
CANADA / JUDGMENT

R. v. B.E.

2019 BCSC 1442

COURT

Supreme Court of British Columbia

DECIDED

27 June 2019

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. B.E.,

2019 BCSC 1442

Date: 20190627

Docket: 3371-2

Registry: Prince Rupert

Regina

v.

B.E.

Restriction on publication: Pursuant to s. 517 or the Criminal Code of Canada and s. 110 of the Youth Criminal Justice Act

Before: The Honourable Justice Williams

Oral Reasons for Judgment

Counsel for the Crown:

R.L. Kis

Counsel for the Defence:

J.J. Saulnier

Place and Date of Trial/Hearing:

Prince Rupert, B.C.

April 15-18;

May 6-8 and 13-14, 2019

Place and Date of Judgment:

Prince Rupert, B.C.

June 27, 2019

[1] THE COURT: B.E. is before this Court charged with two offences:

Count 1

B.E. on or about the 18th day of October 2017, at or near Prince Rupert, in the province of British Columbia, did commit the second degree murder of H.L., contrary to s. 235(1) of the Criminal Code.

Count 2

B.E., on or about the 18th day of October 2017, at or near Prince Rupert, in the province of British Columbia, did commit the second degree murder of S.L., contrary to 235(1) of the Criminal Code.

[2] He has entered pleas of not guilty in respect of each count.

[3] At the relevant time, the defendant was 17 years of age; accordingly, he is a young person as defined by s. 2 of the Youth Criminal Justice Act, S.C. 2002, c. 1. [YCJA], and this prosecution proceeds pursuant to s. 67 of that Act.

[4] Further, pursuant to the provisions of the YCJA, a Notice of Re-election and Consent to Re-election has been filed in this matter. By that notice, the accused and the Attorney General evidence their consent that the trial of the indictment will be heard by a Justice of the Supreme Court of British Columbia sitting without a jury.

[5] The trial commenced before this Court at Prince Rupert, on April 15, 2019, and continued, with some adjournments, over five days. A total of 12 witnesses were called by the Crown. As well, an extensive statement of admissions of fact was tendered in evidence.

[6] I heard the final submissions of counsel on May 13 and 14, 2019, and judgment was reserved to today's date.

[7] As matters have developed, much about this case is not in dispute. The events that give rise to the charges are admitted, as are a number of other matters. In effect, B.E. admits that he stabbed the two victims and caused their deaths; that is, he does not dispute that he committed the actus reus of the offences.

[8] However, in order to secure convictions for the murder charges, the Crown is obliged to prove beyond a reasonable doubt not only that he caused the deaths but also that he did so with the necessary criminal intent, that is, the mens rea.

- [9] In this case, B.E. says that the prosecution has not established that proof.
- [10] I will not discuss that issue in detail at this time. Later in these reasons I will return and deal with it at length, given that it is at the heart of this Court's verdict and given that a substantial focus of the submissions of counsel were directed to that matter.
- [11] Before doing so, I propose to set out the background circumstances and some details of the events, together with reference to certain of the investigative findings. A substantial amount of this description is taken from the admissions of fact, the contents of which are taken as proven.
- [12] The defendant, B.E., lived at [redacted]. He lived there with his foster parents, H.L. and S.L. They are the victims of the offences.
- [13] Mr. B.E.'s family of origin was in Alberta, but he was separated from them at a very early point in his life. Originally, he was placed with the L.s when he was two months old, and remained there until the age of five. For the next three years, he lived with an uncle, but at age eight, he was returned to the L.s, pursuant to a guardianship order, and he remained there until the events at bar.
- [14] There were no other children in the household. Only those three persons lived there.
- [15] In October 2017, B.E. was a student at Charles Hays Secondary School in Prince Rupert. He was enrolled in Grade 12 and was on track to graduate in the spring of 2018.
- [16] The residence where the family lived was a two-storey row house. Each of the three parties had their own bedroom on the second (upper) floor.
- [17] The events which give rise to this prosecution took place in the early morning hours of Wednesday, October 18, 2017.
- [18] To set the stage, on the day prior, that is October 17, at approximately 3:15 p.m., a meeting took place at the Charles Hays Secondary School. The meeting was attended by Ms. Pond, the principal of the school; Ms. Bryant, a counselor and teacher; Ms. Beckworth, a support worker; S.L.; H.L. and B.E. The purpose of the meeting was to address a concern that B.E. had been caught at school under the influence of marihuana, a few days earlier. The evidence is that the meeting went well, and the outcome was a decision that there would be an in-school suspension, together with drug/alcohol counselling on B.E.'s free afternoon block. Apparently B.E. was receptive to that outcome.
- [19] Also on the evening of October 17, B.E. worked a five-hour shift at a part-time job he had recently taken at a movie theatre in Prince Rupert. At the end of his shift, at 11:15 p.m., S.L. picked B.E. up from the theatre and drove him home. Upon arriving home, she told him to go to bed because he had school in the morning. S.L. then retired to her bedroom, together with the family dog.

