
CANADA / JUDGMENT

R. v. Ruffolo

2010 BCSC 1630

COURT

Supreme Court of British Columbia

DECIDED

18 November 2010

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2010 BCSC 1630 R. v. Ruffolo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ruffolo,

2010 BCSC 1630

Date: 20101118

Docket: VI 126605

Registry: Victoria

Regina

v.

Ruby Ann Ruffolo

Before: The Honourable Madam Justice Humphries

Corrected Judgment: The text of the judgment was corrected at paragraph 68 and the addition of Counsel for the Crown and Counsel for the Defence was made on December 1, 2010

Reasons for Judgment

Counsel for the Crown:

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C. Smith (March - November, 2009)

C. Jennings (June - November, 2010)

Counsel for the Defence:

G. Delbigio (June - November, 2010);

D. Lyon

C. Tollefson (March - May, 2009)

Place and Date of Trial:

Victoria, B.C.

March 3-5, 9-13, 16, 19, 23-26, 30-31;

April 1, 3, 6-9, 14-17, 20-24, 27-30;

May 1, 4, 6-8, 11-15, 19-20, 22, 25-28;

June 1-5, 8, 10-12, 15-19, 22-26, 29-30;

July 2-3, 6-8;

August 4-6, 17-21, 24-25, 27, 31;

September 1;

October 7, 13-14, 26, 30;

November 5, 2009

June 14-18, 21-22;

July 14-16, 21-23, 26;

November 3-4, 2010

Place and Date of Judgment:

Victoria, B.C.

November 18, 2010

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- [1] The accused is charged with the first degree murder of her husband, John Ruffolo, on October 19, 2003. Voir dres were held in February, March, and April of 2006, before the late Mr. Justice Edwards, and a ruling was delivered on May 9, 2006.
- [2] This trial, which proceeded by direct indictment, began before a jury on March 3, 2009. The Crown closed its case, which comprised about seven weeks of evidence, six months later on August 28, 2009. The delay in completing the Crown's case was due to the ongoing illness of defence counsel, which meant the court sat half days only, usually about three a week, with many longer breaks.

- [3] Following the close of the Crown's case, again due to the illness of counsel, the defence was not prepared to proceed. Two months later, at the end of October, defence counsel withdrew, declaring himself incompetent to continue, without having opened the defence case. The court tried to proceed with the assistance of amicus curiae, but without the assistance of defence counsel, which was not provided, this was not possible. A mistrial was declared on November 5, 2009, and the jury was discharged.
- [4] In March of 2010, counsel advised the court that they had reached an agreement that the new trial should proceed by judge alone on the transcripts of the previous trial, and the defence would then call its case. Most reluctantly, I agreed, in the interests of the administration of justice, given the time and expense which had been wasted on the previous trial. As I explained to counsel, although I had listened to the evidence carefully and taken copious notes, I had listened not as a trier of fact but as a judge who would have to instruct the jury on legal and evidentiary issues. To reconsider the evidence from the perspective of a trier of fact, more than a year after the Crown witnesses testified, has been a challenging and difficult exercise.
- [5] The trial recommenced on June 14, 2010, and Ms. Ruffolo elected to be tried by judge alone. She was represented by her previous counsel and by Mr. Delbigio, who had been amicus curiae on the original trial. Counsel filed the following set of admissions, signed by Ruby Ann Ruffolo, Mr. Lyon as her counsel, and Mr. Van Alstine for the Crown:
1. All admissible evidence entered in the previous trial of this matter held before Madam Justice Humphries and a jury between March 3, 2009 and November 5, 2009, including exhibits and the admissible evidence which took place on the "View" with the judge and Jury on Humpback Road and 994 Tulip shall form part of the new trial of this matter.
 2. In the new trial of this matter, the Judge may review and rely on all transcripts (to be filed) and audio recordings of testimony in the possession of the Court entered in the previous trial of this matter.
 3. In the new trial of this matter, the Judge may rely on her own notes, recollections, and assessments of all evidence entered in the previous trial of this matter.
- [6] When the trial recommenced on June 14, 2010, three Crown witnesses, Linda Horton, Douglas Murray and Vivian Kirkland, were recalled for additional cross-examination. The accused called evidence and her case completed in about five days. Extensive written and oral submissions followed and concluded on July 26, 2010. The court advised counsel it hoped to have the judgment ready by October 25, 2010.
- [7] On October 19, 2010, the court advised counsel a further week was required, and judgment was set for November 3, 2010.

- [8] On November 1, 2010, the court received an application from the defence to reopen their case and call further evidence. The application proceeded on November 3, 2010, and the court agreed to hear a further witness that afternoon. The witness sought a publication ban and the matter was put over to 9:30 a.m. on November 4, 2010, to allow any representatives of the media to address the ban.
- [9] Counsel appeared on behalf of two media outlets, and after hearing from the witness as to his concerns for his safety, the lawyer for the media consented to an order that the witness be referred to as "Mr. X," and the drug dealer for whom he said he acted as a driver as "Y." The nature of the relationship between the two and a description of the time period in which they were associated was also made the subject of a ban on publication as it might tend to identify the witness.
- [10] Counsel for the accused also sought to adduce evidence respecting ownership of a pager that had been entered as an exhibit, and the exhibit was released for testing by Telus. The results of the testing were received within a day and filed as an admission.
- [11] Argument was then addressed to the significance of the new evidence, and the decision was put over to November 18, 2010.

OVERVIEW

- [12] It is the Crown's theory that Ruby Anne Ruffolo killed her husband, John Ruffolo, on the night of October 19, 2003, at their home at 994 Tulip Avenue in Saanich, near Victoria, B.C., by injecting him with an overdose of heroin. The Crown says she had previously rendered him unconscious by mixing a prescription drug called amitriptyline into a protein shake which she prepared for him that morning.
- [13] In submissions, the Crown allowed for the alternative theory that Ms. Ruffolo killed her husband with the assistance of Vivian Kirkland, her tenant and friend.
- [14] The Crown contends that, with the assistance of Vivian Kirkland, Ms. Ruffolo moved the body out to the driveway but was unable to get it into her car. She drove to downtown Victoria to get the assistance of a friend of Ms. Kirkland's, Robert Johnson. She drove Mr. Johnson back to her home. Mr. Johnson refused to help and walked away.
- [15] Ms. Ruffolo and Ms. Kirkland then sought the assistance of Douglas Murray, also a tenant at 994 Tulip Avenue, and the three of them managed to load the body into the car. Ms. Ruffolo, with Ms. Kirkland, drove the car to a remote wooded area on Humpback Road and rolled the body into a ditch and into a large broken culvert.
- [16] On October 25, 2003, a hiker discovered the body at the other end of the culvert across Humpback Road where it had been washed through by heavy rains.

- [17] The toxicologist discovered amitriptyline in a toxic dose and heroin in a lethal dose in the body. The pathologist was unable to discover any other cause of death and concluded that Mr. Ruffolo death was consistent with an acute mixed drug toxicity (heroin and amitriptyline).
- [18] There was no other forensic evidence.
- [19] Ms. Ruffolo testified on her own behalf. She denied all of the evidence of Ms. Kirkland, Mr. Johnson and Mr. Murray.
- [20] Insofar as the defence had a position to put forward to explain Mr. Ruffolo's disappearance and death, which of course they have no obligation to do, it came from Mr. Whitman.
- [21] Mr. Whitman, another tenant of Ms. Ruffolo's, said Ms. Kirkland and Mr. Murray told him several months after Mr. Ruffolo's death that Mr. Ruffolo had gone into hiding from drug dealers on October 19, 2003, and had gone to a party later that week during which Ms. Kirkland had, at Mr. Ruffolo's request, injected him with a large amount of heroin, and he died as a result. Several men at the party took the body and put it in a spot in the woods.
- [22] The defence called two witnesses who claim to have seen John Ruffolo having lunch at the Knockanback Grill in Saanich, B.C., on October 22, 2003, three days after the Crown witnesses say they had helped Ms. Ruffolo put the body in the car.

EVIDENCE

- [23] I will now move on to a more comprehensive review of the Crown and defence cases, and will then examine the evidence of the crucial witnesses in detail.
- [24] John Ruffolo was born in 1967. He and Ms. Ruffolo married in 1990. Their daughter Jovanna, was born later that year.

The Hortons and Tessa Lloyd, spring of 2002

- [25] In chronological terms, the Crown's evidence begins with Linda and Jonathan Horton, also known as Mochizuki. This evidence was ruled admissible in a previous voir dire on the basis that it is relevant to motive and pre-meditation.
- [26] Jonathan Horton testified that in the spring of 2002, he lived with his mother, Linda Horton, in an apartment in a building owned by the Ruffolos at 826 Esquimalt Road in Victoria, B.C. The Ruffolos lived in another unit in the same building. Ricky Burton, Ms. Ruffolo's son by a previous relationship, also lived with them.
- [27] Jonathan Horton said Ms. Ruffolo came to their unit, asked him to go for a ride with her, and asked him to kill Mr. Ruffolo for \$5,000, half before and half after. He immediately told his mother, Linda Horton, who testified that she angrily confronted Ms. Ruffolo and was also asked to kill John Ruffolo for \$5,000 payable immediately and \$5,000 in the future.

- [28] Tessa Lloyd, a counsellor at Ms. Ruffolo's daughter's school, testified that Ruby Ann Ruffolo told her repeatedly, during counselling sessions in the spring of 2002, that she wanted their marriage to end and John would have to die.
- [29] Around this time, John Ruffolo was having an affair with a woman named Jamie Huson whom he had met in the spring of 2001. Certain conversations between John Ruffolo and his mother, Lois, about this relationship were ruled admissible during the previous voir dire. Lois Ruffolo said John Ruffolo had told her about the relationship with "Jamie" and had discussed his wish to divorce Ruby Ann Ruffolo. However he said he was reluctant because he had worked so hard and she would take him for every penny. He didn't relish starting over. He told his mother Jamie was tired of waiting and was ending their relationship. They had broken up, and he hoped she would change her mind.
- [30] Linda Horton testified that she told John Ruffolo of her conversation with Ms. Ruffolo. John Ruffolo told his former girlfriend, Jamie Huson about it, on March 29, 2002, on a chat line. The chat line conversation was declared admissible in the voir dire for the purpose of corroborating Linda Horton's evidence that she told John Ruffolo certain things, but not to corroborate Linda Horton's evidence that those things actually happened.
- [31] Ms. Ruffolo denied ever approaching the Hortons in this way. She said the Hortons had come to her door out of the blue and offered to kill John Ruffolo for her, and that John Ruffolo had told her they had offered to kill her for John Ruffolo. She and John discussed it. He laughed it off but she wanted them evicted. She denied ever having any contact with Tessa Lloyd.
- [32] The Hortons were soon evicted in any event because Jonathan Horton got into a fight with Ruby Ann Ruffolo's son, Ricky Burton.

Suicide of Ricky Burton, September 2002

- [33] In September of 2002, Ms. Ruffolo's son, Ricky Burton, committed suicide by hanging himself in the shed in the back yard. Two police officers who attended at the scene testified that Ms. Ruffolo, understandably distraught, blamed Mr. Ruffolo for this. This evidence was ruled admissible on the voir dire as relevant to motive.

2003, up to September

- [34] Moving forward to 2003, John and Ruby Ann Ruffolo, with their daughter Jovanna, had moved to 994 Tulip Avenue in Saanich, B.C., with Vivian Kirkland, Douglas Murray and Vaughan Barnes as downstairs tenants. They owned two cars - a red Tempo which John Ruffolo usually drove, and a blue-green Toyota which Ms. Ruffolo usually drove. John Ruffolo's parents live on the same street; so does his sister Mena and her husband Norm Westhaver.

- [35] Vivian Kirkland began to help the Ruffolos manage their rental properties. Her foster brother, Neil Klatt, had a friend named Robert Johnson who occasionally worked for the Ruffolos.
- [36] At the time of his death, John Ruffolo was working at a number of jobs. He worked at Land's End group home, Manchester House (a residence for forensic patients) and at Brinks Security. He and Ms. Ruffolo also owned and managed several rental properties, including two apartment buildings on Esquimalt Road. Although the properties were purchased primarily with Ms. Ruffolo's money, they were all in Mr. Ruffolo's name, apparently because Ms. Ruffolo was diagnosed with cancer some years ago and the couple were of the view that this would enable them to avoid "estate taxes" if Ms. Ruffolo died.
- [37] John Ruffolo was required to have a medical examination in order to work at Brinks. On March 18, 2003, he was examined by Dr. Meir and found to be a fit and healthy young man. Dr. Meir became Mr. Ruffolo's general practitioner, and saw him for some minor ailments - stomach upset and a persistent sore throat. When he last saw him at the end of June 2003, John Ruffolo was still fit and healthy. Dr. Meir saw no indication of drug-seeking behaviour in Mr. Ruffolo's medical records.
- [38] During the summer and fall of 2003, Mr. Ruffolo was having an affair with a fellow employee at Brinks, Dilek Sensoy. According to Ms. Sensoy and Mr. Ruffolo's mother Lois, he was planning to leave Ms. Ruffolo and had told her he wanted a divorce. Ms. Sensoy said Mr. Ruffolo always wore a wedding ring, except during the last couple of weeks of his life. She testified that it was her understanding that John and Ann Ruffolo did not share a bedroom.
- [39] Ms. Sensoy testified that she took a Brinks gun home by accident once, and a fellow employee termed it "to pull a John" because John Ruffolo had done that once.

Meeting with Robert Johnson, September 2003

- [40] According to Robert Johnson, he was asked to meet with Ms. Ruffolo and Ms. Kirkland sometime in the fall of 2003, perhaps September. They met at the Crystal Pool Park in Victoria. Ms. Ruffolo asked Mr. Johnson if he would kill Mr. Ruffolo, and how he would do it. Mr. Johnson thought this was a joke and refused to help, but having seen a TV program the night before on "hot capping," that is injecting a large amount of heroin, told her that would be a good way to kill someone. He said \$150 worth of heroin would be enough to ensure the person would die.
- [41] Vivian Kirkland said Ms. Ruffolo pressured her to use her contacts on the street to find heroin for her. Eventually, Ms. Kirkland was able to arrange a meeting with a dealer and Ms. Ruffolo purchased \$150 worth of heroin.

Thanksgiving, 2003, at Lois Ruffolo's

- [42] Lois Ruffolo said she had a conversation with her son John Ruffolo at her home at Thanksgiving, that is, the week before his death. This conversation was declared admissible at the voir dire as relevant to motive.
- [43] Lois Ruffolo had a dinner at her house and John Ruffolo and Jovanna, then about 12 years old, were invited. Lois Ruffolo said Ruby Ann Ruffolo had cut herself off from the family years before. She said the family saw John Ruffolo often for the first year and a half of his marriage to Ruby Ann Ruffolo, but then Ms. Ruffolo called at Christmas in 1991 to say they should not see each other for two years. In 1994, John Ruffolo called to say he was coming over, and they saw him frequently after that. Lois Ruffolo said she was aware that her son and Ms. Ruffolo had separated for a few months years before, although they both lived in the same apartment building during the separation.
- [44] On the Thanksgiving Sunday, Ms. Ruffolo phoned to say Jovanna had homework and would not be coming, but then called back about 9:00 p.m. to say John Ruffolo was upset Jovanna had not gone over, and she would drop her off.
- [45] Lois Ruffolo testified that Ms. Ruffolo then asked her to be a guardian for Jovanna because she did not want John bringing her up alone. Lois Ruffolo asked Ms. Ruffolo why she was bringing the subject up out of the blue, as it had all been arranged years before. Ms. Ruffolo said she did not want John to know and they would soon know why. Lois Ruffolo said of course they would look after Jovanna but would never exclude John. Lois Ruffolo said Ms. Ruffolo had called when Jovanna was five years old, saying she, that is Ms. Ruffolo, had cancer, and asking if the Ruffolos would be Jovanna's guardians.
- [46] Lois Ruffolo said Ms. Ruffolo told her during the call at Thanksgiving, with apparent amusement, that Jovanna had said if anything happened to Ms. Ruffolo, her life would not be worth living, she would slit her throat and throw herself on top of her mother and go with her.
- [47] Lois Ruffolo testified that Ms. Ruffolo brought Jovanna to the door about ten minutes after ending the call. Lois Ruffolo said she was shocked to see Ms. Ruffolo at the door, since she had not seen her since 1991, except for one chance encounter at a swimming pool. Ms. Ruffolo left. Jovanna ate dinner and fell asleep in the living room.
- [48] John Ruffolo arrived at about 10:40 p.m. after his shift was finished. He told his mother he had met someone named Dilek at Brinks and planned to divorce Ms. Ruffolo. He said he had told Ms. Ruffolo. He said Ms. Ruffolo had written him a note to say they would discuss it in the first two weeks of November, which he said was not the way they usually communicated. He said Ms. Ruffolo made it clear that if he left, he would never see Jovanna, and she would take him for every penny he had. Lois Ruffolo told John Ruffolo she would support his decision to divorce Ruby Ann Ruffolo. John Ruffolo asked her not to tell his father; he wanted to do it himself.

- [49] Ms. Ruffolo said she had been aware of John Ruffolo's previous relationship with Jamie, whose last name she did not know. John Ruffolo had told her he was afraid of divorce and Jamie was tired of waiting.
- [50] Lois Ruffolo said Ms. Ruffolo called three more times that evening wondering when John was coming home. In the last call Lois Ruffolo testified that she told Ms. Ruffolo John was on his way home. Ms. Ruffolo then said, "As far as I'm concerned this is not his home."
- [51] The Ruffolos had a family picnic on Thanksgiving Monday at a nearby park. John Ruffolo came with Jovanna.
- [52] Lois Ruffolo testified that she was visiting her daughter Sarina in the hospital on October 17, 2003 when John Ruffolo dropped in for a quick visit, accompanied by Ms. Sensoy. That was the last time Lois Ruffolo saw John Ruffolo.
- [53] In cross-examination Lois Ruffolo said although John Ruffolo often said he wanted her to come to the house, Ruby Ann Ruffolo had only invited her once, a month before John Ruffolo died, but she did not go. She said it was her understanding that John and Ruby Ann had separate bedrooms and that John was staying in the marriage for Jovanna's sake until Ruby Ann's expected death from cancer.

Sarina Ruffolo

- [54] John Ruffolo and his sister Sarina were fairly close in the last months of his life. Sarina would come to the Ruffolo home at 994 Tulip Avenue to smoke marijuana with John. She said she never saw John Ruffolo do any other drugs; she had no knowledge of other drugs, and she had not attempted to introduce him to heroin.
- [55] Sarina Ruffolo said it was fair to say she disliked Ms. Ruffolo. She said John Ruffolo asked her to assist in covering up meetings with Dilek Sensoy but she refused because she did not want Ms. Ruffolo to find out that she, Sarina, was part of that situation.
- [56] Sarina Ruffolo said her brother had never indicated to her that he had asked Ms. Ruffolo for a divorce. She said her brother was very protective of money and she had gotten the impression over the years that he did not want to divide the assets and pay alimony.
- [57] Sarina had her tonsils removed in early October 2003 and due to complications, was back in and out of the hospital during the week of October 17 - 24, 2003. John Ruffolo and Dilek Sensoy came by to visit on the morning of October 17, 2003 two days before John Ruffolo disappeared. Her parents were also there. This was the last time John Ruffolo was seen by his family.

October 19, 2003

- [58] John Ruffolo ended his shift at Land's End Group Home at 8:30 a.m., October 19, 2003. Ms. Sensoy testified that he came to her place, stayed half an hour, and left for home. This was the last time Ms. Sensoy saw John Ruffolo.
- [59] According to Robert Johnson, whose evidence I will review in more detail later, Ms. Ruffolo came to his rooming house that evening and asked him to come with her to do some "heavy lifting" in exchange for alcohol. She drove them back to her place, and she and Vivian Kirkland told him John Ruffolo had overdosed and was dead, pointing to the driveway by the car. Robert Johnson refused to help and left immediately.
- [60] Vivian Kirkland and Douglas Murray, whose evidence I will also review in more detail later, testified that they assisted Ruby Ann Ruffolo to put John Ruffolo's body into her car in the late evening of October 19, 2003. Ms. Ruffolo then drove to Humpback Road with Vivian Kirkland, and they put the body in a culvert in a ditch.
- [61] John Ruffolo was supposed to work a shift at Brink's at 10:30 p.m. on October 19, 2003. He did not show up. His co-worker, Jason Amos, called his residence sometime between 10:30 and 11:00 p.m. A female told him John Ruffolo was on his way to work. After waiting a few minutes longer, Mr. Amos called another employee to come in and take the shift.

October 20, 2003

- [62] The next morning, around 9:30 or 10:00 a.m., Ms. Ruffolo called the Brinks office. She spoke to Angel McIntyre. Ms. Ruffolo said Mr. Ruffolo had not come home and she asked if he was doing overtime. Ms. McIntyre told her she had not seen Mr. Ruffolo, but believed he had been late for his shift the night before. After getting off the phone, Ms. McIntyre learned that Mr. Ruffolo had not come in for his shift at all the night before, and called Ms. Ruffolo to tell her. Ms. Ruffolo said that was impossible. Ms. McIntyre suggested Ms. Ruffolo call Mr. Ruffolo's other jobs, as well as his pager. Ms. Ruffolo said Mr. Ruffolo's pager was there with her.
- [63] Around noon, Ms. Ruffolo called back and said she had checked with the other workplaces and he was not there. She said she was going to call hospitals and the police. They discussed the weather the night before - Ms. McIntyre said it had been nasty, very rainy and windy, raising a concern for Mr. Ruffolo's late night travel.
- [64] Ms. Mockford from Land's End Group Home testified that she received a call from Ms. Ruffolo on October 20, 2003, asking if she knew where John Ruffolo was. Ms. Mockford said Ms. Ruffolo seemed very upset. Ms. Mockford spoke to Ms. Ruffolo again in the afternoon as she needed John Ruffolo for a shift, but Ms. Ruffolo said he was still missing.
- [65] Later in the day, as Mr. Ruffolo's next shift at Brinks neared, Ms. McIntyre called Ms. Ruffolo again and left a voice mail message. Ms. Ruffolo called back at 5:30 or 6:00 p.m. and said her friend had driven to Land's End but Mr. Ruffolo wasn't there. She had checked the hospitals.

She said she had gone to the Victoria Police Department and been told to go to the Saanich Police Department instead. Ms. Ruffolo told Ms. McIntyre that after Mr. Ruffolo had gotten home the morning before at about 9:00 a.m., she and her daughter had let him sleep and she had been working at the rental properties. She said when she got home at 10:00 p.m. John Ruffolo was gone. She seemed upset and said maybe John was somewhere hurt, maybe he got hit in the head.

- [66] Meanwhile, Dilek Sensoy, John Ruffolo's girlfriend and co-worker at Brinks, found out John Ruffolo had missed a shift. She called his workplace and his pager. She went to the bank where Sarina Ruffolo worked to see if she could find her. Ms. Sensoy called 911 anonymously. She also called Lois Ruffolo around 5:30 p.m. to tell her John Ruffolo had not worked his shift.
- [67] Lois Ruffolo and her daughter Sarina, who was out of the hospital temporarily, went over to 994 Tulip Avenue. Ms. Ruffolo's car was there and they could hear movement inside the house. They knocked and called but received no response. Both Lois and Sarina Ruffolo called John Ruffolo's pager a number of times. Eventually the daughter, Jovanna, returned the call in the evening and said they did not know where her father was.
- [68] Later that night Ms. McIntyre called Ms. Ruffolo to see if she had heard anything. She got the Ruffolo's voice mail and heard a recorded message saying "John, if this is you, please leave a number where you can be contacted." Ms. McIntyre left a message but did not hear from Ms. Ruffolo again.
- [69] Ms. McIntyre agreed that she had heard other workers at Brinks mention that John Ruffolo had been threatened by inmates at Wilkinson Road jail (Vancouver Island Regional Correctional Centre) where he had worked until 2000, when he was dismissed as a result of having been convicted of twenty-two infractions of the Real Estate Act, (the dismissal was grieved and eventually resolved by a settlement). Cst. Muth, one of the police investigators, later reviewed Mr. Ruffolo's personnel file from that job but did not see any notation of threats by inmates against Mr. Ruffolo.
- [70] All of the supervisors and fellow workers of John Ruffolo from all three workplaces testified that he was a good reliable worker, and was highly thought of. He never missed shifts and always showed up when they needed someone.
- [71] All were asked if they were aware he had taken a Brinks co-worker (Dilek Sensoy) to Land's End on a night shift and had had sexual relations with her while working. They said they were not. All were asked if they knew Mr. Ruffolo had some connection with an escort agency. They said they did not.

Missing Person Report to Police

- [72] Leanne Aldridge, a communications specialist with the Victoria Police Department, took a missing person report from "Ann Ruffolo" somewhere around midday on October 20, 2003. Ms. Ruffolo was in the vestibule at the police station and spoke to Ms. Aldridge by phone from the report desk. The call was recorded. She told Ms. Aldridge that her husband had not shown up for work at Brinks the night before, no one had heard from him, and it was out of character for him not to call. She said he had been using marijuana since his sister had come back into his life. Ms. Ruffolo said she had also heard he was using heroin. She said he had been depressed and was having problems with his family; she said he did not like his mother.
- [73] Ms. Aldridge realized the address Ms. Ruffolo provided was in Saanich and told her she would have to make the report there rather than in Victoria, but said she would send the information she had gathered from Ms. Ruffolo to Saanich. She created a report and faxed it to Saanich at about 1:30 p.m.
- [74] Cst. Nancy Melville of the Saanich Police Department said Ms. Ruffolo came to the front desk in the early afternoon of October 20, 2003. She was with another female named Vivian.
- [75] Cst. Melville said Vivian did most of the talking, saying they had been to Victoria and were told the information would be faxed. After waiting 20-30 minutes, Cst. Melville called to see where the fax was because she had still not received it. She suggested the women go home and she would call them. She did not receive the fax until about 3:30. She called Ms. Ruffolo to tell her she had received it. The call was taped.
- [76] Cst. Melville asked Ms. Ruffolo if she was going to come in to speak to an officer about it. Ms. Ruffolo said she had to take care of her daughter. Cst. Melville said Ms. Ruffolo needed to speak with an officer, either at the station or at her home. Ms. Ruffolo insisted she had given all the information she had to the Victoria Police Department. Cst. Melville said several times that they needed to see Ms. Ruffolo, and Ms. Ruffolo continued to respond that she had given all the information to the Victoria Police Department.
- [77] Cst. Melville asked more questions of Ms. Ruffolo and obtained more information, including that Mr. Ruffolo had been involved in drugs but quit, and Ms. Ruffolo could not really say if he was using heroin. She said "the stuff he used he smoked. That's what I know."
- [78] Cst. Melville said she would have an officer get in touch with Ms. Ruffolo. Cst. Lee Anne Rowan of the Saanich Police Department was asked to contact Ms. Ruffolo. She left a message at 4:00 p.m. Her shift was over at 7:00 p.m. on October 20, 2003. She did not receive a call. Cst. Marco Berton was requested to follow up. He left a message at 7:41 p.m. He received a call from Vivian Kirkland at 10:10 p.m. but never spoke to Ms. Ruffolo.
- [79] Sgt. MacKenzie of the Saanich Police Department was assigned the missing person investigation on October 21, 2003. He was told to call a lawyer, Chris Brennan, who had been retained by Ms. Ruffolo. He did so at 1:15 p.m. Sgt. MacKenzie asked Mr. Brennan to have

Ms. Ruffolo contact him. Mr. Brennan called back at 1:45. Sgt. MacKenzie decided to go to Ms. Ruffolo's home to try to speak to her directly. He went to 994 Tulip Avenue, knocked, but did not get a response. He testified he went a couple of times but never did hear from Ms. Ruffolo that day.

- [80] The next day, October 22, 2003, he arranged for the distribution to patrol cars of a photograph of Mr. Ruffolo, which he received from Lois Ruffolo. He called Mr. Brennan again. Around 10:00 p.m. he received a voice mail from Ms. Ruffolo which he picked up when he arrived at work at 7:00 a.m. on October 23, 2003.
- [81] Ms. Ruffolo asked how the investigation was going, and asked whether Mr. Ruffolo's car had been found and whether there was any blood in it.

October 22, 2003 - John Ruffolo's car is found at the Knockanback Grill

- [82] Meanwhile, on October 22, 2003, Mr. Ruffolo's brother in law, Mr. Westhaver, who is married to John Ruffolo's sister Mena, had stopped at a gas station on Interurban Road between 12:00 and 1:00 p.m., and noticed what he thought could be John Ruffolo's car - a late '90's red Ford Tempo - at the Knockanback Grill across the street. He went over to investigate. He called his wife to check the licence plate and realized it was John's car. He called the police to report it. He looked in the window of the pub, which he said was about half full, to see if John was in there. He could not see him. The pub is about 1 ½ kilometres from Mr. Westhaver's home on Tulip Avenue. According to Sgt. Mackenzie, this is about a 15 minute walk or a two minute drive.
- [83] Cst. Phillips arrived at about 2:00 p.m. and guarded the car. No one approached it. No one touched the inside of the vehicle. None of the staff in the Knockanback Grill had seen anyone near it. The vehicle was towed. Mr. Ruffolo's Brinks uniform was in the car, with his gun belt containing a revolver cylinder with six bullets in it, and his wallet.
- [84] The driver's seat was positioned too far forward towards the steering wheel - 34 centimetres between the edge of the seat and the wheel - for Sgt. Bellanger, the identification officer, to sit in.
- [85] Sgt. MacKenzie searched the Knockanback Grill and the other businesses nearby but did not find Mr. Ruffolo.
- [86] Sgt. MacKenzie received another voice mail from Ms. Ruffolo which she left about 10:00 a.m. on October 23, 2003. Ms. Ruffolo said her daughter had told her Lois Ruffolo said the car had been found.

- [87] Sgt. MacKenzie returned the call and asked Ms. Ruffolo to come to the police department. She said she felt the police were corrupt and she did not feel safe. However, she agreed to come to the station at 1:00 p.m., but Mr. Brennan called later on to say they would come in at 8:30 a.m. the next day instead. Sgt. MacKenzie had decided to release the photograph of John Ruffolo which he had received from Lois Ruffolo to the media. He called Mr. Brennan at 4:00 p.m. to let him know so Ms. Ruffolo would not be shocked when she saw it.
- [88] The next morning, October 24, 2003, Ms. Ruffolo came to the station with Mr. Brennan and Ms. Kirkland. Sgt. MacKenzie told Ms. Ruffolo that he had had difficulties contacting her since he had been instructed by Mr. Brennan to go through him because Ms. Ruffolo did not want to talk to the police.
- [89] Ms. Ruffolo told Sgt. MacKenzie that the female officer (Cst. Melville) had been aggressive and rude with her so that was why she realized something was wrong. She said Vivian told her Lois Ruffolo had said Ms. Ruffolo would be going to jail whether John Ruffolo came back or not. Sgt. MacKenzie said that was not correct. (The defence argues that this comment of Sgt. MacKenzie was admitted by him during cross-examination to refer to Ms. Ruffolo's level of cooperation. The questioning was based on the transcript without playing the tape again, and at the time of the questioning, although I did not hear the comment the way defence did, the jury was the trier of fact so I left the interpretation to them; it is necessary to listen to the tape to understand the flow of the exchange. Ultimately it does not have much significance, but it formed part of the defence position that the police aligned themselves against Ms. Ruffolo from the beginning). Eventually Ms. Ruffolo began to answer questions and provide the information requested. The hand-held tape recorder did not function well and the account of the interview was supplemented by Cst. Muth who monitored it and took notes.
- [90] Ms. Ruffolo told Sgt. MacKenzie there was no talk of divorce between her and John. She said John had been off drugs for seven years. He had previously taken marijuana, LSD, and had experimented with heroin. His sister Sarina had recently re-entered his life and John would do drugs with her.
- [91] Sgt. Mackenzie asked if it was safe to say John Ruffolo had a drug problem. Ms. Ruffolo said he was a good person, not a bad person; he was a drug addict, although she didn't see him as a drug addict. She said he was trying to get off drugs and was having a hard time. She said he told her he would do it himself; he had done it before and he could do it again, she trusted him. She said "he was trying so hard but his sister was so much into this."
- [92] Ms. Ruffolo provided a photograph of John Ruffolo to Sgt. MacKenzie.
- [93] Ms. Ruffolo said she saw John Ruffolo on Sunday morning at about 9:00 a.m. when he got home from his shift. They talked for about 20 minutes and he went to bed. She left a lunch on the counter for him, did something with the daughter, and went to the apartment buildings.

