

CANADA / JUDGMENT

R. v. Khan

2013 BCSC 975

COURT

Supreme Court of British Columbia

DECIDED

31 May 2013

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2013 BCSC 975 R. v. Khan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Khan,

2013 BCSC 975

Date: 20130531

Docket: X070004

Registry: New Westminster

Between:

Regina

v.

Amjad Khan and Naim Saghir

Before: The Honourable Mr. Justice Josephson

Reasons for Judgment

Counsel for Crown:

D. Ballyk

S. Sidhu

Counsel for Accused Naim Saghir:

S. Buck

Counsel for Accused Amjad Khan:

R. Claus

Place and Date of Hearing:

New Westminster, B.C.

January 28-31, 2013

February 4-8, 12-15, 2013

February 18-20, 22, 25-27, 2013

March 1, 4-7, 2013

March 11-15, 2013

March 21 and 22, 2013

Place and Date of Judgment:

New Westminster, B.C.

May 31, 2013

- [1] The victim, Tasha Rossette, (hereinafter also referred to as "the victim" or "the deceased") was a pregnant single mother living in a basement suite at 14260 72nd Avenue in Surrey with her three year old daughter Jasmine. The father of her unborn child was the accused Mr. Khan, with whom she had what appears to have been a casual sexual relationship.
- [2] On the evening of November 20, 2005, the victim attended a bingo hall, Big Country Bingo, located at 7093 King George Highway in Surrey, B.C. with friends after leaving her child to be babysat by another friend, Ellissa Gibson. After the deceased was finished at Bingo, she used her friend Christine Angelis' phone to call Mr. Khan to tell him that she was ready to be picked up. Mr. Khan admits to picking up the deceased from the Bingo hall for what the victim hoped would be some time together that night. After stopping at a nearby Subway restaurant located at 13775 - 72nd Ave in Surrey, B.C., to get some food, Mr. Khan drove the victim home to her residence located at 14260 72nd Avenue in Surrey. She entered a darkened garage to access the door to her suite and was attacked and killed with a knife at the entry to her suite.
- [3] The deceased's body was not discovered until about two days later. When the victim's body was discovered she was dressed in the same clothes that she had worn to the bingo hall. As well, found scattered about her body were plush toys won at the bingo hall and an uneaten Subway sandwich purchased when in the company of Mr. Khan after the bingo game.
- [4] Following a lengthy police investigation the accused Naim Saghir and the accused Amjad Khan were arrested towards the end of 2006.

I. The Charges

[5] This is a second trial for both accused. The indictment reads as follows:

Count 1 / Chef 1

Naim Mohammed SAGHIR and / et Amjad KHAN, between the 19th day of November, 2005 and the 22nd day of November, 2005, inclusive, at or near Surrey, in the Province of British Columbia, did commit the first degree murder of Tasha Rossette, contrary to Section 235(1) of the Criminal Code.

II. Overview of the Crown and Defence positions

- [6] The Crown theory is that Mr. Saghir killed the victim at the behest of Mr. Khan. The two were close friends. Mr. Saghir also worked for Mr. Khan in a dial-a-dope drug trafficking operation. The theory is that Mr. Khan's motive was the refusal of the victim to abort their unborn child and that Ms. Rossette was creating a significant and unwanted financial burden for Mr. Khan.
- [7] There is no direct or forensic evidence linking either accused to the alleged offence. The Crown relies on circumstantial evidence as well as the evidence of two witnesses. Mr. Singh, a roommate of Mr. Saghir, testified that Mr. Saghir admitted his guilt to him at their residence the evening of the alleged offence. Mr. Saran testified that the two accused asked him to kill someone and drove him to the residence of the victim approximately two to three months before the alleged offence for the purpose of having him kill the victim. He did not comply with their request.
- [8] The accused Mr. Khan testified and provided a blanket denial of any involvement in the alleged offence, saying that he drove to the back alley of the deceased's residence, parked the car in the driveway off the alley with the engine running and headlights on as Ms. Rossette walked down the pathway and out of his sight towards the entry door. He testified that he never got out of his vehicle and that he left the victim's residence after dropping her off on November 20, 2005 and then returned home to his residence.
- [9] Mr. Saghir did not testify at trial.
- [10] I pause to note that this was a lengthy and vigorously presented trial. The trial involved numerous witnesses and resulted in a voluminous and often complex body of evidence. In reaching my conclusions in this proceeding I have considered all of the evidence, even where it is not specifically referred to in these reasons.

III. Evidence of Friends of the Victim

A. Christine Angelis

- [11] Ms. Christine Angelis is a now 38 year old mother of three children who was a good friend of the victim. She was familiar with the victim's residence. The driveway is located in the back yard off an alley. Entrance to the suite is gained by entering a side door to the garage. The

garage is very dark without the garage light being turned on. Ms. Angelis testified that the garage light was not working, even after she had supplied the victim with a new light bulb a few days before the alleged offence. Confirming her evidence, the police discovered that the fuse for that light bulb had the wire removed so that the bulb could not operate. Some light can be gained by propping open the door to the garage with a child's toy. That was the case when police attended after the body was discovered.

- [12] For a number of days before the offence the victim had been unable to locate the keys to her suite and so had been leaving the door unlocked.
- [13] Ms. Angelis attended bingo on the evening of November 20, 2005, though she sat in a different section from the victim as the victim sat in the smoking section. The victim sat with another friend, Sandy Marson. The witness recognised the clothes found on the victim's body as the clothes she was wearing that evening at the bingo hall. The witness testified that the bingo hall is a few minutes' drive from the victim's residence.
- [14] Bingo ended at approximately 10 p.m. on November 20, 2005. Ms. Angelis offered the victim a ride home, but the victim declined - saying that Mr. Khan was coming to pick her up. She understood that the two were going to spend some time together as the victim already had an offer of a ride home. The witness waited with the victim for Mr. Khan to pick her up. They played a coin machine, winning three stuffed animals which the victim kept. The victim phoned Mr. Khan twice to ask why it was taking him so long. On each occasion, the victim stated to Ms. Angelis that Mr. Khan would be there soon. They eventually moved outside and after standing for a short while, moved into her vehicle to continue waiting. The witness repeated her offer of a ride home, but received the same reply. The victim phoned Mr. Khan again on the witnesses' cell phone and again stated that Mr. Khan would be there shortly. After about 10 minutes in the vehicle, Mr. Khan arrived in his burgundy Ford Taurus and the victim entered his vehicle. That was the last time Ms. Angelis saw the victim.
- [15] Ms. Angelis attended the crime scene on November 23, 2005 and confirmed that what she saw on the floor of the garage were the stuffed animals won at the bingo hall the evening of November 20, 2005.
- [16] She described the victim as having a "weird fear of being alone" to the point that she would escort the victim into her residence when dropping her off. The victim often confided in Ms. Angelis, and some of these remarks were admitted as evidence at trial. The victim told Ms. Angelis that she was pregnant with the child of Mr. Khan and that he was pressuring her to have an abortion from the beginning. The victim added that, if she didn't have an abortion, he wouldn't be there for her. The victim also said she would inform his family of the pregnancy as they were unaware of that fact.
- [17] Ms. Angelis also said that she was aware that Mr. Khan had been assisting the victim by paying her rent and by offering her rides.

B. Ellissa Gibson

- [18] 30 year old Ellissa Gibson was also a close friend of the victim. She has three children and was pregnant and expecting a fourth child at the time of her testimony at trial. Ms. Gibson and the victim babysat for each other on a frequent basis. Ms. Gibson described their activities together on November 20, 2005. The victim had been at Ms. Gibson's residence earlier that day and Ms. Gibson's boyfriend drove the victim home in the early evening. As the victim had lost her keys, she had the upstairs landlady open the garage doors and used the vehicle headlights to lighten the interior of the garage. Ms. Gibson testified that the victim "made me go in with her" as she "wouldn't do nothing alone, especially in the dark" and would never walk alone in the dark. The witness agreed to babysit the victim's 3 year old daughter overnight. On dropping her daughter off at the witness's residence around 6 p.m., the victim phoned Mr. Khan to inform him that she was leaving. The victim stated that if Mr. Khan did not stay with her that evening, she would return to the witness's residence to watch movies. Ms. Gibson tried to contact the victim later that evening and several times the next day, with no success.
- [19] On the evidence of Ms. Gibson, Mr. Khan assisted the victim by driving her when needed and paying her rent "once or twice".
- [20] The witness was aware that a woman known to her by the name "Rubby" owed the victim money in relation to an arrangement where the victim had entered into a marriage strictly for the groom's immigration purposes. The victim had not been fully paid and that gave rise to arguments between the two a year or two before. "Rubby" had a boyfriend named "Jindy". Ms. Gibson said that the victim had been afraid of them "years before".

C. Sandy Marson

- [21] Sandy Marson was also a close friend of the victim. They sat together at bingo the evening of November 20, 2005. The victim was very worried over having lost keys to her residence a couple of days earlier. Ms. Marson testified that Ms. Rossette had used the phone at the Bingo hall on three or four occasions and that the victim had said that she had an evening planned with Mr. Khan. At approximately 10 p.m., the witness offered the victim a ride home. The victim had contacted Mr. Khan on several occasions and declined the offer, saying that he was going to pick her up. Ms. Marson left the Bingo hall alone.

IV. Other Crown Witnesses**A. Harvinder Saran**

- [22] Now 30 year old Mr. Saran was a classmate and friend of Mr. Khan in grade 8 and/or 9. In 2002, he pled guilty to offences of break and enter, as well as robbery following his involvement in a home invasion near Bear Creek Park in Surrey, B.C. He was sentenced to four years in jail on top of a credit of one year for time served. About a month after his release on parole in August 2005, he returned to prison as he reported to his parole officer

that he was under a threat and felt unsafe in the community. During the time that he was back in prison due to his parole suspension in September of 2005, he was approached by Cst. Bentley and another officer, Cst. Uppal. He testified that he had a conversation with them at the prison after they showed up unannounced and asked to speak with him. In this meeting, Mr. Saran agreed to act as a police informer. He was released into the community again shortly afterwards, but could not remember the date with any degree of specificity.

