IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Furey*, 2021 NLCA 59
Date: December 23, 2021
Docket Number: 202101H0019

BETWEEN:

DAVID EDWARD FUREY — APPELLANT

AND:

HER MAJESTY THE QUEEN — RESPONDENT

Coram: Welsh, White and Knickle JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador, St. John's

Appeal Heard: October 18, 2021
Judgment Rendered: December 23, 2021

Reasons for Judgment by: Welsh J.A.
Concurred in by: White J.A.
Dissenting Reasons by: Knickle J.A.

Counsel for the Appellant: Derek Hogan
Counsel for the Respondent: Arnold Hussey Q.C.

Authorities Cited:

Welsh J.A.:

CASES CITED: *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *R. v. Charlebois*, 2000 SCC 53, [2000] 2 S.C.R. 674; *Mahoney v. The Queen*, [1982] 1 S.C.R. 834; *R. v. R.V.*, 2019 SCC 41; *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239.

STATUTES CONSIDERED: *Criminal Code*, section 686(1)(b)(iii).

TEXTS CONSIDERED: David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed, (Toronto: Irwin Law Inc., 2015).

Knickle J.A.:

CASES CITED: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *R. v. Bridgman*, 2017 ONCA 940; *R. v. Omar*, 2018 ONCA 787; *R. v. Hannaford*, [2019] N.J. No. 401 (NLPC); *R. v. Carroll*, 2014 ONCA 2; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720.

TEXTS CONSIDERED: David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto, ON: Irwin Law Inc., 2015); David M. Paciocco et al, *The Law of Evidence*, 8th ed (Toronto, ON: Irwin Law Inc., 2020).

Welsh J.A.:

[1] David Furey was convicted of break and enter into a dwelling, assault with a weapon, assault causing bodily harm, possession of a knife for a purpose dangerous to the public peace, and breach of an undertaking. Mr. Furey appeals his convictions on the basis that the trial judge erred in admitting, for the truth of its contents, an out-of-court statement given by one of the complainants, who subsequently died of unrelated causes.

BACKGROUND

[2] Mr. Furey's convictions resulted from events that took place when, on two different occasions on the evening of January 7, 2020, he entered uninvited into the residence of Paul and Chris Worrall. Paul Worrall was home and confronted Mr. Furey on the first occasion. On the second occasion both Worralls were home when a further confrontation occurred.

[3] Paul Worrall gave a statement to the police later that night. However, he died from unrelated causes prior to the trial. At the trial, the judge heard testimony from Chris Worrall, police officers and neighbours. A *voir dire* was held to determine the admissibility of Paul Worrall's statement. The trial judge concluded that the audio and video recorded statement was admissible for the truth of its contents.

ISSUES

[4] At issue is whether the trial judge erred by failing to apply the correct legal principles in admitting Paul Worrall's statement for the truth of its contents.

ANALYSIS

The Legal Analysis – Reliability and Necessity Criteria

[5] The analysis to determine the admissibility of an out-of-court statement where the declarant is unavailable to testify at the trial begins with a consideration of necessity and reliability. In *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, Karakatsanis J., for the majority, discussed relevant considerations:

> [1] Hearsay is an out-of-court statement tendered for the truth of its contents. It is presumptively inadmissible because – in the absence of the opportunity to cross-examine the declarant at the time the statement is made – it is often difficult for the trier of fact to assess the truth. Thus hearsay can threaten the integrity of the trial's truth-seeking process and trial fairness. However, hearsay may exceptionally be admitted into evidence under the principled exception when it meets the criteria of necessity and threshold reliability.

[6] Karakatsanis J. went on to discuss the importance of threshold reliability in the analysis:

> [26] To determine whether a hearsay statement is admissible, the trial judge assesses the statement's *threshold* reliability. Threshold reliability is established when the hearsay "is sufficiently reliable to overcome the dangers arising from the difficulty of testing it" *(Khelawon* [2006 SCC 57, [2006] 2 S.C.R. 787], at para. 49). These dangers arise notably due to the absence of contemporaneous cross-examination of the hearsay declarant before the trier of fact (*Khelawon*, at paras 35 and 48). In assessing threshold reliability, the trial judge must identify the specific hearsay dangers presented by the statement and consider any means of overcoming them (*Khelawon*, at paras. 4 and 49); ...
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> (Italics in the original.)

