

# Court of Queen’s Bench of Alberta

Citation: R v Jolicoeur, 2022 ABQB 370

Date: 20220526  
Docket: 191485531Q1  
Registry: Edmonton

Between:

**Her Majesty the Queen**

Crown

- and -

**Blake Jolicoeur**

Accused

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**Written Version of Oral Reasons for Decision of the  
Honourable Justice Douglas R. Mah**

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### **A. Opening Remarks about Decision**

[1] I have distributed a two-page handout:

- The first page is a topical outline of my decision, so counsel and Mr. Jolicoeur can follow along and know where I am in the decision; and
- The second page is a list of the legal cases I refer to, primarily for the benefit of Madam Court Reporter.

[2] If any party requests a transcript of these reasons, I reserve the right to edit the transcript to correct grammatical errors and to make it more readable. I will not change what I say today in

any substantive manner. I will do the same if either counsel requests a written version of these reasons but will also add formatting and citations.<sup>1</sup>

[3] Argument in this matter was heard on March 30, 2022 at which time I reserved until today. I took advantage of the interval to review the trial evidence, the arguments made and the authorities submitted by counsel. I expect to be some time so I ask everyone to sit back and listen. Mr. Jolicoeur, this decision is quite long and has a lot of legal content that the lawyers will easily understand but may be unfamiliar to you. I have to give you and everyone a full explanation of my decision both in terms of facts and law, so please bear with me.

### **B. Overview & Synopsis**

[4] Something went terribly wrong when the accused Blake Jolicoeur met with the deceased Saladina Vivancos on the evening of November 16, 2019 near a pond off a country road in the vicinity of Spruce Grove, Alberta. They met to engage in a drug transaction. It is not disputed that Mr. Jolicoeur caused the death of Ms. Vivancos or that she died by blunt force trauma to her cranial region. In fact, Mr. Jolicoeur walked into the police station a few days later and confessed to the killing. What was in issue at the trial was whether Mr. Jolicoeur had the intent at the time for second-degree murder and, if so, whether provocation operates as a partial defence so as to reduce the act to manslaughter.

[5] The two of them had a business relationship. Ms. Vivancos was a street-level drug dealer on behalf of a drug organization operating in the Spruce Grove/Stony Plain area. Mr. Jolicoeur was one of her customers. They had transacted business on two previous occasions that very day.

[6] Mr. Jolicoeur did not testify at the trial. His version of what occurred with Ms. Vivancos is contained in a series of statements that he gave to RCMP in the days following the event. There is no issue with the voluntariness and admissibility of the statements. There is otherwise no forensic evidence linking Mr. Jolicoeur to Ms. Vivancos' death.

[7] The Crown alleges that during their encounter at the pond, Mr. Jolicoeur repeatedly struck Ms. Vivancos about the head with a metal object, eventually causing her death. He did so, says the Crown, either intending to kill her or intending to cause her bodily harm that he knew was so serious and dangerous it would likely kill her and proceeded nonetheless. The weapon has not been determined. The Crown further says that Mr. Jolicoeur attempted to cover up his crime by placing Ms. Vivancos in her vehicle and first attempting to set it on fire. When that didn't work, he pushed the vehicle onto the pond so that it would break through the ice and submerge.

[8] Consequently, the Crown argues that the requisite intent for second degree murder can be inferred from the extent of the injuries, the evidence at the crime scene and Mr. Jolicoeur's post-offence conduct which the Crown says is evidence of an attempt to cover the up extent of the injuries inflicted. The Crown also says that the partial defence of provocation has been disproven beyond a reasonable doubt in that the evidence shows that Ms. Vivancos did not, in law, engage in provoking behaviour and that Mr. Jolicoeur did not lose the power of self-control because he was acting purposefully when attacking Ms. Vivancos.

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<sup>1</sup> This written version is a near *verbatim* rendition of the oral reasons for decision delivered on May 24, 2022, produced at the request of one of the counsel. I have corrected grammar and spelling, added formatting and citations and made minor wording changes to make the text read better. Otherwise, nothing else has been added or changed. The oral reasons remain the official decision of the Court.

[9] Mr. Jolicoeur's position at trial was that Ms. Vivancos initially attacked him with the weapon and that he disarmed her and struck her back. When she verbally threatened him (as he says in the statements), he was provoked and lost his self-control and again struck her on the head with the object. He says she was still alive when he placed her in her vehicle and that the unsuccessful attempt to set the vehicle on fire was to make the scene look like a robbery. He explained that the reason the vehicle was rolled onto the pond was to make it more difficult for Ms. Vivancos to drive out.

[10] His counsel argued at trial that the evidence is consistent with Mr. Jolicoeur not having, or at least raises a reasonable doubt about whether Mr. Jolicoeur had, the necessary intent, or that the Crown has not disproven provocation beyond a reasonable doubt. Mr. Jolicoeur's counsel submits that he should be convicted of manslaughter. He attempted to enter a plea of manslaughter at the outset of the trial, which was not accepted by the Crown.

[11] The credibility of Mr. Jolicoeur, throughout his various statements, is a critical consideration.

### **C. Agreed Statement of Facts**

[12] A detailed Agreed Statement of Facts was tendered in evidence. The Agreed Statement of Facts establishes:

- What communications Mr. Jolicoeur had with Ms. Vivancos in the hours preceding her death, and the communications he had with his common law partner Kim Zyha in the hours both before and after the killing, provided through cell phone records from Mr. Jolicoeur's phone and Ms. Vivancos' work phone.
- Ms. Vivancos' movements on the day in question, provided through GPS records. A GPS tracker had fortuitously enough been installed on the vehicle that she was using to conduct her business that day.
- How Ms. Vivancos went missing on the evening of November 16 and early morning hours of November 17, and how two individuals connected to her, Mr. Moldovan-Falnicu and Mr. Ibanescu, searched for her using the GPS and came upon the scene at the pond in the early morning hours of November 17; how they discovered her cold and stiff, attempted to revive her with CPR and called emergency services.
- What the scene looked like when first Mr. Moldovan-Falnicu and Mr. Ibansecu arrived, and when the paramedics arrived.
- The forensic results.
- The medical examination results and the cause of death.
- That Mr. Blenkinsop, a tow truck driver, was dispatched to a new home construction site in Spruce Grove in the early morning of November 17 and used a winch to free Mr. Jolicoeur's work van which had become stuck in mud. Mr. Jolicoeur tipped him \$20.
- That a teenaged babysitter was at the home that Mr. Jolicoeur shared with Ms. Zyha and her two children and their three dogs between 6 and 9 p.m. on November 16, and said that she believed no one came home that evening until Ms. Zyha arrived at 9

p.m. If someone had come home earlier, the babysitter said she would have noticed one way or the other.

- That Mr. Hill, another customer of Ms. Vivancos, bought two grams of crack cocaine from her at 6:05 p.m. at the Red's Convenience store in Spruce Grove. He said she was driving a silver car that night.
- The circumstances under which Mr. Jolicoeur gave the various statements to the police.

[13] A number of Crown witnesses also testified in person to verify and supplement the evidence accepted in the Agreed Statement of Facts.

[14] It is fair to say that the Defence does not really contest the evidence, or at least most of it. The Crown and Defence differ on how the evidence should be interpreted. Interpretation is key because the evidence of Mr. Jolicoeur's state of mind, on which the Crown relies in order to convict, is circumstantial.

#### **D. The Events of the Day**

##### *The Drug Enterprise, Ms. Vivancos Goes Missing*

[15] Ms. Vivancos worked for a drug enterprise headed by an individual referred to as Bobby, Russian Bobby, Russian B or the Russian. He had a staff that included someone named Pablo as well as Ms. Vivancos, who went by the name Jess or Jessica. There were other staff that had come and gone during Mr. Jolicoeur's association with the group. The staff worked in shifts.

[16] The operations consisted of a main drug line which customers could call when they wished to purchase product. That phone was forwarded to the staff member on shift at the time. The staffer would take the call and then meet the customer somewhere to complete the transaction. The staff member on shift was in a vehicle in order to move from place to place. Sometimes Russian Bobby himself would take the orders and do the transactions if no-one else was available.

[17] The drug line cell phone belonged to the Russian. If a customer texted the cell phone, the text would go to the Russian. Ms. Vivancos' work phone, the one the drug line was forwarded to when she was on shift, belonged to an individual who called himself Vlad Tepes.

[18] Daniel Ibanescu testified for the Crown. He said in November 2019 he still associated with people involved in the drug business but was no longer himself actively involved. He was a friend of Ms. Vivancos whom he knew as Jessica<sup>2</sup>. He said they had known each since they were young, some 15 years or so. He generally described how this drug business worked. He said it did not resort to violence. The organization tried to do business with trustworthy people and avoided criminals. Mr. Ibanescu was familiar with the practice of 'fronting' or allowing a customer to purchase drugs on credit. If someone didn't pay, they would simply stop doing business with that person. Mr. Ibanescu conceded the drug business could be dangerous. That is why he recommended Jessica use a driver. He did not know her to carry a weapon. Mr. Ibanescu had never heard of Mr. Jolicoeur prior to Jessica's death.

[19] Ms. Vivancos, or Jessica, was working on November 16, 2019. She was supposed to attend a birthday party that evening for Mr. Ibanescu's wife but never showed up. According to

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<sup>2</sup> I omitted to say at the time that Mr. Ibanescu also knew Ms. Vivancos to go by the nickname "Nani".

the Agreed Statement of Facts, Mr. Moldovan-Falnicu, who is Mr. Ibansecu's cousin and who worked with Jessica, noted several texts on the drug line from customers reporting that Jessica was not answering. Although the texts started around 6-6:30, he did not notice them until after midnight. He called Mr. Ibansecu who agreed to go with him to search for Jessica. Mr. Ibansecu had been become concerned about Jessica's absence when she didn't turn up at the birthday party.

