

## COURT OF KING'S BENCH OF MANITOBA

### B E T W E E N:

HIS MAJESTY THE KING,

- and -

SKYLYNN AUTUMN ELIZABETH KEEPER,

Accused.

)  
)  
) Manoja Moorthy  
) for the Crown  
)  
)  
) Jill Duncan  
) Anthony Kavanagh  
) for the Accused  
)  
)  
) Judgment Delivered:  
) January 29, 2024

### INNESS J.

#### INTRODUCTION

[1] Arnel Arabe (the “deceased”) was killed by Skylynn Keeper (the “accused”) inside his apartment, in Winnipeg, on or about October 3, 2021. The cause of death was blood loss due to stab and incised wounds. There were no eyewitnesses to the events. She is charged with second degree murder.

[2] The accused has pled not guilty. She admits that she killed the deceased but asserts that she did so while in an intoxicated blackout such that she has no recollection of the killing and had no intent to kill. She invites the Court to convict her of the included

offence of manslaughter. The Crown disagrees and asserts that it has proven the necessary *mens rea* to support a conviction for murder.

[3] The issue for me to decide is whether the Crown has proven beyond a reasonable doubt that the accused intended to kill Arnel Arabe (s. 229(a)(i) of the ***Criminal Code***) or intended to cause him bodily harm that she knew was likely to cause his death and was reckless whether he died (s. 229(a)(ii) of the ***Code***).

[4] For the reasons that follow, I have determined that the Crown has proven beyond a reasonable doubt that the accused possessed the requisite intent for murder when she killed the deceased. I, therefore, find Skylynn Keeper guilty of the second degree murder of Arnel Arabe.

### **THE TRIAL**

[5] The Crown's case was provided to the Court by consent through witness testimony and exhibits. The accused also testified in her own defence. It was agreed that her statement to the Winnipeg Police Service ("WPS") was voluntary and could be used by the Crown in cross-examination. A brief summary of the evidence is set out below.

#### **Marlet Ugot**

[6] The deceased's sister, Marlet Ugot, testified that although she and the deceased did not see each other often, they spoke by telephone once a week. She confirmed that he lived with their brother Rogelio Arabe in a suite in a Prevette Street apartment building (the "Building"), in Winnipeg, Manitoba. While she was familiar with the accused, she testified that she and the deceased did not discuss their relationship, and she did not know much about it.

[7] On October 2, 2021, Ms. Ugot hosted a party in the building where she lived on William Avenue. The deceased arrived with the accused at about 6:30 p.m. This was her third time meeting the accused, although Ms. Ugot could not recall the dates of the two prior times she met her.

[8] Ms. Ugot testified that there were less than 20 people present at her party on October 2, 2021. People were eating, drinking and playing cards. She did not speak to the accused or the deceased much that night. Ms. Ugot said that the deceased had brought a 12-pack of Budweiser beer with him. She recalled that the accused and the deceased drank beer at the party and the accused also drank some of Ms. Ugot's alcohol. She did not know how much alcohol the accused or deceased drank but confirmed the accused drank more than the deceased.

[9] Ms. Ugot described the accused as "quiet" and said she did not talk much unless spoken to. She thought it was "sweet" that the deceased was feeding the accused with a spoon. Everything seemed fine between them that night. She recalled the two of them periodically going outside to smoke, and with intention to visit the deceased's mother who lived in the same building.

[10] Ms. Ugot had previously observed her brother drunk. She testified that neither the deceased nor the accused appeared drunk when they left together just after 12:00 a.m. on October 3, 2021. She sent the deceased home with some food she had made. He did not take any beer with him.

### Call History

[11] On October 3, 2021 at about 9:00 a.m., a resident of the Building was looking out her window and noticed a bag, some clothes and a window screen on the ground. She shared these observations with the building caretaker at about 10:00 a.m. Shortly thereafter, the caretaker's husband went to the deceased's suite and noticed the door was not fully closed. He noticed blood smeared on the door beside the handle. He left without entering the suite and had his wife contact the WPS to request assistance.

### The Scene and Exhibits

[12] At approximately 10:57 a.m. on October 3, 2021, Constables Bax and Dueck arrived at the Building to investigate. They found the door to the deceased's suite slightly ajar. Inside the suite, blood was observed on the left wall. A blood trail on the floor went in a direction to the left, down the hallway and to the deceased's bedroom. The door to the bedroom was partially open. The deceased was lying on his back in a horizontal position across the width of the bed, with his legs bent over the edge of the mattress and his bare feet on the floor. He was not moving or making any sounds. He was wearing underwear and a tank top shirt that was soiled in blood. There were numerous lacerations on his upper body and head. A blood-stained steak knife was laying near him on the bed. The tip of the blade was bent. A significant amount of blood was observed throughout the bedroom, including on the doorway, floor, walls and furniture. Footwear impressions were evident in the dried blood on the floor.

[13] A Budweiser beer box and five spiked Snapple Spiked cans were found in the recycling bin in the kitchen. No beer was found inside the fridge. Six opened Budweiser

beer cans were found on the kitchen counter. Four opened Budweiser beer cans were found on the living room table. A pitcher style jug (the "jug") containing brown liquid was also found in the living room. It appeared to be blood stained. No testing was done on the liquid. An empty beer can was found in the deceased's room, along with a shot glass that appeared blood stained. A 24 Budweiser beer box was found by the caretaker of a nearby community centre on Keenleyside Street and was turned over to the WPS. It contained seven empty Budweiser beer cans and one empty Molson beer can.

[14] Blood stains were observed on a cushion in the living room that was askew, next to another cushion that was upended on the same couch. Blood stains were located on the handle area of the fridge door in the kitchen. Blood stains were also found on towels laying on the sink area in the washroom. The majority of the bloodstaining was located in the deceased's room and the hallway leading from his room to the exterior door.

[15] A black backpack and a window screen were found on the ground outside the Building, below the deceased's suite. The backpack contained items including clothing and a knife with the deceased's blood on it (Police Exhibit 6a).

[16] The deceased's car (registered to himself and Rogelio) (the "car") was found parked in the exterior parking lot of the Building. The driver's window was smashed. A small boulder was found on the ground near the driver's door, along with a store shopping cart. Blood stains were observed on the driver's side door and mirror of the car, and on the small boulder. A small "remote control piece" was found near the car, as were two other blood stained "remote control pieces" found in the playground area of the nearby Keenleyside Street Park.

Knives Seized

[17] Four knives were seized:

- a) A 12-centimetre long Cuisinart paring knife (non-serrated) was found inside the backpack, stained with the deceased's blood (Police Exhibit 6a);
- b) A 14-centimetre long kitchen steak knife (serrated) was found on the bed near the deceased's body. The knife was blood stained and the tip of the blade bent. No DNA testing was done on this knife (Police Exhibit Sc1);
- c) A Cuisinart knife (non-serrated) was found under a pillow and blankets on the bed near the deceased's body with no obvious bloodstaining (Police Exhibit Sc31); and
- d) A Homemaker meat cleaver was found on the living room floor, with the handle protruding out from under the couch. There was a black hair attached to the handle. Bloodstaining appeared on the blade and handle. No DNA testing was done on this knife (Police Exhibit Sc13).

A Cuisinart knife block in the kitchen contained knives with similar handles and rivets as two of the knives seized (Police Exhibits 6a and Sc31). There were five empty knife slots in the block.

Surveillance Video / Timeline Reports

[18] By consent, Detective Sergeant Trudeau testified as to the location and seizure of video surveillance and the preparation of timeline reports regarding the accused and the deceased at the following relevant locations:

- a) The entrance to the William Avenue apartment (residence of Ms. Ugot);

- b) The exterior of the entrance doors to the Building;
- c) The Keenleyside Street Park and playground area; and
- d) The exterior parking lot where the car was parked.