- [23] Mr. Saran testified that he contacted Mr. Khan after his release by obtaining Mr. Khan's number from his mother. Mr. Saran said that his reason for calling Mr. Khan was to talk to him and to obtain the phone number of his female cousin, who Mr. Saran was interested in. Later, Mr. Khan phoned Mr. Saran and said he would come by his residence. He called again when outside Mr. Saran's residence later that same evening. Mr. Saran left his residence to find Mr. Khan's silver Acura parked on the street. A stranger was driving and Mr. Khan emerged from the driver's seat. Mr. Saran said that he could tell that the driver was Muslim because of his name, but that he could not remember that name. Mr. Khan showed the witness some cash and an expensive watch and offered Mr. Saran money if he wanted to be involved in his drug trafficking business. The witness declined, but then said he would think about it. Mr. Saran testified that while they were talking Mr. Khan seemed paranoid and at one point a Black Jeep Cherokee showed up and slammed on the brakes; this caused Mr. Khan to get in the car and then the Acura "just took off".
- [24] After more phone conversations in which Mr. Khan said he would come back another time, Mr. Khan eventually returned to his residence and that time he was also with someone. Mr. Saran identified that person as Mr. Saghir in the courtroom. They met on the street again, at around 7:00 or 8:00 pm. Mr. Khan stated that he wanted to take the witness somewhere and they drove to a nearby park. When they pulled into the parking lot of the park they parked one stall away from an older model white civic. The three men engaged in a conversation in the parking lot. Mr. Saran testified that Mr. Saghir had retrieved a basketball and was bouncing it around in the space that separated the two vehicles.
- [25] Mr. Khan then stated he wanted Mr. Saran to do a "job" for him. That job was to kill someone for \$2,000; Mr. Khan showed him the cash. The witness claimed to be very nervous at this point, particularly as the other two were speaking in a language he didn't understand. Mr. Saghir stated words to the effect, "Go ahead, it's going to be an easy job". The two stated that they would show him where the person lived that night and that Mr. Khan stated that he, or someone else, would drop the money off to him the next day. Mr. Saran replied that he would do it, though he testified he did not intend to follow through with it. They got back in the car and Mr. Khan drove them toward the area of 144th Street and 72nd Avenue in Surrey. Mr. Saran testified that they drove to what turned out to be the residence of the victim; a person and residence he said were unknown to him at the time. While driving past the front of the residence, Mr. Khan pointed out the door to the garage by which he could enter. They then drove to the alleyway behind that residence with both men saying, "Whoever opens the door, just kill them".

- [26] According to Mr. Saran, there was what appeared to be a gun in the lap of Mr. Khan; he said he could tell because there was a magazine and he could see the clip in the back. He testified Mr. Saghir gave him a bar to use as a weapon to commit the killing. Mr. Saran testified that because he was trying to kill time and because he didn't want to commit the act, he asked for the gun. Mr. Saghir replied that he couldn't use the gun because of the noise. One of the two accused told him to walk around the house and whoever opens the door, just kill them. They said they would wait down the alley.
- [27] The witness left the vehicle and walked around the house from the right side, on the opposite side of the house from the entrance door to the garage. As he rounded the residence by the garage entry door, a Toyota 4-Runner pulled up in the driveway behind the residence off the alleyway. A young female emerged from the vehicle with a child that appeared to be approximately 3 years of age. He thought there may have been a second child as the woman reached into the back seat area. A male was driving the vehicle. The witness walked to the alleyway via the adjacent residential lot with the iron bar tucked up his sleeve. When he could not find the vehicle of the two accused he began walking the short distance to his own residence.
- [28] Before reaching his home, the two accused pulled up next to him in the same vehicle. Both asked if he had "done it". The witness explained that a vehicle had pulled up and a female emerged from it, though "a guy was there too". When Mr. Saran asked, "who did you want me to do?" Mr. Khan stated that he had to kill "the girl". When the witness protested, saying that there was a kid there, Mr. Khan said, "It's okay, don't worry about it". The witness replied that there was someone else there that may have seen him, referring to the male driver, and claimed that as the reason he didn't want to go back. He testified that he was not being truthful with them regarding having been seen by the male at the victim's residence. Mr. Khan said he could do it some other time. The witness agreed and the two accused departed. Mr. Saran maintains that he never had any intention of following through with Mr. Khan and Mr. Saghir's request that he kill the victim.
- [29] Mr. Saran says that he was shocked and upset that Mr. Khan had asked him to kill someone. He said that he avoided further phone calls from Mr. Khan and told his mother to tell anyone that called for him to say that he had returned to jail.
- [30] Mr. Saran asked his parole officer for Cst. Bentley's telephone number. After some difficulty and time, the witness was able to meet with Detective Bentley in an unmarked police vehicle. Another officer, Cst. Uppal, was also present. He informed them of the incident involving the two accused and directed them to that same residence and, as well, to the residence of Mr. Khan. He told Detective Bentley that, despite being a confidential informant, he would testify about the incident.

- [31] Mr. Saran was unable to identify Mr. Saghir in a police "photo pack" when he was interviewed by the police following the murder. However, upon inspection of the photo, filed as Ex. 38, there is considerable difference in Mr. Saghir's appearance when compared with his appearance as shown in Exhibits 8 and 20.

B. Detective Bentley

- [32] Detective Bentley testified that he and another officer, Cst. Raj Uppal, met Mr. Saran while the Mr. Saran was in custody on September 21, 2005.
- [33] Detective Bentley testified that Mr. Saran was not offered anything in exchange for acting as a confidential informant and that he had nothing to do with the release of Mr. Saran shortly thereafter.
- [34] On November 17, 2005, Mr. Saran joined him and Cst. Uppal in their unmarked police vehicle. He says that Mr. Saran related some limited information regarding the incident with Mr. Khan and directed them to the residence where he was asked to "kill this girl". While driving past the front of the residence, Mr. Saran pointed out the door he was told to enter. The Detective confirmed that to be the residence where the killing took place three days later. Mr. Saran then directed them to a second residence which Det. Bentley understood to be the residence of the person who asked Mr. Saran to commit the killing. Det. Bentley testified that Mr. Saran pointed out the residence of Mr. Khan at 7101 - 125th Street in Surrey. When the unmarked car was on Mr. Khan's street, Det. Bentley observed Mr. Saran duck down in his seat; it appeared to him that Mr. Saran was doing so to prevent being spotted through the car windows.
- [35] Detective Bentley then dropped off Mr. Saran. He endeavoured to search police data banks to obtain information on residents associated with the two addresses identified by Mr. Saran. A few days lapsed. When he returned to the residence shortly after the time of the alleged offence to attempt to identify vehicles associated with the victim's residence, Det. Bentley observed police tape surrounding that residence.
- [36] A complaint was filed by a member of the victim's family regarding Detective Bentley's lack of response to the information provided by Mr. Saran three days before the killing. That complaint and the investigation into Detective Bentley's conduct in this matter have yet to be resolved.

C. Kristen Marrs

- [37] Ms. Marrs resided in Nanaimo in the years 2004 and 2005. She and Mr. Khan developed an intimate relationship. They communicated daily by phone. She reached him at his personal phone number: 778-882-0231. He frequently travelled to see her on weekends. She met Mr. Saghir, who she believed to be his cousin, on three occasions.

- [38] In October of 2005, she and Mr. Khan had a phone conversation in which Mr. Khan informed her that a woman was saying she was pregnant with his child and that "he had been dealing with that". She testified that she could hear it in his voice that he was not happy about the situation. At some time after the date of the alleged offence but before New Year's Eve 2005, Ms. Marrs and Mr. Khan were together in a social group setting in Nanaimo. Mr. Khan discussed the fact that he had been questioned by police regarding a girl who had been murdered and that he had been the last person seen with her and that it was someone he had picked up from bingo and driven home.
- [39] Some five to seven days later at the end of November or early December of 2005, she asked him "out of the blue" what happened with the pregnant woman. Mr. Khan replied "I dealt with it". He added that he didn't want to talk about it and Ms. Marrs testified that there was no further discussion on the topic.
- [40] The relationship ended after a year and a half on December 31, 2005, when she found him with another woman in a bar in Nanaimo. She became angry and slapped his face.
- [41] Though she used no drugs herself, she had been aware that Mr. Khan was a drug dealer attempting to extend his territory to Nanaimo. She introduced Mr. Khan to her father. She believed that the purpose of the two meeting was to explore extending Mr. Khan's drug operation to Nanaimo.

D. Michelle Mestry

- [42] In 2005, Ms. Mestry was a grade 10 student at L.A. Matheson School. Mr. Khan coached her basketball team from the end of October of 2005 to February of 2006. Practices occurred two or three times a week after school. Mr. Saghir occasionally joined Mr. Khan at practice. She was captain of the team and was therefore the contact person between the team and Mr. Khan.
- [43] According to Ms. Mestry, Mr. Khan had two or three cell phones. She called his 604 area code number to talk to him. Another person answered and gave her the 778 number which she used to contact Mr. Khan.
- [44] On November 23, 2005, she wished to call her parents to pick her up before practice ended in order to attend a religious ceremony. Her cell phone battery was too low to use. Mr. Khan gave her his cell phone from his pocket and she used it to call home. That call attracted the attention of investigators and Ms. Mestry subsequently provided investigators with the two numbers that she had for Mr. Khan.

E. Ravi Singh

- [45] Now 30 year old Mr. Singh came to British Columbia in February of 2005. He worked in the automotive repair business as a mechanic. Mr. Khan brought vehicles in for repair and that is how the two met. He testified that they became friends and, through Mr. Khan, he met and befriended Mr. Saghir.
- [46] A couple of weeks after meeting Mr. Saghir, Mr. Khan asked the witness if Mr. Saghir could reside with him temporarily and the witness agreed. After a month, Mr. Singh was evicted and moved to a two bedroom apartment along with Mr. Saghir. This second apartment was located at 8419 164th Street in Surrey, B.C.
- [47] Mr. Singh testified that Mr. Khan informed him that his girlfriend was pregnant with his child that she didn't want to abort and that he "had to get his problem or headache resolved". This he repeated on many occasions, sometimes saying he wanted his problem to get "handled" however it had to get handled. Mr. Khan also stated he "had to get rid of his headache" and that he didn't want "to bring down" his family name. The witness testified that he told Mr. Khan that he "wanted nothing to do with this".
- [48] Mr. Singh recalled a few occasions where these conversations came up. One was at an I-Hop restaurant where his friend "Nav" was also present. He also testified about an incident where he asked Mr. Khan to pick him up from Metrotown mall and that a young woman and a small child were in the vehicle on this occasion. He said that his discussion with Mr. Khan at this time lead him to believe that this was the woman he had been talking about when referring to his "headache". The description he provided was that the young woman had dark hair, was a bit chubby and was light skinned. He could not recall the specific month of this interaction.
- [49] Mr. Singh described an evening when he was awoken from his sleep by his roommate Mr. Saghir who knocked on his bedroom door and then asked him for help and to use his phone. The witness described Mr. Saghir as looking pale and frazzled. He had scratches on his forearms, hands and around his neck, consistent with fingernail scratches. Mr. Singh testified that Mr. Saghir stated he had gotten rid of Mr. Khan's problem, that the girl was fighting back and so he had to "slice the bitch's throat".
- [50] While Mr. Singh knew Mr. Saghir to have a cell phone, he asked for and then used Mr. Singh's cell phone (778-828-1355) and had a very brief conversation which Mr. Singh said he could not overhear. There was also an incoming call with Mr. Khan's name on the call display. At trial he was unable to remember the order of the two calls.
- [51] Mr. Saghir then took a shower and used the washing machine. The witness then heard the front door shut as if Mr. Saghir was leaving. Mr. Saghir borrowed Mr. Singh's boots, which were never returned.

