence. This leads me to believe that Mr. Y. must have called 911 almost as soon as she left. It was a very short call at 6:06 p.m. Mr. Y. told the dispatcher, "I need, need, some, some officers here." M.S.'s agitated voice can be heard in the background.

[142] As I mentioned earlier, Mr. Y. had a poor memory for the timing and sequence of events during the day of December 3. Just because he failed to accurately recall *when* things happened on December 3 does not mean he did not accurately recall *what* happened. He recalled in direct testimony that when Ms. M. arrived at suppertime, M.S. was "hollering" for her to go to the bedroom. He described her running out, crying "O my god! O my god!" This essentially squares with D. M.'s evidence. And like D. M., Mr. Y. recalls M.S. making statements

about B.G. being unfaithful: “She went out on me, Poppy, three times” is what Mr. Y. remembers M.S. saying. And Mr. Y. shared Ms. M.’s description of M.S. expressing a concern about witnesses. According to Mr. Y., M.S. repeatedly said: “I can’t leave no witnesses...”

The X Street 911 Call

[143] In the background of the very brief 911 call placed by Mr. Y., M.S. can be heard crying out: “Don’t call, don’t call.” I am satisfied that only M.S. and his grandfather were in the house at this time. Even if M.S. was telling his grandfather not to call for assistance, this does not indicate an awareness that he had just committed a murder; his awareness that he was involved in a homicide is an equally reasonable inference to draw. What M.S.’s frantic words do indicate is that he was aware he did not want help being dispatched to the scene.

[144] Mr. Y.’s memory about the 911 call is faulty. He testified that M.S. told him to call the police, but in so many respects, his recollection about this call is not reliable. Mr. Y. said M.S. spoke to the police on the phone, which did not happen. The recording of the call (Exhibits 40 and 41) establish that only Mr. Y. was speaking and it was to the dispatcher. He described M.S. calling the police and then just sitting down and waiting until they came. That is also inaccurate. Mr. Y. said after M.S. hung up the phone, 911 called back and Mr. Y. spoke to dispatch. The call shows that 911 could not get any answer when they called back after the call was disconnected. The call lasted seconds only.

[145] I have considered whether Mr. Y.’s flawed recollection about this fleeting event should undermine my confidence in his testimony about what else M.S. was

saying and doing, but as I have noted, his evidence is supported by D. M.'s testimony and the blood spatter evidence.

Utterances Heard By Cst. Martell

[146] Responding to the X Street 911 call, Cst. Martell turned onto X Street and saw M.S. He recognized M.S. from prior dealings with him. M.S. had a smear of blood on his face. He had been informed that M.S. was associated with X Street and was on a house arrest condition. When Cst. Martell rolled down his window and asked M.S. what he was doing, he got no response. M.S. gave him a blank stare and kept walking.

[147] When M.S. ignored Cst. Martell's request that he stop, and started instead to jog across the street, Cst. Martell pursued him. Catching him after about 50 feet, he put M.S. under arrest for breach of his conditions. As Cst. Martell went to cuff him, M.S. shrugged away from him and crossed the street back toward the patrol car. Cst. Martell pursued him again, and handcuffed him.

[148] As Cst. Martell was placing the second handcuff on him, M.S. sank to the ground, sobbing a bit, and crying, "my girlfriend's dead, my girlfriend's dead." In response to Cst. Martell's inquiry about the whereabouts of his girlfriend, M.S. said "she's at the house." Cst. Martell asked if that was X Street, and M.S. said yes. M.S.'s utterances come within section 146(3) of the *Youth Criminal Justice Act* and are admissible evidence against him. (*R. v. D.T.W.D.*, [2012] N.S.J. No. 336 (Y.J.C.))