[19] The difference between the timestamp on the surveillance videos and the actual time varied by two to three minutes. The times were not at issue in this case. For ease of reference, I have referred to the timestamps on the videos/reports.

[20] On Saturday, October 2, 2021 at 1:34 p.m., the accused and the deceased are seen entering the Building. The accused can be seen wearing a black and white jacket and carrying a black backpack with light coloured trim. The deceased is seen carrying what appears to be a box of Budweiser beer.

[21] At approximately 5:48 p.m., that same day, they are both seen entering Ms. Ugot's building on William Avenue. Each appear to be carrying a case of beer. The accused is seen wearing the same black and white jacket. They are seen leaving Ms. Ugot's building through the same doors they entered at 12:24 a.m. on October 3, 2021. Neither of them appear to be carrying beer when they leave.

[22] At approximately 12:49 a.m., the car with the accused and the deceased inside can be seen pulling into the parking lot of the Building. They both get out of the car and the accused is seen walking towards the Building. She stands outside the Building's entrance on the sidewalk, looking in his direction and drinking out of a clear plastic cup. At one point, she holds up her right hand and appears to look at her palm. The deceased is seen looking inside the car and then walking towards the Building carrying what

appears to be a white bag. The deceased and the accused meet up at the Building's entrance and they go inside at approximately 12:52 a.m.

[23] The accused is then seen leaving the building alone at about 6:58 a.m., through the same doors. She grabs the door handle with her right hand, turning it and pushing the door open as she leaves. She is carrying what appears to be a Budweiser beer box under her left arm. Blood can be seen on the front left and right upper areas of her jacket where the fabric is white. She turns westbound and is seen heading in the direction towards the exterior parking lot.

[24] At approximately 7:04 a.m., the accused is seen walking on a path towards the play structure in Keenleyside Street Park, which is nearby to the Building and its exterior parking lot. She walks up the ramp/stairs to the top of the play structure and appears to sit down. At about 7:14 a.m. she gets up, slides down a small slide and walks over to a nearby rock garden in the park. She bends over and tries to lift a boulder but it rolls. She stands upright and walks back towards the play structure while tying up her hair. She climbs a short ladder on the play structure and while on top, bends over to pick something up. She then climbs back down the ladder and carries what appears to be the beer box over to a nearby shopping cart, placing it inside the cart. She pushes the cart with the box of beer in it back towards the rock garden. She stops, enters the garden and tries picking up a small boulder, which she drops. She tries a second time, picking up the boulder and placing it in the shopping cart. She pushes the cart around the rock garden, turning left around a short wall and going back in the same direction she came from and out of camera view at 7:16 a.m.



[25] The next video surveillance captures the accused as she is coming from the direction of Keenleyside Street Park playground, walking along the path and heading towards the car in the parking lot. Approximately three minutes later, at about 7:19 a.m., she is seen coming from the direction of the parking lot and entering the park, without the shopping cart or the small boulder, but carrying a box. She walks around and past the rock garden, and out of camera view.

#### DNA Results

[26] The WPS investigators made decisions on what items to submit for testing but ultimately it was up to the staff at the National Forensic Science and Identification Services Laboratory to decide which items to test. In this case, three DNA reports were submitted by consent (Agreed Statement of Facts, Exhibit 1, Tabs 2, 3, 4). The relevant DNA findings confirm the presence of the deceased's DNA being found on: the blood-stained knife inside the backpack (Police Exhibit 6a); a hoodie from inside the backpack; the accused's shoe; and the exterior driver's door of the car. The DNA of at least two other individuals was also found on the accused's shoe but due to weaknesses in the components and the number of possible contributors, no meaningful comparisons could be made.

#### Footwear Impressions

[27] Constable Cifuentes, a forensic identification officer with the WPS, qualified by consent, provided opinion evidence with respect to the "*identification, analysis, and comparison of footwear impressions*". He examined the shoes seized from the accused on her arrest on October 6, 2021. He made the following assessments: her left shoe

likely made the footwear impression in the blood on the floor of the deceased's bedroom near the night stand facing the west wall window; her left shoe likely made the footwear impression just inside the deceased's bedroom, facing towards the hallway and it was possible her left shoe made the footwear impression in the hallway, pointing towards the exterior door. He could not come to any conclusion regarding the footwear impression pointing upwards on the front passenger window of the car.

### Toxicology

[28] Gillian Sayer, a forensic toxicologist from the National Forensic Laboratory Services was qualified, by consent, to provide expert opinion evidence in the areas of "*analysis, and the physiology and pharmacology of drugs and alcohol and their effects on the human body*". She testified that there was no evidence of drug use detected in the deceased's body but that his blood alcohol content ("BAC") at the time of death was approximately 31 mg/100 mL of blood (31 mg%), which is under the legal driving limit of 80 mg/100 mL of blood (80 mg%).

[29] Ms. Sayer described alcohol as being a central nervous system depressant. Alcohol has the effect of slowing brain activity. It affects the executive functions of the brain, including higher order cognitive processes such as planning, judgment and risk assessment. The effects of alcohol are dose dependent and are related to the concentration of alcohol in the blood. As the concentration increases, so do the effects. A person can continue to be intoxicated on alcohol for as long as they continue to drink. The effects of alcohol, however, are also related to a person's tolerance. Tolerance is achieved through previous exposure to alcohol to withstand its effects. The more tolerant

a person is to alcohol, the more alcohol is required in order for them to achieve the desired effects.

[30] Ms. Sayer testified that at BAC levels under 50 mg%, individuals may display few, if any, observable symptoms and could experience mild euphoria, talkativeness and relaxation. At BAC levels between 50 mg% to 100 mg%, there is an impairment of cognitive processes and observable symptoms may include bloodshot or watery eyes, flushed face and diminished attention, balance and coordination. Mild to moderate intoxication occurs at BAC levels of 100 mg% to 150 mg%, with commonly-observed symptoms being deficits in fine and gross motor control, problems with balance and coordination and slurred speech. At BAC levels between 150 mg% to 300 mg%, individuals are moderately to severely intoxicated, with observable symptoms including staggering gait, impaired memory and confusion. A BAC above 300mg% is associated with significant mental and motor dysfunction, including marked incoordination, decreased level of consciousness, diminished reflexes, coma and potential death due to respiratory depression.

[31] She stated that her expertise as a forensic toxicologist was primarily confined to impaired driving investigations and she was not qualified to offer expert evidence on the issue this Court must determine. For example, when specifically asked whether a hypothetical intoxicated person would be unlikely to be able to predict the consequences of their actions, she responded that she is unable to opine on the impact of intoxication on a person's prediction of risk or the foreseeable consequences of their actions outside of a driving context. She differentiated her expertise from that of a cognitive scientist.

Her evidence, therefore, while helpful, was quite limited and general in nature. She could not testify about the impact of alcohol on a person's ability to predict consequences in the context of this case because that was outside of her expertise.

[32] Ms. Sayer described a blackout as a memory loss caused by the consumption of alcohol. A blackout is the brain's inability to convert short-term memory to long-term memory such that the memory is no longer available and can never be retrieved. There are several risk factors for blackouts such as a very high BAC (over 200 mg%) or a rapidly-rising BAC. The blackout may be "en blanc", which is complete memory loss or "fragmented", where a person only remembers bits and pieces. With a fragmented blackout, some memories may be triggered but others may never be retrievable. A person in a blackout may otherwise appear normal with no observable symptoms of being in a blackout. In addition, if a person is very tolerant, they may have few observable effects of alcohol and be able to walk and carry things while being in a blackout state.

