

CANADA / JUDGMENT

## R. v. Lewis

2021 BCSC 1739

COURT

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2021 BCSC 1739 R. v. Lewis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Lewis,

2021 BCSC 1739

Date: 20210903

Docket: X081448

Registry: New Westminster

Regina

v.

Kerryann Sharmila Dawnette Lewis

Before: The Honourable Madam Justice Devlin

Oral Reasons for Judgment

Counsel for the Crown:

C.A. McPherson, Q.C.

K. LeNoble

Counsel for the Accused:

M. Sandford, Q.C.

A. Tolliday

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New Westminster, B.C.

September 3, 2021

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- [1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

## Introduction

- [2] The accused Kerryann Lewis stands charged with the first degree murder of her daughter Aaliyah Rosa - whom I will refer to as Aaliyah in these Reasons - on July 22, 2018 in Langley, British Columbia.
- [3] This case involves a terrible tragedy - the death of a young child. The many who loved Aaliyah will undoubtedly suffer her loss for the rest of their lives.

- [4] On the evening of July 22, 2018, Aaliyah was found lying on the floor near the bathtub of the ensuite bathroom in her mother's apartment (the "apartment"). She was wearing a damp pink bathrobe, and wet shorts and panties. Her skin was wet and cold. There were small air bubbles around her left nostril, and she was not breathing. There were no visible signs of trauma. Aaliyah was dead.
- [5] Results of toxicology tests revealed the presence of diphenhydramine and lorazepam in Aaliyah's blood. Both are central nervous system ("CNS") depressant drugs.
- [6] Aaliyah had been with her mother Ms. Lewis since 10 a.m. that morning when her father Mr. Rosa dropped her off at their usual meeting place at the Langley Events Centre ("LEC"). Aaliyah was to spend the day with Ms. Lewis and then be returned to the drop off location at the LEC at 5 p.m., where her father would meet her. That never happened. After Aaliyah was dropped off with Ms. Lewis at the LEC, she and Ms. Lewis then went to Shopper's Drug Mart where Ms. Lewis purchased, among other items, a box of Sleep-Eze, and filled a prescription for an emergency supply of a one milligram dose of sublingual Ativan. They then went to the nearby BC Liquor Store where Ms. Lewis purchased a 375 ml bottle of Smirnoff Vodka. After that, they went to a Shell gas station and then, at approximately 11:00 a.m., they went to the Sandman Signature Hotel a short distance away from the gas station. They left the hotel around 11:31 a.m. and entered the parkade for Ms. Lewis's apartment at 11:38 a.m. The last image of Aaliyah alive is from the surveillance video in the lobby of the Sandman Hotel. After entering the parkade of the apartment at 11:38 a.m., there is no evidence that either Ms. Lewis or Aaliyah left the apartment again.
- [7] A large body of evidence was tendered at trial, including the testimony of 22 Crown witnesses and one defence expert. In addition, substantial Admissions of Fact (the "ASF") were filed, together with photographs, videos, and other documentary evidence.
- [8] I am mindful of the fact that Ms. Lewis is presumed innocent unless and until the Crown meets its burden of proof. The Crown is required to prove the guilt of the accused beyond a reasonable doubt. The burden never shifts to the accused. A reasonable doubt is not an imaginary, farfetched, or frivolous doubt. It is not doubt based on sympathy for or prejudice against anyone involved in this trial. It is a doubt based on reason and common sense. It is a doubt that logically arises from the evidence or lack of evidence: *R. v. Lifchus*, [1997] 3 S.C.R. 320 [Lifchus] at para. 36.
- [9] In determining whether the Crown has met its burden in a circumstantial case such as this, I must apply my logic and common sense to the totality of the evidence, including gaps in that evidence, and consider whether other reasonable possibilities or plausible theories inconsistent with guilt exist and preclude a finding that an inference of guilt is the only reasonable inference available: *R. v. Villaroman*, 2016 SCC 33 [Villaroman] at paras. 35-37; *R. v. Ali*, 2021 ONCA 362 [Ali] at paras. 97-98.

- [10] Some evidence in this case may be regarded as reflecting badly on the character of Ms. Lewis. When considering this evidence, I am aware that it cannot be used to infer that Ms. Lewis is of bad character such that it is more likely that she committed the crime with which she is now charged. This evidence was necessary as part of the narrative, and will be used for no other purpose.
- [11] I will begin these Reasons by setting out the applicable legal principles, because they guide my analysis throughout. I will then discuss the positions of the parties, and the evidence with respect to the relevant events. I will then review the evidence of the expert witnesses in considerable detail. I will comment on issues that arise in the evidence as I proceed. Unless otherwise stated, I find the witnesses' evidence both credible and reliable. Finally, I will apply the relevant law to my analysis of the present case.

### The Governing Legal Principles

### The Relevant Statutory Provisions

- [12] Section 222 of the Criminal Code, R.S.C., 1985, c. C-46 [Code] states that a person commits homicide when, directly or indirectly, by any means, he causes the death of a human being (s. 222(1)). Homicide is either culpable or not culpable (s. 222(2)). Homicide that is not culpable is not an offence. Culpable homicide is murder or manslaughter (s. 222(4)). A person commits culpable homicide when he causes the death of a human being by means of an unlawful act (s. 222(5)(a)).

- [13] In this case, the Crown is relying on s. 229(a)(i) of the Code, which states:

#### Murder

#### 229 Culpable homicide is murder

- (a) where the person who causes the death of a human being
- (i) means to cause his death

[ ]

- [14] Murder is either first degree or second degree (s. 231(1)). Murder is first degree murder when it is planned and deliberate (s. 231(2)). All murder that is not first degree is second degree murder (s. 231(7)). Culpable homicide that is not murder is manslaughter (s. 234).

### The Applicable Legal Principles

- [15] The legal principles that govern my analysis are well-established and not in dispute. Therefore, I will briefly canvass the relevant case law and discuss the applicable legal principles, which I will then apply to my analysis.

- [16] Of course, as I have set out above, the burden of proof lies on the Crown. The Crown is required to prove the guilt of the accused beyond a reasonable doubt - the burden never shifts to the accused. A reasonable doubt is not an imaginary, farfetched, or frivolous doubt, or a doubt based on sympathy for or prejudice against anyone involved in the trial. It is a doubt based on reason and common sense - one that logically arises from the evidence or lack of evidence. While it does not involve proof to an absolute certainty, and is not proof beyond any doubt, more is required than proof that the accused is "probably" guilty: Lifchus at para. 36. As stated in Lifchus at para. 13, the onus resting on the Crown to prove the guilt of the accused beyond a reasonable doubt "is inextricably linked to the presumption of innocence".
- [17] In *R. v. Nette*, 2001 SCC 78 [Nette], the majority of the Supreme Court of Canada explained that in a homicide trial, the Crown must establish that the actions of the accused were a significant contributing cause of the death the victim: at para. 71. The question in a homicide trial "is not what caused the death or who caused the death of the victim but rather did the accused cause the victim's death": Nette at para. 77. In accordance with Nette, the parties agree that the Crown is not required to establish the precise mechanism by which the death occurred, or a conclusive medical cause of death, but rather that the death resulted from an unlawful act that led to the injuries that caused the death, and that the accused is legally responsible for that act: see *R. v. Park*, 2018 BCSC 1632 [Park] at para. 164, citing *R. v. Stewart*, 2003 NSCA 150 [Stewart] at para. 30.
- [18] The evidence in this case is entirely circumstantial, and I am therefore guided by the holdings of the Supreme Court of Canada in Villaroman. Justice Cromwell, writing for the Court, in Villaroman set out the correct approach the trier of fact must take when assessing circumstantial evidence. Specifically, at para. 35 Justice Cromwell set out that in assessing circumstantial evidence, if, considering all of the evidence, there are reasonable inferences that can be drawn other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt; requiring proven facts to support explanations other than guilt "wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence". Justice Cromwell clarified that therefore, in assessing circumstantial evidence, inferences that may be consistent with innocence do not have to arise from proven facts: Villaroman at para. 35.
- [19] The trier of fact should consider other plausible theories or reasonable possibilities that are inconsistent with guilt when assessing circumstantial evidence: Villaroman at para. 37. However, as the Court cautions, such plausible theories or reasonable possibilities "must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation": Villaroman at para. 37. The Court acknowledged that the line between a "plausible theory" and "speculation" is not always an easy line to draw, but articulated that "the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty": at para. 38.

- [20] Recently, in *R. v. Gibson*, 2021 ONCA 530 [Gibson], the Ontario Court of Appeal provided a helpful summary of the established principles that apply when considering circumstantial evidence and its use as proof of facts in a criminal case. Beginning at para. 76, Justice Watt, writing for the court, stated:
- [76] First, circumstantial evidence is all about inferences. Individual items of circumstantial evidence give rise to a range of inferences. The available inferences must be reasonable according to the measuring stick of human experience. That there may be a range of inferences available from an individual item of circumstantial evidence does not render the item of evidence irrelevant or neutralize its probative value: *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 112, per Martin J. (dissenting, but not on this point), citing *R. v. Smith*, 2016 ONCA 26, 333 C.C.C. (3d) 534, at para. 77.
- [21] Secondly, with respect to the standard of proof required, Watt J.A. stated:
- [77] A second point concerns the standard of proof required where proof of the offence or one or more of its essential elements depends wholly or substantially on circumstantial evidence. In such a case, an inference of guilt drawn from circumstantial evidence must be the only reasonable inference available on that evidence: *R. v. Villaroman*, 2016 SCC 33, at paras. 30, 32-34.
- [22] The final two points, beginning at para. 78, explain how to assess the evidence:
- [78] Third, the standard of proof applies to the evidence taken as a whole, not to each individual item of circumstantial evidence: *R. v. Morin*, [1988] 2 S.C.R. 345, at pp. 359, 362. See also *R. v. Morin*, [1992] 3 S.C.R. 286, at p. 295-96.
- [79] Finally, where proof of an essential element or the offence charged depends wholly or substantially on circumstantial evidence, it is the cumulative effect of all the evidence, taken together, each item in relation to another and the whole, that must be considered in determining whether the standard of proof has been met: *Cote v. The King* (1941), 77 C.C.C. 75 (S.C.C.), at p. 76.
- [Emphasis added.]
- [23] With respect to the defence of intoxication, I am guided by the decision of the Supreme Court of Canada in *R. v. Daley*, 2007 SCC 53 [Daley], which is the leading case on intoxication as it applies to the specific intent for murder. In *Daley*, the Supreme Court of Canada articulated three legally relevant levels of intoxication: mild intoxication, advanced intoxication, and extreme intoxication or automatism: at paras. 41-43. The extent of intoxication required to negate specific intent may vary, depending on the type of offence involved. As stated in *Daley* at para. 42, "for certain types of homicides, where death is the obvious consequence of the accused's act, an accused might have to establish a particularly advanced degree of intoxication to successfully avail himself or herself of an intoxication defence of this type": see also *R. v. Florence*, 2014 BCCA 288 at paras. 21-22.

- [24] In *R. v. Robinson*, 2010 BCSC 368 [Robinson], the court explained that in addition to intoxication, whether by alcohol, drugs, or both, evidence of an accused's mental condition or state is to be considered in determining whether the accused had the requisite intent for murder: at paras. 107-111. At para. 110, Justice Joyce stated:
- [110] Where there is evidence of a mental condition relevant to intent, this evidence must be considered along with all the other evidence in determining whether the accused had the intent requisite for murder. Such consideration does not create the notion of diminished responsibility, which does not exist in our law. Rather it simply recognizes that if the accused was suffering from some sort of mental condition at the time of the offence, that mental condition is a circumstance that might affect whether or not he formed the necessary specific intent (see *R. v. Bailey* (1996), 111 C.C.C. (3d) 122 (B.C.C.A.))
- (See also *R. v. Klein*, 2020 BCSC 333 [Klein] at para. 165; *R. v. Batstone*, 2019 BCSC 476 [Batstone] at para. 125.)
- [25] The ultimate burden of rebutting the defence of intoxication and of proving its case beyond a reasonable doubt always rests with the Crown: *R. v. Arjun*, 2015 BCCA 273 [Arjun] at para. 41, leave to appeal dismissed [2015] S.C.C.A. No. 324. However, as stated in *Arjun*, there is an evidential burden on the accused to provide a sufficient foundation for the defence if evidence derived from other sources has failed to achieve this: at para. 41.
- [26] As stated at para. 128 of *Batstone*, even if the court is not satisfied that the factors impacting intoxication or impaired mental state on their own raise a reasonable doubt as to whether the accused had the requisite intent, "the court must consider the cumulative effect of the evidence of those factors, along with all of the other evidence in deciding whether the Crown has proved beyond a reasonable doubt that the accused had the requisite intent". See also *Klein* at paras. 164-165.
- [27] In *R. v. Calnen*, 2019 SCC 6 [Calnen], Justice Martin, dissenting, but not on this point, explained that after-the-fact conduct is a form of circumstantial evidence, and that "the proper legal treatment of after-the-fact conduct is highly context and fact specific". After-the-fact conduct encompasses both what the accused said and did after the offence charged was allegedly committed, and covers a large range of possible circumstances: *Calnen* at para. 106. It allows the trier of fact to draw particular inferences based on a person's words or actions, relying on logic, common sense, and experience: *Calnen* at paras. 111-112. At para. 112, Martin J. in *Calnen* stated that "[t]he inferences that may be drawn "must be reasonable according to the measuring stick of human experience" and will depend on the nature of the conduct, what is sought to be inferred from the conduct, the parties' positions, and the totality of the evidence", citing *R. v. Smith*, 2016 ONCA 25 at para. 77.
- [28] *R. v. Beckett*, 2020 BCCA 262 [Beckett] provides helpful guidance for considering whether a false statement was intentionally concocted or fabricated by the accused: see paras. 14-17. At para. 14, Justice Fenlon, writing for the court, stated that false statements by the accused are a type of after-the-fact conduct, but that the law "draws a firm distinction between

statements that are disbelieved and therefore rejected by the trier of fact, and those that are proved to be intentionally fabricated" - that "[t]he former have no evidentiary value", whereas "the latter are evidence from which an inference of consciousness of guilt may be drawn".

- [29] Finally, with respect to expert evidence, I am mindful of two particular cautions expressed in the jurisprudence. Firstly, in *R. v. Abbey*, 2017 ONCA 640, Justice Laskin quoted an article written by Professor David Paciocco, now Paciocco J.A., on the Goudge Report - "Taking a 'Goudge' out of Bluster and Blarney: An 'Evidence-Based Approach' to Expert Testimony" (2009) 13 Can. Crim. L. Rev. 135 - wherein then Professor Paciocco wrote that "[i]n effect, the 'trust me' approach, once typical in Canadian courts, has been replaced by a 'persuade me' standard", and that "the essence of an evidence-based approach is that the tribunal be given all of the data it needs to assess the opinion it is being asked to accept. Anything less and a 'trust me' approach is used": at para. 119.
- [30] Secondly, in *R. v. Sekhon*, 2014 SCC 15, Justice Moldaver, writing for the majority of the Court, at para. 50 stated that the "inherent danger" of admitting anecdotal evidence from experts is "obvious". He then agreed with the comments of Justice Newbury, writing in dissent, from the decision below of the Court of Appeal that anecdotal evidence "does not speak to the particular facts before the Court, but has the superficial attractiveness of seeming to show that the probabilities are very much in the Crown's favour, and of coming from the mouth of an 'expert'", and that "[i]f it can be said to be relevant to the case of a particular accused, it is also highly prejudicial": at para. 50. Justice Moldaver went on to say at para. 50:

This type of anecdotal evidence would appear to require the accused to somehow prove that, regardless of a particular expert's past experience, the accused's situation is different. Such a result is contrary to another fundamental tenet of our criminal justice system -- that it is the Crown that bears the burden of proving the mens rea of an offence beyond a reasonable doubt. As the appellant points out, "such evidence would logically trigger a defence need to call evidence to refute such opinions, such as a retired investigator who did experience an innocent person in similar circumstances, or a witness who could testify that he or she was in the same circumstances of the accused and was innocent" (A.F., at para. 61). At that point, the trial would become a battle of experts -- and a completely irrelevant battle at that.