Post Offence Conduct

[149] The discarded clothing at X Street, M.S. washing himself off at the sink, and his decision to leave the house, all of which constitute what is referred to as after-the-event or post-offence conduct is not evidence that can be used to determine M.S.'s culpability for B.G.'s death as between murder and manslaughter. It is equally consistent with both. It cannot be considered evidence of M.S. having had a specific intent to kill. (*R. v. White*, [2011] S.C.J. No. 13, paragraph 39; *R. v. Berner*, [2012] B.C.J. No. 817 (C.A.), paragraph 22; *R. v. McIntyre*, [2012] O.J. No. 2375 (C.A.), paragraph 44)

[150] However, I can use M.S.'s post-offence conduct to assist me in assessing the extent of his intoxication and his awareness of the circumstances. (*R. v. Bailey*, [2001] B.C.J. No. 2543 (C.A.), paragraph 56) Where an accused's mental state is in issue, for example, through evidence of intoxication, evidence of his after-the-fact conduct "could support an inference that, despite intoxication, the accused did have sufficient awareness to form the requisite intent for murder." (*R. v. Peavoy*, [1997] O.J. No. 2788 (C.A.)); *Cudjoe*, paragraph 91)

[151] What this post-offence conduct evidence tells me is simply this: when M.S. was at X Street and shortly after he left the house, he was significantly less impaired than when he was in police custody, particularly at the lock-up. And while his utterances best illuminate the extent of his awareness, his after-the-fact conduct is relevant to this issue too.

[152] M.S.'s after-the-fact conduct is arguably subject to "competing interpretations." (*R. v. Hall*, [2010] O.J. No. 4603 (C.A.), paragraph 137) He may have discarded his clothing because they were saturated with blood. He may have

washed himself off at the sink simply because D. M. suggested it. And as Dr. Hucker noted, he may have left the house because he knew the police were coming and given his experience with the police, “it would be virtually automatic for him to run.” Notwithstanding, M.S. was sufficiently aware that he discarded all his bloody clothing, viewed Ms. M.’s suggestion to wash himself off as a good idea, and left the house once 911 had been called. This shows that he was adverting to his circumstances and responding cognitively to them.

[153] The Defence argued that M.S.’s behaviour just before he left the house indicates that he was engaging in very disorganized thinking. Ms. McRury posited the suggestion that street-smart M.S. would have covered his tracks - all his agitated flailing about in the house, getting D. M. to come and see what he’d done, waving the knife and circling the kitchen, threatening to eliminate witnesses, after having invited one into the house, but not doing so, leaving all the knives in plain sight, going into the street in a state of undress – this, in the Defence submission, indicates a mind that was not focusing and not functioning. This was the behaviour of a very confused person, not someone who has just formed and acted upon an intention to kill.

[154] Dr. Hucker commented on these behaviours when he was asked about them in cross-examination. He agreed it was disorganized behaviour, and not what would be expected of a street-smart, savvy veteran of the criminal justice system - unless the influence of drugs and alcohol is taken into account. As Dr. Hucker put it, a killer who cleans up suggests a killer who is unimpaired.

Motive

[155] As a matter of law, motive is not an essential element of the prosecution case and does not have to be proven. As evidence, it is always relevant, making evidence of motive admissible. (*R. v. Lewis*, [1979] S.C.J. No. 73, page 7 (Q.L. version)) Its utility in an evidentiary sense is as a means of proving “the anterior intention or identity of the person who committed the actus reus.” (*Lewis*, page 8)

[156] In the Crown’s submission, M.S.’s police interview includes an indication of animus toward B.G. Around 6:15 a.m. December 4, after M.S. had been in contact with counsel, he again raises the issue of calling his girlfriend with Cst. Campbell: “Fuck, I guess I can’t call my girlfriend, eh?” It is the Crown’s view that he next says: “She’s the one that fucked me...” Having listened closely to this segment of the interview a number of times, I am satisfied M.S. was saying: “She’s the one that’s fuckin’...”, a statement he leaves dangling. Cst. Campbell, by now off-screen, is in the process of leaving the room and is not responding. M.S. must have concluded it was futile to continue. I do not accept the Crown’s version of the words spoken or what is reflected in the transcript. I do not know what M.S. was starting to say, but I find nothing suggestive of motive in this snippet of an unfinished comment.

[157] Through the hours that followed, Csts. Campbell and Ross hammered away at M.S. to supply a reason for what happened to B.G. He tells them nothing, not even when they suggest he was angry and upset and lost control. He makes no admissions and offers no explanation.

[158] The content of what Csts. Campbell and Ross put to M.S. when questioning him reveals that they knew what M.S. had previously said to D. M. and Mr. Y. at X Street. He had disclosed a motive to them. He told Ms. M. he “had to” kill B.G.

because she had “cheated” on him. He mentioned B.G.’s infidelity to his grandfather. This was all said in the aftermath of what had happened in the bedroom.