- [52] Mr. Saghir had been wearing dark colored clothing. The witness subsequently observed dark colored clothing in the garbage bin.
- [53] On November 2, 2006, Mr. Singh was arrested for murder in relation to the killing of the victim. There followed a lengthy interview by police in which Mr. Singh slowly revealed information in slices, he testified that he did so hoping it was enough to "lead them in the right direction" and extract himself from the situation. In the course of doing so, he agreed he was not always honest with them until towards the end, when "I told them everything I knew and none of it was a lie".
- [54] During cross examination the witness agreed that he had been smoking marihuana the evening Mr. Saghir came to his bedroom door and woke him. He agreed he had committed an act of theft from his employer, but claimed money was owing to him. He also agreed he had in the past phoned Mr. Khan to purchase drugs.
- [55] Mr. Saghir phoned his girlfriend after release from police custody; this call was intercepted by the police. In it he states words to the effect "I saw her picture last night with her injuries...I still have a picture of her in my head, he slit her throat... he killed the pregnant girl... stabbed her 55 times... slit her throat". Cpl. Mumford conducted the interview of Mr. Singh after his arrest for the murder of the victim. While he denied showing a photograph of the deceased victim or providing details of how she was killed. It is clear that some police officer did just that. The autopsy revealed 55 stab wounds. Mr. Singh could not have conjured up that exact number on his own. Contrary to the Crown's submission, he was not speaking of a mental image fashioned from the information he had. Some police officer, I conclude, showed him a photograph of the deceased victim and informed him of the number of stab wounds.

F. Constable Lauzon

- [56] Constable Lauzon stopped a vehicle being driven by Mr. Saghir on November 24, 2005. This was done at the request of the investigative team involved in this case. Also at their request, he had Mr. Saghir exit the vehicle and face south. While facing that direction, another officer was able to take photographs of Mr. Saghir, which were entered into evidence at trial and marked as Ex. 20.
- [57] The vehicle was registered in the name of Mr. Saghir, but he did not have a driver's licence. The officer agreed to let his passenger, his girlfriend from California, drive the vehicle to the residence of Mr. Saghir to retrieve his passport, while the officer followed behind in the police vehicle. Mr. Saghir produced his passport at his residence. The incident took a total of one hour, of which not more than 15 minutes involved driving to the residence of Mr. Saghir.

[58] The officer estimated that he spent 15 to 20 minutes in the company of Mr. Saghir. Lighting at the residence was good. He agreed in cross-examination that he made detailed observations of Mr. Saghir. When it was suggested to him that there were no scratches or marks on his neck or hands, he replied "None". That evidence is consistent with the photographs in Ex. 20.

V. Defence Evidence of Mr. Khan

A. Testimony of Mr. Khan

- [59] Now 29 year old Mr. Khan testified that he met the victim at high school. At that time, he says they had a "Hi-Bye" type of relationship. They met again when he was 20 or 21 years of age. They exchanged phone numbers. They eventually met and "hooked up I guess", meaning, on his evidence, that they had an intimate relationship on one or two occasions.
- [60] She informed him she was pregnant when she was one or one and a half months into her pregnancy. He was surprised and "a little shocked". They met and, though there were no plans to live together, he told her he would be there for her financially; for food or "whatever she needed". Initially, the victim said she intended to have an abortion, but then changed her mind.
- [61] He assisted her in obtaining the basement suite after she was evicted from another unit shared with her sister. He paid her first month's rent and the damage deposit. He offered to provide her "anything she wanted - groceries, or if she wants to go out". He also took her to most of her medical appointments and paid for an ultra sound.
- [62] Mr. Khan sold drugs for a living. Mr. Saghir worked for him selling drugs as well. Mr. Khan testified that he had "close to 10" cell phones, with different phones in different areas to service his drug customers. The phones were registered to Tony Ahluwalia to isolate him from the drug trade. A cell phone with the number 778-882-0231 was registered in his name, which he says was the number used by Ms. Mestry to contact him regarding the basketball team at L.A. Matheson. He denied ever giving Ms. Mestry another phone number. Mr. Khan said that Mr. Saghir occasionally came to the practises, as did other people who were working for his dial-a-dope operation.
- [63] Crown witness Ravi Singh was a mechanic who worked for a friend of Mr. Khan. The accused denied any other relationship with him. He did suggest that Mr. Saghir move in with Mr. Singh. Mr. Khan has visited both their residences. His evidence is that Mr. Singh worked for him as a drug dealer for only about one week as Mr. Singh "kept on coming up short on the money and drugs".
- [64] He told Mr. Saghir, who he described as his good friend, that he got someone pregnant, but says that didn't tell Mr. Singh "directly". He admits that he had not informed his parents about Ms. Rossette's pregnancy.

- [65] He denied playing with a taser in the presence of Mr. Singh and denied saying that he needed to kill someone or that he needed Tasha to be killed, or that he referred to the deceased as his "headache". He denied ever picking up Mr. Singh with the victim in the vehicle, as described by Mr. Singh in his evidence. He denied discussing a plan with anyone to have the victim killed.
- [66] He met Ms. Marrs on a trip to Nanaimo, where he travelled as part of his drug operation every other weekend. They developed a sexual relationship. That ended at the very end of 2005 when she found him with another woman. He denied telling her that he had got someone pregnant and said that he would not have told Ms. Marrs about it because it was none of her business. However, she was aware that he was seeing other woman. She contacted him in early 2006 after the relationship had ended to inform him that police were trying to contact her. He says he told her to speak to them. He testified that he told her that his lawyer was dealing with it and Ms. Mars replied "you've dealt with it".
- [67] Mr. Khan also testified about the date of the alleged offence. The victim phoned his personal cell phone. She said she needed him to drop off money for her rent. He told her he would drop the money off at the bingo hall she was attending that evening. He testified that he later changed his mind about giving her the rent money as it was not due for eight days and he thought she would spend the money on other things. He attended the bingo hall a couple of hours later, after spending a few hours at the gym, socializing and working out. He thought she called him en route shortly before he arrived. He testified that he stopped at an Esso gas station before proceeding to the Bingo Hall. He picked her up and they stopped at a Subway restaurant and that while he was eating his sandwich she decided to exit the restaurant in order to go to another store to purchase some scratch tickets. She took her food with her without eating. He then drove her home, stopping in the driveway off the alley. He saw her walking in the direction of the usual entrance and he departed and went to his home. He denied arranging for Mr. Saghir or anyone else to be in the garage waiting to kill the victim.
- [68] He denied that he had introduced Ravi Singh to the victim as described by that witness. He denied telling him that the victim was a "headache" that he had to get rid of.
- [69] He described a minimal relationship with Harvinder Saran. Years prior Mr. Saran had been arrested for a home invasion and eventually offered testimony against his accomplice, Mr. Menzies, who, as it turns out, was a brother of a friend of Mr. Khan.
- [70] The accused described receiving a phone call from Mr. Saran before November of 2005 asking him to attend at his residence. He said he was at a "Wings" restaurant with Mr. Saghir and three others. He testified that he went to meet up with Mr. Saran at the request of Mr. Menzies, the brother of the Menzies on whom Mr. Saran had informed on to police after the home invasion. They sat in Mr. Khan's vehicle. Mr. Saran said he was just out of jail and wished to make money by selling drugs. Mr. Khan testified that he refused because he knew Mr. Saran to be a "rat". Mr. Saran asked for the phone number of Mr. Khan's female cousin, but Mr. Khan refused, called him a "rat" and told him to leave the vehicle in which the

discussion was taking place.

- [71] Mr. Khan denied that any second incident resembling that described by Mr. Saran at the park and then at the residence of the victim ever took place. He categorically denied having anything to do with the death of the victim.
- [72] In cross-examination by Mr. Saghir's counsel, Mr. Khan described a very active dial-a-dope crack and cocaine trafficking operation working 24 hours a day, seven days a week. He testified that he had some ten operatives, whom he supplied with cell phones provided by Mr. Alhuwalia. He denied that there were only the two described by Mr. Alhuwalia. The accused testified that when one worker went off shift, the cell phone would be given to the worker coming on shift. Mr. Khan testified that he supplied vehicles to his workers, including a white 1989 Honda Civic. The accused testified that he kept no log of who had what phone at what time.
- [73] In cross examination by the Crown with respect to the meeting with Mr. Saran at the Saran residence, Mr. Khan agreed that, at his first trial, he had not testified that he went to the meeting at the request of Mr. Menzies. He then testified that he agreed to meet with Mr. Saran while he was still on the phone with Mr. Saran before having a chance to speak with Mr. Menzies about it, and that he agreed to meet Mr. Saran because he knew Mr. Menzies would want him to.
- [74] Mr. Khan denied ever mentioning the victim to Mr. Saran, let alone pointing out her residence and asking him to kill her as described by Mr. Saran. He also testified that he and Mr. Saghir communicate exclusively in English as Mr. Khan does not speak or understand the Arabic language, which he says is Mr. Saghir's second language. He testified that there are few similarities between Arabic and his native language, which I believe was referred to as the Pashto language. This testimony stands at odds with Mr. Saran's evidence that the two accused were speaking in another language which Mr. Saran could not understand.
- [75] Mr. Khan testified that Mr. Singh was "not necessarily" a friend. Mr. Khan asked Mr. Singh to take in Mr. Saghir as a roommate. He denied suggestions that he was really a small town dealer who couldn't afford to pay bills despite his claimed income of \$30,000 to \$40,000 per month, explaining that he spent most of the proceeds of his drug operation on gambling.
- [76] Mr. Khan agreed that Mr. Saghir used the phone number 604-617-8710 "some of the time" but could not remember if he used it frequently. He denied using either the 604-374-6535 or the 604-617-8710 drug phones on the night of the alleged offence. He denied ever "personally" giving out the drug numbers to others.
- [77] With respect to Ms. Marrs, in cross-examination he repeated his denial of having told her about his sexual relationship with the victim or that she was pregnant in the fall of 2005.