[33] Ms. Sayer testified that cocaine is a central nervous system stimulant. It is a recreational drug that mimics the "fight or flight" response and produces feelings of euphoria, self-confidence and a rapid flight of ideas. The length of the effects depends on the manner and amount of consumption. She was unable to say how much cocaine is in a "50 bag" as that opinion was outside of her area of expertise. She generally agreed that if a person was snorting cocaine, the effects could last between 20 and 60 minutes. She described how some persons may "binge" on cocaine to maintain a high.

[34] Ms. Sayer testified that "magic mushrooms", or "shrooms", is a drug containing psilocybin, a hallucinogenic. When taken, it can have the effect of altering perceptions,

and creating visual, auditory and tactile hallucinations. When asked how long a “high would last” if a person consumed three grams of magic mushrooms, she testified that the length of the high varies, depending on how much psilocybin is contained within the mushrooms consumed and the timeframe in which it is consumed. She did not attend court prepared to testify about the “dosing” of mushrooms but stated that generally, a recreational dose can produce effects lasting six hours or less.

[35] Ms. Sayer also testified that the effects of drugs and alcohol may be more pronounced when combined and with greater amounts of consumption. Ms. Sayer stated that drugs affect different people in different ways and how the combination would affect any individual is dependent on the dose and the individual. When asked if she could comment on the effects of combining alcohol, cocaine and psilocybin, Ms. Sayer testified that the effects of combining drugs is difficult and complex to predict. She was not aware of any scientific studies that researched the combined effects. She did not provide specific evidence on how, or in what way, the combination may affect a person generally, or the accused specifically. This was outside her area of expertise.

#### Forensic Pathology

[36] Dr. Jason Morin, a forensic pathologist, was qualified to provide opinion evidence in the areas of “*pathology, forensic pathology and evidence relating to the causes and mechanisms of injuries and death*”.

[37] Dr. Morin conducted the autopsy on the deceased on October 5, 2021, who was 5’ 7” and 161 pounds at time of his death. He testified that the cause of death was blood loss from stab and incised wounds. He was unable to state the time of death.

[38] Dr. Morin described a stab wound as a wound that is deeper than its length and an incised wound as longer than its depth. The terms do not connote the seriousness of the wound. He testified the autopsy revealed many stab wounds on his head, neck, chest and upper extremities. He noted that there were a combined total of 46 distinct and separate stab and incised wounds.

[39] Most of the wounds of the deceased were limited to the skin and the underlying tissue. The multiple stab and incised wounds on the scalp were of varying lengths and varying depths, with some penetrating the entire scalp down to the skull, resulting in superficial defects on the skull itself. Dr. Morin testified that a significant degree of force would be required to inflict the injuries to the deceased's skull, but he acknowledged he could not quantify the force. He explained that the skull, located underneath the scalp, is a very thick bone, making it fairly difficult to penetrate with a sharp-bladed weapon. He qualified this evidence by adding that the amount of force required would also be dependent on the blade but would still require some significant force.

[40] Dr. Morin testified that one of the stab wounds to the deceased's head entered the right ear in a downward direction through the back of the cheek, resulting in perforation of the jugular vein. He explained that this injury alone would result in death within minutes. Because there was no bone or hard object in this area, not much force would be required to inflict this injury. He had not observed this injury in prior autopsies. He agreed that the location of the jugular vein is not visible from the outside of the body and it would require particular knowledge of anatomy to be aware that the jugular vein could be located through the ear. With respect to the other wounds, individually they

would not be life threatening, however, cumulatively they had the potential to be life threatening depending on the amount of blood loss.

[41] Dr. Morin could not opine as to the relative position of the bodies of the accused and the deceased when the wounds were inflicted. He could not say how rapidly the wounds were inflicted, nor in what order they were inflicted. He reiterated that the stab wound to the ear would have been fatal within minutes of it being inflicted.

[42] Dr. Morin noted a superficial stab wound to the deceased's left palm and a cut to the left side of his index finger on his left palm, which had a "jagged edge" appearance, consistent with being caused by a serrated blade. Dr. Morin testified that it is possible these injuries were defensive wounds, caused by the deceased putting his hand up to block an attack.

[43] Prior to testifying, Dr. Morin viewed the photographs taken by Constable Veldkamp of the four knives seized. It was his opinion that any of them could have been used to inflict some of the injuries on the deceased. He clarified that a serrated blade could not have caused all of the injuries because some of the wounds had a smooth edge. As for the Homemaker meat cleaver seized from the living room, Dr. Morin explained that it was possible that it could have inflicted some of the larger wounds on the deceased.

[44] When shown photos of the injuries on the accused's right palm, taken when she was arrested on October 6, 2021 (Exhibit 14), Dr. Morin agreed they appeared to be sharp force injuries consistent with having been caused three days earlier. He agreed they may have been caused defensively. He also agreed it is possible to sustain blunt force or sharp force injuries while stabbing someone. Therefore, the injuries observed

on the left palm of the deceased and on the inside right hand of the accused may have been caused defensively or while using a knife offensively.

Accused's Arrest

[45] The accused was arrested on October 6, 2021. It was an agreed fact that the accused's statement to the WPS, comprising an interview over 11 hours, was admissible for the purpose of cross-examination. The statement was not filed with the Court. In it, the accused answered some questions regarding her use of alcohol and drugs and whether she had any injuries. She also chose to remain silent and not answer other questions, including questions about what happened.

[46] Patrol Sergeant Neumann testified that he processed the accused during her arrest and seized her t-shirt, pants and running shoes. He observed four injuries that appeared recent: a small horizontal cut on the lower part of her baby finger; a small horizontal cut on the ring finger parallel to the cut on the baby finger; a small horizontal cut higher up on the ring finger; and a large horizontal cut across the palm. He photographed these injuries and made a drawing of them in his notes (Exhibit 14, p. 4 and p. 7). He noted no other injuries to the accused.

Testimony of the Accused

[47] The accused testified that she is 23 years old. At the time of the offence, she would have been almost 21. She is an Indigenous woman from the Pauingassi First Nation ("Pauingassi"). While she grew up in that community, she came to Winnipeg in 2018 in the hopes of completing her grade 12 education. She would travel back and



forth between Winnipeg and Pauingassi, and while in Pauingassi, she would work as a security person and cashier at the store in the community.

[48] She described herself as an alcoholic and drug addict. She began drinking alcohol at 13 years old and would do so whenever she felt like it. She began using drugs at the age of 16. When in Winnipeg, she drank daily. She used drugs and alcohol "a lot" in September of 2021.

[49] She met the deceased in 2018 through a family member and they became friends. He was in his early 60s. She testified they spent time together "hanging out", drinking, talking and watching movies. They would both use cocaine and "shrooms".

[50] The deceased picked her up on October 1, 2021. They were going to spend the weekend together. She remembered going to the deceased's sister's house for a get together on October 2, 2021, on William Avenue. She testified that she did not drink or do drugs prior to going there. Once there, she drank Budweiser beer, tequila and vodka. She does not know how much she drank. Ms. Ugot made food and she ate well at the party. The accused said she was mostly on her phone and the deceased was playing cards. By the time they left, she was intoxicated but could walk and talk fine.

[51] On the way back to the Building, the accused testified that the deceased asked her if she wanted to stop for some drugs. She agreed and they stopped at her dealer's place where she purchased a "50 bag" of cocaine for \$100 and three grams of "shrooms" for \$60. They also stopped at a Tim Horton's restaurant so she could get an "iced capp", which she can be seen drinking on the surveillance video outside the Building at 12:52 a.m.

[52] Upon returning to the deceased's suite, the accused said that the two of them hung out in the living room. She said it was just the two of them at his place all night. She was drinking beer. He did not drink any alcohol or do any drugs. He cleared the beer cans into the kitchen as she drank. She has no idea how much beer she consumed, but said she drank the cans on the kitchen counter and living room table. She also took all three grams of the shrooms. She then took the entire "50 bag" of cocaine, which she snorted from a plate in the living room. She took the shrooms first because she knows there is a delay in experiencing the effects. She could not say when, or over what timeframe, she consumed the drugs and alcohol. She also drank tequila from a shot glass. She could not say how much alcohol she drank. She was cross-examined on whether she drank first or did drugs first. This began a lengthy period of questioning where she did not answer the questions, she swore at the Crown and said she was confused.

