

CANADA / JUDGMENT

R. v. Ball

2020 BCSC 2243

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2243 R. v. Ball

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ball,

2020 BCSC 2243

Date: 20201211

Docket: 77086

Registry: Nanaimo

Regina

v.

Jonathan David Ball

Before: The Honourable Mr. Justice Crossin

Oral Reasons for Judgment

Counsel for Crown:

Nicholas P. Barber

Counsel for Accused:

Jeffrey R. Arndt

Place and Date of Trial/Hearing:

Nanaimo, B.C.

January 13-17, 20-24 and

September 14-17, 2020

Place and Date of Judgment:

Nanaimo, B.C.

December 11, 2020

Introduction

[1] The accused is facing four charges arising from two separate fires occurring on the same property at or near Coombs, British Columbia.

[2] The charges are as follows:

Count 1 / Chef 1

Jonathan David BALL, on or about the 26th day of June, 2013, at or near Coombs, in the Province of British Columbia, did break and enter a place, situate at 1800 Gibbs Rd and commit an indictable offence therein, contrary to Section 348(1)(b) of the Criminal Code.

Count 2 / Chef 2

Jonathan David BALL, on or about the 27th day of June, 2013, at or near Coombs, in the Province of British Columbia, did break and enter a place, a dwelling house, situate at 1800 Gibbs Rd and commit an indictable offence therein, contrary to Section 348(1)(b) of the Criminal Code.

Count 3 / Chef 3

Jonathan David BALL, on or about the 26th day of June, 2013, at or near Coombs, Province of British Columbia, did intentionally or recklessly cause damage by fire or explosion to property not owned in whole or in part by Jonathan David BALL, contrary to Section 434 of the Criminal Code.

Count 4 / Chef 4

Jonathan David BALL, on or about the 27th day of June, 2013, at or near Coombs, Province of British Columbia, did intentionally or recklessly cause damage by fire or explosion to property, a dwelling house, not owned in whole or in part by Jonathan David BALL, contrary to Section 434 of the Criminal Code.

[3] Counts one and three allege Mr. Ball broke and entered a place at 1800 Gibbs Road and caused damage to that place by fire on June 26, 2013. It is alleged Mr. Ball, on this day, broke and entered a garage on the property and committed arson.

- [4] Counts two and four allege that Mr. Ball, on the next day, June 27, 2013, returned to the same property; broke and entered the residence, and committed arson in relation to that residence.
- [5] On neither of these occasions were the premises occupied.
- [6] A week or two after the fires the RCMP in the community of Oceanside, near Qualicum, British Columbia, interviewed Ms. Carmen Lacey. Ms. Lacey and the accused had recently experienced a breakup of their romantic relationship.
- [7] It was on July 6, 2013, she attended the RCMP detachment and provided a statement to the RCMP. She alleged her ex-boyfriend, the accused, had confessed to her that he had lit the fires. The alleged confessions by the accused were made, according to Ms. Lacey, in face-to-face discussions and, as well, via Facebook messaging between the cell phone of the accused and the computer of Ms. Lacey.
- [8] During the interview of Ms. Lacey, the RCMP arranged for Ms. Lacey to utilize an RCMP computer and retrieve the Facebook messages from her own computer. Once accomplished, the RCMP took photos or screenshots of the messages as they appeared on the RCMP computer.
- [9] Armed with this information, the accused was arrested by the RCMP on July 10, 2013. On the same date, the accused underwent an in-custody interview conducted by Cst. Racz and Cst. Kipperchuk. It took place at the local RCMP detachment. The statement was audio and video recorded. A voir dire was conducted concerning the voluntariness of the statement. I concluded the statement was made voluntarily and the statement has been tendered by the Crown in the trial.
- [10] The statement is recorded over the course of approximately two hours. The accused initially denied setting the fires and denied confessing these matters to Ms. Lacey. He urged the RCMP to undertake an analysis of her computer and his cell phone. He contended the messages were "fake" and were not in fact created by the accused.
- [11] Later in the interview, the accused resiled from his denials and confessed to setting the fires and admitting the conduct to Ms. Lacey.
- [12] One of the central themes of the defence on the voir dire in relation to the statement was the assertion the confession was false. Indeed, the accused testified on the voir dire to this effect.

[13] In finding the statement was voluntary, I also found as follows:

In my view, in the circumstances of this case, the position of the accused that he provided a false confession is more properly assessed within the context of the whole of the evidence presented at trial; not within the framework of a voir dire concerning voluntariness.

[14] The accused testified in the trial. He testified the inculpatory nature of his statement is false.

- [15] There is no identification evidence linking the accused to the scene of the fires during the relevant time frame. There is no forensic evidence linking the accused to the crime. There is no expert opinion evidence concerning the cause or origins of the fire. The computer of Ms. Lacey and the cell phone of the accused was not forensically examined and indeed the Facebook messages are not before me.
- [16] It is clear the case for the Crown really rests on the statement of the accused and the evidence of Ms. Lacey. In this regard, credibility is very much in issue.

Background Facts

- [17] Much, if not all, of the evidence heard on the voir dire was, by agreement, tendered as evidence at trial. In addition, there is further evidence adduced at trial, including, as referenced, additional evidence of the accused.
- [18] There is certain common ground in the evidence.
- [19] The offences took place in a small community on Vancouver Island in British Columbia. The participants in the narrative of events were all known to one another.
- [20] The property in question is owned by Mr. and Mrs. Maskell. They have a son, Mark Maskell. It appears Mark Maskell alienated many people in the community as a result of his behaviour. The accused and Mark were friends for a period of time. They were in a band together. The accused was often at Mark's home (the residence that is the subject matter of counts 2 and 4) practising and playing music. In and around the time of these events, in June 2013, the relationship between the accused and Mark Maskell had deteriorated. This was due in part to a dispute concerning the location of an amplifier.
- [21] Ms. Carmen Lacey also lives in the community. Ms. Lacey and the accused dated for a good period of time leading up to the events in question. It also appears that in and around the time of these events, the relationship between the accused and Ms. Lacey had become somewhat toxic and had ended, or was in the process of ending. Ms. Lacey also knew Mark Maskell. She was, as well, at least at the time of these events, for her own reasons, not fond of Mark Maskell.
- [22] Mr. and Mrs. Mrychka also live in the community. Mr. and Mrs. Mrychka have children, including a daughter, Brooklyn Mrychka. At the time of these events, the accused appeared to have been in the process of beginning, or had begun, a romantic relationship with Brooklyn Mrychka as he was ending the relationship with Ms. Lacey. Brooklyn Mrychka had also dated Mark Maskell. It is this romantic knot that was also causing difficulties in the relationship between the accused and Mark Maskell and, perhaps, the relationship between the accused and Ms. Lacey.

- [23] The father of Brooklyn Mrychka, Mr. David Mrychka, also held very unkindly feelings toward Mark Maskell; to say the least. It appears that this ill will was primarily as a result of the way Mr. Mrychka perceived Mark Maskell as having treated his daughter Brooklyn when they were dating.
- [24] Mr. Mrychka, approximately a week before these offences, left highly threatening voice messages on the Maskell's phone directed at Mark. There is also evidence that he threatened to burn the Maskell's house down. In addition, he delivered a letter to Mrs. Maskell which letter was so highly inflammatory and threatening to the Maskell family that Mr. Mrychka was ultimately viewed as a suspect in these offences and was interviewed by the police. One of the more understated features of the letter is as follows:

I will get you back for all you have done. You are the scum of the earth. Now it's my turn to play WAR! I am gonna fuck you up now!