[159] Dr. Hucker described M.S.’s utterances as indicating “a very clear motive for the killing.” (Exhibit 131, page 4) M.S. explained lucidly why he had attacked B.G.: he believed she had not maintained an exclusive relationship with him. He stabbed her in retaliation for her perceived faithlessness.

The Opinions of Dr. Syed Akhtar and Dr. Stephen Hucker

[160] Drs. Akhtar and Hucker were each qualified to give opinion evidence in the area of forensic psychiatry and the capacity to form specific intent. They each filed reports (Dr. Akhtar – Exhibit 129 and Dr. Hucker – Exhibit 131) and reviewed materials provided to them that included: Crown materials such as Confidential Instructions to the Crown, Crown Brief, Supplementary Occurrence Reports, and statements of witnesses; the JEIN Offender Summary Report on M.S. detailing his history of conflict with the law from 2007 – 2010; and the statements of D. M. and Mr. Y.

[161] Each doctor also interviewed M.S. Dr. Akhtar met M.S. for two and a half hours on September 19, 2011, an interview that did not involve the administering of any psychological testing. Dr. Hucker interviewed M.S. on October 20, 2011 for approximately two hours. Dr. Hucker had M.S. complete a number of psychological tests, including a Personality Assessment Inventory (PAI) which produced a profile with features that, according to Dr. Hucker’s report: “...suggest an individual who is easily angered, has difficulty controlling the expression of his

anger, and is perceived by others as having a hostile, angry temperament.” (Exhibit 131, page 12) Dr. Hucker testified that M.S.’s profile, garnered from another psychological test, the Aggression Questionnaire (AQ), did not reveal anything that was not discerned from the interviews with the psychiatrists: his profile on subscales for Physical Aggression – a measure of the tendency to use physical force in expressing anger and aggression – was high; on the Verbal Aggression subscale it was high average; and on the Anger subscale, measuring anger-related arousal and sense of control, high. (Exhibit 131, page 13) M.S.’s Total Aggression Questionnaire score was in the high average range and represents “a summary measure of the overall level of anger and aggression” reported by him. Using an alcohol screening test, Dr. Hucker scored M.S. as high, indicating he was a “problem drinker.” (Exhibit 131, page 13)

[162] Both Dr. Hucker and Dr. Akhtar diagnosed M.S. as having a severe Conduct Disorder which was complicated by a serious substance abuse problem. Dr. Akhtar noted in his evidence that substance abuse impairs judgment and control which worsens the antisocial behaviour and attitudes related to a Conduct Disorder. He observed that this had resonated in M.S.’s history. Both experts agree that M.S. did not have a mental disorder sufficient for a finding under section 16 of the *Criminal Code* that would exempt him from criminal responsibility.

[163] The area of divergence between Drs. Akhtar and Hucker lies not in their assessment of M.S.’s personality profile or the severity of his problems. Where they are at odds is on the issue of M.S.’s intent in relation to B.G.’s death. Dr. Akhtar holds the opinion there is “a reasonable probability” that at the time he stabbed B.G., M.S. “lacked the capacity to form specific intent as a result of

extreme rage and consumption of alcohol and drugs.” (Exhibit 129, page 2) Dr. Hucker takes a different view.

[164] Dr. Hucker testified that intent is “a cognitive capacity.” It was his evidence that M.S.’s anterograde amnesia did not mean his capacity to form intent was impaired. He emphasized M.S.’s statements to D. M. and Mr. Y., seeing them as a reflection of awareness by M.S. of what he had done, of potential consequences, and of M.S.’s ability to process cognitively. He noted that M.S.’s statements were all made in context; there was nothing irrational about them. As for M.S.’s intoxication, Dr. Hucker testified that a person can have a conscious operating mind that is under the influence of substances. For example, he noted that M.S. left X Street knowing the police had been called. He said it seemed that M.S. was trying to get away. He also observed that going to the kitchen to get the knives indicated an intention. In Dr. Hucker’s opinion, deliberately going to get weapons is indicative of an intention to use them, which is precisely what M.S. did, to deadly effect.

[165] It is significant to me that Dr. Hucker’s opinion is grounded in the observations of the witnesses closest to the events – D. M. and Mr. Y. – whereas Dr. Akhtar was influenced most by M.S.’s presentation in police custody. Dr. Akhtar focused on M.S.’s reaction to being told he is charged with murder and his repeated requests to call B.G. He also noted the inappropriate clothing M.S. had on for December when he was arrested. This supported his opinion that M.S. was in a state of confusion and lacked the “consideration and reflection” that are required for specific intent.