- [31] More recently, the Ontario Court of Appeal in *R. v. K.J.*, 2021 ONCA 570 [K.J.], provided a helpful reminder that expert evidence must not distort the fact-finding process and overtake the trier of fact's task of objectively assessing the totality of the evidence at trial. Justice Roberts, writing for the court, provides helpful guidance at para. 19, where he explains:

Expert evidence is only a part of the evidence that a trier of fact is required to assess in order to determine if the Crown has proven an accused's guilt beyond a reasonable doubt: [citations omitted].

- [32] These are the legal principles that will govern my analysis as I proceed. I will now set out the positions of the parties.

### **Positions of the Crown and the Defence**

- [33] The Crown submits Ms. Lewis assaulted Aaliyah by intentionally submerging her in the bathtub with the intent to kill her. Prior to the submersion, the Crown submits that Ms. Lewis developed a plan to sedate Aaliyah and purchased the two medications - Sleep-Eze and Ativan - on the morning of July 22, 2018 for that purpose. Once Aaliyah was sedated, the Crown submits that Ms. Lewis deliberately submerged Aaliyah in the bathtub, drowning her.
- [34] The Crown acknowledges there is evidence that Ms. Lewis consumed alcohol on July 22, 2018, although precisely when and how much is unknown. The Crown also acknowledges that Ms. Lewis had a history of mental health issues. However, the Crown takes the position that neither her level of intoxication nor her mental health issues impacted on her ability to form the specific intent to cause death.
- [35] In terms of motive for the killing, the Crown submits that Ms. Lewis had unrelenting animus towards Mr. Rosa due to what she perceived to be his mistreatment of her throughout their relationship and his ongoing efforts to deny Ms. Lewis time with Aaliyah.
- [36] The defence submits the Crown has failed to prove the essential elements of the offence. They emphasize that there is no direct evidence of the circumstances surrounding Aaliyah's death, that the exact manner of her death is unclear, and that the cause of death is uncertain. The defence also focused on the methodology employed by Dr. Steele, the forensic pathologist, in conducting the autopsy, and suggested that her methodology was flawed in various respects and led to significant and meaningful limitations in the other two experts' review of her materials.
- [37] The defence submits the inferences the Crown invites the Court to draw are entirely speculative. They submit there is no evidence to establish how Aaliyah came to ingest the two CNS depressants she had in her system, nor is there any evidence that Aaliyah was actually submerged in water. Similarly, the defence submits there is no evidence as to what caused the neck injury or the mild head injuries sustained by Aaliyah. In addition, given Aaliyah's pre-existing medical condition of arrested hydrocephalus, and considering the expert evidence regarding how that condition, in all the circumstances, could have resulted in cerebral herniation and death, the defence submits there are other reasonable possibilities or plausible theories arising from the evidence or lack of evidence that preclude a finding that an inference of guilt is the only reasonable inference available.
- [38] Further, the defence submits Ms. Lewis's level of intoxication, together with her deteriorating mental health, raises a reasonable doubt that she had the requisite intent for murder at the time of the offence, and that the Crown has not met its burden with respect to this defence.

[39] I will now turn to a summary of the evidence.

### Summary of the Evidence

[40] I will commence my review of the evidence with some background information regarding Ms. Lewis and her relationship with Aaliyah's father, Stephen Rosa. I will then turn my focus to the time frame preceding the incident, and I will detail the events of July 22, 2018 leading to the discovery of Aaliyah's body. I will then review the expert evidence including the toxicology results relating to both Aaliyah and Ms. Lewis, the results of the autopsy conducted by Dr. Steele, and the neuropathological evidence tendered by both the Crown and defence experts.

### The Relationship of Ms. Lewis and Mr. Rosa

[41] Ms. Lewis and Mr. Rosa were married on December 18, 2010. Their only child, Aaliyah Rosa, was born on January 15, 2011. The couple became estranged and separated around June 26, 2016. They resolved their property issues through mediation and Ms. Lewis received a substantial payout. They divorced in early 2019.

[42] From the time of their separation until Aaliyah's death, Mr. Rosa had custody of Aaliyah. At first, Ms. Lewis had limited access to Aaliyah, but the degree and type of access changed at various times. In April 2018, Mr. Rosa agreed to allow Ms. Lewis unsupervised access to Aaliyah, and increased the number of hours she could spend with Aaliyah. At the time of Aaliyah's death, Ms. Lewis was permitted unsupervised access to Aaliyah twice a week, every Wednesday from 4:00 p.m. to 7:00 p.m., and every Sunday from 10:00 a.m. to 5:00 p.m. As I will discuss in more detail below, it is evident that Ms. Lewis was upset with respect to her lack of access to Aaliyah, and desired more access to Aaliyah. Notably, however, the week before Aaliyah's death, Mr. Rosa had offered Ms. Lewis extra time with Aaliyah because he knew Ms. Lewis's mother, Aaliyah's grandmother, was in town; Ms. Lewis did not take Mr. Rosa up on this offer.

[43] Mr. Rosa testified that during their marriage, there were several occasions where Ms. Lewis overdosed on various medications and was hospitalized. Clinical records filed at trial indicate Ms. Lewis had a history of mental health issues, which included hospitalization on several occasions before she and Mr. Rosa separated in 2016.

[44] Ms. Guo was a homestay student who lived with Mr. Rosa and Ms. Lewis for one year starting in 2013. Ms. Guo introduced Ms. Lewis to Ms. Guo's friend Ms. Yu. Ms. Guo and Ms. Yu remained in contact with Ms. Lewis after her separation from Mr. Rosa. Their evidence provided some further insight into the relationship between Ms. Lewis and Mr. Rosa, and into Ms. Lewis's desire to have more access to Aaliyah. The evidence of these two witnesses confirmed what is evident from the large body of electronic communications - that Aaliyah was very important to Ms. Lewis, and that Ms. Lewis was upset and unhappy that her time with Aaliyah was limited. Ms. Guo and Ms. Yu also testified that Ms. Lewis complained about

Mr. Rosa and the way he had treated her during their marriage. Additionally, Ms. Guo also testified that while she was staying with Ms. Lewis and Mr. Rosa, Ms. Lewis had to be taken to the hospital on one occasion.

- [45] Mr. Rosa described his communications with Ms. Lewis as a "nightmare". There was a lot of animosity between them. Mr. Rosa described Ms. Lewis as very angry. A large body of electronic communications involving Ms. Lewis and Mr. Rosa were filed as an exhibit. It is readily apparent from a review of these exchanges that Ms. Lewis was continually concerned about access to Aaliyah and that she believed Mr. Rosa was intentionally denying her access. Numerous messages and video recordings of their meetings to exchange Aaliyah reveal their acrimonious relationship.
- [46] Mr. Rosa agreed in cross-examination that the months immediately preceding the incident were not good for Ms. Lewis. He testified her mood was "up and down". He also acknowledged that despite their strained relationship, there were periods of time where they could be more pleasant to each other.
- [47] Mr. Rosa described Aaliyah as a healthy, active child who was always busy. He recalled that in the past, he had given Aaliyah children's Tylenol and cough syrup when she had a cough, but that Aaliyah never took any medications on her own.

### **The Events of July 22, 2018 from Mr. Rosa's Perspective**

- [48] On the morning of Sunday July 22, 2018, Mr. Rosa made Aaliyah pancakes for breakfast. She appeared perfectly healthy. It was a regular Sunday and, as scheduled, he took Aaliyah to the LEC to meet her mother at 10:00 a.m. Mr. Rosa said Aaliyah was happy to see Ms. Lewis.
- [49] Mr. Rosa said Ms. Lewis's behaviour was no different that morning during the drop off at the LEC than on other occasions, and she drove off before he could speak with her. In the video of this exchange, Aaliyah can be heard telling Ms. Lewis that Mr. Rosa wanted to speak to Ms. Lewis. Ms. Lewis had no interest in speaking with Mr. Rosa. The tension between the two is palpable.
- [50] At 5:00 p.m., Mr. Rosa returned to the LEC to meet Ms. Lewis and to pick up Aaliyah. When there was no sign of them, he tried calling Ms. Lewis, but there was no answer. Because he had agreed the week before to alter Ms. Lewis's return time to 7:00 p.m. because Ms. Lewis's mother, Aaliyah's grandmother, was in town and he wanted Aaliyah to spend time with her, he thought perhaps Ms. Lewis thought the return time was still 7:00 p.m., so he decided to return to the LEC at that time. When he returned to the LEC at 7:00 p.m., there was no sign of Aaliyah or Ms. Lewis. After Mr. Rosa walked around the area looking for Aaliyah, he called the police non-emergency number to report his concerns. At 8:30 p.m. he called the police again, expressing concern for Aaliyah's safety.

- [51] Sometime between 8:30 and 9:00 p.m., he spoke to RCMP Cst. Pooni and provided him with information about Ms. Lewis, including her licence plate number, her mother's phone number, and he thought perhaps Ms. Lewis's sister's phone number. He did not know Ms. Lewis's current address, but provided Cst. Pooni with her previous address. Mr. Rosa then called Ms. Lewis's sister and told her he could not get in contact with Ms. Lewis. It was during that call he learned that Ms. Lewis's mother was already back in Edmonton.
- [52] Mr. Rosa estimated he called Ms. Lewis's number at least ten times. At 9:31 p.m., her phone was answered by a male who he believed identified himself as Anthony. However, as set out later in these reasons, the phone was actually answered by Mr. Stephany. Mr. Rosa testified that the male told him that Ms. Lewis was in the bathroom and would call him back. Mr. Rosa then called Cst. Pooni to report the conversation he had just had.
- [53] At 11:30 p.m. that same night, the police attended at Mr. Rosa's residence and informed him that Aaliyah was dead.

### **July 22, 2018: Ms. Lewis's Activities Prior to Picking up Aaliyah**

- [54] At 8:41 a.m., the records indicate Ms. Lewis had a 47 minute and 33 second telephone call with a number associated to Maureen Lewis, and that at 9:30 a.m., she had an 8 minute and 54 second FaceTime communication with the number associated to Claudette Lewis, her mother.
- [55] At 9:43 and 9:46 a.m., Ms. Lewis placed calls to Shoppers Drug Mart in Langley, B.C.
- [56] At 9:45 a.m., the key fob normally used by Ms. Lewis was used to leave the parkade of her apartment building.
- [57] At 9:59 a.m., Ms. Lewis had a 3 minute and 40 second FaceTime communication with the number associated to Claudette Lewis, her mother.

### **July 22, 2018: Aaliyah's Movements between 10:00 a.m. and 11:38 a.m.**

- [58] As discussed earlier, at approximately 10:00 a.m., Ms. Lewis picked up Aaliyah from Mr. Rosa at the LEC.
- [59] Information obtained by the police after the discovery of Aaliyah's body provides a timeline for events immediately following Mr. Rosa dropping Aaliyah off with Ms. Lewis at 10:00 a.m. until Aaliyah and Ms. Lewis returned to the apartment at 11:38 a.m. on July 22, 2018. The following timeline is based on the ASF, CCTV footage, and testimony of the individuals who dealt with Ms. Lewis and Aaliyah that morning.

- [60] After picking Aaliyah up at the LEC, Ms. Lewis and Aaliyah went to the Shoppers Drug Mart located at 6339 200th Street, Langley, B.C. CCTV video obtained from that Shoppers Drug Mart depicts Ms. Lewis and Aaliyah inside the store. They both appeared well as they walked through the store. Ms. Toroghi, the store clerk who dealt with Ms. Lewis, can be seen on the video assisting Ms. Lewis in the aisle where the sleeping medication, including Sleep-Eze, is located.
- [61] While at Shoppers Drug Mart, Ms. Lewis purchased a package of extra strength Sleep-Eze containing twenty blue gel capsules, a bottle of blue Powerade, and a package of Koala King Kone candy. She also filled a prescription for an emergency supply of a one mg dose of sublingual Ativan (which is a brand name for the drug lorazepam). It is admitted the active ingredient in "Sleep-Eze" is diphenhydramine.
- [62] After leaving Shoppers Drug Mart, Ms. Lewis and Aaliyah are next seen on CCTV footage entering the BC Liquor Store located at 6435 201st Street, Langley, B.C. While there, Ms. Lewis purchased a 375 ml bottle of Smirnoff Vodka. As discussed further below, an empty 375 ml bottle of Smirnoff Vodka was located in the recycling at the apartment during the search of the apartment. CCTV from the liquor store shows Ms. Lewis at the till interacting with the store clerk, Ms. Browne, at about 10:34 a.m.
- [63] Both Ms. Toroghi and Ms. Browne testified they observed nothing unusual about Ms. Lewis during their dealings with her. The CCTV footage depicts Ms. Lewis and Aaliyah interacting with each other and the store clerks. Both seem to be functioning well as they move around the stores.
- [64] At 10:42 a.m., Ms. Lewis and Aaliyah entered the Shell gas station store located at 8622 200th Street, Langley, B.C. Ms. Lewis appeared to make some purchases and the two left the store at 10:44 a.m.
- [65] At 11:00 a.m., a vehicle matching the general description of Ms. Lewis's car was observed entering the parking lot of the Sandman Signature Hotel located at 8828 201 Street, Langley, B.C. CCTV footage shows Ms. Lewis and Aaliyah entering the lobby of the hotel at 11:09 a.m. Ms. Lewis dealt briefly with the front desk clerk, during which time she showed the clerk something on her phone. Then, she and Aaliyah were out of view for a short time. Approximately 13 minutes later, CCTV footage shows Ms. Lewis and Aaliyah back in the lobby, and Ms. Lewis is seen on her phone. At 11:29 a.m., Ms. Lewis and Aaliyah appear again on the CCTV footage, and are seen leaving the hotel at 11:30 a.m. At 11:31 a.m., the same vehicle observed earlier is seen leaving the hotel parking lot.
- [66] At 11:38 a.m., the key fob ordinarily used by Ms. Lewis was used to enter the parkade of the apartment building. That was the last time that key fob was used on July 22, 2018.
- [67] Between the time Ms. Lewis and Aaliyah returned to the apartment at 11:38 a.m., and the discovery of Aaliyah's body sometime after 9:00 p.m. on July 22, 2018, there was little activity on Ms. Lewis's phone.

**July 21-22, 2018: Kim Stephany Ends His Relationship with Ms. Lewis**

- [68] Before I canvass those events leading to the discovery of Aaliyah's body, I will set out some background information regarding the relationship between Mr. Stephany and Ms. Lewis, for context.
- [69] Mr. Stephany and Ms. Lewis had known each other for years, and they began a relationship in 2017. Although their relationship had some challenges, they decided to move in together in March 2018. It is admitted that on May 29, 2018 they signed a rental agreement effective July 1, 2018 for a two bedroom unit located at Suite 507B, 20053-68th Avenue, Langley, B.C. which I referred to earlier as Ms. Lewis's apartment.
- [70] Mr. Stephany testified that in the weeks prior to the incident, their relationship was strained. He noticed Ms. Lewis was becoming increasingly depressed, primarily over her lack of access to Aaliyah. On one occasion, he had to take Ms. Lewis to the hospital because she was not eating and was upset about Aaliyah, as is confirmed by the medical records. He stated that Ms. Lewis would occasionally use cannabis to assist her with eating. He also testified that Ms. Lewis would be very upset after her visits with Aaliyah. He said he tried to be positive, but he found the situation draining and knew he needed to get out of the relationship.
- [71] On the evening of July 21, 2018, he left the apartment to go to a friend's BBQ. He described Ms. Lewis as upset about something when he left the apartment. While at the BBQ, he received several messages from Ms. Lewis asking when he would be returning. He got back to the apartment around midnight and checked to see Ms. Lewis sleeping in the master bedroom. Mr. Stephany attempted to sleep in the bed, but when Ms. Lewis appeared to become upset, he moved to the couch. She followed him there. After several attempts to sleep, he decided to leave the apartment. He took his dog, wallet, and key and left at about 1:30 or 2:00 a.m. on July 22, 2018.
- [72] Mr. Stephany then went to his friend Ms. Rai's residence and spent the day there. He did not return to the apartment on July 22, 2018 until he came back later in the day (at or about 9:20 p.m.) with his friends, Ms. Rai and Mr. Harrison, so that he could pick up some of his things, including his identification, which Ms. Lewis stored in her safe.
- [73] After he left the apartment in the early hours of July 22, 2018, he received a series of messages from Ms. Lewis asking him to come home so that they could talk. At 5:50 a.m., Ms. Lewis messaged to him: "I hurt myself very bad. Where are you?". After receiving several messages from Ms. Lewis, Mr. Stephany told her he was at his parents' house, and that if she needed help, they would call 911. The records indicate that they then had a 4 minute and 4 second call, but Mr. Stephany could not recall that taking place. Between 6:03 a.m. and 6:22 a.m. on July 22, Ms. Lewis attempted to contact Mr. Stephany over ten times by phone and text message. At 6:27 a.m., Mr. Stephany sent a text advising Ms. Lewis the relationship was over. The message read: "U can say what u want but I am done with us. I need to better myself and better my life and being with you it's not going to happen". Ms. Lewis replied,

asking him repeatedly to come home. Mr. Stephany advised her that he would come by later in the day to grab some of his stuff when he had someone else with him.

