
CANADA / JUDGMENT

R. v. Ghiorghita

2017 BCSC 1469

COURT

Supreme Court of British Columbia

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2017 BCSC 1469 R. v. Ghiorghita

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ghiorghita,

2017 BCSC 1469

Date: 20170721

Docket: X078540-2

Registry: New Westminster

Regina

v.

Irinel Catalin Ghiorghita

Before: The Honourable Mr. Justice Pearlman

Oral Reasons for Judgment

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Place and Date of Hearing:

New Westminster, B.C.

March 27, 28, 29, 30,

April 3, 4, 5, 6, and 10, 2017

Place and Date of Judgment:

Vancouver, B.C.

July 21, 2017

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OVERVIEW

[1] THE COURT: The accused, Irinel Catalin Ghiorghita, is charged with second degree murder of his wife, Andra Ghiorghita, with the use of a firearm on July 15, 2014, at Port Coquitlam, British Columbia, contrary to s. 235(1) of the Criminal Code, R.S.C., 1985, c. C-46.

[2] Section 229(a) of the Criminal Code provides:

229 Culpable homicide is murder

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

(i) means to cause his death, or

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

[3] In order to convict Mr. Ghiorghita of the offence of second degree murder, the Crown must prove beyond a reasonable doubt the following elements:

(1) that Mr. Ghiorghita is the person who actually committed the offence;

(2) that the offence occurred at the time and place set out in the indictment;

(3) that Mr. Ghiorghita committed an unlawful act;

(4) that the unlawful act caused the death of Andra Ghiorghita; and

(5) that Mr. Ghiorghita either meant to cause the death of his wife or meant to cause bodily harm that he knew was likely to cause death and was reckless about whether or not it caused death.

- [4] The Crown and defence agree that the central issue in this case is whether Mr. Ghiorghita was in a state of automatism when he shot and killed his wife. The Crown contends that although the accused experienced stress and anxiety associated with the breakdown of his marriage and the potential loss of custody of his son, Mr. Ghiorghita's actions were an expression of his pent-up anger, and that the shooting of his wife eight times while she was lying in bed was not an involuntary act.
- [5] The defence maintains Mr. Ghiorghita was in a dissociative state of non-mental disorder automatism at the time he shot his wife, and that because he acted involuntarily, he should be acquitted. As I will discuss later in these reasons, where the defence of automatism is raised the accused bears the burden of establishing on a balance of probabilities that he acted involuntarily.

FACTS

Background

- [6] The accused, who is now 41 years old, and Andra Ghiorghita, were both born and raised in Romania.
- [7] In 2001, Mr. Ghiorghita and Andra were married in Romania. On September 21, 2005, their son, Matei, was born. In July 2007 Mr. Ghiorghita, Andra and Matei immigrated to Canada, where they took up residence in Vancouver.
- [8] The accused's mother and father, Maria Ghiorghita and Irinel Ghiorghita, continue to reside in Romania.
- [9] In 2008, Mr. Ghiorghita and Andra purchased a three-level townhouse in Port Coquitlam, located on Davies Avenue, where they lived with Matei until the early summer of 2014.
- [10] The ground floor of the townhouse contained the main entrance and a parking garage. A stairway provided access to the second floor, which contained the living room and kitchen. Another flight of stairs gave access to the third floor, where the master bedroom and the second bedroom were located at opposite ends of the hallway.
- [11] At the time of the alleged offence, Mr. Ghiorghita was employed as a calibration and testing technician. His work involved the repair of computer hardware and software. Andra worked as a professional general accountant.
- [12] The defence expert in psychiatry, Dr. Shabehram Lohrasbe, fairly described the marriage of Mr. Ghiorghita and Andra as unstable. Mr. Ghiorghita testified that particularly in the later years of the relationship, Andra was cold; the couple were rarely intimate, and his wife was jealous of even his most casual social contact with other women. The accused also gave evidence that Andra often declined to take part in family activities, claiming the demands of her work prevented her from doing so.

- [13] Mr. Ghiorghita formed a strong bond with Matei and struggled to maintain his relationship with Andra, in large part for the sake of his son. The accused's activities with Matei included target shooting at the local hunting and fishing club.
- [14] On June 8, 2014, Mr. Ghiorghita and Andra purchased an airline ticket for Matei to travel to Romania, on his own, to visit with Mr. Ghiorghita's mother and father. Matei left for Romania on June 15 and was scheduled to return to Canada on July 27, 2014.

Andra Ghiorghita's Relationship

- [15] In 2014, Andra Ghiorghita entered into a relationship with a co-worker, Mr. Esmail.
- [16] The defence made the following admissions of fact concerning the relationship between Andra Ghiorghita and Mr. Esmail:
- (a) Mr. Esmail first met Mrs. Andra Ghiorghita in December 2013.
 - (b) Mr. Esmail and Mrs. Ghiorghita formed a friendship in early 2014, and their relationship developed into a romantic relationship in late April 2014.
 - (c) On May 30, 2014, Andra Ghiorghita invited Mr. Esmail to her home at Unit 32, Davies Avenue, in Port Coquitlam, British Columbia. On that day, they had intimate relations in her home.
 - (d) During the months of June and July 2014, Mrs. Ghiorghita stayed at Mr. Esmail's home in North Vancouver on several nights.
 - (e) Mrs. Ghiorghita stayed at Mr. Esmail's home on July 11, 2014, and returned to her home on July 12, 2014.
 - (f) Mr. Esmail and Mrs. Ghiorghita had planned to travel together on July 16, 2014, to Montréal, and then to Cuba.
 - (g) On the night of July 14, 2014, Mr. Esmail spoke with Mrs. Ghiorghita on the telephone at approximately 10:24 p.m.
- [17] I will return to Mr. Ghiorghita's discovery of his wife's infidelity and its bearing on subsequent events later in these reasons.

July 15, 2014: What the neighbours heard

- [18] Mr. Clayton Dunsford lived in another unit of the townhouse located approximately 20 to 30 feet from the Ghiorghita residence. On the morning of July 15, 2014 Mr. Dunsford woke to the sound of several loud bangs. He looked at his clock radio and noted the time was 5:39 a.m. Mr. Dunsford thought the sounds could be gunfire or were related to the garbage and recycling pickup. He fell back asleep until his alarm woke him again at 6:00 a.m. Mr. Dunsford saw nothing unusual outside the Ghiorghita residence before he departed for work at approximately 7:15 a.m.

- [19] Ms. Sarah Fenrich, another resident of the townhouse complex, was awoken on the morning of July 15, 2014, by approximately six loud sounds that she thought could be gunshots. She did not check the time. However, when interviewed by police later that day she estimated that she heard the loud sounds around 6:00 a.m.
- [20] Mr. David Distelmeyer, who also lived in the townhouse complex, was awoken on the morning of July 15, 2014, by five or six loud bangs. When he spoke with police later that day he estimated that he heard the loud sounds between 5:00 a.m. and 6:00 a.m.

Video Surveillance

- [21] Video surveillance from the Metro Motors Ford Dealership located at 2505 Lougheed Highway in Coquitlam showed that Mr. Ghiorghita walked northbound on Hastings Street and then turned westbound onto the sidewalk of the Lougheed Highway at approximately 6:03 a.m. on July 15, 2014.
- [22] The dealership, located on the northwest corner of the Lougheed Highway on Hastings Street, is approximately 300 metres north of the accused's residence.
- [23] The Coquitlam RCMP detachment is located at 2986 Guildford Way in Coquitlam, about 2.5 kilometres, and a 33 minute walk, from the accused's residence.
- [24] Video surveillance from the public entrance to the detachment showed Mr. Ghiorghita arrived at the front door at 7:41 a.m. on July 15, 2014. He attempted to open the front door, which was locked. He then appeared to read a sign on the door indicating that the detachment opened to the public at 8:00 a.m. Mr. Ghiorghita walked away, but returned at 8:02 a.m., opened the front door, and entered the public lobby of the detachment.