- [25] In any event, the Maskell property appears to be a sprawling configuration of a long driveway through a wooded area leading up to the residence. As you approach the residence there is a garage or, as it was sometimes referred to during the trial, a shed. There is, as well, a structure that was referred to as a cabin. There may have been other structures on the property. Somewhat further on up the driveway is the residence.
- [26] The garage was discovered ablaze on June 26, 2013. The police attended at some point, as well as fire personnel. There was really no exploration in the evidence as to what occurred upon the attendance by the authorities on June 26, 2013; nor was there any forensic investigation conducted in relation to the garage.
- [27] Constable Kipperchuk was assigned to the investigation in the early morning hours of June 27, 2013.
- [28] Constable Kipperchuk and his colleague Cst. Racz first attended the scene late in the afternoon of June 27, 2013 at approximately 2:45 p.m. The purpose of this attendance was to investigate the garage fire. Upon their attendance however, as they made their way up the driveway, they noted not only that the garage had burned but that the residence was then on fire. Constable Racz phoned for the fire crew. Upon discovery of the residence on fire, Cst. Kipperchuk approached to determine whether anyone might be inside. No one was inside the residence.
- [29] It appears before attending the scene he contacted a Cst. Jill Swann to arrange for Cst. Swann to attend the scene. Constable Swann, at the time, was in general investigation but undertaking certain arson investigation training. Constable Swann ultimately attended the scene in the early morning hours of June 28, 2013.

- [30] Corporal Bezanson was also summoned to attend for the purpose of taking photographs. Certain of the photographs taken of the residence at the scene on June 27, 2013 have been tendered as exhibits. As well, Cst. Swann, upon her attendance on June 28, 2013, took certain photographs of the residence that have also been marked as exhibits.
- [31] The residence is a two-level home; consisting of an upstairs living area and a basement. The entry door to the upstairs is at the top of some steps on the outside of the residence. The only door to the basement is somewhat below ground level. There exist windows on the upper floor. There are also windows on the ground level looking down into the basement.
- [32] Constable Kipperchuk took particular note of the state of the back of the house where an oil tank was situated (the south side depicted in photo 43 of Exhibit 2).
- [33] Constable Kipperchuk noted a broken or blown out window in the upper floor of the south side. The lower window in that area, looking into the basement of the residence, on the ground floor, he noted was not broken. This observation took on particular significance in the trial.
- [34] Constable Swann arrived at the scene for the purpose of her assessment at approximately 8:00 a.m. on June 28, 2013.
- [35] Constable Swann, upon her arrival, entered into the area of the basement and made various observations. She noted a certain area in the basement appeared to be an area where the fire had been concentrated. Constable Swann did not enter the upstairs area. In addition, Cst. Swann twice testified, with certainty, that there were no rocks or stones in the basement area. This observation as well takes on some significance.
- [36] The main purpose, it appears, of the evidence of Cst. Swann, was to relate the results of an experiment she conducted some months later. The experiment was intended to determine whether it was viable that the fire could have been started in a way that had been described by the accused in his statement to the police. I will return to this evidence.
- [37] As previously referenced, there was no opinion evidence led by the Crown concerning whether the fire was intentionally lit, the cause of the fire, its origins, or any fire tracing. There was no opinion evidence concerning any testing at the scene for accelerant and there was no evidence by way of expert opinion or otherwise as to when the fire in the residence might have started.
- [38] Shortly after his attendance at the scene, Cst. Kipperchuk became aware of the threats made by David Mrychka towards the Maskells. Mr. Mrychka was arrested and questioned. Constable Kipperchuk gave evidence at trial that Mr. Mrychka was not pursued as a suspect because "he had an alibi for June 27". The detail or context of this was not explored by either counsel.

- [39] Following the receipt of the statement from Ms. Lacey on July 6, as previously referenced, Cst. Racz invited the accused to the police station. The accused attended the station with his mother on July 10, 2013. It was then the accused was arrested and questioned. He was charged with these offences shortly thereafter. It is apparent on the evidence the accused has had past psychiatric issues, that were extant at the time of the fires. He continues to experience those psychiatric issues. It is certainly urged by the defence that this evidence is an important factor to weigh in this trial.
- [40] Finally, there is evidence of alibi in this case. Some months after the accused was charged with these offences either the Crown, or the police, or both, were advised through counsel that the accused, at least on June 27, 2013, was with his grandmother, Mrs. Loretta Ostman, for a period of time, prior to 2:45 p.m., on June 27, 2013.
- [41] In June 2014, Cst. Kipperchuk attended the residence of Mrs. Loretta Ostman and arranged to obtain a KGB statement. Constable Kipperchuk testified that Mrs. Ostman was warned before she provided her statement concerning the ramifications of giving false information. Constable Kipperchuk confirmed that Mrs. Ostman produced a calendar with writing on it for the day June 27, 2013, that tended to support her recollection that the accused had been with her for a portion of that day. Constable Kipperchuk testified at the time of his dealings with Mrs. Ostman she was, as he describes, "astute". Mrs. Ostman gave evidence at the trial that I will deal with in due course.

The Evidence of Carmen Lacey

- [42] Ms. Lacey is 41 years of age. The evidence is unclear as to where she currently resides.
- [43] Ms. Lacey testified that she and the accused were in a romantic relationship for proximally two to two-and-a-half years. Ms. Lacey told the Court that around the time of the fires they had been broken up for a period of time but it was around that time, mid-June to early July, that they had decided to attempt to see whether or not the relationship might be rekindled. Ultimately, Ms. Lacey testified that the relationship came to an end, once again, because they simply could not get along.
- [44] Ms. Lacey also testified she is acquainted with the Maskells, in particular Mark Maskell. She testified she never heard the name Mrychka. However, she later testified that she had heard of Brooklyn but only "after the fact".
- [45] Ms. Lacey testified, at least initially, that she became aware of the fires at the property when she was told by the accused. This conversation occurred either, according to Ms. Lacey, on the day of the first fire or the next day.
- [46] Ms. Lacey stated that the first discussion she had with the accused was face-to-face. She testified it was somewhere in Coombs but she could not remember exactly where. Ms. Lacey couldn't remember how the discussion came about.