[20] From this, it appears that Mr. Moldovan-Falnicu was in possession of or had access to the drug line cell phone at that time. Although initially evasive with police about the extent of his involvement in the drug trade, he eventually admitted to having access to the drug line cell phone that night. I do not know if Mr. Moldovan-Falnicu is Russian Bobby or the Russian. No one at the trial tried to make that connection.

[21] Ms. Vivancos or Jessica was apparently driving a loaner vehicle that night, a silver Volkswagen Jetta, that was equipped with a GPS tracker. Mr. Ibansecu and Mr. Moldovan-Falnicu located the vehicle on the pond and found Jessica, or rather her body, in the back seat. At first Mr. Ibansecu did not realize she was dead. They got her out of the vehicle, laid her on the ice and called emergency services. Mr. Moldovan-Falnicu attempted CPR for 5-10 minutes until police and EMS arrived.

*Mr. Jolicoeur interacts with Ms. Vivancos, cracks a tooth*

[22] Mr. Jolicoeur was employed as a plumber and service technician for PJ Faucet Plumbing and Heating. Before getting this employment, he had gone through a rough patch financially. Starting in February 2019, he had been purchasing cocaine through the drug line for resale at a small profit. Mr. Jolicoeur had himself been a cocaine user but said at the time of the incident, he had not been using and had been clean for several months.

[23] According to the phone logs, there were three groups of calls between Mr. Jolicoeur and Ms. Vivancos that day:

- between 10:43 – 11:14 a.m.
- between 2:22 – 2:30 8 p.m., and
- between 5:16 – 6:15 p.m.

[24] The cell phone logs and the GPS data roughly coincide with what Mr. Jolicoeur says were the times and locations of his interactions with Ms. Vivancos that day.

[25] The first group of calls relates to their first meeting that day. The purpose of the meeting was so that Mr. Jolicoeur could pay Ms. Vivancos the \$60 that he owed her. She had fronted him some drugs. They met near the Century Convenience Store between Highways 16A and 16. Ms. Vivancos was driving a silver vehicle. The meeting occurred without incident and the money was paid back.

[26] Later that day, Mr. Jolicoeur was attending a birthday party for one of Kim's children at the daycare. He says he experienced a split tooth part way through the party and drove over to the dentist's office. While en route, someone contacted him for drugs and he in turn contacted Ms. Vivancos. They met at a liquor store near his dentist at which time Mr. Jolicoeur purchased \$100 worth of cocaine for resale. He was not able to see the dentist.

[27] When he returned to the party, it was over so he went home. At around 5 p.m., the same person who wanted drugs from him before wanted more, so he contacted Ms. Vivancos once again to arrange a transaction. He said he was going out anyway to the pharmacy to pick up inhalers. He tried to arrange a rendezvous with Ms. Vivancos, but she kept changing the location or kept him waiting. Mr. Jolicoeur was anxious because he was supposed to have a date night with Kim that evening starting at 6 p.m. A babysitter had been secured.

#### **E. Encounter at the Pond**

[28] This entire narrative is from the point of view of Mr. Jolicoeur, coming from his cautioned statements.

[29] Mr. Jolicoeur then says that Ms. Vivancos directed him to the pond area, off the service road parallel to Highway 16. Mr. Jolicoeur arrived first and then Ms. Vivancos arrived in the silver Jetta. She was preceded by another vehicle, which appears to have spooked her in some way, and so directed Mr. Jolicoeur to get into her vehicle.

[30] While they were driving down Township Road 532A parallel to Highway 16, Ms. Vivancos received a call on her cell phone. After the call but before arriving at the T intersection, Ms. Vivancos reached over to the driver's side door and grabbed a metal object with her right hand and began hitting Mr. Jolicoeur with it, just as he was lighting a cigarette.

[31] Mr. Jolicoeur described the weapon as a long-handled tool. He said he did not know what it was exactly. He was struck on the hand or forearm and leg.

[32] Mr. Jolicoeur then disarmed her and struck her back and demanded to be taken back to his parked work van at the pond. The silver Jetta did turn around and go back toward the pond but because of the altercation going on inside the vehicle, the vehicle ended up at the fence line, with headlights facing the highway. The fence was barbed wire which possibly accounts for hood scratches later noted on the vehicle.

[33] Mr. Jolicoeur recounted that he struck Ms. Vivancos on the head with the metal object 2 or 3 times in order to get her to turn around and then 5 times or so as they were driving back to the pond. Mr. Jolicoeur was hitting her with the object in response to threats she was making.

[34] At this point, Ms. Vivancos was trying to contact someone on her cell phone. All the while, she was making utterances to Mr. Jolicoeur to the effect of: "This isn't over. We know where you live." These were the remarks interpreted by Mr. Jolicoeur as the threats. Ms. Vivancos then fled from the vehicle, clutching her cell phone.

[35] Mr. Jolicoeur pursued her from behind and eventually subdued her with blows to the head. He then says that he tried to load her into the trunk of the car. The blood smears on the rear of the vehicle, which are extensive, and inside the trunk attest to these efforts. He says that she was still resisting and coherent when he was trying to put her into the trunk. He says that he was not strong enough to achieve this purpose.

[36] Mr. Jolicoeur put her into the rear seat of the vehicle instead. The exhibit photos show footprints near the tire tracks at the fence, suggesting driver and passenger getting out of the vehicle while it was still at the fence line. There is no apparent blood at the fence line. Closer to the entrance to the pond, there is blood in the snow. Although nothing really turns on it, from this I infer that Mr. Jolicoeur moved the vehicle closer to the pond entrance in order to load Ms. Vivancos into the trunk.

[37] Mr. Jolicoeur admits to attempting to start a fire in the car by igniting a piece of paper in the front seat. He said his purpose was to make the scene look like a robbery. I think I can also conclude that Mr. Jolicoeur did indeed push the vehicle onto the pond. At one point he suggested that the vehicle had rolled onto the pond by itself. The palm prints and digital smears on the trunk were not conclusive but there is no evidence that anyone else was involved. Mr. Jolicoeur stated that his reason for moving the vehicle onto the pond was to make it more difficult for Ms. Vivancos to drive out.

[38] Mr. Jolicoeur says that he left the weapon at the scene and did not know what happened to the cell phone Ms. Vivancos had used. He says he took her purse and later disposed of it, again to make it look like a robbery. He conceded there was \$200 and drugs in the purse. He said he took the drugs but did not expressly say that he took the money.

[39] Mr. Jolicoeur says that after leaving the scene he returned home, went to the basement, took a shower and put the clothes he had been wearing in the laundry. He says he then went out again, driving around and wondering what to do. He says that Kim was not at home at the time and that the babysitter did not notice him.

[40] The text messages that he exchanged with Kim indicate that shortly before 6 p.m. on November 16, he reported losing the money for date night. The couple did not go on their date night. Shortly before midnight, Mr. Jolicoeur informed Kim that he was stuck in mud and waiting for the AMA. At 12:20 a.m. on November 17, he reported to her that he had found his money under the seat. At 2:18 a.m., he reported that that he saw an ambulance and police blocking every entrance, presumably referring to the pond site.

[41] In the statements given to police, Mr. Jolicoeur was unaware of any reason why Ms. Vivancos would attack him with a metal bar while they were driving on the Township Road away from the pond. He speculated that it might be about the late payment of \$60. He did not connect his practice of reselling cocaine to Ms. Vivancos' attack on him.

[42] A tire iron was found in the trunk of the Jetta. The tire iron had some of Ms. Vivancos' blood on it. The Crown is not alleging that the tire iron is the weapon.

## **F. Injuries**

[43] Dr. Bannach, recently retired but assistant chief medical examiner at the time, conducted the autopsy and prepared the report found that Tab B of the Agreed Statement of Facts. He was assisted at autopsy by Dr. Joseph Andrews. I will summarize the report:

[44] Ms. Vivancos sustained 56 distinct blunt force injuries:

- 18 of those were external blunt force injuries to her head,
- 17 were internal blunt force head injuries,
- 15 were blunt force injuries to the arms and hands, and
- 5 were blunt force torso and lower extremity injuries.

[45] Dr. Bannach acknowledged that the number of injuries does not correspond with the number of blows or strikes. One blow or strike may cause more than one injury. For example, a single blow could account for both a laceration and a fracture. Conversely, it may take two or more strikes to cause a single injury such as a depressed skull fracture, as Dr. Bannach stated at the trial.



[46] Dr. Bannach's report, along with the autopsy photos, indicate that Ms. Vivancos was repeatedly struck with an object. Although I do not have precise evidence on the number of strikes, I can conclude on the evidence before me that they were numerous and applied with great force.

[47] I'll describe some of what I saw in the autopsy photos:

- Her face is covered and her hair was soaked with blood;
- The back of her skull is a veritable lattice-work of lacerations, some of them gaping;
- There is soft spongy red material leaking or protruding out of her head from some of these lacerations;
- There are two 5 cm lacerations on her forehead & several lacerations at the front of the scalp;
- There is extensive bruising of both hands and forearms;
- There are lacerations over the knuckles of both hands;
- the skull fractures I will describe separately in a moment.

[48] Dr. Bannach conceded that it is not possible to pinpoint when or how the bruising and lacerations occurred. Bruising can occur just prior to death or couple of days earlier. They can be sustained at different times. What was described as defensive wounds or lacerations to the hands could have been sustained by punching someone.

[49] Dr. Bannach notes that all the bruises were in the early stages of colour change, even given that bruises in different locations change colour at different rates. He described the lacerations and bruises on the back of the hands as defensive, the bruising on the forearms as defensive and the bruising to the knees and legs as bringing up the legs to ward off blows.

