

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Bernard*, 2016 NSSC 358

Date: 2016-11-03

Docket: *Syd.* No. 449499

Registry: Sydney

Between:

Her Majesty the Queen

v.

Albert Michael Bernard

Judge: The Honourable Justice Robin C. Gogan

Heard: September 19–23, October 3–12, 2016, in Sydney, Nova Scotia

Oral Decision: November 3, 2016

**Written Release of
Oral Decision:** May 18, 2017

Counsel: Darcy MacPherson and John MacDonald, for the Crown
Darlene MacRury, for the Defence

By the Court (Orally):

Introduction

[1] This decision will address whether the Crown has proven beyond a reasonable doubt that the accused, Albert Michael Bernard, is guilty of the offence charged in an Indictment dated April 4, 2016. The accused stands charged that he:

On or about the 4th day of July, 2015, at or near Eskasoni, in the Cape Breton Regional Municipality, Province of Nova Scotia, did commit second degree murder on the person of Dale Dennis, contrary to Section 235(1) of the Criminal Code of Canada.

[2] The court heard evidence in this matter commencing September 19, 2016. During the trial, a *voir dire* was held to determine the admissibility of various statements made by the accused to police. These statements were admitted into evidence. There were a number of other evidentiary issues which will be dealt with in these reasons. A number of formal admissions were made throughout the trial and form part of the record. The evidence concluded on October 12, 2016.

[3] I note at the outset that the accused testified. Having heard evidence from both parties then, I am instructed by the Supreme Court of Canada in *R. v. W. (D.)*, [1991] 1 SCR 742 not to engage in a credibility contest. I am not choosing

whether I believe the Crown evidence or the Defence evidence. Rather, I must examine the totality of the evidence and decide whether the Crown has discharged its burden, or whether I am left with a reasonable doubt as to some or all of the elements of the offence as charged.

[4] Next, I note that there is no question that the accused was responsible for the death of Dale Dennis. This was acknowledged by the Defence at the conclusion of the Trial. I would add that the evidence adduced by the Crown at Trial clearly established this fact. The accused inflicted the beating on Dale Dennis that killed him.

[5] What remains then is a determination as to whether the actions of the accused constitute second degree murder or manslaughter.

Issues

[6] With respect to the main issues to be determined in this matter, I would organize those as follows:

- (a) Has the Crown proven the required intent for second degree murder beyond a reasonable doubt? If so,
- (b) Was the accused provoked to kill Dale Dennis?

[7] Resolving the issue of intent will require consideration of the level of intoxication of the accused at the relevant times.

Position of the Parties

The Crown

[8] It is the theory of the Crown that the accused had the requisite intent to kill Dale Dennis as he beat him on July 4, 2015. It relies upon various pieces of the evidence to say that the accused intended to kill Dale Dennis. Among those pieces of evidence are the fact that the accused repeatedly beat Dale Dennis about the head and neck with his hands and steel toe boots. The accused struck Dale Dennis with sufficient force to break his own hand. The injuries inflicted to the head and neck of Dale Dennis were the cause of his death. The force of the repeated blows caused serious injuries to the head and neck, including a broken hyoid bone.

[9] The Crown submits that the motivation for the attack was the accused's belief that Dale Dennis was having an affair with his long standing girlfriend, Anita Googoo. Furthermore, it is the Crown's position that the lack of memory on the part of the accused is not credible given the totality of evidence and that the defences of intoxication and provocation have no "air of reality".

The Defence

[10] The defence acknowledges that the accused inflicted the injuries to Dale Dennis that killed him. It is acknowledged that Mr. Bernard hit and kicked Dale Dennis repeatedly. What is contested is whether the beating was carried out with the intent to kill. The severity of the beating is likewise contested.

[11] More specifically, the Defence says that the Crown has not proven the intent beyond a reasonable doubt. It is submitted that the evidence establishes that the accused was not aware that he had killed Dale Dennis. It was the evidence of the accused himself that he could not remember anything in the time between building a fire at a family birthday party on the evening of July 3, 2015, and being in custody at the Pictou Correctional Facility some four days later. Further, the post-offence conduct of the accused does nothing to establish intent, but rather supports that the accused had no perception of what he had done. The accused's statements to police corroborate this disbelief and otherwise amount to the drunken meanderings of a person too intoxicated to form the requisite intent.

[12] In the alternative, the defence submits that the evidence supports the defence of provocation. Specifically, it is submitted that the evidence shows that the accused believed that Anita Googoo was having an affair with Dale Dennis, and

that when he saw Dale Dennis on the evening of July 4, 2015, he acted in the heat of the passion and before he had time to regain his self-control.

Analysis

(a) The Offence of Second Degree Murder – Essential Elements and Burden of Proof

[13] I now turn to a review of the essential elements of the offence in question and the burden of proof.

[14] The accused is charged with one count of second degree murder. In order to succeed, the Crown must prove that the accused (1) caused the unlawful death of Dale Dennis, and (2) either (a) intended to cause his death or (b) meant to cause him bodily harm that he knew would likely cause his death and was reckless as to whether or not death ensued.

[15] As already noted, it is not contested that the accused caused the death of Dale Dennis. Therefore, at this stage, in terms of the Crown's burden, intent is the outstanding issue to be resolved.

[16] The decision of the British Columbia Court of Appeal in *R. v. Barrett*, 2013 BCCA 157 contains a concise review of the required intent, summarized by Finch, C.J.B.C. at para. 73:

73 The difference between the 2 intentions described in s. 229 was considered in *R. v. Cooper*, [1993] 1 S.C.R. 146 (S.C.C.), at 155-156, 78 C.C.C. (3d) 289 (S.C.C.), where Cory J. for the majority said:

The concept of recklessness was considered by the Court in *Sansregret v. The Queen* [1985] 1 S.C.R. 570. At p. 582 it was said:

[Recklessness] is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and takes the chance.

The same words can apply to s. 212(a)(ii) with this important addition: it is not sufficient that the accused foresee simply the danger of death, the accused must foresee a likelihood of death flowing from the bodily harm that he is occasioning the victim.

It is for this reason that it was said in *Nygaard* that there is only a “slight relaxation” in the *mens rea* required for murder under s. 212(a)(ii) as compared with s. 212(a)(i). The position was put this way at p. 1089:

...[where] two accused form the intent to repeatedly and viciously strike a person in the head with a baseball bat realizing full well that the victim will probably die as a result. Nonetheless they continue with the bone splintering, skull shattering assault. The accused... must have committed as grave a crime as the accused who specifically intends to kill... I would conclude that the crime defined in s. 212(a)(ii) [now s. 229(a)(ii)] can properly be described as murder and on a “culpability scale” it varies so little from s. 212(a)(i) as to be indistinguishable.

The intent that must be demonstrated in order to convict under s. 212(a)(ii) has 2 aspects. There must be (a) subjective intent to cause bodily harm; and (b) subjective knowledge that the bodily harm is of such a nature that it is likely to result in death. It is only when those two elements of intent are established that a conviction can properly follow.

[17] On the element of intent, the Crown's burden is satisfied if either state of mind is established on the evidence (see *R. v. Barrett*, *supra*, at para. 75).

[18] The accused is not required to prove anything in relation to the offence now before the Court. He is entitled to the presumption of innocence. The presumption is only displaced when the Crown has proved its case beyond a reasonable doubt. These fundamental principles were articulated by Justice Cory in *R. v. Lifcus*, [1997] 3 SCR 320 (SCC) at para. 39, and Justice Iacobucci in *R. v. Starr*, 2000 SCC 40 at para. 242.

[19] I now turn to the assessment of the evidence. As discussed further in these reasons, some factual findings are in keeping with the admissions of the parties. Others are in keeping with largely uncontroversial evidence. Many of the crucial findings turn on my assessment of the credibility and reliability of central witnesses. I note at this point that subject to my assessment, I can accept all of a witness's evidence, some of it, or none of it. And I am never to lose sight of the burden of proof.

(b) Some Evidentiary Issues

[20] I begin by reviewing a number of evidentiary issues that arose during the course of the trial.

The Extraction Reports

[21] The Crown called Mr. Gilles Marchand to prove two pieces of evidence, *Exhibits 9* and *10*. Mr. Marchand is a civilian employee of the RCMP. He works specifically with the tech crime unit doing electronic forensics. He was provided with a Samsung smart phone belonging to the accused and was asked to extract data from the phone. As I understand it, extracting the data from the phone meant extracting the data from the phone's SIM card.