- [47] In any event, Ms. Lacey testified that the accused told her he had gone to the property and looked around in the shed. She testified the accused told her that he had gone to the house and knocked and determined no one was home. Ms. Lacey gave evidence he then told her he lit the shed on fire. Her evidence is that the accused told her he had gone to look for his amp. She testified the accused told her he had used a Bic lighter that had been in his pocket to light the fire in the shed. She testified that the accused said there was clear plastic over pink insulation in the shed and he lit it on fire and it ignited quickly.
- [48] Finally, Ms. Lacey testified that the accused told her he did it out of revenge; revenge, according to the accused, because Mark would not return his amp and also, according to Ms. Lacey, because he and Mark had had a falling out over Brooklyn.
- [49] This was the evidence of Ms. Lacey concerning the first discussion.
- [50] Ms. Lacey testified she didn't believe him. It was only within a day or two after the discussion that she began to hear rumours about the fires. She drove by the Gibbs Road property and looked up the driveway and saw the yellow tape and then, according to Ms. Lacey she knew it was true.
- [51] Ms. Lacey testified that the first conversation, as previously related, just concerned the shed. Ms. Lacey indicated it was later the accused told her he had returned the next day and he had broken into the house. Ms. Lacey testified that he said by "smashing a window". Ms. Lacey testified the accused said he couldn't find the amp or anything of value so he lit the basement on fire in the same way. Ms. Lacey gave evidence that during the discussion she asked if he had used an accelerant and the accused had said no.
- [52] Ms. Lacey could not recall whether the second discussion concerning the residence was face to face or via Facebook.
- [53] In any event, Ms. Lacey then testified that after the first two discussions she has described, there were several other conversations on the same topic.
- [54] Ms. Lacey testified that she told the accused that he shouldn't be sending these incriminating messages via Facebook and that he should delete them.
- [55] Ms. Lacey then testified that the discussion concerning the shed, and the discussion concerning the house in fact happened on the same day; either on June 26 or June 27.
- [56] Ms. Lacey testified she had blocked Mark Maskell on her Facebook due to bad blood between her and Mark. Ms. Lacey believes that on the 26th or the 27th she sent Mark Maskell a Facebook message telling Mark that it was the accused that lit the fires. Ms. Lacey testified she was feeling "vengeful".

- [57] Ms. Lacey stated she told Mark these matters because she thought he would be interested to know that the accused was still dating Brooklyn. Ms. Lacey testified that she told Mark Maskell that she didn't care what Mark did to the accused. Ms. Lacey was aware of Mark's reputation for violence. She testified she told Mark she didn't care if Mark killed the accused. Ms. Lacey confirmed that she didn't like Mark Maskell because he had threatened her.
- [58] Ms. Lacey gave evidence that it was a week or so after these discussions that her conscience kicked in and she phoned Crime Stoppers. On the same day she decided to go and report it to the police. Ms. Lacey testified that she doesn't remember if she told the accused she was going to do this. The visit to the police occurred on July 6, 2013, and by then the two had broken up. In fact, it was later revealed, they had broken up that very day. She concedes she went to the police not only due to her conscience but also the fact that she was angry because of Brooklyn.
- [59] At some point during this time frame Ms. Lacey testified that she told the accused that they should break up. He said some hurtful things to her. He said to Ms. Lacey that he was seeing Brooklyn and didn't need her.
- [60] Ms. Lacey did testify that she thought the accused was "off" intellectually. He was erratic. His emotional state was inconsistent. She testified that he was "constantly lying".
- [61] In cross-examination she confirmed that her half-brother is the Fire Chief of the Coombs Fire Department. (It appears on the evidence it was the Coombs Fire Department that attended these fires).
- [62] Ms. Lacey testified that she couldn't recall whether she spoke to her half-brother about the fire and how the fire was suspected to have been started. Ms. Lacey testified she didn't believe she spoke to others in the community or others in the fire department about how the fires had started. Ms. Lacey said it was "all over town" in any event. It was, according to Ms. Lacey as well "all over the newspapers".

The Evidence of David Maskell

- [63] Mr. Maskell confirmed that Mark lived in the residence in question on a full time basis and that he and his wife lived in the residence during the week. Mr. Maskell confirmed the house was not empty or almost empty at the time of the fire. He testified that everything the family owned and utilized in the residence remained in the residence at the time of the fire; including furniture, bedroom items, personal items and the like.
- [64] Mr. Maskell confirmed that while some musical equipment had been moved from the garage, the garage was not "cleaned out" before the fire. Mr. Maskell testified that the garage contained some musical equipment at the time of the fire.
- [65] He testified that the furniture in the house included a pool table in the middle of the basement; in the rec room; and, there was also musical equipment in the basement.

[66] Mr. Maskell was uncertain whether there was any exposed vapor barrier in the garage. He confirmed there was vapor barrier in the basement; but he was not asked the location.

[67] Finally, Mr. Maskell testified the garage was, in his view, a fire hazard because it was near a stove.

The Evidence of Mrs. Maskell

[68] Mrs. Maskell, as well, confirmed the living arrangements as testified to by her husband. The evidence of Mrs. Maskell is that certain musical equipment remained in the garage; she gave no evidence of clutter in or about the garage.

[69] She testified the basement bedrooms were furnished and there was a couch with a pool table in the rec room area of the basement. Mrs. Maskell testified the residence was their home at the time of the fire and was not gutted or empty, and, in fact, contained many valuables and personal items.

The Evidence of Charlene Ball

[70] Mrs. Ball testified that the accused is one of her two children. She testified that prior to grade 9 he did very well at school; an honour student. However, beginning in and around grade 7 or 8, he was bullied at school and so he homeschooled for a period of time. He again tried to function in public school beginning in grade 9. It is in this timeframe he had a series of mishaps. Mrs. Ball testified during this time he appeared to have seizures and memory lapses. He started to struggle in school. He was 20 years of age before he graduated and by then he had begun suffering from depression. Prior to the time of these allegations he was hospitalized for psychiatric care. In the years leading up to these events he had been seen by a variety of psychiatrists relating to symptoms of anxiety and depression.

[71] Mrs. Ball confirmed that at the time of these events the accused was taking a variety of medications including an antidepressant; Venlafaxine. In around June 2013, he was taking Venlafaxine twice a day which, Mrs. Ball testified, "mellowed him out", relieved stress, and helped with confusion. Mrs. Ball testified that if the accused failed to take his medication as dictated that "after a few hours" it would be "bad". This, she indicated, would result in headaches and high anxiety. As well, in Mrs. Ball's view, his cognitive abilities were "not that good".

[72] Mrs. Ball testified concerning the events of July 9 and 10, 2013.

[73] Shortly after Ms. Lacey was interviewed, Cst. Racz attended at the home of the parents of the accused, where the accused resided. Constable. Racz left his business card with Mrs. Ball asking that the accused contact him. The visit by Cst. Racz occurred on July 9, 2013.

- [74] Mrs. Ball stated that she spoke on the phone with the accused while he was at work on the evening of July 9. He was exhibiting excitement and anxiety due to the fact he had misplaced his wallet. Further, Mrs. Ball testified that the next morning, July 10, 2013, the accused was in a frenzy concerning his lost wallet.
- [75] On July 10, 2013, the accused, accompanied by his mother, attended at the RCMP detachment arriving at approximately 11:00 a.m.
- [76] Mrs. Ball stated that immediately following the arrest of the accused, Mrs. Ball went back to the skateboard park to look for the wallet to determine whether perhaps it had been turned into the concession at skateboard park. Indeed, it had. Mrs. Ball then returned to the detachment and testified that she met Cst. Racz in the parking lot of the detachment. The police then took a statement from Mrs. Ball between 11:50 a.m. and 12:36 p.m. It was during this time frame that Mrs. Ball reminded Cst. Racz that (he) had attended on many occasions to the residence where the accused had been living with Ms. Lacey over the years. This was in response to 911 calls as a result of the difficulty the accused was having with Ms. Lacey from time to time.
- [77] Mrs. Ball testified that she was insistent with Cst. Racz that the accused needed his medication and that there will be an escalation of confusion and what has been referred to as "brain zaps". She told Cst. Racz that "his head starts going funny inside" when he doesn't get his medication.
- [78] Mrs. Ball stated that she told Cst. Racz that she would retrieve the medication as the accused will need it. She testified she returned at some point prior to 2:00 p.m. (it was subsequent to 2:00 p.m. that the interview took place with the accused) and provided the medication to Cst. Racz in the parking lot of the detachment. Constable Racz did not take issue with the version of these discussions offered by Mrs. Ball. The accused did not receive the medication until after the interview had completed.