[50] Ms. Lind argued that it was conceivable that some of these injuries pre-existed the encounter at the pond. It is conceivable in the sense that it is possible for the human mind to conceive of such a thing but it is not likely or in keeping with the preponderance of probabilities. In viewing the evidence, I have to take a logical and realistic approach. Ms. Vivancos was assaulted repeatedly with a blunt weapon, even on Mr. Jolicoeur's account, by Mr. Jolicoeur. His target was the head. People generally use their hands and arms to protect their head when they are attacked. I therefore conclude that all the injuries described in the autopsy report occurred in the same attack, and in particular, that the bruises and lacerations to Vivancos' hands and forearms are defensive wounds sustained in the attack.

[51] I hope I am as professional and clinical in my observations as Dr. Bannach was. The autopsy photos from numbers 75 through 79 depict injury #17, which is a 6.5 cm depressed skull fracture over the left occipital region. Connected to this fracture is a 15.2 cm stellate fracture along the right temporal parietal bone. 15.2 cm equals 5.9 inches and 6.5 cm equals 2.5 inches. There is accordingly one long continuous skull fracture, among other head injuries, that is 8.4 inches long. It is not a hairline. From the look of it, the fracture is so wide that I think one would be able to see through the entire thickness of the skull by shining a light.

[52] My point here is to make note of the extent and severity of the injuries, particularly to the skull area and the amount of force that must have been used to inflict them.

[53] Dr. Bannach stated that he would not expect that once all these injuries were sustained that a person would still be conscious. He did allow that it was possible that a person could still be breathing after sustaining all those injuries. He also said that fixing time of death, like in the television shows, is scientifically impossible.

### **G. Cautioned Statements**

[54] I am now going to discuss the various statements that Mr. Jolicoeur gave to the police:

- He first gave two non-custodial statements.
- On November 22, 2019 starting at 11:19 a.m., Mr. Jolicoeur gave an audio-recorded cautioned statement to Sgt. Aaron Ewert and Sgt. Mark Sloan of the RCMP major crimes unit while he was seated in the front seat of an unmarked police vehicle. At that time, he admitted to being a customer and acquaintance of Ms. Vivancos and that he had had contact with her on that day but did not connect himself with her death. He appeared surprised to learn of her death.
- On November 25, 2019 starting at 10:30 a.m., Mr. Jolicoeur presented himself at the Parkland RCMP station and gave an audio and video-recorded cautioned statement to Sgt. Sloan in which he confessed to the killing of Ms. Vivancos.
- Following arrest on November 25 at 7:39 p.m., Mr. Jolicoeur provided cautioned statement # 3 which consists of 4 parts. It is acknowledged that the interview began at 22:19 hrs. and continued until 00:58 hours (or almost 1 in the morning) the next day for part 1, resumed at 02:05 hrs. until 02:41 hours for part 2, picked up again at 09:15 hrs. and continued until 10:05 for part 3, and then resuming at 14:15 hrs. for part 4 and I'm not sure of the end time because the last few pages have been redacted in my copy.
- By providing those times, I acknowledge that Mr. Jolicoeur was arrested in the evening and was then interviewed until nearly 3 in the morning, had a break for 7 hours and was interviewed again. While the statements are admitted as voluntary, I want to make note of the circumstances of the giving of the statements to say that Mr. Jolicoeur may not have been fresh and alert and feeling his best at all times while being interviewed.
- I also wish to make note that throughout all of the interviews there were instances in which Mr. Jolicoeur was clearly emotionally distressed about his predicament, tearful and distraught. At one point he is seen talking to himself, bemoaning his fate and hoping that the police will act honestly.

[55] Those are basically the events that bring us to court.

### **H. Reasonable Doubt, WD & Credibility**

#### *Reasonable Doubt*

[56] The Crown must prove the Accused's guilt beyond a reasonable doubt. The classic statement in Canadian law concerning this concept is found in *R v Lifchus*, [1997] 3 SCR 320, 1997 CanLII 319 (SCC) at para 36 and consists of these propositions:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, namely the presumption of innocence;

- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;
- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a trier of fact who concludes only that the accused is probably guilty must find the accused not guilty of the offence charged.

### **WD**

[57] Counsel agreed that this a **WD** case. While Mr. Jolicoeur called no evidence at trial, the statements made by him in police interviews were presented in evidence in both video and transcript form and in the case of the first interview, in audio and transcript form. I am guided by the reworking of the Supreme Court of Canada's direction in **WD** by our Court of Appeal in **R v Ryon**, 2019 ABCA 36 and **R v Achuil**, 2019 ABCA 299, leave to appeal dismissed 2020 CanLII 71203 (SCC), 18, from which I draw the following principles:

- **Ryon** and **Achuil** restate and refine the **WD** assessment concerning the totality of trial evidence under the reasonable doubt standard;
- The burden of proof to prove the accused's guilt beyond a reasonable doubt remains on the Crown such that the accused is never required to prove his innocence, or disprove any of the Crown's evidence;
- If any exculpatory evidence is believed by the trier of fact, or even if not believed still leaves the trier of fact with a reasonable doubt that it may be true, then there must be a 'not guilty' finding;
- If after careful consideration of all the evidence, the trier of fact is unable to decide whom to believe or what happened, there must be a finding of 'not guilty';
- Even if the trier of fact completely rejects the exculpatory evidence, one cannot simply assume the Crown's version of events must be true. Rather, the trier of fact must carefully assess the evidence that is believed and decide whether that evidence persuades the trier of fact beyond a reasonable doubt that the accused is guilty.
- Whether evidence exculpating an accused raises a reasonable doubt must be assessed in the context of the evidence as a whole, cumulatively and not in isolation.

[58] The purpose of the **WD** approach is to ensure the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt.

[59] If, after a careful consideration of all of the evidence, the court is unable to decide whom or what to believe, it must find the accused not guilty of the offence charged: **R v JHS**, 2008 SCC 30, para 12.

[60] Since Mr. Jolicoeur admits to manslaughter, the most favourable outcome for Mr. Jolicoeur after application of the **WD** approach is a conviction for manslaughter.

*Credibility*

[61] Ms. Lind took issue with the credibility of only one of the Crown's witnesses, Mr. Ibansecu. However, it is Mr. Jolicoeur's credibility in his police interviews, particularly as it concerns his state of mind, which is critical in this case.

[62] The assessment of credibility is not, as the Supreme Court of Canada reminds us in **R v Gagnon**, 2006 SCC 17 at para 20, a precise science but rather a

...complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.

[63] As noted by Renke J in **R v JAB**, 2016 ABQB 362 at para 20, a good summary of the proper approach to credibility assessment is provided by Justice Ferguson at para 78 of **R v Storey**, 2010 NBQB 80:

... the proper approach is to consider the evidence of a particular witness against the backdrop of the rest of the evidence led or other evidence tendered, searching for connectors that may not necessarily rise to the level of legal corroboration between witnesses, the other evidence tendered or a combination of the two in deciding what worth should be attributed to it. In the final analysis it becomes a matter of determining the veracity of the evidence utilizing the age-old tools of logic, reason and common sense in measuring the probability, if it is deducible from the evidence, that the witness or witnesses' honesty on the central issue or issues is assailable.

[64] **JAB** also refers to O'Halloran JA's frequently cited description of credibility assessment in **Faryna v Chorny**, 1951 CanLII 252 (BCCA), [1952] 2 D.L.R. 354 at para 11:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. ...

[65] After referring to the above paragraph from **Faryna**, Justice Ryan in **R v Sue**, 2011 BCCA 91 notes at para 47:

Doubtless, a skilled liar or a good actor can easily feign sincerity. But it is also the case that most people of average intelligence can tailor a story to fit the circumstances if they put their minds to it. Thus, a trier of fact will test a story for both its logic and, with the appropriate cautions, the manner in which it was told.

[66] From these authorities, I instruct myself as follows:

- It is fair to rely on demeanour but not exclusively;
- Most people of average intelligence can construct a story to fit with the circumstances;
- The real test is whether is the evidence given consistent with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[67] In making this assessment, the trier of fact may look at factors that are common in human experience such as:

- Whether a person's evidence is consistent from one telling to the next, and if, not whether the inconsistencies are explainable or inconsequential;
- Whether the evidence is consistent with other known facts or evidence that is accepted;
- Whether the witness can adequately explain things that are or should be within the witness' knowledge;
- Whether the witness is vague or evasive;
- Whether the witness' conduct is consistent with what the witness insists is the truth; and
- Whether the witness has shown a willingness to engage in deception on other occasions.

#### **I. Second Degree Murder- Intent & Inferring Intent**

[68] The issues I am tasked with deciding are:

- Whether Mr. Jolicoeur had the intent for second-degree murder; and
- If so, whether provocation in law has been established, or at least not disproven beyond a reasonable doubt, to reduce second-degree murder to manslaughter; and
- A further overarching issue that fundamentally affects the other issues which is that of Mr. Jolicoeur's credibility: What I should believe and accept from his statements to police and what I should disbelieve and reject.

[69] While the issues may be defined in a discrete way, the analysis is not necessarily discrete. What I mean by that is that the same evidence applies to all three of these issues.

#### *Circumstantial Evidence*

[70] I agree with counsel that all the evidence concerning intent that the Crown relies on is circumstantial. There is no direct evidence of Mr. Jolicoeur's intent other than contrary evidence when he says he didn't intend to kill Ms. Vivancos. There is no statement from him where he says, 'yes, I realize I was inflicting bodily harm likely to cause death and I continued anyway'. If that intent exists, it must be inferred from the circumstances.

[71] Of course, I accept and will apply the principle from the SCC case *R v Villaroman*, 2016 SCC 33 that in order to draw an inference of guilt from circumstantial evidence, it must be the only reasonable inference available, when the circumstantial evidence is viewed logically and in light of human experience. Any alternative inference to be drawn pointing away from guilt must also be reasonable in the same way and not speculative.

*Second Degree Murder – Components*

[72] It is not disputed that Mr. Jolicoeur unlawfully caused Ms. Vivancos' death and that it is a culpable homicide. The question is the level of intention attached to Mr. Jolicoeur's actions. Intention for second-degree murder takes two forms. The charge requires the Crown to prove that Mr. Jolicoeur either:

- intended to cause Ms. Vivancos' death; or
- that he meant to cause Ms. Vivancos bodily harm that he knew was so dangerous and serious that it was likely to kill her and proceeded despite his knowledge of that risk.