[7] In assessing the reliability of the statement, Karakatsanis J. addressed both procedural and substantive reliability:

> [28] *Procedural* reliability is established when "there are adequate substitutes for testing the evidence", given that the declarant has not "state[d] the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination" (*Khelawon*, at para. 63). ...
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> (Italics in the original.)

[8] Relevant considerations may include whether there is a video recording of the statement, and whether the statement was given under oath or a warning was given about the consequences of lying.

[9] Regarding substantive reliability, Karakatsanis J. explained:

> [30] A hearsay statement is also admissible if *substantive* reliability is established, that is, if the statement is inherently trustworthy (*Youvarajah* [2013 SCC 41], at para. 30; *R. v. Smith*, [1992] 2 S.C.R. 915 (S.C.C.). at p. 929). To determine whether the statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement (*Khelawon*, at paras. 4, 62 and 94-100; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298 (S.C.C.), at para. 55).
>
> [31] ... Substantive reliability is established when the statement "is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken" (*Smith*, at p. 933); "under such circumstances that even a skeptical caution would look upon it as trustworthy" (*Khelawon*, at para. 62, citing Wigmore, at p. 154); when the statement is so reliable that it is "unlikely to change under cross-examination" (*Khelawon*, at para. 107; *Smith*, at p. 937); when "there is no real concern about whether the statement is true or not because of the circumstances in which it came about" (*Khelawon*, at para. 62); when the only likely explanation is that the statement is true (*U. (F.J.)*, at para. 40).

> [32] These two approaches to establishing threshold reliability may work in tandem. Procedural reliability and substantive reliability are not mutually exclusive (*Khelawon*, at para. 65) and "factors relevant to one can complement the other" (*Couture*, at para. 80). That said, the threshold reliability standard always remains high – the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents (*Khelawon*, at para. 49). ... Great care must be taken to ensure that this combined approach does not lead to the admission of statements despite insufficient procedural safeguards and guarantees of inherent trustworthiness to overcome the hearsay dangers.
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> (Italics in the original, emphasis added.)

[10] The interplay between reliability of the statement and necessity in admitting the statement for the truth of its contents is discussed in *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520. Fish J., for the majority, concluded:

> [72] ... And it is important to remember that the criteria of necessity and reliability work in tandem: if the reliability of the evidence is sufficiently established, the necessity requirement can be relaxed: see *Khelawon*, at para. 86, citing *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.), and *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764 (S.C.C.).
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> (Emphasis added.)

See also *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at paragraphs 103 to 105.

[11] At issue in this appeal is the obverse of the above principle; that is, whether reliability may be relaxed where necessity is high.

Application of the Law

[12] Counsel for Mr. Furey submits that, in *Baldree*, having stated the principle that, "if the reliability of the evidence is sufficiently established, the necessity requirement can be relaxed", Fish J. did not suggest or adopt as a principle that, where necessity is high, reliability may be relaxed. On this basis, counsel submits that the trial judge erred by relying on the following statement in Paciocco and Stuesser, *The Law of Evidence*, 7th edition, (Toronto: Irwin Law Inc., 2015), at paragraph 1.2(b) (the "Paciocco text"):

> A final point on the principled approach that may assist in applying the law is that necessity and threshold reliability are interrelated. They are not fixed standards. Rather, they are fluid and work together in tandem. If an item of evidence exhibits high reliability then necessity can be relaxed and, similarly, if necessity is high then less reliability may be required. Professor Irving Younger provided this "rule of

> thumb": necessity plus reliability equals one. What this means is the greater the necessity, the less the reliability. Conversely, the greater the reliability the less the necessity. ...
>
> (Emphasis added.)