[22] The first exhibit was *Exhibit 9*, which is a full extraction report, and *Exhibit 10* is a subset of *Exhibit 9*. Essentially, as I understand the evidence, *Exhibit 9* contains a forensic copy of all data extracted from the smart phone of the accused including electronic data identifying the sender, receiver, times and content of various types of communications. *Exhibit 10* contains only communications from Facebook messenger and SMS text messaging and the electronic data associated with these text message communications.

[23] One item of data not contained in either *Exhibit 9* or *10* relates to Facebook wall posts. More will be said about that particular type of evidence later in these reasons, but for now I note that the absence of Facebook wall data in these exhibits

does not mean such posts were not made. Rather, it reflects the fact that the data associated with such posts is not stored on the user's phone.

[24] Mr. Marchand was asked about the time data extracted from the phone and testified that the accused's phone was set to grab the correct time from its mobile network. To that extent, there was no reason to doubt that the time data was correct.

[25] The Defence objected to the relevance of portions of *Exhibit 10* and to the content of the communications being admitted for the truth of the content with the exception of the content of the conversations with Mary Ann Francis and Maddy (Mudlane) Dennis (pp. 45-51 of *Exhibit 9*). The Crown submitted that the only portion of the evidence it sought to rely upon was the electronic data associated with a text message sent by the accused to Stephanie Googoo-Zuckerberg. Presumably, the remaining information in these exhibits was intended to properly authenticate the evidence.

[26] I find that the content of both *Exhibits 9* and *10* are electronic real evidence. On this point, I reference the decision of Justice Wood in *Saturley v. CIBC World Markets Inc.*, 2012 NSSC 226. The exhibits are intended to show the electronic data stored on the phone of the accused at the time of his arrest. The evidence is

compliant with s.31 of the *Canada Evidence Act* and therefore admissible. The ultimate use of this evidence requires further assessment in the context of all of the evidence offered at trial.

The recorded conversations with Police

[27] The first contentious evidentiary issue in this Trial was the admissibility of certain statements made by the accused to Cpl. Darrell Johnson on the day of his arrest while receiving medical attention. The accused was initially arrested at the home of his brother at approximately 8:30 a.m. on July 4, 2015. This arrest was made under the *Involuntary Psychiatric Treatment Act* and was based on concerns that the accused was suicidal. Following this arrest, the accused was transported to the Eskasoni detachment of the RCMP at which time he was arrested for the murder of Dale Dennis. He subsequently had hours of recorded conversation with police. These recorded conversations were divided into two distinct blocks of time.

[28] The initial recording, which runs from 9:24 a.m. until 12:21 p.m., was admitted by consent. The recording of this conversation is *Exhibit 21*. The transcript of the conversation, with included translation from Mi'kmaq, is *Exhibit 18*.

[29] At issue was a second conversation recording which ran from 4:42 p.m. until 8:04 p.m., a period during which the accused was transported from the Baddeck Detachment of the RCMP to the Baddeck hospital for medical treatment and then back to the Baddeck Detachment. The accused objected to the admissibility of this conversation. A *voir dire* was held and it was determined that the statements were made voluntarily, and that no breach of the accused's *Charter* rights had been established. The statements were admitted into evidence. The recording of the conversation is *Exhibit 24*. The transcript of the conversation, along with its translation, is *Exhibit 23*.

Video Recording of Phone Call with John Gould

[30] Next, the Crown sought to admit a video recording of a phone call between the accused and John Sidney Gould. The defence objected to the admission of this evidence. John Gould testified as to the circumstances surrounding the call and confirmed that he placed the call to the accused's phone number minutes before 3:57 a.m. on July 4, 2015. He had the call on the speakerphone feature so that those in the immediate vicinity could hear both sides of the conversation. At some point after the call began, another cell phone was used to capture the call on a video recording. Mr. Gould confirmed that he was one of the parties to the call and that both the video recording and the transcription of the conversation

accorded with his memory of the call. He identified the voice of the accused as the other party to the call. The videotape and transcript were relevant and probative and both were admitted into evidence. The video recording is *Exhibit 13* and the written transcript and included translation from Mi'kmaq is *Exhibit 12*.

The 911 Call

[31] The next issue involves a call purportedly made by the accused to the 911 dispatch center in Truro at 10 minutes and 24 seconds after midnight on July 4, 2015. It was referred to frequently throughout the Trial as the “911 call”, although it was not an urgent call, nor was it related directly to the charge before the Court.

[32] During the call, the caller identifies himself as Albert Bernard and requests removal of one of his brothers from the front steps of another brother's home. He relates personal details in the call. The Crown took the position that the call was probative of the level of sobriety of the accused at a time proximate to the beating of Dale Dennis. The defence objected to the admissibility of the call for various reasons and took the position that the Crown must prove the call and establish that the accused was the caller.

[33] The Crown thereafter called Matthew Russell. Mr. Russell was the 911 dispatcher who received the call. He confirmed the details surrounding the call and its recording. The audio recording of the call is *Exhibit 22*.

[34] The Crown also called Stephanie Googoo who confirmed that she was present with the accused at the home of his mother when he placed a call from the home phone sometime between 12:08 and 12:20 a.m. on July 4, 2015. She confirmed that the audio recording in *Exhibit 22* represents the conversation that she heard the accused have with the 911 dispatcher. The call records the accused speaking approximately one-and-a-half hours before the beating of Dale Dennis.

[35] Further I note that although the accused said he did not recall making the 911 call, he confirmed that it was his voice calling 911 in the audio recording of the call.

[36] On the basis of the evidence offered by the Crown, the call itself is proven. I am further satisfied on a balance of probabilities that the caller is the accused, Albert Bernard. The audio recording is relevant to the level of intoxication of the accused and therefore admissible.

The Facebook Wall Posts

[37] The last controversial item of evidence came in the form of a photograph or photographs taken of what are purported to be various “posts” made by the accused to his “Facebook wall”. The Crown sought to rely on the truth of the content of two of the posts as probative of the intent of the accused in the hours before his beating of Dale Dennis. The Crown sought the admission of these photographs on the basis that they were photographs and not electronic documents. It was the Crown submission that the evidence simply needed to be authenticated to be admitted. The Crown further submitted that the nature of the Facebook posts put the information in the “public domain”.

[38] The defence strenuously objected to the admissibility on this basis. It argued that in spite of the form of the exhibit being a photograph, in reality it was an electronic document, and the Crown had not met the requirements for admission of such documents as set out in sections 31.1 to 31.8 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5.

[39] The Crown offered the evidence of a number of witnesses on this issue. Mudlane Dennis testified that “someone” had sent her the “screen shots” and that she had shown them to Cst. Gaetan Stevens. Mudlane Dennis could not remember

who had sent her the information because “so many people were messaging her that night”. Ms. Dennis said that she was not a Facebook friend of the accused and confirmed that she had not accessed the information directly from the Facebook account of the accused. She further confirmed that she would have had no idea about the context of the posts.

[40] Cst. Stevens testified that she had been approached by Mudlane Dennis at the crime scene in the early morning of July 4, 2015. Ms. Dennis had shown Cst. Stevens the screen shots and Cst. Dennis believed from the content that they may be useful. Cst. Stevens asked Ms. Dennis to come to the detachment in the morning. She did. Cst. Dennis said that she tried various ways to transfer the information from Ms. Dennis’ phone and cannot remember now how it was done. What is clear is that no steps were taken to search the computer of the accused nor was there any attempt to access the Facebook account of the accused directly, at the police detachment, or anywhere else. There was no explanation offered as to why no attempt was made to print the information directly from the Facebook account of the accused if it truly was in the public domain and implicitly accessible by anyone or at least anyone with a Facebook account.

[41] The photographs of the Facebook posts are *Exhibit 16*. The content purports to be posts to a Facebook wall in the name of the accused between 7:52

p.m. and 11:28 p.m. on July 3. There is no year apparent. There is a photograph adjacent to the name “Albert Bernard” at the top of each post but it is not clear. The earliest post references a birthday party for an older brother and baby sister. There are photos accompanying this post but the photos are not reproduced as part of the exhibit. The next two posts reference interaction between the poster’s brother and a female police officer. This is followed by a post that only shows the name Albert Bernard and no other details. Finally, there are three posts between 11:15 and 11:28 p.m. which suggest that the poster was “looking for his love”, that “he would do time for his love” because he’s “got nothing to lose anyway”. The evidence of a number of Crown witnesses established that the accused arrived at the home of Anita Googoo sometime around 12:30 a.m. on July 4, 2015, and that the beating of Dale Dennis took place a short distance away at about 1:30 a.m. on July 4, 2015.