[73] In this case, the Crown relies primarily on the second form of intent, namely that Mr. Jolicoeur meant to cause bodily harm to Ms. Vivancos that he knew was so dangerous and serious that it was likely to cause death and he proceeded nonetheless.

[74] This second form of intention required for murder, found in s. 229(a)(ii) of the *Criminal Code*, consists of three components:

- Intention (to cause bodily harm);
- Knowledge (that the bodily harm will probably be fatal);
- Recklessness (whether the victim dies or lives).

[75] Subjective foresight of death is a constitutional requirement for the crime of murder: *R v Martineau*, 1990 CanLII 80 (SCC), [1990] 2 SCR 633, at p. 646. It is not sufficient that the accused foresee simply a danger of death, rather he must foresee a likelihood of death flowing from the bodily harm inflicted on the victim.

[76] Furthermore, the SCC in *R v Cooper*, [1993] 1 SCR 146 at para 21 explained that there need not be perfect temporal concurrency between the wrongful act and the *mens rea* or intention requirement and that in the case of repeated blows, if the requisite intent coincides at any time with the sequence of blows, then that could be sufficient to found a conviction.

[77] This combination of intention and subjective foresight of the likelihood of death renders the recklessness component in s. 229(a)(ii) almost an afterthought: *R v Nygaard*, 1989 CanLII 6 (SCC), [1989] 2 SCR 1074, at pp. 1087-1088.

[78] Unless all these elements are proved beyond a reasonable doubt:

- Intention (to cause bodily harm);
- Knowledge (that the bodily harm will probably be fatal);
- Recklessness (whether the victim dies or lives);

then Mr. Jolicoeur is not guilty of second-degree murder and in this case would be guilty only of manslaughter.

[79] On the proven facts so far, there is no question that Mr. Jolicoeur had the intention to cause bodily harm to Ms. Vivancos. That is inherent in the very wielding of a metal bar or weapon to Ms. Vivancos' head. For the offence of second-degree murder, the Crown relies on the blows that were struck in the vehicle, and when the two of them got out of the vehicle. By the time they left the vehicle, Ms. Vivancos was already bleeding from the head. There can be no question of Mr. Jolicoeur's intention to cause bodily harm with respect to these blows.

*Subjective Foresight of Death in this Case (includes discussion of Post-Offence Conduct) – Positions of Crown and Defence*

[80] By far the more vexing question is whether Mr. Jolicoeur knew that the bodily harm so inflicted would probably be fatal. The Crown argues that Mr. Jolicoeur must have known that a lethal result was likely because:

- there is a natural inference and, in this case, an inescapable conclusion that Mr. Jolicoeur intended the natural and probable consequences of his actions, namely in striking Ms. Vivancos numerous times about the head with a metal object;
- this knowledge can also be inferred from the nature and extent of the injuries, citing *R v Cerra*, 2002 BCCA 515 and *R v Borbely*, 2021 OJ No 110 (ONCA); and
- the requisite intent can be inferred from Mr. Jolicoeur's post-offence conduct which shows that he was trying to conceal the extent of the injuries inflicted upon Ms. Vivancos.

[81] This latter argument refers to Mr. Jolicoeur's attempts to set the Jetta on fire and when that didn't work, says the Crown, pushing the vehicle onto the pond so that it would submerge. During argument on this point, counsel canvassed a range of cases dealing with whether and how intent may be derived from post-offence conduct. I will mention two decisions from the Supreme Court of Canada that support the legal proposition that the Crown relies on. On the authority of *R v Rodgerson*, 2015 SCC 38 and *R v Calnan*, 2019 SCC 6, the Crown says that Mr. Jolicoeur's post-offence conduct or attempts at concealment of evidence was for the purpose of concealing the nature and extent of Ms. Vivancos's injuries and the degree of force required to inflict them. The nature and extent of these injuries could support a further inference that Mr. Jolicoeur had the intent for second-degree murder. The Crown argues that the fact that Mr. Jolicoeur's attempts at concealing were not successful as opposed to the more successful attempts in *Rodgerson* and *Calnan* does not detract from the fact that the inference is available even in the failed attempt at concealment.

[82] Mr. Jolicoeur's counsel responds that intention to cause bodily harm that Mr. Jolicoeur knew was likely lethal has not been proven beyond a reasonable doubt for these reasons:

- the inference that a person intends the natural consequences of his or her actions is permissible but not irresistible or inevitable, citing *R v Taniskishayinew*, 2017 B CSC 1944 at para 43;
- knowledge that death is likely to ensue cannot be imputed from the amount of blood found at the scene; the blood on the pond ice resulted from Mr. Moldovan-Falnicu and Mr. Ibanescu moving her body there afterwards, Mr. Jolicoeur may not have been aware of the amount of blood because it was dark during the incident, and people have a lot of blood in them and they bleed a lot even when injuries are not serious;
- knowledge that death is likely to ensue cannot be imputed from the injuries themselves; Mr. Jolicoeur would not have known about the extent of head injuries because they were not visible to him due to Ms. Vivancos' abundance of hair; the EMS personnel noted only one or two lacerations to her head and the significant injury to the back of her head was not obvious; Mr. Ibanescu thought she might still be alive; Dr. Bannach could not determine the number of blows involved and he could not say what position Ms. Vivancos was in when struck on the back of the head except that she was being struck from behind

and he said it was possible that she still could have been breathing when Mr. Jolicoeur left the scene;

- there are Mr. Jolicoeur's numerous declarations throughout his statements that he did not intend to kill her, that she was still resisting as he tried to put her in the trunk and was alive and still breathing when he left;
- the post-offence conduct is not probative of intent; it is equally consistent with manslaughter, to which Mr. Jolicoeur has already admitted, citing *R v Arcangioli*, [1994] 1 SCR 129, the aforementioned *Calnan*, *R v White*, 2011 SCC 13 at para 41, *R v Lightning*, 2018 ABCA 324 at para 32;
- Ms. Lind also makes the point that post-offence conduct can also be exculpatory and points to Mr. Jolicoeur's voluntary confession on November 25 and subsequent statements which are replete with detail. Presumably, a murderer would not usually do this.

#### *Finding*

[83] I address the foregoing arguments as follows:

- This is a case where I think that the inference that a person intends the natural and probable consequences of his or her actions is not just permissible but irresistible and compelling. This is not a case like *R v Taniskishayinew*, which involved the accused stabbing the victim in the heart with a knife. There was no evidence of how the stabbing occurred, only that it had occurred. The court entertained the distinct possibility that the victim had suddenly lunged at the accused while she was holding the knife to ward him off. There was factual ambiguity about how the physical act occurred. Accordingly, there is room for the common sense inference not to apply. In this case, there is no dispute that Mr. Jolicoeur chased down Ms. Vivancos and deliberately smashed her over the head with a metal weapon, tool or baton of some sort. This is no factual ambiguity about what physically occurred or how Ms. Vivancos sustained her injuries.
- On this point, in cautioned statement #3, part 4, Mr. Jolicoeur was being asked by Detective Kuca about the number of times Ms. Vivancos was struck after getting out of the vehicle. Mr. Jolicoeur answered "I don't know, 2, 3?" Detective Kuca then asked, "Fair to assume that she would've gone to the ground pretty soon?" And Mr. Jolicoeur responds, "Eventually, yeah." The word "eventually" describes a period of time during which Mr. Jolicoeur is striking Ms. Vivancos on the head with the object. It may not have been a long period of time, perhaps just a few seconds. Nonetheless, the use of the word suggests to me that there were repeated strikes. She did not go down right away, she went down eventually. In other words, he knew what he was doing, hitting her on the head until she eventually went to ground. That being the case, unlike in *R v Taniskishayinew*, the common sense inference that a person intends the natural and probable consequences of his or her actions has not been displaced.
- I will concede Ms. Lind's point that the human body contains a lot of blood and that people can bleed profusely even though not grievously injured. I heard no expert evidence on whether the amount of blood found at the scene indicated a fatality had occurred.
- I will also concede that Mr. Jolicoeur at the time did not have precise knowledge of what Ms. Vivancos' injuries were. Yes, it was dark, and yes she had an abundance of hair such



that skull fractures would not be apparent. Mr. Jolicoeur did not have the benefit at the time of the autopsy photos that I saw. However, he did know he was using a metal weapon, bar or tool, he did know that he was repeatedly hitting her over the head with it and as is apparent from the injuries sustained, regardless of whether he knew what the injuries were, he must have known that he was using considerable force.