[53] The accused testified that when she finished drinking and doing the drugs, she used the washroom. She did not know what time she used the washroom or how much time had passed since they arrived. When she was done in the washroom, she heard the deceased walking down the hallway into his bedroom. She said when she left the washroom, the deceased told her to come into his bedroom. When she entered the bedroom, the deceased immediately started punching and kicking her while she was on the floor. He never said anything to her and she did not know why he did that. He punched her all over her head multiple times with a closed fist, including both sides of her cheeks, her forehead, nose and lips but not her eyes. She further testified that he

punched her "everywhere" else on her body, including her arms and stomach and that "everywhere" hurt. While barefoot, he kicked her on her entire body, except her eyes. She also said that he "stomped" on her entire body from "head to toe" except her neck. She could not say how many times in total she was kicked and punched but agreed it was more than 20 and probably more than 30 times each. She is 5' 6" tall and believes she was about 180 pounds at the time. She had stomach issues from surgery in May and had been on antibiotics for a couple of months.

[54] The accused said she told the deceased to stop the assault but he would not and instead grabbed a knife that was laying on the coffee table in his bedroom and tried stabbing her with it. She tried grabbing the knife from him and cut her right palm in the process. She identified the knife with the serrated blade and bent tip found on the bed near the deceased as being the one that cut her palm. She did not notice if she was bleeding. He dropped the knife on the floor and continued to beat her. She does not know how long this lasted. The last thing she recalled was the deceased kicking her in the head before she blacked out.

[55] The next thing she remembered was standing in front of the deceased. The scene appeared how it looked in the picture at Exhibit 8, p. 32. She was crying and "scared shitless". She has no recollection of what happened, including how or why she killed him, and how or why her backpack containing a knife with the deceased's blood was found on the ground below his bedroom window.

[56] She blacked out again and the next thing she remembered was standing in the washroom in front of the mirror, looking at her face. The accused said that she saw that

her face was covered in both his and her blood and she noticed that she was bleeding from her nose and mouth. She recalled that after wiping the blood off her face, she then blacked out again.

[57] The accused said that she has no memory of leaving the deceased's suite, going to the Keenleyside Street Park playground, picking up a boulder and putting it in a shopping cart, or pushing the cart over to the car in the parking lot. She also said that she has no memory of smashing his car window or gaining entry into his car. Her next memory is sitting in the car and grabbing her phone from the console area. She explained that earlier, when they returned from his sister's place, he told her to leave her phone in his car. Although she acknowledged being very attached to her phone and having social media on it, she did not say why she left it in his car at his direction. She then blacked out again.

[58] The accused said that her next memory is when she fully "unblacked out" while on a transit bus going downtown. She has no knowledge or memory of how she got on the bus or why. She came out of the blackout and was "in a buzz". She was not carrying anything. She went to the hotel where her father was staying. He was not there so she went downstairs and was talking to relatives. She went drinking with them. When she returned, her father still was not home so she took a transit bus to her brother's place. However, he was not there so she called a friend to pick her up and she stayed the night at his place.

[59] The next day the accused went to a drop-in-center, where she stayed for a couple of hours. She got a friend to pick her up and take her to her brother's place, where she

spent the night. The next morning, on October 6, 2021, WPS detectives showed up and arrested her.

[60] The accused was cross-examined on her WPS statement. She testified that she knew she did not have to answer the police officers' questions. She testified she was untruthful to the officers about being two weeks sober and not being a drug user because she was scared. In cross-examination she testified that her entire body hurt from the assault and that she had two "goose eggs" on her head. When confronted with her WPS statement in which she denied having injuries other than to her palm, she said she believes she told the WPS about these other injuries.

[61] She testified that the amount of cocaine and shrooms she took on the night of October 2 into the morning of October 3, 2021, combined with alcohol, was "typical" for her during that time frame. She has previously blacked out when she drank a lot, or mixed alcohol and drugs. She said that when she blacks out, she forgets things, but will always be able to remember certain parts. She believes it was the combination of alcohol and drugs that caused her to blackout during the events surrounding her killing the deceased.

## **THE LAW**

### Murder

[62] Second degree murder is a specific intent offence. The Crown bears the onus of proving beyond a reasonable doubt the accused intended to kill the deceased, or intended to cause him bodily harm that she knew was likely to result in death and was reckless

whether death occurred. The Crown need only prove one of the two required intents, not both.

### Manslaughter

[63] The accused admits that she caused the deceased's death unlawfully and invites the Court to convict her of manslaughter. Unlike murder, manslaughter is a general intent offence. The test for unlawful act manslaughter is objective foreseeability of the risk of bodily harm that is neither trivial nor transitory. Foreseeability of the risk of death is not required (**R. v. Javanmardi**, 2019 SCC 54 (CanLII), [2019] 4 S.C.R. 3, at paras. 30-31).

### Credibility and Reliability

[64] The accused testified and I therefore must assess her evidence in accordance with the law on credibility (**R. v. W.(D.)**, 1991 (CanLII) 93 (SCC), [1991] 1 S.C.R. 742; **R. v. Menow**, 2013 MBCA 72). While I may accept some, all or none of the accused's evidence, I must remain mindful that the burden of proof does not shift to the accused, even where advanced intoxication is raised as a "defence". The burden remains on the Crown to prove the intent for murder beyond a reasonable doubt.

[65] As the Supreme Court of Canada articulated in **R. v. R.E.M.**, 2008 SCC 51 (CanLII), [2008] 3 S.C.R. 3, credibility is a "*difficult and delicate matter that does not always lend itself to precise and complete verbalization*" (at para. 49). For example, in articulating the reasons for credibility assessments, the trial judge may exercise restraint in commenting upon the demeanour of an accused person, whose evidence they may have rejected or disbelieved for other reasons.

[66] Credibility relates to the veracity or truthfulness of a witness whereas reliability concerns the accuracy of a witness's evidence (*R. v. Perrone*, 2014 MBCA 74 (CanLII), at paras. 25-27, aff'd 2015 SCC 8). The Manitoba Court of Appeal offered some practical considerations in analyzing the testimony of a witness in *R. v. Storheim (S.K.W.)*, 2015 MBCA 14 (CanLII), aff'd 2014 MBQB 141 (Can LII). Some of the things to consider are: Did the witness seem honest? Is there any reason why the witness would not be telling the truth? How did the witness appear when giving evidence? Was the witness forthright and responsive to questions, or was he or she evasive or hesitant? Was the testimony of the witness reasonable and consistent, or did the witness contradict himself or herself? Was the witness's testimony consistent with the testimony of other witnesses? Do any inconsistencies in the witness's evidence make the main points of the testimony more or less believable and reliable? Did any inability or difficulty the witness had remembering seem genuine or did it seem made up as an excuse not to answer questions? Was there something that helped the witness remember the detail of the event that he or she described? While I am mindful that these factors may not be directly applicable to the assessment of an accused person's evidence because they have the right to remain silent and are presumed innocent, they offer some guidance.

[67] More recently, direction has been given to be cautious about overly relying upon demeanour evidence in making credibility assessments. Behaviour is assessed subjectively and may be misinterpreted due to background or cultural attributes, prejudices or the stresses of giving evidence in the intimidating and unusual confines of a

courtroom. Behaviours attributable to other factors may wrongly suggest untruthfulness. (**R. v. Ramos**, 2020 MBCA 111 (CanLII), at paras. 112-113, aff'd at 2021 SCC 15).