- [78] He described his relationship with the victim where they would "hook up" for sexual purposes. He testified that they never went to social functions together. After picking up the victim at the bingo hall in order to give her rent money, he decided against it, but could not think of a reason he did not tell her that on the phone.
- [79] When it was suggested to him that never before had he suggested that a purpose of picking her up was to comply with her request for rent money, he replied "no one ever asked". He denied that he invented that evidence to explain why the victim would wait so long for a ride from him when she had other earlier offers to do the same.
- [80] While at the Subway with the victim, she left to purchase some scratch tickets. Mr. Khan denied that he used that opportunity to call Mr. Saghir.
- [81] He denied giving Ms. Mestry his drug phone number and testified that he didn't know how she obtained it. The call records reveal a call to her parents residence from an area consistent with the school where he taught basketball, but he denied ever giving her that drug phone and implied that if Ms. Mestry used the phone it must have been because his other drug workers sometimes attended basketball practices.

B. Ruby Jubbal

- [82] In 2005 Ms. Jubbal was living with a man named Mr. Bagri, a person who was on probation at the time. Both she and Mr. Bagri were known to be violent.
- [83] Ms. Jubbal was called by Mr. Khan on the issue of a motive by her to kill the victim, or have someone kill the victim at her behest. Ms. Jubbal knew and had contact with the victim in the fall of 2005. She had offered the victim money to enter into a sham wedding prior to 2005 in order to permit the groom entry into Canada. While the victim went along with Ms. Jubbal's plan and married this man, she did not receive all the money she was promised. The marriage had the effect of her from receiving welfare on the grounds that she had a working husband.
- [84] Ms. Jubbal admitted that the victim frequently asked for her money, and would sometimes threaten to go to the police or immigration officials if she was not paid. Angry words were exchanged in conversation in the week before the alleged offence. She denied ever being in the residence of the victim or even knowing her current address until after the time of the murder. She denied any involvement in the homicide.
- [85] In cross examination by the Crown, the witness agreed that when the victim asked for her money, she would give her a portion and that would end the discussion. She agreed that their conversation was never heated and that she liked the victim. She agreed that she told the victim that if informed on, they could both go to jail. The witness agreed that she only knew the location of the victim's residence at the time of the alleged offence because she happened to drive by and saw the police tape surrounding it. She informed the police in a statement that a friend had informed her that the residence with the police tape was the

victim's residence; although, at trial she was not certain on this point. While she could no longer recall that, she agreed she was being honest with police in that statement. She agreed she liked the victim and felt affection for the victim's daughter.

- [86] She agreed that, at the time of her statement to police, she believed the victim had been shot to death. Ms. Jubbal acknowledged that her ex had also been involved in arranging the sham marriage. However, she testified that she had been out of that relationship for almost a year prior to the time of the alleged offence. That person moved to Vancouver at the time of separation and, to her knowledge, had no dealings with the victim. Her partner at the time of the alleged offence, Mr. Bagri, was not involved in the marriage fraud.
- [87] She agreed that, as she was on bail at the time for non-violent offences, she feared the consequences if her participation in the fraudulent marriage was discovered by authorities. She also agreed that it was a foregone conclusion, after the murder of the victim, that the police would uncover her involvement in the fraud marriage in the course of their investigation.
- [88] In re-direct, the witness agreed that her partner Mr. Bagri was out of the residence on the evening of the alleged offence and was acting suspiciously.
- [89] The victim told her that the father of the unborn child said he would take care of them financially and that is the reason she was planning to keep the child.

VI. Cell Phones and Call Records

- [90] A significant aspect of the Crown's evidence related to cell phone calls which the Crown submits is strong circumstantial evidence that supports the finding that Mr. Khan and Mr. Saghir were using Mr. Khan's drug phones to communicate with one another on November 20, 2005 in order to coordinate the execution of their plan to have Mr. Saghir murder Ms. Rossette.
- [91] The following cell phone evidence was introduced into the trial by way of a joint admission of fact:
- The public phone at Big Country Bingo had the phone number 604-590-3230 in November 2005
 - Crown witness Ravi Singh had cellular telephone number 778-828-1355 from March 28, 2005 to May 16, 2006
 - Singh had a second cell phone with a telephone number of 778-868-1345 from November 1, 2005 to May 14, 2006
 - Roheeda ("Ruby") Khan's telephone number in November 2005 was 604-537-7051
 - Khan's parent's land line residential phone number was 604-597-5767

- [92] Additionally, at trial the accused Khan admitted that during the fall of 2005 his personal cellular telephone number was 778-882-0231. Exhibit #12 depicts the Rogers subscriber information and call record history associated with this number from November 19 to 23, 2005.
- [93] Christine Angelis' phone number is shown on the phone records as 604-825-7259.
- [94] The Crown entered a number of exhibits pertaining to cell phone evidence. These exhibits included cell phone call records, subscriber information records, and maps depicting the location of various cell phone carrier "cell sites" or towers in Surrey, B.C.
- [95] The Crown called Mr. Tony Ahluwalia as a witness. Mr. Ahluwalia testified that he provided Khan with two cell phones registered under the name "Dawn to Dusk Couriers". Exhibit #13 shows the subscriber information associated with the 604-374-6535 number and the associated call records between November 19 and 23, 2005. Exhibit #14 shows the subscriber information associated with the number 604-617-8710 and the associated call records between November 19 and 23, 2005. Exhibit #10 provides the stored SIM card contacts and some deleted SMS (text) messages as well as handset information associated with the 604-617-8710 number. The Nokia handset associated with this number was provided to the police by Ravi Singh upon his release from custody, following his arrest in November 2005. Singh testified that the accused Naim Saghir had left this phone behind when he was evicted from the apartment he shared with Singh on 164th Ave. in Surrey B.C.
- [96] Mr. Khan admitted that the two phone numbers, 604-374-6535 and 604-617-8710, were used for his drug dealing business and that he obtained the phones from Mr. Ahluwalia. Mr. Ahluwalia testified that he believed that he provided a total of two such phones to Mr. Khan. However, Mr. Khan maintained that he had about ten such drug phones and that the phones were passed around between workers in his drug business. He testified that he did not keep a record of who had what cell phone at any given time and said that the cell phones were passed off between "shifts" and that each phone was, for the most part, associated with a specific drug dealing area in Surrey, B.C. Khan's explanation as to why he acquired cell phones from Mr. Ahluwalia was to avoid having a phone under his name when dealing drugs as a precaution in case the "cops pick it up".
- [97] The Crown contends that Mr. Khan's 604-617-8710 phone was provided by Mr. Khan to Mr. Saghir. There is significant evidence which supports this argument. Ex. 10 shows text messages in December 2005 from 951-206-4296 linked to a contact saved as "Liz"; Elizabeth Ontiveros was Mr. Saghir's girlfriend from California. Also saved in the SIM card contacts is the number 604-537-7051, saved as "R-rated", which is admitted to be the number of Roheeda "Ruby" Khan - who is alleged to have been Mr. Saghir's local girlfriend. Additionally, as stated above, the handset associated with the 604-617-8710 number had been in the possession of Ravi Singh ever since Saghir was evicted in December 2005 or January 2006. The device report shows that the last call was on December 19, 2005. If 604-617-8710 was simply a drug phone passed around by various workers in Khan's dial-a-dope operation, as

Khan testified, it would make little sense that Saghir would not have taken the phone with him or returned the phone to Khan, or that Khan would not have retrieved it from Singh.

- [98] The Crown contends that the drug phone with the number 604-374-6535 was used by Khan himself, at least on November 20, 22 and 23, 2005. On November 22, 2005 this number received four incoming calls from Khan's ex-girlfriend Melia; the Crown's evidence is that Khan maintained fairly close contact with Melia. Additionally, the testimony of Michelle Mestry was that on November 23, 2005 Khan lent the 604-374-6535 phone to her at L.A. Matheson School so she could call her home residence. Ex. #13 shows a call from 604-374-6535 to 604-582-5797 at 17:42 on November 23.
- [99] The Crown relies on the cell phone evidence depicted in Ex. #25, entered through Crown witness David Mak, to support the argument that Khan was using the 604-374-6535 number on the evening of November 20, 2005. Ex. #24 is a street map depicting the Newton and Fleetwood areas of Surrey as well as parts of Delta and Cloverdale; there are eleven cell sites shown on this map. Ex. #25 is a 29 page booklet which includes a series of maps - each map from page 4 to 29 provides a visual representation of cell phone calls or SMS messages registering on the cell site activated at the beginning of each call between 19:20:34 on November 20, 2005 and 00:31:54 on November 21, 2005. The Crown's argument is that the cell phone records, as represented in Ex. #25 demonstrate that Khan's personal phone and the 604-374-6535 phone were "travelling together" on the night of November 20, 2005. This argument is supported by a review of the records which shows five "clusters" of phone calls, as follows:
1. The page 4 Map shows that the 604-374-6535 phone received an incoming call at 19:20:34. This call registered at cell site 56617 (located at 7740 - 132nd Street, Surrey). The Map on pages 5 shows that Khan's personal phone received a phone call registered at the same cell site at 20:15:21. These calls are just under an hour apart; however, on Khan's own evidence he was at the gym for a couple of hours before going home to shower and change before driving to pick up the victim. At page 6, the Map reveals that between 20:30:09 and 20:40:06 Khan's phone received two more incoming calls and one more outgoing call from the 56617 cell site.
 2. There is an odd occurrence depicted on the page 7 Map: the 604-374-6535 number calls Khan's personal phone - the call is 9 seconds in duration. It is odd because, on the Crown's theory, this shows Khan using his drug phone to call his personal phone. In any event, for both phones this call registers on the 56617 cell site.
 3. Map pages 18 and 20 show incoming calls to Khan's personal phone registering at cell site 48602 (located at 7337 -137th Street, Surrey), which is the cell site most proximate to the Subway restaurant between 22:27:38 and 22:29:52. After the call originating at 22:29:52, Khan's personal cell phone falls silent until 23:14:13. In the short period between these two calls, the Map on page 19 shows that at 22:28:28 the 604-374-6535 number calls Khan's other drug phone (604-617-8710 - "Saghir's phone") and this outgoing call registers on the 48602 cell

site as well. The page 19 Map shows the incoming call to the 604-617-8710 number registers at the 50988 cell site (located at 15753 Fraser Hwy - a cell site which is proximate to the Singh/Saghir residence on 164th Street).

4. Later in the night, when Khan's personal phone resumes contact, the page 25 Map shows Khan making an outgoing call at 23:14:13 lasting 22 seconds which registers on the 48632 cell site (located at 7300 - 115th Street, Delta) and almost immediately after that call ends, Map page 26 shows Khan's 604-374-6535 number calling the 604-617-8710 number from the nearby 50989 cell site (located at the 12500 block of 66th Ave, Surrey).
5. About 15 minutes later, the page 27 Map shows the 604-374-6535 drug phone calling Singh's 778-828-1355 number at 23:30:05. This outgoing call registers at the 48632 cell site, which is the same site as Khan's phone was last registered on. Finally, page 28 shows Khan's personal phone receiving an incoming call registering at the 48632 cell site at 23:31:26. These calls are about a minute apart.