- [20] In the early morning hours of October 18, I would estimate somewhere around or shortly prior to 1:30 a.m., S.L. was asleep in her bed when B.E. entered her bedroom and stabbed her multiple times with a knife. S.L. called out for her husband, H.L., who came to the bedroom. B.E. stabbed him when he entered the bedroom.
- [21] Following the stabbings, B.E. dialled 911, requesting an ambulance and providing the address of the residence to the dispatcher. When he was asked by the dispatcher what happened, he replied, "I can't remember what I did. I, I stabbed my parents."
- [22] Members of the RCMP were dispatched to the scene immediately, arriving shortly before 2:00 a.m. As they approached the residence, they saw B.E. standing, shirtless, at the top of the front stairs in the open front door, holding a telephone. He had blood on his chest, forearms, and hands. He was ordered to raise his hands and did so. He was handcuffed and taken into custody without incident.
- [23] Police officers entered the residence through the front door. They found H.L. lying on the floor, near the bottom of the stairs, in a pool of blood. He was bleeding heavily from his right arm and struggling to breathe. A police officer applied a tourniquet to his arm and the bleeding appeared to stop. H.L. had a brief conversation with the attending police officer.
- [24] Police went upstairs in the residence and located S.L. on top of the bed in her room. She had obvious injuries and was bleeding. Ambulance paramedics arrived shortly and transported her to hospital.
- [25] B.E. was then taken to the police detachment where he was processed.
- [26] At approximately 2:32 a.m., a physician in attendance at the residence pronounced H.L. deceased.
- [27] In their dealings with B.E. at the police detachment, the officers detected no odour of alcohol on the breath or body of B.E. He was observed to be quiet and compliant with the directions given to him by police during the processing procedure.
- [28] Following his processing, B.E. was placed in contact with legal counsel.
- [29] Later that day, that is, shortly before 2:00 p.m. on October 18, B.E. was transported by police to the Prince Rupert Regional Hospital for treatment of an injury to his finger. The attending doctor determined that there was a cut to his tendon that would require surgery at a later date. In the interim, the wound was cleaned and sutured. B.E. was then transported back to the police lockup.
- [30] On that same afternoon, an RCMP investigator interviewed B.E. and obtained a warned statement from him. That statement was video and audio recorded and has been received in evidence.

- [31] The police investigation included a search of the family residence. The forensic examination concluded that both S.L. and H.L. were stabbed in S.L.'s bedroom. Police investigators seized three knives:
- a steak type knife with multi-coloured rope wrapped around the handle, found in a kitchen drawer next to the refrigerator;
 - a steak type knife with a black handle, found on a roll-top desk in S.L.'s bedroom; and
 - a steak type knife located on a shelf in the open closet, between the top of the stairs and S.L.'s bedroom.
- [32] Two of the knives, that is the first and the third, had what appeared to be blood on them. The other did not.
- [33] On the evening of October 19, 2017, police facilitated a visit between B.E. and three of his family members - his sister, his brother-in-law, and his grandmother.
- [34] A short time later, police facilitated a visit between B.E. and his stepbrother R.L.
- [35] Audio recordings were made of those family visits.
- [36] An autopsy was performed on the body of H.L. The pathologist observed three wounds on his body, consistent with being stabbed. Two of those were to the right upper arm and the third was to the head. The arm wounds were of significant magnitude. The head wound was described as superficial.
- [37] The pathologist determined the cause of death to be blood loss from an injury to the right brachial artery, due to a stab wound in the right upper arm.
- [38] S.L. did not immediately succumb to her injuries. In fact, she survived for eight days and died on October 26, 2017.
- [39] Initially, she was treated at the hospital in Prince Rupert. While there, she was interviewed by police, and I will refer shortly to the contents of that interview.
- [40] On October 18, S.L. was transported to a hospital in Vancouver. Her condition on admission was deemed to be stable and she was expected to make a full recovery. However, on October 26, 2017, when she was undergoing emergency surgery, doctors detected a significant brain bleed in her brain stem. That injury was deemed inoperable and not compatible with life. She was kept on life support for a short time and declared dead at approximately 11:30 p.m. on October 26th.
- [41] An autopsy was performed on the body of S.L. The pathologist documented multiple recent stab wounds over her upper anterior (front) torso, her upper back, the left side of her head, the left shoulder, and her left hand. The cause of death was determined to be acute subdural hemorrhage (a bleeding of the brain) caused by a stab wound to the left side of her head.

- [42] In her interview with the police, S.L. described her history as the foster parent of B.E. and told of having picked him up at the theatre in the late evening of October 17. She told the officer that, upon arriving home, she had gone to her bedroom, and that later B.E. entered the room, which was unusual. She asked him what he was doing in the bedroom. She said that she felt she got hit by something, and then remembered feeling something warm running down her arm. She said that B.E. told her that he was going to call 911 and he walked out of her bedroom into the hall. Her next memory is of waking up in the hospital.
- [43] S.L. told the interviewing officer that there had been no previous history of violence with B.E.
- [44] The police investigation included a search of the family residence, which resulted in the finding of a number of items and articles in B.E.'s room. As well, R.L. (H.L. and S.L.'s adult son) found certain further items in B.E.'s room. Those were delivered to the police.

Positions of the Parties

- [45] The Crown says, relying on the definition of murder in s. 229(a)(ii) of the Criminal Code, R.S.C. 1985, c. C-45, and the common sense inference that a sane and sober person intends the natural and probable consequences of his actions, that the evidence establishes beyond a reasonable doubt that the defendant meant to cause bodily harm to the deceased persons, knowing it was likely to cause their death, and was reckless whether death ensued or not.
- [46] The Crown accepts that certain circumstances or conditions, such as intoxication by drugs or alcohol, evidence of a mental disorder or condition, and a lack of life experience and reduced maturity, can all, singularly or in combination, affect the ability of a young person to foresee the consequences of their actions. However, in the submission of the Crown, in the matter at bar, there is no evidence that the accused was intoxicated by drugs or alcohol; there is no evidence that the accused was suffering from a mental disorder or condition that would have impaired his ability to foresee the consequences of his actions at the time of the stabbings; and there is no evidence which would suggest that this defendant, by virtue of age, lack of life experience, and level of maturity, was in any way limited in terms of his ability to foresee the consequences of his actions. Accordingly, the Crown says that the common sense inference should be applied in assessing the issue of intent, and that in all the circumstances the clear conclusion to be drawn is that it has been established beyond a reasonable doubt that he meant to cause bodily harm which he knew was likely to cause death, and was reckless whether or not death ensued.
- [47] With respect to the other considerations, such as the fact that the defendant, following the event, provided assistance, including calling 911; the fact that he has expressed remorse; the fact that he is otherwise a person of good character; and that there was no evidence of animosity or a triggering event, the Crown submits that these, considered either individually or cumulatively, do not give rise to a reasonable doubt as to intent.