### Intoxication

[68] As set out in **R. v. Daley**, 2007 SCC 53 (CanLII), [2007] 3 S.C.R. 523, the issue is whether there is intoxication to the point where the accused lacked the specific intent to kill or impaired their subjective foresight of the consequences of their actions sufficient to raise a reasonable doubt about the requisite *mens rea*.

[69] In cases where the only question is whether the accused intended to kill the victim (s. 229(a)(i) of the **Code**), the practical reality is that evidence short of a particularly advanced state of intoxication will be unlikely to raise a reasonable doubt, eg. pointing a gun within a couple of inches of someone's head and pulling the trigger. Although the ultimate issue is actual intent, not capacity to form intent, a particularly advanced state of intoxication akin to incapacity would practically be required (**Daley**, at paras. 41-42).

[70] In most second degree murder trials, the trier of fact will "grapple" with the foreseeability prong of the test for intent (s. 229(a)(ii) of the **Code**). In such cases, they will consider the permissive inference that sane and sober persons intend the natural and probable consequences of their actions (**R. v. Seymour**, 1996 CanLII 201 (SCC), [1996] 2 S.C.R. 252, at paras. 19-21). The relevant question becomes whether the accused's degree of intoxication affected their ability to foresee the consequences of their actions, rendering the common sense inference inapplicable (**R. v. Williams**, 2023 MBCA 11 (CanLII), at paras. 36-38).



[71] Notwithstanding a high degree of intoxication, a person may still possess the requisite intent for murder. An intoxicated intent may nonetheless be an intent. Also, a lack of recollection does not automatically equate with a lack of intent. Furthermore, although a person's stated inability to remember portions of an event could be a factor shedding light on their degree of intoxication relevant to intent, that evidence must be accepted as credible before it may be considered as part of the evidentiary foundation in assessing intent (***R. v. Cassan***, 2010 MBQB 241 (CanLII), at para. 345, (aff'd at 2012 MBCA 46 (CanLII)).

[72] Expert evidence on the accused's degree of intoxication is not necessary to raise a reasonable doubt but may be of assistance to the Court if proffered on the relevant issue. However, ultimately it is the function of the trier of fact to come to their own conclusion as to the effect, if any, that intoxication had on the accused's intent and whether evidence of intoxication raises a reasonable doubt on that issue (***Williams***, at paras. 41-42, and 50).

#### Circumstantial Proof of Intent

[73] Where proof of intent relies upon circumstantial proof, such as the present one, the Court must be satisfied that guilt for murder is the only reasonable inference. If there are reasonable inferences other than guilt, the Crown's case has not been proven beyond a reasonable doubt (***R. v. Villaroman***, 2016 SCC 33, [2016] (CanLII), 1 S.C.R. 1000, at para. 35).

[74] Plausible theories and reasonable explanations other than guilt do not need to arise from proven facts but must be reasonable in light of the evidence and absence of

evidence, “*assessed logically, and in light of human experience and common sense.*” (**Villaroman**, at para. 36). In determining whether an alternative inference is a plausible one or speculative, the Court stated, “*the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty*” (**Villaroman**, at para. 38).

#### After-the-Fact Conduct

[75] After-the-fact conduct may properly be considered in determining the accused’s level of intoxication and intent (**R. v. Cassan**, 2010 MBQB 241 (CanLII), at paras. 70-73).

[76] As stated in **R. v. Beardy**, 2022 MBCA 90 (CanLII), at para. 12:

[12] The probative value of post-offence conduct with respect to an accused’s level of culpability “depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial” (*R v White*, 2011 SCC 13 at para 42). Drawing the line between reasonable doubt and speculation was the responsibility of the trial judge as the trier of fact (see *Villaroman* at para 71). Deference must be afforded to her reasoning about the probative value of the accused’s post-offence conduct to his degree of culpability (see *R v Hall*, 2018 MBCA 122 at para 166).

#### Proof Beyond a Reasonable Doubt Standard

[77] It is trite to say that the trier of fact must be satisfied beyond a reasonable doubt that the accused is guilty before convicting. A reasonable doubt is based on reason and common sense, which must be logically based upon the evidence or lack of evidence. It cannot be based on sympathy or prejudice. It must not be imaginary or frivolous. However, the Crown is not required to prove its case to an absolute certainty since such an unrealistically high standard could seldom be achieved (**R. v. Lifchus**, 1997 CanLII 319 (SCC), [1997] 3 S.C.R. 320, at paras. 30-31).

### **POSITION OF THE CROWN**

[78] The Crown's position is that it has proven murder beyond a reasonable doubt. It says it has proven that the accused intended to kill the deceased, or alternatively that the accused subjectively foresaw that her actions were likely to cause death in the context of the circumstances of the case, and the injuries inflicted. It further argues that the accused's assertion as to her level of intoxication and blackout is not believable, and furthermore that there is a lack of evidence to support advanced intoxication impairing her intent to kill or ability to foresee the consequences of her actions.

[79] The Crown says the accused's evidence of being attacked and beaten by the deceased makes no sense and is inconsistent with her lack of observable physical injuries, her appearance on arrest and the fact she told the WPS she had no injuries. Her description of experiencing pain is contradicted by the evidence of her movements at the park, including bending over and lifting a small boulder and doing laundry at her brother's place.

[80] The Crown argues the accused is being untruthful about her consumption of alcohol and drugs and blacking out. The Crown says her testimony about being intoxicated when she left Ms. Ugot's place is contradicted by Ms. Ugot's testimony, the surveillance evidence as well as the accused's WPS statement, in which she described not using drugs and being two weeks sober. She was an evasive and argumentative witness, which negatively impacted her credibility.

[81] The Crown argues that the forensic toxicologist's opinions on alcohol and drug effects were general and not linked to the ultimate issue of intent to be decided by the

Court, nor is there an underlying factual foundation for those opinions to receive consideration in this case.

[82] Applying the permissive, common sense inference that a sane and sober person intends the natural and probable consequences of their actions, the Crown argues that the nature, number and location of the injuries on the deceased's body are the strongest evidence on the requisite intent. Anyone stabbing a person more than 46 times in the areas of the body where the deceased was stabbed would do so intending to kill them, or at least foresee death would likely result from the bodily harm intentionally inflicted. The Crown argues that there are no other reasonable inferences other than the intent for murder.

### **POSITION OF THE DEFENCE**

[83] The defence invites the Court to convict the accused of manslaughter. The accused says she neither had the intent to kill, nor did she foresee that her actions were likely to result in death due to her advanced level of intoxication. She testified credibly and was not materially shaken on her core evidence which described her blackout state with only fragmentary memories. As a self-acknowledged alcoholic and drug addict, the accused's tolerance to alcohol and drugs and their resulting effects explains why she may outwardly appear sober when she really is intoxicated. The defence says the evidence, including the empty beer cans, the plate in the living room, the shot glass, the accused's own evidence and the unusual, after-the-fact behaviour (including remaining at or near the scene following the killing) support her version of events on her level of intoxication such that the common-sense inference cannot apply. The forensic toxicologist's evidence

supports the phenomenon of blackouts and fragmentary memories experienced by the accused previously, and on this occasion. The impact of intoxication on the executive functioning of the brain, the ability to assess risk while intoxicated and the foundation for a blackout being triggered by a high BAC lend support for her being in a blackout state of advanced intoxication. All of this evidence relevant to intoxication, considered together, renders the common sense inference inapplicable.

[84] The accused, like many others, would not have known the potential for severing the jugular vein by stabbing someone in the ear. She did not foresee the other injuries were life threatening because they were not life threatening. The accused's responses during the WPS questioning and cross-examination were due to her being nervous, scared and confused. Her evidence of being assaulted is confirmed by the cuts to her palm/fingers and a credible account of how the events unfolded. If she were to lie, why would she not come up with a better lie than a blackout and lack of recollection? The defence argues that even if the Court finds the common sense inference is applicable, a reasonable doubt still arises on consideration of all of the evidence.