- [74] Between 6:28 a.m. and 6:42 a.m., Ms. Lewis sent Mr. Stephany several more messages asking him to come home and talk. After Mr. Stephany wrote her that he was done, she immediately switched topics and sent a series of messages between 6:43 a.m. and 8:26 a.m. to Mr. Stephany and others regarding recovering money she had invested in a gifting club, which is admitted to be a pyramid scheme that they had contributed to. At 9:26 a.m., after a series of exchanges about assisting Ms. Lewis in getting her money refunded, Ms. Lewis thanked Mr. Stephany. Ms. Lewis did not message Mr. Stephany again.
- [75] At 12:26 p.m. and again at 1:28 p.m. on July 22, Mr. Stephany sent Ms. Lewis messages to advise her he would be coming to the apartment to pick up some of his stuff later that night.
- [76] Between 4:23 and 4:24 p.m., three photographs of documents and three short videos were taken on Ms. Lewis's iPhone. The photographs and videos were of a Great West Life disability form, which was later located on the bed in the master bedroom in the apartment.
- [77] At 8:02 p.m. and 8:03 p.m., Mr. Stephany messaged Ms. Lewis, advising her he was coming back soon. The records indicate the message he sent at 8:03 p.m. had been read. Mr. Stephany testified he sent these messages so Ms. Lewis would not be surprised when he returned to the apartment.

### **July 22, 2018: Cst. Pooni's Efforts to Contact Ms. Lewis**

- [78] As discussed earlier, Cst. Pooni was the RCMP member who spoke directly with Mr. Rosa on July 22, 2018. At approximately 9:00 p.m., after obtaining information from Mr. Rosa, Cst. Pooni went to Ms. Lewis's last known address to see if he could locate Ms. Lewis, and learned she had moved. At 9:09 p.m., Cst. Pooni called Mr. Rosa and obtained another phone number for Ms. Lewis. Cst. Pooni proceeded to both call and send a text message to that number. The records indicate a call at 9:12 p.m. to that number, followed by a text message sent at 9:13 p.m. stating "Hi kerryann it's Cst. POONI from Langley rcmp please call me back". Between 9:31 and 9:33 p.m., he called Ms. Lewis three more times, and each time the phone rang at least six times. The fourth time he called, someone answered the phone, but no one spoke.
- [79] Cst. Pooni then had his phone unblocked so his number would appear as "Langley RCMP", and he called Ms. Lewis again. At 9:36 p.m., he had a 4 minute and 51 second conversation with a female who identified herself as Ms. Lewis. Cst. Pooni explained he was calling to check on the well being of her daughter, and that he was not going away until he saw her daughter. Cst. Pooni said Ms. Lewis told him that her daughter was with her father, and she had dropped her off in the morning. Cst. Pooni described Ms. Lewis's voice as sounding faint and groggy, as if she was just waking up.

[80] Cst. Pooni said another female voice then came on the phone and told him that there was a little kid unconscious, not breathing. This woman was screaming and very emotional. There was panic in her voice. As discussed below, this woman was Ms. Rai. Cst. Pooni heard a lot of screaming in the background, but he managed to get the address. Cst. Pooni advised his supervisor, Cpl. Magill, of the situation and they proceeded to the scene, where they met Ms. Rai who escorted them and the other first responders into the apartment at approximately 9:46 p.m.

### **July 22, 2018: Mr. Stephany and Friends Arrive at the Apartment**

[81] On July 22, 2018 at about 9:20 p.m., Mr. Stephany, along with his two friends Ms. Rai and Mr. Harrison, entered the apartment. In addition to Mr. Stephany, both Ms. Rai and Mr. Harrison testified at trial. Ms. Rai and Mr. Harrison were friends of Mr. Stephany and both also knew Ms. Lewis. Mr. Harrison is a police officer in Alberta who was visiting family in B.C. at the time. They were also both aware that Mr. Stephany had just ended his relationship with Ms. Lewis. Given the distressing events that unfolded that evening, the minor discrepancies in their evidence are understandable and do not detract from the overall credibility and reliability of their evidence.

[82] Although he had keys to open the apartment door, Mr. Stephany had to push the door open in order to squeeze through. Mr. Harrison said Mr. Stephany "shouldered the door a couple of times" so he could get in. Once they got inside the apartment, Mr. Stephany found that a bookcase and several boxes were blocking the entrance at the front door. Mr. Stephany recalled that the bookcase was against the wall when he left the apartment earlier that day. Mr. Stephany noticed the apartment was warm and the patio door was closed. He turned on the lights. Mr. Harrison testified that Mr. Stephany opened the drapes and the sliding patio door. Mr. Stephany and Ms. Rai started to collect some of Mr. Stephany's things while Mr. Harrison sat on the armrest of one of the couches in the living room.

[83] The door to the master bedroom was closed. Mr. Stephany knocked on the bedroom door, calling Ms. Lewis's name, as she was not in the living room or spare bedroom. There was no answer. He said the door appeared to be locked - that he was not sure if there was a lock on the door, but that when he tried to open the door, it was like something was blocking it. Mr. Stephany recalled someone said "we might call the ambulance if you're hurt", although Mr. Harrison recalled he told Mr. Stephany that they should call the police to come assist them to get into the bedroom. After that, Mr. Stephany heard some rumbling around on the other side of the bedroom door. Mr. Stephany tried to push the door open but it would not budge. Both Mr. Stephany and Mr. Harrison said they could hear sounds of something being moved on the other side of the door. Ms. Lewis then slowly, partially opened the door and Mr. Stephany went inside the bedroom. Mr. Harrison said he could see Ms. Lewis slowly move through the doorway. Mr. Stephany noticed Ms. Lewis was not looking very healthy. He had not seen her like that previously. He said she was stumbling, slurring her words, and seemed groggy. As he entered the bedroom, he noticed her phone was ringing.

- [84] Mr. Stephany asked Ms. Lewis to open the safe that was inside her closet so he could get his identification documents. She tried several times but could not get it opened. He did not know the code for the safe. Since the phone continued to ring, he picked it up and told the male who was calling that Ms. Lewis was busy, but that she would call him right back. Mr. Stephany believed the caller was Stephen (Mr. Rosa). This accords with Mr. Rosa's evidence.
- [85] After Mr. Stephany put the phone down, he continued to ask Ms. Lewis if she could open the safe. Mr. Stephany and Mr. Harrison both testified the phone continued to ring, and when Mr. Stephany answered it, a police officer asked him if he had seen Ms. Lewis's daughter because her father was looking for her. Mr. Stephany was not sure what happened next, but he thought he told the police officer he would call him back. Mr. Stephany did not see Aaliyah when he entered the apartment, and thought she was back with her father. As he spoke on the phone, Ms. Lewis was still trying to open the safe.
- [86] Mr. Harrison went into the bedroom to see what was going on. He saw Ms. Lewis sitting on the floor beside the safe and Mr. Stephany was beside her. Mr. Harrison asked Ms. Lewis what was going on, and she responded that she was stressed out, had not slept in a long time, and was going through a divorce. Mr. Harrison noticed bags under Ms. Lewis's eyes and that she spoke with a lisp, like her mouth was frozen so she could not speak correctly. After he saw Ms. Lewis, Mr. Harrison went back to the living room. He told Mr. Stephany they should call paramedics because he did not think they should leave Ms. Lewis in the apartment in that state. Mr. Harrison recalled Mr. Stephany told him to let him try to figure something out. Mr. Stephany then went back into the bedroom.
- [87] As this was unfolding, Ms. Lewis's phone continued to ring. After Mr. Harrison heard Mr. Stephany say "Why is the RCMP calling?", he went back to the master bedroom to see what was going on. As noted earlier, Cst. Pooni had unblocked his phone so it now showed his calls were from Langley RCMP. Mr. Harrison saw Ms. Lewis was now sitting on the bed with the phone and Mr. Stephany was standing next to her. Mr. Harrison said he heard Ms. Lewis telling the person on the phone that she lived in Surrey or Langley. He could hear the caller asking Ms. Lewis for her address, and at that point Ms. Rai, who was standing at the bedroom door, said the address out loud so the person on the phone could hear her. Ms. Rai said Ms. Lewis's voice was slurred and soft like she was drunk or out of it. Mr. Harrison then heard the caller ask to speak to one of the males in the apartment to make sure that the child was okay.
- [88] By this time, Mr. Stephany, Ms. Rai, and Mr. Harrison had been in the apartment for 15 or 20 minutes and had not seen any child. Mr. Harrison looked towards the door of the ensuite bathroom and noticed it was partially opened. As he pushed the door, he looked down on the ground and saw Aaliyah laying on the ground. He described what he saw as follows:

So she is on her back. Her feet are facing towards the bathtub. She has on a pink bathrobe, which is done up. Her bathrobe is damp, as if she's been in water. She had a plastic sport type band around her neck. Her eyes were partially open, kind of had a glazed-over look. And then she had small air -- air bubbles around her nose. I believe it was her left nostril. She was not breathing. She was cold. She did not have a pulse.

- [89] Mr. Harrison did two or three chest compressions, and brown liquid came out of Aaliyah's nose. Mr. Harrison recalled that he said: "The kid is here and she's dead".
- [90] Mr. Stephany recalled Mr. Harrison called his name to come in and that is when they found Aaliyah on the floor in the ensuite bathroom. It was a chaotic situation. Mr. Harrison heard Mr. Stephany tell Ms. Lewis that she could not go in there, as Mr. Harrison saw Ms. Lewis running towards him, so Mr. Harrison grabbed her and put her on the floor. Mr. Harrison thought she may have hit her head on the floor because she was shaking. He pinned her hands to her chest and told Mr. Stephany to hold Ms. Lewis down. Although Mr. Harrison testified he had to subdue Ms. Lewis twice, rather than once, considering the other evidence, I think he may have been mistaken in that regard, which is understandable, given the chaos. The evidence establishes that at least on one occasion Ms. Lewis tried to move towards the ensuite bathroom and was stopped by Mr. Harrison.
- [91] During cross-examination, Mr. Harrison was challenged on the discrepancies between his testimony at trial and the statement he made to police shortly after the incident. He explained that the incident was one of the most horrific things he had seen in his life and that at the time of providing his statement to the police, which was one hour after the incident, he was distressed - in disbelief and shock. Given the very difficult situation he encountered that evening, I do not find these discrepancies to detract from the strength of Mr. Harrison's evidence.
- [92] Mr. Stephany testified that as he held Ms. Lewis down she was mumbling. At this point, everyone was in the bedroom area. Ms. Rai, who was on the phone with the police, thought she handed the phone to Mr. Harrison, although she was really panicked and there was a lot of commotion. Mr. Harrison said the phone kept cutting out while he was standing in the little hallway leading from the master bedroom into the ensuite. He said that the dispatcher said they could not hear him and needed to help the child, and asked him to please move her somewhere where they could help her. Mr. Harrison said he thus picked Aaliyah up off the ensuite bathroom floor and moved her into the living room. He placed her on her back, with her head facing towards the window or the sliding balcony door. Mr. Stephany thought it looked like Ms. Lewis was going to be sick - she was heaving - so he turned her onto her side, but continued to hold her down.

- [93] Meanwhile, Ms. Rai had called 911 on her own phone and went down to the front of the building to meet the first responders, including Cst. Pooni. At approximately 9:46 p.m., various first responders from Emergency Health Services ("EHS"), RCMP Cst. Pooni, and RCMP Cpl. Magill began to arrive at the apartment. After they entered, they found Aaliyah's body lying face up on the living room floor.
- [94] At some point, Mr. Stephany decided to let go of Ms. Lewis and leave her in the bedroom with the door closed. He did not want Ms. Lewis to try to chase after Aaliyah. Mr. Harrison had told Mr. Stephany to not leave Ms. Lewis alone, as he was concerned she would harm herself, and when he realized Mr. Stephany had left Ms. Lewis alone, he checked and could not see her in the bedroom. Cst. Pooni was in the master bedroom and did not see anyone and could not open the ensuite bathroom door. Mr. Harrison then kicked the ensuite bathroom door and it swung open. Mr. Harrison saw Ms. Lewis floating in the bathtub face down.
- [95] Cst. Pooni recalled that the water was running and the bathtub was overflowing, although in their evidence, none of the other first responders recalled water running, and EHS Member Mr. Deluca recalled the bathtub as being "partially full". In any event, as Cst. Pooni grabbed Ms. Lewis out of the water, she coughed and took a breath. EHS members Mr. Zalit and Mr. Deluca lifted out Ms. Lewis out of the bathtub and carried her into the living room. EHS treated Ms. Lewis at the scene. Mr. Deluca did chest compressions, which caused Ms. Lewis to vomit clear fluid, which appeared to be water. She was breathing. He inserted an IV with saline fluid. Mr. Zalit testified Ms. Lewis never said any words, was not alert, and scored 8 out of 15 on the Glasgow Coma Scale, which is an assessment tool used to assess level of consciousness.
- [96] At about 10:19 p.m., Ms. Lewis was transported to the Langley Memorial Hospital, arriving there at approximately 10:31 p.m. Blood and urine samples were taken from Ms. Lewis at the hospital. I will discuss those findings later in these reasons.

### **EHS Attend to Aaliyah and Removal of Her Body**

- [97] Before he dealt with Ms. Lewis, Mr. Zalit, who was an advanced life support paramedic and the highest ranking paramedic on the scene, attended to Aaliyah. Mr. Zalit assessed Aaliyah and noted she did not have a pulse and was cold. He also noted Aaliyah's jaw was stiff and explained that rigor mortis affects the small muscles like the jaw first. Based on his assessment, he decided not to attempt resuscitation and declared her dead.
- [98] EHS Mr. Deluca also attended to Aaliyah. He could not open her jaw and noted lividity on the left side of her neck. Mr. Deluca described Aaliyah as wearing a pink bathrobe with a white garment underneath. He noted that her hair and the white garment appeared to be wet. He also noted the robe was dry, but in cross-examination agreed he could be mistaken in that regard. While Mr. Deluca described Aaliyah as wearing a white garment, the photographs establish that she was wearing purple coloured shorts.

- [99] EHS Mr. Watson also attended to Aaliyah. He found her to be rigid, stiff, and cold. He observed rigor mortis. She was wet and her skin was mottled.
- [100] Because Aaliyah was deceased, her body was left in the same position on the living room floor in the apartment until it could be transported to the morgue. This unfortunately did not occur until July 23, 2018 at approximately 11:02 p.m., when her body was removed from the apartment and transported to the morgue. Aaliyah's body was subsequently transferred to the Royal Island Hospital in Kamloops, B.C., where an autopsy was performed by Dr. Steele on July 27, 2018. The autopsy findings are discussed in detail later in these reasons.