- [48] B.E. initially asserted that the Court should find that he was unable to control his actions: they were not voluntary. He accepts that is akin to "automatism, perhaps some form of parasomnia or sleepwalking." However, he also accepts that in the circumstances of this case, "the defence would bear the burden of establishing the acts were involuntary", and the defence has not done so. The defendant concedes that he has not led expert evidence to prove automatism, and he therefore, "cannot legally, as opposed to factually, prove automatism." Accordingly, he accepts that the Court will likely conclude the stabbing was an unlawful act.
- [49] The defendant submits that the issue to be determined is whether B.E. stabbed the victims "intentionally". B.E., in his submissions, does not concede that the stabbings were "intentional". He points out that the common sense inference is not a presumption and says that is only to be considered after the trier of fact takes into account all the evidence bearing on the matter of intention. Only when the trier of fact has done so and has no reasonable doubt should the trier of fact be entitled to consider the common sense inference.
- [50] An overall summary of the defence position on intent is found at paragraph 34 of the defendant's first submissions:
- B.E. could not remember the start of the incident;
 - The actions happened in a nightmare;
 - B.E. could not control his actions;
 - B.E. tried to help his parents afterwards; and
 - B.E. did not know why it happened.
- [51] In terms of issues to be considered in assessing intent, B.E. says that the following are relevant:
- his statement to the police and, in particular, his assertion that because of his sleep-affected condition, he did not have control of his actions;
 - he is a person of nonviolent and good character;
 - that there is no evidence of any motive;
 - the lack of any precipitating event;
 - his actions before, during and after the stabbings;
 - his post-offence conduct, including the call to 911 and the rendering of assistance; and
 - the statement of S.L. indicating that the event was untriggered.

- [52] The defendant submits that the significance of this analysis is that the Court should not approach the issue of intent, nor the common sense inference, from the starting point that he intended to stab his parents. That would make the only issue in the case whether he knew the natural consequences of stabbing someone multiple times in the head and neck. The issue is not whether he knew the natural consequences of intentionally stabbing his parents. The issue is whether he stabbed his parents intentionally.
- [53] With respect to the victim H.L., the defendant says that even with the application of the common sense inference, intent is not proven. He observes that there were only three wounds inflicted on H.L.: two stab wounds to the upper right arm and a third, superficial, wound to the scalp. As regards the arm wounds, the defendant says that when consideration is taken of the number of wounds and the locations (that is not to a vital part of the anatomy) together with the fact that there was an element of spontaneity in how the attack upon H.L. came about, there is a real doubt as to whether that evidence allows the Court to conclude beyond a reasonable doubt that the defendant intended to kill or cause bodily harm knowing death was likely to ensue. Although the wounds resulted in the death of H.L., the defence contends that it cannot be said that the death was a natural and reasonably foreseeable consequence of those wounds.

Issues for Determination

- [54] In fact, there is one central issue to be determined by this Court. That is, has the Crown proven to the requisite criminal standard that when B.E. inflicted the wounds upon H.L. and S.L., he meant to cause their deaths or meant to cause bodily harm that he knew was likely to result in the deaths of the victims and that he was reckless whether death ensued or not.

The Law

- [55] I commence with a statement of principles that will guide this Court's deliberation and that must be applied in the determination of verdict. Those are as follows:
1. The defendant is presumed to be innocent unless and until this Court is satisfied that the Crown has proven his guilt to the standard of proof beyond a reasonable doubt;
 2. The onus of proof lies upon the Crown; there is no obligation on the defendant to call evidence or to prove anything; and
 3. The criminal standard of proof beyond a reasonable doubt will apply in respect of each element. Any doubt on any element must be resolved in favour of the defendant. Unless the Crown proves all of the essential elements of the offence charged or any included offence, a verdict of "not guilty" must result.
- [56] The definition of murder as provided in the Criminal Code, as relevant to the matter at hand, is s. 229(a)(ii).

229 Culpable homicide is murder

(a) where the person who causes the death of a human being

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

[57] In order for the Crown to prove the murder charges against the defendant, it must satisfy the Court to a standard of proof beyond a reasonable doubt of two principal elements:

(1) That the defendant caused the deaths of the victims, that is the (actus reus), and

(2) That, at the time the defendant acted to cause the death, he meant to cause the victim bodily harm that he knew was likely to cause death, and was reckless as to whether death ensued or not (mens rea).

[58] In these reasons, I will sometimes refer to the latter element as the requisite murderous intent, even though the word intent is not used in the provision.

[59] Also relevant in the matter at hand is the offence of unlawful act manslaughter. That is not expressly defined in the Criminal Code. For practical purposes, it is a residual category of unlawful killing: an unlawful killing that is neither murder nor infanticide. Essentially, to prove guilt of manslaughter, the Crown must prove beyond a reasonable doubt two elements: that the accused caused the death of the victim and that the accused caused that death unlawfully. That second element of the offence is proven where the death is caused by an unlawful and dangerous act. An unlawful act is an act that is an offence under the law. With respect to the element that the act be dangerous, that is established if a reasonable person in the same circumstances would realize that the unlawful act would likely put another person at risk of bodily harm. Bodily harm means any hurt or injury that interferes with another person's health or comfort in something more than a brief or minor way. It is not necessary that the prosecution prove that a reasonable person would realize that the unlawful act would likely cause the death of that other person.

[60] The difference between the two offences is that murder requires the Crown to prove beyond a reasonable doubt that the defendant had the specific murderous intent as defined.

[61] Proof of unlawful act manslaughter does not require that the defendant intended or meant to cause the death of the victim. It is sufficient that the Crown establish the general intent required for the unlawful act.

[62] I make reference to the offence of manslaughter because, in the circumstances of the present case, it is a lesser included offence of the murder charges alleged against the defendant.