### **ANALYSIS**

[85] Is the intent for murder the only reasonable inference available on the totality of the evidence? Ultimately, this is the question I must answer in coming to my decision on this trial. I begin with my assessment of the accused's testimony in the context of the trial evidence and the issues at play.

[86] I find that on the evening of October 2, 2021, while at Ms. Ugot's party, the deceased and the accused drank alcohol. She drank more than he did because he was

driving. This was confirmed by Ms. Ugot's evidence. The accused could not provide the Court with an estimate of the amount of alcohol she drank, explaining that as an alcoholic, she does not keep track of what or how much she drinks. This makes it more difficult for the Court to assess the impact of alcohol on her without any estimate of how much she drank.

[87] Although she said she was "drunk" when they got back to the Building, she did not explain how she was experiencing the effects of alcohol at that time. She ate well at his sister's place and therefore did not drink on an empty stomach. She seemed to have a good recollection of the events at the party, including the time they left, and the details of stopping at her drug dealer's house and Tim Hortons. Based on this evidence, and my observations of her on the surveillance camera, I find that on October 3, 2021, at approximately 1:00 a.m., her consumption of alcohol was not impacting her mental or physical functioning when they returned to the Building. Furthermore, the accused agreed she could walk and talk fine on her own and did not require any assistance.

[88] The accused could not say how many beer she drank when they got back to the Building but identified the empty beer cans found in the kitchen and living room as having been drank by her that night. She testified the deceased did not drink any alcohol upon their return. Given the inconsistencies in her evidence about the order in which she did drugs and drank alcohol; her inability to time any of the events upon arriving back at the suite; as well as her lack of detail in her evidence, including any estimate of how much she drank, I find her evidence generally unreliable with respect to her consumption of alcohol. It is difficult for me to accept the accuracy of her assertion that she drank all of

the beers from the cans identified at the scene, and that she did so on that particular occasion. I was left with the impression her evidence arose from an assumption she must have done so as her lack of recollection seems to contradict her evidence of knowledge.

[89] The accused testified that the deceased already had a case of beer with him when he picked her up for the weekend and that she was drinking in the morning of October 2, 2021, when she woke up. I believe the two of them regularly drank together in his suite. The presence of alcohol receptacles (a Budweiser beer box and Snapple Spiked cans) found in the recycling bin in the kitchen, the general disorganization of the apartment, prior drinking in the suite and the lack of details in her evidence, leaves me with uncertainty about whether one or both of them left some of those beer cans there previously, or that the deceased drank any of the beers upon their return, contrary to her assertion otherwise. The deceased's BAC at the time of death would allow for that possibility, depending on when he was killed and his BAC upon leaving his sister's residence. It certainly does not eliminate the possibility that he had some beer upon his return.

[90] The accused said she drank tequila from a shot glass, but provided no further details as to where, how much and from what container. Although a shot glass was found in the deceased's bedroom, I have no evidence that the WPS located a tequila bottle in the suite. There was an unknown brown liquid in a jug on the floor in the living room that was discarded by the WPS and therefore not tested, however the accused provided no evidence about the brown liquid in the jug, nor did she assert that it

contained alcohol or that she drank it. Furthermore, she testified that she drank and did drugs in the living room, not in the bedroom.

[91] In addition to being an alcoholic, the accused described herself as a drug addict who began using drugs at age 16. She described the street drugs she would use, including cocaine and shrooms. She said this was not the first time she combined alcohol with cocaine and shrooms. She agreed with the Crown that it was typical for her to use the amount of cocaine and shrooms she used on October 3, 2021, and to mix those drugs with alcohol. Yet, in her WPS interview after she was arrested on October 6, 2021, the accused told them she had never used drugs and was two weeks sober. She said she lied to the WPS because she was scared. In cross-examination, she said she did not know why she was scared. I understand and accept that accused persons may not always be honest with the WPS for a variety of reasons, including fear, and why in certain instances those lies may ultimately not weigh against them in a credibility analysis. In this case, however, the accused testified that she was aware of her right to remain silent and knew she did not have to answer questions. In fact, during her WPS interview she chose not to answer certain questions asked of her, including about the events comprising the killing. Her decision to choose to answer this question and be untruthful out of fear is difficult to understand without any explanation from her on why she was fearful.

[92] Notwithstanding the accused's admitted untruthfulness to the WPS about her consumption of intoxicants, I cannot say I entirely disbelieve her that she stopped to pick up cocaine and shrooms and consumed those upon her return to the suite. Despite being vigorously cross-examined, she provided details about the drug transaction. She said she



snorted the cocaine on a plate in the living room and I note the existence of a plate on the living room table, albeit containing some leftover food pieces. I believe the accused's evidence that she regularly abused alcohol and drugs from a young age and continued that use while in Winnipeg, and with the deceased.

[93] As stated above, the accused testified she did not know how long she was inside the apartment prior to doing the shrooms. She provided no evidence on how long she was drinking and doing drugs in the living room prior to using the washroom. She provided little evidence on what the two of them were doing during that time frame, except to say they were "hanging out" in the living room. She could not provide any evidence on the "upended" couch cushions shown to her in the living room photographs (Exhibit 8, pp. 18-19) nor how they came to be like that. She identified the Homemaker meat cleaver on the floor in the living room near the couch as belonging in the kitchen and previously being used by the deceased to cut meat but said nothing about whether or when she was aware of it being there. Her lack of evidence about the state of the living room is difficult to reconcile with her own testimony that she was in the living room while drinking and doing drugs, as well as her familiarity with the apartment from staying over there.

[94] This brings me to my assessment of the accused's evidence that her consumption of intoxicants caused her to blackout and have no recollection of stabbing and killing the deceased. The accused described standing over the deceased as she came out of her blackout, being "scared shitless" and crying. In direct-examination, her lawyer asked her why she was scared. She paused and said, "uumm...I seen...I don't know". She was

asked if she knew what had happened. After a ten-second pause and no answer, her lawyer asked the question again. After another ten-second pause, she responded "yeah". When asked if she could "tell the Judge what you think happened", there was another ten second pause followed by her answer, "it was only me and him in there so like something happened". When asked do you remember how "that something" happened, she said no.

[95] I was struck by the pauses in her evidence. It appeared to me that she was thinking about whether and how she would answer those questions. Her testimony did not flow naturally. I was left with a strong impression that she could remember what happened but was withholding that evidence from the Court, for whatever reason.

[96] The description of being in the washroom and seeing blood on her face and somehow knowing that it was both his blood and her blood is difficult to accept. If she could see that she was bleeding from her nose and mouth this would suggest a visible injury. Her ability to observe herself, notice where she is bleeding from and have the wherewithal to use the towels to clean the blood off her face suggests some ability to engage in a rational thought process. Yet she claims to not remember how she washed her face, even though she has a recollection of doing so. I believe she went to the washroom to clean blood off herself because there are bloody towels on the counter. I do not believe she was blacked out before or after doing so.

[97] Her description of briefly coming out of her blackout while seated in his car, looking for her phone in the console is also difficult to understand. She testified that she was quite attached to her phone. She agreed she spent a lot of time on her phone while at

Ms. Ugot's place and that she had a variety of social media on that phone. It makes no sense why she would leave it in his car, at his suggestion. She offered no explanation for acting in a way so obviously contrary to her attachment to her phone. However, the evidence does support her attempting to damage the car in a manner consistent with attempting entry into it so I cannot entirely reject retrieval of her phone as a possible explanation.