Dr. Mohamed Gheis

- [79] Dr. Mohamed Gheis is the current treating psychiatric physician of the accused. Dr. Gheis provided evidence and a report for the purpose of the voir dire in this matter. The parties agreed that the evidence of Dr. Gheis and his report will form part of the record of the trial.
- [80] Dr. Gheis is a physician specializing in psychiatry and neuro-psychiatric services. He was qualified to give expert opinion evidence in this area and in particular relating to the causes of anti-depressant discontinuation syndrome; its symptoms, its effect upon patients, and its treatment. He was also qualified to give expert opinion evidence concerning testing patients for psychiatric profiles, particularly in respect to verbal memory scores, complex attention scores, and general testing and scores relating to the executive function of the brain.

- [81] He was qualified to give an expert opinion regarding the accused in particular, and the cognitive abilities of the accused and his observations concerning the accused, including the accused's personality traits and what was referred to as "suggestibility."
- [82] Mr. Ball has been a patient of Dr. Gheis' since April 2017.
- [83] Dr. Gheis prepared a report dated January 9, 2020, concerning these matters. In addition, Dr. Gheis performed a battery of tests in relation to the accused's cognitive abilities, the results of which are contained in a report entitled CNS Vital Signs Report that is also marked as an exhibit. The test results in this regard are as at July 12, 2017.
- [84] Dr. Gheis also had the opportunity to review some of the past medical records generated by the accused. He received certain information from Mr. and Mrs. Ball. He read the transcript of the statement of the accused. Dr. Gheis did not take the opportunity to review the video of the statement to observe and hear the accused.
- [85] Dr. Gheis confirmed in his evidence that he did not observe in the medical reports any previous diagnoses of the accused having seizures, nor any evidence in the medical records that the accused suffered a traumatic brain injury; nor that he was ever treated for such a head injury.
- [86] The current condition of the accused is diagnosed as generalized anxiety disorder, social phobia, paranoid ideas secondary to substance abuse, and, in the context of his social anxiety, a depressive disorder and neurocognitive disorder. His cognitive placement is much lower than what would be expected for his age and education. Dr. Gheis noted that the mood of the accused is constantly and moderately depressed.
- [87] Dr. Gheis states in his report that research has demonstrated that the discontinuance of Venlafaxine can cause severe withdrawal symptoms. Dr. Gheis states in his report that the withdrawal symptoms described with this medication include agitation, anxiety, confusion and shock-like electrical sensations.
- [88] Dr. Gheis expressed in his report that the accused experiences high suggestibility most of the time. This is described as someone who changes his opinion quickly as information is presented without making adequate assessment of the information.
- [89] Dr. Gheis did confirm in his evidence that brain zaps and headaches become a signal to a person when that person hasn't taken the medication and the brain zaps and headaches can occur within hours or days. The symptoms are more often mild to moderate although occasionally there are severe cases. The symptoms can in turn prejudice logical thought and cause a person to be vulnerable.
- [90] There is no opinion concerning the probable diagnosis of the accused in 2013, based upon a hypothetical suggestion or otherwise. The only evidence of Dr. Gheis in relation to the accused, in around the time of the giving of the statement in issue, is that there was nothing in the transcript that Dr. Gheis would characterize as significant. Dr. Gheis offered his

opinion, albeit somewhat anecdotally, that he advised the Ball family he didn't think withdrawal from the medication impacted the accused's statement. There was no evidence from Dr. Gheis explaining or elaborating on this comment.

The Evidence of David Ball

- [91] Mr. David Ball is the father of the accused. He is 67 years of age and retired. He is a computer analyst and for many years was employed with the government and IBM.
- [92] Mr. Ball testified that about a year prior to the fire his son brought Ms. Lacey's computer to him to assess. Apparently, there were well over 100 viruses on the computer. Mr. Ball testified it had a poor antivirus software system and over the course of about three days he replaced the antivirus system.
- [93] Mr. Ball stated that there were two accounts saved on Ms. Lacey's computer; one for Ms. Lacey and one for the accused. Mr. Ball testified that he could easily log into the accused's account because the password of the accused was on the computer. In addition, he could log into Ms. Lacey's account. He gave evidence that one could easily, from her computer, send messages from Ms. Lacey's account to the accused's account.
- [94] Mr. Ball recalled that the accused and Ms. Lacey were together, on and off, over the course of five or six years. He stated, as did the accused, that Ms. Lacey was very controlling. Over the course of a year or two leading up to the fire, the accused would call his parents to ask to be picked up from where he was residing with Ms. Lacey due to difficulties. The last time Mr. Ball went to retrieve the accused from the residence Ms. Lacey threw something at him.
- [95] Mr. Ball testified concerning the mental health of the accused. He confirmed that as a result of incidents at school his concentration fell significantly and they decided to take him out of school and homeschool him. He confirmed that the accused became, over the course of time, depressed, and had very little interaction with other children. This in turn made his depression worse according to Mr. Ball. At some point prior to the fires, he was hospitalized at St. Joseph's Hospital in Comox expressing suicidal thoughts.
- [96] Mr. Ball testified that in the event the accused forgot to take his Venlafaxine, it would affect him and within 24 to 48 hours. He would become more depressed, more agitated, and find it more difficult to concentrate.
- [97] He indicated that around the time of the fires the accused was under psychiatric care from time to time when it was available. Mr. Ball stated that the more pressure one put on the accused to agree with something the more agreeable he would become. Mr. Ball observed "if you press the accused that the sky was green, he would eventually agree".
- [98] Mr. Ball testified that around the time of the fires the accused appeared to him to be extremely depressed and anxious and he believed it was in relation to breaking up with Ms. Lacey.

The Evidence of Loretta Ostman

- [99] Mrs. Ostman is the grandmother of the accused. She is now 84 years of age and living in a seniors' care housing unit.
- [100] Mrs. Ostman testified that over the years, the accused would frequently visit at her home. They were quite close. They would talk and watch TV together. When visiting, their general habit was to watch a program called General Hospital between 1:00 and 2:00 p.m. and then watch Let's Make a Deal between 2:00 and 3:00 p.m.
- [101] Mrs. Ostman indicated that around the time of the fires in June 2013, she worked one-half day, in the morning, at the thrift store. In that regard, she would arrive home around noon and that is the time the accused would generally come to begin his visits with her.
- [102] She can say with certainty that the accused visited her in this regard on June 27, 2013. Mrs. Ostman keeps a calendar and notes events and matters on the calendar, as well she records when she would give gifts of money to various people. The note for June 27, 2013 reveals she gave \$20 to the accused for gas money. She is adamant her notation on the calendar reflects and corroborates her memory; and she confirmed that she makes these sorts of notations on a regular basis.
- [103] Mrs. Ostman recalls that sometimes the accused would eat lunch with her on these visits, but they did not have lunch together on this date because the accused had told her he had stopped off at McDonald's before he came.
- [104] Mrs. Ostman testified that she did make lunch for her and her husband and she and the accused chatted and watched the two shows together. She is certain that they watched all the shows and after the shows they chatted for a little bit of time and she thinks he left around 3:30 - 3:45.
- [105] The evidence of Cst. Kipperchuk is that when he attended to obtain the KGB statement, he also took a photo of the calendar she referred to. A still photo of the relevant page had been produced at trial. Mrs. Ostman testified she no longer has the original as she had to move into the care home and the calendar became lost in the shuffle.