Analysis

A. Actus Reus

- [63] The submissions of the defendant make reference to the defence of non-insane automatism, essentially sleepwalking. In fact, the defendant concedes that the defence is not available to him.
- [64] In my view, that concession is proper and warranted.
- [65] In *R. v. Stone*, [1990] 2 S.C.R. 290, the Supreme Court of Canada made clear that the law recognizes automatism as a state of impaired consciousness in which an individual, though capable of action, has no voluntary control over that action. Such action, not stemming from a disease of the mind, supports a claim of non-insane automatism. The Court has also made clear that for such a defence to be invoked, there is an evidentiary burden upon the defendant. Furthermore, the Court held that the burden on the defence is constitutionally justified.
- [66] Three significant points made in *Stone* are these:
1. The law presumes that people act voluntarily. Accordingly, since a defence of automatism amounts to a claim that one's actions were not voluntary, the accused must rebut the presumption of voluntariness: para. 171.
 2. If the accused establishes non-insane automatism, the doctrinal effect is that the voluntariness component of the actus reus is not proven: para. 170.
 3. If a component of the actus reus is not proven, the defendant is to be acquitted: para. 157.
- [67] In the matter at bar, B.E. has not adduced any evidence that would support a finding of non-insane automatism.
- [68] I am therefore satisfied that the acts of the defendant B.E. were voluntary and that the actus reus is established.

B. Mens Rea

- [69] At the outset, I wish to address a point which arises from the defence submissions and, particularly, references to intentional acts. My concern is that there is some confusion or ambiguity in the use of that expression in those submissions. To my mind, it is important to distinguish between the question of whether acts are volitional, that is done voluntarily, and the issue of whether or not the act was done intentionally. The two are not the same. With respect to the first, whether an act is volitional, as noted, the law presumes that people act voluntarily. The Crown is not obliged to prove voluntariness beyond a reasonable doubt. The Crown is entitled to rely upon the premise that an act done by an apparently conscious individual is willing or voluntary.

[70] With respect to the intent required to be proven for murder, in *R. v. Moo*, 2009 ONCA 645, Justice Watt summarizes the fault element of s. 229(a)(ii) as follows:

[45] The fault element in the definition of murder in s. 229(a)(ii) consists of three components:

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

Subjective foresight of death is a constitutional requirement for the crime of murder: *R. v. Martineau*, [1990] 2 S.C.R. 633 (S.C.C.), at p. 646.

[46] The most prominent among the three components of the fault element in s. 229(a)(ii) is the intention to cause bodily harm of such a grave and serious nature that the person inflicting the harm, the accused, knows that the harm is likely to kill the victim. 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] 2 S.C.R. 1074 (S.C.C.), at pp. 1087-1088.

[47] The recklessness component of the fault element in s. 229(a)(ii) does not exist in a vacuum as the only mental or fault element, rather works together with the intentional infliction of horrible bodily harm: *Nygaard*, at p. 1088. The variation in the degree of culpability as between the fault elements of ss. 229(a)(i) and 229(a)(ii) is too slight to warrant distinction: *Nygaard*, at pp. 1088-1089.

[48] The requirement in s. 229(a)(ii) that the fatal assault be carried out in a reckless way, in other words by heedlessly proceeding with the deadly assault well-knowing the obvious risks, adds nothing to the vital element of the intent to cause bodily harm that the killer knows is likely to cause death and yet persists in the assault. Anyone who causes bodily harm that she or he knows is likely to cause death must, in those circumstances, have a deliberate disregard for the fatal consequences that she or he knows are likely to happen: *R. v. Cooper*, [1993] 1 S.C.R. 146 (S.C.C.), at pp. 154-155. In other words, such a person must, perforce, be reckless whether the victim lives or dies: *Cooper*, at p. 155.

[71] It has been frequently observed that intent is not an element that lends itself to being readily discerned. Sometimes, there will be evidence of statements and events that give a reasonable insight into intent. For example, two cases to which the Crown referred this Court are of that type: *R. v. Batstone*, 2019 BCSC 476; *R. v. Eli*, 2014 BCSC 2116. However, in some other cases, including the one at bar, that evidence is not present. In such instances, the trier of fact will be left to examine the trial evidence and consider it circumstantially. Accordingly, assessment of the issue can involve inferential reasoning, by which I mean the process by which certain facts are established and then a logical, rational conclusion is considered. Drawing an inference is the process of reasoning from proven facts to that conclusion.

- [72] Historically, courts tended to examine the issue in two stages. The first step was to consider whether the defendant had the capacity to form the intent. If there was reasonable doubt with respect to capacity, intent was not proven, and that was the end of the matter. If there was no reasonable doubt, then the second stage was to determine whether the evidence established that the defendant had the intent in fact. More recently, courts have adopted a streamlined approach, whereby the two stages collapse into one, with the ultimate focus being on whether the accused had the actual specific intent required for murder at the time of the alleged offence. See: *R. v. Lemky*, [1996] 1 S.C.R. 757 at para. 16; *R. v. Daley*, 2007 SCC 53 at paras. 49-50, 100-102; *R. v. Spence*, 2017 ONCA 619. As stated in *R. v. Reeves*, 2017 BCCA 97 at para. 20, the ultimate question is not whether the accused could have formed the intent; rather it is did the accused form the intent.
- [73] In the context of determining the accused's actual intent, courts may, in certain circumstances, have recourse to what is known as the common sense inference. *R. v. Seymour*, [1996] 2 S.C.R. 252 describes this inference as follows:
- [19] When charging with respect to an offence which requires proof of a specific intent it will always be necessary to explain that, in determining the accused's state of mind at the time the offence was committed, jurors may draw the inference that sane and sober persons intend the natural and probable consequences of their actions. Common sense dictates that people are usually able to foresee the consequences of their actions. Therefore, if a person acts in a manner which is likely to produce a certain result it generally will be reasonable to infer that the person foresaw the probable consequences of the act. In other words, if a person acted so as to produce certain predictable consequences, it may be inferred that the person intended those consequences.
- [20] It used to be a standard instruction to juries that there was a presumption that a person intends the natural and probable consequences of his or her acts. However, the Ontario Court of Appeal wisely held in *R. v. Giannotti* (1956), 115 C.C.C. 203, that, rather than a presumption, it should be considered a reasonable inference which may be drawn but is not required to be drawn by juries. This reasoning was subsequently affirmed in *Mulligan v. The Queen*, [1977] 1 S.C.R. 612.
- [21] The common sense inference as to intention, which may be drawn from actions of the accused, is simply a method used to determine the accused's actual intent. the jury must be instructed to take into account the evidence of the accused's consumption of alcohol or drugs, along with all the other evidence which is relevant to the accused's intent, in determining whether, in all the circumstances, it would be appropriate to draw the permissible inference that the accused intended the natural consequences of his actions.
- [74] In *R. v. Robinson*, 2010 BCSC 368, Mr. Justice Joyce summarizes when and how the "common sense inference" is to be applied, noting the modern one-step analytical approach to determining whether the accused had the actual intent:

[107] Of course, the Crown has the burden to prove the requisite intent under s. 229(a)(ii) beyond a reasonable doubt. Because we cannot look into the mind of the accused and there is often little direct evidence of an accused's mental state, intent must generally be proven based upon inferences to be drawn from established facts. This is where use may be made of the common sense inference that a sane and sober person intends the natural consequences of his acts. But there may be circumstances that cast doubt on whether one can safely rely on the common sense inference. Such circumstances include intoxication, whether by alcohol or drugs. In addition, evidence of a mental condition that falls short of a mental disorder that renders the accused not criminally responsible, may raise a reasonable doubt as to whether the accused had the necessary specific intent. If such circumstances, either alone or in combination, raise a reasonable doubt that the accused had the subjective intent to cause bodily harm or that he had the subjective knowledge that the bodily harm he inflicted was of such a nature that it was likely to result in death, then the accused is entitled to the benefit of that doubt and cannot be convicted of murder.

[108] Furthermore, the ultimate question is not simply whether the accused had the capacity to form the specific intent, but whether because of intoxication or any other relevant circumstances he did not in fact possess that intent at the time he committed the homicide. In most cases, it is not necessary and not helpful to go through a two step process of determining, first, whether the accused had the capacity to form the intent and, secondly, if so, whether in fact he had the requisite intent. A two-step test was rejected by the British Columbia Court of Appeal in *R. v. Canute* (1993), 80 C.C.C. (3d) 403 (B.C.C.A.) where Wood J.A. said at p. 418-19:

In fact, as was pointed out in *Korzepa* [*R. v. Korzepa* (1991), 64 C.C.C. (3d) 489 (B.C.C.A.)], the two-step test in *MacKinlay* [*R. v. MacKinlay* (1986), 28 C.C.C. (3d) 306 (Ont. C.A.)] is inherently confusing. What reason could there be for requiring a jury to struggle with the elusive concept of "capacity to form an intent", when at the end of that exercise they will only be required to turn their consideration to the real legal issue, namely, the actual intent of the accused? The issue of actual intent necessarily renders the question of capacity to form that intent redundant. With respect, it seems that the only likely result of retaining the two-step approach in *MacKinlay*, with its reference to "capacity", would be to confuse the jury into considering something other than the actual intent of the accused, with potentially unconstitutional consequences.

[109] In *R. v. Robinson*, [1996] 1 S.C.R. 683, Lamer C.J.C. agreed that a two-step process is generally not necessary, although there may be cases where it is appropriate. At para. 48 he said:

48 How then should juries be instructed on the use they can make of evidence of intoxication? I am of the view that before a trial judge is required by law to charge the jury on intoxication, he or she must be satisfied that the effect of the intoxication was such that its effect might have impaired the accused's foresight of consequences sufficiently to raise a reasonable doubt. Once a judge is satisfied that this threshold is met, he or she must then make it clear to the jury that the issue before them is whether the Crown has satisfied them beyond a reasonable doubt that the

accused had the requisite intent. In the case of murder the issue is whether the accused intended to kill or cause bodily harm with the foresight that the likely consequence was death.

[110] Where there is evidence of a mental condition relevant to intent, this evidence must be considered along with all the other evidence in determining whether the accused had the intent requisite for murder. Such consideration does not create the notion of diminished responsibility, which does not exist in our law. Rather it simply recognizes that if the accused was suffering from some sort of mental condition at the time of the offence, that mental condition is a circumstance that might affect whether or not he formed the necessary specific intent (see *R. v. Bailey* (1996), 111 C.C.C. (3d) 122 (B.C.C.A.)).

[111] Evidence of intoxication, whether by alcohol, drugs or both, and evidence of a mental condition or state is to be considered with respect to the question whether the accused intended to cause bodily harm as well as the question whether he had the subjective foresight or knowledge that the bodily harm was likely to cause death and was reckless whether death ensued or not, that is the accused's ability to measure and foresee the likely consequences of his actions. In *R. v. Dickson* 2006 BCCA 490, Rowles J.A. made the point at para. 53 in these words:

53 The case authorities support the appellant's argument that the instructions to the jury ought to have made a clear and specific link between the potential effects of intoxicants and a person's ability to measure and foresee the likely consequences of his or her actions. The foundation for giving such an instruction is explained in *Seymour* by Cory J. at para. 22:

One of the effects of severe intoxication is an inability to foresee the consequences of one's actions, much less intend them. It was for this reason that the Ontario Court of Appeal in *MacKinlay*, supra, at p. 332, held that the state of mind required to commit the crime described in s. 229 (a)(ii) involves an ability on the part of the accused to measure or foresee the consequences of his act and that, therefore, the jury should consider whether intoxication affected his ability to have the required foresight.

[112] While the foregoing passage speaks of intoxication, it is my view that it applies as well to evidence of a mental condition that affects a person's ability to measure and foresee the consequences of one's actions.