[42] The accused testified during the trial and said that he had no memory of anything during the crucial time period. He specifically denied any memory of being on Facebook or posting to Facebook on the evening of July 3, 2015. His statement to police likewise contained a denial that he had been on Facebook after 11:00 p.m. on July 3. He was not asked whether he had a Facebook account but I

took the whole of his evidence on this point to acknowledge that he did have such an account.

[43] As to the Crown submission that the Facebook wall posts are in the public domain, I specifically reject that point in this case. There was no evidence to support that such access was generally a characteristic of Facebook wall posts, nor was there any evidence that the accused had a particular Facebook account or what, if any, privacy settings apply to such an account if it exists.

[44] Further, I cannot accept the Crown submission that this evidence is admissible on the basis that it is a photograph. While the evidence comes to the Court in the form of a photograph or photographs, I accept the Defence submission that it is properly characterized as electronic evidence for admissibility purposes. In my view, common sense dictates that one should not be able to circumvent the admissibility rules for electronic information simply by taking a photograph of the information.

[45] I note that a similar submission was made by the Crown in *R. v. Soh*, 2014 NBQB 20. That case dealt with the admissibility of a Facebook conversation. The proffered evidence in that case took two forms. One form was printouts of screen captures and the second was photographs of the complainant's computer screen.

Both forms of the proffered evidence captured the relevant Facebook conversation. As in the present case, the Crown argued that the evidence was not electronic information but rather real evidence and admissible on this basis. The defence contested such a characterization.

[46] In *Soh*, *supra*, the Court dealt first with whether the documents were electronic documents. After reviewing the definitions in s.31.8 of the *Canada Evidence Act*, the Court concluded that the proffered evidence constituted electronic documents and said at para. 23:

As in the case of any other documentary evidence, electronic evidence must be authenticated. However, electronic documents are much more malleable than ordinary documents. They give rise to specific problems with respect to authenticity and reliability. It is possible to overcome these problems by applying sections 31.1 to 31.8 of the Act. These provisions were added to the Act in 2000 for the purpose of facilitating the admission into evidence of data recorded or saved by means of a computer system.

[47] The Court in *Soh* went on to admit printouts of the screen captures and not the photographs of the Facebook conversation based upon compliance with the provisions of the *Act*. As to the photographs, the Court went on to say:

[31] I will briefly address the photo printouts included in Exhibit VD-1. The Crown's position is that the photos taken by Constable Francis with his Nikon camera as admissible as real evidence under the ordinary common law rules since the person who took them, Constable Francis, confirmed that they faithfully reproduce the images he saw on the screen when he took the pictures. The Crown submits that it will be left to the jury to give this circumstantial evidence the

weight it chooses. It argues that, given the circumstances, it does not have to comply with sections 31.1 to 31.8 of the *Act*, which apply to the admission in evidence of an electronic document.

[32] Given my finding that the screen capture printouts are admissible as electronic documents, I do not have to decide the issue regarding the photos, as there is no longer any use for them. Nevertheless, I would add that considering these photos were presented as evidence of their content, and the fact that the content is an out-of-court statement given by someone in electronic format, it seems to me that the photos would still be subject to the provisions which govern authentication, best evidence and integrity which are set out in sections 31.1 to 31.8 of the *Act*, as well as to the rules which apply to the admissibility of hearsay evidence. The photos would lose their relevance if they could not be used to establish the veracity of the information they contain. In the instant case, I find that the screen capture printouts, rather than the photo printouts, constitute the best evidence of the Facebook conversation.

[48] More recently, the reasons in *Soh*, were adopted by the Court in *R. v. K.M.*, 2016 NWTSC 36. In that case, printouts of Facebook messages between the accused and a witness were admitted over Defence objections to authenticity. The Court in that case found that the Crown had satisfied the burden under s.31 of the *Canada Evidence Act* on the basis that there was ample evidence that supported a finding that the printout was what it purported to be.

[49] There are other cases which have admitted Facebook messages into evidence without specific analysis of compliance with the relevant portions of the *Canada Evidence Act*. In those cases however, there appears to be ample evidence supporting the authenticity, integrity and identity. (See for example: *R. v. MacDonald*, 2016 ABPC 142 and *R. v. J.S.M.*, 2015 312 and for a contrasting

result, *R v. Nardi*, 2012 BCPC 318). The evidence in those cases included evidence from one party to a Facebook conversation or expert evidence which discharged the requirements of the *Canada Evidence Act*.

[50] I am satisfied that the evidence that the Crown seeks to admit in this case is electronic information. Although aspects of the evidence, such as the time and date and name of the account holder may be real evidence, the primary importance of the evidence for the Crown is in the substance of the posts. In that respect, I find that the information is properly characterized as documentary electronic information (see *Saturley*, *supra*).

[51] In order to have this evidence admitted, there must be compliance both with s.31 of the *Canada Evidence Act* and the customary rules for admission of documentary evidence. In spite of the fact that the Crown did not pursue admission on this basis, I have considered whether the evidence is compliant with s.31 of the *Act*. The burden is on the Crown as the proponent of the evidence to establish such compliance. It must prove authenticity by evidence capable of supporting a finding that the electronic document is that which it purports to be. In this context, the best evidence rule may be satisfied by way of statutory presumption or proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored.

[52] In this case, the Crown made no attempt to prove the integrity of the electronic documents system in which the evidence was recorded or stored. Moreover, in keeping with s.31.2(2), I am not satisfied on the evidence that the photograph is essentially a printout of the Facebook wall of the accused or, if it was, that the information had been acted on, relied on or used as contemplated by that section of the *Act*.

[53] The remaining avenue for admission is the use of any of the presumptions found in s.31.4 of the *Act*. The only presumption that applies in the current circumstances is found in s.31.3(b) which provides for satisfying the best evidence rule “if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it”. Admittedly, there are few, if any, decisions dealing with the interpretation of the presumption. My approach therefore is to proceed in a manner consistent with the common law best evidence rule.

[54] In the present case, I note that the Facebook wall posts are not the same as a Facebook conversation which has some level of interaction with other identifiable Facebook users. If the proffered evidence took the form of a conversation, then it may be possible to look to one of the other parties to the

conversation to satisfy the best evidence rule. This was the path chosen in many of the decisions reviewed involving Facebook conversations.

[55] Furthermore, I recall the evidence of Mr. Gilles Marchand that electronic data associated with Facebook wall posts are not stored on the users phone or computer, but rather in the “cloud” and therefore not accessible by means of his extraction methods.

[56] In the end, I am left with no evidence as to the origin of the screen shots of the Facebook wall posts. Mudlane Dennis was not the origin of the screen shots and she could not remember who had sent the screen shots to her. She could only say that she passed the information she had received to the Cst. Stevens. The evidence of Cst. Stevens was less than assuring about the methods she used to record or store the information that she received from Mudlane Dennis.

[57] In the circumstances, there is no evidence as to the identity of the person who recorded or stored the original screen shots. It is not known how many electronic devices those screen shots then passed through before reaching the phone of Mudlane Dennis. And, there is no evidence to support that the screen shots now before this Court accurately reflect the information posted to the Facebook wall of an account held by Albert Bernard.

[58] In the absence of evidence as to the origin of the screen shots nor any attempt to access the purported Facebook account directly, I am left with no basis to satisfy the presumption in s.31.3(b). As a result, I find the evidence inadmissible. In coming to this conclusion, I am also mindful of the authentication analysis employed by Trotter J. (as he then was) in *R. v. Andalib-Goortani*, ONSC 4690.

(c) *Assessment of the Evidence*

[59] Having reviewed some of the evidentiary issues, I now turn to my findings.

[60] As I turn to the assessment of evidence, I am mindful of the *R. v. W. (D.)* analysis. In terms of many findings however, much of the evidence of the accused does not stand in contrast to the evidence of other witnesses. For the most part, the evidence of the accused was that he did not recall the relevant events. So, I make the following findings based almost exclusively on the evidence other witnesses.

The Timeline Findings

[61] I begin with a brief timeline which is based upon the evidence of a number of witnesses whose evidence I found to be credible and reliable unless I say otherwise.

[62] On the evening of July 3, 2015, Albert Bernard attended a birthday party for a brother and sister. He likely arrived sometime before 7:00 p.m. on July 3, 2015, according to a text message he sent around that time. At 9:00 p.m., Cst. Gaetane Stevens attended at the party to remove Albert Bernard's brother, Noel Bernard. Cst. Stevens confirmed that Albert Bernard was at the party when she attended the scene.