- [94] Following the meeting, Sgt. MacKenzie and Cst. Muth were allowed access to the upper floor of 994 Tulip Avenue for a cursory search. They found nothing of significance. Ms. Ruffolo had said Mr. Ruffolo kept about \$7,000 in cash taped to the back of a cabinet. There was no sign of the money or tape residue. Ms. Ruffolo told them John Ruffolo's pager was in the bedroom. They did not ask to see it.
- [95] Following the release of Mr. Ruffolo's photograph on October 23, 2003, Mr. Kimmerly, who had been having lunch in the Knockanback Grill the day before when the car was found, contacted the police to say he had seen John Ruffolo having lunch there. He said his girlfriend called him to the TV when the Knockanback Grill was mentioned, and he saw the photograph. The person stuck out in his mind because he seemed to be fixated on staring at Mr. Kimmerly. Mr. Kimmerly went to the Grill and asked the waitress, Toby Bolger, if she remembered the person. She said she had been too busy. However, Ms. Bolger testified that when she was later shown a photograph by the police, she thought it looked like someone they had served.

October 25, 2003 - John Ruffolo's body is found on Humpback Road

- [96] On October 25, 2003, Mr. Ruffolo's body was found by a hiker, Mr. Mattingly, in a culvert running under Humpback Road, a narrow, twisting road in a heavily wooded area between Sooke Road and the Trans Canada Highway. Humpback Road is 15 to 17 kilometres from Tulip Avenue, depending on the route taken.
- [97] According to Sgt. Bellanger, the culvert is actually an old water line made of cement and heavy wire. It angles from the southwest to the northeast, under the road. The inside diameter of the water line is 1.07 meters. On the far side of the road from where the body was found, below the level of the road, the cement is broken, with a large hole in it, 1.5 meters across. There is a smaller hole on the lower side of the road, 90 centimetres by 70 centimetres, through which a hand was visible to Mr. Mattingly. Just beyond this hole, the water line is blocked off by cement.
- [98] Mr. Mattingly was hiking along the top of the water line, something he had never done before. He saw what looked like a hand through the hole in the cement. He gave the hand a little touch to see if it was plastic. He realized it wasn't and backed off and called the police.
- [99] The body was wedged into the culvert under pieces of wood and rocks, with the head close to the smaller opening but covered by debris, including a large log. The body and legs were pointed back into the culvert under the road. No serious issue was taken with the impossibility of a body being placed into the location where it was found. The only possible inference is that it was placed at or into the large hole on the other side of the road and was washed through the culvert in the heavy rains of that week. Cst. Leblanc testified the rains were torrential. Mr. Mattingly also said the rains were heavy in the preceding days and the ditches in that area fill with water during heavy rains. He said there was water in the ditch that day, although the level had dropped from the debris line. An admission was filed that

October 2003 holds the record for monthly rainfall for Victoria since 1961, when recording commenced.

[100] The body was removed from the culvert by a member of the Coroner's team. Cst. Leblanc said it took some time. The Coroner's assistant had to stand in the depression under the pipe and remove the body through the hole. It was difficult because of the debris. John Ruffolo's body was clothed in a green sweatshirt, nylon track pants that snapped up the side, socks, and one shoe. The pants were down. He was wearing a wedding ring.

[101] The area was searched and various drug paraphernalia was found, including needles. No further reference was made to these items, other than that they did not contain heroin.

October 26, 2003 - notification of death by Cst. Ferguson

[102] The body was positively identified to be that of John Ruffolo on October 26, 2003. Once the matter became a homicide investigation, it was turned over to the Westshore RCMP. Cst. Ferguson was assigned to advise Ms. Ruffolo that the body had been found. He was briefed on the information obtained in the missing person investigation and told to obtain what information he could from Ms. Ruffolo. He said at that point, Ms. Ruffolo could have been a victim, a witness, or a suspect. This statement was ruled admissible on the voir dire.

[103] After several attempts, Cst. Ferguson set up an appointment through Mr. Brennan for 2:30 p.m. October 26, 2003. He arrived at that time. Ms. Ruffolo came out of the house, left in her car, and returned in 10 minutes with Mr. Brennan. Vivian Kirkland was present at the house and for the interview.

[104] Cst. Ferguson's conversation with Ms. Ruffolo was taped. A considerable amount of time was spent during the trial before the jury on the issue of whether the tape was being played at the proper speed and whether it accurately reflected or was distorting the pitches of the voices. Defence obtained engineering assistance to create another tape at a slightly slower speed, which resulted in Cst. Ferguson's evidence being fragmented over several weeks. In my view, nothing turned on it in the end.

[105] Ms. Ruffolo began by asking Cst. Ferguson not to give her bad news. She left the living room with Ms. Kirkland and Cst. Ferguson followed them to the kitchen. He heard them talking and asked Ms. Ruffolo to come back to the living room.

[106] He told Ms. Ruffolo her husband's body had been identified on Humpback Road. Ms. Ruffolo said over and over "Are you sure, you have to be sure." Through the first part of the tape, Ms. Ruffolo appears to be very emotional, breathing loudly, crying, out of control.

- [107] During the lengthy conversation, she told Cst. Ferguson one of John's sisters had "got him back involved in drugs." The officer asked what kind she meant. She said she knew he did some marijuana, acid, and then asked Ms. Kirkland, "What was that other stuff that one of the tenants saw on the table, a pipe or something?" Ms. Kirkland said, "Oh, it's a heroin pipe." Ms. Ruffolo said she had some problems with John Ruffolo's extreme mood swings, but he promised her he would do what he did before, which was cut himself off and quit.
- [108] Ms. Ruffolo said she had been assuming John Ruffolo was alright since Wednesday because two people had seen him at the Knockanback Grill. She said their marriage was good, although there had been a bad period around the time when her son hung himself. She told Cst. Ferguson they had put all their property and bank accounts in John Ruffolo's name so they could avoid "death duties" when Ms. Ruffolo got sick.
- [109] Substantial cross-examination of Cst. Ferguson, as with most of the police witnesses, was aimed at showing that the police improperly focussed on Ms. Ruffolo right away, to the exclusion of pursuing other leads. Each officer explained his role, which was to follow up particular things to which they were assigned, not to investigate every lead themselves. The case management team was in charge of the entire investigation and would make decisions about who followed up what matters.
- [110] Every witness who had known John Ruffolo was asked if they ever saw him display any indications of drug use or drug dealing, particularly heroin (Angel McIntyre, Jason Amos, Norm Westaver, Bruce Morrow, Kathy Roy, Chris Aspelund, Sue Mockford, Russell Brown, Dilek Sensoy, Sarina Ruffolo said he used only marijuana, Lois Ruffolo, Linda Horton, Jonathan Horton, Jamie Huson, Robert Johnson, Douglas Murray - except his speculation about cocaine and John Ruffolo's behaviour before his death, which I will deal with later, Vivian Kirkland said he used only marijuana). None had. Many were familiar with heroin use, either personally or because they dealt with heroin addicts in the course of their work. The effects of heroin were generally described as being "on the nod," showing an inability to concentrate, "pinned" pupils, irritability and mood swings.

Investigation to Arrest

- [111] On October 28, 2003, Robert Johnson went to the police and made a statement.
- [112] The investigation continued through the fall of 2003. Reference was made several times during cross-examination to witnesses' suspicions of "bugs" in the house and cars, but no wiretap evidence was adduced.
- [113] A search warrant was executed on 994 Tulip Avenue on March 3, 2004. Prescription bottles of amitriptyline were found in both Douglas Murray and Vivian Kirkland's rooms.
- [114] Douglas Murray, Vivian Kirkland, and Ruby Ann Ruffolo were arrested on March 4, 2004. Both Douglas Murray and Vivian Kirkland gave lengthy statements on which they were cross-examined. Mr. Murray was told the next day he was not a suspect.

- [115] At some point, Robert Johnson, Neil Klatt and Douglas Murray were removed from their respective residences by the police and given a minimal amount of money for alternate accommodation and food.
- [116] On December 21, 2007, Vivian Kirkland pleaded guilty to offering indignity to the remains of John Ruffolo and received time served (19 days) plus two years of probation.

The Pathology evidence

- [117] A toxicologist, Heather Dinn, testified that on October 30, 2003, she received a number of samples of blood from John Ruffolo's body, from the heart, the pulmonary area between the lung and heart, the liver, the stomach and from the femoral artery in the leg. She also received urine samples. These samples were taken during the autopsy performed by Dr. Boone on October 28, 2003.
- [118] She was asked to analyze them for the presence of drugs that affect mental/motor function.
- [119] She discovered morphine, amitriptyline, and a metabolite (a substance from the parent drug converted by the liver for purposes of excretion) of amitriptyline called nortriptyline in each sample except the stomach which contained only amitriptyline and nortriptyline. No other drugs or alcohol were detected, except a therapeutic level of codeine which could have come from a pharmaceutical or could be a by-product of the heroin. The morphine metabolite in the urine indicated that the morphine was heroin.
- [120] Ms. Dinn explained that in a chronic user of amitriptyline, the levels of amitriptyline and the metabolite nortriptyline will be about equal. Here the level of amitriptyline was so much higher than that of the metabolite that acute use was indicated.
- [121] Ms. Dinn said drugs will move from blood to tissues when a person is alive, but when a person dies, drugs in the tissues will go back into the blood and the concentration can become elevated after death. This is not so much of a concern in the legs because of the distance from the absorbing tissues. Therefore she relied on the femoral blood as a more accurate indicator of the levels of drugs at the time of death.
- [122] For morphine, any reading over .2 micrograms per millilitre of body fluid is potentially fatal, whether for a tolerant or a non-tolerant user. Here the level of free morphine was .25 ug/mL, and the level of total morphine was .39 ug/mL. This level could result in death.
- [123] She testified that amitriptyline is an old prescription drug used to combat depression. It is a mood elevator but a body system depressor. It is usually taken orally and has a bitter taste. It has fallen out of favour because of the availability of non-toxic drugs such as Paxil and Zoloft. A dose over .5 ug/mL is toxic. A lethal dose is 1.0 ug/mL or greater. Here the level in the femoral blood was .84 ug/mL, which is toxic to lethal. She said this level is potentially fatal and there was a potential for death from the amitriptyline alone. She said the concentration was far more than a therapeutic dose but would not give an opinion on how many tablets would be required to reach this level of amitriptyline. She said the sedative

effect of the amitriptyline would begin in about 30 minutes, with maximum effect in two to four hours.

- [124] Ms. Dinn said once drugs are combined, the risk of fatality is elevated. Adding morphine to the amitriptyline and the nortriptyline resulted in a much greater risk of a lethal outcome.
- [125] Ms. Dinn could not say which drug was administered first. She said, using common sense, if the heroin were injected intravenously, the effects would be felt very quickly, so it would be less likely someone would then swallow amitriptyline, but if the heroin were injected intramuscularly, the effect is slightly delayed and the amitriptyline could have been taken orally. Oral ingestion of heroin results in the slowest manifestation of effects.
- [126] Ms. Dinn said the toxicological marker 6-monoacetylmorphine takes 30 minutes to metabolize. The marker was not in the blood, so there was at least 30 minutes between use and death. There is a disagreement in the scientific community regarding the significance of free morphine versus total morphine in estimating time of death. Some researchers say death would ensue within 3 hours. Some say that is not reliable.
- [127] Ms. Dinn said amitriptyline is more valuable when assessing time of ingestion to death. Amitriptyline metabolizes to nortriptyline slowly. Nortriptyline begins to appear after 2 hours and is equal to amitriptyline in 8 - 12 hours. Ms. Dinn said the range of time between use of amitriptyline and death would be at least 2 hours and no longer than 8 to 12 hours. Here, because the amitriptyline and nortriptyline were not equal (.56 / .28 ug/mL), ingestion to time of death would not be less than two hours and not more than 8-12 hours, although at the end of that time range, she would expect the concentrations of amitriptyline and nortriptyline to be more even.
- [128] Ms. Dinn said there would be no pharmacological benefit to a heroin user from taking amitriptyline.
- [129] Dr. Boone, the forensic pathologist, could find no other cause of death in the autopsy conducted on October 28, 2003, and in her final report of December 23, 2003, relied on the toxicology report, dated December 10, 2003, to come to the conclusion that the cause of death was consistent with acute heroin and amitriptyline toxicity.
- [130] She found a puncture wound and subcutaneous bruising on the inside of the left elbow; she found the same subcutaneous bruising on the inside of the right elbow typical of a puncture wound although no definitive puncture wound was visible to the naked eye. She saw no evidence of healing, which is consistent with the bruises occurring at or about the time of death. She saw no evidence of chronic drug use.
- [131] Dr. Boone found no tablets in the stomach contents.
- [132] She found four superficial blunt force abrasions on the head; all occurred before death, were consistent with the head striking a blunt surface or vice versa, and none were relevant to cause of death.

- [133] Dr. Boone said it was not possible to set a time of death. There were too many factors and too many variables. Environmental factors such as cold temperatures, cold water, and individual variances such as medications and weight influence the rate of decomposition.
- [134] In cross-examination, Dr. Boone said she did not see any evidence of chronic intravenous drug use; she could not comment on other methods of ingestion.
- [135] She said her reading of the literature indicates that rigor mortis, the stiffening of the muscles that begins immediately after death, becomes fixed in 12 - 18 hours. She was asked to agree that it passes in 24 - 36 hours but said she was not familiar with those numbers and that it was open to great variability.
- [136] She agreed there was no evidence to suggest the body had been submerged for a length of time, although the wrinkling of the hands and feet suggested exposure to moisture. There was no evidence of drowning.
- [137] At the time of the autopsy, October 28, 2003, Dr. Boone noted mild rigor in the major joints, passing. She said refrigeration slows the process but does not stop it.
- [138] Rigor mortis can be broken, but once broken, it does not reform.
- [139] Dr. Boone was asked to comment on Mr. Mattingly's evidence that he touched the hand with a hiking staff and it did not move; she said she would not base any opinion on another person's observations, but if a hand does not move, it suggests the presence of rigor mortis.
- [140] She was referred to a photograph of the body in the culvert, with the right hand resting on a thick branch in the debris; then the branch was removed and the hand stayed in the same position. She agreed it looked like rigor mortis was present.
- [141] She agreed that if a body were "stiff as a board", and then placed in the culvert, it would not be scientifically possible for rigor to be broken and reform as indicated by the hand remaining in position once the branch was moved.
- [142] She agreed that the position of the hand was scientifically possible if the body were placed in the culvert before rigor mortis had formed and it developed in that location.

Defence Evidence

- [143] Ms. Ruffolo denied all of the events of October 19, 2002 as testified to by Robert Johnson, Douglas Murray and Vivian Kirkland. She said she had no involvement in her husband's death. She said she left him sleeping at home on the morning of Sunday, October 19, 2003 and assumed when she returned that night after a long day of looking after the rental properties that he had gone to work at Brinks. She received the call from Brinks asking where he was; she checked to see if his uniform was there. It wasn't so she said she assumed he was on his way. She did not check again until the next morning when she phoned Angel McIntyre on Monday morning. She did not recall where her daughter was that night.

- [144] She said Vivian Kirkland was a tenant, not a friend, but she relied on her in the days after John disappeared.
- [145] Ms. Ruffolo denied ever meeting with or speaking to Tessa Lloyd. She denied the conversations with the Hortons, saying the Hortons had actually approached both her and Mr. Ruffolo separately, with an offer to kill the other for insurance money.
- [146] Ms. Ruffolo denied having conversations with Lois Ruffolo at Thanksgiving.
- [147] Mr. Whitman testified for Ms. Ruffolo. He said he had moved into 994 Tulip Avenue early in 2003. He had a conversation with Mr. Murray and Ms. Kirkland in which they told him John Ruffolo had not died the night he had disappeared. Instead, he had gone into hiding from drug lords and had attended a party a few days later at which Ms. Kirkland had accidentally injected him with an overdose of heroin. They said the men at the party carried him to a car and dumped the body in the woods.
- [148] Several other witnesses, including Jovanna Ruffolo, were called by the accused and I will refer to their evidence during relevant parts of the analysis.

New Evidence

- [149] I will now set out the evidence called by the defence as a result of their application to reopen their case brought on November 3, 2010. The application was allowed and defence called an additional witness and filed an admission with respect to John Ruffolo's pager.
- [150] The witness, referred to as Mr. X for publication purposes although named in open court, is now retired from his occupation as a driver and heavy equipment operator and testified that he is in frail health. He said he lost his company due to the NDP government and their unions, and was forced at some point to take up driving for a drug dealer, "Y," who was related to him. Mr. X said in the fall of 2000 he drove the dealer to a location on Rock Bay and David to sell some heroin. A man approached the open window, acting aggressive, threatening, wide-eyed and yelling, and an exchange of heroin for \$200 took place. The man told Y the heroin better be good; he wanted the same deal as the prostitutes got. Mr. X asked Y why he had accepted that behaviour, and the dealer said the man was "a pig, the Man," and was a guard at Wilkinson Road. The dealer said he had to accept the behaviour or he would get a rough time next time he was in jail.
- [151] Mr. X said the man bought \$200 worth of heroin in a particular type of package. Mr. X was in the driver's seat and the man was standing at the passenger side window. Mr. X said the man had a roundish face, short hair, and was unshaven. He said the man was fat, about 200 pounds. In examination in chief he said the man was between 5'8" and 6' tall, in cross-examination, he settled on 5'10", which is John Ruffolo's height.
- [152] Mr. X said he saw the same man again in the same area in the spring or summer of 2001, at twilight, from 30-50 feet away.

- [153] Mr. X said he saw a picture of this man in the newspaper last spring sometime and read the article, which was about the trial. On the first day he testified, he said he learned that Ms. Ruffolo had apparently bought heroin for this man, and Mr. X thought to himself that she did not have to do that as the man knew all the major dealers. Court was adjourned to the next day because the issue of the publication ban arose. The next day, Mr. X said the article gave the impression that the man was "snow white", a fine upstanding member of the community, and that someone else had gotten him drugs but it never said anything about John Ruffolo not being involved in the heroin trade, which Mr. X purported to find extremely funny. He said he considered it for awhile as he did not know these people and it was nothing to him, and then decided to come forward, although he was afraid for his safety.
- [154] According to the affidavit filed in respect of the application to adduce this additional evidence, Mr. X had approached Mr. Lyon in July, 2010, which was when final submissions were taking place. In cross examination, Mr. X said he was pretty sure he had seen the article this year, but it could have been January, February, March or April. (There was no evidence or submissions taking place then, so it is unlikely there were newspaper articles setting out details of the case in those months).
- [155] Mr. Lyon informed the court that he had been unable to give the man the assurances he required for his safety and so was unable to call him as a witness before this late date. For some reason, the assurances now provided by the ban on publication have proven sufficient for this witness to agree to take the stand.
- [156] The Crown sought and obtained an admission from the defence that Y, the dealer Mr. X said he was driving for in the summer and fall of 2000, was in custody from July 2000 to the end of March 2001.
- [157] On November 3, 2010, the defence sought the release of a pager entered into evidence during their case, which Ms. Ruffolo and Jovanna Ruffolo had testified belonged to John Ruffolo. The next day, an admission was filed stating that Telus was able to identify the pager by its serial number as belonging to John Ruffolo in October 2003.

EXAMINATION OF THE EVIDENCE

- [158] There is no definitive forensic evidence as to time of death; time of death is crucial to the defence position. The Crown's case, which is based on John Ruffolo being killed the night of October 19, 2003, depends on the credibility of Robert Johnson, Douglas Murray, and Vivian Kirkland. The other witnesses are significant to the extent that they bolster or detract from the credibility of these witnesses.
- [159] It is the contention of the defence that the evidence of each of these three witnesses is so frail and unreliable that it cannot be accepted, and cannot ground a conviction. Each is unsavoury and must be viewed with the strongest suspicion. In addition, the defence contends they colluded with each other and cannot be used to corroborate each other. As

well, the defence says their position that John Ruffolo died after October 22, 2003 is supported by the witnesses who saw him having lunch at the Knockanback Grill. They say this date is more consistent with the forensic evidence as well, and the failure of the Crown to prove beyond a reasonable doubt that John Ruffolo died on October 19, 2003 is fatal to their case.

[160] It is therefore necessary to go through the evidence of the crucial witnesses in more detail.

[161] I will start with Linda Horton, Jonathan Horton, and Tessa Lloyd. While their evidence concerns events a year and a half before John Ruffolo's death and in that sense they are not essential to the Crown's case, a great deal of time was spent on this evidence, particularly of Jonathan Horton and Tessa Lloyd.

Linda Horton

[162] Linda Horton testified that she met Ruby Ann Ruffolo and John Ruffolo in 2000. They were her landlords. Both the Ruffolos and the Hortons lived on the ground floor of the apartment building owned by the Ruffolos on Esquimalt Road. Ms. Horton described the building as looking like a converted motel.

[163] Linda Horton said in the spring of 2002, Ruby Ann Ruffolo came by their apartment and knocked on her son's window. She heard them talking. Jonathan Horton came out of his room and said Ruby Ann wanted him to go for a drive with her. She was driving the red Tempo. Ms. Horton found this request unusual.

[164] Her son returned in about 45 minutes. Ms. Horton followed him to his room; he pushed past her and said "She asked me to kill John, okay." He told her Ms. Ruffolo had offered him \$10,000 to do it. Ms. Horton said she was enraged at the thought that someone would endanger her son. She stormed out to confront Ms. Ruffolo.

[165] She knocked at the Ruffolo's door and John Ruffolo answered. Ms. Ruffolo immediately came out and steered Ms. Horton to the red Tempo, saying she would explain everything. Ms. Horton said Ms. Ruffolo told her she really needed Jonathan's help. She was crying and distraught. She said she was suffering threats and abuse and there was no other way but to have John killed. She said she would give them half now and half later. She showed Ms. Horton her green bank book which had \$5,003 in it. Ms. Horton said she should consider divorce. Ms. Ruffolo said no, that would mean he would get half the money and it was all hers.

[166] Ms. Horton said her anger about Ms. Ruffolo's attempt to use her son abated as she listened to Ms. Ruffolo and she became concerned for Ms. Ruffolo herself as they drove. They had driven to Ms. Ruffolo's daughter's school. The daughter and a friend came out and got in the car. Ms. Ruffolo told her daughter she was upset because Mr. Horton's dog was dying.

- [167] Ms. Ruffolo took Ms. Horton back home and told her not to say anything. Ms. Horton and Jonathan Horton discussed what had happened.
- [168] Ms. Horton said she did not speak to Ms. Ruffolo after this event. A couple of weeks after the incident with Ms. Ruffolo, on March 28, 2002, Jonathan Horton and Ricky Burton got into a fight. The police were called. Ms. Ruffolo yelled at Ms. Horton that she wanted her out.
- [169] Shortly after, John Ruffolo came to see Ms. Horton and told her something bad was about to happen and they would have to move. Ms. Horton told John Ruffolo about her conversation with Ms. Ruffolo. She said her son was not present. John Ruffolo agreed to give her a rental reference and they moved out. Ms. Horton said she last saw the Ruffolos on the street, hand-in-hand with their daughter, after the Hortons had moved out and thought they looked good.
- [170] Ms. Horton said her son had been diagnosed as diabetic a year before this. She said she had discussed this with Ms. Ruffolo, who had suggested they inquire about oral insulin.
- [171] Ms. Horton admitted she uses heroin. She said she never saw any signs of heroin use by John Ruffolo. She has mixed heroin and cocaine. Although she had heard of amitriptyline, she had never mixed it with heroin.

Jonathan Horton

- [172] Jonathan Horton, also known as Jonathan Moshizuki, and "JP", testified that Ms. Ruffolo came to their apartment and wanted to go for a ride and talk to him about something. She was angry and upset, not happy with her husband, and wanted him dead. She said he was cheating on her. She wanted to hire Jonathan Horton to kill him. He said she offered \$5,000, half before and half after.
- [173] He said she did most of the talking. He told her he would talk to her later. She took him home and he told his mother about it. His mother went to confront Ms. Ruffolo.
- [174] Jonathan Horton testified that his mother told John Ruffolo about the conversation. He said he thought he had been present for this conversation, and had told the police that, but now thinks he must have mentioned it later to John Ruffolo, after his mother had already told him.
- [175] Jonathan Horton said he never got back to Ms. Ruffolo about her proposal. He had a fight with Ms. Ruffolo's son Ricky Burton and they moved.
- [176] Both the Hortons were extensively cross-examined, Jonathan in particular. He was confrontive, argumentative, evasive, and inconsistent. He has an extensive criminal record.

- [177] Jonathan Horton had said in his statement of October 29, 2003 and during his evidence on the voir dire that he did not recall Ms. Ruffolo mentioning an amount. At trial he said he did not know why he said that; he recalled Ms. Ruffolo said she did not care about the cost, but she offered him \$5,000.
- [178] Mr. Horton also answered a number of questions in his statement based on the assumption that there were no wounds on Mr. Ruffolo's body when it was found, suggesting it was planned. He said he did not know where he got that idea and said he was guessing.
- [179] Mr. Horton said he has discussed this matter with his mother and other people, although he and his mother did not discuss her evidence before he began to testify.
- [180] Ms. Horton was generally consistent in her own testimony, although many details conflicted with Jonathan Horton's evidence. Much of the cross-examination of Ms. Horton centered on her son and her knowledge of his activities and his friends. She was overly concerned for her son, seeing him as an ill person with poor judgment, who is in need of protection.
- [181] There are two pieces of evidence that are relevant to an assessment of the Hortons' evidence. One is the chat line conversation with Jamie Huson and the other is the evidence of Tessa Lloyd.
- [182] Before dealing with that, however, it should be noted that Vivian Kirkland testified that Ann Ruffolo told her John Ruffolo had asked the Hortons to kill her for \$5,000 so she asked them to kill him for \$5,000. "Isn't that a lot of bullshit," Ms. Ruffolo said, laughing, according to Ms. Kirkland. Ms. Kirkland said she did not know the Hortons, but Ann Ruffolo told her they used to be tenants. This conversation took place before John Ruffolo died.
- [183] Mr. Murray also testified that Ms. Ruffolo told him, some months before John's death, that some tenants approached John and offered to kill Ms. Ruffolo for \$3,000, then came to her and offered to kill John for \$3,000.

The chat line

- [184] Jamie Huson testified that she had an intimate relationship with John Ruffolo after she met him in the spring of 2001. She said they communicated regularly through a computer chat line. After two years she decided to end the relationship as long as he stayed with his wife.
- [185] On March 29, 2003, she participated in a chat with John Ruffolo. The conversation begins at 13:12, with John asking if she was there. She did not join the conversation until 18:27.

John Ruffolo begins:

Hi Jamie Im sorry Im bothering you but I just learnt something and Im scxared to death literally are you there? It's nothing to do with us, ok, um, ok, im writing this to have it on record that if something happenes to me this will be archived and that its on record. I had an adult female tenant of mine named Linda m come to me and tell me that Ruby had taken her son for a car ride

3 weeks ago...im assumming about the same time I told her I was leaving. She then told me that Ruby asked her son to kill me in return for \$20,000 dollars. To prove this she took him to a bank to prove the money was in the bank. The son told her he wouldnt do it and that she should get someone else and apparently thats happening. My gut feeling is that Linda is telling me the truth because she was able to give me details of our relationship that no one knows about For over 2 weeks now Ruby has been claiming that she has spoken to someone that says I was planning to kill her (Ruby) and offered \$10,000 to do it...which I now beleive is just a deflection as to whats really in the works. The tenant Linda says she beleives her son has been asked to do it and today Ruby says that she is calling back her brother from Edmonton because she needs him...for what eve reason. Put this on your archives and don't erase it...im taking it seroiusly and Im probably gettin the cops to deal with it. Bye.

[186] Several hours later, Jamie Huson joined the conversation:

JH: hereia iam

JR: is away. (Sorry I am busy right now. Please try later." Im playing a guy chess just read that stuff and i should be done in about 15,mins..or you could go into chess?

JH: I read whats here there's nothing

JR: no way! Nothing thre about \$20000 u sure?

JH: I chekced archhives I thnk I may ahve found it

JR: who read that then? FUCFK!

JH: I don't think anyone did. i'm reading it now

JR: oh

JH: so Ruby asked the neighbours son to kill you?

JR: ya. its true I think.

JH: because she thought you asked someone to kill her?

JR: no shes making that part up as a diversion from what shes planning

JH: the neighbour?

JR: Im in absloute shock.

JH: I can tell

JR: these r tenants she knows would do it...criminal element type people.

JH: so will the neighbour make a statement o thte cops?

JR: yes

JH: when are you getting on that?

JR: there was a knife fight last night involving them

JH: involving who?

JR: dunno...her son and the guy who was to be hired. if something happens you know now ok

JH: what? ruby's son and the neighbours son got in a knife fight?

JR: with swords...big cop scene

JH: so when did you mention to the police your wife was trying to hir some one to kill you?

JR: I havent yet...just learnt today the tenant aproached me...says shes known for 3 weeks

JH: so when are you?

JR: so when am I what?

JH: telling the police

JR: she drove the guy to one of my banks and showed him theres enough money to cover it

JH: I guess the neighbour mom believes her son would do it?

JR: he's been convicted for assualt mega times

JH: was linda in the car too?

JR: on a seperate occasion not the first time. How was the Waddling Dog Inn?

JH: the first time was when your wife showed the guy the money?

JR: yes

JH: maybe you should get as many details down as possible

JR: cant beleive its even real...but Linda gave some convincing details

JH: like whats the neighbours last name and what the poss.perp.'s name

JR: John Morshizi also known as JP

JH: mom has same lst name

JR: ya

JH: k

JR: dont know if that sspellings right

JH: what else maybe some times or plans or something?

JR: um..thers still sonme plan yet...ill got to the police. just when I told her I was leaving

JH: I'm trying to print this up also. hang on I'll put it in another file.

JR: yuo are

JH: yes

JR: jamie its ok. I just wanted someone to know in case something happens.

[187] The conversation continues for some time with John Ruffolo musing about his relationship with Ms. Huson, and resumes in the late evening with someone else in Ms. Huson's household using the same chat line name, where he repeats some of the same information. That person advised him to take all his money out of the bank so Ms. Ruffolo could not pay anyone. Mr. Ruffolo said he had five different accounts for different mortgages, and said the properties were all in his name.

[188] The defence contends that John Ruffolo did not believe what Ms. Horton had told him or he would have gone to the police. He simply used this event as an excuse to get back in touch with Jamie Huson.

Tessa Lloyd

[189] Tessa Lloyd is a youth and family counsellor for the Saanich School District.

[190] In 1996, she worked at George Jay Elementary School in Victoria.

[191] Ms. Lloyd testified that she met Ruby Ann Ruffolo in 1996 when the daughter, Jovanna, was in Grade 1. Ms. Lloyd said the Grade 1 teacher, Mr. Langheldt, called her in to support him in the first parent teacher interview of the year. It lasted 15 minutes. She said she met Ms. Ruffolo various times over the next several years.

[192] In the spring of 2002, Jovanna was in Grade 6. By that time Ms. Lloyd had her Masters degree in counselling. She became a registered clinical counsellor that year. She worked in various roles in the school, supporting parents and children in individuals and groups. She ran the Parent Resource Room for parents.

[193] Ms. Lloyd testified that Ms. Ruffolo asked to meet her for counselling. She recalled Ms. Ruffolo approaching her in the cloakroom, wearing a duffel coat and a scarf. After each meeting, they would arrange the next. Ms. Lloyd said they had about six formal sessions over the winter months until May. Jovanna was there for one meeting. Ms. Lloyd kept no records of the meetings.

[194] Ms. Lloyd said she could not remember the specific words used, but Ms. Ruffolo told her she had marital problems. She described her relationship with John Ruffolo. She said she was desperate to leave or end the relationship. She said John was despicable, a slum landlord, overweight, and lazy. She hated him and wanted him out of her life. She felt he was an impediment to Jovanna's success in life.