Evidence of Jonathan Ball

- [106] The accused is now 33 years of age. He confirmed that while in high school he suffered two separate head injuries that he characterizes as changing his life.
- [107] This has resulted in going forward in his life, suffering from chronic fatigue and, as well, memory impairment. While prior to this accident he was an above average student, after the accident his marks were poor.

- [108] He testified that he has suffered from anxiety most of his life and indeed was anxious while giving his evidence. He has been under psychiatric care from time to time and was treated by a psychiatrist the year of the fires. At one point he was hospitalized for psychiatric care as a result of a psychotic episode and, as well, was suicidal.
- [109] During the relevant period he was prescribed the drug Venlafaxine. He was taking 75 mg twice a day. The dosage would change depending on the advice of his doctors.
- [110] Leading up to the fire he was working at the French Creek pub and was active playing music. On the day of the house fire he arose at his usual time. He could not remember precisely when, but he testified that he usually awakens in the morning around 11:00 a.m. as his job usually takes him to midnight. His regular routine is that he would get up and have breakfast, and perhaps ride his bike at various skate parks.
- [111] The accused testified he worked the evening of June 26, 2013. He does not recall if he worked the evening of June 25, 2013. He testified he doesn't recall going anywhere on the morning of June 26, 2013. He denies he went to the property and lit the garage on fire.
- [112] The accused testified that he found out about the fires a day or so after they occurred. He found out from Mark Maskell. He testified he never went to the Maskells on June 27, 2013.
- [113] The accused testified he never had a key to the Maskell's home. He denied he broke into the house and lit the plastic on fire in the house and in the garage. He denies he ever told Carmen Lacey that he started the fires or sent her Facebook messages.
- [114] He testified he told the police that he had said these things to Ms. Lacey because he felt anxiety and he was beginning not to think straight. He became confused. He testified that he felt the police were not listening to him and would not listen to him no matter what. He hadn't taken his medication that morning nor the evening before. This caused him anxiety and confusion. He testified he thought the police were just "pretending" to be nice to him but "I saw anger and felt intimidation". The police kept cutting him off, testified the accused. "They kept changing what I was saying and not listening to me". He testified that if he doesn't take his medication he starts to experience mild vertigo and nausea and then ultimately anxiety and panic set in.
- [115] The accused testified that he didn't directly provide Carmen Lacey with the password to his Facebook but he logged into her computer on many occasions with his password. He observed her use his Facebook page and she would log into his computer for that purpose.
- [116] He testified that the idea of lighting plastic and/or plastic vapor came from the suggestion by the police. He felt they would hurt him if he didn't agree with what they were saying. The police were "making a picture of what happened then I started to doubt whether I was remembering things accurately". The accused testified that he told the police these inculpatory matters because he then thought they would leave him alone. He testified that he confessed because he was confused and began to imagine it. He testified that he said that he had lit the garage on fire with a BIC lighter "out of confusion".

- [117] He indicated he doesn't know why he said plastic. This of course is contrary to what he testified to earlier in his evidence which is that the police had mentioned plastic. Still later in his testimony he gave evidence that he couldn't recall where he got the idea of saying it was "vapour barrier that he lit on fire". Still later in his cross-examination he then did remember that the police did mention the vapour barriers and that is where he got the idea. Finally, he testified he simply adopted the vapour barrier story for both the garage and the house; and he doesn't really know why.
- [118] He testified he didn't break the window; he didn't throw a rock; he didn't leave the house and lock it up with a key; and was never at the house. The accused stated that the idea of breaking the window he just randomly thought of. "I was familiar with the house", the accused testified.
- [119] The accused testified there was no other way out of the basement other than the basement door. He testified in direct examination that he could not have physically exited the basement by lifting himself up and back through the broken window. He was pressed on whether physically he could have somehow managed to exit the basement through the broken window. He quickly conceded he could. Still later, the Crown returned to this issue; however, the accused reversed course and testified he could not have gotten back out of the window because of the broken glass and the fact it was too high.
- [120] The accused testified that the source of his information concerning the fire, at least before his interview with the police, was from Mark, and also from speaking with his mother (who had apparently talked to Mark). The accused did testify however that he didn't think Mark went into any detail. He later testified in cross-examination that he now doesn't remember talking to Mark on the phone. He stated he remembered incorrectly. The accused says he just spoke to his mother about the fire.
- [121] He reiterated that he imagined the details and filled in the gaps of what the police told him. He indicated that he gave the description of the garage in accordance with the last time he had seen it.
- [122] The accused stated it was Cst. Racz that raised the "breaking of the window". His thought process was that there would be no other way into the house. He imagined throwing a rock and imagined how he would have felt in doing so.
- [123] The accused was taken through the Facebook messages on the voir dire. He denied sending them. They were not read into the record and they were not marked as exhibits. He testified that he was shown the messages and/or read the messages with the police and they "look convincing".

- [124] In relation to the statement, it was his perception that the police seemed aggressive and confident and he was feeling that they were not listening and not interested in hearing any more from him in terms of his denials. The accused testified the police appeared not to be accepting the answers he was giving. "I simply didn't trust them", so states the accused. "I thought potentially they would harm me if I didn't agree with them and I began to worry for my safety", is the accused's evidence.
- [125] Due to the lack of medication, the accused testified, he was becoming progressively ill. He was experiencing brain zaps and he started to see images of what he was being told. Images in the details start to play out in his imagination as if they really happened.
- [126] The accused testified that because he had been told he was lying and being told more and more details of the offence, he became fearful. Constable Kipperchuk, in the view of the accused, was calm and confident and reminded the accused of someone who had bullied him. The accused testified he didn't want to put up protest once they started to press him because they didn't really want to listen. The accused gave evidence he was feeling fearful and sick and felt that if he didn't cooperate things would get worse. "I didn't want to complain because I didn't want to upset them. At the same time, I didn't want to be an imposition to them or burden them".
- [127] The accused gave evidence he didn't understand where he was or what was taking place. The accused's thought process was that the police wanted him to agree and he wanted to make them happy. The accused did give evidence that he sometimes did not accept what the police said and added detail but he doesn't really know why he did this.
- [128] The following is another example of the difficulty in assessing the accused's evidence. In the course of a few minutes the accused testified that he had heard Mark had beat up Brooklyn when they were dating. He testified he had not seen Mark beat her up. He then testified he did see Mark beat her up on more than one occasion. He then almost immediately testified he didn't actually see Mark beat her up.
- [129] As previously referenced, the accused provided a crude drawing of the house during the police interview. The critical feature that has been addressed is the location of the window that the accused stated he broke by throwing a rock and then entering the basement.
- [130] The accused testified concerning the potential alibi evidence relating to his visit to his grandmother's house on June 27, 2013. The accused testified that he believed he visited her the day of the fire. He doesn't recall when he saw her. He recalls watching the TV show Let's Make a Deal and he thinks he would have arrived at his grandmother's sometime before 1:00 p.m. and left at approximately 3:00 p.m.
- [131] He testified that he spent two hours with his grandmother when he did visit her. He testified that he went home after his visit on June 27, 2013 (although earlier in his direct evidence he indicated that his memory was somewhat vague concerning whether or not he had visited her or not.)