Mr. Ghiorghita's attendance at the detachment

- [25] Jacqueline McCambridge, a civilian clerk who worked at the front counter, asked Mr. Ghiorghita if he was looking for somebody in particular. Mr. Ghiorghita replied that he was looking for the police.
- [26] Mrs. McCambridge asked Mr. Ghiorghita why he needed to speak to the police and whether he had an appointment with anyone. For about five to ten minutes Mrs. McCambridge asked Mr. Ghiorghita for clarification of the reason for his attendance at the detachment. The accused kept saying that he wanted to speak to the police. Mrs. McCambridge then requested that the radio room officer, Constable Raj Uppal, come to the front counter.

- [27] In response to Mrs. McCambridge's request for identification, Mr. Ghiorghita produced his driver's licence from his wallet. Mrs. McCambridge then asked Mr. Ghiorghita once more whether he could provide her with more information, such as whether his request had to do with fraud, a traffic matter, or an assault. Mr. Ghiorghita nodded or said "yes" in response to an assault. When Mrs. McCambridge asked Mr. Ghiorghita if he had been assaulted, he replied "no".
- [28] Mrs. McCambridge then asked Mr. Ghiorghita to have a seat and wait in the public reception area, which he did. Overall, Mrs. McCambridge described Mr. Ghiorghita as presenting as calm and fine, but adamant that he wanted to speak to a police officer. He appeared to understand everything that she said and she understood everything he said.
- [29] At approximately 8:36 a.m. Constable Uppal arrived at the front counter where he met Mr. Ghiorghita. In response to the accused's request that they speak in private, Constable Uppal took Mr. Ghiorghita to an interview room. Constable Uppal's interview with the accused was not video or audio recorded.
- [30] The defence admits the voluntariness of any statement made by Mr. Ghiorghita to any police officer.
- [31] I make the following findings of fact concerning Constable Uppal's interview with the accused.
- [32] Mr. Ghiorghita told Constable Uppal that he had done something bad - he had shot his wife. The accused said it had happened about an hour before and gave his address. When Constable Uppal asked if the accused's wife was dead, Mr. Ghiorghita said he did not know. He also said he did not know in what part of her body he had shot her.
- [33] Mr. Ghiorghita also told Constable Uppal the firearm was in the hallway, that it was a 9 mm, and that he did not know if the front door was locked.
- [34] Constable Uppal then left the interview room, called dispatch and requested that police officers and Emergency Services attend at the Ghiorghita residence.
- [35] When he returned to the interview room, Constable Uppal asked Mr. Ghiorghita why he did it. The accused replied there was another man in his house. When Constable Uppal asked Mr. Ghiorghita how many times he had shot his wife, the accused replied "once". Constable Uppal asked Mr. Ghiorghita where his wife was, and the accused said she was on the bed.
- [36] In his direct examination Constable Uppal described Mr. Ghiorghita's demeanour as very nervous, stressed and emotional, and testified the accused was crying at the end of the interview. However, Constable Uppal said that he had no trouble understanding the accused.

- [37] In cross-examination, the officer agreed that Mr. Ghiorghita presented as unsure if his wife was alive, and appeared to be very stressed and overtired. Mr. Ghiorghita told Constable Uppal he had not slept for 30 days. I find that the accused was highly stressed and at times emotionally distraught during the interview, but was capable of understanding and responding to the questions put to him by Constable Uppal.
- [38] At the conclusion of the interview, Constable Uppal arrested Mr. Ghiorghita for murder. The accused remained in police custody through July 15, 2014. At approximately 12:05 p.m. Constable Romaniuk re-arrested Mr. Ghiorghita for murder, reviewed his Charter rights and police caution, and arranged for Mr. Ghiorghita to consult with counsel.
- [39] Between approximately 9:15 p.m. on July 15 and 1:33 a.m. on July 16, 2014, Mr. Ghiorghita was interviewed by Constable Shewchuk and later Constable Blount. That interview was audio and video recorded. A copy of the video and audio recording of the accused's statement to Constables Shewchuk and Blount was marked as Exhibit 9 and the transcript of that interview was marked as Exhibit 10. Mr. Ghiorghita's evidence at trial, which I discuss later in these reasons, was largely consistent with that statement.

Police attendance and searches at the townhouse

- [40] Three police officers, Corporal Hilder and Constables Brown and Blake, were dispatched to the Ghiorghita residence on the morning of July 15, 2014. They arrived at the residence at 8:50 a.m., forced open the front door and entered the townhouse.
- [41] On the second floor, the officers observed an open gun safe located against the wall between the living room and kitchen areas.
- [42] On the third floor, Corporal Hilder found Andra Ghiorghita dead in the master bedroom. The victim was lying on her back, with her right arm positioned slightly above her head in what Corporal Hilder associated with a normal sleeping or lying position. She was covered with a comforter blanket or duvet from the bottom of the bed up to her neck. Mrs. Ghiorghita was wearing pyjama pants and a sleeveless pyjama top. Her body was cold and pulseless. Her cell phone was on the night table beside the bed. The phone's alarm clock was ringing.
- [43] In the hallway outside the master bedroom the police found Mr. Ghiorghita's 9 millimetre semiautomatic handgun. The weapon was in the locked-back position, indicating that every round in the handgun had been fired, and its magazine was empty. Constable Brown picked up the handgun and determined there were no bullets in the chamber or magazine. She then returned the handgun to the position where she found it.
- [44] In the second bedroom on the third floor, the police found a gun case for a 9 millimetre handgun and another magazine containing four rounds of 9 millimetre ammunition.

- [45] Emergency Services personnel arrived, confirmed that Mrs. Ghiorghita was dead, and then transported her body to the Royal Columbian Hospital, where Dr. Craig Litwin performed an autopsy on July 17, 2014.
- [46] Sergeant Ashley Harker, who was initially the crime scene manager and later the lead investigator for this matter, described the two searches of the Ghiorghita residence conducted by the police on the evening of July 15, 2014, and on the following day. In the master bedroom, the police found and seized eight spent 9 millimetre shell casings. They also found one bullet on Andra Ghiorghita's body, two in the mattress, and one under the bed. Blood stains were confined to the bed.
- [47] On the kitchen counter, the police found a 9 millimetre ammunition box capable of holding 25 rounds. There were 13 rounds in that box. In the gun locker, the police found four rifles. Mr. Ghiorghita held a valid licence for the handgun and the rifles. The key to the gun locker was in the lock.
- [48] The police also seized the 9 millimetre handgun, its trigger lock, gun case and cable lock, and sent all of those items, together with the spent shell casings and bullets, for forensic examination.
- [49] On the kitchen counter Sergeant Harker also found an unopened blister pack containing two sleeping pills. On the kitchen floor he found two empty casings of a blister pack for the same medication.

Evidence of Sergeant Hack and admissions concerning search of electronic devices and communications

- [50] Sergeant Keith Hack was qualified as an expert in the forensic examination, analysis and functioning of computer systems, mobile devices, cellular phones and their associated software, programs and applications. The police seized and obtained judicial authorization to search the various electronic devices examined by Sergeant Hack. Those devices included an HTC cell phone seized from the accused upon his arrest, Mr. Ghiorghita's work computer, Andra Ghiorghita's Motorola cell phone and a Toshiba laptop, Samsung tablet, and a Cooler Master Computer tower all seized from the residence.
- [51] The forensic examination of the seized devices showed that Mr. and Mrs. Ghiorghita sent electronic communications to each other by email, text and Facebook messages.
- [52] The continuity, integrity and content of the electronic communications recovered from the seized electronic devices are admitted. However, the defence does not admit the accuracy of the translation of the electronic communications from the Romanian language to the English language.