[75] In *R. v. Walle*, 2012 SCC 41, Justice Moldaver provides a helpful overview of how the trier of fact is to ultimately assess the accused's intent:

[65] In the end, what is critical is that the jury be made to understand, in clear terms, that in assessing the specific intent required for murder, it should consider the whole of the evidence that could realistically bear on the accused's mental state at the time of the alleged offence. The trial judge should alert the jury to the pertinent evidence. How detailed that recitation should be will generally be a matter for the trial judge, in the exercise of his or her discretion.

- [66] After the jurors have been alerted to the pertinent evidence, they should be told that if, after considering the whole of the evidence, they believe or have a reasonable doubt that the accused did not have one or the other of the requisite intents for murder at the time the offence was committed, then they must acquit the accused of murder and return a verdict of manslaughter.
- [67] If, however, there is no evidence that could realistically impact on whether the accused had the requisite mental state at the time of the offence, or if the pertinent evidence does not leave the jury in a state of reasonable doubt about the accused's intent, then the jury may properly resort to the common sense inference in deciding whether intent has been proved.
- [76] A critical consideration in the present case is whether it is appropriate for this Court to apply the common sense inference in deciding whether the Crown has proven the element of intent. The Crown says it is appropriate to apply the inference. The defendant says it is not.
- [77] Whether or not to apply the common sense inference depends in significant measure on the state of the evidence of the defendant's mental circumstances at the time of the offence. Put simply, did the accused have a sufficiently "sane and sober" mind, such that the common sense inference can be drawn that he intended the natural consequences of his actions?
- [78] Typically, circumstances that may impact the state of the accused's mind, for the purposes of whether the common sense inference may be drawn, are intoxication (by drugs and/or alcohol), some form of mental disruption (such as a psychiatric or psychological condition), or, in the case of a youth, "lack of life experience [that] affects the level of maturity and can affect the ability of youths to foresee the consequences of their actions": *R. v. F.M.*, 2008 BCCA 111, paragraph 24.
- [79] In short, it seems to me that the critical element is whether there is some consideration (or considerations) present which raise a reasonable doubt about the accused's mental state at the time of the alleged offence.
- [80] In the case at bar, there is no evidence to suggest that the defendant's state of mind was, at the relevant time, compromised by intoxication, his youth, or his level of maturity. Rather, the matter turns on the mental disruption aspect. While this aspect may be variously described as a mental condition, illness, or disturbance, amongst others, for the purpose of the analysis which follows, I will refer to it as mental disruption.
- [81] Notwithstanding that the accused was not in a state of non-mental disorder automatism (and is accordingly presumed to have been acting voluntarily) and has led no medical evidence to establish a mental disorder (as contemplated by s. 16 of the Criminal Code), evidence of the accused's mental condition at the time of the offence remains relevant to determining whether the common sense inference can be applied, and, ultimately, if the fault element required for murder has been proven beyond a reasonable doubt: *Robinson* at para. 110-111; *Spence* at para. 45-49; *R. v. Bakker*, 2003 BCSC 741 at 99-100.

- [82] There is no question that the facts of this case are unusual. Moreover, the assessment of the accused's intent is made more difficult because the evidence bearing on that issue is entirely circumstantial.
- [83] The Court must critically examine all of the evidence as it goes to this issue. Ultimately, it is necessary to consider all of the circumstances to discern whether the defendant's state of mind was sufficiently mentally disrupted so as to warrant not characterizing him as possessing the required sane and sober mind for the common sense inference that he intended the natural consequences of his actions to be drawn.
- [84] I note that while the actus reus and the mens rea, that is the intent, must at some point coincide, intent need not persist throughout the entire act for the offence to be made out. That is, it is not always necessary for the guilty act and the intent to be completely concurrent: *R. v. Cooper*, [1993] 1 S.C.R. 146 at paras. 18-24. Therefore, the Crown may be able to establish the offence of murder if the accused had the aforementioned requisite murderous intent at some point during the stabbing, even if he did not have this intent throughout the entire stabbing.
- [85] To conclude and to be clear, in considering this issue, it is not a matter of whether I believe the claims of the defendant with respect to his state of mind. By his claims, I refer to certain statements made by B.E. Rather, the issue is whether there is a reasonable doubt regarding whether the accused acted with the requisite murderous intent. If the trier of fact has reasonable doubt of the accused's intent, the common sense inference must not be applied: *Seymour* at para. 23.
- [86] To reiterate, for the fault element of murder in s. 229(a)(ii), the accused must foresee a likelihood of death flowing from the bodily harm he intentionally caused the victim: *Moo* at para. 38.
- [87] Thus, the Crown must prove beyond a reasonable doubt that B.E. knew death was a likely consequence of his actions for each guilty verdict of murder: *Daley* at para. 48; *Batstone* at para. 113. If the Crown fails to prove this element, the accused will be guilty of the lesser and included offence of manslaughter, so long as the Court is satisfied that (a) the unlawful act was objectively dangerous; and (b) a reasonable person would recognize that it subjected the victim to a risk of bodily harm that was neither trivial nor transitory: see *R. v. Park*, 2018 BCSC 1632 at paras. 107-108.
- [88] In my view, the principal consideration regarding the accused's intent is the evidence found within certain statements made by B.E. subsequent to the event. I refer specifically to statements made by him to the police investigator in the interview that was conducted on October 18th. As noted, that statement was audio and video recorded, and a transcript was prepared. The statement was tendered as part of the Crown's case. For reference, I excerpt six particular passages from that statement:

B.E.: I went to work at six around six to about eleven and work was well, as soon as I got home, I went to bed and fell asleep, as soon as I woke up I realized I had the knife in my hand and I realized that like I think it was when [H.L.] pushed me away and that's when I woke up and I started shaking a bit like...

B.E.: Um [H.L.] was upstairs sleeping in his room, [S.L.] went to go watch TV for a little bit, I went straight to my room and went to bed and fell asleep, like I that when [S.L.] went up to her room like her foot steps on the stairs kind of woke me I went up to go get a drink of water then I went back to bed then I fell asleep kind of felt like a nightmare.