[63] The party was at the home of his mother, Rita Michael, on George Street in Eskasoni. People were drinking at the party and Albert Bernard was drinking Smirnoff vodka. Stephanie Googoo said that she saw him drink beer as well. Albert had his girlfriend Anita Googoo on his mind. He spoke about her fondly to Stephanie and showed Stephanie a photo of her.

[64] At some point during the party, Albert made a fire in the back yard. He later left the party with his younger brother Leon at around 11:15 p.m. He returned later, just after midnight. Stephanie Googoo thought that Albert arrived back at 12:08 a.m. on July 4, 2015, as she glanced at the clock at the time. At 12:10 a.m. on July 4, 2015, Albert made a 911 call. Stephanie Googoo heard Albert make the call. It lasted two minutes and 30 seconds. Albert asked that his brother, GW, be removed from his brother's home. An audio recording of the call is *Exhibit 22*.

[65] Albert was observed to be having a good time at the party. At about 12:20 a.m., Albert Bernard left his mother's home. He was driven to his father's residence by Stephanie Googoo and his brother John Michael Bernard. It was Stephanie Googoo's evidence that when she dropped Albert off, he was "very intoxicated", maybe an eight to ten, and he just stood there outside his father's house. She also said that they said their goodbyes and that it was "all good" as she and Johnny left Albert. She did not see Albert enter the residence.

[66] The accused appeared at the home of Anita Googoo at 136 Spencer's Lane, Eskasoni, Nova Scotia, sometime after midnight on July 4, 2015. Anita Googoo, her daughter Mary Googoo, and Mary's boyfriend Curtis, were out on the front step when the accused arrived. Anita and the accused argued outside for a period of time before going inside and moving into Anita's bedroom. Mary went to the kitchen. Anita Googoo testified that Albert arrived around 12:30 a.m. This was also the evidence of Noel Jeddore as to the timing of Albert's arrival.

[67] Anita's daughter, Kylie Alex, was home at the time and saw her mother and the accused go into her mother's bedroom. Not long after, maybe 10 to 15 minutes, Kylie heard her mother and the accused arguing. She went to her mother's bedroom door. She knocked on the door and her mother opened it and exited the room. She followed her mother into her room and the accused followed

them. The accused spent a few minutes in the room trying to convince Anita Googoo to leave for a walk with him. She refused. Several witnesses described an emotional scene. Albert was forcefully hugging and kissing Anita, was saying he loved her and wanted her to go with him. Anita Googoo, Kylie Alex and Noel Jeddore testified that Albert Bernard was asked to leave. Kylie then got up, grabbed her cell phone and went into the living room.

[68] Moments later, the accused exited Kylie's bedroom and then left the home through the front door. It was the evidence of Kylie and Mary that the accused left the house directly after he exited the bedroom. Moments later, Kylie saw the accused pass under a streetlight on Spencer's Lane. She was looking out her mother's bedroom window. At about the same time, she heard Dale Dennis's voice but did not see him.

[69] Shortly after these observations, perhaps a minute later, Kylie looked out the window a second time and saw the accused at the garbage box. At first, it appeared that Albert Bernard was hitting the garbage box. Then Kylie saw feet on the ground by the garbage box which prompted her to run out of the house in that direction. By this time, Mary had already run outside and was ahead of her. Kylie was at the right front corner of her yard as she observed the accused kicking Dale Dennis with his feet. The area was lit by a streetlight near her house and the lights

from Jeff Nicholas's house. This is consistent with the evidence of Cst. Mike Peters and the photo he took of Jeffrey Nicholas' house. (See *Exhibit 17*, photo 5)

[70] Mary made it as far as an area adjacent to Jeffrey Nicholas' driveway before stopping. She could see the fighting from there and said she saw the accused repeatedly kick Dale Dennis in the head and neck and stomp on his neck. I note at this point that Mary gave evidence about her observations of the beating she witnessed. At one point she said that she thought that the accused kicked Dale Dennis in the face 30 times. This evidence does not accord with the evidence of others as to the extent of the beating and I find it unreliable in respect of the number of kicks to Dale Dennis. I do place some weight in her general observations of the beating and in particular as to the sequence of the attack consisting of kicks to the head of Dale Dennis, followed by repeated stomps on the neck, followed by more kicks.

[71] Likewise, Kylie, from her vantage point by the streetlight, observed the accused "kicking and stomping" Dale Dennis more than once. She could not see Dale Dennis' head but she thought the accused was stomping his head. She observed Mary continue toward the garbage box area and yell to the accused to stop. The accused did not stop at that point. In the meantime, Mary called 911 and started to walk back in the direction of 136 Spencer's Lane.

[72] As both Mary and Kylie began to walk back to the house, others ran to the area of the garbage box. Kylie returned inside the house and locked the back door. Mary remained outside in the yard. She saw her brother Alfred and boyfriend Curtis run to the area of the garbage box. She saw Albert Bernard run away into the trees as Alfred and Curtis approached. She also saw them pull Dale Dennis' pants up and try and help him. These observations were consistent with the testimony of Alfred and Curtis.

[73] By the time Mary returned to her yard, the accused had reappeared. He had come from the direction of the neighbor's yard, and out from between her house and a blue school bus parked adjacent to the house. She then saw the accused run to the front door of 136 Spencer's Lane, kick the door in, and then run off down Spencer's Lane.

[74] Kylie was standing at the top of the stairway inside when she observed the accused kick in the front door. After doing this, the accused stood in the doorway and said something to the effect, "look Anita, this is what you did to me". Then he left without entering the house. Noel Jeddore had similar observations. He had been outside until he saw Albert Bernard coming around the corner by the blue bus. He went inside and locked the front door. He was half way up the stairs when Albert Bernard kicked the front door in. Noel Jeddore observed that the door

was bloody after Albert kicked in it. Photos 28 to 33 in *Exhibit 2*, first section, confirm the blood smears on the door.

[75] Alfred Alex is the brother of Kylie Alex and son of Anita Googoo. He was in the home at 136 Spencer's Lane on July 4, 2015. He was in his room in the basement. He heard his mother arguing with the accused and about 10 minutes later, heard him leave the house. About two to three minutes later, he heard someone say there was fighting. He went to the front door and stood on the front step for 30 seconds to a minute. He then went out into the yard. Mary and Kylie were already in the yard and he followed.

[76] As Alfred approached the area of the street light on Spencer's Lane, he first observed the accused kicking someone. He also saw him stomping on his head. He could not say how many times the accused kicked and stomped. As Alfred ran toward the area of the garbage box, the accused ran off toward the trees across the *cul de sac* toward the Kenny Googoo property. As Albert arrived at the garbage box, less than five minutes had passed since he had heard that someone was fighting. He did not recognize the man on the ground at the garbage box as Dale Dennis. He was bloody and not moving. He observed his pants pulled down to the knees. Alfred tried to render first aid. He moved the man to his side and pumped his chest. Alfred remained at the scene until the police arrived.

[77] Anita Googoo testified that she had been in a relationship with the accused for about 11 years. She said that she and Mary and Curtis had gone out on the front step of her house about 12:30 a.m. on July 4, 2015. It was her recollection that the accused had arrived about 12:45 a.m. They talked outside briefly and then she invited him inside.

[78] They went into her room and talked until it became heated. Albert Bernard accused her of sneaking around on him with Dale Dennis. He raised this repeatedly. She denied it. After about 20 minutes, Kylie knocked at the door and everyone then moved into Kylie's room next door. Albert then approached Anita and tried to kiss and hug her and ask her to "go walking". She refused and asked him to leave. She recalls Kylie asking him to leave as well. Albert left. She did not see anything that happened outside. She was still inside the house when Albert returned and kicked in the front door. She heard him speak in Mi'kmaq that it was her fault, "the way I beat him." She then retreated to her room.

[79] I pause at this point to make a brief comment about the evidence of Anita Googoo. She appeared to me to be a reluctant witness. There were inconsistencies between her evidence and the evidence of others that I thought were not material. There were also inconsistencies between her testimony in court and her previous statements. Some of these inconsistencies I attribute to translation or language

issues. Some of the inconsistencies could be attributed to her discomfort in the presence of police or perhaps in Court. None of the inconsistencies impacted my assessment of her credibility and I found her to generally to be a credible witness. I was, however, concerned with the reliability of aspects of her testimony and to the extent they differ with the testimony of others present, I give the evidence little weight.

[80] By contrast, I found the testimony of Jeffrey Nicholas to be very significant and a key piece of evidence in the overall assessment. He testified that he and Dale Dennis and Albert Bernard had been childhood friends. He and Dale Dennis remained friends to the date of his death. Albert Bernard and Dale Dennis were not friends in the recent past.