[132] He testified that he does remember seeing his grandmother but then again, most readily, conceded that he couldn't really recall. He conceded he only has a vague recollection and the fact is he has been told by his grandmother that he was there that day. Finally, he testified that he had no idea whether he was at his grandmother's because he simply couldn't remember those dates so long ago.

False Confession

[133] Mr. Justice Mainlella for the Court in *R. v. Pearce*, 2014 MBCA 70, offered very helpful comments concerning the phenomenon of false confession and the approach a court must take in assessing that issue.

[134] The Court beginning at para. 51, commented as follows:

51 Until recently there were few documented cases of false confessions leading to a wrongful conviction because of the difficulty of proving, post-conviction, that a confession was indeed false (The Honourable Fred Kaufman, *The Admissibility of Confessions*, 3d ed. (Toronto: The Carswell Company Limited, 1979) at 15-17).

52 However, in *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, the Supreme Court of Canada recognized that false confessions during police interrogations do occur and can contribute to wrongful convictions. The phenomenon is, as Iacobucci J. explained, "counterintuitive" (at paras. 34-35):

. [I]t may seem counterintuitive that people would confess to a crime that they did not commit. And indeed, research with mock juries indicates that people find it difficult to believe that someone would confess falsely. . . .

However, this intuition is not always correct. A large body of literature has developed documenting hundreds of cases where confessions have been proven false by DNA evidence, subsequent confessions by the true perpetrator, and other such independent sources of evidence. . . .

53 The counterintuitive nature of false confessions can lead to miscarriages of justice. Bruce MacFarlane, Q.C. explains:

False confessions easily lead to miscarriages of justice because of the significant impact they have on the decision-making process of justice officials and lay juries. Except in the rare situation where a perpetrator is actually caught in the act of committing the crime, a confession is regarded as the most powerful, persuasive, and damning evidence of guilt that the state can adduce. It follows, therefore, that a false confession is the most prejudicial evidence that can arise at trial. Judges and juries tend to disbelieve claims of innocence in the face of a confession, and are usually unwilling to accept that someone who has confessed did not actually commit the crime. [Footnotes omitted]

[135] And further, the Court observed the following:

56 Why someone would falsely confess to a particular crime is often difficult to pinpoint. Legal and academic sources cite frequent causes of a false confession in the context of a custodial interrogation as being a combination of factors such as: (1) the vulnerability of a suspect (e.g., low intelligence, poor memory, mental illness, youth or extreme age, a significant personality trait or disorder, the fulfilment of a psychological need such as a desire for notoriety or a temporarily diminished condition for reasons such as hunger, sleep deprivation or intoxicant withdrawal); (2) the circumstances and nature of the custodial confinement and interrogation; and (3) the manner of police interrogation (e.g., use of fabricated evidence) (Oickle at paras. 38-43, and *The Psychology of Interrogations and Confessions* at 173).

57 According to Dr. Gudjonsson, some care must also be taken in analyzing the causes of false confessions because not every occurrence is a situation of the police inducing the innocent to say they are guilty. Some false confessions are made voluntarily and for a deliberate purpose. For example, sometimes a police interrogation is corrupted for reasons unknown to the police, particularly in situations where peer loyalty or peer pressure may be a factor. In such cases, according to Dr. Gudjonsson, suspects may falsely confess to protect others (*The Psychology of Interrogations and Confessions* at 177, and *R. v. Phillion* (R.J.), 2009 ONCA 202 at para. 203, 246 O.A.C. 317 (Phillion 2009)).

[136] And finally, the approach to be taken by the trier of fact should be governed by the common sense analysis as set out beginning at para. 119:

119 As explained in *Kelsey* (at p. 226) and *Rustad v. The Queen*, [1965] S.C.R. 555 at 561-63, the nature of the accused's narrative of their commission of the crime in the confession is important to its probative value and the substance of an accused's claim of false confession.

120 Whether an accused's narrative in their confession is consistent with or conflicts with the independently verifiable circumstances of the crime is important for a trial judge to review with the jury (*Rustad* at p. 562; and *Colpitts* at p. 756). The trial judge should also direct the jury to any evidence from the trial as to the accused's knowledge of the crime and the source(s) of that knowledge (*Osmar* at para. 77). Relevant is whether the accused's knowledge of the crime, as set out in his or her confession, is information only the real perpetrator would know, or alternatively, is information the accused may have learned from the police, the media or some other source before the confession, thereby decreasing the potential probative value of the confession.

Analysis

[137] The critical issue in this matter concerns the admissions of the accused; as contained in his warned statement and as allegedly conveyed to Ms. Lacey. Evidence of this kind of course is always important; but it takes on more importance given the otherwise barren remaining evidentiary landscape implicating the accused.

- [138] To begin, there is a dearth of independent evidence directed at whether the fires were caused intentionally or recklessly or otherwise.
- [139] As previously referenced, there is no expert opinion evidence concerning how the fires started; where they originated; and when they commenced. The only evidence before me is that the police arrived at 2:45 p.m. and the fire and smoke were observed at the residence.
- [140] Constable Swann has expressed the view that the fire in the residence appeared to be concentrated in a certain corner of the basement. There is some evidence there was a gas can in and around the residence.
- [141] There is some independent evidence there was plastic vapour exposed in the basement area of the residence, however there is little helpful evidence as to the location of the plastic vapour in the basement. There is no clear evidence as whether the shed or garage had exposed plastic vapour. There is some evidence a stove in the garage "presented a fire hazard", but there is no forensic evidence in this regard.
- [142] There is evidence (the Swann experiment) that lighting plastic vapour, with a lighter, would ignite the vapour and commence a fire that would spread.
- [143] There is evidence Mark Maskell and family lived in the residence during the week, but no direct evidence of identification of the accused, or anyone for that matter, being in or around the scene of the fires in the days in question.
- [144] There is no forensic evidence linking the accused to the scene at the relevant time.
- [145] There is some evidence the accused was at his grandmother's house between 12:00 and 3:00 p.m. on June 27, 2013. Certainly I accept Mrs. Ostman was attempting to be truthful in her evidence. Whether this evidence would provide an alibi is unclear, as there is no evidence when the fire started.
- [146] There is evidence the accused was a vulnerable individual. At the relevant time he suffered from depression and anxiety. He was taking medications. There is some evidence his cognitive abilities were compromised during this period of time.
- [147] There is evidence the accused held an animus towards Mark Maskell. There is also evidence that Mr. David Mrychka held animus towards Mark Maskell. There is evidence Carmen Lacey held animus towards Mark Maskell.
- [148] It is this evidence, or lack of evidence, that provides the backdrop that highlights the importance of the statement and the admissions to Ms. Lacey. This fact, in turn, amplifies the critical issue of credibility.