B.E.: I woke up and I saw so, so much blood everywhere it scared me, what scared me more was because [H.L.] was, [H.L.] was bleeding and he, his voice was calm, his voice was calm.

B.E.: When I woke up I didn't notice like we were in [S.L.]'s room I didn't see her, yet

B.E.: I remember one more thing, once I woke up I looked at [H.L.] and seen him bleeding and I asked what happened I asked him what happened a few times.

HUFF: And that's what we're trying to figure out, we're trying to figure why, you talk about this nightmare, do you remember the nightmare?

B.E.: I remember part of it.

HUFF: Let's, let's talk about that.

B.E.: I remember the start of it.

HUFF: Sure.

B.E.: And it scared me I don't know how I didn't wake up, I was holding the knife above her head, it seemed like I was getting ready to swing it down on her head.

HUFF: Take your time, buddy.

B.E.: Thank you, then I swung it down then there was a small black out and I remember was she leaned up to hug me and asked what was happening and I didn't reply anything and I think I stabbed her back.

HUFF: You think you stabbed her in the back?

B.E.: Yeah then I pulled the knife out and I let go of her then she called out for [H.L.] and I, [H.L.] came down the hall I don't remember him turning on the lights I think as soon as he got to the door I just plunged at him that's when I got and then that's when he pushed me on, pushed me off of him and that's when I woke up.

HUFF: That's, um

B.E.: And I became too shocked that but, just too shocked that I and it's hard to process somethings.

HUFF: The officer, Yeah, for sure, so when you punched at [H.L.] in your dream and then you woke up you were holding

B.E.: I was still holding the knife.

[89] In my respectful view, this is evidence which directly bears upon the issue of intent, and also upon whether it is appropriate to apply the common sense inference. I find that these statements raise a doubt as to whether B.E. was sufficiently sane and sober for me to permissibly draw the common sense inference that he intended the natural consequences of his actions regarding S.L. That is, the accused is describing being in a state of mind that casts doubt on whether he was able to subjectively foresee the consequences of the bodily harm he was inflicting on S.L. To find the fault element of murder proven, I must be satisfied that the accused's mind was of sufficient competence at the time of S.L.'s stabbing that he knew that this was likely to kill her.

[90] There is in this case what I would categorize as evidence of motive or lack thereof. *Lewis v. The Queen*, [1979] 2 S.C.R. 821 at 831, makes clear that motive and intent are distinct concepts in criminal law. The mental element of a crime ordinarily involves no reference to motive, and motive need not be proven. However, as Lewis summarizes at 833-838, evidence of motive may nonetheless be relevant and probative to the matter of intent:

- (1) As evidence, motive is always relevant and hence evidence of motive is admissible;
- (2) Motive is no part of the crime and is legally irrelevant to criminal responsibility. It is not an essential element of the prosecution's case as a matter of law;
- (3) Proved absence of motive is always an important fact in favour of the accused;
- (4) Conversely, proved presence of motive may be an important factual ingredient in the Crown's case, notably on the issue of intention, when the evidence is purely circumstantial;
- (5) Motive is therefore always a question of fact and evidence; and
- (6) Each case will turn on its own unique set of circumstances. The issue of motive is always a matter of degree.

Lewis remains good law: see *R. v. Barton*, 2019 SCC 33 at paras. 130-132.

[91] At the same time, as noted by Mr. Justice Punnnett in *Eli*, at para. 178, the fact that the accused's behaviour is inexplicable is not relevant to the issue of intent. While motive may have been relevant evidence for the Crown, lack of motive does not mean a lack of intent.

[92] That said, in the facts at hand there are a number of considerations that suggest an absence of motive, which I consider to be at least somewhat supportive of my doubt as to the accused's harbouring the requisite murderous intent:

1. That there was no history of animosity between the defendant and his foster parents;

2. That there was no history of violence in the relations between the defendant and his foster parents; and
3. That there was no precipitating event prior to the stabbings.

[93] I note, as well, that the defendant is a person of otherwise good character.

[94] At the same time, there are also aspects of the evidence that offer some support for the view that relations were troubled as between the defendant and his foster parents:

1. The notation he made in his journal to the effect that his personal credo was, "Take no shit".
2. The events that had transpired on the afternoon of November 18, when the defendant and his foster parents had a conference with school authorities to discuss the issue of B.E.'s use of marihuana, and particularly a comment attributed to S.L. in that conference, namely to the effect that if there were recurrences of such problems, he would be sent back to Alberta.
3. There were suggestions offered by the defendant, both in his police interview and his conversations with R.L., wherein he makes reference to possible reasons for him to have animus and to have acted out against the L.s.

[95] There is also, of course, the evidence that prior to making his attack upon S.L., B.E. obtained two knives and then entered her room. There is, as well, the fact that the attack upon S.L. was prolonged and brutal. My understanding is that there were some 33 incised wounds to her body, including 17 wounds to the chest and back, and eight injuries to the head, one of which penetrated her skull. In the defendant's statement to the police, he describes obtaining a knife from the kitchen and certain moments during the course of the attack when he apparently had some fragmentary memory of what was occurring. These features of the event are very troubling, and I have considered their relevance carefully. Nevertheless, they do not answer my concerns with respect to his state of mind and my reservations about his inability to foresee the consequences of his actions. These features do not convince me that he formed the requisite murderous intent, and are not inconsistent with him being of a state in which he was not able to form the intent required.

[96] "After the fact conduct" may also be taken into account in assessing intent, including for second degree murder: *Batstone* at paras. 131-139, citing *R. v. Calnen*, 2019 SCC 6. Like other forms of circumstantial evidence, after the fact conduct allows the fact finder to draw particular inferences based on the accused's words or actions. The strength of the inference that can be drawn from the evidence "will be determined by the nature of the conduct, what is sought to be inferred from the conduct, the parties' positions, and the totality of the evidence": *Calnen* at para. 135. In determining whether an inference may be drawn, the court is to consider it against the evidence, logic, and common sense, as explained in *Calnen* at para. 145:

Whether an inference is available is measured against what is reasonable and rational according to logic, human experience, and common sense. It is this combination which informs the determination of whether the impugned evidence makes the proposition more or less likely. This is an evaluative assessment, which is not defeated simply by listing alternative explanations. As long as the evidence is more capable of supporting the inference sought than the alternative inferences, then it is up to the fact finder, after considering all explanations, to determine what, if any, inference is accepted, and the weight, if any, to be provided to a piece of circumstantial evidence.