[81] On July 3, 2015, Jeffrey and Dale had met at around just before midnight. They were at a home on Spencer's Lane. Dale was drunk and talking loud. After 5 or 10 minutes they left together and went to Jeffrey's house. They went into the shed in the back yard. They smoked marijuana and had a few drinks. They talked there for about 30 minutes. Then, they moved to the front step of his house for another 20 minutes or more. Dale was still being loud and so they moved again. This time they moved to the area of the garbage box. Dale was staggering and facing away from Jeff's house, leaning up against the garbage box. Dale and

Jeffrey were facing each other, talking and drinking. They were there for 20 to 30 minutes.

[82] It was Jeffrey's evidence that Albert Bernard arrived and that he hit Dale and said "you wanna fuck with me". Dale went down with one punch. Jeffrey did not see the strike but saw Dale go down and described him as going "flat down and out for the count". Jeffrey only saw Albert Bernard after Dale was down on the ground. Jeffrey briefly looked for a weapon but finding none he ran inside to get the phone. He estimated that running inside took maybe 20 seconds. During this time he did not see what was happening between Albert Bernard and Dale Dennis.

[83] Once Jeffrey was inside and had the phone he looked out the window. He could see the accused hit Dale Dennis a few times in the head with his hand (two to three times) and stomp on him at least two times in the face. The accused was using his right foot to stomp. Jeffrey yelled out the window to Albert Bernard to stop. It appeared to Jeffrey that the accused then got more angry. He pulled down Dale Dennis's pants. As soon as he saw this, Jeffrey ran outside with the cordless phone. He was unable to see the beating again briefly as he ran from his living room to the driveway outside. As he came to view the scene again, he observed the accused kicking Dale Dennis repeatedly in the groin. He described the kicking motion as being like a soccer kick. Jeffrey yelled that he had called the cops. As

soon as he said this, the accused ran off toward the trees in front of Kenny Googoo's house. It was Jeffrey's evidence that the time from the first punch to the time the accused ran off was two to three minutes.

[84] At the same time Alfred was just coming out of his house at 136 Spencer's Lane. Jeffrey yelled to Alfred to check on Dale. Jeffrey was scared to go to the scene. Jeffrey watched from his driveway as Alfred pumped Dale's chest and tried to revive him. Jeffrey then ran to a neighbor's briefly and then returned to the scene. At that point, he and Curtis Boutilier tried to pull Dale's pants back up quickly. Jeffrey confirmed that the pump house light was not on that night but the outside lights of his house were on. A short time later, people began to gather and the police and ambulance arrived. The ambulance left after about five minutes. Jeffrey then returned to his house.

[85] I have already referenced the presence of Curtis Boutilier during these events. He was then a resident of 136 Spencer's Lane and the boyfriend of Mary Googoo. I am satisfied that Mr. Boutilier was present and observed some of the events on the morning of July 4, 2015. As he ran to the area of the garbage box, he saw Albert over Dale Dennis and saw Albert inflict some blows but not any to the head. Before arriving at the area where Dale lay on the ground, he saw Albert Bernard run into the tree line in front of Kenny Googoo's house. He was present at

the scene and assisted in pulling Dale Dennis pants back up. He later confirmed that there was blood on the damaged front door of Anita Googoo's residence. As to the rest of Mr. Boutlier's observations, I attribute little weight to them.

[86] The evidence indicates that police arrived on scene at 1:48 a.m. A number of officers testified as to their observations of the scene on July 4, 2015. It was described as a "horrific scene" by Cst. Stevens and Cst. Bernard observed Dale Dennis to be in "very bad shape" with his face and head covered in blood. Cst. Mike Peters took pictures of the scene with his phone as Cst. Stevens attended to Dale Dennis. *Exhibit 17*, photo 7 shows Dale Dennis still on the ground at the scene.

[87] Melissa French was an EHS Paramedic who attended at the scene. It was her evidence that she received a call from dispatch at 1:39 a.m. They were on route by 1:41 a.m., staged for perhaps five minutes until the scene was safe, and arrived on scene by 1:49 a.m. They were back in the ambulance with Dale Dennis 10 minutes after arrival. Unfortunately, Mr. Dennis arrested in the ambulance and was pronounced dead while still in transit to the hospital.

[88] Albert Bernard is next spotted when he arrived at a shed belonging to Joey Benn's Sr. Tim Dennis, Clayton Dennis, Ryan Googoo, and Joey Benn were there

drinking. Albert Bernard arrived at the shed at about 1:30 a.m. on July 4, 2015. The evidence was that Albert Bernard would have had to pass his house if he was walking from the direction of Spencer's Lane to the shed and it was a short distance. He arrived with a Walmart bag containing 4 to 6 cans of Bush Ice Beer and he sipped on one while he was in the shed.

[89] Albert Bernard was only there a short time, maybe 5 to 10 minutes. While at the shed, he repeatedly said that he thought he killed Dale. He also said he was "going away for a long time". They did not believe him. While still at the shed, Tim saw two police cars go by but not the ambulance.

[90] When Tim Dennis and Ryan Googoo left, Albert Bernard followed. They walked along the road to a place with a speed bump and it was there that Albert Bernard went into the woods. He pulled out a rope and said that the cops "would find him hanging" in the woods. He asked them to come. They did not go. They did not take him seriously. Albert kept on into the woods. Tim and Ryan continued on toward the ballfield where Ryan's father picked them up. Ryan's father told them that Dale was dead.

[91] The next contact that came from Albert Bernard on July 4, 2015 came in the form of text messages. The electronic information from these text messages is

contained in *Exhibit 11*. There is a text conversation between Albert Bernard and Mary Ann Francis beginning at 2:49 a.m. on July 4, 2015 and continuing through to 3:24 a.m. The accused sent 12 text messages in those 25 minutes including one at 3:16 a.m. saying “I nearly killed dale joiij”, “If my way Ikill himm” and “Not done with him yet”. Another conversation begins with Maddy Dennis at 3:24 a.m. and concludes at 4:41 a.m. during which time the accused sent eight text messages at regular intervals. In this conversation, the accused repeatedly says that “he’s done” and at 4:07 a.m. he sends a message saying “Tell them call me back”. This ties into a telephone call with John Gould.

[92] John Gould testified that he was with Maddy Dennis on the morning of July 4, 2015 when she began receiving text messages from Albert Bernard. John Gould had “known about” Dale Dennis since 2:00 a.m. He looked at the telephone number on Maddy’s phone and called it sometime shortly before 3:57 a.m. He candidly testified that he was trying to help the police find Albert Bernard.

[93] John Gould had known Albert Bernard for over 30 years. He recognized Albert’s voice on the phone. He had a brief conversation with Albert Bernard before putting the call on speaker phone and video recording it with Maddy’s cell phone. The video recording of the telephone call is *Exhibit 13* and the translated transcript of the call is *Exhibit 12*. The call is five minutes and seven seconds long.

It ends abruptly. I note that Albert Bernard sent a text message at 4:07 a.m. saying “Tell them to call me back”.

[94] In the period immediately following the beating of Dale Dennis, the police were looking for Albert Bernard. Cst. Bernard testified that in the hours following, he attended at 4757 Shore Road, Eskasoni more than once within an hour and a half of leaving the crime scene. The only thing of note was a dog inside. He returned sometime between 4 and 5 a.m., and noticed that the dog was outside. He then remained at the scene in view of the door until he was relieved at 7:00 a.m. by other officers.

[95] Corporal Darryl Johnson entered the residence at 4575 Shore Road at about 8:00 a.m. on the morning of July 4, 2015. He and other officers found Albert Bernard inside, sleeping on the floor, wrapped in a telephone cord with a charger, underneath the Canadian flag as seen in *Exhibit 2*, second section, photos 10 and 11. He was arrested at 8:30 a.m., and under the *Involuntary Psychiatric Treatment Act* and taken to the Eskasoni RCMP Detachment.

[96] Once at the detachment, Albert Bernard was arrested for the murder of Dale Dennis. The arrest took place at about 9:30am on July 4, 2015. Following his arrest, the accused made statements to police which are in evidence at *Exhibits 18*

and 23. *Exhibit 18* was admitted into evidence by consent and *Exhibit 23* was entered following a *voir dire*. More will be said about those statements further on in these reasons.

[97] The foregoing encapsulates the evidence on the sequence of events from the evening of July 3, 2015 through to the arrest of the accused on the morning of July 4, 2015. Going forward, I intend to focus on two specific areas before moving on to an analysis. The first specific area relates to the injuries sustained by the accused and the cause and manner of death.