- An assailant does not need to see the results in order to know that he has done the job. Someone who intentionally plunges a knife into the heart of another does not need to see that the aorta has been severed to know that fatal damage has been done. Similarly, someone using considerable blunt force on another's skull does not need to see the fracture to know the damage has been done.
- As I said, there is a continuous 8-inch long crevice in her skull that is visibly wide. There is also depression fracture. Mr. Jolicoeur's position appears to be: 'I didn't realize I was using lethal force'. As between the two of them, Ms. Vivancos and Mr. Jolicoeur, the onus was on Mr. Jolicoeur as the person administering the head strikes to regulate the amount of force used. That is inherent in the wording of s 229(a)(ii) of the *Criminal Code* which requires the elements of knowledge of the likely lethal effect of the bodily harm and recklessness or disregard in inflicting it.
- The plain and utter destruction of Ms. Vivancos' skull is tangible proof of Mr. Jolicoeur's intention. He was the one wielding the instrument. He was the one who knew exactly how much force he was using. Just as the Supreme Court of Canada says in *R v Cooper* "since breathing is essential to life, it would be reasonable to infer the accused knew that strangulation was likely to result in death", here, everyone knows that the head is essential to life. We are not talking about a finger or a kneecap or an extraneous body part.
- To me, it does not matter whether he chased her down and struck her from behind while she was still standing, or whether she went to the ground face down and he continued to strike her from behind. In either scenario, the target was the head.
- As to the EMS staff who didn't notice skull injuries or Ms. Vivancos' two associates who thought she might still be alive and that they might still have a chance to revive her, I appreciate the severity of the injuries might not have been immediately obvious to them. But they were not there when it happened. They did not see Mr. Jolicoeur striking her on the head with a metal object. They did not witness the number of strikes. They did not see the force used.
- I now refer to the case of *R v Borbely*. In the Court of Appeal, the appellant accused was attempting to resurrect manslaughter as an alternative to second-degree murder. The deceased had died after the accused had struck her 4 times on the back of the head causing a skull fracture and death by blunt force trauma. Admittedly, in this case, at trial the Defence had conceded intent for second-degree murder. The appeal involved, in part, a request that manslaughter be put on the table for the jury in a retrial. The Court of Appeal said there was no air of reality to the alternative manslaughter verdict because of the nature and extent of the injuries.
- In *R v Cerra*, 2002 BCCA 515 at para 11 the appeal court also found that a beating itself is sufficient proof of the intent to commit murder even apart from the fact that the victim was dumped unconscious into a pond and actually died from drowning. The attack was

savage and prolonged, said the court, and had she not been put in the water, the head injuries by themselves would have been enough to kill her. The court found that the person who administered such a beating either intended to kill or to inflict bodily harm that he knew was likely to cause death, and that this inference was necessary and inescapable from the circumstances.

- The Crown relies on these cases, which are appellate decisions from other provinces, for the proposition that intent can be inferred from the nature and extent of injuries themselves. The cases are not binding on me but instructive. In both cases, the dichotomy between manslaughter and second-degree murder was squarely before the Courts of Appeal, which rejected the former in both cases. I cite the cases only for the purpose of showing that an inference of intention for second-degree murder can arise from the autopsy evidence. I intend to deal separately with the partial defence of provocation.
- I can conclude from a human skull that has been pummelled and cracked open that the person who did the pummelling appreciated that death was a likely result of the blows.
- One might then ask, what about Mr. Jolicoeur's protestations throughout his statements that he did not intend to kill Ms. Vivancos? After all, he was there and he is the only one who knows what was in his head. How can I discount or reject his declarations of no intent?
- I have two responses to that. The first is that I am going to deal with Mr. Jolicoeur's credibility at length in these reasons. While I believe, or at least I don't reject, much of what Mr. Jolicoeur says happened that evening, as I will explain in a moment, there are some critical junctures in his narrative where I think he has been untruthful and has attempted to minimize what he has done. His declarations of no intent fall into that category.
- Second, I can accept that Mr. Jolicoeur did not set out to kill Ms. Vivancos and that now, after the fact, he wishes the whole thing had never happened. However, as I explained earlier there must be some kind of temporal overlap between the deadly actions and the required state of mind. That state of mind may only be fleeting or last a few seconds but it is nonetheless necessary to elevate culpable homicide to the level of second-degree murder.
- An ordinary person might say that the law is harsh if an accused can be found guilty of second-degree murder for a transient state of mind that may come and go within the span of mere seconds. But that state of mind translates into actions which in turn translate into consequences, which in this case is the death of Ms. Vivancos.
- If there is one thing that our society and our community values, it is life, and the preservation of life, no matter who the victim is, including a drug dealer. We are all equal that way. That is why our lawmakers have created a law that recognizes second-degree murder even where the intent could be fleeting. Often, murders happen within mere seconds, such as when someone picks up a gun, forms intent and shoots it.
- The law is constructed to prevent an assailant who intends to cause bodily harm, from using the means and the force likely to cause death and being indifferent to the consequence, to then escape that consequence by saying, 'I didn't mean to cause death, I was only trying to hurt her'.

- I will deal with post-offence conduct somewhat summarily at this point. I have reached the conclusion that having unlawfully caused the death of Ms. Vivancos, whether it was manslaughter or second-degree murder, Mr. Jolicoeur was trying to cover up what he had done. In trying to set fire to the vehicle, or have it sink in the pond, he was trying to conceal his crime. At that point, he was not drawing a distinction between manslaughter and second-degree murder and only knew that he had done something bad. As such, I conclude that this post-offence conduct is not probative of the level of intent. I will return to the post-offence conduct when I discuss credibility.
- I do however think that Mr. Jolicoeur has minimized the number of blows. He said he thought it was 2 or 3 to make Ms. Vivancos turn the vehicle around, another 5 or 6 while they were still seated in the vehicle, and then 2 or 3 thereafter when they were outside the vehicle. In looking at the number of injuries, over her face and skull and over her hands, arms and lower extremities, even taking into consideration that one blow can cause more than one injury, I am drawn inexorably to the conclusion that Mr. Jolicoeur struck Ms. Vivancos with the metal weapon more times than he said he did. By itself, the web of lacerations on the back of the head speaks to multiple blows.
- I also conclude from looking at the number, nature and extent of the injuries and in particular the injuries sustained to the skull, that Mr. Jolicoeur meant to cause Ms. Vivancos bodily harm that he knew was likely lethal and was indifferent to that likelihood. He knew, as we all know, that the head is vital to life and that by repeatedly striking her head with a metal object, with the force that he used, she was likely to die and he did so anyway. In other words, he had the subjective foresight for murder.
- I further find that at some point when the two of them were outside the vehicle and he was hitting her over the head with the metal object, he was aware that she was likely to die from the blows to her head and thus the element of temporal concurrency is met.
- Finally, on the intent issue, I conclude from the evidence of the nature and extent of the injuries that no other reasonable inference can be drawn other than that Mr. Jolicoeur intended to cause Ms. Vivancos bodily harm that he knew was so serious and dangerous that it would likely cause death and that he was reckless to it. In saying this, I am not rushing to judgment or filling in the blanks. Looking at the outcome of the attack, I am compelled to say that Mr. Jolicoeur must have known that death was likely. The circumstantial evidence here is so compelling that it easily overcomes the protestations of ‘no intent’ found in Mr. Jolicoeur’s statements.
- Accordingly, I find that Mr. Jolicoeur had the intent for second-degree murder in causing the death of Ms. Vivancos.

#### **J. Credibility of Mr. Jolicoeur**

[84] First of all, it is trite but true to say that a trier of fact may accept all, some or none of what a witness says. Mr. Jolicoeur was not a witness in this trial but his version of what happened came in through the Crown’s case in the presentation of his statements to police. I am going to treat those statements in terms of assessing credibility in the same way I would assess the credibility of in-court testimony.

[85] Mr. Jolicoeur’s counsel tells me that he is credible through his series of police interviews because of:

- his demeanour and openness, and the consistency of his statements; and
- that much of his statements are corroborated by other evidence.

[86] Accordingly, I should either believe him or his statements should leave me with reasonable doubt on the critical questions before me.

[87] I acknowledge that Mr. Jolicoeur did not force the police to solve the crime. He voluntarily walked into the Parkland RCMP station and confessed. He admitted causing Ms. Vivancos' death and attempted to enter a guilty plea to manslaughter at the commencement of the trial. He instructed his counsel to make any and all admissions necessary to make the process easier for the witnesses, the respective families, the Crown and the court. He admitted the voluntariness of his statements. All the while he knew that he was in serious trouble and facing significant jail time. Furthermore, as it turns out, there was no real forensic evidence linking him to the scene. The blood samples taken from his home and his work van proved inconclusive for the purposes of the trial. His counsel says that all of this is a sign of his good faith, which supports his credibility.

[88] I will give Mr. Jolicoeur his due for doing all of that. By admitting his involvement and by making admissions at trial, he has certainly made the path easier for the police, the Crown, the witnesses and the court and that is worth something in the legal process.

[89] Nonetheless, I still have observations to make about Mr. Jolicoeur's credibility, that are unfavourable to him. Mr. Jolicoeur, this will seem that I being harsh on you but it is part of my explanation as to why I have come to the conclusions I have.

[90] First of all, it was submitted to me that Mr. Jolicoeur was motivated completely by conscience to confess to Sgt. Sloan on November 25. I note that three days earlier, he was interviewed by Sgt. Ewart and Sgt. Sloan while seated in the police vehicle. His cell phone was seized from him at that time. Although to be examined through a later search warrant, he knew that cell phone contained a record of his interactions with Ms. Vivancos on the day of her death. On the day of that initial interview on November 22, he told the two investigating officers that he had no involvement in the death, and that he had been home with Kim watching Hallmark movies that evening. Sgt. Sloan told him at that point that he (Mr. Jolicoeur) had reached the most important moment in his life. Mr. Jolicoeur's work van was then seized, although nothing came of it but he did not know that at the time. He had just been told by the police that he had reached a crossroads and that the course of the rest of his life would be determined by choices he was facing. I don't dispute that conscience played a part but from the circumstances I can also surmise that Mr. Jolicoeur realized he was in serious trouble and wanted to get ahead of it by putting his version of events on the record up front rather than have the police dragnet close around him.

[91] I also think he is motivated by keeping his partner Kim, her children and others, such as the babysitter, as far away as possible from this case. He is trying to protect them.

[92] It was urged upon me that Mr. Jolicoeur's demeanour throughout the statements was genuine and remorseful. I accept that the distress he displayed during the interviews is genuine. He had reason to be distressed. He had killed someone and faced a significant term of imprisonment, no matter what the verdict is. I am certain he is remorseful. I am certain that he wished none of this had ever happened.

[93] Demeanour just one factor to consider. As the authorities referred to are quick to caution, demeanour is only one factor and should never be the only factor.

[94] I also agree that Mr. Jolicoeur was open about much of what happened and provided considerable detail to the police. However, as I will elaborate in a moment, he was also vague and evasive at times, inconsistent with detail and only confirming other details, such as what happened to the phone and whether he looked in the purse, when pressed by the interviewer.