- [195] Ms. Lloyd said her job was to identify courses of action so she suggested things Ms. Ruffolo could do. Ms. Ruffolo said if she were to divorce John she would not come out with money to let her lead the life she had. She felt he would twist the system, be evasive, and hide assets. Ms. Lloyd suggested leaving him and living with friends or family, or going to a transition house. Ms. Ruffolo said that would not work. The only possible avenue was for John to be dead.
- [196] Ms. Lloyd said that theme comes up repeatedly in sessions with parents in conflict. However after a couple of sessions, the person shifts to practical approaches. Ms. Ruffolo's theme never changed. Ms. Lloyd said Ms. Ruffolo was stressed and anxious but not tearful.
- [197] Ms. Lloyd said Jovanna was good at anything she took on. She recalled details of her school activities that were confirmed by Jovanna herself - that she played chess and was a "fabulous swimmer."
- [198] Ms. Lloyd became aware that Mr. Ruffolo was dead and that Ms. Ruffolo had been charged. However, she only went to the police in March of 2009 after she read an account of the Crown's opening statement in the paper. The newspaper report of the opening statement, which was entered as an exhibit, contained the following sentence: "The jury will hear that in the spring of 2002, Ruffolo tried to pay a 20-year-old Esquimalt man \$5,000 to kill her husband." Ms. Lloyd said she realized her experience was likely relevant so she called the police.
- [199] Ms. Lloyd was cross-examined extensively. Her evidence was first heard in a voir dire, and she admitted to the jury that she had been mistaken initially in the year she reported these events occurring, and that she had thought Jovanna was in Grade 7 in Ms. Cavanagh's class. She said instead that Jovanna was in Grade 6 in Ms. Lennie's class.
- [200] Ms. Lloyd admitted she called the school after speaking to the police in order to assist her memory as to which year the conversations took place. She remembered it was the spring of the year, that Jovanna was in a senior class, and that she was in a particular classroom. She could not recall if the classes were straight single grade classes or split classes. She connected the classroom with Ms. Cavanagh, but did not recall that Ms. Cavanagh had retired and that Ms. Lennie was teaching in that classroom that year. She said she knew these events had not occurred during her last year at the school, and Ms. Lloyd left the school in 2003.
- [201] Defence adduced by admission a letter from the Greater Victoria School District stating that Grades 6 - 8 were moved from George Jay to Central Middle School in the fall of 2002, so Jovanna Ruffolo went to that school for her Grade 7 year.

- [202] Defence called Mr. Langheldt, now 76 and long retired. He testified that he had the highest respect for Ms. Lloyd, saw her as an asset to the staff and a positive influence. Mr. Langheldt said he was involved constantly in counselling. He said he did not recall asking Ms. Lloyd, who was not a counsellor at that time, to come to a counselling meeting and would not do so. He was not asked about his practice with respect to initial parent teacher interviews and whether he considered those counselling sessions.
- [203] He said he did not recall having Jovanna Ruffolo as a student and did not recall ever meeting her or Ms. Ruffolo. In fact, from the school records, it is apparent that Jovanna Ruffolo was his student that year, and from Jovanna Ruffolo's evidence that he was her teacher for the entire year. He said in cross-examination that he could be mistaken about Tessa Lloyd, and the best he could say about meeting Ms. Ruffolo was he didn't remember.
- [204] During Tessa Lloyd's evidence, Ms. Lloyd was asked to look around the courtroom to see if she could see Ms. Ruffolo. She could not. Ms. Ruffolo had been allowed to sit at counsel table throughout the trial on the basis that her active participation in her defence was crucial to counsel, and kept her head down writing notes at all times. She rarely if ever raised her head during the trial. There was a TV monitor on the table between her and the witness box. Ms. Lloyd said she saw the woman seated at counsel table but she was behind the monitor and never looked up. She assumed she was part of the defence team.
- [205] Ms. Lloyd testified that she did see Ms. Ruffolo the next morning outside court and spoke to her. Ms. Ruffolo told Ms. Lloyd she did not know who she was and would not speak to her unless her lawyer was present.
- [206] Ms. Ruffolo, in her testimony, said she did not know Tessa Lloyd and never had any dealings with her. Jovanna said she knew Tessa Lloyd at George Jay Elementary School but denied ever speaking to or taking counselling from her.
- [207] I will now move to the evidence of Robert Johnson, Douglas Murray, and Vivian Kirkland.

Robert Johnson

- [208] Robert Johnson was a close friend of Neil Klatt in October 2003. Neil Klatt is Vivian Kirkland's foster brother. Robert Johnson was an alcoholic. He used to use heroin. Neil Klatt died in 2005; Robert Johnson has died since he testified before the jury.
- [209] Mr. Johnson was very nervous and anxious on the stand, but he appeared to give each question thought and took time to answer carefully. However, it became clear that his memory for the details of events six years before was confused and easily challenged.
- [210] Mr. Johnson said he worked on and off for John Ruffolo, painting and cleaning rental units. He said he did not deal much with Ann Ruffolo, although he met her. He dealt mainly with John.

- [211] Robert Johnson said two to three weeks before John Ruffolo's death, Vivian Kirkland and Ann Ruffolo picked him up in Ann's blue-green car and took him to a park at Crystal Pool. Ms. Kirkland had made the arrangements with him to be picked up at Neil Klatt's place, where she often hung out. He was told he would be doing some work, and was encouraged to go to the meeting because Vivian Kirkland had bought him an \$8 bottle of sherry of the kind he preferred. They sat in the bleachers by the soccer field.
- [212] Mr. Johnson said there was not much talk in the car. Once seated on the bleachers, he was immediately asked if he would kill John Ruffolo and how he would go about it. He said Ruby Ann Ruffolo said John had just started a new job at an armoured car service. She said he was abusing her in some way.
- [213] Mr. Johnson said both women talked to him and were involved in the discussion, but Ms. Ruffolo was the one asking him to kill John. She did not disagree with anything Vivian said during the discussion. He did not recall which one asked him how he would go about killing someone. He said their demeanours were businesslike, but he never assumed they were serious and would go through with it.
- [214] Mr. Johnson said he told them there was no way he would do it but he mentioned a method - a heroin overdose, or "hot capping." He has seen it used on "Oz," a prison show on TV, the night before. He said hot capping is done by injecting someone with a large quantity of heroin. He said he told the women you could inject someone anywhere with a large quantity, it would take effect quickly, and the person would die. He said he threw out a general figure of \$150 worth of heroin. He said he had overdosed a few years before on \$10 worth of heroin, so with \$150, there would be no hope of being revived. In his statement to the police, he had said the women came up with that amount as a guestimate, or maybe it was all the money they had to spend. He testified that he was embarrassed to explain it was his idea, and was worried about a conspiracy to commit murder charge.
- [215] Mr. Johnson said the women asked him if he could find the heroin for them. He told them he could not because he didn't use it. He said he believed both asked him; both were present. He had said in his statement that Vivian showed up at Neil's place saying she had \$150 with her, asking if Neil could buy \$150 worth of heroin for her but Mr. Johnson said he did not know any people to buy heroin from so could not help her. He testified he assumed the money was Ann Ruffolo's. Vivian was on welfare and he had never seen her with \$150 to spend. He said Ms. Ruffolo waited in the car. She did not have the connections and Vivian knew "the druggie people".
- [216] Mr. Johnson said the meeting in the park lasted fifteen to twenty minutes. He was taken back home and dropped off. He told Neil Klatt about it. He did not go to the police because he thought it was just a bad joke.

- [217] After the meeting, he was asked to come to dinner at Vivian Kirkland's house, out of the blue. He had never been asked before. She took him to her place on the bus. She lived in a basement suite out by Interurban Road. Another fellow was there, whom he described as "a homosexual" - Mr. Johnson did not know him and never saw him again. It appears from later evidence that this was Douglas Murray.
- [218] Vivian Kirkland bought Mr. Johnson another bottle of sherry, which he found odd. He said he was basically sober when he went, but drank the bottle there. He woke up in the drunk tank. He said this was the first time that had happened to him in Victoria. In cross-examination, the records of other times in the Victoria drunk tank were put to him. He admitted them and said he had not remembered them.
- [219] Mr. Johnson was living on the third floor of a rooming house for single men on Fisgard Street in Victoria. He testified he was shocked to have Ms. Ruffolo knock on the door to his room where he was watching TV and ask him to come and do some heavy lifting. This was later in October. He said she had never been there before and he had never spoken to her alone. She was always with Vivian Kirkland.
- [220] Mr. Johnson said it was just getting dark. He said he knew the date was a Sunday because the buses weren't running on their regular times, and he eventually had to walk back home from Ms. Ruffolo's house.
- [221] Mr. Johnson asked Ms. Ruffolo if there would be alcohol available. She said they would find some for him. She drove him to her house in the blue-green car; this was the same residence where he had had dinner with Vivian Kirkland.
- [222] Ms. Ruffolo pulled up in front on the street and got out of the car. There was another car parked in the driveway. Vivian Kirkland came out of the house. In his statement to the police, he had said Ann Ruffolo went into the house and came out with Vivian Kirkland. He testified that he had said that, but it was five years ago and he was very nervous when he gave his statement; he just remembered pulling up, Vivian Kirkland coming out, and both of them crying and pointing at the body.
- [223] Both women started crying. Ms. Ruffolo said, "John is dead, he overdosed, we didn't know he did heroin." They told Mr. Johnson John was over by the car. The women wanted him to help put the body in the car and hide it. Mr. Johnson wondered why they needed him, if they had already gotten the body out to the driveway. Neither said how the body got to the driveway. Ms. Ruffolo had said nothing about this on the way to the house, but she did not appear to be surprised.
- [224] Mr. Johnson said he did not see the body, just a body under a sheet, with both ladies pointing at it saying John was dead. He said the body was beside the car on the far side from the house.

- [225] Mr. Johnson said he was scared, freaked out, and wouldn't go near the body. He backed away. He said the women were panicking and so was he. He couldn't believe it and he walked away, back to town, looking over his shoulder. He said he was there at the house about 5 minutes. It took an hour to walk back to town.
- [226] Mr. Johnson said he went straight to Neil Klatt and told him what happened. He also told his mother, his sister, and all his friends.
- [227] Over the next few days he felt he was being stalked by Vivian Kirkland and Ms. Ruffolo. They would park outside his rooming house or outside Neil Klatt's house. He never talked to the women about it.
- [228] Mr. Johnson said he learned John Ruffolo was dead by hearing it on the news. In his statement he said it had been on the radio and the news and he had missed it every time. He testified his friends had seen it and he kept missing it but eventually did see it.
- [229] On October 28, 2003 Mr. Johnson went to the police. That was a Tuesday, so he put the date he was taken to Ms. Ruffolo's place as the Sunday of the week previous, that is, October 19, 2003.
- [230] In his statement to the police, he put the visit to Crystal Pool Park a month and a half before.
- [231] Mr. Johnson admitted he has used amitriptyline years ago as a sleeping pill, but it gave him leg pain so he stopped. He admitted he had used heroin and had been present when friends had overdosed and had called 911 to save them. He testified that he had lost an eye in 1997 and had not driven since.
- [232] He said he went to Neil Klatt's to drink all the time; on the day of the Crystal Pool meeting, Vivian Kirkland told him they would pick him up there and he was sober because he was broke. Mr. Johnson had flexible notions of sobriety, using terms like "sober-ish," and "from an alcoholic's point of view I was sober." In his statement to the police, he said he was drunk on the Sunday night when Ms. Ruffolo came to his rooming house. He testified he was sober but he'd had some drinks. He said he would probably blow over .08.
- [233] Mr. Johnson was unclear on the timing of the events that evening. He said it was just getting dark when he and Ms. Ruffolo pulled up to her house. In his statement he said the lady came over about 11:00 and took him out Interurban Road. He said he may have been confused, that may have been the time he got back after walking home. It was just getting towards night time when she came over. In redirect, another portion of his statement was presented to him in which he said he had stopped at Neil's when he got back from Ms. Ruffolo's: "... it wasn't 'til 11 o'clock. It was 8 o'clock she picked me up and I didn't get home 'til 11. That's what it was." In re-cross-examination, it was suggested to him that sunset that date was 6:18 p.m. He said it could have been 7:00 when he was picked up, because it was getting dark when they got to her place.

- [234] The defence suggests that Mr. Johnson never did see a body, and his evidence offers no corroboration for Mr. Murray or Ms. Kirkland. Mr. Johnson said he did not see the body until they pointed it out. Then he could definitely see the shape of a person lying under a sheet. In his statement he said many times that he did not see the body and was finally asked if he saw the sheet and he said "No, I wouldn't even go close." He said he thought the police officer meant once again, did he see the body. He said he did not see any "flesh parts" sticking out, and he did not go peek under the sheet, and although he could see the figure of a man under the sheet, he was still hoping it wasn't true and that it wasn't a body.
- [235] Mr. Johnson said he became suspicious and worried because he had lost his clothes, shoes, glasses and backpack the night he woke up in the drunk tank after the dinner at Vivian Kirkland's. He was concerned they might be trying to frame him.
- [236] He said Ms. Kirkland and Ms. Ruffolo, who were always together, asked him to go to work a couple of times after that but he refused.
- [237] Mr. Johnson said he never spoke to Vivian Kirkland about these events again, but in his statement to the police he had told the police he asked her about "the gay guy" who lived downstairs, and whether he knew about it. Ms. Kirkland said he did not, and Mr. Johnson had said "he has to know." Mr. Johnson testified that he obviously said that to the police, but had forgotten about it.
- [238] In his statement Mr. Johnson was asked where he would put the truthfulness of what he told the police on a scale of 1 to 10. He said about an 8. In his statement he said: "I don't even know her last name, either one of them, and I'm not sure of the dates, and I was so drunk that one night when I lost all my clothes. Don't know about that night. Just things like that. But as for them asking me to kill him and -- yes, and I didn't see the body, that sort of thing, but yeah, they said 'He's over there.' I said 'I'm not going there.' Yeah, I'm telling the truth."
- [239] At trial he agreed and said "I know I was asked to kill John and I was asked to move his body, and what more do you want me to say?"

Douglas Murray

- [240] Mr. Murray was on the stand for many days. He was the only witness called during the month of May 2009. As a result of the ongoing health concerns of defence counsel, there were many days when the court did not sit at all and on the days when court was in session, it sat only until noon.
- [241] Mr. Murray was on several medications at the time of the trial which affected his thought patterns and memory. Many times during his testimony he would lose track of the question. He explained he would be talking and forget what the question was or what he was talking about.

- [242] Some days were better than others for Mr. Murray. One day about two weeks into his cross-examination court had to stand down because Mr. Murray had taken extra diazepam because he was having trouble sleeping. He said later that any answers he had given that day could not be relied upon. Other days were quite good. On days when he was tired or his medications were bothering him, he would often trail off in his responses, lose track of the question, and say he was lost. He admitted to having hallucinations on one occasion in the past and being committed to the Eric Martin Institute for a short period, although there was no evidence of the date. He had been a heroin addict and had stolen to support his habit. He said he had gotten off heroin a few months before John Ruffolo died, although the time frame changed several times during his evidence.
- [243] Reading Mr. Murray's transcript, it appears that he was often completely confused and unable to follow a train of thought. While that was also apparent watching him as he testified and cross-examination was often painfully slow, it was also clear that he was earnestly trying to do his best and to cope with the situation in which he finds himself, that is trying to recall events in detail from six years before. He said often, as he found himself confronted with points from his statements or from his evidence that did not coincide, that the basic events will never leave his mind, but it is natural to forget things over time.
- [244] Mr. Murray gave six statements to the police. He was interviewed on November 1, 2003, soon after John Ruffolo's body was found. He was interviewed twice on March 4, 2003, after his arrest, and then again on March 6, 2004. He went back on his own to make other statements on November 18, 2004 and on April 7, 2005 as he remembered more details.
- [245] Douglas Murray was born in 1964. In October 2003, he was a tenant living in the basement of the Ruffolo's house at 994 Tulip Avenue. A heroin addict, he said he had stopped using the drug a few months before. Mr. Murray described the effects of heroin as everyone else did - "on the nod," sleepy, eyes half closed. He said he did not notice John Ruffolo to display any of those symptoms, in fact prior to his death John Ruffolo was very jumpy and nervous, behaviour more suggestive to him of cocaine than heroin, although Mr. Murray said excessive heroin use can lead to sleeplessness. He said Ms. Ruffolo told him she had gotten John off drugs years before.
- [246] Mr. Murray said he took various medications in the fall of 2003, including amitriptyline. He was not very strong and had trouble lifting things. He said at one point some of his medications went missing, although his evidence was vague. At first he said the missing medication was Clonazepam; later he said it was amitriptyline. He had both. In cross-examination he said he built up an extra supply of amitriptyline over time, and Vivian Kirkland might have asked him at some point, perhaps 4 - 6 weeks before John Ruffolo died, whether he had any extra, and he was able to give her some. However, he testified later that she had not asked him for amitriptyline.

- [247] He testified that he liked Ms. Ruffolo, although he didn't know her well, merely as an acquaintance. He described John Ruffolo the same way. He said he felt he was becoming a good friend to her daughter, Jovanna. She would come and watch TV with him, and he helped her with her homework. Mr. Murray said John Ruffolo exhibited "erratic and paranoid" behaviour before his death and Ms. Ruffolo was worried about it. He said John Ruffolo was careless with maintenance tasks. He was watchful and was careful about locking up.
- [248] I will first set out the testimony Mr. Murray gave during his examination in chief respecting the events of October 19, 2003.
- [249] On Sunday, October 19, 2003, Mr. Murray was at home. He said he had been putting up some chicken wire in the back yard during the day to help keep Ms. Ruffolo's dogs in. He had asked Ms. Ruffolo where John was and she said he was sick. Mr. Murray had a nap about 7:30 p.m. A bang in the hallway upstairs woke him up. He heard movement upstairs. He went into the kitchen to make some soup, and then went into Vivian's room to watch TV. He said this was around 8:30 - 8:45 p.m.
- [250] Jovanna was not at home; Mr. Murray said Ms. Ruffolo told him she was at a friend's named Shirley.
- [251] The movie "Fatal Attraction" was on TV. It was one of Mr. Murray's favourites and he had seen it many times. Out the window to his left, he could see the red car back into the driveway. Ms. Ruffolo got out, looked at him, and he went back to the movie. He did not hear anything outside during that time.
- [252] Mr. Murray said that while the roller coaster scene from Fatal Attraction was on, Ann and Vivian came running into his room. Vivian was really drunk. She spoke into his face. She said it was life or death, John was in the driveway and had had an overdose of drugs, they needed help to put him in the car.
- [253] Mr. Murray hugged Ms. Ruffolo, said he was sorry, put on his shoes and pants and went out to the driveway with them. He asked where John was. It was very dark and he couldn't see. They pointed and said "over there." He went and looked where they pointed. He said the body was on its back, partially underneath the car and beside it, laid out straight, with the head to the top of the driveway. The body had a t-shirt, shorts, socks and shoes. There was a blanket laid out. He saw the face and recognized him. Mr. Murray grabbed an arm and it was stiff. He threw the hand down, said "Fuck, fuck!" and ran in to call the police.
- [254] He said the women followed him in. He was on the floor saying he did not want to be involved and could not help.

- [255] The women told him they wanted to dump the body. Mr. Murray said he would help put John in the car to go to the hospital. Ms. Ruffolo looked at Vivian and said maybe they should take him to the hospital. Vivian said no. She grabbed Mr. Murray and told him this was a pact they would take to their graves. Ms. Ruffolo said the spouse of someone who's murdered is always blamed first. She had to get rid of the body or they would blame it on her.
- [256] They opened the door, and Vivian Kirkland and Mr. Murray tried to put him in the back seat of the red car, passenger side, feet first. They pushed him in. Mr. Murray said he thought he might wake up and it would all be a joke. The body was heavy and hard to lift, but he was so shocked he didn't even feel the weight. He said he was terrified of touching a dead body. He was certain John Ruffolo was wearing shorts and that he touched the skin on his legs.
- [257] Mr. Murray said the body was stiff and he couldn't bend his feet. He told Ann to go to the other side and open the window and pull the feet through. He helped as well.
- [258] Mr. Murray said he rolled down the driver's side window, which only went partway down. They put the legs through the window. Mr. Murray said he could not bend them and did not want to try. They got the legs through. He could see John Ruffolo's face in the car light. It looked ashen and gray. His eyes were closed. He looked asleep. He wasn't breathing. Vivian closed the door with the head against it. John Ruffolo's head and shoulders were partially on the seat and partially against the door.
- [259] Mr. Murray testified that he said, "That's it, take him to the hospital," and went back into the house to Vivian's room. The last he saw was Ms. Ruffolo going to the red car and Vivian going to the teal car which was parked on the road.
- [260] Mr. Murray said he felt something had been thrown in his lap that he had nothing to do with. He felt he had to call the police, but was afraid the women would get back before the police could arrive and might shoot him. Also, he said, he is terrified of the police.
- [261] Mr. Murray said Vaughan Barnes, another tenant, came in drunk and sat on a chair in Vivian's room talking for about fifteen minutes. Mr. Barnes then fell asleep and Vivian and Ms. Ruffolo came in, maybe twenty minutes to half an hour after they had left. He said they looked satisfied with a job well done, and both were laughing. He said they told him they put the body in a ditch, and that Vivian Kirkland said he was mooning the world.
- [262] Mr. Murray said he asked Ms. Ruffolo if the front door had been open when she got home at 9 o'clock. She said it was open. Mr. Murray was concerned that someone could have come in while he was asleep. He asked where the body had been. She showed him in the bedroom, by the weight set.
- [263] He said he stayed upstairs with them in the bedroom and Vivian went to sleep on the bed. Ms. Ruffolo was on the computer all night. Mr. Murray said he might have dozed off but was basically awake all night, trying unsuccessfully to get information. He said they all went to Vivian's room in the morning, and he saw someone walk down the driveway about

8:00 or 8:30 in the morning. He could only see a skirt through the window. Mr. Murray said Ms. Ruffolo told him it was John's sister Sarina, and he was to say that she had come often to the house.

[264] Mr. Murray said he went to his room eventually and slept.

[265] Mr. Murray said in the days that followed, Ann Ruffolo became friendly with him, giving him food and taking him with her in her car. He found this confusing. He said within the next few days he was with Ann Ruffolo and Vivian Kirkland in Ann's car. As they went by the Knockanback Grill, Ann pointed and said "his own family drives by there every day and they can't even identify his car." Mr. Murray could see the car.

[266] Mr. Murray said a few days later, Ann came to his room and said they had found the body, but it was not where they had put him.

[267] Mr. Murray said he did not go to the police because he had been brutalized by a particular officer. He believed he would be set up. Also, he thought Jovanna would be left with no one if he did, and he wanted her to have a good Hallowe'en and Christmas. She had already lost her brother and now her father.

[268] He said he knew Vivian Kirkland's boyfriend, Ken, and was wary of him. He said Ken was living in Vivian's room, but disappeared two months before John died and came back two months after.

[269] Mr. Murray said Ms. Ruffolo told him she was going through many problems with the police. They were trailing her and following Jovanna. She asked Mr. Murray to phone a local reporter and told him what information to give her. He said he did and an article was published.

[270] Mr. Murray said he did not know Sarina Ruffolo personally, but saw her once at 994 Tulip Avenue. She was on the back stairway to the kitchen and appeared to be waiting for John. They said hello. Mr. Murray said Ms. Ruffolo told him John had gotten back into drugs with Sarina, she was at fault and responsible for John's death.

[271] Mr. Murray said Ms. Ruffolo gave him a bag with a phone and pager in it after John Ruffolo died. She told him to discard it. He did not want to do this so he hid it in an old VCR and told Ms. Ruffolo and Ms. Kirkland they could do what they wanted with it. He went with Ms. Kirkland and Ms. Ruffolo to one of the Esquimalt properties and saw the VCR on top of the garbage as they drove out the other side of the property. The new evidence adduced on November 3, 2010 is relevant to the pager and I will discuss this further when I deal with the allegation of collusion between Douglas Murray and Vivian Kirkland.

[272] Mr. Murray said he met Robert Johnson once at Vivian Kirkland's place. He said Mr. Johnson was getting drunk on that occasion.

[273] That concludes the recitation of Mr. Murray's evidence in chief.

- [274] Cross-examination of Mr. Murray focussed on his many statements. Mr. Murray said he called Cst. Ferguson so often wanting to come back and add things that Cst. Ferguson stopped returning his calls. Mr. Murray admitted he had trouble remembering things, but he said the events of October 19 were "pretty imbedded in my head."
- [275] From the defence point of view, because it is the accused's position that Mr. Johnson, Mr. Murray and Ms. Kirkland all colluded in their evidence, it was important that Mr. Murray admitted that Vivian Kirkland was aggressive about being present when he gave his initial statement to the police which took place at 994 Tulip Avenue, she suggested he should consult a lawyer, and insisted he ask for a transcript. However Vivian Kirkland was not in the room when he gave his statement (although he thought she was in the hallway outside) and he did not obtain a transcript.
- [276] In that statement in November of 2003, Mr. Murray told the police he only knew John Ruffolo had not shown up for work. That's all he knew. He admitted that was a lie.
- [277] Mr. Murray said he was very scared at the time of his first statement. He was afraid Vivian Kirkland or Ann Ruffolo might shoot him, he wondered if there were Hell's Angels involved. He had heard Vivian Kirkland's boyfriend Ken talking about the Hell's Angels and what they did to rats. He said Ann and Vivian were going back and forth outside his room in the hallway and he had to be careful. He did not want them to confront him when the police left. Mr. Murray said he continued to struggle with these events. A recurring theme in his evidence was his anger at having this situation dumped in his lap, at having been made a party to something that was none of his business.
- [278] Mr. Murray had several portions of his November 2003 statement put to him in which he described Sarina Ruffolo's frequent appearance at the house. He said on the Sunday night, before Ann and Vivian returned at around 10:00 p.m., he had seen Sarina out the window, and the next two mornings a woman whom he described and thought was Sarina had been walking around the house. Mr. Murray testified that he was given the description by Ann Ruffolo and that she directed him to say Sarina had been there. Mr. Murray said he was being guided by Ann Ruffolo for a lot of his information. He said he also wanted to protect Jovanna, as he had lost a brother himself.
- [279] Mr. Murray said he did not see Ann Ruffolo as the kind of person who would do this, and did not even know what John Ruffolo died of until he came to court. He said he didn't know what to think about it all. He said it took him a year to conclude that Ann Ruffolo was involved in her husband's death, and he still believes Vivian killed John Ruffolo for Ann. He said Vivian Kirkland often discussed how much she hated John Ruffolo.
- [280] Mr. Murray was arrested on March 4, 2004. He said he felt relieved because he was told he would be put in a safe place. He gave two further statements that day. In his first statement on arrest, he said Ann Ruffolo came home and found John on the floor; she didn't know what happened and she was afraid for Jovanna.

- [281] Mr. Murray testified that at that time he still wasn't sure if Ann Ruffolo had killed John Ruffolo. He said Vivian Kirkland was making all the decisions and calling the shots. He agreed he was "pointing the finger" at Vivian, and he still believed it to be true that Vivian Kirkland made the decisions.
- [282] Mr. Murray told the police on March 4, 2003 that he only became aware during the week after he had helped put the body in the car that they did not take it to the hospital. He admitted he lied in saying that but said he did what he did because the situation was dropped in his lap. He said he feared retribution.
- [283] Mr. Murray said he told the truth to the police to the best of his ability, although some lies still continued because of fear of retribution. He said he lied to the police when he told them that Sarina Ruffolo had come around the house several times, looking around, and that he had seen her and John Ruffolo with a pipe. He said that was not true; he had been told to say this by Ann Ruffolo. Despite Mr. Murray's confusion, he was consistent throughout his evidence as to his knowledge of Sarina and of the story he says he was directed to tell by Ms. Ruffolo - that he was to say he delivered a rent cheque and saw John and Sarina with a pipe, that Sarina had been around often, that although he had only seen a black skirt walking by the window the morning following putting the body in the car, Ann told him that was Sarina, and that he had been taken to the bank to see if he could recognize her.
- [284] Much of the cross-examination of Mr. Murray focussed on timing, and whether the body was "stiff as a board", as he described it. These two issues are very important to the defence.
- [285] It is obvious that Mr. Murray has fixated and obsessed on these events over the past six years, trying to fit them into a reasonable pattern and time frame.
- [286] Although he had been very specific about times during his evidence, Mr. Murray said the Crown had told him not to be, because so much time had gone by. He said time became distorted after a few weeks; the only thing that mattered was that he was called out to the driveway. If he had not been, he would not be on the stand.
- [287] Despite the suggestion that he not try to be precise with times, Mr. Murray did just that in his evidence. He started with the assumption that the roller coaster scene would have been on about 8:45 p.m. and then assessed the time certain events had taken, starting from that reference point. He did say, however, that this was so many years ago, he might not have the times right and might be off by an hour or so.
- [288] Mr. Murray said it was while watching the roller coaster scene that he glanced out the window and caught Ann Ruffolo's eye in the driveway. He said it was about fifteen minutes later that Ms. Ruffolo and Vivian Kirkland came into his room, something he had tied to the roller coaster scene earlier in his evidence. He said they went out to the driveway, and then back to his room for about twenty minutes. They put the body in the car, and by that time he thought it would be about 9:20 p.m. The women left, he went back inside and Vaughan

Barnes came in to talk for fifteen minutes. Vivian and Ann returned in twenty to thirty minutes, by which time it was 10:00 p.m.

- [289] The relevant TV Guide was obtained and put to him. Fatal Attraction began at 8:00 p.m. and ended at 10:30 p.m. He said if that meant the roller coaster scene occurred at about 10:00 p.m., he must have his times wrong. He said if he mis-timed the movie, all his times were wrong.
- [290] It was suggested to Mr. Murray that, given his times and starting from 10:00 p.m., Ann Ruffolo could not have been home to receive a call from Brinks around 10:45 p.m. He agreed that she would not have been able to be home in time. He insisted the women were only gone about half an hour at most. He thought it was very quick, even though they said they dumped the body in a ditch "way out there." Mr. Murray said he has been to Humpback Road since John Ruffolo's death, but is not familiar with the area and did not know the distance between Humpback Road and Tulip Avenue. In one of his statements he had referred to believing the body had been transferred to another car. He testified that no one told him that; it was an impression he got because they told him they did not have enough gas.
- [291] On the issue of the state of the body when it was in the driveway, Mr. Murray's evidence was not entirely consistent. Mr. Murray said over and over that the body was very stiff. He said one of the hands got caught on the door and they had to lift the body to get it loose.
- [292] Mr. Murray said the body's legs were locked and they pulled the legs through the window because the knees wouldn't bend. He said he lifted the arm, which was "hard as a rock," but it did bend from the shoulder when he lifted it. Mr. Murray also recalls the head and shoulders being against the door, the buttocks being on the seat and the legs out the window, which would not roll down the whole way, even though he insisted the body was "stiff as a board." He said he could not understand how the buttocks could be on the seat, but he is sure they were, and the legs went up at an angle, but they would not bend at the knee. He lifted the legs up, put the feet on the partially opened window, and closed the door. The feet were resting on the glass.
- [293] Mr. Murray was cross-examined about the content of his various statements to establish when he had first said various things, and to show that he tended to blame Ann Ruffolo more as time went on, having started out focussing on Vivian Kirkland for making all the decisions.
- [294] It was established that Mr. Murray had never mentioned glancing out the window and seeing Ann Ruffolo in the driveway in any of his statements. This had first come up at trial, as had his testimony that Ann was laughing when she returned from dumping the body, and that the two women had gone to different cars. Mr. Murray had said several times in his statements that he did not know if the women left in one car or two. At trial, he insisted that was not true.

- [295] Mr. Murray told the police he had heard Robert Johnson screaming and drunk on the night he came over to dinner. He testified he heard this from Vivian, although he said if he told the police he heard it himself, then he did.
- [296] In one statement Mr. Murray said Vivian told him the body had been found in a location different from where they had put it. In another statement he said Ms. Ruffolo said this. He said he could not remember after 6 years, but he knew Ann had said it.
- [297] In his November 2004 statement he said he recalled a conversation between Ms. Ruffolo and a man named Druskey in which Ms. Ruffolo asked Druskey when he had seen John Ruffolo on October 19 and Druskey said at 6:00. Mr. Murray said he thought this had been staged for his benefit because Ms. Ruffolo asked him if he had heard it when they got in the car.
- [298] It was not until his April 2005 statement that he told Cst. Ferguson about disposing of the pager and the cell phone.
- [299] Mr. Murray agreed that the information in the latter statements tended to point the finger at Ann Ruffolo more than Vivian Kirkland, but said he had always pointed the finger at both of them.
- [300] Mr. Murray admitted he was scared of being in prison because of what could happen to him as a gay person. When asked if he was trying to save his own skin, he said of course he was, but he said he did not know if Ann was guilty, and did the best he could without hurting himself or others. He denied colluding with Vivian Kirkland; he said he has not been in touch with her. He thought Vivian "got the gang together" and Ann paid her. He said he still has no idea how John Ruffolo died and does not want Ann Ruffolo to go to jail if she is innocent.

Vivian Kirkland

- [301] Vivian Kirkland, who is 48 years old, was on the stand for over a month. Ms. Kirkland had made one short statement on arrest, a lengthy statement to Sgt. Fordy of the R.C.M.P. on her arrest on March 4, 2004, and another short one the next day. She pleaded guilty to interfering with remains in December of 2007, and had, on legal advice, not spoken to anyone else about these events until she was on the stand.
- [302] Ms. Kirkland was a tenant in the basement of 994 Tulip Avenue in October 2003. She worked for the Ruffolos in their rental properties, cleaning and doing odd jobs. She said she was closer to Ann Ruffolo than she was to John Ruffolo and considered her a friend.