The Injuries and Cause of Death of Dale Dennis

[98] As noted at the outset, there is no contest that the accused was responsible for the beating that resulted in the death of Dale Dennis. Having said that, a review of the beating, the injuries, and the cause of death have bearing on the issue of intent and require further review.

[99] A number of witnesses spoke to the particulars of the beating inflicted by the accused. It is undisputed that Dale Dennis sustained serious injuries which were limited to and focused upon the head, neck and genital area. The accused was wearing steel toe boots at the time of the beating and inflicted repeated blows to Dale Dennis with sufficient force to break his own hand.

[100] The evidence was consistent in that Dale Dennis was an intoxicated and unsuspecting victim. The evidence was also consistent that Dale Dennis dropped quickly to the ground after sustaining the first blow from the accused. Thereafter, various witnesses, including Kylie Alex, Mary Googoo, Alfred Alex and Jeffrey Nicholas said that Dale Dennis did not move or speak as he lay passive, likely unconscious, on the ground, while the accused repeatedly punched, kicked and stomped about his head, neck and genital areas. The injuries sustained left Dale Dennis largely unrecognizable, even to witnesses who knew him well.

[101] As to the duration of the attack, it was the evidence of Alfred Alex that from the time he heard that someone was fighting outside until the beating was over was a period of less than five minutes. I note at this point that the beating was underway by the time most witnesses became aware of it. Alfred said he observed the “fighting” from the front door of 136 Spencer’s Lane for 30 seconds to one minute before he went over to intervene. Mary Googoo similarly testified to a duration of about five minutes. Jeffrey Nicholas thought it was a shorter duration, perhaps two to three minutes.

[102] Jeffrey Nicholas was with Dale Dennis when the attack began. There was no warning. The first hit took Dale Dennis to the ground at which time the accused said something to the effect, “you wanna fuck with me?” Jeffrey Nicholas looked

around briefly for a weapon and finding nothing available ran inside his house to get a phone. He was unable to observe what was going on for the time it took him to run inside his house, grab the phone and look outside. He estimated that this was about 20 seconds. Thereafter, he described seeing two to three punches to Dale Dennis's head and at least two stomps to the head area. It was at this point that the accused moved to Dale Dennis's pants and Jeffrey Nicholas ran outside to the driveway of his residence, phone in hand. He obviously did not see what was happening as he moved locations.

[103] The witnesses from 136 Spencer's Lane did not observe Jeffrey Nicholas in the area of the garbage box. Presumably, when they first noticed the beating, Jeffrey Nicholas was inside his house. None of the witnesses from Spencer's Lane saw the accused pull Dale Dennis' pants down. This was something only seen by Jeffrey Nicholas from inside his house. The observations from the 136 Spencer's Lane witnesses recount kicks and stomps to the head and genitals and happened after the accused had taken Dale Dennis' pants down.

[104] I recount all of this to support the conclusion that the 136 Spencer's Lane witnesses who spoke to the number of blows did not observe the entirety of the attack and likely did not see the attack in progress until some point after Jeffrey Nicholas observed the accused moving Dale Dennis' pants. Moreover, there was

at least 20 seconds of the attack that no one saw when Jeffrey Nicholas left the scene. We know that Jeffrey Nicholas did not see the entire attack.

[105] After Jeffrey Nicholas moved to his driveway, and Alfred, Curtis and Mary began running toward the garbage box, more kicks and stomps were observed. Jeffrey Nicholas observed something he described as soccer kicks to Dale Dennis' groin. The kicks and stomps to the head and neck witnessed by those coming from 136 Spencer's Lane were likely in addition to those witnessed by Jeffrey Nicholas.

[106] The evidence of the medical examiner included the photos in *Exhibit 5*. These photos speak at once to the overall brutality of the attack and the obvious focus of the accused on inflicting damage to the head, neck and groin. It is apparent from the photos why Dale Dennis was unrecognizable to those who knew him following the attack.

[107] The medical examiner provided an opinion that the cause of Dale Dennis' death was blunt injuries to the head and neck. The particulars of these injuries are detailed in his Post Mortem Report (*Exhibit 6*). As I understood Dr. Mont's evidence, the blows to the head and neck resulted in brain injury or brain swelling that thereafter impacted the function of the brain and the structures it supports resulting in death. The injuries to the groin were part of the overall constellation of

injuries, and were a contributing factor, but in isolation would not have killed Dale Dennis.

[108] As recounted by Dr. Mont, the individual injuries sustained were numerous and include multiple lacerations, abrasions and contusions, fractured or missing teeth and fractures to the hyoid bone and thyroid cartilage. There were boot impressions visible in the bruising in both the groin and neck area. Significantly, the findings included blunt injuries to the brain with severe cerebral congestion and edema. Dr. Mont was unable to opine on the exact number of blows sustained by Dale Dennis but was able to ascertain at least 10 discreet injuries, possibly more. In my view, this finding is generally consistent with the evidence from witnesses at the scene. I find that the evidence of Dr. Mont, and the observation of witnesses at the scene, support the conclusion that the accused repeatedly kicked and stomped on Dale Dennis' head, and neck and repeatedly stomped and kicked his genital area.

[109] Having reviewed this evidence, it is clear that the attack on Dale Dennis was an intense one of a brutal nature. Lasting somewhere between three and five minutes, the accused inflicted blows to Dale Dennis' head with a force sufficient to break his own hand. In addition, the accused inflicted numerous kicks and stomps to Dale Dennis' head, neck and groin while wearing steel toe boots. One can

imagine such blows inflicting serious injury even to someone trying to resist. In this case however, there is no evidence of any resistance whatsoever. The accused carried out virtually the entire beating while Dale Dennis lay helpless and unconscious on the ground. In this context, a sustained beating inflicted over a three to five minute period, focused particularly on the head and neck, cannot be minimized. Quite to the contrary, the attack is one designed to inflict the greatest possible damage in the shortest possible time.

[110] To these observations, I add only that in the course of the beating, Dale Dennis' blood spattered the clothing of the accused. Dale Dennis' blood was found in the rear heel area of both boots Albert Bernard was wearing during the beating. This was obviously transferred during the course of the assault. Most poignantly however, was the fact that after running from the scene across a gravel cul-de-sac area and through a neighbor's yard, there was enough of Dale Dennis' blood remaining on the accused's boots to leave the blood smears on Anita Googoo's front door.

[111] On this point, I reference *Exhibit 25*, *Exhibit 2*, first section photos 29 to 33 and second section photos 35 onward, as well the evidence of Sgt. Darlene MacEachern. It was Sgt. MacEachern's evidence that there was considerable blood accumulation on both layers of the accused's socks, that blood was found on

the outside of both the left and right boot, and that hairs were found on one of the socks and one of the boots.

Intoxication and Intent

[112] The brutality of the attack brings the focus to the question of intent. What was in the mind of Albert Bernard as he inflicted this beating on Dale Dennis? An answer to this question requires a review of the evidence of the accused and others on all the evidence bearing on the intent of the accused. I begin first with the question of intoxication.

[113] It was the evidence of the accused that he was drinking on the evening of July 3, 2015. He said he was drinking vodka at his mother's home and Stephanie Googoo thought he may have also had some beer. He had been there since before 7:00 p.m. The accused was observed to be "in a good mood". When Stephanie Googoo dropped him at 4575 Shore Road at 12:20 a.m. on July 4, 2015, it was her observation that the accused was "very intoxicated", which she further described as an "eight" on a scale of drunkenness. While I have no reason to doubt Ms. Googoo's observations, I find it significant that the accused made a 911 call at 12:10 a.m. that morning in which he was clear and coherent and capable of conveying his point and the corresponding details.

[114] There is no evidence that the accused entered his house after being dropped off or, if he did, whether he had anything to drink there. As I say this, I note the photos in *Exhibit 2* that show an array of beer cans in the bedroom of the accused as well as the statements of the accused to police that he drank at home before going to Anita's. What is clear is that he was dropped in front of his residence at about 12:20 a.m. on July 4, 2015, and that he arrived at the home of Anita Googoo at about 12:30 a.m. While at 136 Spender's Lane, he was observed to have a liquor bottle with a red cap in his pocket. There was no evidence that he drank from the bottle or had anything else to drink while at Anita Googoo's residence. I note that an empty vodka bottle was found by police in the vicinity of the garbage box after the beating (see *Exhibit 15* and *Exhibit 17*, photo 8).

[115] The witnesses at the Googoo home that night did make various observations about the state of the accused. Generally, he was described as "pretty drunk" and emotional, but also angry and insistent. Various witnesses said that he smelled of alcohol and that he "looked drunk" from his facial expression. Anita Googoo said that she knew he was drunk from past experience. No one observed him stumble or stagger, slur his words, or appear confused, aimless or incoherent. When the accused is asked to leave the home of Anita Googoo, he is compliant.