[95] I further agree that much if not most of what Mr. Jolicoeur told police is corroborated by independent evidence, notably the cell phone records and the GPS data. However, I go back to what Justice Ryan of the British Columbia Court of Appeal said in *R v Sue* that most people of average intelligence can tailor a story to fit the circumstances if they put their minds to it.

[96] Apart from some details, which I'll talk about in a moment, there are really only three main areas in the entire narrative that are controversial and which Mr. Jolicoeur, if he needed to, had to modify to fit the circumstances:

- what happened and what was said while Mr. Jolicoeur and Ms. Vivancos were in the Volkswagen Jetta together;
- what Mr. Jolicoeur's state of mind was when he was striking Ms. Vivancos with the metal instrument; and
- what Mr. Jolicoeur was thinking when he was trying to set the vehicle on fire and then pushing it onto the ice.

[97] I'm now going to talk about those things in the context of Mr. Jolicoeur's credibility and make some other observations about credibility:

- One of the major problems I had with Mr. Jolicoeur's statements is his insistence that it was his fear that Ms. Vivancos' associates would hurt his family that caused him to lethally assault her with the metal instrument. After the assault, he did nothing to protect his family. He says he went home to shower and wash his clothes but then left again with 2 small children and a 13-year-old babysitter alone in the home. If he felt there was danger why did he not evacuate them immediately along with Kim? This would be particularly so if, as he said, he believed Ms. Vivancos to be still alive and capable of driving away from the pond.
- He said that Ms. Vivancos had told him that they know where he lives. From the text message records, we know that at 2:18 a.m. on the morning of November 17, he was still not home although Ms. Vivancos's body had been discovered. If he was so concerned about their safety, why would he leave his family unprotected?
- He seemed to think that as long as his vehicle was not parked in front of the house, Bobby and his minions would not come calling. What was to prevent them from ringing the doorbell and inquiring about Mr. Jolicoeur's whereabouts, regardless of where his vehicle was parked, or harming his family members when he was not there?
- As the Crown pointed out, while he says in may have parked his work van down the street, his personal vehicle remained parked outside of the home he shared with Kim and her children. He described how he moved it to the front of his house because it had been ticketed as an abandoned vehicle.

- He took no precautionary steps. He says in statement #3, part 4 that he kept a steak knife and a pickaxe in the bedroom and tried to buy bear spray, but such measures are only in response to someone breaking into the home. By that time, it is too late, the interlopers are already there. He did nothing preventative, such as moving them to a safe place. If such danger did exist, enough to incite homicidal action at the pond, his subsequent behaviour does not match the extent and nature of the danger. Further, as he admitted in Statement # 3, part 4, he also started using drugs again after the incident. These are not the actions of someone concerned about the safety of his family. I cannot reconcile the danger he says he apprehended in the threats with his behaviour afterwards.
- Mr. Jolicoeur said that Ms V was still resistant when trying to put her into the trunk, even with her injuries. This does not make sense to me. Dr. Bannach said he would not expect a person with such injuries to be conscious. I am no doctor, but in looking at the extent of the injuries, it seems impossible to me that Ms. Vivancos could still be resisting after sustaining those injuries. Mr. Jolicoeur said he put her in the back seat instead. If he was resisting being put in the trunk, then why would she not resist being put in the backseat? I can only conclude that it was because she was either dead or unconscious. He also says that she was still coherent at the time. Given the condition of her skull, that statement defies logic.
- There is his statement that he was putting Ms. Vivancos in the trunk so that she would stay warm. I do not understand how putting someone in the trunk of the vehicle when the weather is cold enough that the pond is frozen would keep her warm. He did put her in the back seat, but we know that the driver's window was rolled down at least partway. Was warmth not a concern when he put her in the backseat? He then gave a different reason for why he was putting her in the trunk, which was to give him time to escape. He said he felt Ms. Vivancos would be able to free herself from the trunk.
- Mr. Jolicoeur stated that Ms. Vivancos was still alive and still breathing when he left the scene. Yet, he admits to attempting to set fire to the vehicle. As the Crown point out, had he succeeded, this means he would have left a critically injured person to burn to death. He denies pushing the vehicle onto the pond for the purpose of submerging it but the reason he gave for doing so does not make sense. He said he wanted to make it more difficult for Ms. Vivancos to drive out. Yet, as the Crown pointed out, there was an easier way by simply taking the keys. If the vehicle had been pushed onto the pond so that it would submerge, then it would have meant leaving a critically injured person to drown. I don't think the Crown suggests that Mr. Jolicoeur wanted Ms. Vivancos to die by fire or drowning, rather, these actions indicate that Mr. Jolicoeur knew she was already dead. I also find Mr. Jolicoeur's suggestion that he thought Ms. Vivancos could drive out of the pond area in her condition to be astounding. Even if he did not know the exact nature and extent of the injuries, he did know what he had done to her and that she was in no condition to drive.
- His explanation about trying to set the fire to make it look like a robbery equally does not make sense. Like Sgt. Kuca, I do not understand how setting a car on fire achieves this. It is more consistent with trying to eradicate evidence.
- I also take the Crown's point that if Ms. Vivancos was still alive as Mr. Jolicoeur asserts, then staging the scene to look like a robbery had occurred would not advance his

interests. Mr. Vivancos would still be able to point to Mr. Jolicoeur as the perpetrator. The staging of the robbery scene only advances Mr. Jolicoeur's interests if Ms. Vivancos is already dead and therefore the robber remains unknown. This is a further illustration of how the explanation makes no sense.

- Mr. Jolicoeur says he was in a panic and not thinking straight. But he did other things that were rational, such as taking the purse and disposing of the purse with the phone in it. Cleaning himself up afterwards and washing his clothes are also rational actions and part of eradicating evidence. Thus, I conclude that the attempt at setting the vehicle on fire and pushing it on to the ice were part of a pattern of cover-up rather than panicked, irrational acts.
- Another marker of credibility, or the lack of it, is whether a version of events changes from one telling to the next. I have before me three fundamentally different versions of what happened that evening from Mr. Jolicoeur. First is the version he told to Kim in which he was kidnapped at gunpoint by a male and a female and something happened thereafter resulting in injury to one of the kidnappers. There is the second version from November 19 when Mr. Jolicoeur was first interviewed by Sgt. Ewart and Sgt. Sloan in which he told them that he spent the entire evening of November 16 watching movies with Kim and not leaving the house. Then there is the third version, which is reflected in statements 2 and 3 which in large measure, as the other evidence shows, is accurate except for certain points I will discuss.
- Even within the final version, there are troubling inconsistencies. I will give a few examples. One would be Mr. Jolicoeur saying at one point that the Volkswagen Jetta rolled by itself onto the ice and then conceding later that he pushed it there. He first had no knowledge of what happened to Ms. Vivancos' phone, the one that was causing him so much concern, and then conceded that the phone was in the purse and that he disposed of it. He at first says that he did not look into the purse and then concedes that not only did he look into the purse but he took the drugs as well. He first claimed to be clean for several months and then later conceded that he had started using again, the day after the incident, with the cocaine obtained from Ms. Vivancos that evening. In a further example, Sgt. Kuca points out to Mr. Jolicoeur that he changed his story about who suggested the pond location. At first he said it was himself, and then he said it was Ms. Vivancos. While some of these points may be minor or collateral as Ms. Lind suggests, their significance really lies in that Mr. Jolicoeur is attempting to minimize his actions.
- Mr. Jolicoeur's defence counsel argued that statements # 2 and 3 remedied the falsehoods advanced in statement # 1. I do not see it that way. Mr. Jolicoeur gave three different versions of what happened. These versions changed as his circumstances changed. This suggests to me that he adapted his story according to what his needs or circumstances were at the time. While the broad outline of what happened as described in statements # 2 and 3 is true, specific facts are corrected as he is pressed on them, as noted in the above examples. This characteristic of modifying facts as circumstances change detracts from, rather than enhances, credibility.
- Ms. Lind argued that Mr. Jolicoeur's credibility is enhanced because he did not try to maintain his lies. He acknowledged that the story he told Kim about being held at gunpoint was untrue and that enhances his credibility. Again, I do not see it that way. By

that point, the police had investigated the scene. The cordon was closing around him. The story that Mr. Jolicoeur told Kim was no longer sustainable.

- Another anomaly that struck me is that Mr. Jolicoeur was unable to name his customer who was requesting drugs that evening. That is found in Statement #3, Part 1. From his description of it, I understood that Mr. Jolicoeur was not a large distributor and that he resold drugs from time to time to pick up an additional dollar here and there, for gas or cigarettes. From his description, I did not have the impression that he had dozens of clients and did so many transactions that he could not remember who he was dealing with that day. It strikes me as odd that he cannot remember who the customer was because the encounter with Ms. Vivancos at the pond is the single most important event of his life. It seems to me that he should remember the identity of the person who set all of this in motion by contacting him twice that day to get drugs. It leads me to wonder whether this person actually exists because if Mr. Jolicoeur were to supply a name, then the police could interview that person. It seems to me somewhat convenient and evasive to say that he could not remember, nine days later, who it was who contacted him when it was that person who played such a key role by setting in motion all of the events that followed.
- Therefore, as a result of the foregoing, I do have grave concerns about the veracity of what Mr. Jolicoeur is saying about certain crucial areas, that is, what transpired between himself and Ms. Vivancos while in the Volkswagen Jetta, his state of mind as he was hitting her over the head with the metal instrument at the pond area, and his explanations for some of his post-offence conduct. I also reject his contention that Ms. Vivancos was both resisting and coherent when he was trying to place her into the trunk.