- [53] The forensic search of the Samsung tablet revealed that it was used by both Andra and Mr. Ghiorghita and was last used at 6:59 p.m. on July 13, 2014 when an Internet search was made for family law lawyers.
- [54] On a search of Andra's cell phone, Sergeant Hack found that on the evening of July 14, 2014, Andra received two incoming calls from Mr. Esmail and made one outgoing call to Mr. Esmail, which occurred at 10:24 p.m. and lasted for approximately 19 minutes. The final user activity on her cell phone occurred at 1:05 a.m. on July 15, 2014. Sergeant Hack also found five different weekday alarm times were programmed into Andra's phone. The earliest alarm time was 5:50 a.m. The latest alarm time was 7:00 a.m.
- [55] Sergeant Hack also found an application named CM Security on both Andra's cell phone and Mr. Ghiorghita's cell phone. CM Security permits the user to log into its website and locate a phone, lock it, or make it ring.
- [56] In cross-examination, Sergeant Hack testified that in addition to those three main functions, CM Security can perform other functions including banking security, malware protection and battery save mode. Sergeant Hack explained that he could not determine what functions were used and could only confirm the application was installed and possibly accessed.
- [57] The forensic search of the Toshiba laptop showed that Andra was the primary user and that the last activity on that device occurred at 1:19 a.m. on July 15, 2014, when the laptop was shut down.
- [58] Sergeant Hack's forensic examination of Mr. Ghiorghita's work computer showed that he made searches for rental housing on June 17 and July 3, 2014, and he searched for child support information on June 16 and for divorce information on June 24. Mr. Ghiorghita also accessed an online dating website on various dates between June 2 and July 14, 2014. Also on July 14, he accessed various Internet websites between 7:34 a.m. and 3:16 p.m., when the last activity on this device occurred. Sergeant Hack also found seven Google searches that had been made in July 2014 on Mr. Ghiorghita's work computer for the same CM Security website associated to the application on Mr. Ghiorghita's and Andra's cell phones.
- [59] Sergeant Hack found that Mr. Ghiorghita was the primary user of the Cooler Master computer seized from the second floor of the residence. The Crown's expert also found one password-protected user account named "Catalin". In order to log onto the computer it was necessary to enter a password. Sergeant Hack found the password had been changed at 8:45 p.m. on July 14, but explained the user could have changed the password by simply entering the old password again. Craigslist searches for rental properties were made on this device on June 27, 28, 29, 30 and July 4, 5, and 10, 2014.
- [60] On his examination of the Cooler Master computer, Sergeant Hack also found that on July 15, 2014:

- the computer entered sleep mode at 12:16 a.m.;
- the computer exited sleep mode at 5:24 a.m., which required human intervention;
- the user account "Catalin" was logged into at 5:38 a.m.
- between 5:38 a.m. and 5:40 a.m. there was activity on the computer involving Yahoo! Messenger, Boomerang and Gmail. Boomerang performs a number of functions, including permitting the user to delay the sending of an email;
- at 5:39 a.m. the email account for irinelghiorghita@gmail.com was accessed and logged out of;
- at 5:40 a.m. the computer shut down;
- no further activity was noted after this time.

[61] On cross-examination, Sergeant Hack testified there were both administrator and guest user options on the Cooler Master computer but that neither had been used.

[62] A forensic search of Mr. Ghiorghita's HTC cell phone showed the user installed the Yahoo! Messenger application at 5:51 a.m. on July 15. Sergeant Hack explained that installation required the user to select various options to configure the settings, including entering a phone number or an email and password and that this was an original installation of Yahoo! Messenger rather than an update.

[63] Sergeant Hack also found that a Google search for "android yahoo mail password" occurred at 7:39 a.m.; that another website was accessed at 7:39 a.m., and that no phone calls were made on the morning of July 15 of 2014.

Email to Maria Ghiorghita

[64] On July 16, 2014, at 9:23 a.m., the accused's mother, Maria Ghiorghita, received the following email:

Good morning, or good evening. Irinel here.

Keep Matei there, do not send him back to Canada.

Here, there is nothing more.

I sent you a parcel and a separate letter with detailed explanations.

Parcel #: CC197 726 082 CA.

All the best!!

[65] That email was sent from Mr. Ghiorghita's Cooler Master computer at 5:39 a.m. on July 15, 2014 from the email account for irinelghiorghita@gmail.com to Maria Ghiorghita's email address.

- [66] The original version in the Romanian language was translated by Andrea Hansen, a witness qualified to translate the Romanian language to the English language. Mrs. Hansen agreed that the line, "Here, there is nothing more" could also be interpreted to mean, "There is not much more here" or "There is nothing here any more".
- [67] The email referred to a parcel mailed by the accused to his parents from a post office in Port Coquitlam on July 12, 2014, at 4:11 p.m.
- [68] Before mailing the parcel, Mr. Ghiorghita had attended a TD Canada Trust Bank in Port Coquitlam, where he withdrew \$4,999.77 in Canadian dollars from a joint line of credit he held with his wife. The funds withdrawn were converted into American currency.

Forensic Examination of Firearms

- [69] Pursuant to s. 655 of the Criminal Code, the following facts related to the Crown's expert evidence of the forensic examination of the firearms and ammunition were admitted:
- (a) Daisy Wong, an expert in the forensic examination of firearms, examined items seized by the police and reported her findings in a report dated August 21, 2015. Her principal findings were as follows.
 - (b) The eight bullets recovered from Andra Ghiorghita's body, from her mattress and the floor beneath her bed are consistent with having been fired by the Jericho 9 millimetre handgun owned by the accused and marked as Exhibit 4.
 - (c) The duvet on Andra Ghiorghita's bed was perforated by 8 holes, consistent with having been caused by 8 bullets.
 - (d) The 8 bullets were fired from a distance greater than 1 foot.
 - (e) A magazine loaded with four 9 millimetre Luger rounds was located in the second bedroom, as depicted in Exhibit 8, tab C, photograph 75. The magazine and rounds are capable of being used with the Jericho handgun.

Cause of Death

- [70] The facts concerning the cause of death of Andra Ghiorghita as set out below in paras. 71 through 73 are all admitted by the defence.
- [71] Dr. Craig Litwin is an expert in forensic pathology. On July 17, 2014, he performed an autopsy on Andra Ghiorghita at Royal Columbian Hospital.
- [72] Dr. Litwin's principal pathological findings were that:
- (a) There were 9 entrance gunshot wounds, consisting of 4 gunshot wounds to Mrs. Ghiorghita's chest, 4 gunshot wounds to her abdomen and 1 gunshot wound to her right forearm.

- (b) The gunshot wound on the right forearm has an entrance and exit wound. The entrance wound is on the posterior aspect of the forearm and the exit wound is on the anterior aspect of the right forearm. The exit gunshot wound could be aligned with any of the entrance gunshot wounds to the chest or the abdomen. As such, one of the gunshot wounds to the chest or abdomen may be a re-entry gunshot wound.
 - (c) The trajectory of the wounds to Mrs. Ghiorghita's chest and abdomen were from her front to her back and upwards.
 - (d) Mrs. Ghiorghita was alive at the time she sustained the wounds.
 - (e) All of the wounds except the one to Mrs. Ghiorghita's right forearm were life-threatening and death would have occurred within minutes without immediate medical attention.
 - (f) The principal cause of Mrs. Ghiorghita's death was blood loss due to multiple gunshot wounds.
- [73] Four bullets were recovered during the autopsy and seized by the police and later analyzed.