- [149] The position of the accused is, if not straight forward, simply stated. He did not set the fire; his confession is false; and Ms. Lacey is lying. In particular, the accused testified that he falsely confessed as a result of confusion, particular vulnerability, and a fear of reprisal. He testified his inculpatory narrative was patched together, for the most part, using the information provided by the police. The accused testified in particular that he did not confess these matters to Ms. Lacey either in person or as a result of Facebook messaging.
- [150] Clearly, if the evidence of Ms. Lacey is accepted it would corroborate the veracity of the confession to the police.
- [151] In this regard, frankly, I am left highly discomforted by the evidence of Ms. Lacey. Her evidence was internally inconsistent. She clearly was not a disinterested witness. She exhibited, in manner, tone, and language, a certain hostility towards the accused.
- [152] One area of concern is the evidence of Ms. Lacey relating to Brooklyn. Ms. Lacey testified that she was motivated, at least in part, to speak to the police about these matters on the very day the accused said "hurtful things to her" and, disclosed the fact he was dating Brooklyn.
- [153] Ms. Lacey initially denied she went to the police because the accused had told her about Brooklyn but, somewhat later in her evidence, agreed that her motive was, at least in part, because she was angry with the accused.
- [154] Ms. Lacey testified she communicated with Mark Maskell to tell Mark about the alleged confessions made to her by the accused because, in part, Mark Maskell would be interested in knowing about Brooklyn and the accused. At one point Ms. Lacey testified this communication with Mark Maskell took place on either June 26 or June 27, 2013.
- [155] Ms. Lacey later testified this communication with Mark could have been after those dates.
- [156] Still later Ms. Lacey testified the communication with Mark Maskell was in fact on July 6, 2013.
- [157] Finally, Ms. Lacey, testified that she may only have found out about Brooklyn after she went to the police.
- [158] I found Ms. Lacey fenced with counsel on this point and was less than forthcoming.
- [159] In a similar vein, Ms. Lacey initially testified that the first discussion she had with the accused concerning these matters took place on either June 26 or June 27, 2013. She testified the first discussion was in-person. She testified it "was later" that the accused told her about the residence.
- [160] She subsequently testified the two discussions, that is concerning the garage and the residence, happened on the same day. She also subsequently testified that she couldn't recall whether the first discussion was in-person or via Facebook.

- [161] In addition, she initially testified that after the first two discussions as described, there were "several" other conversations where the accused reiterated his involvement in the fires. In cross-examination, she agreed that she had previously sworn under oath at the preliminary hearing that there had been "a couple" of subsequent discussions.
- [162] Ms. Lacey denied the fact that David Ball had taken possession of her computer and cleared out her computer viruses as testified to by Mr. Ball. I found the evidence of Mr. Ball on this matter straightforward and frankly not challenged in cross-examination. I prefer the evidence of Mr. Ball over the evidence of Ms. Lacey.
- [163] Ms. Lacey testified, twice, under oath, the accused did not reveal, in his discussions with her, how he broke into the residence to look around for valuables and then decided to light the basement on fire. The third time Ms. Lacey testified under oath, in this trial, she testified the accused in fact did confess to her how he broke into the basement. She testified that the accused told her he broke into the residence by breaking a window to gain entry.
- [164] In the end, I did not find Ms. Lacey's evidence worthy of trust. In places she only reluctantly conceded the obvious. In other areas her evidence presented as inconsistent in a most troubling way. In still other areas the evidence was vague and uncertain. In my view, it would be dangerous to place reliance on the evidence of Ms. Lacey.
- [165] The assessment of the evidence of the accused, and particularly the assessment of his evidence concerning the statement, requires certain context. It is apparent the police, and to a certain degree the accused, were armed with information concerning the circumstances of the fires prior to the commencement of the interview.
- [166] In this regard, the statement of Ms. Lacey is, of course, not before me; nor are the screenshots of the alleged Facebook messages. Nevertheless, it is obvious the police had in hand the statement of Ms. Lacey and the screenshots of the Facebook messages for the purpose of interviewing the accused.
- [167] In addition, there is evidence that the event of these fires was the subject of discussion in this small community; and in the newspapers. There is evidence the accused, prior to the statement, had received some information about the circumstances of the fire from his mother who had recently spoken to Mark Maskell. Mark Maskell did not give evidence.
- [168] It is also apparent, concerning the context of the statement, that the accused was very familiar with the property; including the inside and outside of the buildings.
- [169] It is against this contextual backdrop the accused was interviewed on July 10, 2013.
- [170] Over the course of the first half of the interview, during which the accused denied being implicated, the police disclosed to the accused certain central features of the circumstances of the alleged crimes. This information was gleaned, at least in part, from the statement of Ms. Lacey and the Facebook messages. It is to be observed most of this information eventually became the ingredients of the confession of the accused.

- [171] This observation is of no moment if one assumes the accused said these things to Ms. Lacey and those things were true.
- [172] The disclosures by the police take on a somewhat different significance however, in the face of an assertion that it was a false confession; and if one has doubts about the veracity of the evidence of Ms. Lacey.
- [173] Firstly, it can be seen and heard the police immediately informed the accused that the two buildings on the property that were the subject matter of the arson were the residence and the garage. Significantly, not the cabin.
- [174] During this initial phase of the statement as well, the accused told the police that it was his understanding from Mark that no one was home at the time of the fires.
- [175] The police then disclosed the fact that the fires were on two separate days. The accused was advised the garage fire was on day one and the residence the next day.
- [176] The police also showed the accused a Facebook message and asked the accused to read it. This disclosed to the accused the following: that the accused broke into the basement of the residence; that he looked for anything of value in the house and couldn't find anything; and that he then lit the basement on fire.
- [177] It is next observed on the video that the accused is left in the interview room alone with material that appears to be the Facebook messages that the police had brought to the interview. It appears the accused is seen reading these documents during the police absence.
- [178] Upon the resumption of the interview, the police provided the motive; suggesting to the accused that he was angry with Mark and that he went there looking for his amp. In addition, the police put to the accused he went into the garage looking for his amp. The police then suggested he couldn't find the amp so he lit the garage on fire.
- [179] The police then raised the following with the accused: that he went back the next day to the house looking for his amp; he knew the dog was there; and when he couldn't find the amp he checked out the house and then "lit the place up".
- [180] This information was subsequently repeated by the police; with the added particular that the accused had made certain that the dog was not at home.
- [181] Constable Kipperchuk entered the room and repeated much of the narrative as previously suggested, with the following additional detail: "you shouldn't have lit the plastic on fire".
- [182] It is at this point in the interview the accused resiles from his denials and begins to admit the crimes.
- [183] Constable Kipperchuk tells the accused it means a lot to him that the accused is owning up to things now.