## **K. Provocation**

### *Elements of Provocation*

[98] I will now move on to the defence of provocation. Provocation is the only defence which is exclusive to homicide. The defence applies when the intent for murder has been made out, as it has in this case. As a partial defence, it serves to reduce murder to manslaughter when certain requirements as set out in section 232 of the *Criminal Code* are met:

- there must be provoking conduct by the victim,
- that is of such a nature that it is sufficient to deprive an ordinary person of the power of self-control (often referred to as the objective element),
- the provoking conduct must also be sudden and unexpected,
- the conduct causes or provokes the accused person to act (the subjective element),
- also on the sudden, before there is time for his passion to cool.

[99] I derived these elements from reviewing these cases from the Supreme Court of Canada: *R v Hill*, [1986] 1 SCR 313; *R v Thibert*, [1996] 1 SCR 37 and *R v Tran*, 2010 SCC 58.

[100] In the objective part of the test, the “ordinary person” must have the same general demographics and circumstances as the accused in terms of age and sex. Occupation may be relevant, as well as educational background, family circumstances and other factors such that the provoking act would have the same special significance for this hypothetical ordinary person as for the accused: *Hill* at para 35 and *Thibert* at para 14.



[101] I note here that much of the case law refers to an earlier version of section 232 where the provoking act is described as “a wrongful act or insult” on the part of the victim. The *Criminal Code* was amended in 2015 to revise the definition of provoking conduct and narrow the availability of the defence. It is now “conduct of the victim that would constitute an indictable offence under the *Criminal Code* that is punishable by 5 or more years of imprisonment”.

[102] Like any defence that is raised, there must be an air of reality to the defence: *R v Cinous*, 2002 SCC 29 at para 83. In this case, the Crown concedes there is an air of reality to provocation based on Mr. Jolicoeur’s factual assertions. Those assertions consist of:

- Ms. Vivancos while driving away with Mr. Jolicoeur in the Jetta on the service road grabbed the metal weapon and struck Mr. Jolicoeur with it.
- He then disarmed her and struck her in return, which resulted in her making a U-turn and returning to the pond.
- Mr. Jolicoeur stated on several occasions that, at that point, he had control of the situation, he had possession of the weapon and Ms. Vivancos was no longer a threat to him.
- It was then that Ms. Vivancos engaged in the provocative conduct, which consisted of her statements to the effect of: ‘I’m telling Bobby. This is not over. We know where you live.’
- She then attempted to use her cell phone to contact someone, presumably Russian Bobby.

[103] While still in the vehicle, Mr. Jolicoeur struck her 5 or 6 further times in the head region. Ms. Vivancos then fled the vehicle and Mr. Jolicoeur chased after her and struck her on the head, he says two or three more times, but at any rate there were further head strikes, and as we now know Ms. Vivancos died from that assault.

#### *Positions of Defence and Crown*

[104] The Crown asserts that provocation has been disproven as follows:

- only one element of the defence of provocation needs to be disproven in order for the defence to fail;
- objectively speaking, there was no threat or if there was it was too vague or amorphous to have the effect that the Defence contends
- Ms. Vivancos’ words were neither sudden nor objectively unexpected given that the two of them had just been involved in a physical altercation;
- subjectively speaking, Mr. Jolicoeur had not lost the power of self-control as he was deliberately attempting to stop her from using her cell phone.

[105] The Defence submits that the elements of provocation have either been established, or at least not disproved, in this way:

- Mr. Jolicoeur was already in a state of shock and upset as a result of Ms. Vivancos’ unprovoked attack upon him. He interpreted Ms. Vivancos’ words as a threat and, in particular, a threat directed against his family. The ‘this isn’t over’ part meant to Mr. Jolicoeur that violence was coming his way. The ‘we know where you live’ part was interpreted by Mr. Jolicoeur as a direct reference to his family, namely Kim and her two

children. The use of the plural ‘we’ suggested to Mr. Jolicoeur that it was the drug organization who would be coming after Mr. Jolicoeur and his family.

- He knew that Bobby was the head of this drug organization and everyone knows, despite what Mr. Ibanescu might say, that drug organizations use violence and intimidation to settle disputes. Mr. Jolicoeur had just been subjected to such violence by being struck by Ms. Vivancos.
- There was a previous incident in which Mr. Jolicoeur says he was kidnapped by a dark-complexioned man with a knife and he had to jump from a moving vehicle to escape his captor. He did not connect this previous incident with the drug organization, but this experience informed his fear at the moment.
- An important part of the context, argued defence counsel, is that Mr. Jolicoeur dearly loves his family.
- Taken together, the threats would deprive an ordinary person similarly situated as Mr. Jolicoeur of the power of self-control.
- Defence counsel argues that Mr. Jolicoeur was not prepared for the threat and that it came out of nowhere, on the sudden. Until that day, it appears the relationship between Mr. Jolicoeur and Ms. Vivancos had been cordial and businesslike. There had been no trouble between them until that day.
- That Mr. Jolicoeur acted on the provocation and completed his assault of Ms. Vivancos before his passion cooled, the Defence contends, is clear from his statements that he lost control, that he was scared, that he just reacted, that it was in the heat of the moment, that it was out of fear for his family. He uses these expressions numerous times throughout his various statements to explain his state of mind.

[106] I note here that uttering threats is an indictable offence that attracts a maximum sentence of 5 years.

[107] I accept that anger need not consist of the accused’s sole emotion during the provoked state and that it may be a combination of anger, fear and panic per *R v Raspberry*, 2017 ABCA 135 and *R v Louis*, 2019 ABCA 500. The important point is that the accused has lost the power of self-control, regardless of how one describes the actual emotion experienced, as a result of the provocative conduct. I understand that Mr. Jolicoeur also expressed feelings of fear for his family and panic in addition to anger in reaction to what he viewed as threats.

[108] I further accept, as in the *Raspberry* case, that there is no time limit on the duration of the provoked state or how long it takes for a provoked person’s passions to cool.

*Driving down the service road*

[109] Ms. Lind is quite right that Mr. Jolicoeur’s version of what physically transpired between himself and Ms. Vivancos while they were in the Volkswagen Jetta cannot be disproven. Mr. Jolicoeur is the only living witness to those events. I do express grave misgivings about what Mr. Jolicoeur says happened. First, there is his description of Ms. Vivancos attacking him with the weapon while driving down the service road. There is no antecedent to this attack. There is no existing ‘beef’ between Ms. Vivancos and Mr. Jolicoeur or between the organization and Mr. Jolicoeur. He had paid off his debt and was in the process of doing more business. There was the

cell phone call that Ms. Vivancos took but no suggestion that the call had a connection to the attack. When asked about why Ms. Vivancos would attack him, Mr. Jolicoeur speculated that it may be because of late payment of the \$60 but it was only speculation on his part. He did not connect his reselling of drugs to the attack. In short, the attack by Ms. Vivancos upon Mr. Jolicoeur was completely unprovoked.

[110] There was some discussion in cautioned statement #2 about injuries to Mr. Jolicoeur resulting from Ms. Vivancos attacking him first. Any injuries would have been slight. By the time of that interview anything on his hand or forearm had healed. Sgt. Sloan seemed to think he saw a bruise on Mr. Jolicoeur's leg. I saw the picture, I couldn't tell whether there was a bruise or not, there was a bit of discolouration and maybe it was bruise in the late stage of healing. I really could not tell. At any rate, we know from the autopsy photos of Ms. Vivancos the kind of damage that weapon could do.

[111] I find it difficult to accept, in those circumstances, that someone driving a vehicle down a service road would choose that exact moment to engage in an unprovoked attack upon the passenger while wielding a metal instrument. However, for the purposes of the provocation analysis, I will proceed on the basis that the attack did occur and that Ms. Vivancos uttered the words attributed to her that Mr. Jolicoeur interpreted as a threat against his family.

*Sudden and unexpected act leading to loss of self-control?*

[112] With regard to the issue of whether Ms. Vivancos' utterances were sudden and unexpected so as to induce an ordinary person to lose self-control, I agree with the Crown. Ms. Vivancos and Mr. Jolicoeur had just finished taking turns hitting one another with a metal baton. Mr. Jolicoeur had hit her over the head with it. The tension of the altercation would still be in the air. Ms. Vivancos would have been still feeling the physical sting. One would expect stern words, even words of retribution, to be spoken. In those circumstances, it cannot be said that Mr. Jolicoeur was unprepared for 'trash talk'. They had just finished a physical fight in the car.

[113] Further, the utterance 'I'm telling Bobby' is completely natural and expected. Bobby was the boss. One of his employees had just been in a physical fight with a customer, in which a weapon was used by both participants. All involved would expect that the boss would be told about the incident.

[114] Per the SCC case *R v Cairney*, 2013 SCC 55 at paras 44, 52 and 61, the words spoken by Ms. Vivancos were within a range of reasonably predictable reactions to the altercation that had just occurred such that an ordinary person, or Mr. Jolicoeur for that matter, would not have found the words sudden and unexpected and lead to a loss of self-control.

*Were the Utterances Threats?*

[115] All through the various statements, Mr. Jolicoeur repeats that Ms. Vivancos said:

- I'm telling Bobby
- this isn't over, and
- we know where you live

[116] Only at one single instance in statement #2 does Mr. Jolicoeur say that Ms. Vivancos said 'we'll come after your family'. Although he is asked to recount his interactions with Ms. Vivancos at the pond several times through a couple of hundred pages of transcript in over 7

hours of interviews, he never once repeats the ‘we’ll come after your family’ statement, but he repeats the other statements several times. I would have thought, in quoting Ms. Vivancos’ threats, this particular threat aimed at the family would be front and foremost in his recitation of the events. Instead, it fades from his account after statement # 2 and never reappears. The other statements are repeated. So, I am left to wonder whether these actual words were ever said, or whether they are merely an interpretation or perception by Mr. Jolicoeur, or less charitably, an embellishment.