[98] The accused testified that she fully "un-blacked out" on the bus yet she offered little details as to what transpired in her mind at that time. She claimed she had no idea how or why she ended up on a transit bus that happened to be going downtown. When asked what bus number it was, she said she did not know. When asked what bus number she usually takes to go downtown, she said she did not know.

[99] I have no evidentiary foundation to assess how much alcohol she drank to compare it to the high, or rapidly-rising blood alcohol levels associated with a blackout, as described by the forensic toxicologist. How much alcohol the accused drank, and when, is entirely unknown to me because she said she did not know. Furthermore, her detailed memory of the amount of drugs she consumed and being sure of the order in which she did them, suggests a level of cognitive functioning that is inconsistent with an amount of alcohol to trigger a blackout. Although she said she has had blackouts triggered by a combination of alcohol and drugs and believes that is what triggered her blackout that night, the forensic toxicologist gave evidence about alcohol-induced blackouts only. I am unaware whether a combination of alcohol and drugs can also trigger blackouts. For all

of the foregoing reasons, I do not believe the accused's evidence that she blacked out before, during, or after the events during which she killed the deceased.

[100] The accused's description of a spontaneous, extensive, violent assault inflicted on her, without warning or apparent reason, seems contrary to the evidence that they were generally getting along well. At the earlier party, Ms. Ugot observed the deceased feeding the accused and acting in a manner towards her that she deemed was "sweet". Certainly she did not describe any arguments or physical altercations. The Court was provided little evidence on the history of the relationship between the parties. No evidence was led to suggest there was violence or conflict in the relationship, or that the deceased was previously violent with her. The accused never testified about any arguments or difficulties in the relationship generally, or that night, that would prompt such an extreme violent outburst, or that he was prone to the same. She mentioned in passing that he would sometimes try picking small arguments with her, but she minimized those and did not elaborate. These small arguments appeared inconsequential to her and were not linked in her evidence to his violent and unprovoked attack on her. Furthermore, the accused provided the Court with no details or explanation as to how she went from walking and standing to being on the ground.

[101] Her evidence about the assault and the lack of associated visible or reported injuries was subjected to extensive cross-examination. The accused said the deceased punched her with his closed fist and also kicked and stomped over her entire body, except her eyes, multiple times. On her own description of the assault, even allowing for the fact she did not count the blows, she was subjected to a brutal beating. It is incredible

that she would have no marks or visible injuries. The surveillance video of her leaving the building at 7:00 a.m. (Exhibit 6) and the photographs taken upon her arrest (Exhibit 14) do not support the accused's version. There was no evidence of redness, bruising or marks visible on the accused's body that would be expected, given her own description of the assault.

[102] In cross-examination, the accused stated that she had two lumps that were described as "goose eggs" - one on either side of her head. I am left to wonder why she never testified to this in direct examination and why she never mentioned it to the WPS when she was aware they were attempting to document any injuries to her body. Furthermore, her evidence as to the existence of "goose eggs" is undermined by the lack of any associated visible injuries to other areas of her body one would expect if the significant assaults took place "everywhere" on her body. Also, her actions and demeanour at the Keenleyside Street Park playground, including picking up a small boulder and climbing a small ladder on the play structure, do not seem consistent with someone who has suffered an extensive assault all over their body that results in a level of pain she later described experiencing.

[103] The accused testified in direct examination that while the deceased was assaulting her, he had grabbed a knife laying on the coffee table in his bedroom and tried stabbing her with it. She says she went to grab it to protect herself, which is how she cut her palm. After that, the deceased dropped the knife on the floor. Did she notice this knife previously? Did the deceased have a habit of leaving kitchen knives laying around the

suite? When did she first see the knife on the table, and how could she see it while she was laying on the floor, while being assaulted?

[104] She identified the knife laying on the bed as the one that he grabbed, which cut her palm. That knife had a serrated blade. Dr. Morin's evidence was that knives with serrated blades tend to leave cuts that have a more jagged-edge appearance, consistent with the injury on the side of the deceased's finger on his left hand as seen in Exhibit 13, p. 11. It seems unlikely therefore, that Police Exhibit Sc1 caused the cuts to the inside of the accused's right palm and raises further concerns about the credibility and reliability of her evidence. Although the cuts to her hand do appear to be consistent with being caused by a knife similar to the one found in her backpack with the deceased's blood on it, I am unable to determine which, if any, of the knives seized by the WPS caused the cuts on the right palm and finger areas of her hand. The accused herself offered no evidence as to how or why other knives came into play during the events, or where they came from.

[105] Furthermore, in the surveillance video when she leaves the Building at approximately 7:00 a.m., she can be seen grabbing the door handle with her right hand. Although she denies any cuts to her right palm prior to the killing, on the surveillance video when returning back from Ms. Ugot's, she can be seen spontaneously and inexplicably raising her right hand and looking at her palm while drinking from her Tim Horton's "iced capp" prior to going inside his suite at 1:00 a.m. Although I am left to wonder if the cuts to her palm and fingers were pre-existing injuries, it seems more

likely they occurred some point during the events involving the deceased and I find they did.

[106] In her testimony, the accused insisted that she took her shoes off at the front door of the deceased's suite and was not wearing them inside. The footwear impressions in blood, made by her left shoe, confirm her evidence that she was the only one inside his suite but appear to contradict her evidence that she took off her shoes upon entering the suite. However, given the fact that she used the towels in the washroom and no bloody footwear impressions were found in the washroom area, or in the kitchen where it appears she may have grabbed the fridge handle, I am unable to determine she was contradicted by the footwear impression evidence. When and why she may have taken her shoes off or put them back on is unknown to me and does not impact my overall assessment of her credibility on the issues that are significant.

[107] The accused's behaviour after the fact is of assistance to me in determining her state of mind at the time of the killing. Despite some of her actions being unusual, such as leaving her backpack outside the Building and remaining nearby, the surveillance video demonstrates her to be capable of walking, stepping up and down steps on the pavement, climbing up and down a play structure, picking up and carrying a box of beer cans and an apparently heavy boulder and navigating a pathway around a half wall in order to push a shopping cart back in the direction of the parking lot to the car. I see no evidence of her stumbling or falling. I do not see evidence supporting gross or advanced intoxication that would have impaired her ability to foresee that death would be a likely consequence of her actions towards the deceased.

[108] While I am mindful that tolerance to alcohol can mask outward symptoms of intoxication, her movements indicate some thought process behind them. For example, when she returns to the rock garden the second time to retrieve a boulder, she appears to pick up the same one she previously tried to pick up, which shows some mental functioning and not a randomness to her actions. Similarly, placing the boulder in the shopping cart and wheeling it to the parking lot area indicates a mind capable of foreseeing the difficulty of carrying the boulder that distance. She wheeled the shopping cart back down the path, into the parking lot and up to the car. It is not a leap for me to conclude she used the boulder to smash the driver's side window. These actions suggest some cognitive processing that supports, not contradicts, her mental ability to foresee that stabbing someone 46 times in the upper body, head and neck area would result in bodily harm that she knew was likely to result in death.

[109] The Court heard evidence that "remote control pieces" were found near the car and in the playground area but no further evidence was led as to whether they were vehicle remotes or some other electronic devices. The footprint impression in an upward direction on the front passenger window, while inconclusive on a match with her shoe, is indicative of an attempt to smash the window or to break into the accused's car. She obviously had the state of mind to know which vehicle was his car. Were her actions an expression of anger directed towards his car as continuation of earlier anger? The infliction of the injuries on the deceased would have required some energy and force, particularly the injuries to the skull, as evidenced by the bent tip of the knife (Police Exhibit Sc1), or were her actions an attempt to gain entry to the car to retrieve her phone,



or drive away? Regardless of the underlying reason, her actions towards the car indicate some planning and thought process, as opposed to highly intoxicated, thoughtless or random actions.