- [303] Her evidence as to her movements on October 19, 2003, during her examination in chief was inconsistent and confusing. Some of the disorganization in the narrative might be explained by her refusal to be interviewed prior to her testimony, but by the end of her testimony it became clear that Ms. Kirkland tended to let her instincts for self-preservation take precedence over consistency.
- [304] Initially, it was unclear whether she was talking about October 18 or 19, 2003. As well, she said the events she was recounting took place on a Tuesday, then a Monday, and eventually a Sunday.
- [305] In her evidence in chief, Ms. Kirkland first said that she went upstairs about noon, but went back downstairs because Ms. Ruffolo wasn't home. She said she passed Ann and John's bedroom and saw John Ruffolo asleep in bed. She said she and Ms. Ruffolo then went and worked on the rental properties all day until about 6:00 or 7:00 p.m.
- [306] Ms. Kirkland said she next saw John Ruffolo on the floor of the Ruffolos' bedroom, dressed in jogging pants, a t-shirt and socks. She did not know if he was breathing. She had not known he was home and did not touch him. Ms. Ruffolo was not home as she had taken their daughter to a friend's house.
- [307] Vivian Kirkland said she went back downstairs. She said she stayed downstairs for a couple of hours, drinking, and then Ms. Ruffolo came down and asked her to come upstairs. She went and saw John Ruffolo in the same position she had last seen him in the bedroom. Vivian Kirkland said she told Ms. Ruffolo to call an ambulance, but Ms. Ruffolo said it would be too difficult for their daughter to know her father had overdosed.
- [308] Ms. Kirkland testified that she thinks Ms. Ruffolo put shoes on John Ruffolo in the hallway. They tried to get John Ruffolo's body into the car by pulling it on a blanket, to the stairs and out the front. They got him to the driveway but could not lift him into the car, which she said was a red Topaz. She said the rear of the car was level with the house and that there was a gap between the car and the stairs, enough to allow the door to open.
- [309] Ms. Kirkland testified that Ann Ruffolo said they needed help, and asked if Ms. Kirkland's foster brother, Neil Klatt would help. Ms. Kirkland told her to go ask. Ms. Ruffolo left. Vivian Kirkland went downstairs and drank some more. She said Douglas Murray was home and she believed Vaughan Barnes was too.
- [310] Ms. Kirkland said when Ann Ruffolo came back in half an hour, she was in the driveway. John Ruffolo was still on the gravel with a blanket over him. The red car was still there. Ann Ruffolo brought Robert Johnson with her in her blue Corolla. They got out. Robert Johnson said he would not be involved and left.

- [311] Vivian Kirkland went downstairs and asked Douglas Murray to help. She said Vaughan Barnes was drunk and no help. Vivian Kirkland told Douglas Murray she thought John was dead and Douglas should help them get him into the car. Douglas Murray was shocked, and said something about an ambulance. Ann Ruffolo repeated the remark about her daughter.
- [312] Ms. Kirkland said Douglas Murray helped put the body into the back seat. Vivian Kirkland said she moved the feet and Douglas helped Ann Ruffolo with the top half. She said it was difficult because John was heavy and the body was limp. They could not quite fit him in so they opened the window and left his feet hanging out.
- [313] Ms. Kirkland said she got in the passenger side of the red car; Ann Ruffolo drove them out of town to Humpback Road. Ms. Kirkland said her friend Gordon Boyd, a tenant in one of the Esquimalt apartment buildings, had told them this was a wooded area without much traffic when Ann Ruffolo had asked him about hiking areas a week before. Ms. Ruffolo told Mr. Boyd that Mr. Ruffolo was looking for a new workout. Ms. Kirkland said she believed at the time that the query was genuine. She only changed her belief later when they put the body on Humpback Road.
- [314] Vivian Kirkland said she knew where they were going with the body because she and Ann discussed it the day John died. Ms. Kirkland said Ann told her she wanted John dead because he was trying to kill her.
- [315] Ms. Kirkland said they stopped in the middle of nowhere, got John Ruffolo's body out of the car and put him in a ditch. She said this was very hard to do but it was down an embankment so they could roll him and then carry him into the culvert. The body was still limp.
- [316] Ms. Kirkland said they drove out of the area, changed their clothes, and put the old ones and the blanket into two different garbage cans, the blanket into one on the highway and the clothes in a residential area. Ms. Ruffolo drove them back to Tulip Avenue; Vivian Kirkland drove the car to the pub and Ann followed her and picked her up. She said Ann Ruffolo thought if they left the car at the pub it would look like John had driven away and hadn't returned, "on his own recognizance," as Ms. Kirkland put it.
- [317] Ms. Kirkland said they drove home and Ann Ruffolo told her they would not talk about this. Vivian Kirkland agreed. She started drinking some more. She said Douglas Murray asked where they had put the body and Ann Ruffolo told him they had left it in Beacon Hill Park. Vivian Kirkland said she passed out.
- [318] Ms. Kirkland said she and Ann went to the police station the next day. Ms. Kirkland said Ann told her she was going to go to the police first before they could turn it on her. She wanted to be ahead of the game. Ms. Kirkland said Ann did most of the talking. The officers told them to go to Saanich so they did. Ms. Kirkland said Ann Ruffolo got aggravated because the police weren't helping her and she had to go pick up Jovanna. They went and picked her up and went home. Vivian Kirkland said she had seen Ann Ruffolo taking her

daughter to her friend's the day before, about 3:00 p.m.

- [319] Ms. Kirkland said she heard about the car being found a week later on the news.
- [320] Ms. Kirkland said Ann Ruffolo told her she wanted John dead because he was trying to kill her. She said she could not remember if Ms. Ruffolo had said that to Robert Johnson when they met with him at Crystal Pool Park.
- [321] Ms. Kirkland said she had known Rob Johnson for a few years as a friend of Neil Klatt. She said she, Ann Ruffolo, and Robert Johnson went to Crystal Pool Park about a month before John died. She said Rob and she were drinking. He usually drank beer. They sat on the bleachers. Ms. Ruffolo asked Robert to kill her husband. Robert wanted nothing to do with it. Ms. Kirkland said she and Robert just laughed and figured Ms. Ruffolo was kidding. Ms. Ruffolo dropped Robert Johnson off and drove home. They had no more conversation about the incident.
- [322] Vivian Kirkland had Robert Johnson to her place for dinner. She had intended to ask Neil Klatt but he wasn't home so she asked Robert. She said Douglas Murray might have been in his room but he wasn't there for dinner. Robert got very drunk and began yelling. Ms. Ruffolo told Vivian Kirkland to talk to him.
- [323] Ms. Kirkland testified that in September 2003, Ann Ruffolo told her she needed to buy some heroin because John Ruffolo's heroin dealer was out of town. She said Ms. Ruffolo told her to ask for \$150 worth. Ms. Kirkland said she tried to buy some heroin from Neil Klatt for Ann Ruffolo but did not get any from him. She said Ann Ruffolo kept asking her to get heroin for her, and eventually Ms. Kirkland set Ms. Ruffolo up with a man Ms. Kirkland met at a Thanksgiving dinner for the homeless. She said Ann Ruffolo came and picked her up with Douglas Murray. They took Douglas home and went downtown to a vacant lot. Another car came along; Ann gave the man some money and got \$150 worth of heroin. Vivian Kirkland maintained that as far as she knew they were getting it for John because his dealer was out of town.
- [324] Ms. Kirkland said Ann Ruffolo told her John liked protein shakes every morning, and that she made them in a blender. She said Ann Ruffolo told her the day after John died that she had to get rid of her blender because she put some drugs into John's milkshake. Ms. Kirkland said Ms. Ruffolo did not say what drugs she had used.
- [325] Ms. Kirkland said she took amitriptyline herself. Ms. Kirkland said Ms. Ruffolo was aware Vivian Kirkland used amitriptyline. She said she did not lock her bedroom door, but was not aware of any drugs going missing. Ms. Kirkland said many times that she does not use heroin.
- [326] Ms. Kirkland said she and Ann Ruffolo threw John Ruffolo's pager into the garbage on Esquimalt road. She said Douglas Murray was not involved in this event to her knowledge.

- [327] Ms. Kirkland said that when Cst. Ferguson came to tell her John was dead, Ann Ruffolo went to the kitchen with Vivian Kirkland and asked her if she was doing a good job of appearing distraught. Ms. Kirkland said she told Ms. Ruffolo she was convincing. She said Ann Ruffolo told her to be quiet with the police.
- [328] Vivian Kirkland said Ann often talked about Ricky Burton and John. Ms. Ruffolo said John hated Ricky. Ms. Kirkland said she met Sarina Ruffolo once. Ann told her after John's death that Sarina did drugs with John. Ms. Kirkland said she saw John Ruffolo smoke marijuana, but did not see any other drug use.
- [329] Ms. Kirkland denied ever discussing her testimony with Robert Johnson or Douglas Murray.

Cross-examination

- [330] Ms. Kirkland was cross-examined for many, many days in great detail, as defence counsel embarked on the unenviable task of cross-examining a witness without the benefit of a preliminary hearing, and who had refused to speak to anyone. She was taken back and forth over her extensive statement to Sgt. Fordy, her examination in chief, and her previous answers in cross-examination. The more questions she was asked, the more detail emerged.
- [331] Ms. Kirkland was cross-examined about a house on Bay Street in Victoria that she rented from the Ruffolos in 2002 which she then rented out mostly to welfare tenants. She said she made no money on it, although it was suggested that she tried to keep welfare money that should have been sent to the Ruffolos for rent. During her time on Bay Street, she said she and Ann Ruffolo had become friends and Ms. Ruffolo would drop by and talk about business and her marriage and how she was mistreated. Ms. Ruffolo said John abused her. Vivian Kirkland told her to get a divorce, but Ms. Ruffolo said she did not want to lose the money and the properties.
- [332] Ms. Kirkland said when she left the Bay Street house, both John and Ann Ruffolo told her John Ruffolo used it for an escort business after getting a business licence.
- [333] Ms. Kirkland said she was in and out of other places and eventually moved to 994 Tulip Avenue in January of 2003. She said she was at Ann's beck and call the whole time she lived there, getting up early and working. The tenants would call her at night because Ann did not want them to have her own telephone number. She said Ms. Ruffolo began to buy her food and alcohol, drive her around and give her money to pacify her. Vivian Kirkland said she thought Ann was her friend.
- [334] Ms. Kirkland said her relationship with John Ruffolo was okay but he "pissed people off" because he only wanted things his way. Vivian Kirkland said she was neither sorry nor happy that John Ruffolo was dead.

- [335] Ms. Kirkland said she had a friendly confiding relationship with Jovanna and liked her very much.
- [336] Ms. Kirkland said Vaughan Barnes was comical, a drunk, and nice guy. She said she also found Douglas Murray comical. She liked him and considered him a friend, although she wouldn't go so far as to say a good friend. She'd known Robert Johnson for years and arranged for him to do some work for the Ruffolos.
- [337] Turning to the events of October 19, 2003, Ms. Kirkland was taken through her evidence in chief and her statement to Sgt. Fordy in some detail. She said she lied at the beginning of the statement and left quite a few things out so it wouldn't look like she knew what was going on. Ms. Kirkland said she knew she was in trouble, and the more she talked, the more she would admit to knowing. She said she was trying to protect Ann Ruffolo, and follow her advice not to say anything. She wanted to keep their stories straight and Ms. Kirkland did not know what Ann Ruffolo's story was. She said she was not concerned about Douglas Murray. She did not know he'd been arrested. However, she said she became aware as the questioning progressed that Ann Ruffolo was manipulating her, so her answers changed and she began to protect herself.
- [338] Ms. Kirkland's story to Sgt. Fordy started out with having no involvement in John Ruffolo's death, then to having helped Ms. Ruffolo to some extent with the body, but not having left the house, then to having left the house with Ms. Ruffolo and the body, but being dropped off at the 6 Mile Pub where she spent some time drinking while Ms. Ruffolo disposed of the body, then eventually admitting she was present when the body was disposed of but did not help, and finally admitting she helped with that too.
- [339] Ms. Kirkland's evidence at trial developed as it went along, somewhat like her statement to Sgt. Fordy. She started out with a basic story in her examination in chief that, although showing she had some involvement in the events of October 19, 2003, was quite limited. As the days of questioning progressed, more and more details emerged, incriminating her further and further.
- [340] From the basic version given in her examination in chief, she said she began to recall more and more details, some small, some significant, as she went through the days of cross-examination. Her participation increased as she went along, until the final version implicated her in the activities she said Ms. Ruffolo was involved in from at least noon on the day the body was disposed of, which she eventually recalled was a Sunday. That is, she said Ms. Ruffolo told her earlier that day that she had put drugs in Mr. Ruffolo's protein shake and that was why Ms. Kirkland had to go upstairs to check on him. However, she remained adamant that it was Ms. Ruffolo who set up the plan, asked Robert Johnson to kill John Ruffolo, bought the heroin, and chose the location to dump the body. She also maintained that she did not know why Ms. Ruffolo put drugs in her husband's milkshake, that she believed Ms. Ruffolo had bought the heroin because John Ruffolo's dealer was out of town, and that she did not know how John Ruffolo met his death.

- [341] Ms. Kirkland said at one point during her evidence that she thought October 19 was a Monday. Later she said the day they moved the body was a Sunday. She was vague about the hours she worked that day, saying it was from 7:00 or 8:00 a.m. to 6:00 or 7:00 p.m., or maybe just to 4:30 p.m. She could not recall what she was working on but agreed she was probably drinking after work. She said it may be they didn't put in a long day at work that day. She said she did not always tell Sgt. Fordy the truth about the times, but time was not an issue. She said Ann Ruffolo told her to give the wrong times to cover their tracks. Ms. Ruffolo told her she had learned these tips from reading books written by "Anne Rice" whom Ms. Kirkland said writes detective books out of Seattle (the name "Anne Rule" was not put to either her or Ms. Ruffolo, who testified that Anne Rice writes about vampires and she does not read her books).
- [342] Ms. Kirkland's descriptions of the sequence of events during that day were multiple and varied. The number of times she checked on John Ruffolo, when these checks occurred, and the reasons for them changed over the course of her testimony.
- [343] Ms. Kirkland explained the recurring expansions and additions to her evidence by saying: "as you ask me questions, I remember things."
- [344] She first said she went upstairs, not expecting John Ruffolo to be there, but saw him in the bedroom asleep and went back downstairs. She also said she went upstairs because Ms. Ruffolo had told her to wait for her while she took Jovanna somewhere, and then they would go to work.
- [345] After many days on the stand, Ms. Kirkland said Ann Ruffolo had come downstairs sometime in the morning of October 19, 2003, said she had given John a protein shake and Vivian Kirkland should go check on him to make sure he was sleeping and hadn't just gotten up and left.
- [346] By the end of her cross-examination, she said Ms. Ruffolo told her she had put drugs, which Ms. Kirkland added a few minutes later in her evidence was amitriptyline, in John Ruffolo's protein shake and she wanted Ms. Kirkland to check on him during the day while she was out. She said Ms. Ruffolo told her she didn't know if she had given him enough to knock him out. Ms. Ruffolo left the door unlocked. Ms. Kirkland went up once, not being sure if John Ruffolo would be there or not. She thought if he had not been given enough drugs to pass out, he could have gone out. However, he was asleep on the bed. She went up a second time and he was on the floor. She thought he was dead, but she didn't touch him. Ms. Kirkland went back downstairs to wait for Ms. Ruffolo, who had taken Jovanna to a friend's house.
- [347] Ms. Kirkland had told Sgt. Fordy she and Ann were going out, which is why she went upstairs after she had come home from work. She recalled at trial that Ms. Ruffolo was going to take her to a liquor store.

- [348] Ms. Kirkland said she only learned later that Ms. Ruffolo had used amitriptyline in the protein shake. She said Ms. Ruffolo knew both Mr. Murray and Ms. Kirkland used amitriptyline but she did not tell Ms. Kirkland where she got it. Ms. Ruffolo did ask at one point how many tablets Ms. Kirkland took. Ms. Kirkland's prescription records show that several large prescriptions for amitriptyline were filled in 2003. She said she was not stockpiling them; she took more than she should.
- [349] She said Ms. Ruffolo was very angry with her for not having thrown out the tablets when they were seized during the search of the residence. In re-examination, Ms. Kirkland said Ms. Ruffolo had told her to throw away her amitriptyline tablets, but Ms. Kirkland said she needed them.
- [350] Ms. Kirkland said Ms. Ruffolo told her weeks before that John told her his parents said she was poisoning him with the protein shakes, which Ms. Ruffolo found funny. Although Sgt. Fordy had raised the subject of milkshakes in the long interrogation, Ms. Kirkland did not mention anything to him about her conversation with Ann Ruffolo about the shakes or the blender. She said she thought the less she said to Sgt. Fordy, the better, as she might be able to go home after the interrogation.
- [351] Ms. Kirkland said the meeting in the park with Robert Johnson was not the first time she heard Ann express a wish to have her husband dead. She said some time before that, Ann Ruffolo told her to come upstairs, she had something to show her. Ms. Ruffolo showed Ms. Kirkland a gun wrapped in a sweater in a dresser drawer. Ms. Ruffolo said John Ruffolo never brought his gun home and this time he did. She said John Ruffolo was going to kill her and she had to come up with a plan before he did. Ms. Kirkland acknowledged that she had never mentioned the gun to anyone before.
- [352] Vivian Kirkland said the topic of John being dead became an everyday discussion. Ms. Kirkland said she told Ms. Ruffolo to get a divorce. Ms. Ruffolo said she did not want to lose the money on the properties.
- [353] Ms. Kirkland denied knowing why Ann Ruffolo wanted to take Robert Johnson to the park to talk to him. Sgt. Fordy put Robert Johnson's statement to her in which Robert Johnson had said she and Ann Ruffolo had asked him to kill John Ruffolo. Ms. Kirkland continually denied saying she had asked Robert Johnson to kill John Ruffolo. She agreed she told Sgt. Fordy that Ann Ruffolo asked Robert Johnson to kill John, but that Robert Johnson had said no, he beats people up but doesn't kill them. Ms. Kirkland denied ever buying sherry for Robert Johnson. She said they had beer.
- [354] Ms. Kirkland said Ann Ruffolo asked Robert Johnson how he would go about killing someone. He said a "hot shot." Vivian Kirkland said she had no idea what a hot shot was at that time.

- [355] Ms. Kirkland had told Sgt. Fordy the heroin was not her idea and she did not know how Ms. Ruffolo knew the guy she bought it from. Sgt. Fordy told her Neil Klatt and Robert Johnson had said Vivian had been trying to buy \$150 worth of heroin. Ms. Kirkland was asked about her reaction to this. She testified that Neil and Robert knew she did not do heroin and they would have told the police that. Ms. Kirkland testified she helped Ann Ruffolo buy heroin because she believed her story that John's dealer was out of town. She said she accepted Ann's statement that John used heroin. She knew the people to contact and those people would not deal with Ann. She did not connect it to Ann wanting John dead.
- [356] Ms. Kirkland remained consistent at trial in her description of the events following the Thanksgiving dinner where she described finding someone who would sell them some heroin and setting up the meeting at which Ann Ruffolo bought it. She said she was at the dinner with Douglas Murray. When Douglas Murray was not present, she spoke to a young street kid named Mike with whom she smoked marijuana occasionally. She asked if he could find someone to sell her \$150 worth of heroin. He came back with a couple who said they could arrange it and needed a ride to downtown Victoria. She called Ms. Ruffolo who came to the restaurant, picked them up, dropped Douglas Murray off, and drove with Ms. Kirkland and the couple to an open lot on Quadra Street. The man got out of the back seat where he had been seated, and Ms. Kirkland got in the back. The man got in the front and exchanged drugs for money with Ms. Ruffolo. The couple then left. Ms. Ruffolo asked Ms. Kirkland if it looked like \$150 worth to her. Ms. Kirkland said she didn't know, she just knew it was white. She said they did not discuss it further.
- [357] Ms. Kirkland admitted that in 2003 she had health problems. She walked with a cane sometimes and found it difficult to go up and down stairs. She is an alcoholic and drank a lot of beer in 2003, sometimes a case of 24 a day, perhaps three times a week. She admits she has some memory loss.
- [358] Vivian Kirkland agreed with statements she had made on a disability form in January of 2003, with some qualifications. She had tendonitis and back pain but not every day. She said she could do some housework. She agreed she could not carry more than two pounds per hand. She had depression and took medications. She was upset by yelling and loud noises. She could not walk more than two blocks without having to sit. She said she had never given Ms. Ruffolo a copy of the form, which she kept in her room.
- [359] Moving on to the sequence of events in the evening of October 19, 2003, Ms. Kirkland said she was drinking at Vaughan's, who was really drunk. She said Douglas Murray was in his room. She had a portion of her statement put to her in which she said Douglas Murray was watching "Fatal Attraction." She said Sgt. Fordy had told her that, but Douglas Murray did go in to her room to watch TV.

- [360] Ms. Kirkland said Ann Ruffolo came down and asked her to come upstairs. They went up. They put John on a blanket. Ann told her John overdosed on heroin, she didn't want Jovanna to see him and they had to get him out. Vivian Kirkland said she accepted this, despite the many times she had heard Ms. Ruffolo say she wanted John Ruffolo dead, and said what they did was none of her business.
- [361] Ms. Kirkland had told Sgt. Fordy she first saw the body already wrapped in a blanket in the hallway, but at trial she said they both wrapped up the body. She said Ms. Ruffolo had told her, once they had John Ruffolo's body on the blanket, that they should wait until night to move him, so Ms. Kirkland went back downstairs for half an hour or so. She said she had not told Sgt. Fordy this in her statement; she just remembered it at trial.
- [362] She testified that they rolled the body onto the blanket, dragged him out, pulled him into the hallway. The body was limp. Ann opened the front door. They pulled him out, down the landing, onto the walkway, down the steps to the driveway. Ms. Kirkland said as the body rolled and bumped down the stairs she thought "I hope he doesn't get hurt," which she realized was a strange thought to have.
- [363] She said they tried to get him in the car but he was too heavy. After they were unsuccessful in trying to get the body in the car, they laid him down on the passenger side of the vehicle, with the head toward the street. He was still limp. She said they did not discuss the danger of him being seen and she was not concerned about it.
- [364] Ms. Kirkland told Sgt. Fordy she couldn't help move the body because her back hurts. She said at trial that she denied helping Ann move the body because she knew she would be in bad trouble if she admitted she had helped.
- [365] Ms. Kirkland said it was about 9:30 or 10:00 p.m. when she went upstairs with Ms. Ruffolo. It took about half an hour to get the body out to the driveway. It was about an hour until Ms. Ruffolo left to get Robert Johnson. It was dark. They kept the porch lights off. There was no artificial light, but sufficient to see to drag the body down to the car. It was about two hours before they got him in the car.
- [366] Ms. Kirkland thought Ms. Ruffolo was going to get her foster brother, Neil Klatt. Ms. Kirkland said she trusted Mr. Klatt, whom she suggested initially. Ms. Kirkland said she did not suggest using Robert Johnson or Douglas Murray. She said she thought Douglas Murray was a dramatic kind of person and it was better if no one knew what they were doing.
- [367] Vivian Kirkland said she waited by the body while Ms. Ruffolo went to get Neil Klatt in her blue car, although she went into the house to get a cigarette and a beer. After many days on the stand she mentioned that Vaughan Barnes had come stumbling into the driveway while she was guarding the body. She said she went to the driver's side of the car to make sure Vaughan went that way.

- [368] She said she was hoping Ann would hurry. She said she did not believe John Ruffolo had been murdered; she believed he had overdosed, but she knew it was not right to put him in a car and take him somewhere when he was not alive. She said she did not want Ann Ruffolo to get into trouble, and she did not want Jovanna to know about it.
- [369] Vivian Kirkland said she was surprised to see Robert Johnson arrive with Ms. Ruffolo. She had expected her foster brother Neil Klatt. She watched Ms. Ruffolo and Robert Johnson talking by the car, and then Robert stomped off. She said Ms. Ruffolo asked her if Robert could keep his mouth shut. Vivian Kirkland told her he was a drunkard and probably wouldn't even remember.
- [370] Ms. Kirkland said the two discussed their options. Ms. Ruffolo suggested Douglas Murray. Although Ms. Kirkland did not think he was a good choice, she went to get him when she realized he would also want to protect Jovanna so he could be trusted. She told Mr. Murray John had overdosed and Ann needed help getting him into the car. She repeated her evidence that Mr. Murray suggested calling an ambulance, but Ms. Kirkland said Ms. Ruffolo did not want to do that because she did not want Jovanna to find out her dad had overdosed.
- [371] Ms. Kirkland said Douglas Murray did not have a panic attack and did not run back in the house. He suggested calling an ambulance, but she does not remember him saying he would help only if they took Mr. Ruffolo to the hospital.
- [372] She said the details weren't important, and that she didn't care about them, but she remembered Robert stomping off, and Ann telling her to get Douglas Murray.
- [373] Ms. Kirkland said they loaded the body into the car, with the feet on passenger side and the head towards driver's side. She was asked if the feet were too stiff to bend. She said he was longer than the back seat and if his legs folded there would be room. She said she guessed they would not have stuck the feet out if there was no other way but she didn't remember the feet being out the window. She had read that in the paper so she assumed it was true. Later, a passage from her statement to Sgt. Fordy was put to her in which she had told Sgt. Fordy the feet were out the window. She agreed she must have said it but said she still did not remember it. She said she did not know if the body was too stiff to bend, but he was too big for the back seat of the car.
- [374] Ms. Kirkland said she thought Ms. Ruffolo put John Ruffolo's wedding ring in the red car before they left, but she is not sure about that.
- [375] Ms. Kirkland said they passed the 6 Mile Pub on the way to Humpback Road. They turned right and she saw a sign saying "Humpback Road." She said Ms. Ruffolo knew where to stop, about a mile and a half along, by a huge tree. Ms. Kirkland had not mentioned the conversation with Gordy Boyd about hiking spots to Sgt. Fordy. She said she did not think it was significant until later.

- [376] Ms. Kirkland said there was a hill and a lot of tree roots on the right and a little gulley with "a water thing" on the other. It was dark; she could see only what the headlights illuminated. She said Ms. Ruffolo told her they would roll the body down into the gulley. A car came along, something she acknowledged she had mentioned for the first time during cross-examination. Ms. Kirkland said Ms. Ruffolo got back in the car and pulled to the side. She turned the car around, which was difficult because the road was so narrow. She said they rolled the body out of the passenger side of the car, down into the gulley and pulled it into the culvert by the torso. She said one of the shoes came off when they were trying to put the body in the culvert.
- [377] Despite her health problems, Ms. Kirkland said she was able to assist in moving the body, although it was very difficult. She said she had had a lot to drink and was also taking pills.
- [378] Ms. Kirkland had originally told Sgt Fordy she simply helped push the body out of the car and Ms. Ruffolo did the rest. She testified that she hoped Sgt. Fordy would believe her so she could go home.
- [379] Ms. Kirkland testified that Ms. Ruffolo said, when the body was found, that that was not where they had placed him. A portion of Ms. Kirkland's statement was put to her in which Sgt. Fordy suggested she dropped the body in an alley. Ms. Kirkland told him she had never said that. Sgt. Fordy then said "I'm sorry. In a gutter or whatever it's called. I don't know the words, but that it wasn't in the culvert where it was recovered, all right?"
- [380] The cross-examination on this point, apparently directed at showing that Ms. Kirkland first heard the word "culvert" from Sgt. Fordy, was quite confusing, but ends with Ms. Kirkland saying, "It wasn't found in the culvert, which he says, then I didn't know where it was."
- [381] Ms. Kirkland had eventually told Sgt. Fordy that the place where the body was dumped was dark and wet, and she appeared to agree with his description of it as a ditch, but she did not give further details. At trial she testified that she had put all the details out of her mind at the time she spoke to Sgt. Fordy, but that they did put the body in a culvert. She agreed she first used the word "culvert" at trial, and said she was trying to think of the proper names to say.
- [382] Ms. Kirkland described the culvert as big enough for her and Ms. Ruffolo and John. She said it was about 5 feet high. They couldn't stand up but didn't have to crawl. At one point she said she remembered ripples in it, but another point she said most culverts have them so she could not truthfully recall if this one did. It was level with the gulley.
- [383] She said it was muddy and starting to rain. There was water running and it was slippery. She said they had trouble getting the body into the culvert, and dragged him a few inches at a time. She could see John's pants had come off and Ann Ruffolo was trying to get them up. She said the feet were 2 - 3 feet inside the culvert. She said they drove away, and talked about changing clothes. They stopped, dumped the blanket, and drove to a residential area where they changed clothes by a big tree. The clothes to change into were in the trunk, at

Ann's suggestion. Vivian Kirkland was in her work clothes which were old. Ms. Ruffolo changed her clothes but kept her coat.

- [384] Ms. Kirkland had not mentioned this to Sgt. Fordy. She said she did not tell Sgt. Fordy about the clothes because it would look like she had planned ahead.
- [385] Sgt. Fordy had played a portion of Douglas Murray's statement to her in which Mr. Murray said repeatedly that he thought Ms. Kirkland was making all the decisions and was responsible for involving him in this. She denied it at the time and at trial. She said she was not able to talk to Douglas Murray by that time because of her bail conditions (and according to Mr. Murray and Cst. Ferguson, Mr. Murray had been relocated by the police), but if she had been she would have asked him about it.
- [386] Ms. Kirkland said they went back to 994 Tulip Avenue and Ann Ruffolo discussed where to put the car. Ms. Kirkland said she drove the red car to the pub at Ann Ruffolo's direction. There were other cars in the parking lot but the pub wasn't open. Ms. Kirkland said when they got back, she wanted to be alone, away from Ann Ruffolo. Douglas Murray came out of his room and asked where they put the body. Ms. Ruffolo said Beacon Hill Park.
- [387] Vivian Kirkland said one of the next two days they spent running around police stations. She said she never spoke of the events again. She heard two people had said they had seen John alive. She said she hoped the sightings were genuine and felt happy. She was sure he was dead but this put a doubt in her mind. She hoped it was true, that maybe someone had found him and he was out and about, but she knew it wasn't possible; she knew he was dead.
- [388] Vivian Kirkland said she called a lawyer's answering service for Ms. Ruffolo. Whoever was on the phone said not to talk to the police until they could meet with the lawyer, Adrian Brooks. They went to Adrian Brook's office. Ms. Kirkland said Ms. Ruffolo went in, came out and said "he's not for me." They went to another lawyer's office but she did not want that lawyer either.
- [389] Ms. Kirkland said she did not tell the police Ms. Ruffolo had consulted different lawyers. Ms. Kirkland referred Ms. Ruffolo to her own lawyer, Mr. Brennan.
- [390] Ms. Kirkland said she called the police on the night of October 20, 2003, on Ms. Ruffolo's instructions to tell the officer Ms. Ruffolo would not speak to the police except through her lawyer. She said Ms. Ruffolo was standing by her to tell her what to say, and that it was Ms. Ruffolo's idea to consult a lawyer.
- [391] Ms. Kirkland said after these events, Ms. Ruffolo spent more time with Douglas Murray, driving around in the car without her. However, she said that she and Ms. Ruffolo, although friends before, became closer because they shared a secret. Ms. Kirkland said she refused to discuss anything with Ms. Ruffolo, but she tried to help her out during the conversation with Cst. Ferguson by mentioning the heroin pipe.