[117] As stated, the rest of the words:

- I’m telling Bobby
- this isn’t over, and
- we know where you live

are repeated throughout the statements. But they are vague. They indicate that the grievance between Ms. Vivancos and Mr. Jolicoeur had not been resolved and that the boss would be brought into the discussion. In these words, which there was no actual threat of harm made and any such threat was veiled or implied. Certainly, no words here specifically referenced Mr. Jolicoeur’s family or his children. It is not known whether Ms. Vivancos even knew whether Mr. Jolicoeur had children. With these words, she did not say that Bobby or Bobby’s people were going to kill or hurt either Mr. Jolicoeur or his family.

[118] While I can accept that drug organizations in general have a reputation for using violence and intimidation, there is nothing before me to suggest that Mr. Jolicoeur knew of any violence that had been used by Bobby’s organization. He’d had some sort of unpleasant experience with Pablo but no specifics about that and no mention of violence.

[119] There is nothing to before me to suggest that Bobby is a dangerous person. I think that Bobby is probably a real person because Mr. Jolicoeur said that Bobby on occasion directly participated in street-level transactions when no one else was available. I do not know whether Bobby is his real name and I earlier suggested that Mr. Moldovan-Falnicu might be Russian Bobby because he was monitoring the drug line on the date in question. The fact that the owner of Ms. Vivancos’ work cell phone was Vlad Tepes does not tell me anything or that there is a real person of Russian extraction involved. Vlad Tepes may be a real person, Russian or not, or a pseudonym for someone else. There is an historical Vlad Tepes, you can look it up, and he is not Russian. All of this is to say, apart from Bobby being a drug dealer, I don’t know what Mr. Jolicoeur knew about how dangerous he might be.

[120] Now, on this point, Ms. Lind thought Mr. Ibanescu was not credible when he testified that drug dealing can be a business that involves fear and violence but that this particular drug organization was non-violent. She questioned how he could be a close friend of Ms. Vivancos but did not know her birthdate, whether she had a boyfriend or other particulars about her. She said Mr. Ibanescu’s disavowal of his then current involvement in the drug trade was contrary to the Agreed Statement of Facts.

[121] I am not overly concerned about Mr. Ibanescu’s credibility about the non-violent nature of Bobby’s drug organization. He did concede that it can be a dangerous business; hence the reason for Jessica to have a driver. Also, we are concerned with Mr. Jolicoeur’s state of mind

here and as I just said, there is no evidence about whether Mr. Jolicoeur knew that Bobby's organization is dangerous or not.

[122] Going back to the putative threats, while 'we know where you live' could be an implicit threat, the actual information from Mr. Jolicoeur statements is unclear about whether they, the drug organization, knew where he lived. Mr. Jolicoeur says he spotted someone, he did not say who, driving through the neighbourhood and that is the extent of their knowledge of his residence. On this basis, Mr. Jolicoeur told Sgt. Kuca in Statement #3, part 4 that he believed Bobby's crew had a rough idea of where he lived. Mr. Jolicoeur did say that he parked his work van a block away after the incident as a subterfuge so that they would not figure out where he lives exactly.

[123] Sgt. Kuca questioned Mr. Jolicoeur quite closely about why he took no further steps to warn or protect his family members on the night in question, such as moving them to a safe place, and Mr. Jolicoeur had no answer. These steps were not taken at first when he says he believed that Ms. Vivancos was still alive and able to alert Bobby. In fact, he left two young children and a 13 year-old babysitter alone in the house. And no steps were taken afterwards when he observed that Ms. Vivancos' body was discovered. As I said before, this behaviour shows that Mr. Jolicoeur was not overly concerned about the safety of his family and certainly not to the extent that it would have incited a homicidal reaction.

*Was Mr. Jolicoeur subjectively provoked?*

[124] Finally, the Crown argues that provocation had not actually subjectively manifested because the deadly attack on Ms. Vivancos was not the result of loss of the power of self-control, but rather a deliberate and rational choice made by him to prevent Ms. Vivancos from telling Russian Bobby or the drug organization about what had happened. Part of his motivation here, the Crown suggests, was to keep Kim in the dark about his drug activities.

[125] The Defence is quite right that I need to consider the totality of the statements, and not particular comments of Mr. Jolicoeur in isolation, before arriving at any conclusion about whether provocation has been made out or not. To be fair, Mr. Jolicoeur does give two reasons throughout all of his statements for why he engaged in the lethal attack on this Vivancos. The first is that he was attempting to prevent her from using her cell phone. The second is that he reacted to threats against his family. Both of these themes are constantly revisited throughout his statements. During argument, Ms. Magill for the Crown cited numerous instances from the transcripts of the former and Ms. Lind for the Defence referred me to numerous instances of the latter.

[126] The two cannot co-exist. It is not possible, in my view, to lose the power of self-control and at the same time act with a specific objective and purpose in mind, because the latter requires the actor to act rationally. Furthermore, a purpose or objective of stopping someone is not an emotion that can be combined with anger to produce provocation. Even if I accept that Ms. Vivancos uttered the statements attributed to her by Mr. Jolicoeur and that he interpreted them as a threat, I cannot reach the conclusion that it was the threat and a subsequent loss of the power of self-control that induced the homicidal attack upon Ms. Vivancos. I say that for two reasons.

[127] First, Mr. Jolicoeur is clear in his statements that during his assault of Ms. Vivancos, his objective or purpose was to prevent her from using her cell phone. Second, although he gave iterative statements in which concern for the safety of his family was presented as a concern

during his attack on Ms. Vivancos, with that concern evolving into the defence of provocation presented at this trial, I have concluded as I stated above that he has demonstrated by subsequent conduct that he was not overly concerned about the safety of his family. I am not saying this to mean that Mr. Jolicoeur is a bad family man or is unconcerned about his family. What I mean is that at the time of the deadly attack on Ms. Vivancos, he was primarily focused with her attempt to use her cell phone and that he did not perceive at the time that his family was at particular risk.

[128] I conclude that the Crown has disproven provocation as a defence for three reasons:

- The Crown has persuaded me that Ms. Vivancos' utterances were not sudden and unexpected.
- The Crown has also persuaded me that the nature and quality of the utterances were not sufficient to deprive an ordinary person of the power of self-control.
- Third, the Crown has persuaded me that on the facts Mr Jolicoeur was not actually provoked. Rather, in using lethal force against Ms. Vivancos he was acting deliberately and rationally in attempting to prevent Ms. Vivancos from using her cell phone.

[129] Now one might well ask, what about Mr. Jolicoeur's declarations and protestations throughout all of his statements that he had lost control, snapped and just reacted. None of that is inconsistent with trying to stop Ms. Vivancos from using her cell phone and then getting carried away. It still does not mean that he was provoked in the legal sense as found in s 232 *CC*.

#### **L. Conclusion on *WD***

[130] I will circle back and conclude with some comments about *WD*. I said earlier that the trier of fact is entitled to accept all, some or none of the particular witness' evidence. Mr. Jolicoeur's evidence came in through the Crown by way of his successive statements to police. I accepted Mr. Jolicoeur's evidence with regard to the broad outline of events, and the physical movements of the parties and the timeline of the events on November 16. Much of this was supported by independent objective evidence such as the cell phone records and GPS data. But I disbelieve specific factual exculpatory assertions made by Mr. Jolicoeur with respect to the contentious issues in this trial, particularly as they relate to his state of mind.

[131] I don't particularly believe that Ms. Vivancos pulled out a weapon and attacked Mr. Jolicoeur in an unprovoked manner while she was driving the Volkswagen Jetta down the service road. However, I was prepared to accept that scenario and the utterances attributed to Ms. Vivancos for the purposes of the provocation discussion.

[132] I already commented on how I interpreted Mr. Jolicoeur's many declarations that he did not intend to kill Ms. Vivancos and I found specifically that at some point during the final attack upon her, he knew he was inflicting bodily harm upon Ms. Vivancos likely to cause death, by striking her repeatedly on the head with a metal instrument and he was indifferent to the consequence, which was her death. Therefore, I have rejected any statement from Mr. Jolicoeur that he did not realize his actions would result in her death.

[133] I further found that he was not provoked by threats uttered by Ms. Vivancos but was rather motivated by a desire to stop her from using her cell phone. I rejected any contention on Mr. Jolicoeur's part that he was provoked into a homicidal reaction by threats spoken by Ms. Vivancos.

[134] I did not believe Mr. Jolicoeur on these particular exculpatory aspects of his statements. I am prepared to reject them outright and they do not leave me with any reasonable doubt with regard to the commission of second-degree murder.

[135] I did not accept his explanations for why he attempted to set the vehicle on fire or why he pushed the vehicle onto the pond ice. Those findings relate only to Mr. Jolicoeur's credibility. The post-offence conduct that was discussed much during the trial did not otherwise factor into my finding of intent for second-degree murder.

[136] I do not accept that Ms. Vivancos was still either conscious or coherent while Mr. Jolicoeur attempted to load her into the trunk. I find that she was either dead or that her life was ebbing away from her at the time.

[137] I find that on the totality of the evidence that I do accept, the Crown has proven beyond a reasonable doubt that Mr. Jolicoeur has committed the offence of second-degree murder.

### **M. Verdict**

[138] Please stand up, Mr. Jolicoeur.

[139] With respect to the single count in the indictment, I find you guilty of second-degree murder in the death of Saladina Vivancos.

[140] I thank counsel on both sides for the professional manner in which the trial was conducted. Mr. Jolicoeur, I know this is not the outcome you wanted. I think that Ms. Lind did and said everything possible to get you the outcome you were seeking, but it just didn't work out for you.

Trial heard on the 21<sup>st</sup> day to 25<sup>th</sup> day and 28<sup>th</sup> day to 30<sup>th</sup> day of March, 2022.

Oral reasons for decision delivered on the 24<sup>th</sup> day of May, 2022

**Dated** at the City of Edmonton, Alberta this 26<sup>th</sup> day of May, 2022.

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**Douglas R. Mah**  
**J.C.Q.B.A.**

### **Appearances:**

Alison Magill and Heather Fraser  
for the Crown

Amy Lind  
for the Accused