[100] When considered together, these phone records show a pattern of corresponding cell site use between Khan's personal phone and his 604-374-6535 drug phone on the night of November 20, 2005. There is evidence that there is a general rule that a given call or SMS message will "register" or be "processed" at the cell site and sector with the strongest signal and that the signal is usually strongest when it is geographically closest to the phone handset. However, there are a number of factors that can affect which site is used to process the call or SMS - the existence of any of these factors can create an exception to this general rule. For example, there are instances where, due to the topography of an area, the existence of obstructions, the amount of cell phone "traffic" on the cell site, the cell site which is geographically closest to the phone may not be activated and, instead, the call or SMS may be processed through a less proximate cell site or sector. The dividing line between sectors is not precise; it is possible that there is significant overlap between the 120 degree sectors.

[101] The potential that some or any of the calls recorded in Ex.12, 13, 14 as shown on Ex. 25 follow the exception rather than the general rule creates some measure of uncertainty in drawing inferences about the location of the phone (and therefore the person using it) relative to the recorded cell site and sector. Additionally, while the sectors depicted in Ex. 25 would tend to show a catchment area so-to-speak, the phone is not necessarily located in the 120 degree angle, or pie shape, depicted by the dashed sector lines. In other words, the records of the calls and cell site activity cannot be used to locate the cell phone user in a specific location, but it is open to draw inferences about the general location of the handset based on the plotted cell site and sector records.

[102] In my respectful view, if there were only one or two instances of corresponding cell sites as between Khan's phone and the 604-374-6535 drug phone this would be insufficient evidence to draw the inference that the cell phones were travelling together. The same concern would result if there were significant time gaps between the various calls. However, here

there are four instances where Khan's personal phone and the 604-374-6535 drug phone registers on the exact same cell site, usually within minutes, but at most within 1 hour. There is an additional occurrence where two different but very nearby cell sites are registered. The totality of this evidence, combined with Khan's own testimony that he was not with or being driven around by one of his workers on the evening of November 20, 2005, is sufficient to draw the rational and irresistible conclusion that Khan was using the 604-374-6535 drug phone on the night of the victim's murder.

- [103] In addition, nothing about Khan's denial that he was using this drug phone number is credible. He testified that it could have been any one of his workers using the cell phone on that evening, but he could not say who, because he does not keep track of who had a given cell phone at any given time. Furthermore, he admits that dedicated drug phones are important to have when in the drug dealing business but did not provide evidence of having retained for himself a drug phone for his exclusive use as the head of his dial-a-dope operation. It is difficult to imagine how someone in his position, under the disorganized circumstances as he describes them, might coordinate such a far reaching and lucrative operation without either using his personal phone or having a drug phone for his exclusive use.
- [104] The evidence supporting the Crown's theory that Mr. Saghir was using the 604-617-8710 drug phone on November 20, 2005 is supported by the call records in Ex. 14 which show that the person using this number made outgoing calls to Roheeda Khan (604-537-7051) on November 20, 2005; first at 21:21:31 and 21:29:31 in the evening, again at 23:13:43, and past midnight at 00:31:54 and 00:58:37 on November 21. There is evidence that Mr. Saghir was dating Roheeda Khan, and these records show calls made to her phone number both before and after Mr. Khan picked up the victim from the Bingo hall.
- [105] Thus, on the Crown's argument, the call record history becomes significant circumstantial evidence in support of the theory that between 22:28:28 and 22:59:34 Mr. Khan (604-374-6535) and Mr. Saghir (604-617-8710) were in frequent contact on the night of the murder.
- [106] It is argued by the Crown that Mr. Khan was using the drug phone to conceal his involvement with the execution of the murder plot, and on that theory it is likely that he would take the same precaution and arrange to have the person who had agreed to kill Ms. Rossette use another drug phone. The Crown says that person was Mr. Saghir. The Crown seems to rely on the calls to Roheeda Khan and his possession of that phone on November 24, 2005, combined with Khan's admission that Mr. Saghir sometimes used that phone to establish that the only rational inference to be drawn is that Mr. Saghir was the exclusive user of the 604-617-8710 on the night of the murder. However, it is possible that someone other than Mr. Saghir was using the 604-617-8710 on November 20, 2005. The cell phone evidence linking Mr. Saghir to the 604-617-8710 phone is weaker than the evidence connecting Mr. Khan to the 604-374-6535 phone. Unlike the situation with Mr. Khan, there is no pattern in the call and cell site records combined with known or admitted

whereabouts for Mr. Saghir throughout that evening to provide the basis for the inference that the 604-617-8710 phone was being used by Mr. Saghir at all relevant times.

- [107] The calls between the drug phone numbers, as depicted on the Maps in Ex. 25 show a general pattern of movement towards the vicinity of the Newton cell site, which is near the Subway restaurant and the victim's residence. Most notably, at Map page 22 Khan's (604-374-6535) phone calls 604-617-8710 and the call is 1 minute and 18 seconds in duration; both phones are accessing the 48602 "Newton" site. Commencing at Map page 23 the cell site recordings show that the cell phones are registering at cell sites further away from the 48602 site. The two phones are in contact again at 1:39:00 on the morning of November 21; that call is 5 minutes and 31 seconds long.
- [108] The last significant cell phone record relates to calls involving Ravi Singh's 778-828-1355 number. The Telus call records show a call from this number to Khan's personal phone at 23:25:02. This call was not picked up. Then about five minutes later, at 23:29:46, Singh's 778-828-1355 phone receives an incoming call from Khan's drug phone; this call lasts 67 seconds. It should be noted that the record of this call is the same as the call depicted on Map page 27 of Ex #25 - the slight difference in recorded call start time explained by the fact that cell phone carriers do not have perfectly synchronized clocks.
- [109] From the whole of the cell phone evidence, I find as follows:
1. the accused Mr. Khan was using the 604-374-6535 drug phone on the evening of November 20th, and on the 22nd and 23rd of November, 2005; and
 2. it is likely that the accused, Mr. Saghir, was using the 604-617-8710 drug phone between 21:21:31 November 20 and approximately 01:45 on November 21, 2005.
- [110] The phone records as plotted in Exhibit 25 provide evidence as to the cell sites being activated by various phone numbers. The only reasonable inference is that the four phone calls between the 607-374-6535 (Khan's drug phone) and 604-617-8710 (Saghir's drug phone) as depicted on Map pages 19, 21, 22, and 23 show Khan's phone to have been in the general location of the Newton cell site. The Newton cell site is nearby the Bingo Hall, the Subway and the victim's residence; the use of the Newton cell site is consistent with the phone being located in that general area. However, this is not denied by the accused. These same Maps lead to the inference that just before Mr. Khan picked up Ms. Rossette, the 604-617-8710 phone received an incoming call from the general location of Coast Meridian cell site, which is proximate to Singh and Saghir's residence on 164th Street. The next three incoming calls to Mr. Saghir's phone from Mr. Khan's drug phone show that the phone moves first to the general location of the Scott Road cell site, which is west of Mr. Khan's residence, then to a location in the general location of the Newton cell site where there is a call between the two drug phones at 22:57:19, and finally Mr. Saghir's phone is in the general location of the Vanexe cell site by 22:59:34; this site is located a number of blocks north west of the Newton cell site. From this I infer that at 22:57:19 on November 20, 2005 Mr. Saghir's phone was in the general vicinity of the Newton cell site. This is circumstantial

evidence that puts the 604-617-8710 phone in the general location of the victim's residence on the night of the murder.

VII. LEGAL PRINCIPLES

A. Reasonable Doubt

[111] There is no issue that the standard of proof to be applied in these proceedings is that of proof beyond a reasonable doubt. The Supreme Court of Canada has affirmed that the nature of the crime or the specific facts at issue, no matter how horrific, have no bearing on the requirement that an accused person is entitled to the full protection of the law: *R. v. Malik*, 2005 BCSC 350 at para 662, citing *R. v. Burlingham* (1995), 97 C.C.C. (3d) 385 (S.C.C.) at 408; *R. v. Kirkness* (1990), 60 C.C.C. (3d) 97 (S.C.C.) at 123; *R. v. Evans* (1991), 63 C.C.C. (3d) 289 (S.C.C.) at 311.

[112] In *R. v. Lifchus*, [1997] 3 S.C.R. 320 at 336-337 the Supreme Court set out a model charge on reasonable doubt which, of course, I must apply in this case. The following charge incorporated an amendment to the last paragraph issued on January 30, 1998:

The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.

What does the expression "beyond a reasonable doubt" mean?

The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.

In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.

B. Vetrovec Warnings for Unsavory Witnesses

[113] R v. Khela, 2009 SCC 4 is the most recent Supreme Court authority on the topic of Vetrovec warnings. Justice Fish, writing for the majority in Khela, made the following general remarks about the role of witness testimony in criminal proceedings:

- [1] Legal systems far separated in time and place have long recognized that it is dangerous to rest a criminal conviction on the testimony of a single witness, or on a single piece of evidence. This concern is at least as old as Deuteronomy.* It arises because witnesses can lie deliberately or mislead inadvertently, documents can be forged, and other items of evidence can be tampered with or planted: P. Roberts and A. Zuckerman, *Criminal Evidence* (2004), at p. 466.
- [2] The evidence of a single witness is nonetheless sufficient in Canada to support a conviction for any offence other than treason, perjury or procuring a feigned marriage. Many serious crimes might otherwise go unpunished. But where the guilt of the accused is made to rest exclusively or substantially on the testimony of a single witness of doubtful credit or veracity, the danger of a wrongful conviction is particularly acute.
- [3] It is therefore of the utmost importance, in a trial by judge and jury, for the jury to understand when and why it is unsafe to find an accused guilty on the unsupported evidence of witnesses who are "unsavoury", "untrustworthy", "unreliable", or "tainted". For present purposes, I use these terms interchangeably. And I mean to include all witnesses who, because of their amoral character, criminal lifestyle, past dishonesty or interest in the outcome of the trial, cannot be trusted to tell the truth -- even when they have expressly undertaken by oath or affirmation to do so.
- [114] In R. v. Vetrovec, [1982] 1 S.C.R. 811, the Court did away with strict corroboration requirements on the basis that they were unnecessarily complex and technical. Instead, Dickson J. warned that a special direction should be given to the jury about the risk of adopting the evidence of a disreputable or unsavory witness. While there is no jury in this case, I must still consider whether it is appropriate or required that I instruct myself on this warning given the history of two of the Crown's witnesses: Ravi Singh and Harvinder Saran.