[13] I accept the submission of counsel for Mr. Furey. The case law does not support the above statement in the Paciocco text that, where there is greater necessity, less reliability is acceptable. In fact, increased necessity does not have the effect of reducing the threshold of reliability that is required in order to render an out-of-court statement admissible. Reliability is a key component when assessing whether an out-of-court statement by a deceased person is admissible for the truth of its contents. It follows that the trial judge erred insofar as she relied on and applied the erroneous statement of the law.

[14] In her decision on the *voir dire*, the trial judge discussed considerations and factors relevant to determining the question of threshold reliability. However, she concluded her decision by stating:

> [46] ... The circumstances surrounding the taking of the statement support the indicia of necessity and reliability required by the principled approach [to the admissibility of an out-of-court statement] and I find that contemporaneous cross-examination, while preferable as in any case, would not likely add much to the process of determining the truth of what Paul Worrall said in his statement. I am mindful of the final note put forward by Paciocco and Stuesser that in situations such as the instant, where necessity is high, less reliability is required.
>
> [47] I find that the statement of Paul Worrall does meet the threshold for inherent reliability. Any deficits are offset by the high degree of necessity. ...
>
> (Emphasis added.)

[15] The underlined statements indicate an uncertainty in the mind of the judge as to whether the required threshold of reliability would, in fact, have been cleared if the death of Paul Worrall had not increased the necessity for his statement to be admitted for the proof of its contents. Further, the statements reiterate that the judge was applying the erroneous statement of principle set out in the Paciocco text.

[16] In the result, I am satisfied that, based on the error in the trial judge's reasoning in the *voir dire*, Paul Worrall's statement was not properly admissible for the truth of its contents.

The Curative Proviso

[17] Section 686(1)(b)(iii) of the *Criminal Code* (the "curative proviso") provides authority for the Court to dismiss an appeal against conviction even where the trial judge has erred:

> On the hearing of an appeal against a conviction ... , the court of appeal
>
> ...
>
> (b) may dismiss the appeal where
>
> ...
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; ...

[18] Section 686(1)(a)(ii) provides that the court may allow an appeal where it is of the opinion that "the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law".

[19] The effect of the curative proviso on the accused's rights is discussed in *R. v. Charlebois*, 2000 SCC 53, [2000] 2 S.C.R. 674. Bastarache J., for the majority, quoted from *Mahoney v. The Queen*, [1982] 1 S.C.R. 834, at page 852, regarding a substantial wrong or miscarriage of justice:

> [10] ... McIntyre J. explained how the Court is to determine whether a substantial wrong or miscarriage of justice has occurred:
>
> > ... The determination of what will constitute a substantial wrong or miscarriage of justice must involve the construction of those words in the context in which they are used in the Statute, and such statutory construction has long been considered a matter of law. The Court's decision involves an analysis of the rights accorded by law to an accused and the measurement of the impact of the errors which were made at trial. Once an appellant establishes in the Court of Appeal that errors of law were made at his trial he becomes entitled to have his appeal allowed and a new trial or an acquittal, depending on the circumstances, unless the proviso is applied to annul those rights. ...
>
> (Emphasis added.)

[20] Circumstances when the curative proviso may be applied are discussed in *R. v. R.V.*, 2019 SCC 41. Karakatsanis J., for the majority, explained:

> [85] The curative proviso set out in s. 686(1)(b)(iii) may be applied where there is no "reasonable possibility that the verdict would have been different had the error ... not been made": *R. v. Bevan*, [1993] 2 S.C.R. 599 (S.C.C.), at p. 617, aff'd *R.v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823 (S.C.C.), at para. 28. Applying the curative proviso is appropriate in two circumstances: (i) where the error is harmless or trivial; or (ii) where the evidence is so overwhelming that the trier of fact would inevitably convict: *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272 (S.C.C.), at para. 53; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716 (S.C.C.), at para. 34; *Khan*, at paras. 29-31.

See also *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162, at paragraph 45; *Baldree*, at paragraph 74; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at paragraph 26.