Mr. Ghiorghita's Evidence

- [74] I turn now to Mr. Ghiorghita's evidence. In his direct examination, Mr. Ghiorghita testified that one day in January 2008 he came home from work late and found that Matei was still up. The child, who was then aged two years and seven months, told Mr. Ghiorghita that he needed to sleep with him because his mom was sleeping with the landlord. The accused testified that when Andra told him nothing had happened, he believed her. However, he said he had some suspicions about his wife, because after they married he found out Andra had gone out with another man. On that occasion, she also denied that anything romantic had happened.
- [75] In 2010 or 2011, Mr. Ghiorghita, with Andra's knowledge, installed a motion and sound activated camera in the townhouse living room. The accused testified that he and Andra were both working, and at times, when they were unable to arrange for daycare, they left Matei at home alone. Mr. Ghiorghita and Andra were both able to access to system in order to check up on Matei.
- [76] Family was very important to Mr. Ghiorghita. He had only a few friends. Mr. Ghiorghita testified that whenever he tried to make friends, his wife resisted and accused him of trying to get girlfriends. The accused testified this upset him, but did not make him angry.
- [77] At the end of May 2014, Mr. Ghiorghita went on a weekend hunting trip. The following week, on June 6, 2014, he checked the camera recordings and realized there were some black images on the screen for the day he had been hunting. He observed the camera had been turned to the wall. However, Mr. Ghiorghita listened to the audio recording and discovered that Andra had sexual relations with another man in the townhouse while he was away. Mr. Ghiorghita testified that hearing the audio recording was "something like a punch for me".

He said that he was upset and "a little bit angry".

- [78] On the evening of June 6, 2014, when Mr. Ghiorghita asked Andra what she had been doing the previous Friday, she offered some innocuous explanations. The following morning, when he showed her the audio recording, she acknowledged that she had slept with another man.
- [79] Mr. Ghiorghita gave evidence that after Andra acknowledged the affair, she suggested and he agreed that they would send Matei to Romania to stay with the accused's parents. Their plan was to have Matei away for a month while Mr. Ghiorghita and Andra worked on their marriage and attended counselling. They also made arrangements for a trip to Seattle.
- [80] Mr. Ghiorghita testified that "everything changed" on June 15, 2014, immediately after Matei departed for Romania. While they were still at the airport, Andra informed Mr. Ghiorghita that she intended to continue her relationship with Mr. Esmail. She also said Mr. Ghiorghita had to sleep separately in another room. As the accused put it, all plans to go to Seattle and to see a marriage counsellor "disappeared".
- [81] After June 15, 2014, Andra only came home to the townhouse intermittently. The accused testified that he did not know what to believe and that he was confused, upset, very tired, but not angry.
- [82] Mr. Ghiorghita also gave evidence that he began to have difficulty sleeping around December 2013. Before then, he regularly slept eight hours a night. From December 2013 onward there were some nights when he had no sleep at all because he worried about why Andra was so cold with him. Mr. Ghiorghita began to use over-the-counter sleep medication after Matei left for Romania.
- [83] After Matei departed, Mr. Ghiorghita began to monitor Andra's phone and computer. He hacked her email account and installed a program on her phone that recorded her conversations.
- [84] Through monitoring his wife's conversations Mr. Ghiorghita learned Andra was still going out with Mr. Esmail; that they were taking business trips together; exchanging sexual messages and planning vacations. The accused also learned that Andra planned to move to North Vancouver with Mr. Esmail and to take Matei with her.
- [85] The accused said that because Andra was unwilling to discuss her plans with him, he continued to listen to her recorded conversations with Mr. Esmail. He did not discuss his marital problems with his parents or friends because he was ashamed.
- [86] Mr. Ghiorghita testified that from May through July 2014 he found he was unable to concentrate at work and his performance declined. That evidence is corroborated by the testimony of his supervisor, Ms. Chantelle Anderson, who gave evidence that the accused was good at his job but his performance really slipped around the May 2014 long weekend.

- [87] On the evening of July 12, 2014, Mr. Ghiorghita confronted Andra and told her he had hacked her emails and phone messages. The accused testified they argued and that Andra yelled at him and got angry when he told her that he had read her email and recorded her phone conversations. Mr. Ghiorghita initially denied that he was angry. He testified that he was still hoping to work things out, although Andra insisted they separate. Later in his direct examination, he acknowledged that he was "maybe a little angry".
- [88] Mr. Ghiorghita went to bed around 10:00 p.m. on the evening of July 14, 2014, but was unable to sleep. He was sleeping in Matei's room, the second bedroom on the third floor. Mr. Ghiorghita said that he got up, did something on the downstairs computer, took three sleeping pills and then went back to bed after midnight.
- [89] On the morning of July 15, 2014, Mr. Ghiorghita said that he got up, went downstairs, and was preparing his lunch for work at the kitchen counter when Andra came down and told him not to forget to take his passport, so that he could pick up the clothes and shoes she needed for her vacation from their mailbox in Bellingham, Washington. The accused testified that he intended to go to Bellingham, Washington, after work that day, and that he also intended to do some shopping, fill up the gas tank, and pay American credit card accounts that he could not pay online. Mr. Ghiorghita testified that he had withdrawn approximately \$4,800 from his TD Bank line of credit the previous Saturday to pay these expenses. He said he put the money on the kitchen shelf.
- [90] Mr. Ghiorghita testified that he was not angry when Andra asked him to pick up the clothes in the United States. They had discussed her request the night before.
- [91] On the morning of June 15, 2014, Mr. Ghiorghita knew that Andra and Mr. Esmail were planning on going on vacation in Cuba. From reading her emails he thought that Andra did not care about him or Matei. Mr. Ghiorghita testified that it was hard to describe his feelings, but said that he was stressed out and had never felt more stressed.
- [92] I should correct myself and say the reference was to July 15, 2014, not June 2014.
- [93] Mr. Ghiorghita gave evidence that he did not remember too much after Andra asked him to pick up her clothing from the States. The accused said he had an image in his mind of a black gun case but does not remember seeing the gun or where he saw the gun case. Mr. Ghiorghita also testified that he does not remember loading the gun's magazine. He does remember the sound of the shot, and somebody screaming. He did not know who was screaming, but thought the screaming was from somebody outside the townhouse.
- [94] The accused testified that he also remembered being in the hallway with the gun in his hand, and that he tried to figure out what had happened. Mr. Ghiorghita said he did not know if the gun was loaded, but put the gun to his head and that it did not work. The noise of the gun firing was still in his head. At that point he thought he had shot Andra. He remembered the loud noise, but had no memory of shooting her.

- [95] The accused also testified he has no recollection of walking upstairs, going into the master bedroom, or seeing Andra after she spoke to him about going to the United States.
- [96] The accused recalls taking his jacket and car keys before he left the townhouse. Mr. Ghiorghita also remembered that after he woke up and went downstairs, he turned on the computer and checked his emails before he took his lunch from the fridge.
- [97] Mr. Ghiorghita said he did not remember sending the email to his mother, why he sent it, or whether he sent the email before or after the shooting.
- [98] Mr. Ghiorghita thought that he had only slept for a couple of hours the night before the shooting.
- [99] With respect to the CM Security application, Mr. Ghiorghita testified that it was installed, with Andra's knowledge, on all of their devices and that it had many features, including anti-virus and banking. After he found out about Andra's infidelity, he used the application to track the location of her phone. He also said he had installed Boomerang on some of his devices in June 2014 to test the program for a client interested in its batch mailing function.
- [100] In cross-examination, Mr. Ghiorghita testified that what happened at the airport on June 15, 2014, when Andra announced she intended to continue her relationship with Mr. Esmail and insisted the accused sleep in a separate room, was a major blow, but denied that it made him angry. The accused also gave evidence that he was having trouble looking into the future; that it was difficult to get answers from Andra about their marriage; that he was worried about Matei and concerned that his son would drift away from him.
- [101] Mr. Ghiorghita also gave further evidence concerning his argument with Andra about their marriage on July 12, 2014. The accused testified that in addition to telling his wife he had hacked into her phone, he also told her he was aware of her plan to take Matei with her when she moved to North Vancouver with Mr. Esmail. Mr. Ghiorghita was also aware that Andra would not return from her Cuban vacation with Mr. Esmail in time to pick up Matei at the airport upon his return from Romania. During their argument, when Andra asserted that she would obtain custody of Matei, Mr. Ghiorghita replied, "Matei will go to you over my dead body", to which she replied, "no problem".
- [102] During his cross-examination, Mr. Ghiorghita tended to downplay the effect upon him of his argument with Andra, particularly as it concerned Matei. He initially noted he experienced "a little anger". He agreed that after the shooting, he told Dr. Lohrasbe that: "Looking back, I think her making plans about my son and taking him away from me must have been my breaking point". Mr. Ghiorghita then acknowledged that he and Andra got into a loud argument, that he got angry and that the conversation about Andra taking Matei from him started on July 12 and continued on July 14. The accused also agreed that he was really upset about the situation with Matei after Andra told him she would not be back from her vacation in time to pick up her son.