[115] At 831-832 of Vetrovec, Dickson J. stated:

Because of the infinite range of circumstances which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. There is no magic in the word corroboration, or indeed in any other comparable expression such as confirmation and support. The idea implied in those words may, however, in an appropriate case, be effectively and efficiently transmitted to the mind of the trier of fact. This may entail some illustration from the evidence of the particular case of the type of evidence, documentary or testimonial, which might

be drawn upon by the juror in confirmation of the witness' testimony or some important part thereof. I do not wish to be taken as saying that such illustration must be carried to exhaustion. However, there is, in some circumstances, particularly in lengthy trials, the need for helpful direction on the question of sifting the evidence where guilt or innocence might, and probably will turn on the acceptance or rejection, belief or disbelief, of the evidence of one or more witnesses. All of this applies equally in the case of an accomplice, or a disreputable witness of demonstrated moral lack, as for example a witness with a record of perjury.

[116] Later in the judgment, at 827, Dickson J. clarified that the confirmatory evidence need not implicate the accused. More recently in *R. v. Kehler*, 2004 SCC 11, [2004] 1 S.C.R. 328, the Court held that the confirmatory evidence does not have to directly implicate the accused, nor does it have to confirm the Crown witness's testimony in every respect. Instead, the evidence must simply be capable of restoring the trier of fact's faith in relevant aspects of the witness's testimony.

[117] In *Khela*, the Court set out the following framework for approaching the warning required when considering the evidence of a *Vetrovec* witness:

[37] In *Sauvé*, at para. 82, the Ontario Court of Appeal set out a principled framework that will assist trial judges in constructing *Vetrovec* warnings appropriate to the circumstances of each case. That proposed framework, which I adopt and amplify here, is composed of four main foundation elements: (1) drawing the attention of the jury to the testimonial evidence requiring special scrutiny; (2) explaining why this evidence is subject to special scrutiny; (3) cautioning the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true; and (4) that the jury, in determining the veracity of the suspect evidence, should look for evidence from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused (*R. v. Kehler*, 2004 SCC 11 (CanLII), 2004 SCC 11, [2004] 1 S.C.R. 328, at paras. 17-19).

[38] While this summary should not be applied in a rigid and formulaic fashion, it accurately captures the elements that should guide trial judges in crafting their instructions on potentially untrustworthy witnesses. The fourth component, of particular interest on this appeal, provides guidance on the kind of evidence that is capable of confirming the suspect testimony of an impugned witness.

[39] Common sense dictates that not all evidence presented at trial is capable of confirming the testimony of an impugned witness. The attribute of independence defines the kind of evidence that can provide comfort to the trier of fact that the witness is telling the truth. Where evidence is "tainted" by connection to the *Vetrovec* witness it cannot serve to confirm his or her testimony (*N. Harris*, "Vetrovec Cautions and Confirmatory Evidence: A Necessarily Complex Relationship" (2005), 31 C.R. (6th) 216, at p. 225; *R. v. Sanderson*, 2003 MBCA 109 (CanLII), 2003 MBCA 109, 180 C.C.C. (3d) 53, at para. 61).

[40] Materiality is a more difficult concept. In *Vetrovec*, the Court did away with the requirement that corroborating evidence implicate the accused. As Dickson J. noted, such evidence is not the only type capable of convincing a jury that a witness is telling the truth. In *Kehler*, the Court confirmed that evidence, to be considered confirmatory, does not have to implicate the accused. We maintain that position here.

[41] Individual items of confirmatory evidence need not implicate the accused. As Dickson J. explained in *Vetrovec*:

The reason for requiring corroboration is that we believe the witness has good reason to lie. We therefore want some other piece of evidence which tends to convince us that he is telling the truth. Evidence which implicates the accused does indeed serve to accomplish that purpose but it cannot be said that this is the only sort of evidence which will accredit the accomplice. [p. 826]

[42] However, when looked at in the context of the case as a whole, the items of confirmatory evidence should give comfort to the jury that the witness can be trusted in his or her assertion that the accused is the person who committed the offence. Again in *Vetrovec*, Dickson J. thus noted, with respect to evidence capable of being confirmatory:

All of this incriminating evidence, when considered together, strongly strengthens the belief that Langvand was telling the truth regarding the participation of *Vetrovec* and Gaja. It rebuts any suggestion that he is falsely implicating innocent individuals. [Emphasis added; p. 833.]

[43] This passage was cited with approval in this Court's unanimous judgment in *Kehler*, where the Court concluded that confirmatory evidence must be capable of restoring the trier's faith in relevant aspects of the witness' account (para. 15). As a matter of logic, where the only issue in dispute is whether the accused committed the offence, the trier of fact must be comforted that the impugned witness is telling the truth in that regard before convicting on the strength of that witness's testimony.

[118] There are some cases where the decision to instruct on the warning is discretionary and others where a failure to do so amounts to an error of law: see *R. v. Bevan*, [1993] 2 S.C.R. 599; *R. v. Brooks*, 2000 SCC 11, [2000] 1 S.C.R. 237 ("*Brooks*"). In *Brooks* Major J.'s reasons for the majority on the applicable approach to assess whether the warning is mandatory. Major J. reviewed the common sense approach of *Vetrovec* and *R. v. Bevan*, [1993] 2 S.C.R. 599 and stated his agreement with the views expressed by M. Rosenberg (now Rosenberg J.A.) in "*Developments in the Law of Evidence: The 1992-93 Term*" (1994), 5 S.C.L.R. (2d) 421 at 463 before concluding at para 80:

In summary, two main factors are relevant when deciding whether a *Vetrovec* warning is necessary: the witness's credibility, and the importance of the witness's testimony to the Crown's case. No specific threshold need be met on either factor before a warning becomes necessary. Instead, where the witness is absolutely essential to the Crown's case, more moderate credibility problems will warrant a warning. Where the witness has overwhelming credibility problems, a warning may be necessary even if the Crown's case is a strong one without the witness's evidence.

In short, the factors should not be looked to independently of one another but in combination.

[119] On the basis of the evidence before me, and on the authority of Brooks, I cannot accede to the Crown's position that no Vetovec warning is required for the witness Mr. Singh. When the importance of Mr. Singh's evidence is considered in light of a combination of the following facts: (a) Mr. Saran admits that he was a frequent marijuana user and had in fact smoked marijuana on the night that he says Mr. Saghir came to his door; (b) he failed to come forward with his knowledge of the crime during the year between the murder and his arrest for this very offence; (c) upon his arrest, he did not come forward with his story until many hours into a lengthy interrogation; and (d) was later receiving some benefits from the police for his participation as an agent for police in the investigation for a period of approximately three weeks, I find that the warning is not discretionary in this case, and I have instructed myself accordingly. It is uncontested that Mr. Saran is a Vetovec witness and his evidence will also be subject to special scrutiny on that basis.

[120] There is one further point on this issue. In *R. v. Tse*, 2013 BCCA 121 the Court of Appeal confirmed a trial judge's decision wherein he found that "one Vetovec witness is capable of supporting the evidence of another Vetovec witness": para 107.

C. Circumstantial evidence

[121] There is no legal requirement for a special instruction on circumstantial evidence, even where identification of the accused is at issue: *R. v. Cooper*, [1978] 1 S.C.R. 860. Rather, in cases resting on circumstantial evidence in order to establish the guilt of the accused, the trier of fact must be "satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty": *R. v. Griffin*, 2009 SCC 28 at para 33. If there is another rational inference to be drawn then a guilty verdict cannot be found on the basis of the circumstantial evidence because the guilt of the accused would not be established beyond a reasonable doubt.

[122] In order to determine whether the Crown has proved the guilt of the accused, a judge must assess the totality of the circumstantial evidence rather than consider it in a piecemeal fashion: see *R. v. Munif*, 2009 BCCA 451 at para. 10; *R. v. Morin*, [1988] 2 S.C.R. 345; and *R. v. Morin*, [1992] 3 S.C.R. 286. In *Munif*, Frankel J.A. wrote:

[10] In applying that test, it is important to keep in mind that it involves a judicial assessment of "the cumulative effect of all the evidence", not a "piecemeal evaluation": *R. v. Robinson*, 2003 BCCA 353 (CanLII), 2003 BCCA 353, 176 C.C.C. (3d) 23 at para. 40.

[123] In *R. v. Kandola*, 2012 BCSC 968 Romilly J. provides a helpful summary of the principles that apply when drawing inferences related to circumstantial evidence. Starting at paragraph 28, he states:

[28] In *R. v. Munoz*, (2006), 86 O.R. (3d) 134, 205 C.C.C. (3d) 70 at 84 (Ont. Sup. Ct. J.), Ducharme J. (as he then was) discussed the importance of distinguishing between inferences and speculation. He commented:

...The inference must be one that can be reasonably and logically drawn and, even where difficult; it cannot depend on speculation or conjecture, rather than evidence, to bridge any inferential gaps.

[29] The court in *R. v. Kyd* (1957), 120 C.C.C. 178 at 183 (N.W.T. Terr. Ct.), noted that a trier of fact must exercise caution when drawing inferences in criminal cases:

One must be most careful in drawing an inference in a criminal case. It must not be a mere guess or suspicion. A man is not to be convicted on a guess, however shrewd that guess may be.

[30] The approach to be applied in cases that are based on circumstantial evidence underscores the need for proven facts from which to draw reasonable inferences in deciding whether the Crown has proved its case beyond a reasonable doubt. Reasonable inferences to be drawn from proven facts must be distinguished from mere speculation.

[124] Romilly J. then referred to *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 97 C.C.C. (3d) 193 (Ont. C.A.) at 209, where Doherty J.A. described the distinction in this way:

A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation....

[125] In *R. v. J. (G.L.)*, [1997] B.C.J. No. 2994 (C.A.), our Court of Appeal stated at para. 29:

[E]ach individual circumstance cannot be weighed in isolation to see whether or not it supports the guilt of the accused but rather all of the circumstances taken together must be considered to determine whether or not the evidence, as a whole, was reasonably capable of supporting the trial judge's conclusion.

[126] As the trier of fact I must consider whether, based on the whole of the evidence, the Crown has proved the guilt of the accused beyond a reasonable doubt.

D. Aiding and Abetting

[127] In this case, the Crown takes the position that Mr. Khan did not actually commit the murder, but that he is a party to the offence by aiding or abetting the principal offender, alleged to be Mr. Saghir, in committing the offence of first degree murder.