[21] Determining whether the second category applies, that is, the evidence is so overwhelming that the trier of fact would inevitably convict, was discussed in *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239. Dechamps J., for the majority, explained:

> [82] ... The standard applied by an appellate court, namely that the evidence against an accused is so overwhelming that conviction is inevitable or would invariably result, is a substantially higher one than the requirement that the Crown prove its case "beyond a reasonable doubt" at trial. This higher standard reflects the fact that it is difficult for an appellate court ... to consider retroactively the effect that, for example, excluding certain evidence could reasonably have had on the outcome.

(Emphasis added.)

[22] In this case, as discussed in *Charlebois*, as a result of the errors of law made at his trial, Mr. Furey is entitled to have his appeal allowed unless the curative proviso applies. Regarding the first incident, Paul Worrall's statement, admitted for the truth of its contents, would have been critical to establishing Mr. Furey's first entry into the house since Paul Worrall was alone at the time. On this basis, the Crown concedes that, if the statement is not admissible, an acquittal would properly be entered for the offences arising from that incident.

[23] However, while I have determined that the trial judge erred in admitting Paul Worrall's statement, this was based on her application of an incorrect principle of law. For the reasons that follow, I am satisfied that the decision of the trial judge must be set aside and a new trial ordered. In the context of a new

trial, the admissibility of the statement must be reassessed applying the correct law in a *voir dire*.

[24] Regarding the second incident when both Worralls were present, the Crown submits that the curative proviso would apply. I do not agree. Paul Worrall's statement would be relevant insofar as it provides corroboration of Chris Worrall's evidence. All three men were injured during the incident, and Mr. Furey's version of what transpired differs significantly from Chris Worrall's version. In the circumstances, it is not possible to assess the importance that Paul Worrall's statement would have in determining whether all the charges against Mr. Furey had been proven beyond a reasonable doubt. As a result, I am not satisfied that this Court is in a position to determine what effect excluding Paul Worrall's out-of-court statement could reasonably have had on the outcome (*Trochym,* at paragraph 82).

[25] In summary, the trial judge's error in applying an incorrect principle of law in determining the admissibility of Paul Worrall's statement could not be characterized as harmless or trivial. Further, from the perspective of the appellate court, it cannot be said that the evidence is so overwhelming that the trier of fact would inevitably convict.

[26] In the result, I am satisfied that the curative proviso would not apply on the facts of this case.

SUMMARY AND DISPOSITION

[27] In summary, the trial judge applied an erroneous statement of the law, and as a result of her reliance on it, erred in admitting Paul Worrall's out-of-court statement for the truth of its contents. The curative proviso cannot be relied upon.

[28] Accordingly, I would allow the appeal, and set aside the decision of the trial judge, including the decision on the *voir dire* regarding the admissibility of Paul Worrall's out-of-court statement. At a new trial, the admissibility of the statement may be determined at a *voir dire* applying the correct law.

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B. G. Welsh J.A.

I concur: _____

C. W. White J.A.

Dissenting Reasons of Knickle J.A.:

INTRODUCTION

[29] This appeal addresses whether at the trial of David Furey, the trial judge erred in admitting hearsay evidence: a video recorded statement of one of the complainants.

[30] Mr. Furey was charged with several offences arising from allegations by Paul Worrell and his son, Chris Worrall, after two altercations between the three gentlemen on January 7th, 2020. Paul Worrell provided a videotaped statement to the police soon after the altercations. Unfortunately, by the time of trial, he was deceased. Because Paul Worrall was deceased, there was no dispute under the principled approach to the admission of hearsay evidence that the statement clearly met the criteria of "necessity". The videotaped statement, taken shortly after the events, was the only means for the Court to assess Paul Worrall's account of the events. The issue was whether or not the statement met the second criterion of the principled approach; that is, reliability.

[31] After a *voir dire*, the trial judge admitted the statement. The judge provided written reasons (*R. v. Furey*, 2020 NLPC 0120PA00574).