### Searches of the Apartment and of Ms. Lewis's Vehicle

- [101] On July 23 and 24, 2018, RCMP members executed search warrants on both the apartment and Ms. Lewis's vehicle. Various RCMP members attended the execution of the warrants, including Cst. Timmermans, who took photographs, and Cst. Lim, who seized various exhibits.
- [102] In addition to taking photographs, Cst. Timmermans testified that he measured the water in the bathtub as 7.5 inches. Cst. Timmermans did not locate any indication of a struggle on the bathtub.
- [103] Cst. Lim seized a number of items from the residence including Ms. Lewis's iPhone, an iPad, a MacBook, and a Samsung phone. I have noted above the bulk of the communications that were located on those devices.
- [104] Cst. Lim seized the Great West Life documents that were located on a clipboard on top of the bed in the master bedroom. As discussed above, photographs and a video of these documents were also located on Ms. Lewis's iPhone. These two documents related to disability benefits. One form was two pages and dated June 22, 2018 on one page and July 22, 2018 on the other. The other form was undated. It is not possible to determine conclusively when the information was written on these documents, but the content is consistent with other information pertaining to Ms. Lewis's unhappiness, particularly with respect to her access to Aaliyah.
- [105] Cst. Lim also noted damage to the door leading into the ensuite bathroom.
- [106] A large number of prescription medications were located in various areas of the apartment, including in the master bedroom, bathroom, and kitchen. Inside an orange suitcase located in the master bedroom were eight prescription bottles dated 2016 and 2017, which included a bottle containing 3 of 15 Ativan sublingual tablets dated July 2017; a bottle containing 14 of 35 Ativan sublingual tablets dated November 2017, and an empty bottle of lorazepam dated June 2017. A blister pack of prescription medications was located in Ms. Lewis's car. Records filed at trial indicate that Ms. Lewis had been prescribed various medications, including sublingual Ativan (or lorazepam), in the recent past.

- [107] The police did not locate any packaging or receipts relating to the sublingual Ativan prescription or Sleep-Eze Ms. Lewis had purchased at Shoppers Drug Mart on the morning of July 22, 2018. However, they did locate a half-full bottle of blue Powerade on a side table in the living room and a cone-shaped bag of candy on the side table in the master bedroom, which corresponded to items purchased by Ms. Lewis earlier that day. Neither of these two items were seized or analyzed.
- [108] A BC Liquor Store receipt for a red label 375 ml bottle of Smirnoff Vodka, dated July 22, 2018 at 10:33 a.m., was seized, and police located and seized an empty 375 ml Smirnoff Vodka bottle in the garbage bag in the laundry room.
- [109] A bottle of Crown Royal, which appeared to be about half full, was located on the kitchen counter. A receipt for the purchase of 750 ml of Crown Royal dated July 20, 2018 at 5:24 p.m. was located in a white purse found in the second bedroom.
- [110] On July 25, 2018, Cst. Lim returned to the apartment and located a package of Gravol Kids suppositories on the shelving unit inside the ensuite bathroom. There were four remaining pills in a package of 10.
- [111] I will now consider the evidence of the expert witnesses, in some considerable detail.

#### The Expert Evidence

#### Michael Rosland - Toxicologist

- [112] Mr. Rosland was qualified as an expert in the field of forensic toxicology to provide an opinion on: (i) the physiology of drugs and alcohol, particularly with respect to the absorption, distribution, and elimination of drugs and alcohol from the human body, including post-mortem redistribution of certain drugs; (ii) the area of pharmacology of drugs and alcohol and the effects of drugs and alcohol on behaviour and motor functions; and (iii) the analysis of biological fluids, including blood and urine, for the presence of common drugs and alcohol.
- [113] In the ASF filed as exhibit 1 at trial, admissions were made with respect to the toxicology results from samples taken from both Aaliyah and Ms. Lewis. It is admitted that the blood taken from the heart of Aaliyah produced test results that showed a concentration of 1,703 ng/ml of diphenhydramine and a concentration of 45 ng/ml of lorazepam in the blood. Test results also showed less than 10 mg% of ethyl alcohol.
- [114] It is also admitted that blood was taken from Ms. Lewis at Langley Memorial Hospital at approximately 11:04 p.m. on July 22, 2018. Toxicology results showed a blood alcohol concentration ("BAC") of between 119 and 135 mg%. Urine was taken from Ms. Lewis at approximately 11:15 p.m. on July 22, 2018, which showed the presence of benzodiazepines and cannabis, though not their concentration.

## Opinion Regarding Aaliyah Rosa

- [115] With respect to the toxicology findings related to Aaliyah, Mr. Rosland explained that diphenhydramine is an antihistamine drug found in many over-the-counter medications including non-prescription sleep aids, medications dealing with motion sickness or nausea, and common cough and cold medications. He explained that diphenhydramine is an antihistamine drug, but that it also has CNS depressant effects - it affects the activity of the brain, slowing it down. Its effects (i.e., the effects to be expected with respect to a standard therapeutic dose) include drowsiness and sedation (i.e., that a person may experience depressed levels of consciousness because they are tired, sedated, and drowsy). He noted that because of its CNS depressant effects, diphenhydramine may impair a person's ability to perform motor coordination tasks, such as "fumbling objects with hands, or it might be more extreme problems with balance and walking". He also explained that it has been noted in the literature that certain individuals, particularly those under the age of six and the elderly, may experience "paradoxical excitation" when diphenhydramine is used, such that they paradoxically become more excitable.
- [116] When a dose higher than a standard therapeutic dose is taken, Mr. Rosland explained that an individual can begin to experience "toxicities" (i.e., undesirable adverse effects of the drug). He stated that toxicities have been known to exist where a person has a concentration greater than 1,000 ng/ml of diphenhydramine, and that lethal outcomes start to appear at around 5,000 ng/ml. He stated that some of the toxicities to be expected if someone takes a greater than therapeutic dose of diphenhydramine include more pronounced or substantial sedation or drowsiness - generally, that as the dose increases, it is expected the individual will have more significant CNS depression - potential agitation, hallucinations, seizures, cardiac or heart arrhythmias, and even potential coma or death.
- [117] Mr. Rosland opined that the concentration of diphenhydramine found in Aaliyah's blood was larger than the concentration one would expect to see in an individual who has taken diphenhydramine for therapeutic uses. He stated that generally speaking, the normal therapeutic concentration would be in the range of "probably at higher level, around a hundred nanograms per millilitre"; he noted that someone might take a somewhat larger dose, exceeding the standard therapeutic dose, which might not result in any sort of toxicity. He opined that, consistent with the literature, the concentration found in Aaliyah could cause toxicities; however, he stated that diphenhydramine alone (i.e., "mono intoxication") at the level found in her blood is not lethal.
- [118] Mr. Rosland confirmed that Sleep-Eze is an over-the-counter sleep medication that contains diphenhydramine as its active ingredient. He confirmed that the active ingredient in Gravol is also diphenhydramine.

- [119] In cross-examination, when asked about the timeframe of the effects of diphenhydramine after consumption, he replied that when taken orally, the onset of the effects of diphenhydramine is generally between 20 to 30 minutes, and maximum effects would likely be between one to two hours from ingestion. He stated that the effects would last likely six hours after the maximum effects set in, but qualified this by saying that that depends on the dose - a substantial dose may last longer.
- [120] Mr. Rosland also gave evidence with respect to the phenomenon called "post-mortem redistribution". He explained that some drugs can move into the tissues and organs of one's body and effectively deposit themselves there, leading to a relatively higher concentration of the drug in certain tissues and organs relative to the concentration of the drug in the person's blood. When someone dies, as the body starts to decompose, the drugs that are present in their organs and tissues can move back into their blood after the time of death - this is post-mortem redistribution (i.e., redistribution of the drug from the tissues back into the blood). The relevance of this phenomenon is that it is possible that because of post-mortem distribution, the concentration of a certain drug can increase in a person's blood between the time of death and the time the sample is collected at autopsy.
- [121] Mr. Rosland testified that diphenhydramine is particularly susceptible to post-mortem redistribution, particularly if there has been a dose taken recent to the time of death, and that the literature specifically identifies the heart blood as being known to have elevated concentrations after the time of death. In cross-examination, he agreed with and clarified that the organs in the "central compartment" or the center of the body are more prone to the effects of post-mortem redistribution, as compared to sites further away from the center of the body, so it is possible that samples taken from those more central organs are more subject to the effect of post-mortem redistribution. He agreed that his preferred place from which to take a post-mortem sample would be from the femoral artery or vein inside the leg. Therefore, when considering the concentration of diphenhydramine found in blood collected from the heart, as was the case here, one must interpret it with caution, because the concentration could be falsely elevated via post-mortem redistribution, and may not reflect the concentration in the blood at the time of death.
- [122] Mr. Rosland stated that for most drugs that are susceptible to post-mortem redistribution, the concentration of the drug might increase by a factor of two or three times from what it was at the time of death. He noted that with respect to diphenhydramine in particular, he was aware in the literature of one case where the concentration in the blood increased by approximately 17 times, but he considered that to be "probably the highest extreme" he had observed in the literature.

- [123] In cross-examination, he agreed that the closer a post-mortem sample is taken to the time of death, the better, and agreed that the sooner an autopsy can be done the better, as far as trying to capture samples with as little post-mortem redistribution as possible goes. He could not say for certain whether the temperature of the place the body is stored post-mortem would affect post-mortem redistribution, and stated he would have to look at the literature.
- [124] Mr. Rosland stated that lorazepam, sold under the brand name "Ativan", is a benzodiazepine, and is a class of CNS depressant available by prescription that is primarily prescribed to treat anxiety. He also stated there was some mention in the literature of using it as a short-term treatment for insomnia. He described the common side effects of lorazepam as including drowsiness and sedation, and noted that it can result in muscular incoordination, and thus in a difficulty performing tasks. He stated it may also result in memory problems, such that individuals may not have a recollection of what had occurred when they had taken the drug.
- [125] I note that in cross-examination, Mr. Rosland clarified that the testing done at his lab that showed the lorazepam present in Aaliyah's blood was confirmatory for that specific drug. In other words, it was not a test that just indicated the presence of benzodiazepines generally, like that performed at the hospital with respect to Ms. Lewis. Rather, as he stated in cross-examination, the test result that he obtained with respect to Aaliyah demonstrated the specific presence of lorazepam.
- [126] Mr. Rosland opined that the concentration of lorazepam detected in Aaliyah's blood would be consistent with therapeutic concentrations, or potentially, depending on the literature you look at, sub-therapeutic concentrations. I pause to note that the prescription medications found at the residence containing lorazepam, and the prescription for lorazepam filled the morning of July 22, 2018, were prescribed to Ms. Lewis, not to Aaliyah.
- [127] In cross-examination, when asked about the timeframe of the effects of lorazepam after consumption, he replied that, either taken orally or sublingually, the onset of its effects would occur in around 30 minutes after consumption, with maximum effects taking place around one to two hours after consumption. He opined that its effects would last between six to eight hours, depending on the dose taken.
- [128] Mr. Rosland also stated that lorazepam is not clearly identified in the scientific literature as being a "high risk drug" with respect to post-mortem redistribution, but noted it also was not identified as a drug that does not have that effect - he stated he could not rule it out as a possibility, but that it was not as clearly identified in the literature.
- [129] Mr. Rosland opined that in situations such as that here, where an individual ingests a combination of both diphenhydramine and lorazepam, that the drugs can have an additive effect, where the individual might experience a more pronounced CNS depressant effect than if either of these CNS depressant drugs was taken alone. He stated that this effect depends on a number of variables, including the tolerance of the individual to these drugs,

the time the drugs were ingested relative to each other, the dose taken, and the duration of the effects of the drugs.

- [130] With respect to either drug, Mr. Rosland opined that a naïve user could experience more severe symptoms upon consumption as compared to a user who has developed a tolerance to the drug.

### Opinion Regarding Ms. Lewis

- [131] As discussed above, toxicology results of Ms. Lewis's blood taken at the hospital at 11:04 p.m. on July 22, 2018 revealed a BAC of 119 to 135 mg%. Mr. Rosland agreed, just for reference, that the offence of impaired driving begins at a BAC of 80mg%. Mr. Rosland was asked by the Crown to estimate a BAC at a particular point in time that was earlier than the time at which the sample was collected. Relying on a series of assumptions, including that there was no consumption of alcohol in the 30 minutes prior to the time of interest, that there was no consumption of alcohol in the 30 minutes between the time of interest and the time of collection of the sample, and that the average person eliminates alcohol from their blood at a rate of 10-20 mg% per hour, Mr. Rosland estimated that the BAC of the same person at 9:40 p.m. on that same date would have been between 133 and 163 mg%.
- [132] Mr. Rosland explained that alcohol is also a CNS depressant, and that it has a continuum of effects. He opined that at a relatively low dose, alcohol has a counterintuitive response in that it can cause an individual to be more boisterous, social, and loud than they would typically be - it can cause them to lose their inhibitions and become more self confident. As consumption increases, side effects can include problems with motor control and coordination, primarily initially with fine motor control, i.e., things requiring dexterity. This can progress to observable problems with gross motor control and coordination, problems with balance, swaying and staggering while walking, and may also lead to problems with speech (i.e., slurred speech or difficulties forming words). If the person continues to drink, they may exhibit signs of mental confusion, emotional instability (i.e., mood swings), and disorganization in performing tasks out of order. Beyond this, the person may have difficulty standing or walking entirely; they may have delayed responses to questions or poor reflexes; while conscious, they may effectively not be providing any sort of meaningful responses to questions; they may go into a "stuporous" type of state, which may progress into a coma; and if the concentration gets high enough, there can be respiratory depression followed by death. Mr. Rosland explained that these symptoms vary from person to person, and that they are affected by a person's tolerance to alcohol.
- [133] Mr. Rosland testified he would expect that an average social drinker with a BAC of 133 to 163 mg% would be "intoxicated", and would be considered to be "at an advanced state of impairment". I pause to note that Mr. Rosland's reference to an "advanced state of impairment" was a statement from a toxicological perspective, not a legal perspective, and is not determinative of whether Ms. Lewis was at an "advanced" state of intoxication as discussed in Daley. Mr. Rosland explained that the side effects expected at that level of

consumption would include a flushed face, an odour of alcohol, some observable problems with fine motor control (e.g., doing something that requires a high degree of dexterity, such as threading a needle with one's hands), and coordination. He stated that individuals at the higher end of this range may display slurred speech, and may have problems with gross motor control (e.g., taking steps or walking) and coordination, which may be displayed as problems with balance, like swaying or staggering. On cross-examination, he noted that a tolerant drinker may display few, if any, of these symptoms.

- [134] In cross-examination, Mr. Rosland stated that typically, when a person consumes alcohol, their BAC will rise quite quickly, and they will achieve their maximum BAC somewhere between 20 to 40 minutes after consumption of their last drink. After that, their body processes the alcohol and begins eliminating it from the body. The rise in their BAC depends on how fast they are drinking, what type of beverage they are drinking, their body weight and gender, and consumption of food. The consumption of food also affects the maximum BAC they will achieve (i.e., it lowers it).
- [135] In cross-examination, Mr. Rosland was asked to provide some further estimates of BAC levels based on the reading from 11:04 p.m. of a BAC of 119 to 135 mg%. Using the same assumptions set out above (i.e., a standard elimination rate of 10 to 20 mg% per hour, no consumption of alcohol 30 minutes prior to 9:20 p.m., and no consumption of alcohol between 9:20 p.m. and 11:04 p.m.), he estimated the BAC of the same person at 9:20 p.m. on the same day would have been approximately 136 to 170 mg%.
- [136] He was also asked to estimate the theoretical maximum BAC that a female weighing 66.4 kilograms would achieve after consuming 375 millilitres of vodka. He estimated the maximum theoretical BAC in that scenario would be 315 mg%. Mr. Rosland carefully explained this was a theoretical maximum. He stated that when he calculates a theoretical maximum, it is consistent with an overnight fast followed by the consumption of alcohol, and that in an actual drinking situation, people do not typically meet theoretical maximums - that he expects a person in a real world scenario would achieve between 50 to 75 percent of the theoretical maximum BAC, and that it depends greatly on what food they have consumed, and how much food they have consumed relative to the amount of alcohol. He explained that if someone has fasted, it is possible that they could achieve a BAC much closer to their theoretical maximum.
- [137] With respect to the results from Ms. Lewis's urine sample, as noted above, the drug screen performed at approximately 11:15 p.m. on July 22, 2018 indicated the presence of both benzodiazepines and cannabis, though not their concentration.
- [138] Mr. Rosland stated that the presence of cannabis and benzodiazepines in Ms. Lewis's urine would simply suggest that she had ingested both at some point in the past, but the test did not provide a timeframe with respect to ingestion. Mr. Rosland noted that these substances can be detected in the urine for a period of time after use (i.e., they may not be active in the blood, but you would still expect to detect them in the urine), and that you cannot make any

link between a drug found in the urine and what would have been present in the blood at the time. He noted that this period of detection in one's urine with respect to cannabis can be quite extended, depending on the frequency of use - any period between hours to a week, and even longer ("perhaps longer than a month") in the case of a daily user. With respect to benzodiazepines, because it was unknown which was taken by Ms. Lewis, he opined it was difficult to say how long the drug would remain detectable in her urine - benzodiazepines can reside in the urine for either an extended period or a shorter period, depending on the type taken.