[128] Section 21(1) of the Criminal Code sets out:

21. (1) Every one is a party to an offence who

(a) actually commits it;

- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

[129] In *R. v. Briscoe*, [2010] 1 S.C.R. 411, 2010 SCC 13 at para. 13, Madam Justice Charron explained that in terms of liability, the criminal law does not distinguish between the principal offender and the parties to an offence. The elements of the offence and their applicability to a situation where the principal committed murder were explained by the Court commencing at para 14:

14 The actus reus of aiding or abetting is doing (or, in some circumstances, omitting to do) something that assists or encourages the perpetrator to commit the offence. While it is common to speak of aiding and abetting together, the two concepts are distinct, and liability can flow from either one. Broadly speaking, "[t]o aid under s. 21(1)(b) means to assist or help the actor... . To abet within the meaning of s. 21(1)(c) includes encouraging, instigating, promoting or procuring the crime to be committed": *R. v. Greyeyes*, [1997] 2 S.C.R. 825, at para. 26. ...

15 Of course, doing or omitting to do something that resulted in assisting another in committing a crime is not sufficient to attract criminal liability. As the Court of Appeal for Ontario wrote in *R. v. F. W. Woolworth Co.* (1974), 3 O.R. (2d) 629, "one does not render himself liable by renting or loaning a car for some legitimate business or recreational activity merely because the person to whom it is loaned or rented chooses in the course of his use to transport some stolen goods, or by renting a house for residential purposes to a tenant who surreptitiously uses it to store drugs" (p. 640). The aider or abettor must also have the requisite mental state or mens rea. Specifically, in the words of s. 21(1)(b), the person must have rendered the assistance for the purpose of aiding the principal offender to commit the crime.

[130] In explaining the mens rea requirement, Charron J. continued:

16 The mens rea requirement reflected in the word "purpose" under s. 21(1)(b) has two components: intent and knowledge. For the intent component, it was settled in *R. v. Hibbert*, [1995] 2 S.C.R. 973, that "purpose" in s. 21(1)(b) should be understood as essentially synonymous with "intention". The Crown must prove that the accused intended to assist the principal in the commission of the offence. The Court emphasized that "purpose" should not be interpreted as incorporating the notion of "desire" into the fault requirement for party liability. It is therefore not required that the accused desired that the offence be successfully committed (*Hibbert*, at para. 35). ...The same rationale applies regardless of the principal offence in question. Even in respect of murder, there is no "additional requirement that an aider or abettor subjectively approve of or desire the victim's death" (*Hibbert*, at para. 37 (emphasis deleted)).

17 As for knowledge, in order to have the intention to assist in the commission of an offence, the aider must know that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed. That sufficient knowledge is a prerequisite for intention is simply a matter of common sense. Doherty J.A. in *R. v. Maciel*, 2007 ONCA 196, 219 C.C.C. (3d) 516, provides the following useful explanation of the knowledge requirement which is entirely apposite to this case (at paras. 88-89):

... a person who is alleged to have aided in a murder must be shown to have known that the perpetrator had the intent required for murder under s. 229(a): *R. v. Kirkness* (1990), 60 C.C.C. (3d) 97 (S.C.C.) at 127.

The same analysis applies where it is alleged that the accused aided a perpetrator in the commission of a first degree murder that was planned and deliberate. The accused is liable as an aider only if the accused did something to assist the perpetrator in the planned and deliberate murder and if, when the aider rendered the assistance, he did so for the purpose of aiding the perpetrator in the commission of a planned and deliberate murder. Before the aider could be said to have the requisite purpose, the Crown must prove that the aider knew the murder was planned and deliberate. Whether the aider acquired that knowledge through actual involvement in the planning and deliberation or through some other means, is irrelevant to his or her culpability under s. 21(1).

18 It is important to note that Doherty J.A., in referring to this Court's decision in *R. v. Kirkness*, [1990] 3 S.C.R. 74, rightly states that the aider to a murder must "have known that the perpetrator had the intent required for murder". While some of the language in *Kirkness* may be read as requiring that the aider share the murderer's intention to kill the victim, the case must now be read in the light of the above-noted analysis in *Hibbert*. The perpetrator's intention to kill the victim must be known to the aider or abettor; it need not be shared. *Kirkness* should not be interpreted as requiring that the aider and abettor of a murder have the same mens rea as the actual killer. It is sufficient that he or she, armed with knowledge of the perpetrator's intention to commit the crime, acts with the intention of assisting the perpetrator in its commission. It is only in this sense that it can be said that the aider and abettor must intend that the principal offence be committed.

[131] While the Crown must prove that the specific offence charged was committed, an aider or abettor may be found guilty even where the actual perpetrator is unknown or not convicted: *R. v. Hick*, [1991] 3 S.C.R. 383.

[132] In this case, as the Crown's theory is that Mr. Khan was not the principal offender, the Crown's burden is to prove that Mr. Khan did something to assist the perpetrator in the planned and deliberate murder and that in rendering that assistance or by instigating the commission of the offence he did so for the purpose of aiding or encouraging the perpetrator in the commission of a planned and deliberate murder. In other words, the Crown must prove that Mr. Khan knew the murder was planned and deliberate.

VIII. The Evidence of Mr. Khan and Reasonable Doubt

- [133] The only issue in this case is identity of the killer and whether Mr. Khan is a party to the first degree murder. If the evidence of Mr. Khan, whether I believe all, none, or a part of it, raises a reasonable doubt, then I must acquit: *R. v. W.(D)*. [1991] 1 S.C.R. 742, 63 C.C.C. (3rd 397). As with all of the witnesses, I am entitled to accept parts of his evidence and reject other parts, and similarly, different weight may be accorded to different parts of the evidence which is accepted: see *R. v. Howe*, (2004), 192 C.C.C. (3d) 480 (Ont. C.A.) at para. 44.
- [134] Mr. Khan's relationship with the victim was little more than sexual. On his own evidence, which is generally corroborated by the evidence of Ms. Marrs, he was intimately involved with numerous women. One of those women was the deceased. He testified that he was fully supportive of the victim, regardless of whether or not she kept the unborn child. He testified that he had nothing to do with her murder.
- [135] I do not believe Mr. Khan's evidence when he denies his involvement in the murder of Ms. Rossette and his evidence does not raise a reasonable doubt. He testified that when the victim phoned him on the evening of November 20, she said she needed him to drop off money for her rent. He agreed that he never mentioned this in the first trial, explaining that no one asked. I find this evidence to be completely contrived for the purpose of attempting to explain away the fact that she had no need of a ride home from him and waited for him as she expected to spend some time with him that evening. There is no evidence or reasonable explanation as to why she would be expecting rent money from him some 10 days before it would have been due. It makes no sense that he would agree to pay her that money and then choose not to after he met her out of fear she would spend the money on other matters.
- [136] Mr. Khan would have me believe that he agreed to pick Ms. Rossette up from Bingo and drop her off at home so that he could provide her with rent money. However, nothing changed from the time he agreed to give her that money and the time he withdrew his offer. Mr. Khan crafted a version of events that he believed would assist his defence, without any regard for the truth.
- [137] There is evidence from friends of the victim that she was afraid of entering her residence alone. When they dropped her off, they had to escort her into her residence. She would expect no less from Mr. Khan and he had no reason not to comply. This was a dark and foggy night. Her fear would have been compounded by the knowledge that the garage was completely dark and the door to her residence was left unlocked. The victim was murdered very shortly after she entered the garage, as evidenced by the plush toys won at the bingo hall and the Subway sandwich purchased with Mr. Khan after they left that hall.

- [138] While Mr. Khan's evidence as to the fact that he and Mr. Saghir do not communicate in another language would tend to undermine Mr. Saran's evidence that Mr. Khan and Mr. Saghir were speaking in a language that he could not understand, I find it difficult to believe that Mr. Saran would manufacture this type of detail as has little relevance to the material aspects of his account, specifically as it relates to Mr. Khan. This evidence does not raise a reasonable doubt.
- [139] I must now turn to the balance of the evidence to determine if it proves the guilt of Mr. Khan beyond a reasonable doubt.

IX. Motive

- [140] While Mr. Khan testified that he was supportive of the victim regardless of her decision whether or not to keep the unborn child, I find the opposite to have been the case. When he related this issue to Ms. Marrs in Nanaimo, she testified that she didn't think he sounded too happy about it. After the alleged offence, she asked him about the pregnant woman and he replied "I dealt with it". I accept the evidence of Ms. Marrs on this point and the evidence of Mr. Singh that Mr. Khan repeatedly called the victim his "headache" and that he needed to "get rid of his headache". Mr. Khan agreed that he had not informed his family of this situation. Christine Angelis testified that the deceased had threatened to tell Mr. Khan's family if he did not continue to support her financially.
- [141] As well, I accept the evidence of Mr. Saran that, earlier in the fall of 2005, shortly after his release from prison, Mr. Khan, in the presence of Mr. Saghir, offered him \$2,000 to enter the victim's residence and kill whoever answered the door. I must be cautious in assessing the evidence of Mr. Saran because he was convicted of a serious crime and is a Vetrovec witness. However, there is no evidence that he and the victim were anything but complete strangers. Mr. Saran agreed to become a confidential informant. Three days before the actual murder, Mr. Saran was picked up at his residence by two peace officers, Cst. Bentley and Cst. Uppal. He guided them to the very residence of the victim and pointed out the door that he was asked to enter and carry out the killing. Cst. Bentley's evidence provides powerful and independent confirmatory evidence that provides a significant measure of comfort in reviving Mr. Saran's credibility on material aspects of his evidence.
- [142] That would remain my finding even if I accepted the evidence of the mother of Mr. Khan that Mr. Saran offered to accept money to alter his evidence two days after a new trial was ordered. But I do not accept her evidence. It makes little sense on many levels. Mr. Saran was a confidential police informer at the time. He would be aware of the great risk of a complaint being made to the police. The first reaction of a person in the position of Mrs. Khan would have been to contact police, but she did not and, in fact, the incident was kept private until it was put to Mr. Saran under cross-examination. The person alleged to be Mr. Khan casually strolling down the street to the Khan resident does not appear to be Mr. Saran. Mr. Saran's evidence denying the incident was convincing, and I accept his evidence that he did not attempt to solicit a bribe from the Khan family in exchange for favourable

evidence at this trial.

[143] Mr. Saran's account is also confirmed by Mr. Singh's evidence that Mr. Khan repeatedly complained about his "headache" and about needing to get rid of it.

X. Evidence of Motive by Another to Kill the Victim

[144] Mr. Khan led evidence of a dispute between Ms. Jubbal and the victim over the sham marriage in which the victim participated. It is not contentious that the funds promised to the victim had not been paid in full. None of that evidence raises a reasonable doubt in this case. The two remained on friendly terms. Ms. Jubbal informed the victim that if she reported the matter to authorities, they would both be at risk of jail. There was no motive on the part of Ms. Jubbal to murder or arrange the murder of the victim as that would essentially guarantee the outcome she feared; exposure of her participation in the sham marriage.