- [392] Ms. Kirkland had a boyfriend named Ken Hubbard. He often stayed with Ms. Kirkland at 994 Tulip Avenue although both Ms. Kirkland and Mr. Murray said Mr. Hubbard was working out of town at this time. He was alleged to have connections with the Hell's Angels, and had beaten up Vaughan Barnes at one point. Douglas Murray was there, and said Ann Ruffolo stopped it. Ken Hubbard had conversations with Vivian Kirkland in which he expressed strong views about rats, including Ms. Kirkland's foster brother Neil Klatt. Ms. Kirkland said Ms. Ruffolo wanted to kick Ken out. After John Ruffolo died but before their arrest, Ms. Kirkland and Ms. Ruffolo had a dispute over a damage deposit because of damage done by Ken Hubbard.
- [393] A number of propositions were put to Ms. Kirkland which she denied - that she had killed John Ruffolo or knew who did; that she had asked Neil Klatt for a gun; that Ken Hubbard had asked Gordy Boyd to find him a non-traceable pistol; that Ms. Kirkland and Ken Hubbard offered to put the rental properties in their names so John Ruffolo's family wouldn't get them; that she had been threatened and was thus implicating Ann Ruffolo; that she made up a story with Douglas Murray; that she promised booze and rent money to Robert Johnson.
- [394] Ms. Kirkland said she did this for Ms. Ruffolo because she was a friend. Ms. Kirkland said she did not have women friends, but felt that Ann Ruffolo was her friend, someone she could talk to. She said they talked a lot. Ms. Ruffolo drove her around, took her to the liquor store and took her to get groceries. She said she believed what Ann told her and she did what was asked.
- [395] Ms. Kirkland said John Ruffolo did not like her in his home and, according to Ms. Ruffolo, he said he did not want Vivian Kirkland around all the time. She said Ann Ruffolo told her John Ruffolo wanted to evict her but Ms. Ruffolo promised Ms. Kirkland she would never have to move, and after John Ruffolo died she figured she would not have to move. Ms. Kirkland said she could not work at a regular job and liked the convenience of living at the Ruffolos' house, doing some work for them, and hanging out with the tenants. Money was secondary.
- [396] Although initially charged with first degree murder, Ms. Kirkland pleaded guilty to a much lesser offence. She said she did not really hear the facts that were put in at the sentence hearing. There was no mention at that time of Ms. Kirkland assisting in dragging the body to the culvert, of drugs in the blender, or of dumping their clothes, the blanket and the car.
- [397] Ms. Kirkland said more than once during her testimony that she and Ann Ruffolo had done something really bad, but it was Ms. Ruffolo who had bought the heroin and who had planned it all.
- [398] I will now turn to the evidence called by the defence, although I will deal with the Knockanback Grill witnesses and Sid Langheldt later in the analysis.

Randolph (Randall) Whitman

- [399] Mr. Whitman, a tenant of Ann Ruffolo's, was called by the defence. He had previously lived at one of the Esquimalt rental properties and moved into the basement of 994 Tulip Avenue in January or February of 2004 after Ms. Ruffolo had evicted Vaughan Barnes. Vivian Kirkland and Douglas Murray still lived in the basement. He said he got to know them a little, and they would party together.
- [400] On one occasion, they were all sitting at the kitchen table, and Douglas Murray asked how well Mr. Whitman knew Ann Ruffolo. Mr. Whitman said he had known her a couple of years. Mr. Murray said he was worried that Ann Ruffolo was in such a deep depression over her husband's death that she might kill herself, and he needed advice on whether to give her some information that might prevent that.
- [401] Mr. Whitman testified that Vivian Kirkland said it was not a good idea to tell Mr. Whitman anything. Mr. Murray then mentioned that Rob or Neil or any of the other guys might go to the police or Ann first, and Ann would then come after them. Vivian Kirkland said if Mr. Whitman said anything it would be his word against theirs, and he already knew what happened to rats because she had told him about Vaughan.
- [402] Mr. Whitman promised not to say anything. He said they then told him that John Ruffolo did not die the Sunday night he disappeared. He went into hiding from drug dealers to whom he owed money. He was asking friends for loans. He had done this before and had been allowed to repay the money bit by bit, but this time they wanted it all.
- [403] Mr. Whitman said Vivian Kirkland said John asked her to buy heroin for him to get really high. He normally didn't shoot up because of the track marks. He normally smoked it. Vivian Kirkland shot him up and also gave him some of her medication to help the heroin high last longer. Then a friend of hers, Gordy, came into the room where John was, not moving, and said he thought John was dead. They all went and looked and panicked. Douglas Murray suggested calling an ambulance. Vivian Kirkland said there would be too many questions and they might be blamed for his death. Someone suggested they knew a spot in the woods to drop a body and that's what they did. All the guys carried John down to a vehicle. He was very heavy and Vivian could not help because of her back. They took him to "wherever it was."
- [404] Mr. Whitman said he saw Douglas Murray after the arrest and told him he had to go to the police with the information because he knew Ann Ruffolo was innocent. Mr. Whitman said Mr. Murray told him he knew she was innocent, but he did not want to go to jail because he was gay. He said Vivian Kirkland is not someone you mess with. Mr. Whitman said once the charges were dropped against Douglas Murray, he was gone.

- [405] Mr. Whitman says he went to see John Green, the lawyer Ann Ruffolo had retained after she was arrested and before she was out of jail, which would be sometime in March of 2004, and told him about the conversation. Mr. Whitman said he did not go to the police because he knew they were not on Ms. Ruffolo's side. He said Vivian Kirkland and Douglas Murray told him, while at the kitchen table, that they knew the police were after Ms. Ruffolo and all they had to do was give Ms. Ruffolo to the police and they would be fine.
- [406] Mr. Whitman said he had not come forward before because he expected the lawyer to do it and he did not feel comfortable with the police's negative attitude towards and real hatred for Ms. Ruffolo. He said he knew of that attitude because he had been in court at Vivian Kirkland's preliminary hearing when her statement to Sgt. Fordy was put in evidence, in which Sgt. Fordy said the police hated Ms. Ruffolo.
- [407] He said he did not tell Ann Ruffolo about the conversation because she would just march downstairs and confront Mr. Murray and Ms. Kirkland.
- [408] Mr. Whitman said he had never discussed this with Ann Ruffolo as her lawyer told her not to discuss the criminal case. Mr. Whitman said he regretted having promised to say nothing, but he was afraid of Vivian Kirkland.
- [409] Mr. Whitman admitted the information he had received was "pretty scary." He says Ms. Kirkland and Douglas Murray used Ms. Ruffolo as a scapegoat to save their own skins and he has lived his life ever since looking over his shoulder. He said he waited seven years for a lawyer to contact him, but no one sat down with him to get his evidence until two days before he testified.
- [410] During cross-examination of Jonathan Horton, telephone records were put to him showing a call from his telephone number to Ann Ruffolo's number on January 18, 2006. Jonathan Horton denied ever calling Ms. Ruffolo and said he learned later the call had been made by his friend Ryan. He was unable or unwilling to provide any information that would allow Ryan to be located.
- [411] Mr. Whitman, who has remained a tenant of Ann Ruffolo's, said he was present at her home some years ago when she asked him to monitor a telephone call she expected to receive because she had just had a person hang up on her. Mr. Whitman came upstairs and stood by while Ms. Ruffolo got a call from Jonathan Horton telling Ann Ruffolo he and his mother would disappear if she gave them money, because they didn't want to come to court to lie about her. Ann Ruffolo refused. Mr. Whitman said he heard Jonathan Horton say "Mom's with me."
- [412] Mr. Whitman said he had run into Linda Horton a couple of weeks earlier at the Compassion Club and she had said the same thing to him. He said Linda Horton told him at that meeting that her daughter had just had a baby.

- [413] Mr. Whitman had had an altercation with Jonathan Horton while they both lived at the Esquimalt property. He said Jonathan Horton had stolen items from him. He said he did not like him or his mother, and was surprised that Linda Horton spoke to him at the Compassion Club.
- [414] Mr. Whitman said he told Ann Ruffolo about his conversation with Linda Horton but he didn't do anything more about it. He left it up to her. He said Ms. Ruffolo called her bail supervisor and her lawyer right away. Ms. Ruffolo's testimony on this issue was in accord with Mr. Whitman's.
- [415] Mr. Whitman said he was giving his evidence because he had seen the evil done to Ann Ruffolo. He says he likes and trusts Ann Ruffolo but is simply a tenant and part time employee, not a friend, although she asked him to accompany her to places because she was always being followed by the police. He said she had no one else, as there were one hundred and twenty "no contact" names on her bail terms, including her own brother.
- [416] Mr. Whitman said he had attended Vivian Kirkland's preliminary hearing and had listened to the evidence. He said he went with Ann Ruffolo because she asked him to. He said he has gone to other civil court appearances with her.
- [417] Mr. Whitman took many opportunities to volunteer some little detail of evidence, whether from his own knowledge or not. He admitted he had heard many things from Ann Ruffolo, including that John Ruffolo's family was horrible to him and that Jovanna had to force her father to see them, that Ann Ruffolo was in cancer remission and all the assets were in John Ruffolo's name, that John Ruffolo and his sister did hard drugs together, and that Ann Ruffolo had left John once before because of drugs.
- [418] Mr. Whitman was asked in cross-examination if he ever heard the Ruffolos arguing. He said occasionally, but nothing specific. In re-examination, when asked if anything he overheard caused him concern, he claimed to have been present at the Ruffolos' apartment in Esquimalt and heard Ann Ruffolo tell John Ruffolo to phone the police because the Hortons had come to the door and said they wanted to kill her or kill John for \$10,000 of insurance money.
- [419] Douglas Murray, Vivian Kirkland, and Linda Horton were recalled for cross-examination on this information which had not been put to them the previous year when the case was before the jury. The court was told by defence this had been a tactical decision of defence counsel and that there was no suggestion of recent fabrication since the witnesses were last on the stand. Crown accepted this assurance, as does the court.

- [420] Douglas Murray said he did not know Randall Whitman well. He said Mr. Whitman kept to himself and stayed in his room playing computer games. Mr. Murray seemed genuinely puzzled, saying repeatedly, as the various aspects of Mr. Whitman's evidence regarding the conversation at the table were put to him "I don't remember this at all. I don't recall speaking to Randall very much." He said he did recall being afraid at times he might be put in jail on the assumption that the police did not know the real story.
- [421] Randall Whitman had testified to his knowledge of some details of Mr. Murray's life. Mr. Murray said in redirect that he had no friendship with Randall Whitman but he himself is one to discuss personal matters easily. He said he had no knowledge of drug lords or a house party, and none of the suggestions were even close to what he recalled from October 19, 2003.
- [422] Vivian Kirkland said she did not recall having conversations with Randall Whitman. She said he was always in his room on his computer and she did not talk to him much. She said she didn't care for him herself; he was there because Ann Ruffolo wanted him there. She said Ms. Ruffolo had asked him to move in after Vaughan Barnes was evicted. She denied the conversation at the kitchen table and said she had never spoken to Randall Whitman about John Ruffolo's death.
- [423] Vivian Kirkland was also asked about a conversation she had had with her former boyfriend, Ken Hubbard, in a restaurant named Montana's, in January of 2004. Ken Hubbard had just given a statement to the police and they met for lunch. According to the surveillance notes entered by the defence through admissions, Ms. Kirkland had driven there from 994 Tulip Avenue in the red Tempo. A police officer had been seated nearby and had heard snatches of the conversation. The officer's notes, entered by admission, were put to Ms. Kirkland. The notes reflect what the officer could hear, but there were gaps of seconds to minutes where she could not hear what Ms. Kirkland and Mr. Hubbard were saying.
- [424] Ms. Kirkland was asked about the following scattered comments:
- Vivian: Hi...didn't you explain to them that a heroin overdose is lethal. Were you just down at the police station?
- Ken Hubbard: Yes, but don't tell Ann.
- After conversation that could not be overheard, Mr. Hubbard said:
- You just say you didn't buy it....
- Vivian Kirkland: I don't even know where to buy it.
- Kenneth Hubbard: You just tell them you didn't fucking buy it.
- Vivian Kirkland: Why don't they talk to me.

Kenneth Hubbard: I told them they don't fucking need to talk to Vivian, she's not violent, she couldn't do that.

Vivian Kirkland: Why would I spend my money on stuff I don't use?....Don't tell her anything.

(more conversation that could not be overheard)

KH: I told them, you think you are going to give me twenty-five years. I'm fucking 60 years old.

VK: At least they know you are my boy friend, you can tell them what you want. (pause)

KH: She is one of the only ones not abusing the system.

VK: Yeah, I know. She was so distraught I had to drive....She didn't get any money...just like after we left the police station. Usually John called her all the time. They were together 16 years you know...They just said to us sit down there and we will let you know as soon as we can. We gave statement at the police station downtown. They have talked to everyone but me, thank you, not like the media

(pause)

VK: It's not true! and based on what!

KH: I didn't even know John...

[425] At that point a waiter approached, had some conversation about entering a contest, and the couple left.

[426] Vivian Kirkland said she did not recall the event, but said she and Ken Hubbard did go to Montana's and she obviously said the things attributed to her. She said she never discussed moving the body with anyone, including Ken Hubbard. She said she heard from Douglas Murray that Ann Ruffolo was afraid she would tell him but she never did. She said she may have mentioned heroin because Ann Ruffolo told her that John Ruffolo had overdosed.

[427] Ms. Kirkland said Ann Ruffolo was never distraught and Ms. Kirkland had not driven to the police station. She did not recall ever driving Ann Ruffolo's blue car except on one occasion when Ms. Ruffolo jumped out of the car because there was a dog in the middle of the road, and Vivian Kirkland had to drive the car around the corner. She said she drove the red car once, when she was with Douglas Murray, and was pulled over by the police and had no licence. She did not mention driving the red car to the Knockanback Grill after coming back from Humpback Road.

[428] As for the "abusing the system" comment, Ms. Kirkland said they could have been talking about disability, or misuse of welfare cheques.

- [429] Linda Horton was recalled for some additional cross-examination. She recalled the fight between Randall Whitman and her son Jonathan. She recalled being asked about the phone call during her previous cross-examination, but had not known anything about it. She said she talked to Jonathan about it after and learned that Jonathan had said his friend Ryan had made the call.
- [430] She said she did not remember seeing Randall Whitman again, but when it was put to her that she had run into him downtown and mentioned that her daughter had had a son, she said her daughter had had a son in June of 2006, "if that would help."

Jovanna Ruffolo

- [431] Jovanna Ruffolo, now 20 years old, testified that she thought the family was doing okay when her father died, and she had heard no discussion of divorce. She said she was closer to her father than her mother. She said her mother had no friends and became withdrawn after Ricky Burton's suicide, but she never heard her blame John Ruffolo for it. She said her mother exhibited the same withdrawal after John Ruffolo died.
- [432] Jovanna Ruffolo said she was not friends with either Vivian Kirkland or Douglas Murray, and never saw her mother with either. She said she never spoke to Tessa Lloyd. She testified that she was never picked up from school by her mother with Ms. Horton.
- [433] She admitted in cross-examination that she was very busy with school, extra-curricular activities and her social life and was not home much of the time. Jovanna denied that Douglas Murray helped her with her homework, but was unable to explain a homework assignment she had done with Douglas Murray's name on it.
- [434] Jovanna Ruffolo claimed she was present for a conversation between her parents in which her father had told her mother she would not believe what one of the Hortons had said to him. Ms. Horton had told him Ms. Ruffolo had offered them \$10,000 to kill him, and her mother then "exchanged the information to him that vice versa." Jovanna Ruffolo said this conversation took place at Esquimalt, but in cross-examination said she was mistaken, and she was certain it took place at 994 Tulip Avenue. In her statement to the police she said her mother had told her about it the day after her father had also mentioned it. She said she was treated very badly by the police and would say anything to get out of there.
- [435] In direct examination, Jovanna Ruffolo said she had never seen her mother make the milkshakes her father had in the morning. She had told the police that it varied - her mother used to make them, then her father did. She testified that it didn't vary; her mother used to make them then the routine changed.
- [436] There was no evidence from Jovanna Ruffolo as to where she spent the night of October 19, 2003.

Ruby Ann Ruffolo

- [437] Ms. Ruffolo said her marriage to John Ruffolo had its ups and downs, and she left him at one point when he was taking a combination of marijuana, acid and heroin, which he smoked. She said he worked through his issues, proved to her he was drug free, and they reconciled.
- [438] She said they bought a number of properties. Jovanna started school. Ms. Ruffolo went to law school, which Mr. Ruffolo allowed on the condition that she pay for it, that she keep up the properties, and that she look after Jovanna. Ms. Ruffolo said she did well at law school.
- [439] Mr. Ruffolo told her he was likely going to be fired from Wilkinson Road jail because of Real Estate Act violations. He wanted her to do the legal work. He was convicted, and was suspended in February 2000 and then fired in May 2000 from Wilkinson Road. Ms. Ruffolo persuaded the union to go to arbitration. They received a consent award of \$17,000 in September of 2001, and Mr. Ruffolo was allowed to resign.
- [440] Ms. Ruffolo said she was concerned that the properties were all in John Ruffolo's name. They had had a tough time with the trial respecting the real estate charges. She was working on the appeal. She wanted some security. She produced an agreement dated December 17, 2000, which said that in the event of a divorce or separation initiated by John Ruffolo ("Mrs. R.A. Juba Ruffolo" is crossed out), Ms. Ruffolo would be paid \$100,000 up front for everything she had done, and everything else would be divided in half. She produced an additional document with the barely legible date of July 23, 2001, which said 826 Esquimalt, which they had just purchased, was acknowledged to be half hers.
- [441] The documents have various illegible scribbles and crossed out dates - the clearest on each seems to be 2005, which Ms. Ruffolo said cannot be correct. She said the signatures are John Ruffolo's.
- [442] Ms. Ruffolo said they had no agreement dealing with Mr. Ruffolo's death and neither had any life insurance.
- [443] Ms. Ruffolo said the Wilkinson Road situation strained their relationship, but she felt they were becoming a partnership. They moved to the Esquimalt property. Her son Ricky and Jonathan Horton did not get along. She wanted the Hortons evicted, but John did not agree.
- [444] She said she never asked Jonathan Horton to kill John Ruffolo. She said the Hortons came to the door and said they would kill John for her if she gave them insurance money, telling her John had asked them to kill her for \$10,000. She said she told John and he laughed, saying they had just been down there offering to kill her for the insurance money. Ms. Ruffolo said she wanted to call the police. John felt it was entertaining.
- [445] Ms. Ruffolo said she never had any counselling sessions with Tessa Lloyd and had no recollection of ever speaking to her. She said she never told Ms. Lloyd she wanted her husband dead.

- [446] In September of 2002, her son Ricky committed suicide. Ms. Ruffolo said John Ruffolo was always supportive and she did not blame him for Ricky's death. Two police witnesses had testified that on the evening of the suicide, Ms. Ruffolo screamed at John Ruffolo that he was to blame, she was going to leave him, the marriage was over, he had always been too military with her son, and had not let him come upstairs (apparently Ricky Burton had lived in the room later occupied by Douglas Murray).
- [447] Ms. Ruffolo testified that she was devastated and blamed only herself. The police officer who dealt with Ms. Ruffolo on the occasion of her son's suicide said she was distraught to the point of requiring medical attention.
- [448] Ms. Ruffolo said she did not know Robert Johnson; she was aware of him but did not know his name until she heard it in court. She said John Ruffolo had hired Robert Johnson through Vivian Kirkland to hang some doors. Mr. Johnson hung them upside down and he did not work for them after that. Ms. Ruffolo said she heard a naked man screaming in the yard one night and told Vivian Kirkland to get him off the property. According to other evidence, this was likely Robert Johnson. Ms. Ruffolo said she had no other dealings with him.
- [449] Mr. Ruffolo said she saw a gun in the file cabinet on one occasion and yelled at John to get it out of the house. He said it was from Brinks and he had forgotten and brought it home. She said she never showed it to Vivian Kirkland and never told her she believed John was trying to kill her.
- [450] Ms. Ruffolo said in the summer and fall of 2003, their family life was busy. She said John Ruffolo told her he wanted to move to Vancouver to take a job with Customs. She said he was frantic and paranoid, and impatient with Jovanna. Ms. Ruffolo said she knew nothing about girlfriends, was never asked for a divorce, and was never told he was leaving her. She said she did not believe he wanted to kill her.
- [451] Ms. Ruffolo denied ever having a conversation with Lois Ruffolo at Thanksgiving.
- [452] Ms. Ruffolo said that on October 19, 2003, John Ruffolo came home from his night shift at Land's End, gave her a list of things to do on the properties and went to bed. Jovanna went in to use the computer and he yelled at her to get out. Ms. Ruffolo said she took Jovanna to her friend Shruti's around 3:00 p.m. and went to the Esquimalt property where there was a lot of work to do. There was an empty apartment that needed to be rented out because they were losing money. She said she had showings in the evening. She came home briefly at 8:00 p.m. to get something and finally got home to stay at 10:00 p.m. She said she got a call from Brinks around 10:45 p.m. asking if John was running late; she went to see if his uniform was there. She told them his stuff was gone and his car was not there so he must be on his way.

- [453] Ms. Ruffolo testified that she was not sure if Jovanna stayed the night at her friend's, but it would be unusual if she stayed over on a school night. She was not sure if she took Jovanna swimming the next morning as she usually did. She said she would normally take her to school and then go home. She said she waited for John but he did not show up. She called Brink's and spoke to Angel McIntyre. She learned he had not gone to work. She said she began to get scared. She called his workplaces and one of his friends.
- [454] Ms. Ruffolo testified that she felt she had to go to the police so she asked Vivian Kirkland if she would answer the phone while she was gone. Ms. Kirkland was strictly a tenant at that point, not a friend. Ms. Ruffolo testified that Ms. Kirkland kindly said she did not feel Ms. Ruffolo was in a condition to drive, and asked if she wanted Ms. Kirkland to drive. Ms. Ruffolo said Ms. Kirkland drove them to the Victoria Police station. She said she had taken a photograph of John so they could use it to find him. They were directed to go to the Saanich Police instead, and they did so.
- [455] Ms. Ruffolo said they then went home. She took Jovanna to her swimming class, and waited for the police to call. She said she did not feel the police were taking her seriously. She told Vivian Kirkland she needed someone to get them moving. Vivian Kirkland suggested her own lawyer, Mr. Brennan. She called him. She said she did not know Vivian Kirkland had told the police Ms. Ruffolo would only deal with them through a lawyer and did not authorize her to say that.
- [456] Ms. Ruffolo testified that on October 22, she learned from the police that John had been seen at the Knockanback Grill. She said she felt things would be okay. However, a couple of days later, Cst Ferguson came to the house, looking solemn. He told her John had been found dead.
- [457] Ms. Ruffolo said her relationship with Vivian Kirkland and her other tenant Douglas Murray became closer after John's death. She said they were supportive and Vivian in particular was very helpful.
- [458] Douglas Murray and Vivian Kirkland testified that Ms. Ruffolo had disposed of a pager in the days following John Ruffolo's disappearance. Ms. Ruffolo testified that she never asked Douglas or Vivian to dispose of anything. She produced a pager to her lawyer which was entered in court. Ms. Ruffolo said that was John's pager. Jovanna Ruffolo also testified it was her father's pager. Until the defence applied to put in additional evidence on November 3, 2010, there were no markings or any additional evidence that would assist in demonstrating whether the pager entered as an exhibit was John Ruffolo's or not. Once the Telus evidence was obtained, it was clear the exhibit is indeed John Ruffolo's pager.

- [459] There was no clear evidence regarding John Ruffolo's use of a cell phone. Sgt. Mackenzie was asked in cross-examination if he had called a particular cell phone number that a person who provided a statement said John Ruffolo might have. He said he did and discovered the phone was a Brinks phone and was with a Brinks employee. Jovanna Ruffolo testified that her father bought a cell phone at a garage sale but she does not know if he ever used it. She said she did not use it and did not think it worked.
- [460] Ms. Ruffolo said she received a call from the Hortons in 2006 which she asked Mr. Whitman to monitor. She had received a hang up call that made her suspicious and thought the person might call back. She said Jonathan Horton told her that he and his mother did not want to come to court to lie about her and would take money to disappear. She heard him say "Mom be quiet." Mr. Whitman had told her about his conversation with Linda Horton a couple of weeks before. Ms. Ruffolo said she was shocked and afraid. She wondered what she was being set up for. She also realized the Hortons were on her "no contact" list for her bail. She reported the call to her bail supervisor and her lawyer.
- [461] She said Mr. Whitman, a tenant only, is a decent fellow but irritating. They have no interests in common. She said she did not go to Vivian Kirkland's preliminary hearing and was not aware that Mr. Whitman went.
- [462] Ms. Ruffolo denied buying heroin or having Vivian Kirkland arrange a buy, denied killing her husband or asking anyone else to do so, denied administering heroin or amitriptyline to her husband, and denied asking anyone's help to move the body. She said she had nothing to do with John Ruffolo's death.

Cross-examination

- [463] Ms. Ruffolo is 5'4 1/2" tall, very slight in stature. She said she and John Ruffolo were both a little overweight in 2003, but relatively healthy.
- [464] Ms. Ruffolo admitted she had three other children besides Ricky with Mr. Burton. These girls had been raised by her mother.
- [465] Ms. Ruffolo said the money used for the initial purchase of properties was almost entirely hers. However, she said John Ruffolo worked and put money into maintenance of the properties. She said John was busy, trying to get full time work and holding down three jobs. She looked after the properties, the bookkeeping, his arbitration, the court case over the real estate charges, Ricky, Jovanna, John and the home.
- [466] She admitted the only source of information she had about John Ruffolo's previous drug use was John himself. She said they did not seek professional help, and although she thought she might have spoken to his mother about the problem several years before, she said she and Lois Ruffolo were not close.

- [467] Ms. Ruffolo said the Hortons came to the door of 822 Esquimalt with their proposal to kill John for insurance money out of the blue while she was there with a prospective tenant. The tenant left quickly. She did not have the tenant's name. Ms. Ruffolo denied ever approaching the Hortons. She said she hardly knew them as they dealt mostly with John and got along with him.
- [468] Ms. Ruffolo said John Ruffolo went to the Knockanback Grill occasionally when he worked at Wilkinson Road jail and took her there once, but she doesn't care for bars.
- [469] Ms. Ruffolo denied ever meeting with Robert Johnson in Crystal Pool Park. She said she had no knowledge of any girlfriends, and that John never asked her for a divorce. She denied speaking to Lois Ruffolo at Thanksgiving and said they never talk. She agreed she drove Jovanna over to her grandparents and picked her up. She denied calling Lois Ruffolo's house and leaving messages for John.
- [470] Ms. Ruffolo said she hired a lawyer because the police were not taking her seriously. They kept asking about drink and drugs and just seemed to think John was out having a wild time and would be back. She said she went to the Victoria Police instead of Saanich because she wasn't thinking. She said she may not have gotten the messages the police were leaving for her because Vivian Kirkland was monitoring the phone while she drove Jovanna around. She said she took several photographs to the police and gave them to Vivian Kirkland to give to the front desk. She said she may not have been home when the police came because she was walking around the neighbourhood looking for John.
- [471] Ms. Ruffolo admitted she did not try to contact any of John Ruffolo's family. She said John was not that close to them so that was not where he would be. She does not recall family members coming and knocking and does not think they would come to her house. She said Jovanna pointed out to her that Sarina Ruffolo had called John's pager.
- [472] Ms. Ruffolo said Sgt. Mackenzie got the wrong impression when he thought she did not want to meet with him, despite her saying she felt all police were corrupt. She said she did want to meet with him and did not know why she said that. She thought having the lawyer, Mr. Brennan, deal with the police for her would speed things up.
- [473] Ms. Ruffolo said John liked protein shakes in the morning, but did not like the ones she made because she took the fatty stuff out. She said he did not have anything to eat on the morning of October 19, 2003. She said she left with Jovanna at 3:00 or 4:00 p.m. John was in bed but not sleeping. When she went home briefly at 8:00 p.m. neither John nor his car were there. She said she did not know his shifts as he was on call. She said she might have picked up Jovanna before she went home at 10:00 p.m., but she also testified that Jovanna may have slept over at her friend Shruti's, whose family now lives in Seattle.
- [474] Ms. Ruffolo had told the various police officers she dealt with on October 20, 2003 that she had last seen John early in the day of October 19, 2003, around 9:00 or 9:30 in the morning. However, at trial she said she last saw him at about 3:00 p.m., which accords with some of

Vivian Kirkland's evidence that that is when Ms. Ruffolo took Jovanna to her friend's. Ms. Ruffolo said she had a memory of seeing John Ruffolo at 3:00 p.m. because she and Jovanna left the house then. She said she was not worried by the call from Brinks and did not check up to see if John had arrived at work.

[475] Ms. Ruffolo said she drove to Land's End the next morning looking for John. The supervisor at Land's End, Ms. Mockford, said Ms. Ruffolo had not been there, although she had called. Ms. Ruffolo said she may have driven to Manchester House instead.

[476] Sarina Ruffolo had testified that on August 9, 2003, after their cousin's wedding, she and John had gone to 994 Tulip Avenue to smoke some marijuana, as they did occasionally in the last six months of John's life. She said Ms. Ruffolo was always there but did not smoke any. John went to get the marijuana from a tin but it wasn't there. He asked Ms. Ruffolo if she knew where it was. She said no and asked Jovanna. Jovanna denied any knowledge of it and said she wanted to go to a friend's. Ms. Ruffolo drove her, and when she returned, she said Jovanna had admitted putting it in a flower pot. Sarina testified that Ms. Ruffolo offered to get some from one of the downstairs tenants, but they found the marijuana Jovanna had hidden and smoked that. Sarina said she never saw John Ruffolo do any other drugs.

[477] Ms. Ruffolo denied ever getting marijuana from a tenant or seeing John and Sarina smoke marijuana in the house. She said she did not approve of drug use in the home. She said she came home one day to find John yelling at Jovanna, who was crying. John told Jovanna to give back the tin with the drugs in it. Ms. Ruffolo took Jovanna outside to talk to her, and Jovanna said the marijuana was in a potted plant. Ms. Ruffolo gave it to John and asked them to leave as there would be no drugs in the house. Ms. Ruffolo said John told her Sarina was always trying to use him as a dealer. She said she could not comment on their relationship as she did not see them interact.

[478] Jovanna testified that she hid the box with the marijuana because she felt her father should not do that. She said he yelled at her to give it back and she did. She had told the police another version of the incident, - that the dog had taken the box outside and when she saw what was in it, she took it back inside. Her father was looking for it and she gave it to him. She said she was covering for her father. In neither of her versions did her mother play a role.

[479] Ms. Ruffolo agreed she told the police another person had said John was using heroin. She testified that was Douglas Murray. She said Mr. Murray had told Vivian Kirkland he came up to pay the rent and he saw a crack or heroin pipe, and Vivian told Ms. Ruffolo. Ms. Ruffolo said she asked Douglas about it and he admitted it. She found it upsetting.

[480] Ms. Ruffolo said she did not know Douglas Murray well enough to like him. He was simply a tenant. She denied every interaction or conversation he testified to.

- [481] Ms. Ruffolo said she and Ms. Kirkland were cordial, but not friends. They did not have a lot of contact. She said Ms. Kirkland was supportive and helpful after John's death, but has not told the truth in court. She denied every detail of Vivian Kirkland's evidence. She denied ever complaining of abuse and said John was really good to her. She denied ever having a conversation with Gordy Boyd about hiking. She denied trying to cast her husband as a serious heroin user in order to deflect attention from herself.
- [482] Ms. Ruffolo agreed to be interviewed on TV on March 3, 2004, which was the day a search warrant had been executed at her residence, and was the day before she, Vivian Kirkland, and Douglas Murray were arrested. In that interview she claimed to believe Mr. Ruffolo had been shot. She said she did not believe he was dead and wanted an independent coroner. She said divorce had never been mentioned, but even if it had, it would not be the end of the world. She mentioned that John had been involved in an escort agency and she had not known about it until after he died.
- [483] The defence filed, through admissions, a police report of a complaint about a possible business licence for an escort agency at the 994 Tulip Avenue address under the name of Rebecca Wilson. Police officers had gone to the residence in February 2003 and had noted that Ms. Ruffolo said she knew nothing about it. Ms. Ruffolo denied ever speaking to officers about an escort agency. She said they may have asked about a business licence but could not have mentioned what it was for or she would have remembered.
- [484] Also in the TV interview, Ms. Ruffolo said John Ruffolo had been good to her son and was a genius at business. When asked who would want to kill such a great guy, she said John Ruffolo wasn't always great to other people; he could be quite mean and was not good to the tenants. She said John's sister had been seen at the house by one of the tenants on the night he disappeared and she thought the police should be looking at his family. She said Douglas Murray had told her about John's sister but she had not told the police. Ms. Ruffolo also told the interviewer that John kept getting fired, and that a lot of the tenants told her he was selling drugs.
- [485] Ms. Ruffolo told the interviewer she had come home one day to find her daughter crying and John Ruffolo yelling at her to get the drugs she had taken from him and his sister. According to Ms. Ruffolo, her daughter "didn't want her daddy doing drugs." She said John had quit drugs seven years ago, but got right back on them when his sister got back in his life. She said he had smoked heroin and done cocaine as well as marijuana.
- [486] Ms. Ruffolo was asked in cross-examination about the reporter mentioned by Mr. Murray and said as far as she recalled, Douglas Murray said he knew the reporter and she could help get information out, but Ms. Ruffolo did not think they followed it up, although she had told the TV journalist that the same reporter had done a "hatchet job" on them and never checked any of her facts.