- [103] Mr. Ghiorghita testified in cross-examination that after he placed the envelope containing the money he had withdrawn from the TD Bank account on the kitchen bookshelf on July 12, 2014, he never saw the money again. He denied he had sent the money to Romania in the package he had mailed to his parents on July 12, 2014.
- [104] The accused confirmed that he had often picked up items for Andra from their Bellingham mailbox.
- [105] Mr. Ghiorghita agreed that he knew a single shot from a gun could kill a person.
- [106] The accused acknowledged that he told Constable Uppal he had shot his wife once, did not know if she was dead and did not know what part of her body he had hit.
- [107] Mr. Ghiorghita agreed that he had not called an ambulance, but denied he had not called an ambulance for assistance because he wanted Andra to die. When Crown counsel suggested that he did not want Andra to be saved, Mr. Ghiorghita replied "I do not know what was in my mind". He also said he could have called the ambulance but did not think to do so, and that he did not know how long he remained in the townhouse after the shooting.
- [108] Later in his cross-examination, Mr. Ghiorghita agreed that he told Dr. Lohrasbe he had an image of taking the handgun out of its case. Mr. Ghiorghita testified that he has a picture of the gun case open. He also agreed that during his second interview with Dr. Lohrasbe he recalled taking the key to the gun safe. The accused testified that he has a picture of that. When asked why he had not mentioned that during his direct examination, Mr. Ghiorghita responded, "Nobody asked me".
- [109] Mr. Ghiorghita testified that when he was in the hallway and realized he had the gun in his hand, he tried to shoot himself but the gun was not working. He said he had memories of dropping the gun and that he chose not to shoot himself. He thought he was thinking about Matei at that point.
- [110] In cross-examination, Mr. Ghiorghita reiterated that after waking on the morning of July 15, 2014, he went downstairs, checked his email and then removed his lunch from the fridge before Andra came down and told him not to forget his passport.
- [111] During his interview by Constables Shewchuk and Blount, Mr. Ghiorghita was asked the following question by Constable Shewchuk:

Ah yes, I know it is clear what happened, but why did that happen? And why are you sitting here today?

Mr. Ghiorghita replied:

'Cause I made a stupid . . . choice.

- [112] At trial, Mr. Ghiorghita said when he told Constable Shewchuk he had made a stupid choice, he was referring to marrying Andra and to have chosen to stay with her, despite opportunities to get out of the relationship.
- [113] Later in the interview, when asked by Constable Blount why he came to the police, Mr. Ghiorghita responded "Because I had done a stupid thing".
- [114] In cross-examination, Mr. Ghiorghita acknowledged that in giving that answer he was referring to the act of shooting Andra.
- [115] Counsel, we will now take a short break and then I will continue with the balance of my reasons.
- [116] THE CLERK: Order in court.
- (PROCEEDINGS ADJOURNED FOR MORNING RECESS)
- (PROCEEDINGS RECONVENED)
- [117] THE COURT: I turn now to Dr. Lohrasbe's evidence.

Dr. Lohrasbe's Evidence

- [118] Dr. Lohrasbe was asked by the defence to provide an opinion on Mr. Ghiorghita's mental state at the time of the shooting. In conducting his psychiatric assessment, Dr. Lohrasbe interviewed the accused for a total of four hours in two sessions.
- [119] In Dr. Lohrasbe's opinion, Mr. Ghiorghita was in a dissociative state of automatism at the time of the shooting. Dr. Lohrasbe thought that condition was the product of cumulative psychological blows sustained by the accused until he could no longer suppress his over-controlled anger. In Dr. Lohrasbe's view, Mr. Ghiorghita had long functioned in an over-controlled way in his troubled marriage, and had kept a tight lid on his emotions, including his anger. Dr. Lohrasbe explained that the accused:
- ... suppressed the conscious experience and expression of anger, and emotion that threatened his values, his identity, his marriage, and his desire to provide a united parental front for his son. In the process of doing so, he exerted excessive control, or over control, on feelings of betrayal, humiliation, resentment, all of which kept feeding his unacknowledged and unexpressed anger.
- [120] In Dr. Lohrasbe's opinion, the accused's unaddressed anger became dissociated from his overall mental functioning. Cumulative psychosocial stressors overwhelmed Mr. Ghiorghita's capacity to cope with stress, anger and humiliation of his relationship with Andra. Dr. Lohrasbe thought the accused was likely in a dissociative episode at the time of the shooting of his wife, and that there was a significant impairment of his awareness of, and ability to control, his actions.

- [121] Dr. Lohrasbe described dissociation as the disconnection or splitting off of mental functions that are normally integrated. He referred to dissociation as a state of hyper focus which can involve goal-directed behaviour and complex actions.
- [122] Dr. Lohrasbe thought that Mr. Ghiorghita, rather than feigning amnesia, was trying to piece together his fragmented memory of the events of July 15, 2014.
- [123] The defence psychiatrist acknowledged that he could not provide a definitive opinion; that there were alternative explanations for the accused's loss of memory; that amnesia is an easy symptom to feign; and that his opinions were highly dependent on Mr. Ghiorghita's account.
- [124] In cross-examination, Dr. Lohrasbe agreed that memory can be the one function that is splintered off when a subject is in a dissociative state, and that the subject may maintain control of his actions. He gave examples of a police officer or soldier acting deliberately in combat but having no recollection of the event afterwards. He agreed that dissociative amnesia can set in after the event, and that the amnesia then erases the memory of the event.
- [125] Dr. Lohrasbe also acknowledged that retrograde amnesia happens after the fact as the subject unconsciously represses the memory of a horrific or traumatic event. He agreed that if the amnesia were retrograde it was possible that during the event the person was aware of his actions and that the pathological process began after the event. He candidly said there was no way of definitively knowing.
- [126] Dr. Lohrasbe confirmed that the accused had no past history of dissociative disorder, and that in determining whether an accused was in a dissociative state at the time of the alleged offence, a pre-existing history of dissociative events made the existence of such a dissociative state more likely.
- [127] Dr. Lohrasbe did not recall discussing with Mr. Ghiorghita the email he sent to his mother at 5:39 a.m. on July 15, 2014, requesting that his parents keep Matei in Romania. Dr. Lohrasbe assumed the accused sent the email after the shooting and agreed that it would make a difference if it were sent before the shooting. On cross-examination, Dr. Lohrasbe agreed that it was fair to say Mr. Ghiorghita was not in a dissociative state when he sent the email. On re-examination, Dr. Lohrasbe was asked whether the accused could have sent the email in a dissociative state. After pausing to consider his answer, Dr. Lohrasbe said that the literature can be pretty confusing about whether there can be periods of dissociation broken up, and suggested that Mr. Ghiorghita had more than one dissociative event on the morning of July 15, 2014.
- [128] Dr. Michael Sheppard, a psychologist retained by the defence, provided an assessment of Mr. Ghiorghita's personality. He was not asked to provide an opinion on the accused's state of mind at the time of the offence.

- [129] Dr. Sheppard agreed with Dr. Lohrasbe's hypothesis of over-controlled anger, and that the accused had obsessive personality traits and dependent and avoidant traits related to his marriage. He also thought Mr. Ghiorghita's loss of memory of the offence was consistent with dissociative amnesia.
- [130] I find that Mr. Ghiorghita's personality did include the over-controlled anger as described by Drs. Lohrasbe and Sheppard, and that he also had the obsessive, dependent and avoidant personality traits described by those experts.