[166] M.S.'s cognitive functioning at X Street around 6 p.m. on December 3 is at the heart of this case. It is best revealed by what he was doing and saying at that time: his later conduct, appearance, and utterances are simply not as relevant, especially when the known effects of Rivotril are taken into account. Dr. Akhtar's emphasis on subsequent events over the evidence from Ms. M. and Mr. Y. causes me to reject his opinion on the issue of M.S.'s intent.

[167] It is Dr. Hucker's opinion that I find persuasive. It accords with my own assessment of the whole of the evidence. Dr. Hucker had the following to say in his report about M.S.'s cognitive functioning:

...While it is clear that [M.S.] was under the influence of substances at the requisite time, the statements of Ms. M., who arrived at the scene very soon after the incident, and of his grandfather, strongly suggest that he was in fact aware at that time of what he was doing. He even indicated that he would have to remove potential witnesses by killing them too. Moreover he gave a very clear motive for the killing. I would put greater weight on those observations than the police report that he had left the murder scene in wintertime without his shirt and shoes, his subsequently appearing unsteady, or of his claim of amnesia for the event. Those observations would nonetheless be consistent with his being intoxicated. (Exhibit 131, page 15)

[168] I also do not accept Dr. Akhtar's opinion on the issues of rage and intent. Dr. Akhtar acknowledged that the "ferocity" of the attack on B.G. shows the extreme rage and total loss of control that had been unleashed. In his opinion, rage impairs judgment and control and compromises the ability to form intent. Dr. Hucker disagreed. It was his opinion, which I accept, that rage does not affect the ability to form specific intent nor can it be said to impair reason. Dr. Hucker testified that rage is a state of disinhibited behaviour rather than a cognitive defect. And, as I

noted previously in these reasons when discussing the law of provocation, rage is not a defence to murder. (*Parent, paragraphs 9 and 10*)

Finding Specific Intent

[169] I find that M.S. does not remember what he did in less than 16 minutes at X Street on December 3, 2010, not because he was so impaired at the time but because he subsequently developed an “anterograde amnesia” as the effects of the Rivotril took hold. No memory now does not equate to no intent then.

[170] At supper-time on December 3, 2010, M.S. was disinhibited by drugs and alcohol. Touched off by a perceived wrong, he undertook a ferocious assault that was fueled by jealousy and incandescent anger. Although intoxicated, he was able to focus on what would have been a demanding task. He had to get down on the floor, kneeling next to B.G.’s prone body to stab her multiple times with multiple knives. Her blood pooled on her left side and the right knee of M.S.’s jeans soaked it up. Using his right hand he got two of the knives stuck in the left side of her body. He either already had at hand or went to retrieve additional knives. The only reasonable inference to be drawn from all the evidence is that when M.S. stabbed B.G. he intended to kill her. He inflicted 104 sharp force injuries to achieve that objective. He was goal oriented. The goal was to kill. No other inference can be drawn from the devastating wounds to B.G.’s body and the blood spatter they produced. This was force intended to annihilate.

[171] D. M. and Mr. Y. observed M.S. within what must have been minutes of his stabbing of B.G. They have described a person who was functioning cognitively, describing his motive, reasoning that witnesses should be eliminated, expressing

dismay at the prospect of consequences – “I don’t want to go to jail” – and taking steps to distance himself from the evidence - bloody clothing - and the scene. The only reasonable inference is that M.S. was aware of what he was doing and why, and was continuing to act intentionally, just as he had when he went into the kitchen and grabbed the knives, and then returned to the bedroom to stab B.G. over and over again.

[172] The evidence satisfies me beyond a reasonable doubt that M.S., despite his ingestion of drugs and alcohol and their intoxicating effects, was aware of what he was doing. It is an allowable common sense inference that a person usually knows what the predictable consequences of his or her actions are, and means to bring them about. (*R. v. Walle, [2012] S.C.J. No. 41, paragraph 64*) M.S.’s poor impulse control is no defence to murder. I am satisfied beyond a reasonable doubt that he intended to kill B.G., an intent he formed notwithstanding his intoxicated condition. He is therefore guilty of second degree murder and I convict him accordingly.