[116] It is very shortly after these observations, perhaps a matter of minutes, that the accused carries out his beating of Dale Dennis. He is then observed running from the scene into an adjacent tree line and then quickly circling back to the front door of Anita Googoo's house. As he arrives there, he has the strength, agility and conviction required to kick in the front door and the presence of mind to blame his actions on Anita Googoo. The accused then runs from the home before the police arrive. His statements to police indicate that he hid from police for a period of time. Again, I find these are the actions of someone aware of the surrounding circumstances.

[117] The next observations of the accused come from Tim Dennis and Ryan Googoo. They both say that the accused arrived at Joey Benn's shed with a bag full of Bush Ice beer and that he only sipped the beer while in their presence. They had been drinking themselves in the preceding hours, but were consistent in that the accused arrived at the shed with beer, and talked repeatedly about the fact that he thought he killed Dale Dennis. Tim Dennis testified that the accused smelled of alcohol and slurred his words but was not staggering.

[118] Perhaps more significant than the specific observations of Tim Dennis and Ryan Googoo was the overriding fact that the accused went about his business after the beating, that he felt the need to drink more, carried out that plan by

picking up beer and continued his evening by walking around Eskasoni and eventually arriving at Joey Benn's shed. After leaving the shed, he was observed going into the woods. Sometime later he returned to 4575 Eskasoni Road where it appears he may have had more to drink, texted people, made at least one phone call, and eventually passed out on his bedroom floor.

[119] *Exhibit 2*, second section, photos 14 to 17 show an array of Bush Ice beer cans in the bedroom of the accused. Some are open and some are not. Given my findings about the movements of the accused that evening, I find that he stopped at 4575 Eskasoni Road after the beating and picked up some beer, then drank some of it while at Joey Benn's shed, and continued to drink after he later returned home.

[120] It was the evidence of the accused that he had no recollection of most of the foregoing events. In fact, it was his testimony that he did not have any recollection of events after making a fire at the home of his mother in the evening hours of July 3, 2015, until some four days later when he was in custody at the Pictou Correctional Facility. There was no explanation for this four-day blackout except that the accused had been drinking. He said that in the past it was his habit to drink until he passed out and then would not remember things. There was no evidence from the accused that he had blackouts of similar duration in the past.

[121] The evidence of the accused results in a number of observations. First, the accused said that his past experience was to drink until he passed out. In this case, there is clear evidence that the accused had been drinking vodka, and possibly beer, in the hours preceding the beating. Nevertheless, he went about his business in those hours, participating in the family gathering, making a bonfire, leaving his mother's house, returning, making a coherent 911 call and then leaving again. All the while, he was observed to be having a good time. He was texting his friends. There was no warning in his activity of the violence to come. But it was clear as he left his mother's that he had Anita Googoo on his mind.

[122] Second, there is simply nothing in the evidence to explain or support a 4 day blackout by the accused. It defies common sense and experience.

[123] This brings me quickly to my third point which relates to credibility. After hearing the evidence of the accused in the context of the remaining evidence, I simply do not believe that he has the lack of recollection that he claims. His evidence on this point was convenient and had a contrived tone. When first asked if he recalled what he was doing on July 3, 2015, he quickly answered, "no". When prompted for some recollection, he was vague in his answers until asked if he was drinking to which he clearly and definitively says "Oh yes I was".

[124] From there, his evidence was consistent as to his lack of recollection. He denied any recollection of the 911 call at 12:10 a.m. or the call with John Gould at 3:27 a.m., both on July 4, 2015. Having heard both of these telephone calls, I find it difficult to believe that he does not remember them. The accused's speech is clear and coherent in both calls and the substance of what is said contains details connected to the surrounding circumstances. I find that the same can be said for the text message conversations. During the phone call to John Gould, the accused made statements to the effect that he did not remember anything and did not want to say anything that could be used against him in Court. I find this to support the conclusion that the accused had made a conscious choice to "not remember" the relevant events.

[125] One must also consider that Albert Bernard's lack of recollection at trial is inconsistent with his statements to police. By way of example, *Exhibit 23*, at pages 14 and 15, the accused relates details to police of which he now says he has no recollection. I do not believe that Albert Bernard has no memory of his conversation with police or that he could have then relayed such details to police at the time and now have no memory of the entire sequence of events.

[126] There were other inconsistencies between the trial evidence and statements to police. As an example, it was the evidence of Albert Bernard at trial that he and

Dale Dennis were best friends and that they visited in the months prior to the beating. This is inconsistent with statements that the accused made to police which suggested considerable ill will.

[127] Also during his trial testimony, the accused said he could not think of any reason he wanted Dale Dennis to be dead and that he was ashamed of his actions. His statements to police were at times exactly the opposite. Although he denied at trial that he ever thought Anita was sleeping with Dale Dennis, this was clearly the explanation and justification he provided to police for why he inflicted the beating on Dale Dennis.

[128] It is worth noting as well that in the time period following his arrest, the accused has hours of conversation and interaction with police. During this time, he requests nothing more than food and a chance to go to the washroom. There is no evidence of him needing a break or the opportunity to sleep, nor is there evidence of any illness associated with the impact of his drinking.

[129] All of this to say that I do not accept the accused's claim to have no recall of the events in question. I do accept that he was drinking, that he drank for hours preceding the beating, and that at the time of the beating he was intoxicated to some degree. In order to secure a conviction for second degree murder, the Crown

must satisfy me beyond a reasonable doubt that Albert Bernard had the specific intent required for murder notwithstanding his level of intoxication.

[130] Counsel provided me with a number of authorities on the defence of intoxication. They included *R. v. Daley*, 2007 SCC 53, *R. v. Gregory*, 2013 NSCA 102, *R. v. M.S.*, 2012 NSPC 77, and *R. v. Arjun*, 2015 BCCA 273. Unfortunately there are many cases which deal with intoxication as a defence to second degree murder.

[131] The leading case remains the decision of the Supreme Court of Canada in *Daley, supra*. In that case, Bastarache J. reviewed the current state of the law on the defence of intoxication and set out three legally relevant categories; mild intoxication, advanced intoxication (which applies only to specific intent offences), and extreme intoxication. Advanced intoxication was described as occurring:

[41]...where there is intoxication to the point where the accused lacks specific intent, to the extent of an impairment of the accused's foresight of the consequences of his or her act sufficient to raise a reasonable doubt about the requisite *mens rea*.

[132] Justice Basterache went on to note at para. 42 that the extent of intoxication required to advance a successful intoxication defence of this type may vary, depending upon the type of offence involved.

[133] In Nova Scotia, our Court of Appeal recently noted the defence of intoxication as no defence. Rather:

[14]...It is a suggestion that, due to the consumption of alcohol,...the Crown cannot prove beyond a reasonable doubt the necessary *mens rea* to establish criminal liability. In the absence of such evidence, the trier of fact is entitled to apply the common sense inference that a sane and sober person intends the natural consequences of his or her actions.

[15] In terms of the offence of murder, consumption of intoxicants could be to such an extent that an accused did not have the capacity to form the intent to commit murder, or based upon all of the evidence, might raise a reasonable doubt that the accused in fact intended to cause bodily harm with the foresight that the likely consequence was death.

[134] As to the link between the common sense inference and evidence of intoxication, Justice Bastarache in *Daley, supra*, approved of the comments of Huddart, J.A. in *R. v. Courterille* (2001) BCCA 17 at para. 32:

[The common sense inference] does not die with the first drink. The collective common sense and knowledge of life possessed by twelve jurors is of fundamental importance to the unique value of juries...It is equally good sense and common experience that the effect of alcohol on thought processes is a continuum...The more intoxicated a person becomes, the greater likelihood that drink will result first in uninhibited conduct, and ultimately in unintended conduct. It is proper to remind the jury that they may use their common sense with respect to this, even if intoxication is advanced, provided the reminder includes the admonition that the inference is permissive and subject to a consideration of the evidence of intoxication.

[135] In order to determine if Albert Bernard had the requisite intent in this case, it is necessary that all of the evidence bearing on intent be considered, including the

evidence of intoxication. I have already reviewed the timeline of events, the injuries inflicted, the cause of death and the evidence on intoxication. Before completing an analysis of the intent issue, some consideration must be given to the motive of the accused, his post offence conduct and his statements to police.