- [139] In cross-examination Mr. Rosland stated that he would not expect alcohol to affect memory at a BAC of 119 to 135 mg% - that it is possible, but that it would not be a standard expectation at that range. When asked on cross-examination if combining alcohol with drugs such as diphenhydramine or lorazepam would or could exacerbate symptoms, including memory problems, Mr. Rosland said that he believed it could - that he did not recall anything in the literature about the specific combination of drugs proposed, but that it would not surprise him if lorazepam and alcohol combined would have a more detrimental effect on memory.
- [140] I will now proceed to review the medical evidence from Dr. Steele, Dr. Dunham, and Dr. Del Bigio. As I review their evidence, I will consider any frailties in their evidence and the impact those frailties may have on my reliance on their opinion(s).

### **Dr. Steele - Forensic Pathologist**

- [141] Dr. Steele, a forensic pathologist at Royal Inland Hospital in Kamloops, performed the autopsy of Aaliyah's body on July 27, 2018, five days after Aaliyah's death. Dr. Steele was qualified as an expert in the field of forensic pathology to provide an opinion regarding the mechanisms and causes of death and the effects of trauma on the human body.
- [142] The autopsy included an external examination, an internal examination, and a microscopic analysis. Dr. Steele also took samples of Aaliyah's bodily fluids, including blood from Aaliyah's heart. Incorporated in Dr. Steele's autopsy report were the toxicology results from the RCMP laboratory, which I discussed in detail earlier in my review of Mr. Rosland's evidence. When asked on cross-examination whether she would defer to the toxicologist as to the effects of diphenhydramine and lorazepam, the levels required (presumably with respect to the amount of the drugs required to reach either a toxic or lethal level), and the effect of multiple drugs, she agreed she would.
- [143] Dr. Steele did not locate any external injuries on Aaliyah's body. However, she did locate evidence of injury internally in both Aaliyah's head and neck.
- [144] The injury to Aaliyah's neck consisted of hemorrhages in different muscles and tissues on the left side of the neck - specifically, she stated that there was a hemorrhage in the medial (middle) and more lateral sides of the left sternocleidomastoid muscle, another hemorrhage in the left sternohyoid muscle, and some hemorrhage around the left carotid

body and paraspinal muscles on the left side of the neck. There were no overlaying marks, abrasions, or bruises on the skin or subcutaneous fat of the neck in this area. Dr. Steele opined the hemorrhages were caused by some sort of pressure or force applied to the left side of the neck, but she could not identify a specific mechanism that caused what she called the "fairly significant hemorrhages" in Aaliyah's neck. She stated they were "a non-specific finding that could have many different ideologies", and that "the end result is force and pressure being applied to that left side of the neck such that you have blood vessels that break and hemorrhages into these - into these structures". She stated there was no good way to interpret how much impact these hemorrhages had on Aaliyah's cause of death, other than that their presence suggested some kind of pressure to her neck of enough force to cause hemorrhaging into the muscles on the left side. Dr. Steele explained that her microscopic analysis of the tissues from this area of the neck told her that "there is hemorrhage into the musculature and - and some structures on the left side of the neck, and that it's fresh hemorrhage". Dr. Steele considered the neck injury to be one potential indicator of asphyxia - she stated that she could not rule out that there may have been some component of asphyxia, but noted that other findings you would ordinarily see where someone was asphyxiated (e.g., petechial hemorrhages in the conjunctiva of the eyes and lips) were not observed. I note that neither of the other medical experts agreed with this theory, as there is a redundant blood supply to the brain (i.e., blood vessels on each side of the neck), and the other side of the neck did not have any hemorrhages, so the blood flow to the brain would not have been globally obstructed.

- [145] Dr. Steele also found two hemorrhages underneath Aaliyah's scalp (i.e., subscalpular hemorrhages), which she identified as a small hemorrhage on the right frontal area and another hemorrhage in the scalp on the right side, near the back of the head (i.e., the right parietal area). She stated the areas were consistent with sites of impact, but that they were not extensive. There was no damage to the skull underneath. There was, however, also a smear subdural hemorrhage as well as a subarachnoid hemorrhage. Dr. Steele also noted evidence of cerebral edema, both macroscopically and microscopically. Specifically, from a macroscopic perspective, she observed that the undulating pattern of gyri and sulci you would normally see was very flattened, consistent with cerebral edema. On cross-examination, she agreed that the brain weight was also something taken into account to assess cerebral edema - that it was high in this case and supportive of or suggested cerebral edema. Dr. Steele opined that the hemorrhages in Aaliyah's head were the result of a mild blunt force head trauma that would have occurred while Aaliyah was alive (i.e., blood pressure is needed to get bleeding at a site of impact, so she would have had to be alive when the injuries occurred). Dr. Steele was not able to say when these injuries were sustained other than that they appeared to be fresh. Dr. Steele opined these injuries were not the sole cause of Aaliyah's death. I note that Dr. Steele seemed to use the term "edema" interchangeably with "swelling", although as Dr. Del Bigio explained, there is a meaningful distinction between the two: edema can be a cause of swelling, but there are other potential causes of cerebral swelling beyond edema.

- [146] Dr. Steele conducted a macroscopic and microscopic examination of Aaliyah's skull and brain. As I will discuss in more detail below, the two neuropathologists who testified as experts - Dr. Dunham and Dr. Del Bigio - were quite critical of the methodology employed by Dr. Steele in this regard.
- [147] As stated earlier, Dr. Steele identified swelling of the brain while conducting her gross autopsy. She explained with reference to photographs that due to the swelling, the usual grooves and undulations on the surface of the brain were flattened and smooth, and that the brain was pushed up against the skull.
- [148] Dr. Steele stated that she identified cerebellar tonsillar herniation and bilateral uncal herniation on gross autopsy, which she considered to be a result of the cerebral edema. Dr. Steele explained that herniation occurs when tissue enters spaces into which they are not designed to go. With respect to cerebellar tonsillar herniation, she explained that with an increase in pressure in the brain, the brain will push down the cerebellar tonsils into the foramen magnum (i.e., the hole at the base of the skull that the spinal cord exits from and continues through to the vertebral canal) and that this tissue being forced into the foramen magnum will compress the medulla. With respect to uncal herniation, she explained that as a result of pressure in the area of the temporal lobes, the tissue in the uncus can be pushed under the dura. She agreed that both of these conditions are life-threatening and can cause death. When asked how she would factor herniation into the cause of death in this case, she stated:

So cerebral edema is a mechanism that needs a cause, and cerebral edema caused those herniations. So what we're looking to describe is what's the entity that set that -- set that mechanism in motion or what's -- what's the -- what's the entity that put all of that into motion to create the cerebral edema to then cause the herniations. And in this case, drowning could cause the brain to swell -- or would cause the brain to swell and would then lead to those herniations. Asphyxia, like we were talking about with those hemorrhages in the neck, that could be a component to cause the brain to swell. And blunt force head trauma, in and of itself, if it was to a very severe degree could cause the brain to swell and -- and then create those herniations.

- [149] Although photographs were taken during the autopsy, there was only one photograph identified by Dr. Steele which she could say depicted the herniation she observed during the gross autopsy. I note that despite her observation of both tonsillar and uncal herniation, and despite her recognition that both of those conditions could cause death, she did not refer to herniation in her "inclusive" cause of death statement. I also note that neither of the other experts could give a definitive opinion with respect to her findings of herniation given the single poor quality photograph she took of the relevant structures, and the fact that she did not label her slides.
- [150] Dr. Steele stated that she performed respiratory viral testing, and that the panel came back positive for Parainfluenza Virus 2 and Rhinovirus/Enterovirus. She did not think this contributed to Aaliyah's death.

- [151] Dr. Steele testified that she made several findings supportive of drowning. Dr. Steele explained that there are not any hard and fast findings from which one can conclusively diagnose drowning, but that there are features that accompany submersion of an individual that is still breathing (i.e., the submersion of someone into water who inhales water) that are supportive of drowning. The findings she made that were supportive of drowning consisted of: fluid aspirated from the sphenoid sinus; froth in the airways of the lungs; fluid in the stomach; and anoxic/ischemic (or "A/I") damage in certain areas of the brain that are particularly sensitive to oxygen deprivation, consistent with Aaliyah having experienced an "acute incident that caused death". Of those findings, Dr. Steele considered the fluid aspirated from the sphenoid sinus to be the most significant to her analysis.
- [152] Dr. Steele explained that finding water in the sphenoid sinus supports a finding that Aaliyah tried to take a breath while under water - that if you can aspirate water through the sphenoid sinus, it is "in keeping with someone having been under water and breathing during that time frame to actually take water into that sinus". She stated that she aspirated approximately three CCs (i.e., three millilitres) of fluid from Aaliyah's sphenoid sinus.
- [153] On cross-examination, Dr. Steele acknowledged that she did not test the fluid she extracted from Aaliyah's sphenoid sinus. She agreed that mucus can have a lot of consistencies, but agreed that the fluid she extracted looked more like water than mucus, and stated that mucus would be very difficult to draw through a needle into a syringe from the sphenoid sinus. She also disagreed with the proposition put to her that the sphenoid sinus can have some small quantity of water in it for a whole host of reasons on autopsy, and stated that usually the sphenoid sinus has no aspirable fluid within it. Dr. Steele agreed that cerebrospinal fluid ("CSF") can leak into the sinuses in some rare cases, but listed examples of such cases as including, for example, circumstances of trauma leading to fractures such that such leakage could be possible.
- [154] Dr. Steele acknowledged that the finding of water in Aaliyah's sphenoid sinus was not conclusive proof of drowning, but explained that fluid is not commonly found in the sphenoid sinus on autopsy. In explaining the basis for her opinion, Dr. Steele referred to her fellowship training in Miami where the significance of water in the sinuses was "taught and explained" to her. Dr. Steele explained as follows:

Yes. So in my fellowship training, I was in Miami. And Miami being located on the ocean saw a lot of individuals that were deceased and found within water. During my training there, it was -- it was -- it was taught and explained to us that if an individual has been -- has been in water and has breathed in water, you will find -- you will find fluid and water in the sinuses that are -- that are deep within the head. . I -- it's -- it's a finding which is supportive. It is not specific for drowning. So I haven't seen any kind of literature that talks about individuals who are previously deceased and then placed in water having that finding. But at the -- but at the same time, somebody who has been previously deceased and placed in water can have water taken into their lungs just by the fact that they are now under water and their mouth and nose are open, that -- that kind of -

- [155] As she further explained, "it is not with 100 percent certainty", and she did not have "any literature to backup that being a hard and fast rule in every single kind of case like that"; she was relying on her own experience based on what was "taught and explained" to her in Miami, and on what she saw while working there to support her opinion regarding the significance of water in the sphenoid sinuses.
- [156] This qualification by Dr. Steele is particularly important to my assessment of the reliability of her opinion because, as she acknowledges, the significance she attaches to her observation of water in the sphenoid sinus and the conclusions she draws from this finding, including that it indicated Aaliyah would have been alive when submerged in water, are thus based primarily on her anecdotal experience rather than on evidence-based science.
- [157] As discussed earlier, I am mindful of the comments in Sekhon regarding the superficial attractiveness and dangers that arise from reliance on anecdotal evidence. In my view, the foundation of Dr. Steele's opinion that the presence of water in the sphenoid sinus indicated Aaliyah would have been alive when immersed in water is more in line with the now-prohibited "trust me" standard rather than with the required evidence-based or "persuade me" standard for expert opinion evidence. Despite this, I note that she did qualify her finding in cross-examination by acknowledging "there's no good studies that say 100 percent of the time if a person has drowned there's water in the sphenoid sinus. And what I'm saying is that because there is water in the sphenoid sinus, it's a good indicator that she drowned", and then added that "there's no literature that randomizes either living or deceased patients that have water in the sphenoid sinus and what - what that - what that 100 percent indicates or not". Dr. Steele also acknowledged that water in the sphenoid sinus was supportive of drowning in the same way her findings of froth in the airways of the lungs and water in the stomach were, and agreed it does not lead one to conclude definitively that someone has drowned.
- [158] As mentioned, Dr. Steele opined that froth in the airways of the lungs and fluid in the stomach were also findings supportive of drowning. However, she acknowledged that froth in the lungs is a non-specific finding, in that an individual could have been submerged in water with their nose and mouth open, and water could just enter the lungs - that it does not necessarily mean that an individual had to be alive or had to breathe under water to bring water into their lungs. Similarly, she explained that fluid in the stomach is also supportive of drowning, because it suggests Aaliyah gulped water while submerged; however, again, Dr. Steele acknowledged that the finding of fluid in the stomach was non-specific, and could have existed without submersion in water (e.g., in a situation where the deceased person had consumed water a short time prior to their death) or if the person was submerged in water after death with their nose and mouth open (i.e., water could have entered the stomach just by the fact that the nose and mouth were accessible to the water entering).

- [159] Dr. Steele also identified A/I changes at the cellular level in the brain (referred to as "red" or "dead" neurons) upon microscopic examination. She explained that anoxia is with respect to a lack of oxygen coming to the brain (i.e., blood coming to the brain that is not oxygenated), whereas ischemia is with respect to the brain not seeing oxygen because there is a lack of blood flow to the brain; the cellular changes one will see microscopically will be the same in either situation. Dr. Steele testified that she observed A/I changes in two areas of the brain that are particularly susceptible to changes in oxygen levels - in the CA1 region of the hippocampus and in the Purkinje cells in the cerebellum - as well as scattered neurons "consistent with anoxia ischemia or anoxia hypoxia" in the grey matter of the brain. Dr. Steele explained these changes are consistent with someone acutely experiencing a lack of oxygen, but not for a sustained duration. I note that both Dr. Dunham and Dr. Del Bigio referred to hypoxic/ischemic (or "H/I") damage or hypoxia, whereas Dr. Steele more so used the terminology anoxic/ischemic damage and anoxia. My understanding is that they were in essence referring to the same phenomenon - a lack of oxygen to the brain - but that anoxia specifically refers to a complete lack of oxygen, whereas hypoxia refers to a partial lack of oxygen.
- [160] In cross-examination, Dr. Steele agreed that it is not the initial deprivation of oxygen that causes red/dead neurons, but rather, that it is the body's reaction to reperfusion - the restoration of oxygen - after the initial deprivation of oxygen that causes the biological phenomena seen in red/dead neurons. She was pressed as to what length the period of reperfusion and survival would need to be post-insult in order for red/dead neurons to appear. The defence suggested to her multiple times that a period of four to six hours of reperfusion and survival post-injury would generally be required; she agreed that in 10 minutes, you would not see these anoxic/ischemic cellular changes, but stated that she "refused to pigeonhole [herself] into four to six hours" - that within four to six hours you would definitely see those changes, but that she would not exclude that you could see them earlier. She stated that the four to six hour period is a general concept that has differences or variables that can factor into it. Despite this, Dr. Steele opined that her findings were consistent with Aaliyah having experienced an acute lack of oxygen, which resulted in her death.
- [161] It is difficult to reconcile Dr. Steele's opinion in this regard. If there had been a fatal incident of drowning as Dr. Steele suggested, and which she said this finding is supportive of, there would have been no opportunity for the necessary period of reperfusion in order for the phenomenon of red neurons she stated she observed to have manifested. Another layer of difficulty in interpreting Dr. Steele's evidence in this regard comes from the fact that, as I will discuss further below, neither Dr. Dunham nor Dr. Del Bigio observed any H/I damage (including no red neurons) on their review of the microscopic evidence. Rather, they did see evidence of handling artefacts which could be potentially confused with red neurons.