- [97] I note the caution in *R. v. Giroux*, 2007 BCCA 488 at para. 61 that after the fact conduct is generally not relevant to determining whether the accused had the requisite intent when they have admitted the actus reus. That is, when after the fact conduct is as consistent with the commission of one crime, say manslaughter, as it is with the commission of another, say second degree murder, it generally is not probative of intent.
- [98] Here, the accused called 911 following these events. He provided a statement, cooperated with the police, and appeared to be genuinely remorseful for and perplexed by his actions. In the totality of the evidence, logic, human experience, and common sense, that seems quite strikingly at odds with the notion of having committed these acts with the requisite murderous intent. Of course, that is not a certainty, but it nevertheless informs my analysis.
- [99] To summarize my view, there is no doubt that what occurred in that home on that early morning was a shocking, horrific act of ferocious violence. It left two good and decent people dead. Frankly, it is baffling.
- [100] As mentioned, it is not a matter of whether I believe B.E.'s statement about his state of mind at the time he was in the stabbing frenzy of S.L. While I have serious doubts about what he said, I am unable to be sufficiently sure, beyond a reasonable doubt, that B.E. should not be believed in terms of how he described his state of mind. There is a body of other evidence. I have referred to the bulk of it. Counsel made extensive submissions concerning it. Again, this evidence can be seen, to some extent, to support either side of the argument. I realize that some of that evidence is only of tangential relevance to the issue of intent, but it all goes to make up the larger picture.
- [101] My finding that B.E. was experiencing some type of mental disruption at the time of these events is important in terms of the outcome of these very serious charges. An explanation is in order.
- [102] I have found that there is a real and reasonable possibility that when B.E. made his attack he was in a state of mental disruption, such that I cannot be confident that he was "sane and sober". I make that finding, in the absence of any medical evidence to support it, without any expert opinion. In effect, the conclusion is based upon my assessment of all the circumstances.

- [103] In my view, while the Court is undoubtedly obliged to look critically at such situations, this is a matter of applying common sense and judgment. Ultimately, I must draw legal conclusions and not medical ones.
- [104] As for the basis of my conclusion that there was a mental disruption at the relevant time, as best I can surmise, there is reason to think he may have been experiencing some meaningful limitation of consciousness, related to having been sleeping, and operating in a state of partial wakefulness.
- [105] Certainly, I do not believe that B.E.'s mental state at the time he made his attack on S.L. was such that I could find that his mind was disengaged from his actions so as to be in a state of non-insane automatism. However, I do have a doubt that he was sufficiently mentally engaged with his actions so as to foresee that the bodily harm he inflicted would likely be fatal.
- [106] Accordingly, after considering all of the evidence, on balance, I am left with a reasonable doubt as to the issue of B.E.'s specific murderous intent regarding S.L., and I am obliged to resolve that doubt in the defendant's favour. In the result, I am not able to conclude that the offence of murder against S.L. has been made out. However, I am satisfied that the elements of manslaughter have been established and that the accused is guilty of this offence in regard to S.L. Specifically, I find that B.E. caused her death and that he did so by means of an unlawful act, assault with a weapon, an act that is both unlawful (that is, an offence against the Criminal Code) and objectively dangerous.
- [107] I turn now to the matter of the infliction of the wounds to H.L. To my mind, there are different considerations that apply.
- [108] In my view, the statement that B.E. made to the police, when examined carefully, indicates that the mental disruption concern that I have explained, regarding his attack on S.L. was less a factor during the time he engaged with H.L. and stabbed him. Although not perfectly clear, it seems to me for at least a part of the event he was operating at a higher level of awareness, sufficient for me to conclude that it is appropriate to apply the common sense inference that was discussed earlier.
- [109] In doing so, the question that has to be asked is whether, in stabbing at H.L. as he did, he intended to cause him bodily harm that he knew was likely to cause death and was reckless as to whether or not death ensued. That, in turn, raises the issue of whether the natural and probable consequence of those blows can be said to be bodily harm that would likely result in H.L.'s death. There were a total of three wounds inflicted. Two of them were stabs to the upper arm. The third was what is described as a relatively trivial and inconsequential wound to the head. As matters turned out, the arm wounds were fatal, in that major blood vessels were severed and H.L. died as a consequence of blood loss.

- [110] When I consider the number of blows that were struck, together with the fact that they occurred at a point in time when H.L. presented himself at the door to the bedroom, and to some extent may be seen to have surprised or challenged B.E., there was a certain sudden and reactive component to the attack. Furthermore, the fact that the significant wounds were inflicted to an area of the anatomy (that is the upper arm) which is not strikingly vulnerable, also seems to me to be relevant.
- [111] All things considered, I have some doubt as to whether or not the circumstances of the stabbing of H.L. support the conclusion that, at the relevant time, B.E. had the requisite murderous intent and, accordingly, I am not prepared to find the charge of murder to have been proven.
- [112] Nevertheless, it is to my mind self-evident that the offence of unlawful act manslaughter has been made out. There is no doubt that the wounds inflicted by B.E. caused the death of H.L. Furthermore, I am satisfied that they were the consequence of an unlawful act, that is, an assault with a weapon, and the act was inherently dangerous.
- [113] In the result, I find that the Crown has not proven the offences of murder with respect to the death of either S.L. or H.L. However, I do find that the Crown has proven the included offence of manslaughter, in respect of each of those two persons.

"Williams J."

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Prepared on 29 October 2026 · Esheria