- [487] There is a photograph in evidence, taken on March 3, 2004, the day of the search, of a document dated November 25, 2003, located in a drawer in Ms. Ruffolo's bedroom. It appears to be a list of items of information and which makes reference to possible assistance the same reporter might give to Jovanna. However, Ms. Ruffolo was not asked about that document.
- [488] Ms. Ruffolo told the TV interviewer that the police had not moved on her report until the Thursday so she had to get a lawyer to get them to act, as they just kept telling her he was on a binge.
- [489] Ms. Ruffolo testified that she regretted saying these things in the interview, but she was taking medications herself and was devastated. She said her house had just been searched and her thoughts were rambling. She denied intentionally trying to blacken John Ruffolo's name.
- [490] Ms. Ruffolo said her lawyer told her about Randall Whitman's information when she was released on bail after being charged with murder.
- [491] The Crown put its theory to Ms. Ruffolo: that Ms. Ruffolo killed her husband because he wanted a divorce and she felt she would not get the share of the property she felt she deserved. She denied this and said nothing would make her kill John. She said she would have gotten more in a divorce. Now her daughter does not have a father, and Jovanna's baby daughter does not have a grandfather.

DISCUSSION OF VARIOUS ISSUES

- [492] There are some evidentiary issues that require analysis before moving on to the evidence going directly to the elements of the offence with which Ms. Ruffolo is charged.

The Hortons' testimony

- [493] The testimony of the Hortons was ruled admissible in a voir dire as potential evidence of motive and premeditation. It is the accused's position that the Hortons decided to approach the police with their story about Ms. Ruffolo so they could blackmail her into paying them money to disappear rather than "lie" about her in court. The accused says the Hortons are actually trying to cover up the real story - that they approached both John Ruffolo and Ms. Ruffolo separately, offering to kill each of them for some insurance money. There was no evidence that any insurance money exists. Mr. Murray and Ms. Kirkland both testified that Ms. Ruffolo told them about the Hortons, although their versions are different. Mr. Whitman and Jovanna Ruffolo both testified that they were present when John Ruffolo and Ms. Ruffolo discussed the interaction with the Hortons, although their evidence diverged on the substance of the conversation and where the conversation took place.

- [494] The defence says a consideration of both the Hortons' evidence must be tempered by a strong caution as to unsavoury witnesses. The Crown does not disagree and says a functional approach should be taken, as outlined in *R. v. Khela and Sahota*, 2009 SCC 4, at paras. 37-44.
- [495] The special characteristics that trigger the need for special scrutiny should be identified. The trier of fact must bear in mind that it is dangerous to convict on unconfirmed evidence of this sort, although entitled to do so if satisfied that the evidence is true. The trier of fact should look for evidence from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused.
- [496] The Crown says a consideration of all the evidence relevant to the Hortons' evidence, including that of Tessa Lloyd and of the chat line conversation makes the essence of their testimony reliable.
- [497] There were discrepancies between Ms. Horton's evidence and that of her son. They admitted quite openly that they had discussed what had occurred with each other and with other people. Obviously, Mrs. Horton discussed it with John Ruffolo, as this is reflected in the chat line conversation.
- [498] Jonathan Horton's evidence on its own is not worthy of belief. He was an argumentative, evasive, unresponsive witness, disrespectful to counsel and to the process in general. He has a substantial criminal record. However, his evidence must be considered in the context of all the other evidence, particularly his mother's.
- [499] Ms. Horton is a heroin addict. There is also some suggestion that she might have been involved in a welfare scam involving the receipt of extra rent for a friend of hers. Though not without her limitations, she was quite straightforward in her evidence, but her maternally protective attitude to her son is difficult to reconcile with the person he appears to be. Ms. Horton said it was her concern for her son that drove her to confront Ms. Ruffolo. She explained her son's criminal and anti-social behaviour by saying he is diabetic, subject to errant blood sugars, has poor judgment and is vulnerable. For his part, Jonathan Horton said he took care of his mother, supplying her with basic necessities, which included "a doob in the morning."
- [500] It is appropriate to consider whether there is evidence that might tend to corroborate the evidence of the Hortons. However, there is one subsidiary issue involving them that should be discussed first.

The Phone Call from the Hortons

- [501] Telus phone records show a call from the Hortons' number to Ruby Ann Ruffolo's number on January 18, 2006, before the voir dire was to commence in February, 2006. The Hortons testified on the voir dire.

- [502] Ms. Ruffolo and Mr. Whitman say Jonathan Horton told Ms. Ruffolo he and his mother would take money to disappear so they did not have to "come to court and lie about" Ms. Ruffolo. Both say they heard a person whom they assumed to be Linda Horton whispering in the background.
- [503] Mr. Horton was cross-examined extensively on this issue, and came up with a story about the call having been made by a friend of his named Ryan, about whom he was unable to provide any useful information. Ms. Horton was asked about it and said she knew nothing about it. When she was recalled for additional cross-examination a year later, she said Jonathan Horton had told her after her testimony the year before that "Ryan" had made the call.
- [504] I am inclined to accept that Mr. Horton did make such a call, although the insertion of the phrase "and lie" could be, as the Crown suggests, an invention of Ms. Ruffolo's and Mr. Whitman's. There is no persuasive evidence that Linda Horton was involved in the call. I do not accept Mr. Whitman's evidence that Ms. Horton approached him at the Compassion Club with the same demand a couple of weeks earlier. Even on his own evidence, he dated his conversation by Ms. Horton's reference to her daughter having a baby. The only evidence before the court is that the baby was born in June. The call was the previous January.
- [505] I will return now to the evidence respecting the alleged conversations in the spring of 2002.

Tessa Lloyd's Evidence

- [506] While Ms. Lloyd's evidence is subject to the frailties one would expect of an encounter many years ago that was not particularly significant except in retrospect, I am satisfied that she did have conversations of the sort she recounted with Ms. Ruffolo in the spring of 2002.
- [507] It is not overly significant that Ms. Lloyd only came forward once the trial had started. Ms. Lloyd said she did not consider her evidence to be of much importance or relevance, but said once she read an account of the trial in the newspaper, she thought she should let the police decide.
- [508] Ms. Lloyd had no agenda and no interest in the case. Because of the scheduling difficulties that attended this trial, she was required to make herself available to testify by video for several days on a voir dire while on vacation in Wales, and then on the trial when she returned to Victoria.
- [509] She said parents in troubled marriages often have similar thoughts to those expressed by Ms. Ruffolo, although it was unusual that Ms. Ruffolo continued to do so, despite Ms. Lloyd's attempts to counsel her, which Ms. Lloyd described as unsuccessful. Ms. Lloyd recalled details of Jovanna Ruffolo's school activities. Her account of Ms. Ruffolo's complaints are similar to those testified to by other witnesses - Linda Horton, Vivian Kirkland, and Jonathan Horton. Notwithstanding the credibility issues for each of those

witnesses, the complaints are the same and there can be no suggestion that Ms. Lloyd colluded with those witnesses.

- [510] Ms. Lloyd had difficulty establishing the year in which Ms. Ruffolo spoke to her, and her evidence changed on that point. She tried to get documentation from the school to assist her before she testified but none was available. I am satisfied, however, that by a process of elimination, she eventually concluded that it must have been the spring of 2002, although she remained unsure about what grade Jovanna was in. She was not asked about the movement of grades 6 - 8 to another school in the fall of 2002, but she did say she did not have a strong memory of Jovanna in Grade 7. Obviously Jovanna was in another school for Grade 7.
- [511] Ms. Ruffolo adduced some letters from Ms. Hendy, the principal of George Jay Elementary School, one in 2000 suggesting a counsellor for Jovanna named Ms. Duncan, one in January 2001 saying Ms. Hendy herself would liaise with the teacher and the Ruffolos, and one dated May 3rd, with no year, in response to faxes from Ms. Ruffolo sent in June, which is somewhat confusing. The letter refers to two split classes - grades 4 and 5 in one class, and grades 5 and 6 in another, saying Jovanna would be going into the second one with Mr. Gretsinger. This suggests she would be in Grade 5, which would be the 2000-2001 school year, according to the letter from the school district entered by consent, stating Jovanna was in Grade 7 in Central Middle School in 2002/2003. In this third letter, Ms. Hendy refers to having Tessa Lloyd investigate running clubs for Jovanna.
- [512] The defence argues that these letters demonstrate that there was no direct communication between Ms. Ruffolo and Ms. Lloyd. I am unable to draw that inference from these letters, which simply say what they say, nor does Mr. Langhelt's evidence assist. It is clear that he did not remember events from 1996 with any clarity, which is understandable. He did not even recall that Jovanna was his student, when she clearly was. As well, he was gone from the school for many years by 2002 and did not work there after Tessa Lloyd obtained her certification as a counsellor.
- [513] The records from the school district further support Ms. Lloyd's evidence that the conversations took place in 2002, as Jovanna was not at the school in 2003, and she was in a different classroom in 2001.
- [514] Despite the defence contention that Ms. Lloyd simply made up her evidence or was mistakenly recalling interviews with someone else entirely, I am satisfied that she did have the conversations with Ms. Ruffolo to which she alluded in her testimony.

Discussion of the Hortons' Testimony

- [515] I do not accept the accused's version of her interaction with the Hortons. It simply makes no sense that the Hortons would approach both of them out of the blue and make this offer. The Hortons' version of events is consistent with the evidence of Tessa Lloyd. It is supported by the evidence from Jamie Huson and Lois Ruffolo that John Ruffolo was having an affair with Jamie Huson at the time, that the marriage was in trouble, and that both John Ruffolo and Ms. Ruffolo were concerned with the other taking all the money.
- [516] Ms. Horton's version as reflected in the chat line - that John Ruffolo said Ms. Horton told him Ms. Ruffolo asked them to kill John for \$10,000 - is also the one Jovanna Ruffolo said she was told by her father, although she added that her mother told her the Hortons said the same thing to her.
- [517] The chat line evidence corroborates Linda Horton's evidence that she told John Ruffolo her version of events just after the machete incident which is when they were required to move. It is not credible that she would do so if she had previously approached both Ruffolos with offers to kill either one of them for insurance money.

Use of Ruby Ann Ruffolo's Out of Court Statements to Other People Including the Police

- [518] Disbelief of the accused's evidence cannot be used to bolster the Crown's case. Here, however, the Crown says Ms. Ruffolo began to deflect attention from herself through her constant reference to John Ruffolo's heroin use, and through her repetition of her story about the Hortons' offer to kill either one of the Ruffolos. The Crown says the accused made deliberately false statements out of court intended to mislead the police and others, and these statements can be used as circumstantial evidence of guilt (see *R. v. O'Connor* (2002), 170 C.C.C. (3d) 365 (ONCA); *R. v. Hein* [2008] B.C.J. No. 1528 (C.A.)).
- [519] The Crown says the statements regarding heroin use by John Ruffolo are especially significant because Ms. Ruffolo allegedly did not know the cause of death at the time she made these statements, but immediately began referring to John Ruffolo's heroin use from the first report to the Victoria Police.
- [520] The Crown draws an analogy between this evidence and a deliberately fabricated alibi (see *R. v. Hibbert* [2002] 2 S.C.R. 445). The Crown admits that independent evidence of fabrication is required, but says the circumstances of making the statement may provide the required independent evidence (see *O'Connor* at paras. 22-24).
- [521] The defence says there is no basis in the evidence to say Ms. Ruffolo engaged in deflection - the issue of drugs was consistently raised by the police, not by Ms. Ruffolo.

- [522] A careful examination of the transcripts does not bear that out. It is fair to say the persistent hints of hard drug use by John Ruffolo originated with Ms. Ruffolo, although she is circumspect and vague about what she knew and whom she allegedly heard things from.
- [523] The difficulty for the Crown, however, is that the independent evidence of fabrication would come from my previous acceptance of their basic case - that Ms. Ruffolo killed Mr. Ruffolo using an overdose of heroin and disposed of his body. If I get to that point, it hardly matters that Ms. Ruffolo mislead the police about John Ruffolo's heroin use in her initial statements, even though they may be consistent with the Crown's theory. There is a circularity to that argument that is troubling.
- [524] If there were separate independent evidence of fabrication, the "deflection evidence" would be capable of being considered under the heading of circumstantial evidence. However, in this case, the very evidence which would be assisted by the consideration of the "deflection evidence" - that of Douglas Murray and Vivian Kirkland - is the evidence that is alleged to be independent evidence of fabrication. The safer course is not to consider the "deflection evidence" as circumstantial evidence which might go to the issue of guilt.

Post Offence Conduct

- [525] In *R. v. Turcotte*, (2005) 200 C.C.C. (3d) 290 (S.C.C.) the court stated:

"Post-offence conduct" is a legal term of art. It is not meant to be a neutral term embracing all behaviour by an accused after a crime has been committed, but only that conduct which is probative of guilt. It is, by its nature, circumstantial evidence.

- [526] The Crown argues that there is conduct on Ms. Ruffolo's part after John Ruffolo was missing that can be used as circumstantial evidence of guilt. In particular, she reported John Ruffolo missing at the wrong police station, she was not cooperative with the police, and she refused to deal with them except through a lawyer. She refused to answer the door to either the police or the Ruffolo family.
- [527] Ms. Ruffolo testified that she simply made a mistake when she went to the Victoria Police Department first. She said she hired a lawyer not in order to protect herself, but because she did not think the police were moving quickly enough and she felt a lawyer would help speed things up. She said she did not say she would not deal with the police except through a lawyer. If Vivian Kirkland said that, Ms. Ruffolo said it was without her authorization. She said she was not aware of people coming to the door and may have been out.
- [528] Looking at the communications between Ms. Ruffolo and the police in the first days after John Ruffolo's death, it is difficult to see how she could have thought the police were not doing enough to help her and that she needed a lawyer to speed things up. On the other hand, Ms. Ruffolo's wish not to have the police attend at her house when her daughter was there is not unreasonable. When Sgt. Mackenzie finally had his interview on October 23, 2003, he was allowed to conduct a cursory search of the house.

- [529] In order to draw the inference that Ms. Ruffolo was deliberately frustrating the efforts of the police, it is necessary to accept Vivian Kirkland's evidence that she instructed her to tell the police she would not talk to them except through Mr. Brennan. While there is no evidence that Ms. Ruffolo encouraged the police to contact her directly rather than through Mr. Brennan, and while the use of Mr. Brennan obviously slowed things down, it is difficult to reach a conclusion that the only reasonable inference is that Ms. Ruffolo was trying to frustrate the investigation, based only on Ms. Kirkland's evidence. If Ms. Ruffolo's evidence were to be accepted, she had other reasons for retaining Mr. Brennan.
- [530] Once again, the safer course is not to consider the post-offence conduct as circumstantial evidence of guilt.

POSITIONS OF CROWN AND DEFENCE

- [531] The Crown's theory is obvious from the recitation of the evidence. The Crown says Ms. Ruffolo hated her husband and had a motive to kill him. She approached the Hortons to kill him in 2002. She approached Robert Johnson to kill him in the fall of 2003. While he refused, Mr. Johnson gave her the idea of a heroin overdose. She enlisted Vivian Kirkland's help to buy heroin. Based on Vivian Kirkland's evidence, supported in various aspects of her testimony by other witnesses, and particularly Douglas Murray and Robert Johnson, the Crown says, after telling Ms. Kirkland over and over that she had to kill her husband, Ms. Ruffolo arranged through Ms. Kirkland to buy heroin, told Ms. Kirkland she had put amitriptyline in John Ruffolo's protein shake, told Ms. Kirkland to keep checking on him to make sure she had given him enough, injected him with heroin, and then told Ms. Kirkland he was dead and they should wait until dark to put him in the car. The two women managed to get the body out of the house and to the car by wrapping it in a blanket and pulling it, they got it into the car with the help of Douglas Murray, after Robert Johnson refused to help, and took the body to a place on Humpback Road that Ms. Ruffolo had previously located, bringing a change of clothes with them. They rolled the body into the ditch and pulled it into the culvert, drove to another location, changed clothes and disposed of the blanket and old clothes. They returned home and then parked John Ruffolo's car at the Knockanback Grill. The Crown also allows for the alternate theory that Ms. Kirkland was directly involved in the death, and that Ms. Ruffolo is guilty either as a principal or as a party.
- [532] The general position of the defence, which I have already briefly alluded to, is as follows: there were no eye-witnesses to the crime, if it was a crime and not an accident. The case rests on credibility and circumstantial evidence. The Court cannot be satisfied beyond a reasonable doubt of the guilt of Ms. Ruffolo based on the credibility of witnesses. The three crucial witnesses, Robert Johnson, Douglas Murray and Vivian Kirkland, are inconsistent, lacking in credibility, unreliable, and have colluded with each other. The Crown's allegation of a clever plan is not borne out even by its own evidence, which is almost ridiculous. The Crown has put forward a nonsensical motive. The Knockanback Grill witnesses and the

pathology evidence give rise to a reasonable doubt. The Court can only be left to guess and speculate about what really happened. Only by an arbitrary and unprincipled selection of pieces of evidence could the court be convinced of guilt beyond a reasonable doubt, and no reasonable court could reach such a conclusion.

ELEMENTS OF THE OFFENCE

[533] The indictment reads:

Ruby Ann Ruffolo, on or about October 19, 2003, at or near Saanich, British Columbia, did commit the first degree murder of John Frank Salvatore Ruffolo, contrary to Section 235(1) of the Criminal Code.

[534] Every element is in issue - when and where Mr. Ruffolo died, and who killed him.

[535] Although there seemed to be a suggestion emerging early in the evidence that the death might be self-inflicted, whether purposefully or accidentally, that was not pursued through evidence and was mentioned only in passing in argument. My assumption that it might be developed during the case may have been a result of over-cautiousness on my part as I tried to be alert to all the options I might have to put to the jury.

[536] Although the toxicologist could not say which drug - amitriptyline or heroin - was ingested first, she said the effects of heroin, if injected intravenously, are very fast. If injected intramuscularly, the effects would be noticed in minutes. The heroin itself was lethal and could cause death relatively quickly. Ms. Dinn said there was at least thirty minutes between the use of heroin and death, but the combination of the two drugs increased the likelihood of death. Amitriptyline is normally taken orally, which leads to slower absorption. It could cause death in 1 - 2 hours up to 8 - 12 hours, and was partially metabolized to nortriptyline, a process which takes place slowly over several hours. The only reasonable inference is that the toxic dose of amitriptyline was ingested first, caused Mr. Ruffolo to be sedated, and was followed by an injection of heroin. Dr. Boone found a puncture wound in the inside of the left elbow and a similar bruise in both the left and right elbows. The bruising is consistent with Mr. Ruffolo having been injected in the crook of each elbow, which would, as the Crown points out, be unlikely for a right handed person, or indeed any person, to do.

[537] The level of heroin in the body was lethal, and there is no evidence at all to support the notion that John Ruffolo might have committed suicide. All the evidence is to the contrary - he was involved in a new relationship, he was working hard at a number of jobs, communicating with his family, and socializing with his daughter. In all of these circumstances, I am satisfied beyond a reasonable doubt that the drugs were administered by someone other than John Ruffolo. The administration of a lethal dose of drugs is an unlawful act.

Time of Death

- [538] The element of the time of death (and the related issue of whether the death took place in Saanich at 994 Tulip Avenue or elsewhere in Victoria) is also connected with the Crown's contention that Ruby Ann Ruffolo caused the death. Proof beyond a reasonable doubt of the time of death - October 19, 2003 - is therefore crucial to the Crown's case.
- [539] The defence says too much is unknown and cannot be determined on the evidence. The witness' time lines are disparate and unreliable, in fact impossible to reconcile, especially with the evidence of rigor mortis.
- [540] There are several pieces of evidence that are relevant to the defence contention that the Crown has not proven beyond a reasonable doubt that John Ruffolo died on October 19, 2003.

The Knockanback Grill Witnesses

- [541] Webster Kimmerly testified that he was having lunch and playing cards with friends in the Knockanback Grill in the fall of 2003. He noticed two men at a table facing them. One man caught his attention because he seemed to be "staring us down." He described the man as stocky, white, in his 30's, short brownish hair, balding at the front. He said he was 5'6 - 5'8", 220 to 240 lbs.
- [542] The next day Mr. Kimmerly's girlfriend told him the Knockanback Grill was being mentioned on the news. He caught the last part of it and saw the photograph that had been released of John Ruffolo. He called the police and told them he had seen the man the day before. He said the police did not follow it up with him, although in cross-examination he said someone did call him back and ask some questions. Cst. Muth had testified earlier that he had called Mr. Kimmerly's home to interview him but had only been able to speak to Mr. Kimmerly's girlfriend.
- [543] Mr. Kimmerly said he went back to the Knockanback Grill the next day and talked to the bartender, Toby. He asked her if she recalled the man. She said she did not, that there had been lots of people. Mr. Kimmerly testified that he had no doubt himself that the man in the photo was the same one he had seen in the pub. He could not describe him in any more detail, but said he was sure he would know him if he were shown a photo.
- [544] In cross-examination, he said the man stared at them for a good portion of an hour and walked out of the pub around 1:00 p.m. The man's friend was talking to him during the lunch. Mr. Kimmerly drew a diagram showing John Ruffolo sitting against the window on the side of the Grill where the entrance is, and his friend facing the window.

- [545] John Ruffolo was, according to Dr. Boone's report, 5'10" tall, 220 lbs. The autopsy photographs show him to have a closely shaven head and a clipped moustache and goatee of a dark brown. The photograph released to the media which Mr. Kimmerly said he saw was not in evidence.
- [546] Toby Bolger, the bartender, recalled the police coming to her with a photograph. She could not recall what the officer said to her about the photo, but she said she took a quick look at it. She testified: "I recognized him. He looked to be like the person we served." She said he was sitting to the right of the door, the last table against the wall at the back, on the window side. She said he had dark hair, medium build, mid 30s, and was Caucasian.
- [547] In cross-examination she said she was busy that day. She said the photograph appeared similar to a person she or a co-worker had served. She could not say it was the same person.

Use of Sgt. Mackenzie's Evidence re Toby Bolger

- [548] Sgt. MacKenzie, who was asked about his conversation with Ms. Bolger during cross-examination for the limited purpose of allowing the defence to pursue their position that the police had developed tunnel vision early on in this investigation, said, in answer to the question: "Toby Bolger also positively id'd John Ruffolo as being in the restaurant that day?" "She seemed quite convinced, yes." During argument defence submitted that this answer should be considered as original identification evidence and for the truth of its content to bolster Ms. Bolger's identification of John Ruffolo, as Ms. Bolger was not very definite in her evidence at trial.

- [549] The defence relied on *R. v. Starr* [2000] 2 SCR 144 at para 222:

If the witness can at least testify that at some point she made an accurate identification, then a police officer's testimony that he or she observed the identifying witness in the act of identification is original evidence that the identifying witness did indeed select a particular person, and that that person is the accused.

- [550] However, the evidence of Sgt. MacKenzie was never intended to be a substitute for Ms. Bolger's recollection. Ms. Bolger did not say she gave an accurate identification of the photograph on a previous occasion. Sgt. Mackenzie was not asked what she said or what was asked of her, or under what circumstances. The photograph itself was not in evidence. Sgt. Mackenzie gave a conclusory summary of his impression of Ms. Bolger's recollection. His evidence is not admissible as original identification evidence or for its truth.

Weight of this Evidence

- [551] I am not persuaded that either Mr. Kimmerly or Ms. Bolger saw John Ruffolo having lunch at the Knockanback Grill on October 22, 2003, although I am sure both testified to their honest beliefs. Mr. Kimmerly was very positive. Ms. Bolger's evidence was vague. Both gave very general descriptions, which would match any number of people. Neither mentioned John Ruffolo's facial hair. Both said he had short brown hair, which does not accord with Mr. Ruffolo's shaven head.
- [552] Mr. Westhaver testified that he looked into the Knockanback Grill between 12:00 and 1:00 p.m. and did not see Mr. Ruffolo. Of course, after six years, the exact timing of his look versus the departure of the aggressive man Mr. Kimmerly reported seeing is not exact.
- [553] But more importantly, when considered with all the other evidence, which I will go through in more detail when considering Mr. Whitman's evidence, it makes no sense that John Ruffolo would have been having lunch at the Knockanback Grill even without accepting the Crown's position that he was already dead.

Discussion of Whitman's Evidence

- [554] The accused has no obligation to put forward any answer to the Crown's case, and she does not purport to argue that the version of events that Mr. Whitman said he heard from Douglas Murray and Vivian Kirkland is what actually happened, since she has no direct knowledge of it.
- [555] However, the evidence of Mr. Whitman has to be considered in an analysis of *R. v. W.(D.)*, *infra*, because, even if not believed, it could, in the context of all the evidence, raise a reasonable doubt, or at least put the court in the position of not knowing whom or what to believe. It does neither.
- [556] Mr. Whitman was not a credible witness. His account of his conversation with Douglas Murray and Vivian Kirkland contains references to things in the evidence that had arisen in the Crown's case and required explanation or which otherwise assisted Ms. Ruffolo but which do not ring true - that Douglas Murray feared that "Rob or Neil" would go to the police first (Robert Johnson had indeed gone to the police right after the body was found and identified), John Ruffolo usually only smoked heroin to avoid track marks but wanted to be shot up on this occasion to get really high (which purports to explain the lack of any evidence of drug use on John Ruffolo's part, along with the high level of heroin in his system when he died, and supports Ms. Ruffolo's repeated statements about John Ruffolo smoking various drugs), that Vivian Kirkland gave him some of her medications to make sure the heroin high was increased (which explains the amitriptyline), that Gordy was a friend of Vivian Kirkland and was at the party (which casts doubt on Vivian Kirkland's evidence that Ms. Ruffolo asked Gordon Boyd about remote hiking spots), that Douglas Murray was present and suggested calling an ambulance, that Vivian Kirkland could not help because of her back.

- [557] As already mentioned, Mr. Whitman was eager to volunteer anything that could help Ms. Ruffolo, while denying he is anything more than a tenant, despite having lived in her basement for six years, attending court with her, walking her dogs, and doing daily tasks together. In addition to those details listed previously, he slipped in many bits of information during his evidence which could only have come from Ms. Ruffolo, and which bolstered her evidence - that Vivian Kirkland's boyfriend had beaten up Vaughan Barnes, that Ms. Ruffolo let the police search the house when they first came, that the police had mistreated Ms. Ruffolo in the past, that she insisted on calling her bail supervisor (whose name he knew: Tom Larson) and lawyer after the call from Jonathan Horton, and that the Hortons had offered to kill her or John for \$10,000 of insurance money.
- [558] Aside from the obvious bias of Mr. Whitman's evidence, there are many difficulties with the suggestion that Mr. Ruffolo disappeared of his own accord on October 19, 2003 in order to hide from drug dealers. There is, of course, no evidence of it other than Mr. Whitman's purported conversation with Douglas Murray and Vivian Kirkland, which is denied by both of them, and whatever support can be gleaned from Webster Kimmerly and Toby Bolger, from the new witness called on November 3, 2010, and from the pathology evidence which I will deal with below.
- [559] Though apparently in hiding for at least four days, there was no evidence of any clothes or toiletries belonging to John Ruffolo going missing from the house, yet his head is neatly shaved and his goatee neatly trimmed in the autopsy photos. It makes no sense that Mr. Ruffolo, if going into hiding, would leave his pager at home, when every witness acquainted with him said he was never without it. It makes no sense that he would simply leave his car at the Knockanback Grill, within minutes of his home, with his wallet and Brinks uniform inside (which he usually wore to work), and with the seat set too far forward for an average-sized man to sit in. It makes no sense that, if in fear of his life, he would openly have lunch at a popular pub, and engage in a staring contest with a table of young men, while leaving his mother, sister, girlfriend, daughter, and ostensibly his wife in a state of panic over his whereabouts.
- [560] It also makes no sense that, with his photograph out in the media and the police actively investigating his disappearance, he would go to a party downtown with a group of down-and-out drug addicts and alcoholics, some of whom were known to him and to his wife, and allow Vivian Kirkland (whom on all the evidence he disliked and who disliked him, and who was apparently acting as a constant source of support to Ms. Ruffolo during this time) to shoot him up with a concoction of amitriptyline and heroin to get him really high. It makes no sense that he would take such a risk when, on the evidence of all who interacted with him, he displayed no signs of heroin use while carrying on an extremely busy life, holding down at least three jobs, working long shifts, and helping run and maintain the rental properties. According to his doctor, he was healthy and showed no signs of drug-seeking behaviour.

- [561] It is useful to mention the new evidence from Mr. X at this point, and what effect, if any, it has on the evidence previously before the court.
- [562] The defence says this evidence supports Ms. Ruffolo's evidence that John Ruffolo had a connection to heroin. It also reinforces how good John Ruffolo was at hiding things. That is clear in any event - he was having affairs, and he allowed his girlfriend to come and spend the night during a shift at Land's End. He was convicted of a number of regulatory charges partially because the judge did not think he was truthful. Although the Crown's position was that John Ruffolo used only marijuana and was a reliable, punctual, and hard worker, he was not portrayed by the Crown as "snow white" or as an upstanding member of the community, as Mr. X characterized the information in the article.
- [563] It was never satisfactorily explained why Mr. X came forward at such a late date to testify about an alleged event which occurred three years before John Ruffolo's death, nor why he agreed to testify in November 2010 when he would not do so in July when the case was ongoing and being reported in the newspaper. The same protections were always available to him and he did not seem to be overly concerned at having his name used in open court when he finally did take the stand, despite his assertions that he was terrified. His descriptions of the things he said he read in the paper sometime earlier this year are all matters that were, in loose terms, before the court in 2009, especially the evidence of Vivian Kirkland that Ms. Ruffolo told her she needed to buy some heroin for John Ruffolo because his dealer was out of town.
- [564] Mr. X said he threw the newspaper away, and a copy of the issue he said he saw was not produced.
- [565] Even accepting that Mr. X did see a newspaper containing information he said he saw and which prompted him to come forward in these circumstances to support a stranger, his evidence is not reliable. He agreed on cross examination that he saw this wide-eyed aggressive man for about 45 seconds on a dark street, with only the light from a street light across the street, almost ten years ago. He agreed that he and Y had dealt with hundreds of drug transactions in the time they worked together. Mr. X was certain this transaction had occurred in the fall of 2000, but Y was in jail for months on either side of that time frame. John Ruffolo was no longer a guard at Wilkinson Road during that particular period of time when Y was in custody, as Mr. Ruffolo had been suspended in February of 2000 and fired in May of 2000 as a result of the real estate convictions.
- [566] If the evidence were reliable, an alleged connection between John Ruffolo and heroin and/or heroin dealers could be relevant. However, the relevance would be minimal in any event as the incident about which Mr. X testified took place three years before John Ruffolo's death. As well, as the Crown points out, the cause of John Ruffolo's death was a combination of a toxic dose of amitriptyline, which would sedate him, and a lethal dose of heroin.

- [567] While Mr. X's careless statements which he threw out during his evidence - that Mr. Ruffolo knew all the major dealers, and that he was involved in the heroin trade - were apparently designed, either deliberately or coincidentally, to support Mr. Whitman's evidence that Mr. Ruffolo was involved in the drug world, they were not borne out by Mr. X's own evidence as to the specific and limited contact he had with the wide-eyed aggressive man. That Mr. X was prepared to make these generalizations on the basis of one transaction nine years ago casts further doubt on his evidence as a whole.
- [568] Notwithstanding the additional evidence of Mr. X, I accept Douglas Murray and Vivian Kirkland's denials that the conversation described by Mr. Whitman occurred, when their evidence is considered in light of all the other evidence. One thing that Vivian Kirkland displayed clearly with Sgt. Fordy and on the stand was an unflinching instinct to be self-protective regardless of how effective her efforts ultimately were. It is not believable that she would confess a version of events to a relative stranger that puts on her the responsibility for John Ruffolo's death.

The Pathology Evidence

- [569] The defence contends that the court cannot be satisfied beyond a reasonable doubt of the date of death because of the pathology evidence.
- [570] The pathologist, although designating "October 19, 2003" as the date of death on her report, said she did so based on information she received that that was the last date John Ruffolo was seen alive, not because she could determine the date herself. She found signs of early decomposition at the autopsy, but said individual and environmental factors were too wide to allow her to fix a time of death. I will deal further with this below.
- [571] The defence starts with Douglas Murray's assertion that the body was "stiff as a board." Using the toxicologist's evidence that the time of death from the toxic dose of amitriptyline would be between 2 - 12 hours, and death from the lethal heroin injection would be at least 30 minutes, that means John Ruffolo would have been killed in the morning of October 19, 2003 in order to be in full rigor when being placed in the car.
- [572] When the body was found on October 25, 2003, the position of the arm stayed fixed when the piece of wood on which it was resting was moved. Dr. Boone said she would not base a conclusion on someone else's observations, but she said if the hand did not move, it suggests rigor mortis is present. She said mild rigor mortis was present and passing on October 28 when the autopsy was done. She was not asked to comment on the effect on rigor mortis of the difficult removal of the body from the culvert.
- [573] Dr. Boone agreed that if a body were "stiff as a board", it would not be possible for rigor mortis to break and reform in a different position. If the body were limp when deposited in the location, rigor mortis would form at the site.