- [162] Dr. Steele was careful to emphasize that these four findings were supportive of drowning, but that she could not definitively conclude drowning, as drowning is a diagnosis of exclusion. When asked if falling into water would be equally consistent with the findings she viewed as being supportive of Aaliyah having been drowned or having been placed in water, Dr. Steele said "Falling into water and breathing into it, yes."
- [163] Dr. Steele acknowledged that, given the various findings in this case, it was difficult to identify the cause of death. In her opinion, the best approach was to include all of the findings into an inclusive "cause of death statement". Therefore, in her opinion, the multiple injuries, including "the submerging in water, the possibility of asphyxia and blunt force head trauma combined in a setting of diphenhydramine toxicity [and the] effects of lorazepam" together led to the death. She stated there was "no way to really tease out one and only one thing that is responsible for Aaliyah's death". Dr. Steele opined that the mild blunt force head trauma would most likely not have resulted in Aaliyah's death on its own. With respect to the injuries on the left side of Aaliyah's neck, she stated that all she could say is that they are there - that they should be acknowledged, but that they cannot stand alone as a cause of death. In contrast, she opined that drowning could have caused death in and of itself. Her opinion was that Aaliyah died from an acute loss of oxygen with no resuscitation period. As I mentioned earlier, Dr. Steele did not include her observations of uncal and tonsillar herniation in her "inclusive" cause of death statement, despite the fact that she acknowledged in her evidence at trial that those phenomena could cause death.
- [164] On cross-examination, Dr. Steele rejected the proposition that Aaliyah suffered from a pre-existing condition called hydrocephalus. She stated she was not familiar with arrested hydrocephalus, and on re-examination, stated she had no knowledge or opinion with respect to arrested hydrocephalus. Beyond this, when the defence put to Dr. Steele that Aaliyah had several conditions or symptoms, explaining each, which combined would lead to a conclusion that Aaliyah suffered from a pre-existing condition called hydrocephalus, Dr. Steele disagreed with each aspect of that proposition. While I appreciate Dr. Steele was not qualified to provide opinion evidence as a neuropathologist, I note that she was board certified in neuropathology by the U.S. Board of Pathology, and that she previously worked as a consulting neuropathologist to the medical examiner's office in Calgary. Both Dr. Dunham and Dr. Del Bigio testified that the presence of enlarged ventricles and the aqueductal stenosis they identified were readily apparent from the slices of the brain Dr. Steele obtained at autopsy. Yet, when challenged on cross-examination, she was adamant that there was no evidence to support a finding of hydrocephalus. Given that Dr. Steele identified both uncal and tonsillar herniation on gross autopsy, it is concerning that she somehow missed the evidence of hydrocephalus in the samples of the brain she took and examined, which seemed to be clear and readily apparent to both Dr. Del Bigio and Dr. Dunham.
- [165] Of note, in cross-examination, the defence put the following to Dr. Steele:

I suggest to you that the cause of death of Aaliyah Rosa was blunt force trauma that occurred in the context of a pre-existing health condition, hydrocephalus, and led to additional brain swelling that ultimately proved lethal for this child.

[166] Dr. Steele responded as follows:

So I disagree with -- with some pieces of that. The blunt force head trauma that she sustained, in my opinion, was -- was not severe and may, in and of itself, have been survivable. The toxicology results would -- would cause Aaliyah to be - to have a -- a depressed central nervous system response such that she could be more easily submersed in water and not have any -- any - any external or additional findings that -- that -- that might have been present had she not had those toxicology -- the levels of diphenhydramine and lorazepam in her blood.

I do think that she drowned and the findings supportive of drowning, again the water in the sphenoid sinus, I feel has a degree of -- of - a degree of weight to it in the context once submersed in water, water would have to be insufflated through the nose and mouth to - to end up in that area.

And -- and I also -- like, the pictures that we've seen today are not consistent with hydrocephalus. So I -- like, in my opinion, this little girl had a significant amount of -- of -- of diphenhydramine and lorazepam in her blood which would lead to her being -- having a diminished response to -- to something like being placed in water and also the head injury in and of itself could also impact -- impact -- impact that as well.

## The Neuropathological Evidence

[167] Two neuropathologists - Dr. Dunham, called by the defence, and Dr. Del Bigio, called by the Crown in rebuttal - were qualified as experts in neuropathology to provide expert opinion evidence in the area of disease and injury of the brain, spinal cord, and peripheral nervous system. Since neither were present at the autopsy, both based their opinions on a review of existing material, including: the autopsy findings of Dr. Steele and related material, including photographs, microscopic slides, and preserved brain tissue; trial transcripts; statements; and records obtained during the investigation. As many aspects of their evidence align, I will discuss their evidence collectively, identifying those areas of disagreement as they arise. While, as I have noted above, Dr. Steele had some training and experience in neuropathology, this was not her area of expertise, and she was not specifically qualified to provide an opinion with respect to neuropathology; this may account for some of the differences between her findings and those of Drs. Dunham and Del Bigio, who both are extremely qualified and knowledgeable in the area of neuropathology.

## Limitations in Opinions of Neuropathologists Due to Methodological Issues at Autopsy

- [168] Dr. Dunham and Dr. Del Bigio agreed that the methodology Dr. Steele employed at autopsy to examine the brain was in some respects problematic, and resulted in a number of limitations for their review. I will discuss some of those noted limitations here before delving into their opinions of the evidence.
- [169] Dr. Del Bigio's two main concerns, which were shared by Dr. Dunham, were: that given the fact that Dr. Steele identified the possibility of a brain trauma, the brain should have been fixed for a proper examination; and that Dr. Steele did not specifically label the tissue samples and slides she took and made from the brain, which made it very difficult to interpret what might have been going on in the brain.
- [170] Dr. Del Bigio stated that when cutting a fresh brain rather than a fixed brain during an autopsy being done five days after death, the brain tissue is "quite sloppy" and it can be difficult to appreciate all of the "geographic features" of the brain. He also stated that dark neuron artefacts are much more commonly introduced in unfixed sliced tissue.
- [171] With respect to the lack of labelling, Dr. Del Bigio stated that the lack of labelling of the cerebellar tissue was in a sense the most critical in this case, but that more generally, if you do not know exactly where things are from, it becomes difficult to interpret the overall changes - that you can interpret local microscopic abnormalities on their own, but in order to put them into context, you need to know where they are from. Dr. Del Bigio and Dr. Dunham noted that some of the samples in this case have sufficiently distinctive microscopic features that you can tell what region of the brain they are from, like the cerebellum, but that you cannot tell specifically what part of that region they are from. With respect to the question of whether there was herniation, Dr. Del Bigio stated that because none of the samples of the cerebellum or of any part of the brain were specifically labelled with respect to their location, that "it would be dangerous" to make any conclusion about whether changes observed in one of them was related to herniation, but that it would be similarly dangerous to make a conclusion that they were not related to herniation. In other words, the lack of labelling hindered him from giving an opinion one way or the other.
- [172] There were also various samples and photographs not taken by Dr. Steele that the other two experts would have found to be of assistance in interpreting the evidence and in conducting their assessments. In particular, there was only one poor quality photograph, taken from an angle that was not ideal, of the areas where Dr. Steele said she observed herniation. This severely limited their ability to give an opinion with respect to herniation.
- [173] The impact of these limitations is reflected in their findings and their divergence of opinion.

- [174] Dr. Del Bigio was also generally concerned with the timing of the autopsy - that because it occurred five days after death, certain post-mortem changes would have taken place to a level that could be associated with limitations in a neuropathological examination.

## Hydrocephalus

- [175] Dr. Dunham and Dr. Del Bigio agreed that Aaliyah had a pre-existing condition called hydrocephalus, which is characterized by an enlargement of the ventricular system within the brain due to an accumulation of CSF. Dr. Dunham considered Aaliyah's condition as "moderate", but on cross-examination stated "someone might interpret that enlargement as mild. I would call it moderate." Dr. Del Bigio considered it to be fairly mild, but agreed on cross-examination that he could say it was not severe, but that he could not be "absolutely certain" whether it would be what he would call mild or moderate. They agreed that an assessment of severity was subjective. They both agreed that the photographs of the slices of the brain they reviewed clearly showed that Aaliyah's lateral ventricles were enlarged, indicating hydrocephalus. They also agreed that Aaliyah's cerebral aqueduct was clearly abnormally narrowed, which could be the cause of the hydrocephalus. Dr. Del Bigio also did additional tests and confirmed the narrowing of the cerebral aqueduct in that way. He stated that the tests he performed did not show anything to suggest this was a recent abnormality. Dr. Del Bigio also stated that he could not speak as to why what he observed as a "definitive abnormality" with respect to the cerebral aqueduct was not mentioned in Dr. Steele's report, but that he thought it was a definite oversight, and that the absence of comment about it was an error.
- [176] Dr. Dunham found that the markings on Aaliyah's skull had the appearance of a "copper beaten skull", which occurs when the space for the brain is tight and the brain presses up against the skull, resulting in small indentation marks on the skull over time. In his view, this indicated that the hydrocephalus was likely longstanding. Dr. Del Bigio noted there was some "gyral imprinting" on the inner surface of the skull, but stated this was "probably within the range of normal brain and head growth", but that he could not be certain whether it was not simply a function of the child's age at the time of death, and that because the normal range for how deep such impressions are during childhood is not clearly stated anywhere in the literature, he could not be sure if they were within the "normal" range.
- [177] Both agreed that there was no evidence in the material to suggest Aaliyah was exhibiting neurological symptoms prior to her death. Dr. Dunham thus described Aaliyah's condition as "arrested hydrocephalus", where the hydrocephalus is not increasing and for whatever reason the physiology in the brain has acclimatized, the condition has essentially stabilized, and there is a state of equilibrium within the skull. Dr. Del Bigio agreed with that assessment.

## Evidence of Mild Blunt Force Trauma

- [178] Both experts agreed with Dr. Steele's findings that Aaliyah suffered a mild blunt force trauma to her head, as evidenced by the hemorrhages - subscalpular, subdural, and subarachnoid - Dr. Steele identified. Both opined that the hemorrhages in the head were "fairly recent" or "quite recent". Dr. Del Bigio opined that there were two most likely situations in which the hemorrhages could have occurred: either Aaliyah sustained a minor head injury shortly before she died, or her head could have been bumped shortly after she died, for example, as her body was moved from the bathroom to the living room; however, neither Dr. Steele nor Dr. Dunham shared the view that the injury could have been sustained post-mortem.
- [179] Both doctors agreed there were no obvious contusions or bruises on the external surface of the brain, which would have been indicative of more severe trauma. Both doctors agreed with Dr. Steele that there was no obvious evidence of skull fractures. Dr. Dunham, in response to being asked if he would agree that there was no way to know with any degree of certainty if the trauma observed would have caused any change in the level of consciousness, stated that is difficult to determine.
- [180] Dr. Del Bigio opined that the blood collection from the hemorrhages in Aaliyah's head would not have been sufficient to push on the brain or to raise the pressure inside her head.

## Cerebral Swelling and Causes Thereof

- [181] The two neuropathological experts disagreed on the issue of cerebral swelling. Dr. Dunham noted that it was rather severe, whereas Dr. Del Bigio was not convinced there was any substantial degree of brain swelling. In Dr. Dunham's opinion, in addition to the hydrocephalus itself, which would have caused a component of the swelling, both vascular congestion (of a moderate degree) and edema were contributing to the gross appearance of cerebral swelling that he observed, probably more so the edema than the congestion (he opined the congestion could play a "minor mild component" of the swelling).
- [182] Dr. Del Bigio agreed that the outer surface of the brain seemed "a little bit flattened", but stated that it appeared the brain "isn't really terribly flattened" from the photographs taken on autopsy. He opined that the apparent flattening of the brain observed may just be because the brain was softened from post-mortem processes, and that between the time of death and the autopsy, the brain would have basically "slumped" against the skull surface and become slightly flattened. However, on cross-examination, he agreed that the pathologist conducting the gross exam would be in the best position to assess the gross presentation of cerebral swelling.

- [183] Dr. Dunham disagreed, and opined that the gyri appeared flattened and that the sulci were narrowed, such that the surface of the brain was flattened and indicated "rather severe" cerebral swelling. He stated that he would not expect post-mortem processes to lead to a significant appearance of flattening of the contours of the gyri and sulci.
- [184] Dr. Dunham also considered Aaliyah's brain weight to be elevated at the upper end of the normal range, which he found supported his findings of edema and cerebral swelling. Dr. Del Bigio agreed that a higher than normal brain weight may be supportive of edema, but stated that you must be cautious using brain weight unless it is "way out of the normal range on most datasets", and disagreed with the opinion that the brain weight was necessarily abnormal in this case.
- [185] The two neuropathological experts also disagreed with respect to the issue of edema, as a cause of the cerebral swelling. Dr. Dunham noted that cerebral edema has a multitude of causes, including H/I injury and head trauma. He opined that edema would be compatible with blunt force head trauma. He opined that the mild blunt force trauma in this case was likely or at least plausibly one contributor to the presence of edema, but that it was plausible that H/I damage in an early form could also be contributing to the edema; however, that could not be known for sure because of the lack of red neurons. Dr. Dunham noted that because of the amount of hemorrhage present from the trauma to the brain (i.e., that the trauma was mild), he assumed there was another process contributing to the edema in addition to the trauma itself. In cross-examination, he agreed there were lots of possibilities. He agreed the edema could have just as likely been as a result of either primary or secondary H/I injury, but that we do not know if there was a primary source of such injury (e.g., a near-drowning incident), whereas "we surely know that there is probably a secondary source". He agreed that a near-drowning episode with a long enough survival period could potentially account for the edema he observed, but opined that a fatal drowning could in no way have impacted the appearance of the brain, as one must be alive and have a long enough period of reperfusion for edema to take place. He noted that the hydrocephalus was not in and of itself causing the edema.
- [186] Dr. Del Bigio stated that he was "not convinced" there was any substantial degree of either brain swelling or edema. Dr. Dunham observed vacuoles in his microscopic analysis of the brain tissue on certain slides that he opined were suggestive of edema. Dr. Del Bigio agreed with Dr. Dunham's observation that there were vacuoles, but disagreed with Dr. Dunham's interpretation of that observation. He opined that the changes in Aaliyah's brain due to post-mortem autolysis "compromise one's ability to make any definite conclusions about microscopic evidence of edema". He stated that the brain in this case had substantial post-mortem degradation, and that he was not comfortable saying the observation of vacuoles was definitely related to edema. He agreed that he would also never say it was definitely not related to edema. In essence, he could not give an answer one way or the other. Dr. Del Bigio agreed that blunt force trauma can cause edema in and of itself, and that a near-drowning could similarly cause edema if there was a long enough survival period

afterward.

- [187] With respect to the requisite time frame for edema to appear, Dr. Dunham opined that edema resulting from blunt force trauma could occur quite quickly, in around 30 minutes, and that edema resulting from a near-drowning could result in around two hours. When asked what survival time would be required post-deprivation of oxygen for edema to occur, Dr. Del Bigio never gave a specific time period, but stated that it would depend on the period of oxygen deprivation -- that if the period of deprivation was longer (i.e., long enough to damage the lining of the blood vessels), that when circulation is restored, those vessels can leak and the edema can be more rapid and more severe. He stated that "without very specific information about the - you know, the time without circulation, you can make all sorts of conjectures, but not be certain about any of them."

#### Hypoxic Ischemic (H/I) Injury

- [188] Both disagreed with Dr. Steele's microscopic findings with respect to A/I or H/I damage and the presence of red neurons.
- [189] Dr. Del Bigio opined that there were post-mortem cellular changes that were "moderately advanced", which made it difficult to interpret any changes in the nerve cells, so he could not make a definitive diagnosis of H/I damage. However, Dr. Del Bigio did observe "dark neuron artefacts", which are caused by handling of the brain post-mortem. He opined that any neuronal changes in Aaliyah's brain are "mainly related to post-mortem degradation" and he did not see "anything that convincingly is hypoxic ischemic type damage".
- [190] Dr. Dunham had similar concerns about "dark cell" handling artefacts, and how they can in some respects resemble red neurons. He similarly could not confirm the presence of red neurons, and noted that some of the neurons he saw would "be in keeping with handling artefact", and that it looked like there were some dark cell changes. He said that he could not definitively say there was no H/I damage to the brain; you cannot definitively say there is evidence of such damage without the presence of red neurons, but the lack of red neurons does not mean H/I damage did not occur. He explained that H/I injury depends upon the period of reperfusion to the brain after the injury - that you will not see red neurons unless there has been a sufficient period of reperfusion after the H/I incident, so the absence of red neurons does not mean there has not been any H/I damage to the brain, it just means there is no tangible evidence of it. He said you could see resulting edema from H/I injury earlier than red neurons (he noted that some sources say it takes a couple hours for edema from H/I injury to manifest), but that edema is a non-specific finding with numerous causes, including blunt force trauma, so the presence of edema does not in itself tell you there was H/I injury.