Dr. Murphy's Evidence

- [131] The Crown's psychiatrist, Dr. Emeline Murphy, interviewed Mr. Ghiorghita on one occasion in June 2016 for about one-and-a-half hours. Dr. Murphy accepted Dr. Lohrasbe's description of dissociation.
- [132] As the defence pointed out in their submissions, Dr. Murphy's report was marred by a number of factual errors. For example, she incorrectly referred to the firearm as a shotgun rather than a handgun. She thought that Mr. Ghiorghita was unemployed at the time of the alleged offence. Dr. Murphy also thought that Mr. Ghiorghita had installed the security camera in the living room area of his home in order to monitor Andra's activities. She was incorrect in that assumption and I am satisfied that as I have already indicated in these reasons that camera was installed with Andra's knowledge for the purpose of monitoring their child's activities when the parents were absent.
- [133] Dr. Murphy also erroneously referred to Mr. Ghiorghita's employer as describing him as "abusive" when the term she used was "abrasive".
- [134] These errors suggest that Dr. Murphy may have prepared her report with some haste and do tend to detract from her opinion.
- [135] Dr. Murphy did acknowledge that a person with a long history of reacting to stress with personality traits such as dependency or avoidance and experiencing fragmented recollection of events, and who is also exposed to acute stressors, may well be the subject of a hypothesis of dissociation, not amounting to a mental disorder.
- [136] In her cross-examination, Dr. Murphy agreed that family was a highly significant part of Mr. Ghiorghita's life and that his relationship with his wife and Matei was of paramount importance. She also agreed that the accused was prepared to suffer the humiliation and shame associated with Andra's infidelity in an effort to attempt to keep the family intact. Dr. Murphy also acknowledged that there were signs that Mr. Ghiorghita experienced cumulative stress, weight loss and sleep deprivation.
- [137] In Dr. Murphy's view, in assessing a patient or subject for dissociation, it is necessary to look for connections between the social context immediately before the alleged dissociated state and the accused's violent act, to look for a trigger and to consider whether the behaviour was planned, goal-directed and linear. She also placed importance on the

question of whether there was a motive for the injury. In Dr. Murphy's view, the more behaviour is connected with a motive and the more connected the alleged offender is to the person who triggers the emotional reaction, the less likely it is that the accused person is experiencing dissociation.

[138] In Dr. Murphy's view, there was no supportive evidence for a diagnosis of automatism. She adhered in both her direct and cross-examination to the view that the accused's deep disappointment with his relationship with Andra provided a plausible motive. She also emphasized there was no history of dissociative disorders, and in her view no immediate shocking behaviour by Andra sufficient to trigger an automatistic response.

[139] Although I have referred to a number of factual errors in Dr. Murphy's report, which as I say detract somewhat from her opinion, I also note that the factors that she relied upon in reaching her conclusion that the accused was not in a dissociative state at the relevant time essentially parallel those discussed by the Supreme Court of Canada initially in *R. v. Stone*, [1999] 2 S.C.R. 290, as relevant to the determination of whether or not an accused person is in a state of automatism.

[140] I turn now to the law.

THE LAW

The Defence of Automatism

[141] Automatism is "a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action": *Stone* at para. 156.

[142] As Doherty J.A. explained in *R. v. Luedecke*, 2008 ONCA 716 at para. 54:

54 . . . Automatism refers to involuntary conduct that is the product of a mental state in which the conscious mind is disassociated from the part of the mind that controls action. A person in a state of automatism may perform acts, sometimes complicated and apparently purposeful acts, but have no control over those actions . . .

[143] A defence of automatism amounts to a denial of the voluntariness component of the *actus reus* of the offence. A person who is unable to control the performance of the act cannot be said to have committed the act voluntarily. Conduct which is involuntary cannot be criminal: *Stone* at para. 170; *Luedecke* at para. 56; and *R. v. Alexander*, 2015 BCCA 484 at para. 28.

[144] The law recognizes two types of automatism: mental disorder automatism and non-mental disorder automatism. While a successful defence of mental disorder automatism leads to a finding of not criminally responsible by reason of mental disorder pursuant to s. 16 of the Criminal Code, a successful defence of non-mental disorder leads to an acquittal: *Stone* at para. 157 and *Alexander* at para. 29.

The test for automatism

- [145] When assessing a claim of automatism, the trial judge undertakes a two-step process. First, the trial judge must determine whether the accused has established a proper evidentiary foundation for a defence of automatism. Second, the trial judge must determine which form of automatism should be left to the trier of fact: Stone at paras. 171, 182 and 193.
- [146] Because the law presumes that people act voluntarily, and a defence of automatism is a claim that the accused's actions were non-voluntary, the accused must rebut the presumption of voluntariness. Automatism is a "reverse onus" defence, for which the accused bears both an evidentiary burden to rebut the presumption, and a persuasive burden, on a balance of probabilities, to prove he acted involuntarily: Stone at paras. 171 and 179.
- [147] The evidentiary burden will be met, and the defence put to the trier of fact, where there is any evidence upon which a properly instructed jury, acting judicially, could reasonably conclude that the defence has been established on a balance of probabilities: R. v. Fontaine, 2004 SCC 27 at paras. 54 and 89, and Stone at para. 182. To meet the evidentiary burden, the accused must: (1) claim that his or her actions were involuntary at the relevant time; and (2) present expert psychiatric evidence that is logically probative of the claim: Alexander at para. 31.
- [148] In determining whether there is an "air of reality" to the defence of automatism, the trial judge must assume the truth of the evidence that tends to support the defence and leave the reliability, credibility and weight of the evidence to be determined by the trier of fact: Fontaine at paras. 69 and 72.

Determining which branch of automatism to leave with the trier of fact

- [149] Once the defence has met the evidentiary burden, the trial judge decides which form of automatism should be left with the trier of fact: Stone at para. 193.
- [150] Whether a particular condition is a mental disorder is a question of law for the trial judge to decide.
- [151] As the Court of Appeal explained in Alexander at para. 34:

34 A mental disorder is defined by s. 2 of the Criminal Code as a "disease of the mind". The legal concept of a disease of the mind is very broad and embraces:

. . . any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion: R. v. Cooper, [1980] 1 S.C.R. 1149 at p. 1159.

[152] Only in rare cases will automatism not be caused by mental disorder. The trial judge starts from the proposition that the condition the accused claims to have suffered from is a disease of the mind, and then determines whether the evidence in the particular case takes the condition out of the disease of the mind category: Stone at para. 199.

[153] In Stone, the Court adopted a holistic approach to determine whether the accused's specific condition was a disease of the mind. That approach takes into account three factors: (1) the internal cause factor; (2) the continuing danger factor; and, (3) other policy considerations: Stone at para. 203 and Alexander at para. 38. In undertaking the analysis the Court takes into account the particular circumstances of each case.

(i) The internal cause factor

[154] The purpose of the internal cause factor is to determine whether the accused's condition arose from an internal cause such as the accused's psychological or emotional make-up rather than a specific external factor such as a psychological blow. An internal cause will suggest the accused's condition is a disease of the mind: Alexander at para. 39.

[155] The trial judge must consider the nature of the triggering event and determine whether a normal person in the same circumstances as the accused could have reacted to that event by entering into an automatistic state: Stone at paras. 204 and 210; Alexander at para. 40. Evidence of a shocking psychological blow is required to show that a normal person might have reacted to the trigger by entering an automatistic state: Stone at paras. 205 and 206.

[156] The "ordinary stresses and disappointments of life" do not constitute an external cause: Alexander at para. 42.