Motive

[136] In spite of the evidence given by the accused at trial, I find that he was motivated by a belief that Anita Googoo had cheated on him with Dale Dennis. In finding this, I want to specifically note that I do not accept as true statements made by the accused to the effect that he had walked in on Anita Googoo and Dale Dennis having sex on the night of the beating. This simply did not accord with the totality of the evidence on this point. I do, however, believe that the accused believed that something was going on between Anita Googoo and Dale Dennis.

[137] It was the evidence of Anita Googoo that Albert Bernard had been accusing her of sneaking around with Dale Dennis every day of the previous week. When he arrived at Anita's home in the early morning of July 4, 2015, Albert Bernard was both emotional and accusatory. He pursued the issue with Anita during his visit. As he left, it remained on his mind and unresolved. As Albert stood in the

hallway before leaving, it was Anita's evidence that his parting words were, "You and Dale are fucking around on me."

[138] Unfortunately, within moments of leaving Anita's house, Albert Bernard would have seen Dale Dennis at the garbage box. An opportunity had presented itself. His attack was not a random act of drunken unintended violence. To the contrary, the attack, although opportunistic, was clearly directed at Dale Dennis and motivated by the beliefs of the accused.

[139] I find that the words used by the accused as he began his attack on Dale Dennis, and the focus on inflicting injury to the genital area, accord with the motive. I find that his return to the home of Anita Googoo after the attack, and the statements made there, accord with this motive. And I find many of the statements that the accused made to the police accord with this motive.

[140] At this point, I note that I have not made any comment on the evidence of the Crown's first witness, Caroline Lafford. It was her evidence that the accused told her that he was going to kill Dale Dennis. This statement was made in December of 2014, sometime before Christmas.

[141] When confronted with this evidence, the accused responded on direct examination by saying that he did not remember making the statement. On cross-

examination, he said he did not talk to Caroline Lafford. They clearly were not friends. The accused did acknowledge having a bicycle and riding it in the area of the Eskasoni Market.

[142] On this point, I do not believe the denial of the accused. As I have already noted, I find his consistent and convenient memory failures incredible. Beyond that, given the time lapse between this statement and the beating of Dale Dennis, I am unable to determine what place this statement takes in the evidentiary landscape of this case. This statement could be the result of an earlier and unrelated dispute. Or not. I do find that the motive and anger of the accused on the night of the beating was something that had developed over the preceding week, not the preceding months. Nevertheless, I find the opportunity presented itself in the instant that Albert Bernard left Anita Googoo's house and saw Dale Dennis.

Post Offence Conduct

[143] With respect to the relevant post offence conduct, I note that the accused fled the scene at the mention of the police. Instead of completely departing the area, he returned to Anita's house and blamed her for his conduct. He then left and later told police that he was hiding for a period before appearing shortly thereafter

at Joey Benn's shed. It was in the presence of Tim Dennis and Ryan Googoo that the accused mentioned that he was intending to hang himself. On the basis of his later conversation with John Gould, I would say that this intention was something less than a serious one.

[144] I find that the post offence conduct evidence in this instance is not evidence that is of assistance in determining the culpability of the accused as between murder and manslaughter. It is equally consistent with both. On this basis, it cannot be considered evidence of Albert Bernard having a specific intent to kill.

Statements to Police

[145] Finally, some comment must be made about the statements that the accused made to police as contained in *Exhibits 18* and *23*. The Defence referred to the statements as the intoxicated meanderings of Albert Bernard. The Crown relied upon the statements for various purposes. I have already relied on some of the statements made to police in the findings I have already reviewed.

[146] Generally speaking, I found the statements made by Albert Bernard to be those of someone progressively coming to grips with what he had done the night before. On first review, the statements are a mixed array of confusing admissions. The accused appears shocked and in disbelief on first learning that he had killed

Dale Dennis. He also appears overwhelmed, sometimes remorseful, sometimes unrepentant, and strangely boastful. There are times when the accused seems to be admitting what he had done, and other instances where he is clearly lying. He is aware of the difference between murder and manslaughter and he is persistently surprised that he could be charged with murder when, as he says repeatedly, that he only used his hands to kill Dale Dennis.

[147] Without a doubt, the statements are a basis to confirm that Albert Bernard was the perpetrator of the attacks on Dale Dennis. In my view, they also deserve weight in that Albert Bernard had the subjective intent to inflict serious bodily harm on Dale Dennis motivated by the ill will toward him. The ill will flowed from his belief in some kind of a relationship with Anita Googoo.

[148] Further, in my view, the statements that I do accept support that Albert Bernard knew what he was doing notwithstanding his level of intoxication. On this point, I refer specifically to the statement made at p. 60 of *Exhibit 23* where the accused says, “*And I knew what I was doing and I was drinking. I knew what I was doing*”. I accept this statement as true.

[149] In conclusion on this point, I would say that the overall and consistent tone of the statements made by the accused were of a conscious effort to downplay what

he had done to Dale Dennis. He makes much of the fact that he used his bare hands and only makes passing, perhaps mistaken or unintentional reference to a kick (see *Exhibit 18*, p. 24 and 68 and *Exhibit 23*, p. 15). There are many times when the statements take on a confession like tone but having reviewed the statements made against all of the evidence at trial, I find his statements have an intention to mislead. I find the only common thread of the entire series of statements was that Albert Bernard was trying to justify what he had done by amplifying those facts that supported his motivation, and minimizing his disclosures about the attack itself.

Finding on Intent

[150] At this point, I am prepared to make a finding with respect to the intent of the accused as he attacked Dale Dennis and beat him to death in the early morning of July 4, 2015.

[151] I say at the outset that I am not prepared to find an outright intent to kill under s. 229(a)(i). Rather, having reviewed the evidence, the question in my mind is whether the Crown has proven beyond a reasonable doubt that the accused had the requisite intent under s. 229(a)(ii). In order to discharge its burden, the Crown must prove a subjective intent to cause bodily harm and a subjective knowledge

that the bodily harm was of such a nature that it would likely result in the death of Dale Dennis and that the accused continued in spite of the risk.

[152] Having reviewed all of the evidence I am satisfied that the Crown has discharged its burden of proof on the element of intent. I find that the accused was motivated by ill will when he attacked Dale Dennis. This ill will had developed in the accused over the preceding days and peaked at the confrontation with Anita Googoo in the early morning of July 4, 2015. I find that his specific intent crystallized as he left 136 Spencer's Lane and saw Dale Dennis. This intent was not impacted by the accused's level of intoxication. He decided in that moment to take out his anger on Dale Dennis and inflict serious bodily harm.

[153] The nature of the attack satisfies me that the accused intended to cause the kind of serious bodily harm that he knew would likely cause death and continued anyway. The attack was intense and focused. He made the most destructive use of his hands and feet on an unresponsive victim, and he focused on the head and neck area. Common sense says that these are the most vulnerable areas to inflict blunt-force trauma to a human being. On this basis, I find it to be a sound inference that the accused intended to cause bodily harm that was likely to kill and continued despite the risk.

[154] The evidence satisfies me beyond a reasonable doubt that Albert Bernard, despite his level of intoxication, was aware of what he was doing and intended his attack on Dale Dennis. The attack had predictable consequences.

Provocation

[155] This brings me to the final part of this analysis which is the defence of provocation. Section 232(1) of the *Criminal Code* provides that “culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.” Provocation is defined in section 232(2) as “A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control...if the person acted on it on the sudden and before there was time for his passion to cool.”

[156] On this point, I have considered the decision of the Supreme Court of Canada in *R. v. Tran*, 2010 SCC 58. The issue of provocation was more recently raised in *R. v. M.S.*, *supra*, a case where the accused killed his girlfriend because of a suspicion of infidelity. I adopt the analysis of Judge Derrick in that case on the issue of provocation and conclude as she did at paras. 76 and 77 that:

[76] I do not find that a suspicion that a girlfriend has been seeing someone else, or even the fact of it, can be regarded as provocation of the kind that engages the compassion of the law reducing what otherwise would be a murder to a manslaughter. Feelings of anger and frustration do not constitute provocation of the kind that will achieve such a result.

[77] Permitting a perceived threat to a relationship, or its actual breakdown to constitute an insult or wrongful act capable of amounting to provocation to kill...would set a dangerous precedent. (Citations omitted)

[157] I find on the facts of this case that no provocation defence is available to Albert Bernard and, therefore, no basis to reduce murder to manslaughter.

Conclusion

[158] This brings me to the conclusion of my reasons in this case.

[159] **Mr. Bernard – please stand.** For the reasons that I have just reviewed, I find you guilty of the offence of second degree murder in the death of Dale Dennis.

Gogan, J.