[145] While Ms. Jubbal's partner, Mr. Bagri, may be of unsavory character, he had no motive to kill the victim other than at the behest of Ms. Jubbal, who I find did not have such a motive.

[146] No reasonable doubt arises from this evidence.

XI. Conclusion Regarding the charge against Mr. Khan

[147] The case for the Crown is circumstantial. There are no eye witnesses to the murder and there is no forensic evidence linking either accused to the crime scene or the victim's body. The circumstantial evidence, when considered as a whole must not only be consistent with guilt, but inconsistent with any other rationale conclusion.

[148] I have concluded that when all the circumstantial evidence is considered together, the only rationale conclusion is the guilt of the accused as a party to the offence of first degree murder and I am satisfied of that beyond a reasonable doubt.

[149] Some of the factors that lead me to this conclusion include the following:

1. The victim was killed almost immediately after Mr. Khan drove her to her residence in his vehicle.
2. At the bingo hall, the victim only waited for Mr. Khan as she believed the two of them would be spending some time together. On all of the evidence it is clear that Mr. Khan gave Ms. Rossette some indication that they would be spending some time together after Bingo that evening. She had no need for a ride and no urgent need for rent money at that time. I disbelieve the accused when he says that Ms. Rossette was only expecting to be dropped off at her residence after receiving money from him.
3. The victim feared entering her residence alone and expected those dropping her off to first escort her through the garage and into her residence. Mr. Khan would have no reason not to comply with such a simple request.

4. Mr. Khan had earlier endeavored to hire Mr. Saran to kill the victim in her residence and delivered him to the victim's residence for that purpose. He had also discussed the need to get rid of his "headache" in the presence of Mr. Singh.
5. Mr. Khan had a motive to kill the victim as she declined to abort their unborn child which was a consequence of their casual sexual relationship. There is evidence that Mr. Khan's family was unaware of this situation. There is also evidence that the victim threatened to notify his family if financial support was lacking.
6. After the time of the alleged offence, when Ms. Marrs asked Mr. Khan in a telephone conversation what became of the woman who claimed to be pregnant by him as he had earlier mentioned, he replied "I dealt with it". That response is consistent only with his active involvement in her murder and inconsistent with the victim being murdered by someone without the active involvement of Mr. Khan. Ms. Marrs is an intelligent person with a clear recall of events and no motive to fabricate such evidence. She was firm in her recollection of that conversation.

[150] I am convinced beyond a reasonable doubt that: (a) Khan orchestrated Ms. Rossette's murder and thereby encouraged or promoted the principle to commit the murder on his behalf, and (b) that Khan aided the principle by delivering the victim to her house, where Khan knew the principle to be waiting. I must now turn to the case against Mr. Saghir to determine whether the Crown has proved that he was the principal.

XII. THE CASE AGAINST MR. SAGHIR

[151] The Crown's case against Naim Saghir rests heavily on the testimony of Ravi Singh and various sources of circumstantial evidence including his relationship with the co-accused, his alleged opportunity, and the cell phone evidence.

A. Cell phone evidence against Mr. Saghir

[152] On the basis of the cell phone evidence referred to earlier, the cell phone and cell site evidence establishes that Mr. Khan and the person using the 604-617-8710 number were in telephone contact on the night of November 20, 2005 and were in the general vicinity of the victim's residence. If Mr. Saghir was the person using that phone, he had the opportunity to commit the alleged offence.

[153] Even if there is a strong likelihood that Mr. Saghir was using the 604-617-8710 phone, given the nature of the relationship between the two, as friends and drug dealers in the same operation, it cannot be concluded on the whole of the evidence that the purpose of the phone calls between the two drug phones was to communicate for the purposes of setting up the murder of the victim.

B. Other evidence against Mr. Saghir

[154] There is evidence closely connecting the two accused which the Crown argues would support the finding that Saghir had reason to participate in Mr. Khan's plan to have Ms. Rossette murdered.

1. Mr. Khan assisted Mr. Saghir in obtaining housing and illicit employment in the drug trade.
2. Mr. Khan provided Mr. Saghir with a vehicle, the White Honda Civic, and it was registered in Mr. Saghir's name.
3. There is evidence that they were good friends and spent much time together.
4. Mr. Saghir was present when Mr. Khan met with Mr. Saran and actively participated with Mr. Khan in attempting to procure the assistance of Mr. Saran to commit the murder of the victim on an earlier occasion in the victim's residence.

[155] These factors certainly place Mr. Saghir high on the list of suspects. As earlier noted, there is no forensic evidence connecting anyone to the murder of the victim. The only non-circumstantial evidence pointing to Mr. Saghir as the perpetrator of the alleged offence is the evidence of Mr. Singh who related the late night conversation with Mr. Saghir, as earlier noted.

[156] Mr. Singh had legal employment and no criminal record. He certainly was not a sophisticated individual in the witness box. It is clear that, when he was arrested by police for this alleged murder, he began revealing bits of information in the hopes of diverting the police away from himself and towards Mr. Khan and Mr. Saghir while at the same time attempting to avoid becoming a police informant. Otherwise, he had reason to fear retaliation. It was only towards the end of a lengthy police interview that a version of his story consistent, for the most part, with his evidence at trial was revealed.

[157] The Crown says the following evidence is confirmatory of Mr. Singh's testimony:

- 1) Mr. Saran's evidence that Mr. Khan wanted him to kill a woman who lived at the residence where Ms. Rossette resided.
- 2) Mr. Saran testified that Mr. Khan was in the company of a man he identified as Naim Saghir when this overture to kill the woman was made
- 3) Ms. Marrs testified that Mr. Khan told her there was a woman claiming to be pregnant with his child and that he did not seem very happy with this state of affairs. She also testified that after the murder of Ms. Rossette, Mr. Khan said he had "dealt with it" when Ms. Marrs questioned him about the pregnant girl
- 4) Ms. Mestry testified that the cellular telephone number associated with a phone given to her by Mr. Khan on November 23, 2005 was the number taht called Mr. Singh's cellular telephone number on November 20, 2005 at approx. 11:30 pm.

- 5) Cst. Mumford testified that neither the police nor the press disclosed that Ms. Rossette's throat had been slit.
- 6) Dr. Staathof testified that Ms. Rossette had numerous lengthy cuts to her neck that extended to her throat area but did not cut through the major arteries and
- 7) the photographs of the body in exhibit 16 show these cuts give the appearance of her throat being slit.

[158] The first three considerations do confirm the evidence of Mr. Singh, but only serve to implicate Mr. Khan. As to the fourth consideration, there is some evidence in that phone records reveal calls exchanged between Mr. Singh's cell phone and that of Mr. Khan as he described in his evidence, though perhaps not the correct order of calls. However, this aspect of Mr. Singh's evidence lacks independence because Cpl. Mumford informed him that the police already knew of the phone calls.

[159] The hurdles for the Crown include, firstly, the fact that Mr. Singh clearly described reddish scratch marks on the neck and lower forearms of Mr. Saghir, consistent with the struggle Mr. Singh says Mr. Saghir described having with the victim. However, in Mr. Singh's statement to the police he had previously said that the scratch marks were on Mr. Saghir's hands, rather than his forearms. However, police had an opportunity to clearly and closely view Mr. Saghir in good viewing conditions when they stopped his vehicle on November 24, 2005. There simply were no scratch marks of any kind visible.

[160] Secondly, and quite significantly, no DNA evidence was located under the victim's fingernails connecting Mr. Saghir or anyone else to the murder. In fact, the DNA sample taken from the victim's fingernail clippings revealed trace amounts of DNA but Saghir's DNA profile was eliminated from being a possible donor. In other words, Saghir's DNA was not found on the victims' nails.

[161] Thirdly, Mr. Saghir claimed to Mr. Singh that he had to slice the throat of the victim. Yet only superficial scratch marks were found on her throat. This is inconsistent with Mr. Singh's evidence that Mr. Saghir stated "I had to slit the bitch's throat" because she was fighting back.

[162] The Crown, perhaps realizing these difficulties, submits that it is not their theory that the scratch marks observed by Mr. Singh on the neck and hands of Mr Saghir were inflicted by the victim. They say that while that is the theory of Mr. Singh, he is obviously wrong in that respect. Instead, the Crown submits at para. 111 of its submission as follows:

The Crown submits that it is plausible and even likely that the reddish marks observed by Ravi Singh on the neck and forearms of Mr. Saghir were caused by Saghir himself in an effort to prevent the deceased from pushing him away. One can imagine her pushing her attacker with both of her hands on his neck and chest area, and her attacker forcibly pulling her hands off his own neck, scratching his neck in the process. She could grab at his arms to push him away, causing him to rip her hands off his arms and scratching himself with his own nails.

[163] This is a valiant effort by the Crown in a very competently handled prosecution. However, this position dives deeply into the waters of speculation for which there is little if any evidentiary foundation. While it may be a "plausible" scenario to "imagine", it is not the only reasonable alternative. For example, it does not explain how the forearm of Mr. Saghir not wielding the knife would have been scratched. Another even more plausible scenario is that the evidence of Mr. Singh regarding this late night conversation with Mr. Saghir and his observations of him during this conversation is not credible or reliable in light of the balance of the evidence. I am not satisfied that the admission attributed to Mr. Saghir by Mr. Singh was made.

[164] There are further frailties in Mr. Singh's evidence that cause me concern, particularly when viewed as a whole, as follows:

1. Though denied by police witnesses, Mr. Singh must have been given information regarding the death of the victim. How else could he have known the precise number of 55 stab wounds? How else could one explain his intercepted statement to his girlfriend that he "saw the picture last night and I still have the picture of her in my head"? This reference, coupled with the circumstances surrounding the police interview cause further uncertainty about the truthfulness of Mr. Singh's account of Mr. Saghir's admission.
2. Mr. Singh did not tell the police about Mr. Saghir borrowing his cell phone on the night that Mr. Saghir came to his door until confronted by the police as to the existence of the phone records showing that Mr. Singh's phone was used to call Mr. Khan on the night of the murder.
3. Mr. Singh was inconsistent in his evidence on whether the confession from Mr. Saghir happened the same night that Mr. Saghir came to his door, or whether this exchange may have happened the next day. His explanation that he must have been confused or mixed up the time is unsatisfactory given the centrality of this evidence to the case.

[165] The evidence of Mr. Singh, while convincing in some respects, stands largely uncorroborated and is internally inconsistent on many points of some significance, particularly those that directly implicate Mr. Saghir. It follows that the evidence as a whole does not prove beyond a reasonable doubt that Mr. Saghir was the person who caused the death of the victim in the knife attack; the only theory upon which the Crown case against Mr. Saghir is advanced. Accordingly, I find Mr. Saghir not guilty.

"Josephson J."

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