(ii) The continuing danger factor

[157] This factor requires an assessment of the likelihood of the recurrence of violence. A condition which is likely to present a recurring danger to the public should be treated as a disease of the mind: Stone at para. 212. A recurring danger is one that is likely to arise again independently of the accused's voluntary behaviour: Alexander at para. 44.

[158] Two issues particularly relevant to the continuing danger factor are the psychiatric history of the accused and the likelihood that the trigger alleged to have caused the automatistic episode will recur: Stone at para. 214.

(iii) Other policy considerations

[159] Under the holistic approach, trial judges may take into account policy considerations, particularly where neither the internal cause nor the continuing danger factor provides a conclusive answer to the question of whether the condition the accused claims to have suffered from is a disease of the mind: Stone at para. 218.

[160] In *Alexander* at para. 49, the Court identified the major policy consideration as whether it is necessary to protect the public from the accused by using the mental disorder procedure under Part XX.1 of the Criminal Code.

[161] Because medical experts do not take into account policy considerations, expert evidence regarding the accused's condition is informative, but not binding upon the trial judge: *Alexander* at para. 33.

[162] In *Stone* at para. 195, the Court cited with approval the following passage from the reasons of Martin J.A. in *Rabey v. The Queen* (1977), 17 O.R. (2d) 1 (Ont. C.A.):

The evidence of medical witnesses with respect to the cause, nature and symptoms of the abnormal mental condition from which the accused is alleged to suffer, and how that condition is viewed and characterized from the medical point of view, is highly relevant to the judicial determination of whether such a condition is capable of constituting a "disease of the mind". The opinions of medical witnesses as to whether an abnormal mental state does or does not constitute a disease of the mind are not, however, determinative, since what is a disease of the mind is a legal question. . . .

[163] In *Luedecke* at para. 63, the Ontario Court of Appeal suggested that successful claims of non-mental disorder automatism would be limited to cases where an accused suffered a single incident of automatism; could point to a specific external event that triggered that incident; could demonstrate the triggering event is unlikely to recur; and could show the event could have produced a dissociative state in an otherwise "normal" person.

The persuasive burden of the proof of involuntariness on the balance of probabilities

[164] If the trial judge concludes the condition the accused claims to have suffered from is not a disease of the mind, only the defence of non-mental disorder automatism will be left to the trier of fact. The question for the trier of fact will be whether the defence has proven on a balance of probabilities that the accused acted involuntarily. An affirmative answer will result in a successful defence of non-mental disorder automatism entitling the accused to an acquittal: *Stone* at para. 219.

[165] At this stage, the trier of fact should be reminded of the serious policy factors surrounding automatism, including feignability and the repute of the administration of justice: *Stone* at para. 220.

[166] When considering whether the defence has met the persuasive burden, the trier of fact should consider evidence of the severity of the triggering event; whether there was corroborating evidence from bystanders; whether the accused has a documented history of dissociative states; whether there is evidence of the motive for the crime; and whether the alleged trigger of the automatism is also the victim of the violence: *Stone* at para. 220 and *Fontaine* at paras. 86 to 88. The trier of fact should ask whether or not the crime in question

is explicable without reference to the alleged automatism. If not, the plausibility of the accused's claim of involuntariness will be increased: Stone at para. 191.

- [167] The weight to be given to expert evidence will vary from case to case. Where the expert evidence shows a history of automatistic dissociative states it will attract more weight than where the expert simply provides an opinion about the circumstances concerning the allegation of automatism based upon what he or she has been told by the accused. The weight to be attached to the latter type of opinion depends entirely "on the accuracy and truthfulness of the account of events given to the expert by the accused": Stone at para. 186.

ANALYSIS

Has the accused satisfied the evidentiary burden?

- [168] In support of his claim that he was in a state of automatism when he shot and killed Andra Ghiorghita, the accused has given evidence about his lack of memory of the shooting and the events which immediately preceded the death of his wife. In Dr. Lohrasbe's opinion, when Mr. Ghiorghita shot his wife he was in a dissociative state induced by the cumulative effects of the breakdown of his marriage, his wife's betrayal, and the prospects of losing custody of his son. According to Dr. Lohrasbe, "the dam was ready to burst"; Mr. Ghiorghita could no longer suppress his over-controlled anger and acted involuntarily when he shot his wife.
- [169] At this first stage of the analysis, I must accept the truth of this evidence. The Crown concedes, and I find there is some evidence upon which a properly instructed jury, acting judicially, could reasonably conclude the defence of automatism has been established on a balance of probabilities. The accused has met the evidentiary burden.

Mental Disorder or Non-Mental Disorder Automatism

- [170] Both the Crown and the defence submit that the presumption of mental disorder automatism should be displaced in favour of non-mental disorder automatism.

The internal cause factor

- [171] Dr. Lohrasbe thought that although Mr. Ghiorghita did not suffer from any personality disorder, he had a long history of significant avoidant, dependent and obsessive compulsive personality traits. The defence expert explained that persons with avoidant traits are overly sensitive to disapproval and rejection, and that persons with dependent traits go to extreme lengths to avoid rejection, particularly in intimate relationships, where they may become submissive to the needs and demands of their partners.
- [172] In Dr. Lohrasbe's opinion, Mr. Ghiorghita coped with stressors by suppressing his anger, despite his mounting feelings of betrayal, humiliation and resentment as he learned of his wife's infidelity, deception and intended removal of Matei from his care.

[173] Addressing the connection he saw between the accused's over-controlled anger and his alleged dissociative state at the time of the offence, Dr. Lohrasbe said this at page 18 of his report:

...

Unaddressed emotions can become disconnected or dissociated from overall mental functioning. Under circumstances when over-controlled anger finally emerges, the anger takes on a life of its own. It (the emergent anger) is not associated with, informed, or restrained by the over controlled individual's conscious wishes. It is dis-associated or dissociated from the rest of the conscious awareness and drives actions that are discordant with the person's conscious emotions, perceptions, thoughts, fantasies, hopes, wishes and plans.

[174] The defence suggests the immediate trigger for the accused's dissociative state occurred on the early morning of July 15, 2014, when Andra Ghiorghita came down to the kitchen where the accused was preparing his lunch and reminded him to take his passport in order to pick up from the post office box the Ghiorghitas maintained in Washington State some shoes and clothing she required for her vacation with Mr. Esmail.

[175] Mr. Ghiorghita told Dr. Lohrasbe that on July 14, 2014, when Andra had asked him to pick up the purchases from the United States so that she could go on her vacation, he was astounded by her thoughtlessness and he told her that he would not do so.

[176] Text messages exchanged between Andra and Mr. Ghiorghita on July 14, 2014 show that she offered to go if he could not make the trip and that the accused told her that he would go.

[177] Here, Mr. Ghiorghita's personality traits, and in particular his over-controlled anger, suggest a trigger internal to the accused. Viewed on its own, Andra's reminder on the morning of July 15, 2014 that Mr. Ghiorghita not forget his passport does not appear to be the kind of extreme psychological shock that might render a normal person, similarly situated to the accused, susceptible to the onset of an automatistic state.

[178] However, I also bear in mind that over the six weeks preceding the shooting death of Mrs. Ghiorghita, the accused had learned of and struggled to cope with a cascading series of humiliating events, including his wife's intimate relations with her lover in the Ghiorghita residence, her deception following Matei's departure for Romania, and her plan to leave him for Mr. Esmail and to take Matei with her. In Dr. Lohrasbe's opinion, Mr. Ghiorghita suffered a series of psychosocial blows, which cumulatively triggered a violent but involuntary response while the accused was in a dissociative state.

[179] In my view, this is one of those cases where the internal cause factor does not reveal a clear line between internal and external factors.