- [191] Dr. Dunham also opined that in the context of arrested hydrocephalus and blunt force trauma presumably causing edema, the intracranial pressure would build up such that blood could no longer come in to supply the brain with oxygen, and secondary H/I damage would occur. He opined that "it's plausible" that secondary H/I injury occurred here.
- [192] They generally agreed it would take four to six hours of survival and reperfusion after an initial loss of oxygen for red/dead neurons to manifest; Dr. Del Bigio opined that red neurons could be observed after as early as two hours of reperfusion in an ideal autopsy done fairly soon after death (which I note is obviously not the case here), but that more typically, they would be observed after four to six hours of reperfusion in a suboptimal autopsy.
- [193] Dr. Del Bigio conducted some additional staining analysis on Aaliyah's brain tissue and did not see any evidence one would expect if H/I damage had occurred with a sufficient period of reperfusion. Ultimately, no evidence of H/I damage was microscopically observed by either neuropathological expert, which I note differs from Dr. Steele's findings. Specifically with respect to his opinion that Dr. Steele's observation of red neurons was "entirely incorrect", Dr. Del Bigio stated that two factors - the handling of unfixed tissue and the five-day delay in autopsy - create many different changes (i.e., artefacts) that can be mistaken for H/I damage.
- [194] In cross-examination, the defence put various scenarios to Dr. Del Bigio with respect to the lack of evidence of neuronal damage, and he agreed that various possibilities would be consistent with the evidence, including: that Aaliyah did not suffer H/I injury; that she did suffer H/I injury that caused her death, but her death occurred very soon post-insult without any opportunity for reperfusion (i.e., a fatal drowning); or that there was H/I injury followed by a period of reperfusion not long enough for red neurons to manifest, and then death occurred by some means completely unrelated to the H/I injury.

## Herniation

- [195] Dr. Dunham and Dr. Del Bigio agreed that it was difficult to identify herniation in the singular available photograph from autopsy depicting the relevant structures. They both agreed that they were unable to clearly see or identify uncal herniation in the photograph - they were limited by the photograph and could not say one way or the other.
- [196] Dr. Dunham stated he could get a much better look at the tonsils than the unci from the photograph. However, he stated that he could not make out tonsillar herniation from the perspective the singular photograph was taken, and it was very difficult to see any distortion, tissue disruption, or hemorrhage of the cerebellar tonsils. However, on cross-examination, Dr. Dunham went a little further in his conclusions, stating that "there appears to be some distortion along the sides of the tonsils here which raises the suspicion that there is a degree of tonsillar herniation here", but maintained that it was "difficult to be absolutely a hundred percent definitive" that there was tonsillar herniation. Thus, at best,

he was "suspicious" herniation was present from the photo, but it was certainly not definitive from the photo. Dr. Dunham also opined that there was some microscopic evidence that would maybe suggest some cerebellar tonsillar herniation. Specifically, he opined that, despite the lack of labelling, he could tell that one of the samples taken by Dr. Steele was from the cerebellum, and that he observed a tiny amount of hemorrhage on it. He noted that the process of herniation would manifest as hemorrhage under the microscope. He opined that there was thus microscopic evidence that could be compatible with tonsillar herniation, but it was difficult to be certain, given the lack of a precise indication of where in the cerebellum the sample was taken from, and that the cerebellum is quite large. Additionally, in Dr. Dunham's opinion, the degree of cerebral swelling he observed also fit with the picture that there was probably a degree of herniation. Ultimately, he stated he would defer to Dr. Steele's assessment with respect to her observations of tonsillar herniation, because she was there at the autopsy and able to see the tonsils from numerous angles unavailable on his review. He opined that considering her observations, his observation of hemorrhage from an unlabeled section of the cerebellum, which could have come from the tonsils, as well as the cerebral swelling, led him to believe that "tonsillar herniation could likely be present".

- [197] Dr. Dunham also agreed that tonsillar herniation is not necessarily imminently fatal, and the body can compensate for the herniation for a period of time - he cited circumstances where a degree of tonsillar herniation occurs, necessitating emergent surgery - but he stated that eventually, if it is allowed to progress, herniation will cause death.
- [198] Dr. Del Bigio did not think there was "a significant or perhaps any degree of herniation." In essence, he could not be certain there was any evidence of herniation, but he could also not be certain there was not. He opined with respect to the singular relevant photograph that he did not think there was evidence of tonsillar herniation. He also emphasized that because Dr. Steele had not labelled the sections she took with the locations she took them from, that he could not know for certain whether any of the samples actually showed the part of the temporal lobe that would include the unci, and that it would be dangerous to conclude that hemorrhage observed on the slide from the cerebellum was taken from the tonsillar area. On cross-examination, he agreed that it was possible it was taken from the tonsillar area, and agreed it would similarly be dangerous to conclude it was not from the tonsillar area. Again, in essence, he could not say one way or the other.
- [199] Dr. Del Bigio stated with respect to Dr. Steele's observation of herniation that "the bottom line is that there's no tissue available for microscopic examination to try to validate the claim of abnormality based upon a naked eye examination only". He agreed that herniation can occur in a continuum. Both Dr. Del Bigio and Dr. Dunham, however, agreed that herniation was something within the purview of a forensic pathologist to assess.

## Opinions on Possible Mechanisms of Death

- [200] Dr. Dunham agreed that because of Aaliyah's pre-existing condition, she was in a more susceptible state to reaching a critical point of increased intracranial pressure that would lead to something fatal. He agreed she was more likely to have serious consequences as a result of edema because of the hydrocephalus; that absent the hydrocephalus, the mild blunt force trauma would not have resulted in the same degree of edema, and it would have been unlikely that the blunt force trauma would have led to the sort of swelling that could lead to herniation and death.
- [201] Dr. Dunham opined that it was reasonable to conclude the death in this case was caused by severe cerebral swelling that was largely mediated through the production of edema, which in part was likely produced by blunt force trauma occurring on the background of pre-existing arrested hydrocephalus; that the combination of these factors probably would have initiated a "vicious cycle" of increasing intracranial pressure, prohibiting further blood supply to the brain, which would have caused secondary H/I injury and created even more swelling, which ultimately would have led to herniation and death. However, he acknowledged this was just a possibility of how the evidence could all potentially be explained, and that it was obviously difficult to know for sure. On cross-examination, he agreed that there are a lot of different variables in this case that are difficult to define and quantitate, but that he believed this hypothesized mechanism of death was a reasonable possibility.
- [202] While Dr. Del Bigio agreed hydrocephalus was present, he did not agree that a mild head injury would have necessarily exacerbated the situation, although he acknowledged that that was possible in certain situations. His view was that the hydrocephalus was quite mild, and that Aaliyah's brain was not tightly compacted within her skull compartment such that a mild head injury would have necessarily exacerbated the situation. Dr. Del Bigio agreed with Dr. Dunham that in some situations the "vicious cycle" described above could occur. While Dr. Del Bigio agreed it was possible that the "vicious cycle" could have occurred in this case, he did not alter his opinion, out of a concern regarding the poor evidence with respect to herniation in the autopsy materials he reviewed.
- [203] In Dr. Del Bigio's more cautious opinion, it was unclear that the hydrocephalus contributed meaningfully to Aaliyah's death. Due to the degree of post-mortem changes, he could not conclusively opine that there was any evidence of brain swelling or edema, and opined that most changes observed were likely due to post-mortem autolysis. Dr. Del Bigio identified the same limitations in the microscopic slides and photographs as Dr. Dunham, but due to the lack of evidence arising from these limitations, he was not prepared to conclude that there was evidence of cerebellar tonsillar herniation. In cross-examination, Dr. Del Bigio acknowledged that tonsillar herniation was possible, as suggested by Dr. Dunham, but that he could not be certain from the slides or the relevant photograph.

- [204] Dr. Del Bigio noted that the cause of death could still be related to non-neuropathological factors, including submersion in water, and that there is nothing in the brain that will show anything specific to an acute drowning. He was not prepared to opine on a precise cause of death. Dr. Dunham similarly agreed that a near-drowning could have been a potential contributing cause, but that it was impossible to know for sure from the neuropathology whether that was the case. He also agreed that he could not rule out, from the neurological findings, that an acute drowning incident, long enough after blunt force trauma such that edema would have manifested, would be plausible or possible, but that it was just difficult to factor in the significance of any drowning episode, as a fatal drowning would not be expected to have any impact on the brain. He also opined that you would not necessarily need to add in a drowning episode, either fatal or non-fatal, to explain the death in this case.
- [205] In summary, Dr. Dunham and Dr. Del Bigio agreed that Aaliyah had a pre-existing medical condition, hydrocephalus, and specifically arrested hydrocephalus, at the time of her death. They also concurred with respect to Dr. Steele's opinion that Aaliyah sustained mild blunt force trauma to her head and an injury to the left side of her neck. However, as I have discussed in detail above, their opinions differ in many other aspects. With respect to Dr. Steele's observations of herniation, neither was able to provide a conclusive opinion, and neither could say with any certainty that the "vicious cycle" process was underway at the time of Aaliyah's death. Ultimately, both experts agreed that there were various scenarios that could account for the neuropathological evidence.
- [206] Dr. Steele, Dr. Dunham, and Dr. Del Bigio all agreed that this was a very complicated case, with many uncertainties, and a variety of possible explanations. The expert evidence is not conclusive as to the mechanism of death. I note, of course, that the Crown does not have to establish the precise mechanism by which the death occurred; however, the Crown must establish beyond a reasonable doubt that an unlawful act of Ms. Lewis was a significant contributing cause of Aaliyah's death: see Nette; and Park at para. 164, citing Stewart at para. 30.
- [207] Before I proceed to my analysis, I pause to note that expert evidence is of course "only a part of the evidence that a trier of fact is required to assess in order to determine if the Crown has proven an accused's guilt beyond a reasonable doubt": see K.J. at para. 19. Additionally, I am cognizant of the Court's caution in Sekhon that expert evidence must not be allowed to usurp the role of the trier of fact: at paras. 46, 75.

## Analysis

- [208] The first step in my analysis is to determine if murder has been committed pursuant to s. 229(a)(i) of the Code. If I am satisfied that the elements of murder have been established, then I must determine whether the offence should be classified as first or second degree murder in accordance with the criteria set out in s. 231 of the Code: Nette at para. 50.

[209] I will conduct my analysis with reference to the essential elements of the offence.

[210] There are some fundamental elements that are not in dispute. There is no issue with respect to date, time, or place. The evidence establishes that Aaliyah died on July 22, 2018 in Langley, B.C., as set out on the Indictment. The evidence also establishes that Aaliyah was alive and appeared well at 11:29 a.m. on July 22, 2018, as she and Ms. Lewis walked out of the Sandman Hotel lobby. That was the last time Aaliyah was seen until the discovery of her body later that evening. I am satisfied on the evidence that Ms. Lewis was the only person with Aaliyah from 11:29 a.m. until the time Aaliyah died on July 22, 2018.

Did Ms. Lewis commit an unlawful act?

[211] The first question I must consider is whether there is evidence to establish beyond a reasonable doubt that Ms. Lewis committed the unlawful act of assault by submerging Aaliyah in water as the Crown asserts. Although the Crown identified two alternate unlawful acts - criminal negligence and/or failing to provide the necessities of life - arising from a scenario where Ms. Lewis discovered Aaliyah's body in the bathtub, pulled her out, and left her on the bathroom floor without seeking assistance, they did not develop those alternate theories in their submissions. Rather, their submissions, and correspondingly those of the defence, focused only on whether the unlawful act of assault had been committed. Therefore, my analysis will focus on whether Ms. Lewis committed an unlawful act of assault by submerging Aaliyah in the bathtub.

[212] If I conclude that the Crown has not established beyond a reasonable doubt that Ms. Lewis committed an unlawful act, namely, the unlawful act of assault, then I must conclude my analysis and find Ms. Lewis not guilty.

[213] Consistent with what was set out by Watt J.A. in Gibson at para. 79, as I conduct my analysis, I will consider the cumulative effect of all of the evidence, taken together - i.e., I will consider each item in relation to the whole - in determining whether the standard of proof has been met. As I have set out earlier, the critical issue is what reasonable inferences can be drawn from the circumstantial evidence as a whole in this case; if there are reasonable inferences other than guilt, the Crown's evidence simply does not meet the standard of proof. Additionally, as the Court in Villaroman at para. 37 reminds us, I should consider other plausible theories and reasonable possibilities that are inconsistent with guilt as I assess the circumstantial evidence. I am cognizant that alternative interpretations or inferences must be reasonable, not just possible: Villaroman at para. 42. I am also cognizant that inferences inconsistent with guilt do not have to arise from proven facts, as requiring such would wrongly put an obligation on the accused to prove facts, and would be contrary to the rule that I must assess whether there is a reasonable doubt by considering all of the evidence: Villaroman at para. 35.

[214] I will begin by identifying several findings of fact I have made from my consideration of the evidence.

- [215] Aaliyah's body was found lying on the ensuite bathroom floor. Her body was wet and cold to the touch, and she was wearing a damp bathrobe. Both her hair and the shorts she was wearing were wet. Consistent with rigor mortis, her jaw was stiff. There were small air bubbles around her left nostril. The door to the bathroom was partially open at the time her body was discovered.
- [216] Dr. Steele found water in Aaliyah's sphenoid sinus, fluid in her stomach, and froth in the airways of her lungs. Although there was no direct evidence that there was water in the bathtub at the time Aaliyah was found, given the pathological findings, and given that both Aaliyah's hair and shorts were wet, and that the bathrobe was damp, it is reasonable to conclude that at some point she was immersed in water in the bathtub. It is not reasonable to infer that a seven-year-old child would take a bath with their shorts and underwear on. Indeed, counsel for Ms. Lewis conceded that point. Therefore, I find as a fact that Aaliyah was at some point immersed in water in the bathtub, but that she was not taking a bath at the time.
- [217] I have also considered the evidence of Mr. Rosland, the toxicologist, which establishes that Aaliyah had two different CNS depressants in her blood at the time of her death - diphenhydramine and lorazepam - both which have sedative effects, including drowsiness, muscular incoordination and balance issues, impairment of motor skills, and depressed levels of consciousness. It is difficult to know the precise concentration of diphenhydramine that was in Aaliyah's blood at the time she died because, as Mr. Rosland explained, that drug is particularly susceptible to post-mortem redistribution. Mr. Rosland explained that he could not rule out that lorazepam would also be subject to post-mortem distribution - that it was not clearly identified in the literature. In any event, despite the uncertainty around the precise concentrations, it is clear that both drugs were present in Aaliyah's blood at the time of her death. As Mr. Rosland explained, the combination of these two CNS depressants, particularly in a naïve user, could result in an additive effect, with the individual experiencing more pronounced effects from the combination than either drug would give alone. While the evidence does not establish conclusively when Aaliyah consumed the drugs, considering all of the evidence, including the evidence of Mr. Rosland with respect to the time required for the onset of the effects of these drugs and the CCTV footage of Aaliyah that morning in which she was apparently healthy and functioning well, I find as a fact that it was during the period of time when Aaliyah was with Ms. Lewis on the day in question that Aaliyah consumed the two medications that were in her blood when she died.
- [218] I agree with the Crown that it defies logic and common sense that Aaliyah, a seven-year-old child with no known history of consuming medications on her own, would either accidentally or purposefully take two different types of medications on her own that day. In my view, it is unlikely Aaliyah would have taken one medication on her own, and it is simply unreasonable and implausible to infer that she would have taken two. Rather, as counsel for Ms. Lewis pointed out, it is reasonable to assume a seven-year-old child would

take medications if they were given to her by her mother. I find as a fact that Ms. Lewis dispensed the two drugs found in Aaliyah's blood directly to Aaliyah.