- [574] The defence says this evidence is much more consistent with John Ruffolo being alive on October 22 and dying on October 23 or 24th, than with John Ruffolo dying on October 19, 2003.
- [575] It is clear from Dr. Boone's autopsy that there is a puncture wound in John Ruffolo's left elbow and bruising in both elbows. It is also clear from the toxicology report that he had a lethal dose of heroin in his body when he died. There is no evidence, even after Vivian Kirkland's lengthy cross-examination, as to when the heroin was administered, even accepting her evidence that Ms. Ruffolo told her she had given John Ruffolo a drug-laced shake in the morning. According to the toxicologist, the amitriptyline itself could have caused death later in the day. The mixture of amitriptyline with heroin greatly increased the chances of fatality. If the heroin were administered in the late afternoon or evening, after Jovanna was out of the house, rigor mortis would not be fixed until well after John Ruffolo's body was placed in the culvert.
- [576] Dr. Boone said she could not give an opinion as to the time when rigor mortis would pass. Rates of fixation, that is 12 - 18 hours, are given in the literature. However, rates of passing are open to great variability. Once broken, rigor mortis does not re-form. She said cold slows down post-mortem changes.
- [577] There was, as the defence points out, no evidence that John Ruffolo drowned, which demonstrates that John Ruffolo was not submerged in water while he was alive. Dr. Boone said the skin showed signs of exposure to moisture, but she agreed in cross-examination that there was nothing to suggest that the body had been immersed in water for any length of time (although what "any length of time" would encompass was not explained).
- [578] As I have said earlier, given the location and position in which the body was found, there is no other conclusion to come to other than that the body was washed through the culvert by the heavy rains. While there is no evidence of the temperature before the court, these events occurred in late October. Obviously the water would be cold. Temperatures generally would be cool. The view taken of Humpback Road, as well as the photographs filed as exhibits, show that it is in a densely wooded forest, with little sun. The water main itself is obviously dark and damp. The body was covered with debris.
- [579] Mr. Mattingly testified that October 25, 2003 was cold, very cloudy, but not rainy. He recalled it raining heavily in the days before, and said there was water in the ditch that day, although the level had dropped from the debris line close to the road. Cst. Leblanc said the rains that week were torrential. The admission regarding the weather records support this evidence.

[580] The pathologist was not asked to rule out death occurring as early as October 19, 2003, and it is clear from all of the evidence that she could not do so. The toxicology/pathology evidence is consistent with death occurring on that date, as well as later. Therefore it must be considered in the context of all the other evidence before reaching a conclusion on the date of death. This includes the evidence of Robert Johnson, Douglas Murray, and Vivian Kirkland.

The Reliability of Robert Johnson, Douglas Murray and Vivian Kirkland

[581] The case for the Crown depends on an acceptance of at least some of the evidence of Vivian Kirkland, Douglas Murray, and Robert Johnson. The defence says these witnesses are so unreliable and have so obviously colluded with one another that their evidence must be disregarded in its entirety. It is crucial to bear in mind throughout this analysis that the principle of reasonable doubt applies to the credibility of witnesses.

[582] I have gone through the evidence of these three in some detail, although it is impossible to summarize the entirety of their evidence. As I have mentioned, the evidence of Douglas Murray and Vivian Kirkland took up the whole of May and June, 2009, albeit the court did not sit full days. It is clear that there are many inconsistencies in their evidence, both internal and when compared with each other. In their submissions, defence counsel went through a large number of examples, some minor, some more significant. When I was preparing the charge for the jury, I also made a list of the many inconsistencies in the evidence of Robert Johnson, Douglas Murray and Vivian Kirkland, both internally and in comparison with each other.

[583] However, what is consistent in the evidence of all three is that there was a body in the driveway of 994 Tulip Avenue on the late evening of October 19, 2003.

[584] The defence says even this cannot be accepted beyond a reasonable doubt. Their argument falls into three general but interrelated categories.

[585] First, the witnesses are generally so unreliable that nothing they say can ground a conviction. The court must not only be alert to the necessity for the strongest of warnings under the *Vetrovec* heading, but must conclude that these three have obviously colluded with one another, cannot corroborate each other, and must reject their evidence in its entirety.

[586] Second, the story they tell is so flawed, it must be discarded. For example, the time line described by Douglas Murray cannot be possible. Douglas Murray's description of the body being "stiff as a board" cannot be possible. It was physically impossible for Vivian Kirkland to participate in moving John Ruffolo's body. Vivian Kirkland's descriptions of Humpback Road and the culvert are not in accord with the view of the scene.

[587] Third, the Crown's contention is so ridiculous, it defies belief. It is ludicrous to suggest that Ruby Ann Ruffolo, a person of intelligence, would kill her husband with no real motive, relying on the assistance of such unreliable people as Vivian Kirkland, Robert Johnson and Douglas Murray, and would drag the body out of her house, which is situated in a residential neighbourhood, leave the body lying in the driveway for some time, and then drive off to dispose of it some distance away, with the feet sticking out the window.

Collusion

[588] I have already set out the general principles of *Vetrovec*, as reiterated in *Khela* (*supra*). In the context of collusion, the court said, at para. 39:

Where evidence is "tainted" by connection to the *Vetrovec* witness it can not serve to confirm his or her testimony.

[589] I also refer to para. 43 of that judgment:

...confirmatory evidence must be capable of restoring the trier's faith in relevant aspects of the witness' account. As a matter of logic, where the only issue in dispute is whether the accused committed the offence, the trier of fact must be comforted that the impugned witness is telling the truth in that regard before convicting on the strength of that witness's testimony.

[590] The defence alleges that Robert Johnson, Douglas Murray and Vivian Kirkland are not only witnesses requiring special scrutiny, but they have colluded, and therefore their evidence cannot corroborate each other's.

[591] The defence has no obligation to articulate their theory of collusion, and did not do so, other than to assert that these three witnesses have colluded, giving examples of how certain pieces of evidence could not be true.

[592] However, when assessing the evidence, it is helpful to understand how and why collusion could take place to see if there is a coherent way to look at the evidence from a fresh perspective and consider whether it might assist in the W.(D.) analysis. I have attempted, with little success, to put together a scenario that would have some consistency and logic, and would explain the collusion:

1. Mr. Ruffolo died sometime after Webster Kimmerly and Toby Bolger saw him at the Knockanback Grill on October 22, 2003. Vivian Kirkland was somehow involved in his death, or is protecting someone who was, so she knew it involved heroin and amitriptyline. Perhaps Douglas Murray and Robert Johnson were involved as well, or at least were present (there is no evidence that Douglas Murray and Robert Johnson met each other more than once, or that Douglas Murray had anything to do with Robert Johnson's milieu, but perhaps they lied about that too to cover their collusion).

2. Sometime in the next few days, before Robert Johnson went to the police on October 28, 2003, the three decided, or were inspired by fear of Ms. Kirkland, to collude in a story that would implicate Ms. Ruffolo (even though losing Ms. Ruffolo to jail would mean Douglas Murray and Vivian Kirkland would also lose their homes).
 3. Since Vivian Kirkland knew Ms. Ruffolo had been looking for her husband since the morning of October 20, 2003, they decided to say Ms. Ruffolo killed her husband on the night of October 19, 2003. They set out their respective roles, either all three together, or each of the men with Vivian Kirkland, for the events of October 19, 2003: Vivian Kirkland was asked by Ms. Ruffolo to help get the body into the car but they could not get it further than the driveway, Robert Johnson was brought to the house by Ms. Ruffolo, refused to help and left, and Douglas Murray helped get the body in the car.
 4. Robert Johnson was told, or decided on his own, to describe the meeting in the park where Ms. Ruffolo asked him to kill her husband, or how to go about it.
 5. Vivian Kirkland added the story about setting up the meeting to purchase heroin.
 6. Robert Johnson went to the police on his own, or with his friend Neil Klatt, almost immediately after the body was found, (perhaps to add credibility to his story by appearing to be a "rat"?).
 7. Douglas Murray was questioned in early November 2003 and, presumably hoping to deflect attention from all of them, suggested the police look at Sarina Ruffolo, whom he said he had seen around the house on the night of October 19, 2003 (although Sarina Ruffolo was very ill and was in and out of the hospital that week).
 8. Douglas Murray and Vivian Kirkland were questioned extensively upon their respective arrests in March of 2004 and gave statements involving Ms. Ruffolo to varying degrees.
 9. Somehow, Robert Johnson and Douglas Murray misunderstood their instructions, or turned against Vivian Kirkland at some point prior to each of them speaking to the police, and, despite colluding with her, implicated her equally in everything they had concocted.
 10. Then, over the coming months and years, although not in contact with each other, the three gradually blamed Ms. Ruffolo more and more, although Douglas Murray and Robert Johnson still maintained that Vivian Kirkland was actively involved in all the activities and Douglas Murray continued to say that Ms. Kirkland was in charge on the night the body was disposed of.
- [593] While it is not suggested the other witnesses colluded with these three witnesses, the defence submits that they had other reasons for misleading the court, which I will mention at this time:

1. Lois Ruffolo, whose evidence is denied by Ms. Ruffolo, testified as she did out of hostility and animus towards Ms. Ruffolo. (While Lois Ruffolo's dislike of Ms. Ruffolo was clear, it was not put to her in cross-examination that she made up all the conversations to which she testified.)
 2. Tessa Lloyd, whose evidence is denied by Ms. Ruffolo, testified as she did out of confusion, mistake, or some other undisclosed reason.
 3. The Hortons, whose evidence is denied by Ms. Ruffolo, told the police their story on October 29, 2003 in order to be able to blackmail Ms. Ruffolo later with the promise to disappear rather than testify. Since she did not pay them, they have come to court and lied about her.
 4. John Ruffolo's own evidence, through the chat line conversation, is an example of his ability to concoct stories to attract the attention and sympathy of girlfriends.
- [594] Returning to the three main Crown witnesses, Vivian Kirkland falls into a classic category of witness requiring special scrutiny - she was charged with murder along with Ms. Ruffolo and subsequently allowed to plead to a minor offence, to her great advantage.
- [595] Robert Johnson and Douglas Murray are not so easily categorized. If either has a criminal record, it is very minor. Mr. Murray was a drug addict at one time and Mr. Johnson was an alcoholic. Both were involved in the events to varying degrees and both testified to being afraid for their own exposure to criminal charges. Mr. Murray was even arrested and charged with murder in this case but was soon released after giving his statements. After listening to all the evidence, there is no credible suggestion that either Robert Johnson or Douglas Murray did anything more than they have testified to at great length. Nevertheless, whether or not they could be classified as "unsavoury", and whether or not Douglas Murray could fall within the category of an accomplice, their evidence is worthy of close scrutiny because of the inherent frailties of their personalities and because their evidence is so crucial. It must be obvious from these reasons that the court has indeed concentrated on and scrutinized the evidence of these three witnesses carefully.
- [596] I will begin with Robert Johnson. As I said earlier, there were many difficulties with Mr. Johnson's evidence. He said he was often, if not always, impaired to some extent by alcohol at the time of these events. His memory has the additional burden of having to recall events from six years ago. He was not argumentative or evasive. His demeanour was nervous and earnest. In general, he gave the impression of a person taking his role as a witness seriously and honestly trying to recall and answer the questions.
- [597] There was nothing in any of the evidence to suggest that Robert Johnson colluded with Douglas Murray. He did not know Douglas Murray, having met him only once. He knew Vivian Kirkland, and it is Vivian Kirkland whom the defence suggests is the common element for collusion between the three witnesses.

- [598] John Ruffolo's body was found on October 25, 2003, and Ms. Ruffolo was advised of this on October 26, 2003. There was no evidence as to when the information was released to the public, but Mr. Johnson went to the police on October 28, 2003. From the portions of his statement put to him, there is nothing to suggest that he protected Vivian Kirkland at the expense of Ann Ruffolo at that early stage.
- [599] The tenor of all of Robert Johnson's evidence at trial was that the two women acted together. He said each of them participated equally in the meeting in the park and in the questions asked of him that day, although at one point he said John Ruffolo was Ann's husband and "the bottom line was Ann had to do the asking of the murder and she did." He said although Ann Ruffolo came and picked him up on the Sunday night, both Ann Ruffolo and Vivian Kirkland pointed at the body and told him John was dead of an overdose.
- [600] Vivian Kirkland said Robert Johnson was afraid to come over to her place afterwards, something she discussed with Neil Klatt. Mr. Johnson admitted he had told the police he had a conversation with Vivian Kirkland in which he asked her about "the gay guy" and what he knew, saying he must know what had happened, even though Vivian Kirkland said he did not. That is a natural question which arises from the situation in which Mr. Johnson was placed. It is not evidence of collusion.
- [601] There is no reason for Mr. Johnson to collude with Vivian Kirkland either when he went to the police initially or at trial to concoct this particular version of events, which implicates Vivian Kirkland as much as it does Ms. Ruffolo in a planned crime, rather than simply tell the police that Vivian Kirkland had accidentally overdosed John Ruffolo with heroin, if that were really what happened as the evidence of Mr. Whitman might suggest.
- [602] An examination of Robert Johnson's testimony does not lead to an inference of collusion with Vivian Kirkland or Douglas Murray against Ms. Ruffolo.
- [603] Douglas Murray had the opportunity to collude with Vivian Kirkland as they both continued to live at 994 Tulip Avenue. He says they did speak of the events of October 19, 2003; Vivian Kirkland testified that they did not, although she said Douglas Murray might have attempted to do so. Compared to the Whitman evidence, Douglas Murray implicated himself much further in his statements and at trial, so any collusion could not be to protect himself. It would have to be instigated by Vivian Kirkland, whom the defence point out was obviously anxious to control Douglas Murray's initial statement to the police.
- [604] However, Douglas Murray testified that he thought Vivian Kirkland was in charge on the night of October 19, 2003, and in general he was more scared of Vivian than he was of Ann Ruffolo. If this had led to him blaming Ms. Ruffolo to protect Vivian Kirkland or to protect himself from Vivian Kirkland's wrath, then there might be some basis upon which to argue collusion. However, although Douglas Murray did return to the police with additional information which he agreed implicated Ms. Ruffolo, such as the disposal of the cell phone and pager, he did, as he said in his evidence, and in the portions of his statements which he adopted, always point the finger at both of them. He told the police Vivian Kirkland was

making all the decisions and he testified that he still believed that to be true.

- [605] The theory of collusion insofar as it involves Douglas Murray and Robert Johnson colluding with Vivian Kirkland herself is not clear. The only common link between the two men is Vivian Kirkland, which means that any potential collusion must be instigated by her. It is certainly reasonable to infer from Vivian Kirkland's changing testimony and her flexible approach to the truth that she would not be above colluding with someone if it would serve her purposes. However there is no advantage to Vivian Kirkland from the evidence of either Robert Johnson or Douglas Murray, or from the portions of their statements to the police that were put to them. There is nothing in the evidence of either Robert Johnson or Douglas Murray that would allow an apportionment of blame to Ms. Ruffolo to the exclusion of, or advantage to, Vivian Kirkland. Both of them describe the actions and conversation of the two women almost interchangeably.
- [606] Vivian Kirkland certainly got a good deal on her plea and sentence, but that came from a decision, presumably from the Crown and/or police, to allow her to plead to a minor charge, and to call her as a witness at trial. It cannot be as a result of the statements and testimony of Douglas Murray or Robert Johnson, which fully implicate her in the activities of Ms. Ruffolo.
- [607] The defence argues that since Douglas Murray's story that the body was stiff as a board and thus the feet had to stick out the window cannot be true, and because Vivian Kirkland also told Sgt. Fordy that they had trouble because the body wouldn't bend and they put his foot on an open window, that it is clear they cobbled together the same impossible story.
- [608] While it cannot be true that the body was as "stiff as a board," in my view this phrase is typical of Mr. Murray's dramatizations. Despite the use of this phrase it is clear from all of his evidence that the body was not as stiff as a board. He said he could lift the arm, and that the head and shoulders were against the door, while the buttocks were on the seat, even though the legs would not fit and the window had to be opened. Ms. Kirkland said the body was limp. She did say she thought the feet would not bend, but the main problem was the body was too big for the back seat of the car. That the feet were put on the partially opened window is not impossible. It is quite probable. The three of them were obviously in a difficult predicament which they wanted to deal with as soon as possible. Ms. Kirkland said she did not remember the feet being out the window. It was only reading the account of Douglas Murray's evidence in the newspaper that made her mention it, but even then she did not remember it. If this was part of a story they had concocted together, she could be expected to say she remembered it. In any event, the fabrication of such a detail would serve no purpose whatsoever. It does not lead to an inference of collusion.
- [609] The defence argues that the "new evidence" from Telus, that is that the pager put into evidence by Ms. Ruffolo was indeed owned by John Ruffolo in October 2003, is very strong evidence that Douglas Murray and Vivian Kirkland colluded. Since Douglas Murray said he watched Ms. Ruffolo and Vivian Kirkland dispose of a pager and cell phone, and Vivian

Kirkland testified that she threw John Ruffolo's pager away at Ms. Ruffolo's direction, this proves that Douglas Murray and Vivian Kirkland made up this story together and were colluding after their arrests. Mr. Murray only brought up the pager in April of 2005 when he went to see Cst. Ferguson with some new things he remembered. Vivian Kirkland testified to this at trial. According to the defence, the evidence regarding disposing of the pager cannot be true; therefore it must be a result of collusion.

- [610] Ms. Kirkland was asked in examination in chief if she knew if John Ruffolo had a pager. She said he did, and she saw him with it daily. She was asked if she knew what happened to it. She said "we -- Ann didn't want any evidence left in the house so we threw it in a garbage bin." She said Ms. Ruffolo gave it to her and she threw it away. Douglas Murray was not involved.
- [611] Mr. Murray said he was not aware that John Ruffolo had a pager. He said within one to three days Ms. Ruffolo gave him a plastic bag with a pager and cell phone in it and asked him to discard it. She did not say why but she did say they belonged to John Ruffolo. Mr. Murray testified that he would not take anything out of the house that belonged to John Ruffolo so he put the bag in an old VCR and gave it to Vivian Kirkland and Ann Ruffolo and told them they could do whatever they wanted with it. In cross-examination Mr. Murray said there were several old VCRs in a storage room under the stairs. He took the back off one of them, put the bag inside, and put the back on again. He said he did not take the objects out of the bag, but he thought the phone was an older bigger one, not a fold-down. He checked through the plastic to see that the objects were turned off.
- [612] Mr. Murray said Ms. Ruffolo and Ms. Kirkland took the VCR to 822 Esquimalt and dumped it in the garbage. He said he did not see them do it but he saw the VCR on top of the garbage when they drove around the building to come out on the other side.
- [613] Whatever was discarded in the bag, it was not the pager John Ruffolo always carried and that Angel McIntyre inquired about, that Sarina Ruffolo called repeatedly on October 20, 2003 until Jovanna Ruffolo called her back, and that Jovanna Ruffolo testified she noticed vibrating on the cabinet in her parents' bedroom, and that Ms. Ruffolo told Sgt. Mackenzie about on October 23, 2003.
- [614] The Crown says another pager could have been disposed of, or Ms. Ruffolo could have retrieved the pager later. Perhaps Douglas Murray was mistaken and the bag contained only a cell phone - the cell phone which Jovanna Ruffolo said her father bought at a garage sale was unaccounted for and could have been in the bag. In the Crown's submission, the real significance of the pager is that John Ruffolo was never without it, but it was still in the house on October 20, 2003, thus supporting their contention that he was killed in the house on October 19, 2003.

- [615] As with many details in this case, the testimony of Douglas Murray and Vivian Kirkland is not consistent. However, it now assumes exaggerated significance because the defence has now proven that the pager Ms. Ruffolo put in as evidence actually did belong to John Ruffolo, as Ms. Ruffolo testified it did.
- [616] It is simply inexplicable that the defence applied to put in this evidence from Telus on November 3, 2010, when it was clearly available all along. In fact, on May 25, 2009, Mr. Lyon put a pager to Mr. Murray, stated that he was instructed it was John Ruffolo's pager (although Mr. Murray had testified that he was unaware John Ruffolo had a pager) and invited the Crown to contact Telus to confirm it if they didn't believe it. The Crown did indeed argue that Ms. Ruffolo was not telling the truth about the pager that was entered as an exhibit, but in view of all of the evidence about the pager, it did not seem to be a particularly strong position, and I queried them about it in argument. Had the defence put in the evidence they have now obtained (with, I am informed, the Crown's assistance) during their case, that point could not have been advanced and this new "revelation" would not be considered in isolation.
- [617] Douglas Murray could well have put some objects into the VCR, and he could be mistaken about what they were. Vivian Kirkland could be mistaken or she could be lying in order to cast more blame on Ms. Ruffolo. The pager was not put to her during her testimony so whether she could have clarified or qualified her evidence is unknown. If this evidence had come out at trial when the witnesses were in the witness box, it could have been considered in the proper context. That is not possible now. For the present purposes, the importance of this evidence is its relation to the defence's contention that Douglas Murray and Vivian Kirkland colluded.
- [618] The defence points out that Mr. Murray had not mentioned this event until his statement in April of 2005. At this time, Mr. Murray was no longer a suspect, but Ms. Kirkland was still charged with murder. Both had given their extensive statements a year before at the time of their arrest. It was suggested to Mr. Murray in cross-examination that he had discussed all of this with Ms. Kirkland and was trying, by this time, to point the finger at Ms. Ruffolo so he would not implicate Ms. Kirkland and could save his own skin. Of course, Mr. Murray had implicated Ms. Kirkland as well in the disposal of the phone, but it was suggested to him in cross-examination that that was because he could not get his facts straight.
- [619] The suggestion that Douglas Murray was supposed to implicate only Ms. Ruffolo in this event but got mixed up and included Ms. Kirkland as well is simply too convoluted to support a theory of collusion between Mr. Murray and Ms. Kirkland. Mr. Murray's evidence about this event was detailed and very different from Vivian Kirkland's, but he implicated both Ms. Ruffolo and Ms. Kirkland in disposal of the VCR as he did in all of the events of October 19, 2003 and the days following, and as he said repeatedly in his evidence, he always pointed the finger at both of them and he still believes Ms. Kirkland called the shots. I do not accept that Douglas Murray and Vivian Kirkland colluded over this piece of evidence.

- [620] In many other details in their evidence, large and small, the three main witnesses were at odds. For instance, Robert Johnson described the body as being on the far side of the car from the house. This is not in accord with either Douglas Murray or Vivian Kirkland. Douglas Murray said the head was on the driver's side; Vivian Kirkland said the head was on the passenger side, although she said later, when describing taking the body out of the car at Humpback Road that the feet were on the passenger side. Vivian Kirkland said Vaughan Barnes arrived while she was in the driveway; Douglas Murray said Vaughn Barnes came in after the women had left with the body.
- [621] A discussion of the significance of the many inconsistencies is necessary when assessing their evidence, but the many differences in their evidence belie the suggestion that these three cobbled together a story of impossible details. I do not accept that Douglas Murray and/or Robert Johnson colluded with Vivian Kirkland to implicate Ms. Ruffolo. Therefore the evidence of Robert Johnson and Douglas Murray can be used to corroborate each other's evidence and that of Vivian Kirkland.
- [622] While I have rejected the notion that Robert Johnson and Douglas Murray colluded with each other or with Vivian Kirkland, Vivian Kirkland's evidence itself is to be approached with great care. As the defence points out, she was initially charged with murder so she had access to the Crown's disclosure. They say a reasonable inference arises, despite the lack of evidence of it, that this gave her an opportunity to tailor her evidence. On the other hand, defence contends that her unguarded conversation with Ken Hubbard at Montana's should be relied upon, and in it she appears to say that Ms. Ruffolo was too distraught to drive to the police station.
- [623] However, according to Ms. Kirkland, her conversation with Ken Hubbard was not unguarded. She said throughout her evidence that she never told anyone what happened that night until she talked to Sgt. Fordy. Counsel suggested to Ms. Kirkland twice during cross-examination on the Montana conversation that she had told Ken Hubbard about the body. Ms. Kirkland repeated that after they dropped John Ruffolo's body off she never spoke of it. There is nothing in the many days of cross-examination to support the contention that Vivian Kirkland told Ken Hubbard or anyone else about the events of October 19, 2003.
- [624] With respect to the conversation at Montana's, Ms. Kirkland said Ms. Ruffolo was never distraught and she did not recall making the remark. She obviously did make the remark, and it appears to pertain to Ms. Ruffolo. In the missing person report made over the telephone from the lobby of the Victoria Police station, which is the occasion on which Ms. Kirkland supposedly had to drive, Ms. Ruffolo might be described as upset but not distraught. It is also difficult to understand how, if too distraught to drive, Ms. Ruffolo chose to go into Victoria to report to the police, rather than simply telephone or go to the nearby Saanich Police Department. The remark may have been said to mislead Mr. Hubbard, but without Ms. Kirkland's recollection, it remains obscure.

- [625] Vivian Kirkland was allowed to plead to a very minor offence and her involvement, according to the facts read out at the sentence hearing, were limited to assisting Ms. Ruffolo in disposing of the body - similar to the last version Ms. Kirkland provided to Sgt. Fordy in her statement. In the witness box, pressed in cross-examination over days and days, she came out with more and more details until she implicated herself in activities earlier and earlier in the day of October 19, 2003, while continuing to assert her protective position - while she and Ann Ruffolo had done something very bad, Ann Ruffolo had obtained the heroin, Ann Ruffolo told her about the drugs in the shake; Ann Ruffolo was in charge.
- [626] Ms. Kirkland's evidence must be approached with caution, and corroboration for it is necessary. With that warning in mind, I turn to some of the aspects of the evidence which the defence argue necessitates the rejection of the evidence of the Crown witnesses.

Inconsistencies in the Crown's evidence

- [627] There are inconsistencies in the evidence of Douglas Murray that cannot be reconciled. These inconsistencies can be explained, however, by the passage of six years and by the trauma of the events into which Mr. Murray was thrust. He displayed his ability to relive and obsess on these events while on the stand. He has obviously gone over and over them, while bemoaning his fate at "having this dropped in his lap," as he said many times, and for which he blames Vivian Kirkland.
- [628] The defence says Douglas Murray's timeline is impossible, and it demonstrates that his evidence must be rejected. Mr. Murray's timeline, which he insisted on working out in detail, is obviously wrong. He said so himself when confronted with the TV Guide. According to that time table, and that of Vivian Kirkland, these events at the house would be occurring between 10:00 p.m. and 11:00 p.m. on October 19, 2003. That would mean Robert Johnson's estimate that he got home about 11:00 p.m. after an hour's walk is also roughly consistent with this time frame, although his evidence that when Ms. Ruffolo came to get him it was not yet fully dark is not consistent with that time frame.
- [629] Neither Douglas Murray nor Vivian Kirkland recalled a phone call, but Ms. Ruffolo was obviously home to receive the phone call from Brinks, which was made somewhere between 10:30 p.m. and 11:00 p.m. On Douglas Murray's original time frame, with its precise allocation of numbers of minutes to various events, that would not be possible, even when he moved it up an hour. However, it is clear that it is Mr. Murray's time frames that are not possible. For instance, he said the women returned from disposing of the body in 20 to 30 minutes. That is not possible. His carefully constructed time table is a result of his obsession over these events and the details of his evidence, to the detriment of the reliability of his recollection.

- [630] Another inconsistency relates to the state of the body when it was being loaded into the car. While insisting the body was "stiff as a board," Douglas Murray also testified that he raised the arm and it bent at the shoulder. He said the buttocks were on the seat, while the feet were out the window, which would require the body to be bent, something even he admitted he found confusing. Vivian Kirkland said the body was limp throughout the procedure. She described dragging and rolling the body down the stairs and across to the driveway, and having the illogical thought "I hope he doesn't get hurt" flit through her brain. Obviously, a body having been moved as she described it could not be "stiff as a board" once it reached the driveway. Douglas Murray testified that he was in a state of panic, very upset at being dragged into these events, and was in such a state of shock he did not even realize the body was heavy. His perceptions were understandably faulty, and his recollections affected by trauma and time.
- [631] The defence says Vivian Kirkland could not possibly have helped to move the body, given her physical limitations, specifically those listed on her application for disability in January 2003 which said she could not lift more than two pounds in each hand. Ms. Kirkland said she had been drinking and had taken medications, and this helped her to be able to move the body. In cross-examination it was suggested to her that she was so disabled, Ms. Ruffolo must have done the moving by herself. Ms. Kirkland said: "Okay...I remember us both doing it and it was easier for two."
- [632] There is indeed evidence that Ms. Kirkland was physically weak. Ms. Ruffolo was apparently relatively healthy - there was no evidence to the contrary, aside from the mention of cancer years before, which was never clarified; as well she testified that both she and John Ruffolo were, though overweight, relatively healthy. According to Ms. Kirkland, the two of them could pull the body, wrapped in a blanket, down the stairs and down the short sidewalk and stairs to the driveway, but could not lift the body into the car. They needed the assistance of someone strong. Robert Johnson was strong but would not help. Douglas Murray was not strong, but the three of them managed it.
- [633] Two women, one of whom is healthy, one weak, moving the body with the assistance of gravity in circumstances where it was absolutely necessary, is not unreasonable or impossible. Where gravity was not assisting, they needed help and they obtained it.
- [634] At Humpback Road there were only the two of them. The body had to be moved off the car seat and down into the ditch by the culvert opening. Defence says Ms. Kirkland could not have assisted with this activity, and also points out that Ms. Kirkland's description of the culvert is simply not accurate.
- [635] Ms. Kirkland said Ms. Ruffolo knew where to stop along the road. Given the location of the culvert, it is difficult to imagine coming across it by accident. Ms. Kirkland said they rolled the body out of the car, with her pulling the feet and Ms. Ruffolo lifting the torso, sort of like a somersault, and she remembers the body falling over the drop, which she described as a steep embankment. While there is a depression and ditch there, it is not a steep

embankment, although the drop to the bottom of the broken portion of the culvert is straight down off the road. As well, Ms. Kirkland described trees and roots on one side and a gully on the other, which is generally accurate.

- [636] Ms. Kirkland said the culvert was level with the gulley, wet and slippery underneath on the ripples, and they struggled to move the body a few inches at a time. Ms. Kirkland said she took the shoulders and Ms. Ruffolo pushed the feet and they dragged the body into the culvert head first, two to three inches at a time. As they dragged it, the pants came off.
- [637] It appears from the portions of her statement that were put to her that Ms. Kirkland had not initially mentioned a culvert, only a ditch. Without the whole statement to Sgt. Fordy to consider, it is not clear, but it appears that Sgt. Fordy may have first used the word "culvert."
- [638] This was the word commonly used during the trial, although the old broken cement water line would only become a "culvert" as it crossed under the road.
- [639] In cross-examination, when pressed for details, Ms. Kirkland said she was a farm girl and knew what culverts are. She described the conventional culvert - metal with ripples on the side and bottom. She said it was about five feet high. In fact it is a water line made of cement and wire, and is about three and one-half feet high, with rocks and pebbles on the bottom.
- [640] Ms. Kirkland's descriptions of the culvert are not accurate. It is not metal and it is smaller than she remembers, although it is level with the gulley, as she stated. She said she could not stand up in it, but there was room to pull the body in. The view of the scene was of some assistance but the culvert now has six more years of debris in it than it did in 2003. The culvert bends just before it goes under the road, and there is a large space of 1.5 meters on the outside edge of the bend where the culvert is broken. The bottom of the culvert, including along the open space, is level with the gulley beside the road. Dropping the body out of the car to the bottom of this gulley into the broken space in the culvert would not be difficult. It would be very difficult to pull the entire body into the portion of the culvert that runs under the road; it would involve crouching and crawling rather than stooping. It may be that Ms. Kirkland has enhanced her testimony about the culvert because of the confusion arising out of being told by Sgt. Fordy the body was or was not found in a culvert, but Ms. Kirkland's evidence that they pulled the body entirely into the culvert cannot be correct.
- [641] I do not view the inaccurate description provided by Ms. Kirkland as so significant that it means I must reject all of her evidence on this point. These events happened six years ago. Ms. Kirkland had been drinking. She said it was dark and raining on Humpback Road and she could see only what the car headlights illuminated. She said she could see five to ten feet. There would be no light directly in the culvert. She said they were in a hurry in case the car that had passed them came back and it all happened fast. Regardless of the level of her involvement, these events would be extremely stressful.