The continuing danger factor

- [180] Mr. Ghiorghita has no prior history of violence, nor is there any history of previous dissociative states. According to Dr. Lohrasbe, whose opinion on this point I accept, while Mr. Ghiorghita has experienced intermittent symptoms of anxiety and depression, largely associated with his marital problems, he does not suffer from any psychotic mental disorder.
- [181] The Crown's expert, Dr. Murphy, agrees that Mr. Ghiorghita has no signs or symptoms of a major psychiatric disorder such as depression or psychosis. Dr. Murphy also found no evidence that Mr. Ghiorghita suffered from a psychotic disorder or major depressive disorder at the time of the alleged offence.
- [182] Neither Dr. Lohrasbe nor Dr. Murphy has suggested that Mr. Ghiorghita requires psychiatric treatment or care.
- [183] The likelihood of the alleged trigger of the dissociative episode recurring appears to be very low. Although it is conceivable that the accused might experience cumulative emotional distress in a future relationship, it is unlikely that he would encounter a similar combination, level and intensity of the factors said to have triggered his violent response in this case.

Other policy considerations

- [184] Neither of the medical experts diagnosed the accused with a mental disorder. As the Court observed in Alexander at para. 49, if the accused has a pre-existing condition but does not require any special treatment and is not a threat to others, a trial judge could find that the condition is not a disease of the mind. Here, it is unnecessary to protect the public from Mr. Ghiorghita by using the mental disorder provisions of the Criminal Code.
- [185] Upon a consideration of all of the holistic approach factors, I find that the presumption of mental disorder automatism is displaced and that on the evidence adduced in this case I must only consider the defence of non-mental disorder automatism.
- [186] I am just going to take another short break before I conclude my reasons. So we will stand down for just a few minutes. Thank you.

(PROCEEDINGS ADJOURNED AND RECONVENED)

Has the accused satisfied the persuasive burden?

- [187] THE COURT: Here, Mr. Ghiorghita has no medical history of automatistic-like dissociative states and no prior history of dissociation.

- [188] No eyewitness observed Mr. Ghiorghita's demeanour or actions immediately before, during or after the alleged involuntary act. Accordingly, there is no corroborating evidence from a bystander that the accused was uncharacteristically unresponsive or distant at or about the time of the alleged involuntary shooting.
- [189] In *Stone*, the Court observed that the plausibility of the claim of automatism will be reduced if the accused had a motive to commit the crime in question, or if the trigger of the alleged automatism is also the victim. Here, Andra, the "trigger" of the accused's alleged dissociative state, had intimate relations with her lover in Mr. Ghiorghita's home. She was not only unfaithful but also deceived the accused when she led him to believe that she wanted to salvage their marriage. After Matei's departure she demanded that he sleep in a separate bedroom and told the accused she intended to continue her affair. Mr. Ghiorghita was also aware that Andra planned to seek custody of Matei and move with him to North Vancouver. Further, when Constable Uppal inquired why the accused did it, Mr. Ghiorghita said that there had been another man in the house. In short, Mr. Ghiorghita had a motive to kill Andra.
- [190] Mr. Ghiorghita recalled that on the morning of July 15, 2014, he got up, went downstairs, turned on the computer and checked his emails before making his lunch. He also recalled that it was at that point, while he was preparing his lunch, that his wife came down and reminded him about his passport. He has very little recollection of what happened after that.
- [191] I referred earlier in these reasons at some length to the electronic evidence in this case. I find that there are a number of inferences which may be drawn from that evidence.
- [192] First of all, the accused activated the computer by bringing it out of sleep mode at 5:24 a.m. He logged on at 5:38 a.m. and performed functions on the computer involving Yahoo! Messenger, Boomerang and Gmail. I also find at that 5:39 a.m. he wrote the email to his mother and then logged off, before shutting the computer down at 5:40 a.m.
- [193] It is probable that Mr. Ghiorghita took the steps necessary to locate and load his firearm and then go upstairs and fatally shoot his wife after he had sent the email. However, in my view the real significance of the email is that it is the product of integrated or normal mental functioning. At the time that Mr. Ghiorghita composed the email he was able to manipulate the keyboard, compose a rational message, and include a numerical reference to the parcel he had sent to Romania some days before.
- [194] The evidence from the neighbours, who heard loud noises which they believed were or could have been gunshots, indicates that the shooting took place between 5:00 and 6:00 a.m. Mr. Dunsford placed the time of the loud bangs at 5:39 a.m., which was coincident with the time when Mr. Ghiorghita sent the email to his mother.

- [195] Both Dr. Lohrasbe in his direct examination and Dr. Murphy in her evidence thought it unlikely that Mr. Ghiorghita was in a dissociative state when he composed and sent the email. Although Dr. Lohrasbe in his re-examination referred to the possibility of a person experiencing a disrupted dissociated event or sequence of dissociations, I find his evidence on that point in the context of this case to be implausible.
- [196] I also have the electronic evidence that at 5:51 a.m. Mr. Ghiorghita downloaded the Yahoo! Messenger application to his cellular telephone. That again required him to perform a number of functions, including the insertion of a telephone number or password. That again suggests that he was functioning normally at the time of that activity.
- [197] There is also some evidence suggesting that the accused was not in an automatistic state of dissociation at the time he shot his wife. Mr. Ghiorghita had learned weeks before that event of Andra's infidelity. He had time to process and consider that information. He was also aware through his monitoring of her emails and telephone conversations that she was planning a trip abroad with Mr. Esmail and that she intended to obtain custody of Matei.
- [198] I am not persuaded on a balance of probabilities that Andra's request that he pick up her clothes for her vacation was the kind of sudden and extreme shocking event that would trigger a dissociative state, whether viewed in isolation or as the cumulative effect of the various humiliations that Mr. Ghiorghita had suffered, particularly in the period since June 6, 2014, when he discovered his wife's infidelity. Further, and again as I have already noted, Mr. Ghiorghita had frequently made trips to Washington State to pick up objects for Andra that she had purchased and was prepared to do so on this occasion as well.
- [199] I also take into account that in order to carry out the shooting, Mr. Ghiorghita had to go to the gun safe, unlock it, remove the case containing his pistol, extract the pistol, load the magazine, insert the magazine in the handgun, walk upstairs, make his way to the bedroom and then discharge the weapon.
- [200] While I accept the evidence of Dr. Lohrasbe that a person in a dissociative state may be capable of performing organized and directed activities, here Mr. Ghiorghita engaged in a series of relatively complex, organized and directed activities on the morning of July 15, 2014. I say that referring to both the composition and mailing of the email to his mother, the downloading of the Yahoo! Messenger program to his cell phone, and most particularly the sequence of actions involved in obtaining, loading, and discharging the firearm.
- [201] In my view, those sequences of activities weigh against a finding that Mr. Ghiorghita acted involuntarily, in a state of automatism, when he repeatedly shot Andra Ghiorghita.

- [202] I accept that Mr. Ghiorghita has likely repressed his memory of the events in question and that it is unlikely that he is feigning amnesia. However, as Dr. Lohrasbe acknowledged, amnesia can be retrograde and dissociative amnesia may be a reaction, a defensive reaction, to the horror or trauma of what a person involved in violent activity has done or witnessed. Dr. Lohrasbe also agreed that even if a person is in a dissociative state it does not necessarily follow that that person is incapable of acting voluntarily.
- [203] The crime here is also explicable without reference to automatism. Again, Mr. Ghiorghita fatally shot the person said to be his trigger. He did so undoubtedly acting in anger and in circumstances where he had discovered her infidelity, her plans to remove Matei, and her plan to leave him. In short, he had been deceived and humiliated by his wife.
- [204] I find that the defence has not met its burden of establishing on a balance of probabilities that Mr. Ghiorghita acted involuntarily when he fatally shot Andra Ghiorghita on the morning of July 15, 2014. The presumption of voluntariness is not rebutted.

Conclusion

- [205] I am satisfied beyond a reasonable doubt that Mr. Ghiorghita caused the death of Andra Ghiorghita by shooting her on July 15, 2014, and that when he did so he meant to cause her death.
- [206] Mr. Ghiorghita, would you please stand?
- [207] I find you guilty as charged on the count of second degree murder.
- "Pearlman J."

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