[110] What about the fact that she took a box with some beer cans in it from his apartment as she left? I find the blood on the fridge handle and lack of beer inside the fridge supports the inference she likely removed the beer from the fridge. While I cannot rule out the real possibility she was afraid after what she had done, her actions in removing beer from the suite and taking it with her when she left also is some evidence of a mind that is capable of thinking about what to do and planning next steps, even if rudimentary.

[111] In coming to the conclusions regarding the credibility and reliability of the accused's evidence that impact negatively on my assessment of her testimony, I wish to emphasize that I cautioned myself against drawing any negative inferences from her court demeanour, such as some argumentativeness with the Crown and refusal to answer certain questions at the outset of her cross-examination. The context of the courtroom setting and the nature of the questions asked may account for that demeanour. Except for the long pauses when asked questions in direct examination that I referenced earlier, I have made my credibility assessments on the substance of her evidence, without being influenced by her demeanour. Primarily, it is the internal and external inconsistencies in her evidence that have caused me to disbelieve it.

[112] Although I do not believe the accused's evidence of blacking out and having no recollection of the events, nor her description of the assault, I do accept she was not

entirely sober at the time the events unfolded. However, I do not believe her evidence, nor do I have a reasonable doubt arising from it, that she was in an advanced state of intoxication within the meaning of **Daley** that impaired her ability to foresee the consequences of her actions. Simply put, I have no credible or reliable evidentiary foundation to support such a conclusion. Furthermore, the external evidence contradicts rather than supports such an advanced intoxicated state.

[113] The loss of the capacity to form judgments and to judge the appropriateness of one's actions does not equate with the loss of ability to foresee the consequences of one's actions (**Daley**, at para. 85). The accused provided no evidence about her own state of mind or how it was impacted by intoxicants, other than her lack of recollection due to a stated blackout. I do not have a reliable account of the amount of alcohol drank or the amount of cocaine she consumed, or over what period of time they were ingested. The accused testified that she previously used cocaine and shrooms with alcohol, however I have no evidence as to the actual effects on her previously, or specifically on this occasion. I did learn that the amount she consumed on this occasion would be "typical" so I can conclude there would be some tolerance as to the effects regardless.

[114] While I heard evidence of the general effects of intoxicants that may be experienced by taking the drugs and alcohol the accused said she consumed, the effects are personal and dose dependent. I have no evidence that the accused experienced hallucinations, visual perceptions, or was having difficulties processing information, or experienced any other cognitive impairments due to her consumption of intoxicants previously or specifically on this occasion, other than her assertion that she blacked out.

I am unable to conclude from her own evidence that her consumption of intoxicants rendered her unable to foresee that stabbing someone 46 times in the upper body, head, and neck areas would likely result in death.

[115] While the Crown argues the accused's credibility is impacted by a motivation to lie in order to conceal her guilt, I caution myself against proceeding from disbelief to a guilty verdict. If I were to disbelieve the accused's evidence, I am only to use it in my assessment of her credibility, not as affirmative evidence of guilt (*R. v. Coutts*, 1998 (CanLII) 4212 (ONCA); 40 O.R. (3d) 198 (C.A.), leave to appeal refused [1998] S.C.C.A. No. 450). Having disbelieved the accused's evidence and finding that it has not raised a reasonable doubt, I must still examine all of the evidence to decide if I am satisfied the Crown has proven her guilt on the offence of murder to the standard of proof beyond a reasonable doubt. Notwithstanding my finding that the accused was not entirely sober at the time of the killing, I am nonetheless satisfied, based on all of the evidence, that the accused's level of intoxication did not render her unable to foresee the consequences of her actions.

[116] The foregoing analysis brings me to the ultimate issue of whether I am satisfied that intent for murder is the only reasonable inference available on the evidence. While I cannot speculate, I must assess whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than an intent for murder.

[117] Despite four knives being found at the scene, only one (Police Exhibit 6a) was sent for DNA testing that confirmed the presence of the deceased's blood. I have no hesitation

in finding that the bloody serrated knife with the bent tip found on the bed next to the deceased was also used in the attack upon him. This means at least two or possibly more knives were used during the killing.

[118] In the present case, the evidence establishes that the accused killed the deceased by inflicting 46 separate stab and incised wounds on the upper area of his body and over his face, head, neck, arms, chest and back. Some wounds to the neck had depths of 4.5 and 5 centimetres. Some wounds on the head had depths of 5.3, 10.5 and 14 centimetres. Two stab/incised wounds to the chest measured 4.2 and 8 centimetres. The wound to the left side of the deceased's back measured 11 centimetres deep. I reject the argument that most of the wounds were "superficial". The overall nature, number and location of the injuries need to be assessed in context and totality to appreciate their seriousness. I further note, some of the significant injuries were inflicted on the back of the neck and head, as well as a stab wound to the back of the deceased.

[119] In ***R. v. Cassan***, 2012 MBCA 46 (CanLII), the Manitoba Court of Appeal commented on the appropriateness of the trial judge's reliance on the nature and number of wounds as constituting strong and likely decisive circumstantial evidence of the intent for murder notwithstanding the consumption of some intoxicants (at para. 72; ***R. v. Cassan***, 2010 MBQB 241 (CanLII), at para. 68.) While I similarly find strength in the circumstantial evidence in this case, I am unable to conclude, however, that the first prong of the second degree murder test, an intent to kill, is the only reasonable inference to be drawn from the circumstantial evidence before me. Despite the nature, number and location of the injuries, this case is not the same as the example used in ***Daley***, of

pointing a gun at someone's head and pulling the trigger. The only injury that would have resulted in certain death was the stab wound to the ear and I cannot conclude that the accused would have known that, nor that she continued stabbing him until her intent was achieved and he died.

[120] I am satisfied, however, that the circumstantial evidence does prove beyond a reasonable doubt that when she killed the deceased, she intended to cause him bodily harm that she knew was likely to cause his death and was reckless whether he died. This is the intent that I am satisfied the Crown has proven. I infer this intent from a consideration of all the evidence and circumstances, including the number and nature of the wounds, the use of the knives, the location of the injuries being to the upper body and head including his back and from behind, as well as the extent and nature of the force required to inflict the wounds that penetrated the skull. The above, as well as the apparent blood throughout different areas of the deceased's bedroom, all suggest the infliction of the wounds did not arise from a quick or momentary, reflexive action on the part of the accused but instead a more prolonged attack. I find support for this conclusion in the Supreme Court of Canada decision of ***R. v. Rodgers***, 2015 SCC 38 (CanLII), [2015] 2 S.C.R. 760, at para. 19. Furthermore, in cross-examination the accused herself testified that when she saw him lying on the bed, she knew that someone stabbed like that was going to die or be dead. This provides further evidence confirming my conclusion that she knew his death was foreseeable from what she had done to him.

[121] Prior to coming to the above conclusion, I have considered whether there are any reasonable possibilities or other plausible theories based on logic and human experience

applied to the evidence or absence of evidence that are inconsistent with the intent for murder. The circumstantial evidence in this case excludes any other reasonable alternatives other than an intent for murder. Alternative inferences must be reasonable, not merely possible. I am satisfied that in order to find any alternative to murder in the present case, I would be required to speculate, which I cannot do.

### **CONCLUSION**

[122] I do not accept the accused's evidence, nor does it leave me with a reasonable doubt about her ability to foresee the likelihood of death arising from her actions. Notwithstanding the accused's consumption of intoxicants and considering that evidence along with all of the evidence and facts that throw light on her intent or state of mind at the time of the offence, I am nonetheless satisfied that the Crown has met its burden.

[123] The Crown has proven beyond a reasonable doubt, that at the time the accused unlawfully caused the death of the deceased, she had the required state of mind for murder. Therefore, I must find the accused guilty as charged of second degree murder.

\_\_\_\_\_. J.