[642] Although Ms. Kirkland had not mentioned the word "culvert" to Sgt. Fordy, it appears from the physical layout of the culvert and ditch as depicted in the exhibit photographs and as described by the various witnesses that, as difficult as it would have been to do so, the torso must have been moved far enough in so that the rains would wash the body through the culvert to the other side of the road, and not simply wash the body down the ditch beside the road. The location of the body in the culvert on the other side of the road supports Ms. Kirkland's evidence that not only did they drop the body from the car down into the wet and dark slippery ditch, but they had to have moved it at least partially into the culvert.

Too Ridiculous to be True

- [643] The train of events described by Robert Johnson, Douglas Murray and Vivian Kirkland is indeed strange. However, there is nothing in the basic story that is impossible or improbable, unless one simply accepts the proposition that no one could ever behave in such a way.
- [644] The defence says it is contrary to common sense to suggest that Ms. Ruffolo, supposedly an intelligent person, would ever approach Robert Johnson with her request to either kill John Ruffolo or tell her a way to do it. The Crown says Ms. Ruffolo had motive, as expressed to several people. She assumed someone like Robert Johnson would have the knowledge and contacts to help her. Also, as Vivian Kirkland said, Robert Johnson was such a drunk he probably wouldn't remember it anyway.
- [645] At the insistence of the accused, the jury and the court, and the court again during the resumption of the trial, attended at 994 Tulip Avenue in order to demonstrate how ridiculous the notion was that a body could be moved out of the residence and into the driveway without someone noticing. I am unable to draw that conclusion.
- [646] The exhibit photographs show that the house has large trees on either side of the property and a large tree in the front yard. It is set back from the road with a driveway along the right side, as one faces the house. The doorway itself, which opens onto a small porch with a set of three stairs going down to the right side, is clearly visible from the street, but once down the stairs, the sidewalk running in front of the house to the driveway is blocked from view by a large bush. Even allowing for the extra foliage on the bush in the exhibit photographs which were taken the following spring, the view of the sidewalk is substantially obstructed. The driveway is at the bottom of another small set of steps. There is a streetlight two houses away on the other side of the street.
- [647] In my view, the logistics of two determined people moving the body out of the house are not difficult, given that it was late in the evening on a dark "nasty" (to use Ms. McIntyre's word) night in October. Ms. Kirkland said they waited until dark; she also said that it started raining at some point. Ms. Ruffolo and Ms. McIntyre discussed how bad the weather had been the night before when speculating about what might have happened to John Ruffolo. Ms. Kirkland said they left the porch lights off, wrapped the body in a blanket and pulled it

out the door, rolling it down the steps, down the sidewalk, and down the next set of steps to the driveway. I do not recall measurements of the driveway being put into evidence, but from aerial photographs, that point on the driveway is at least the same distance from the road as the house is long. The body would have been, according to the witnesses (except Robert Johnson who said the body was on the other side of the car) between the car and the cement wall which runs down from the steps to the road.

[648] The Crown suggests that the plan, which was fairly simple until then, became complicated by the necessity to obtain outside help when the two women could not lift the body into the car themselves. Ms. Kirkland thought her foster brother Neil Klatt was trustworthy, but he was apparently not available and Robert Johnson was willing to come in exchange for liquor. Robert Johnson would not help when he discovered what he was expected to do and they were forced to approach Douglas Murray.

[649] The body was large; the car was small. They had difficulty fitting the body in the back seat. Leaving the feet out of or on the partially open window appears to have been the option they chose, before driving off in the dark and rain to Humpback Road, about 15 to 17 kilometres away. It is a bizarre scenario but one born of necessity.

Discussion of Date of Death

[650] Aside from the pathology/toxicology evidence, the crux of this case comes down to an assessment of credibility. According to *D.W. v. The Queen* (1991) 63 C.C.C. (3d) 397 at 409:

In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole.
[citations omitted]

Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Secondly, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Thirdly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[651] Refinements to these basic questions have been added (see *R v. J.H.S.* [2008] 2 S.C.R. 152 at paras. 11-12):

As to the second question, some jurors may wonder how, if they believe none of the evidence of the accused, such rejected evidence may nevertheless of itself raise a reasonable doubt. Of course, some element of the evidence of an accused may raise a reasonable doubt, even though the bulk of it is rejected. Equally, the jury may simply conclude that they do not know whether to believe the accused's testimony or not. In either circumstance the accused is entitled to an acquittal.

The third question, again, is taken by some critics as failing to contemplate a jury's acceptance of inculpatory bits of the evidence of an accused but not the exculpatory elements. In light of these possible sources of difficulty, Wood J.A. in *H. (C.W.)* suggested an additional instruction:

I would add one more instruction in such cases, which logically ought to be second in the order, namely:

"If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit."

[652] I also refer *R. v. Thiara*, 2010 BCCA 415, in which the Court of Appeal recognizes the "endless variations" of the problems arising from a strict application of the "W.(D.) formulation." Ryan J.A. referred to *R. v. Avetysan*, 2000 SCC 56, and said:

Major J. said that the essential point in any case where credibility is important is that the jury not be left with the impression that they are to choose between two versions of events and that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt. Or, to put it as Binnie J. has at para. 9 in *S. (J.H.)*, the jury should be alerted to the "credibility contest error", and must have impressed upon them that "the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt.

[653] The defence says in order to convict, I must be able to be satisfied beyond a reasonable doubt that the evidence of Vivian Kirkland and Douglas Murray is true.

[654] However, I must consider all of the evidence, and it is trite to say that I may accept some, all or none of a particular witness's evidence.

[655] I do not accept Randall Whitman's evidence nor does it raise a reasonable doubt, nor does it leave me in the position of not knowing whom to believe, for the reasons I have already set out.

- [656] Ms. Ruffolo has simply denied every pertinent piece of evidence called by the Crown through numerous witnesses - the Hortons, Tessa Lloyd, Lois Ruffolo, Sarina Ruffolo, Robert Johnson, Douglas Murray and Vivian Kirkland, as well as some minor things testified to by various other witnesses. Given her flat denials, I am not put in the position of trying to assess the details of competing stories. She simply says nothing happened on October 19, 2003 and she had nothing to do with her husband's death.
- [657] In the face of the Crown's case, I cannot simply say I believe the defence evidence or that it raises a reasonable doubt in my mind and end the analysis there. It is therefore necessary to consider all of the evidence to determine if the Crown has proven its case beyond a reasonable doubt, or if I am simply unable to decide what or who to believe. While Wood J.A. in H.(C.W.) would have the latter consideration put into the W.(D.) analysis at an earlier point, in the circumstances of this case, where the Crown has called an extensive case, rife with fragile witnesses, and the accused has simply denied it all, that question fits better at the end of the analysis.
- [658] There are, as the defence pointed out, dozens of inconsistencies in the evidence of these three witnesses as to the precise time and sequence of events of October 19, 2003. I have dealt with the important ones above.
- [659] To make logical sense of the fractured recollections of witnesses who, after six years, are asked to recall in minute detail events that took place under extreme stress should not become the sole focus of the analysis. All of them had reasons to be self-protective, which requires close scrutiny of their evidence, but which also provides context for it. Douglas Murray is, as Vivian Kirkland said, and which was obvious from his testimony, an overly dramatic person. Alcohol factors into the perceptions and recollections of Robert Johnson and Vivian Kirkland. The details of their evidence cannot be reconciled. One answer is simply to give up and say that it is so impossible to distinguish fact from fantasy or imagination that none of their evidence can be accepted.
- [660] However, the court's task is not so easily discharged. There might come a point when the court must say there is insufficient reliable evidence on which to conclude that the Crown has proven its case beyond a reasonable doubt. However, in the course of deciding whether to accept all, some, or none of each witness's evidence, and before reaching a decision to reject all of the testimony of each of these witnesses, their evidence must be considered in the context of all of the evidence. It is not a process of selecting and accepting arbitrary bits of evidence in order to ensure the Crown's case can be made out, as the defence suggests the court, in order to reach a verdict of guilty, would have to do in the face of the evidence before it. It is a process of considering each piece of evidence in the context of all of the evidence before deciding whether or not to accept it as a fact for the purpose of determining if the Crown has proven its case beyond a reasonable doubt.

- [661] After a consideration of all of the evidence, some of which I have set out above, I am satisfied that the death of John Ruffolo took place on October 19, 2003 for the following reasons.
- [662] Robert Johnson, Douglas Murray and Vivian Kirkland, notwithstanding all the frailties in their evidence, were unshaken on the basic events of the night of October 19, 2003 - John Ruffolo was dead and his body was in the driveway at 994 Tulip Avenue.
- [663] The three of them are firm on this point - there was a body in the driveway on October 19, 2003, and according to Douglas Murray and Robert Johnson, both Vivian Kirkland and Ms. Ruffolo were in charge of it. I have said I am satisfied that these three witnesses did not collude on their evidence. On this essential point, after having had the chance to observe each witness for many days, and to consider their evidence in the context of all of the evidence, I found each witness to be credible.
- [664] While there is direct evidence from Vivian Kirkland and Douglas Murray that they saw John Ruffolo's dead body, and from Robert Johnson that he was told by the two women that John Ruffolo was dead and his body was over by the car, there is also circumstantial evidence to consider.
- [665] When relying on circumstantial evidence it is, of course, necessary to consider whether, when the circumstantial evidence is considered with all the other evidence, there is any other reasonable inference that can be drawn. In order to base a verdict of guilty on circumstantial evidence, the trier of fact must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts.
- [666] At the time of his death, John Ruffolo was working at least three jobs, on call all the time, seen as reliable by all his employers, involved with Dilek Sensoy, close to his mother and his sister Sarina, as well as to his daughter Jovanna. None of his friends or family, who would expect to be in contact with him and who were desperately worried about him, saw him alive after he left Dilek Sensoy's house on the morning of October 19, 2003. His pager, which he was never without, was left at home.
- [667] Ms. Ruffolo, although alerted by Brinks to John Ruffolo's late arrival, when she knew him to be punctual, did not check again to see if he had arrived. Although apparently very worried the next morning when she began to check on her husband's whereabouts, she never phoned a member of his family.
- [668] I do not find myself in the position of not knowing whom to believe. Since I do not accept Ms. Ruffolo's or Randall Whitman's evidence, nor does it raise a reasonable doubt, there is no other reasonable explanation for John Ruffolo's disappearance as of October 19, 2003 than that given by Robert Johnson, Douglas Murray and Vivian Kirkland.

- [669] The defence is correct to point out that the pathology/toxicology evidence could support times of death other than October 19, 2003, but the evidence supports death occurring on October 19, 2003 as well. While the defence terms it as "a stretch" to include that date, the opinions are wide enough to cover that date, and when considered with all the other evidence, it is the only reasonable inference to draw.
- [670] On a consideration of all of the evidence, I am satisfied beyond a reasonable doubt that John Ruffolo's body was in the driveway of 994 Tulip Avenue on the night of October 19, 2003 in the general circumstances described by Robert Johnson, Douglas Murray, and Vivian Kirkland, and that he died that day from acute heroin and amitriptyline toxicity.

Who Caused the Death of John Ruffolo

Motive

- [671] The Crown does not need to prove motive, but has adduced evidence of it in any event. Evidence of motive may provide assistance on the issue of identity. Absence of motive may raise a reasonable doubt.
- [672] Despite all the time consumed with the Hortons and Tessa Lloyd, the most that can be said of their evidence, which is somewhat remote in time, is that it is consistent with the Crown's theory that Ms. Ruffolo's reaction, when faced with the possible breakdown of the marriage, was to consider the death of John Ruffolo rather than divorce, and to ask others for assistance. At the time of those conversations in the spring of 2002, the breakdown of the marriage, which was threatened because of John Ruffolo's relationship with Jamie Huson, according to the chat line and to Lois Ruffolo, was averted when Ms. Huson ended the relationship because John Ruffolo refused to leave his wife.
- [673] The Crown also relies on Ms. Ruffolo's expressed rage at John Ruffolo at the time of Ricky Burton's suicide. The Crown says the despair of the situation resulted in a display of undisguised hatred and resentment by Ms. Ruffolo against John Ruffolo, and can be relied on as such. It is difficult, however, to place much weight on the utterances of a mother in the few minutes after she learns of her son's death in such circumstances.
- [674] Notwithstanding the evidence of Lois Ruffolo and Dilek Sensoy that their understanding was that the Ruffolos did not share a bedroom at 994 Tulip Avenue, neither has firsthand knowledge of that and it appears from the exhibit photographs that there are only two bedrooms on the main floor of the house - Jovanna's and the master bedroom. From the evidence of John Ruffolo's employers as well as from Ms. Ruffolo herself, it appears that John Ruffolo worked many night shifts, but the couple must have shared the bedroom to some extent.
- [675] Nevertheless, there is convincing evidence of motive. The money to purchase the properties was largely if not wholly Ms. Ruffolo's, but the properties were in her husband's name. A divorce would mean a division of assets, and in fact, Ms. Ruffolo produced an

agreement which would entitle her to half the assets, with a payment of \$100,000 on top for her efforts on Mr. Ruffolo's behalf. Many witnesses testified to her preoccupation with the division of property - Tessa Lloyd, Linda Horton, Vivian Kirkland, John Ruffolo's conversations with his mother - and Ms. Ruffolo's desire to keep John Ruffolo from having any of it, rather than divide it with him in a divorce.

- [676] The defence argues that if Ms. Ruffolo really took as much time to contemplate killing John Ruffolo as the Crown suggests, she had ample time to have the properties put into joint tenancy, which would put her in a better financial position, but there is no evidence she ever complained about the state of the titles.
- [677] Ms. Ruffolo has a law degree, but there was no evidence of her understanding of intestacy or property law. The titles were in John Ruffolo's name alone, but there was no explanation as to why the couple felt putting all the property in John Ruffolo's name, since Ms. Ruffolo apparently had cancer, would be a better way to avoid what she termed "death duties" rather than putting them in joint tenancy. There were no details provided respecting the cancer diagnosis or prognosis, except Ms. Ruffolo's evidence that she was relatively healthy at the time of John Ruffolo's death.
- [678] Despite all their joint hard work and her large contributions to the mutual enterprise of their marriage, including her efforts on the trial of the real estate charges, John Ruffolo told Ms. Ruffolo he wanted a divorce. Ms. Ruffolo, supported by her daughter, testified that the marriage was good, or at least okay, but this was contradicted by the evidence of Tessa Lloyd, Linda Horton, Jonathan Horton, Vivian Kirkland and Lois Ruffolo. Ms. Ruffolo said many negative things about John Ruffolo to many different and unconnected people including to the TV journalist. Ms. Ruffolo's TV interview, although not to be used as evidence of fabrication and deliberate deflection, suggests that there were many problems with their relationship. Ms. Ruffolo denies that John Ruffolo had asked her for a divorce, but John Ruffolo had gone so far as to not only tell his mother (although not his father) about it but to introduce Dilek Sensoy to his family.
- [679] Ms. Ruffolo had a motive to kill John Ruffolo. Vivian Kirkland had a motive not to disturb the status quo and to help Ms. Ruffolo - John Ruffolo did not like her and from her evidence it is clear she did not like him, but she liked the life she was living at 994 Tulip Avenue. Vivian Kirkland testified many times that she helped Ms. Ruffolo because she considered her a friend. That friendship manifested itself in Vivian Kirkland's desired lifestyle at 994 Tulip Avenue. A divorce between the Ruffolos would likely mean an end to that life. As Ms. Kirkland said, after John Ruffolo died she figured she would not have to move.

Parties

[680] The Crown submitted that, on the principal enunciated in *R. v. Thatcher*, [1987] 1 S.C.R. 652, it is not necessary for the Crown to prove beyond a reasonable doubt the identity of the person who administered the heroin to John Ruffolo, or the precise part played by each participant, as long as the court is satisfied beyond a reasonable doubt that Ruby Ann Ruffolo committed the murder or aided or abetted in the commission of the murder, that is, intentionally encouraged or assisted in the commission of the offence.

[681] Section 21 of the Criminal Code provides:

- (1) Every one is a party to an offence who
 - (a) actually commits it
 - (b) does or omits to do anything for the purpose of aiding any person to commit it, or
 - (c) abets any person in committing it.

[682] The Supreme Court of Canada in *Thatcher* quoted with approval from *Sparrow v. R.* (1979), 51 C.C.C. (2d) 443 (Ont. C.A.) at para. 75:

I am of the view that it is also appropriate, where an accused is being tried alone and there is evidence that more than one person was involved in the commission of the offence, to direct the jury with respect to the provisions of s. 21 of the Code, even though the identity of the other participant or participants is unknown, and even though the precise part played by each participant may be uncertain.

[683] The difference between aiding and abetting and personally committing an offence, provided the trier of fact is satisfied beyond a reasonable doubt that the accused did one or the other, is legally irrelevant (*Thatcher*, para. 80): "...both forms of participation are not only equally culpable, but should be treated as one single mode of incurring criminal liability" (para. 84).

[684] At para. 85, the court said:

...if there is evidence before a jury that points to an accused either committing a crime personally or, alternatively aiding and abetting another to commit the offence, provided the jury is satisfied beyond a reasonable doubt that the accused did one or the other, it is a "matter of indifference" which alternative actually occurred...It follows, in my view, that s. 21 precludes a requirement of jury unanimity as to the particular nature of the accused's participation in the offence. Why should the juror be compelled to make a choice on a subject which is a matter of legal indifference?

- [685] The defence agrees with the law but did not address argument to the issue except to say that for the Crown to raise it at his point displays the weakness in their case. It is, of course, their position that the Crown has not proven beyond a reasonable doubt that Ms. Ruffolo had any role in her husband's death.

Discussion of who caused the death of John Ruffolo

- [686] The defence points out that no one saw Ms. Ruffolo kill John Ruffolo.
- [687] During cross-examination of many witnesses, there were suggestions of other dangers to John Ruffolo at various times (Jamie Huson said one or two men came to the door at one point and gave John Ruffolo a letter which inspired "nervous fear"; Dilek Sensoy said John Ruffolo told her he was concerned about reporting drug dealers to the police; she was also asked about a mysterious bank account John Ruffolo claimed to have; Angel McIntyre said she heard rumours that John Ruffolo had been threatened by inmates at Wilkinson Road; Lois Ruffolo said a man spoke to her son in the park at their picnic and John left with Jovanna; Sgt. Mackenzie was asked in cross-examination about a conversation he had with John Ruffolo's sister Mena who told him about the man in the park - she said her brother told her it was a residential tenancy problem and gave her a cassette which he said he might need some day, and which she gave to Sgt. Mackenzie who did not recall what was on it; Vivian Kirkland was asked about her violent boyfriend, Ken Hubbard, with suggestions he was somehow involved in John's death). There was examination of Douglas Murray about a mysterious hooded stranger whom he said Ms. Ruffolo told him had come to the door after John Ruffolo died. There was, as I have already discussed, some suggestion that John Ruffolo was a heroin addict and may have accidentally overdosed (aside from Randall Whitman's evidence which did not come out until much later in the trial).
- [688] None of these items were more than unsupported suggestions and do not, when all the evidence is considered, raise a reasonable doubt. As the Crown points out, a drug/revenge killing, of which there is no evidence in any event, would not occur through the administering of amitriptyline, waiting a period of time, and then injecting Mr. Ruffolo with heroin, which again takes some time to cause death. As already mentioned, the evidence of everyone associated with John Ruffolo is that he displayed no signs of heroin use.
- [689] There is also the evidence of Douglas Murray that John Ruffolo seemed "paranoid" the last few weeks of his life. Mr. Murray was asked to agree that John Ruffolo feared something outside the house. Mr. Murray said he did not know about "outside the house," but Mr. Ruffolo was edgy, became fanatical about locking up, and seemed afraid of something. Ms. Ruffolo said the same. Dilek Sensoy said Mr. Ruffolo was nervous in the last couple of weeks about asking for a divorce, as was she, but he was happy when he left her place on the morning of October 19, 2003. Norm Westhaver said Mr. Ruffolo was his usual easy-going laid-back self at the Thanksgiving picnic on October 13, 2003. Sarina Ruffolo said her brother seemed normal when he visited her in the hospital on October 17, 2003.

- [690] The Crown says any nervousness is easily explained by John Ruffolo's apprehension at having told his wife he wanted a divorce, something she told him in a note that they would discuss in November. He knew, according to the chat line, that Ms. Ruffolo had tried to hire someone to kill him the previous year, and was anxious about what might happen.
- [691] The defence says that does not make sense - if John Ruffolo were that nervous about Ms. Ruffolo, he would simply leave the house. However, the threat the previous time, if Mr. Ruffolo believed it, would come from someone hired by Ms. Ruffolo, not from Ms. Ruffolo herself, so leaving the house would not be an answer.
- [692] Whatever the cause of Mr. Ruffolo's anxiety, which seemed on the evidence to be present only at home, and without something further than the speculation of either side, it does not assist the analysis.
- [693] The defence took comfort from the advancement by the Crown in argument of an alternative theory - that Vivian Kirkland may have participated in the death of John Ruffolo to the extent of being a party, saying that this underlines the weakness of their case against Ms. Ruffolo.
- [694] However, given the increasing self-incrimination of Vivian Kirkland during the weeks of cross-examination, that position necessarily arises out of the evidence. It became clear that Vivian Kirkland was much more knowledgeable about the events of October 19, 2003 than was reflected in the facts at her sentencing hearing. She was aware of this herself, saying she had not mentioned taking a change of clothes to Sgt. Fordy because it would look like she had planned ahead; she had not mentioned helping wrap and drag the body because she knew she would be in trouble if she had done that. By the end of her evidence at trial, she had admitted to her knowledge and involvement in many more things, including the drugs in the milkshake and checking on the effects of the drugs on John Ruffolo during the day. She did not admit to having knowledge of the administration of the drugs in advance or to any actions leading to the death of John Ruffolo, including the injection of heroin, but a reasonable inference arises that she could have participated more fully than she was prepared to admit.
- [695] The defence did not argue that the death occurred at 994 Tulip Avenue but that Ms. Ruffolo was not involved in it, because their position is the death occurred elsewhere at a later date and Ms. Ruffolo knew nothing of her husband's whereabouts on the evening of October 19, 2003. Nevertheless, the Crown points out that the tenants did not usually have access to the upstairs of the house, and in any event, Ms. Ruffolo testified that she was in and out of the house during the day. It would be impossible for Vivian Kirkland or Douglas Murray or anyone else to have engineered John Ruffolo's death without Ms. Ruffolo knowing about it, and neither had a car. As well, the Crown submits that Ms. Ruffolo would not have disposed of the body in such a manner if she had come home and found John Ruffolo dead. Her involvement in the disposal of the body supports their position that she caused the death of her husband.

- [696] Robert Johnson said both Vivian Kirkland and Ms. Ruffolo approached him to kill John Ruffolo or to suggest a method to kill him. He suggested "hot capping", that is, injecting him with a large amount of heroin, which is, according to the toxicology evidence, exactly what was done to John Ruffolo. Douglas Murray said he was told by the two women that Mr. Ruffolo overdosed.
- [697] The evidence of Robert Johnson implicates both women equally in the Crystal Pool Park meeting, which provided the means and method of death. Vivian Kirkland confirms Ms. Ruffolo's involvement in the meeting in the park, although she denies her own active involvement. I accept Robert Johnson's evidence that the purpose of the meeting was to ask him to kill John Ruffolo, and then to suggest a method by which it could be done, which he did by telling them about hot capping with heroin. I also accept his evidence that Vivian Kirkland was trying to buy heroin after that in his presence, which Vivian Kirkland also testified to. The use of heroin is also corroborated by the toxicology evidence that John Ruffolo had a lethal dose of heroin in his body.
- [698] The evidence of Douglas Murray implicates both women equally in the events of the evening of October 19, 2003. This is corroborated by Robert Johnson's evidence and by the self-incriminating statements of Vivian Kirkland, which in turn is supported by the toxicology and pathology evidence that amitriptyline and heroin were present in John Ruffolo's body, and by the location where the body was found.
- [699] Douglas Murray and Vivian Kirkland both say Ms. Ruffolo told them on the night of October 19, 2003 that John Ruffolo overdosed. Vivian Kirkland obviously knew that anyway: I accept her evidence that she assisted Ms. Ruffolo in buying heroin, but I do not believe her when she says she accepted Ms. Ruffolo's story that she needed heroin because John's dealer was out of town. The evidence respecting acquiring heroin is corroborated by the presence of a lethal dose of heroin in John Ruffolo's body.
- [700] I accept Vivian Kirkland's evidence that John Ruffolo was administered a dose of amitriptyline in order to knock him out. This is corroborated by the toxicology evidence and by the evidence of the availability of amitriptyline at 994 Tulip Avenue. Vivian Kirkland herself had a prescription for amitriptyline. It is also corroborated by Mr. Ruffolo's size - he could not be subdued in order to be injected with heroin without some artificial means.
- [701] In the circumstances here, I am satisfied beyond a reasonable doubt that John Ruffolo died from acute heroin and amitriptyline toxicity at his home on October 19, 2003, for all the reasons I have already stated when discussing the date of death. Although Ms. Kirkland testified that Ms. Ruffolo told her she had put amitriptyline in the protein shake she had given her husband, there is no direct evidence as to who injected John Ruffolo with heroin. John Ruffolo's body displays two bruises consistent with injection in each elbow joint, and a puncture wound in the right elbow joint. His body contained a lethal dose of heroin and a toxic to lethal dose of amitriptyline.

- [702] In *Thatcher*, supra, there was a way in which the two theories put forward by the Crown could have been seen as factually inconsistent, at least on some elements; nevertheless the principle that the Crown could rely on either one still held. Here, that problem does not exist. There is no inconsistency. The Crown contends that either Ms. Ruffolo alone or Ms. Ruffolo with the assistance of Ms. Kirkland caused the death of John Ruffolo by a lethal overdose of drugs. Although I will consider the issue of whether I can be satisfied beyond a reasonable doubt that Ms. Ruffolo actually administered the amitriptyline herself and that she injected John Ruffolo with the heroin, or whether she participated as a party with Ms. Kirkland to perform these acts, it is, according to *Thatcher*, legally irrelevant.
- [703] It would be extremely unlikely, to the point of impossibility, that John Ruffolo would drink anything prepared for him by Vivian Kirkland. On all the evidence concerning the way he interacted with her, from Ms. Kirkland herself, Jovanna Ruffolo, and Ms. Ruffolo, he considered Ms. Kirkland a tenant only and she was not allowed upstairs when he was awake. Although Ms. Kirkland may well have supplied the amitriptyline to Ms. Ruffolo, the only rational conclusion is that Ms. Ruffolo administered the amitriptyline to John Ruffolo.
- [704] John Ruffolo was Ms. Ruffolo's husband; he died in their home. She had a motive to kill him. She had the means to plan and carry out this offence. The others who lived there, including Ms. Kirkland, did not. Ms. Ruffolo had access to money to buy heroin; the others were on social assistance or minimal employment incomes. Locating Humpback Road as a potential place to put the body and then taking the body there required a car. Robert Johnson could not drive because he had lost an eye; Ms. Kirkland did not have a licence, although that would not necessarily prevent her from driving. More importantly, neither she nor Mr. Murray had access to a vehicle. Only Ms. Ruffolo had access to vehicles.
- [705] I accept Vivian Kirkland's evidence that she and Ms. Ruffolo left 994 Tulip Avenue to dispose of the body of John Ruffolo. This is corroborated by Douglas Murray, and by the location of the body.
- [706] I accept Vivian Kirkland's evidence that she drove the red Tempo to the Knockanback Grill at the suggestion of and with the assistance of Ann Ruffolo, who was aware of the pub and its location, having been there with John Ruffolo. It is supported by the obvious point that the car was found there, but also from the forward position of the seat that is not consistent with an average-sized man, let alone a large man like John Ruffolo, having driven it there.
- [707] There is no direct evidence as to who injected John Ruffolo with heroin, that is, who used the needle or needles, except Vivian Kirkland's denial that she had anything to do with his death. However, as I have already said, I am satisfied beyond a reasonable doubt that John Ruffolo died on October 19, 2003 at his home. Ms. Ruffolo had a motive to kill her husband, and the opportunity to drug him and inject him with heroin.

- [708] After a consideration of all of the evidence, I am satisfied beyond a reasonable doubt that the only rational conclusion is that Ms. Ruffolo either injected the heroin herself, or if Vivian Kirkland participated, she did so with the assistance and encouragement of Ms. Ruffolo. To reiterate para. 84 of Thatcher, both forms of participation are not only equally culpable, but should be treated as one single mode of incurring criminal liability, and the trier of fact need not choose on a subject which is a matter of legal indifference.
- [709] There is no other rational conclusion to draw from all of the evidence but that Ruby Ann Ruffolo, alone or as a party (as provided for in s. 21(1) of the Code) with Vivian Kirkland, caused the death of John Ruffolo.

Intent

- [710] Section 229 of the Code provides that culpable homicide is murder where the person who causes the death of a human being means to cause his death, or means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not.
- [711] The only rational conclusion to draw from the evidence, including the Crystal Park meeting with Robert Johnson, the presence of amitriptyline, the location of the injection sites and the amount of heroin in the body, is that the killing of John Ruffolo by administering drugs to him was intentional. Therefore I am satisfied beyond a reasonable doubt that Ms. Ruffolo, whether she acted alone or as a party with Vivian Kirkland, had the necessary intent for murder.

Planned and deliberate

- [712] The Crown spent little time on the issue of "planned and deliberate". The defence did not address it. Bearing in mind that the onus always rests on the Crown to prove its case beyond a reasonable doubt, the positions of counsel are polarized - the Crown saying Ms. Ruffolo killed John Ruffolo by a planned and deliberate injection of drugs, the defence denying any involvement on the part of Ms. Ruffolo in her husband's death.
- [713] The Supreme Court of Canada has stated that "the gravity of the crime [of first degree murder] and the severity of the sentence both indicate that a substantial and high degree of blameworthiness, above and beyond that of murder, must be established in order to convict an accused of first degree murder" (R. v. Harbottle (1994) 84 C.C.C. (3d) 1).
- [714] A convenient summary of the difference between "planned" and "deliberate" is set out in R. v. K, (M.M.) (2006) 213 C.C.C. (3d) 538 (Alta. C.A.):

A planned murder is one that was conceived and carefully thought out prior to being committed. It requires that a design or scheme be arranged beforehand.

A deliberate murder is one that is considered, not impulsive. A person commits deliberate murder when he thinks about the consequences and carefully thinks out the act, rather than proceeding hastily, rashly or impulsively.

[715] The method of death is inconsistent with any other conclusion than that it was planned, even without Robert Johnson's evidence of the Crystal Pool Park meeting. In any event I found Robert Johnson's evidence, notwithstanding its inconsistencies, credible on the issue of the fact of the meeting and that both women were involved in a plan to obtain heroin. Vivian Kirkland confirms that the meeting took place, although I do not believe Vivian Kirkland's version of her involvement in that meeting. I accept that Vivian Kirkland set up the meeting to buy the heroin; it is corroborated by her attempt to buy heroin from Neil Klatt in Robert Johnson's presence, and by her associations with people who might have heroin to sell, which Ms. Ruffolo did not have. I do not accept Ms. Kirkland's assertion that she believed Ms. Ruffolo's story that she needed to get heroin for John Ruffolo because his dealer was out of town.

[716] The plan is clear: buy heroin, sedate John Ruffolo with amitriptyline, and then inject him with an overdose of heroin, and hide the body.

[717] As I have already said, there is no direct evidence as to who injected John Ruffolo with the lethal dose of heroin. It is clear beyond a reasonable doubt that Ms. Ruffolo participated in that act, either as a principal or as a party.

[718] The role of parties to first degree murder is summarized in *R. v. Sauve* (2004) 182 C.C.C. (3d) 321 (Ont. C.A.):

While mere participation in a planned and deliberate murder will not, standing alone, render an accused guilty of first degree murder, it is not correct to suggest that each of the accused must have planned and deliberated. The relevant test is not whether the accused was the person who originally planned and deliberated but whether he knew about, adopted and executed a plan to commit such a murder.

[719] Having been satisfied beyond a reasonable doubt that Ruby Ann Ruffolo alone, or as a party with Vivian Kirkland, caused the death of John Ruffolo by giving him amitriptyline and then injecting him with heroin on October, 19, 2003, which had been obtained in advance as a result of the suggestion made by Robert Johnson, there is no other conclusion than that the murder was planned and deliberate and that Ruby Ann Ruffolo participated in the planning and deliberation as the principal offender or as a party.

[720] I find Ruby Ann Ruffolo guilty of first degree murder.

"M.A. Humphries J."

The Honourable Madam Justice M.A. Humphries

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Prepared on 28 October 2026 · Esheria