- [219] However, I cannot find that it was the precise medications that Ms. Lewis purchased at the Shoppers Drug Mart on the morning in question that were given to Aaliyah. As pointed out by the defence, there were other medications found at the apartment which contained the same drugs present in Aaliyah's system; specifically, there was children's Gravol found that Mr. Rosland opined would contain diphenhydramine as its active ingredient, and there were various other bottles of prescription lorazepam found.
- [220] Additionally, I cannot and do not find that Ms. Lewis had planned to kill Aaliyah either when she purchased the prescription Ativan or Sleep-Eze that morning, or when she administered the drugs to Aaliyah. Finding so would be sheer speculation. Firstly, I am not satisfied that at the time the purchases were made that morning, her plan was to sedate Aaliyah in order to submerge her in water. As pointed out by the defence, Ms. Lewis had ample medications at home, including some with the very same active ingredients found in Aaliyah, such that if it was her intent to sedate Aaliyah in order to submerge her in water, she would not have had to buy more drugs to do so. Given there is ample evidence that Ms. Lewis had obtained Ativan for her own use in the past, the fact she obtained a dose that morning does not assist the Crown. It is reasonable and plausible that Ms. Lewis obtained the Ativan to deal with the emotional distress caused by the break-up she experienced earlier in the day. Similarly, it is also reasonable and plausible that Ms. Lewis purchased the Sleep-Eze to assist herself with sleep, given that she was up throughout the night, as established by the body of evidence of electronic communications sent from her phone. It is also purely speculative to suggest Ms. Lewis purchased the blue Powerade in order to dissolve the Sleep-Eze gel capsules and administer them to Aaliyah. Indeed, as the defence submits, if that had been Ms. Lewis's plan, she could have simply purchased the liquid blue Sleep-Eze, which was located on the shelf next to the gel capsules. Secondly, I cannot be satisfied that at the time the drugs were administered to Aaliyah, that it was Ms. Lewis's plan to kill or harm her. Another reasonable and plausible theory is that Ms. Lewis gave Aaliyah the drugs to subdue or relax Aaliyah, in order to keep Aaliyah quiet while Ms. Lewis dealt with her own emotional distress.
- [221] I also accept as a fact that when Mr. Stephany, Mr. Harrison, and Ms. Rai arrived at the apartment sometime after 9:00 p.m. on July 22, 2018, that Ms. Lewis was exhibiting symptoms of intoxication. Their observations, together with the evidence of Mr. Rosland, establish as a fact that Ms. Lewis was intoxicated at that point in time.
- [222] The evidence also establishes that Aaliyah had sustained a mild head injury as a result of blunt force trauma, and that this injury was fresh. In addition, the evidence establishes Aaliyah sustained an injury to the tissues and muscles deep in the left side of her neck, which would have required some sort of force or pressure being applied to result in that depth of injury. As with the head injury, this injury was fresh. Neither injury had corresponding damage on the skin that would have visibly indicated their presence. While I

accept that, consistent with the opinions of Dr. Steele and Dr. Dunham, these injuries must have occurred while Aaliyah was alive in order to have caused the hemorrhaging observed by Dr. Steele and confirmed by the two neuropathologists on review, there is no evidence as to exactly how or when these injuries occurred. There is also certainly no evidence from which I can conclude that the only reasonable inference was that Ms. Lewis was involved in inflicting either of these injuries. Considering the sedative effects the CNS depressants would have had on Aaliyah, including their ability to cause issues with balance and coordination and reduced levels of consciousness, I accept that it is reasonable and plausible that Aaliyah could have incurred the mild head injury and the injury to her neck accidentally, absent any involvement of Ms. Lewis. The head injury could have occurred sometime prior to Aaliyah being immersed in water; it is also reasonable and plausible that she could have incurred the mild head injury at or around the time she was immersed in water. The timeframe is simply too uncertain to know. Similarly, the cause of the injury to the left side of her neck remains unknown, and it would be improper for me to speculate as to how or when that injury occurred.

[223] I have also considered the evidence of Drs. Dunham and Del Bigio, which establishes that Aaliyah had a pre-existing medical condition known as hydrocephalus, which had reached an equilibrium or balance such that it was described as "arrested", in that it would likely not have been an immediate threat to Aaliyah's well-being. Neither Dr. Dunham nor Dr. Del Bigio could provide a conclusive opinion based on the materials available to them with respect to Dr. Steele's observations of herniation. With respect to uncal herniation, they agreed that they were limited by the singular relevant photograph and could not clearly tell if it was there. With respect to tonsillar herniation, Dr. Dunham acknowledged the limitations he encountered in assessing the evidence in this regard (i.e., the lack of labelling of Dr. Steele's slides, and the single relevant photograph of poor quality), and qualified his view accordingly; however, he opined that the hemorrhaging he observed in the slide he identified as being from the cerebellum "could be compatible with tonsillar herniation", but that he could not be certain, and that the sole photograph "would maybe suggest tonsillar herniation". Dr. Del Bigio was more cautious in his opinion, because of the singular photograph and unlabelled slides, essentially concluding that he could not be certain if there was any evidence of herniation, but he could also not be certain there was not. Both Dr. Del Bigio and Dr. Dunham agreed that herniation was something that would be within the purview of a forensic pathologist to assess.

[224] Both Drs. Dunham and Del Bigio agreed that one possible explanation of the neuropathological evidence was that blunt force trauma, occurring in the context of pre-existing hydrocephalus, could have caused a "vicious cycle" of edema and cerebral swelling, leading to secondary H/I damage, and ultimately to herniation and death, although Dr. Del Bigio was more cautious about commenting on the ultimate cause of death. They both agreed that various scenarios put to them could be consistent with the evidence - neither could point to a conclusive cause of death; they agreed that a fatal drowning incident could not be ruled out based on the neuropathology, as there is nothing

in the brain that will confirm an acute, fatal drowning.

- [225] As noted above, I have also considered the evidence of Dr. Steele regarding the findings she says were supportive of drowning; namely, the water in the sphenoid sinus, the froth in the airways of the lungs, and the fluid in the stomach. As I have discussed earlier, she also identified A/I damage, which both Drs. Dunham and Del Bigio disagreed with. As I discussed earlier, I have some concerns regarding the reliability of Dr. Steele's evidence. While I am respectful of Dr. Steele's expertise, her reliance on her own anecdotal experience to support her opinion that an acute drowning took place while Aaliyah was alive causes me concern, particularly when considered together with the other noted concerns about frailties in her evidence. I must also consider Dr. Steele's acknowledgement in cross-examination that the findings she said were supportive of drowning could also be consistent with a near-drowning, or with a situation where a person fell into water (i.e., rather than being forcibly drowned).
- [226] The Crown submits that the evidence establishes a basis upon which I can conclude that sometime after Aaliyah had been sedated, Ms. Lewis submerged Aaliyah in the bathtub while Aaliyah was alive. They submit that when Dr. Steele's findings supportive of drowning are considered together with the fact Aaliyah had two CNS depressants in her system and was found lying on the bathroom floor wearing wet shorts and a damp bathrobe, that the only reasonable inference is that Ms. Lewis submerged Aaliyah in the bathtub, intending to kill her, then removed her body from the bathtub, placed her in the bathrobe, and left her lying on the bathroom floor.
- [227] At this point, I wish to briefly address the submissions regarding Ms. Lewis's statement to Cst. Pooni about Aaliyah's whereabouts when Cst. Pooni called Ms. Lewis at 9:36 p.m. on July 22. The Crown submits Ms. Lewis's false statement to Cst. Pooni regarding Aaliyah's whereabouts was a concoction or fabrication. I agree with counsel for Ms. Lewis that I cannot consider this to be a fabrication, concocted to conceal the fact that she had killed Aaliyah. Relying on the discussion of fabrication in Beckett, I find that the Crown has failed to meet the necessary evidentiary burden to establish fabrication: see Beckett at paras. 14-17. The statement thus has no evidentiary value: Beckett at para. 14.
- [228] Counsel for Ms. Lewis submits that the Crown has not met its burden, as there are a number of alternative scenarios arising from the totality of the circumstantial evidence that support reasonable inferences other than guilt.
- [229] I am mindful that the burden of proof remains on the Crown throughout the trial and never shifts to the defence - that there is certainly no onus on the defence to prove that any other reasonable alternative scenario did in fact occur, and reasonable inferences other than guilt do not have to arise from proven facts: Villaroman at para. 35. My task is of course to assess whether, considering all of the evidence, there is a reasonable doubt as to Ms. Lewis's guilt. As the Court in Villaroman instructs at para. 37, I should consider other plausible theories and reasonable possibilities that are capable of supporting an inference

other than guilt as I assess the circumstantial evidence. I will not exhaustively set out here every alternative scenario I have considered, but I will canvass some, including some theories identified by counsel for Ms. Lewis, in order to determine if the Crown has met its burden.

- [230] The defence submits that the circumstantial evidence supports a reasonable and plausible theory that Aaliyah accidentally incurred a mild head trauma, which triggered a "vicious cycle" of edema and cerebral swelling, which led to cerebral herniation, and ultimately resulted in Aaliyah's death. They submit this theory is plausible - that given that Aaliyah had been sedated at some point, it would be reasonable to find she accidentally incurred the blunt force head trauma due to the side effects of the CNS depressants. I have already accepted that it is a reasonable possibility Aaliyah accidentally incurred the head injury. They submit, based on the expert evidence, that it is a reasonable possibility that this head injury triggered a "vicious cycle" of edema and cerebral swelling, leading to the herniation process. They submit that a reasonable and plausible theory or inference is that at some point, as the "vicious cycle" or herniation process was underway, a sedated Aaliyah, experiencing the effects of the CNS depressants, including balance issues and a depressed level of consciousness, could have fallen into the bathtub, immersing herself in water.
- [231] This can be explained by at least two alternative reasonable and plausible scenarios. First, Aaliyah took a bath, with the neurological "vicious cycle" process underway in her head due to the accidental head injury incurred at some point previously; after taking a bath and putting her shorts on, she lost her balance due to a combination of the effects of the sedatives and the process underway in her head, and fell into the bathtub, immersing herself in water. Alternatively, in this scenario, it is a reasonable and plausible theory that a bath could have been drawn for Aaliyah, and that as she was undressing, prior to taking her shorts off to get into the bath, she lost her balance for the reasons described above, and fell into the bathtub, immersing herself in water. Setting aside entirely the possibility that the "vicious cycle" was triggered by the trauma Aaliyah sustained to her head, it is nevertheless a reasonable and plausible inference that, in either scenario I have set out above (i.e., Aaliyah getting dressed after a bath, or Aaliyah getting undressed to have a bath), due to the effects of the two CNS depressants in her blood, she could have fallen into the bathtub, immersing herself in water.
- [232] In any of these scenarios, the immersion in water could have reasonably and plausibly occurred without the participation of Ms. Lewis. Any of these scenarios would account for all of the evidence, including both the neurological evidence and the water located by Dr. Steele in Aaliyah's body. As acknowledged by Dr. Steele, the various non-specific findings supportive of drowning could be consistent with Aaliyah having fallen into water. Implicit in these scenarios is that upon discovering Aaliyah in the bathtub, Ms. Lewis removed Aaliyah, wrapped her in the bathrobe, and placed her on the bathroom floor. While it maybe shocking to think that Ms. Lewis would leave her own daughter lying on the bathroom floor upon discovering her in the water, without seeking assistance, that does not

logically lead to the only reasonable conclusion, considering all of the evidence, being that Ms. Lewis drowned Aaliyah. There is no evidence from which I can conclude that Aaliyah was either alive or dead at the time Ms. Lewis found her in the water, and there are other reasonable and plausible inferences that can be drawn, such as panic, embarrassment or shame, or fear of false accusation: see Calnen at para. 117.

- [233] This is a very tragic incident resulting in the death of a young child, seven-year-old Aaliyah. It is human nature to seek answers after such an event. In this case, there are unfortunately many things we simply do not and cannot know, and that is unsatisfactory, especially for those who suffer the loss of Aaliyah everyday.
- [234] However, in this case, the Crown must establish that the only reasonable inference to draw from the evidence as a whole is that Ms. Lewis submerged Aaliyah in the bathtub, and in doing so, committed an unlawful act which significantly contributed to Aaliyah's death. As Villaroman reminds us, triers of fact must avoid the natural temptation to fill in the blanks with unsupported or speculative inferences to arrive at an acceptable conclusion. While one reasonable inference, considering all of the evidence, is that Ms. Lewis submerged Aaliyah in the bathtub, significantly contributing to her death, the question is not whether guilt is a reasonable inference. Rather, the question is whether guilt is the only reasonable inference, when the totality of the circumstantial evidence is viewed logically and in light of human experience.
- [235] As discussed earlier, I have some concerns with respect to Dr. Steele's reliance on anecdotal evidence for her opinion that water in the sphenoid sinus was an indicator of drowning, and specifically an indicator that Aaliyah was alive while immersed in water, and have found that I therefore cannot put any more weight on that finding than on any of the other non-specific findings she made supportive of drowning, which the Crown relies on to support their theory that Ms. Lewis committed an unlawful act. Additionally, both Dr. Dunham and Dr. Del Bigio disagreed with her observation of red neurons, which she considered to be supportive of drowning, and that she particularly considered to be supportive of an "acute incident that caused death". As noted above, this opinion is difficult to reconcile because, as both Drs. Del Bigio and Dunham agreed, generally, red neurons take four to six hours of reperfusion to manifest, and so they would not be visible after an acute drowning, and certainly would not be evidence that an acute drowning causing death occurred. Rather, the neuropathological experts agreed that an acute, lethal drowning could not be ruled out in this case precisely because they did not observe evidence of any H/I damage to the brain. I am also concerned that Dr. Steele did not consider the presence of herniation in her inclusive cause of death statement, which she opined that she observed on gross autopsy (both uncal and tonsillar). She opined that Aaliyah died from an acute lack of oxygen with no resuscitation period, which was inconsistent with her own observation of red neurons, and which she never reconciled with her observation of herniation. As set out in Villaroman, the Crown cannot rely on a gap in the evidence to prove an element of the offence: at para. 49.

- [236] I also pause here to reiterate that, as Roberts J.A. instructs at para. 19 in K.J., that expert evidence is only a part of the evidence that I am required to assess in order to determine if the Crown has proven an accused's guilt beyond a reasonable doubt. Additionally, I am cognizant that inferences supporting a finding other than guilt do not have to arise from proven facts. The burden is always on the Crown, and I must assess whether there is a reasonable - not imaginary, farfetched, or frivolous - doubt, considering all the evidence and the absence of evidence. It is certainly not incumbent upon the defence to prove that any alternative scenario supporting a finding other than guilt did in fact occur. The question is whether the body of circumstantial evidence gives rise to any reasonable inference other than guilt.
- [237] At this juncture, I remind myself of the comments in Villaroman with respect to the approach to take in cases of circumstantial evidence such as this one. I have only the guiding light of logic and human experience to assist me in the assessment of the circumstantial evidence. As the Court in Calnen points out, when drawing inferences, they must be reasonable, according to "the measuring stick of human experience": at para. 112.
- [238] In my view, when I consider the circumstantial evidence objectively, as a whole, logically and in light of human experience, I must conclude that while the Crown theory that Ms. Lewis assaulted Aaliyah by submerging her in water is certainly possible, there are other plausible alternative theories or reasonable possibilities, particularly those I have set out above. In my view, the alternative scenarios I have identified above are neither irrational nor fanciful. Rather, they are both reasonable and plausible, given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
- [239] Therefore, I find that the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than guilt.

## Conclusion

- [240] This was a tragic incident resulting in the death of Aaliyah and a devastating loss for her father Mr. Rosa and all those who loved her. Only Ms. Lewis knows what happened to Aaliyah on the day in question.
- [241] I find that the Crown has failed to prove beyond a reasonable doubt that Ms. Lewis committed an unlawful act. The law thus requires that I must find Ms. Lewis not guilty.
- [242] Therefore, Ms. Lewis, I find you not guilty.
- [243] Finally, before we adjourn, I wish to express my sincere appreciation to all counsel for your professionalism and assistance throughout this very difficult case.

"Devlin J."

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