- [184] Almost the first concern in the mind of the accused at this point is whether he can go home. He also apologizes to Cst. Racz. Constable Kipperchuk then left the room and Cst. Racz carried on. He stated to the accused "let's go over what happened".
- [185] Again, the accused asked to go home.
- [186] Constable Racz asked the accused "why did you go into the garage?" The accused answered "to look for the amp". The accused also indicated that he was mad about it.
- [187] Constable Racz asked the accused how he started the fire. "Lighter. A Bic", was the answer.
- [188] Constable Racz then said "Carmen said you lit the plastic." The accused answered in the affirmative. Then Cst. Racz asked "like a vapour barrier?" The accused answered "yes."
- [189] The jurisprudence in this area requires the court to assess a claim of false confession with a framework of common sense and human experience. One aspect of this assessment is to assess whether the narrative of the accused is consistent with or conflicts with verifiable circumstances of the alleged crime.
- [190] The accused added certain detail on his own. The accused said he went into the garage and the garage had been emptied out. There was nothing in there, stated the accused. This, of course, is inconsistent with the evidence of both Mr. and Mrs. Maskell.
- [191] The accused said that he broke into the house to look for his amp and any other valuables. He said he went through the house but the house was bare. It was gutted. It was empty except he thought there was a couch upstairs.
- [192] The evidence of the Maskells of course is that the house was not empty; in fact, their possessions and furniture were in the house including valuables.
- [193] The accused later, at another point in his statement, said that he didn't go upstairs.
- [194] The accused stated he saw nothing in the rooms downstairs. It was also bare, said the accused, but for a couch in the open room (the rec room).
- [195] The evidence of the Maskells was that the rooms downstairs were not empty. The bedrooms are furnished. The open area did contain a couch; but also a pool table and musical equipment.
- [196] It is to be recalled that there is no expert opinion evidence as to whether the fire was intentionally set or the product of accident; much less any expert opinion evidence as to the origin of the fire.
- [197] Nevertheless, there is the evidence of Cst. Swann who opined that it appeared to her that the fire was "concentrated" in the southeast corner of the basement.

- [198] During the interview, the accused was asked to draw a diagram of the external and internal features of the residence to assist to explain certain aspects of his statement. It is marked Exhibit 4.
- [199] At one point the accused was asked where in the basement he started the fire. He stated "he thought in the basement back here". It can be seen that the accused then makes a mark on Exhibit 4. The only mark on Exhibit 4 that would reflect this effort to locate where he lit the fire, appears to be the northeast corner of the basement area; not the southeast corner.
- [200] Additionally, it was confirmed in evidence by the police that the only critical detail concerning the circumstances of entering the residence and lighting the fire that was not proffered by the police during the interview was how the accused entered the residence.
- [201] In this regard, the accused was asked by the police during the interview how he entered the house. He answered "through a window". He did not say how he entered the window. It is the police that then asked "did you break the window?"
- [202] The accused then indicated indeed he did. He further offered that he threw a rock in order to do so. The accused was not asked to describe how he made his way through the broken window down into the basement; nor was he asked how he fled the residence once he started the fire. The accused simply stated at one point "I just left through downstairs".
- [203] It appears to be common ground the basement door was somehow ajar when photos were taken on June 27, 2013. How this came to be is not clear. It can be observed that the deadbolt is clearly engaged. This has generated a theory that if the basement door was used as an entry or exit point by the person lighting the fire, if indeed the fire was purposely lit, that person must have had a key. There is no evidence the accused had access to a key to the residence.
- [204] Therefore, the theme of the cross-examination of the accused was to press the accused that he somehow managed to exit the basement by hoisting himself back up and out the broken window after he lit the fire.
- [205] In my view, I find this scenario improbable to say the least. Why would someone hoist themselves back up through the broken glass of a window, rather than just walk out a door. To me, regardless of any irrationality caused by the agony of the moment, it seems nonsensical.
- [206] This observation leads to another observation. It probably is nonsensical because the broken window, as described by the accused, that plays such prominence in the narrative, was not in fact broken.

- [207] Again, during the course of the interview, the accused was asked to locate on Exhibit 4 the window he smashed by throwing a rock. He clearly marked a certain window. In addition, during his evidence, he confirmed the location of the window he said he smashed in his statement, is in fact the window he depicted on Exhibit 4. As previously referenced, Cst. Kipperchuk made it quite clear in his evidence that this window was not broken upon his arrival at the scene.
- [208] Further, it will be recalled, the accused offered the detail that he "threw a rock at the window" to "smash" the window.
- [209] It is reasonable to conclude that a rock thrown at a window to smash the window to then allow someone to crawl through the window would be thrown with some force. There was no evidence of a rock in the basement area. Constable Swann was quite certain in this regard. Constable Swann testified that had there been a rock in the basement; she would have surely made that observation.
- [210] I accept the evidence of the Ball family, that at the relevant time the mental health of the accused was, and had been for some time, compromised and degraded such that it impacted his proper functioning.
- [211] The Crown, in his able submissions, quite properly points to features of the statement that could be viewed as inconsistent with someone overwhelmed with the circumstances such that he falsely conceded guilt.
- [212] It is quite rightly submitted by the Crown that in some parts of his statement the accused provided an additional narrative surrounding the key event that gave the statement an air of authenticity. The Crown as well points out that the video does not disclose, a person in distress or a state of confusion or anxiety. In other words, the atmosphere in the room does not appear to reflect the inner turmoil described by the accused. In this regard, I am also skeptical due to the disconnect between the evidence of the accused concerning his mental dysfunction and suggestibility, and the observations of the demeanour and behaviour in the interview room.
- [213] On the other hand, there are features to the confession as previously described that cast doubt on whether it is a legitimate and genuine confession.
- [214] On the whole, I am far from fully embracing the evidence of the accused at trial, but I am not persuaded he is being untruthful. Some of the independent evidence is difficult to reconcile with the proposition the accused was truly reciting his involvement in these crimes.

- [215] I am troubled by the evidence of Mrs. Ostman. The evidence at least raises the possibility of an alibi on behalf of the accused for June 27, 2013, notwithstanding the fact that the accused ultimately conceded he could not now recall whether he was at his grandmother's house that day or not. The difficulty of course in assessing alibi evidence with precision, is that there is no evidence as to when precisely the alleged crime was committed.
- [216] It was suggested in argument if Mrs. Ostman's evidence were accepted, given the relative short distances involved for travel in this case, the accused could have both lit the fire in the residence and attended with his grandmother as described. This theory of participation would have to rest on the accused lighting the fire before visiting his grandmother given the fact the fire was underway when the police arrived at 2:45 p.m.
- [217] Perhaps this theory is a possibility, but, in the absence of when the fire started, it would be a theory resting on very fragile ground.
- [218] I have concluded I find no comfort in assessing the veracity of the accused's statement with the assistance of the evidence of Ms. Lacey. I place no reliance on her evidence on this point. In my view, it would be unsafe to accept her evidence.
- [219] I continue to be troubled by the fact that the cell phone of the accused, and the computer of Ms. Lacey, were not forensically examined. A forensic examination may well have provided a short answer to the issue before us.
- [220] This failure, in my view, takes on even more significance in light of the evidence of Mr. David Ball, whose evidence I accept.
- [221] To conclude, I cannot necessarily find the confession is false. The evidence of the accused was certainly not so compelling that I am convinced of his innocence. Conversely, as stated, I do not reject the evidence of the accused on this issue. In addition, I am less than impressed with the evidence of Ms. Lacey. In the result, on the whole of the evidence, I am left in a distinct state of uncertainty concerning the guilt of the accused. I am driven to a finding the allegations have not been proven beyond a reasonable doubt.
- [222] Mr. Ball, please stand. I find you not guilty on all counts.

"Crossin, J."

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