[32] The appellant asserts, and my colleagues agree, that the trial judge misapplied the appropriate principles in admitting the statement. The appellant alleges the trial judge improperly relaxed the requirement that the statement be reliable. The appellant states this was an error because while the necessity requirements may be relaxed where the reliability of the hearsay evidence is high, the converse is not true.

[33] The appellant submits that at paragraph 18 of her judgment on the admissibility of the statement, the trial judge relied on an excerpt from David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto, ON: Irwin Law Inc., 2015), to justify derogating from the reliability requirement under the

principled approach. The impugned quote in *The Law of Evidence*, 7th edition, is at page 139 and states:

> A final point on the principled approach that may assist in applying the law is that necessity and threshold reliability are interrelated. They are not fixed standards. Rather, they are fluid and work together in tandem. If an item of evidence exhibits high reliability, then necessity can be relaxed and, similarly, if necessity is high then less reliability may be required. Professor Irving Younger provided this "rule of thumb": necessity plus reliability equals one. What this means is the greater the necessity, the less reliability. Conversely, the greater the reliability, the less the necessity. Wigmore, for example, was prepared to reform the hearsay rule to admit all statements of deceased persons, absolute necessity alone dictating admissibility.

[34] The appellant then points to two statements by the trial judge where she stated that she was "mindful" of the above statements from Paciocco and Stuesser, that "where necessity is high, less reliability is required" (paragraph 46) and "any deficits [in reliability] are offset by the high degree of necessity" (paragraph 47).

[35] The appellant argues these statements illustrate that the trial judge permitted the admissibility of the hearsay evidence without requiring that the requisite degree of reliability be established under the principled approach.

[36] I disagree.

THE LAW

The principled approach to hearsay evidence.

[37] My colleague has reviewed the law regarding the principled approach to the admission of hearsay at paragraphs 5-11 of her judgment. I would add the following.

[38] In *Khelawon*, Charron J. reviewed the approach to assessing the reliability of hearsay evidence. At issue in *Khelawon* was the reliability of several statements of a declarant who, similar to the circumstances here, was deceased at the time of trial. Also similar to the present circumstances, one of the statements tendered was an unsworn videotaped statement. On appeal it was ruled the statement was inadmissible and this was affirmed by the Supreme Court. The requisite level of reliability of the statement could not be established.

[39] Charron J. explained that the criteria of necessity and reliability are the standards for the admission of hearsay evidence as part of the broader concerns of the principles of trial fairness. At paragraph 49, she stated:

> [49]… The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it…

[40] The burden is on the person seeking to adduce the evidence to establish these criteria on the balance of probabilities (*Khelawon*, at paragraph 46). In determining whether the evidence is admissible, the criteria are not assessed in isolation, but in relation to each other. One "criterion may impact the other" (*Khelawon*, at paragraph 46).

[41] In *R. v. Bridgman*, 2017 ONCA 940, Fairburn J.A., writing for a unanimous Court described the flexible relationship between the two criteria at paragraph 63:

> [63] Moreover, threshold reliability and necessity work in tandem. The more reliable a statement, the less important the necessity analysis may become. The criterion of necessity and reliability are said to intersect and "should not be considered in isolation": *Khelawon*, at para. 77. As they coexist in this symbiotic relationship, they may impact one another: *Khelawon*, at paras. 77, 86; and *Baldree*, at paras. 72, 96. The trial judge did not err in finding this to be the case here.

[42] The flexibility in the assessment of reliability was also illustrated by Charron J. in *Khelawon*, at paragraphs 61-63, where she explained that the reliability criterion of a statement may be met in different ways. A statement may be reliable because of the circumstances in which it was made; such as the fact that it was made under oath and/or recorded. Even where a statement is not under oath, the circumstances in which it is made may support its reliability sufficient to warrant its admission. For example, in *Bridgman*, the substance of telephone calls made by purported drug purchasers were found to be reliable notwithstanding that the declarants would not be called to testify. Nor were such statements made under oath. However the number of the calls ameliorated hearsay concerns as to whether or not the substance of the call were reliable statements (see also *R. v. Omar*, 2018 ONCA 787).

[43] Where a hearsay statement may be not be considered as reliable because of the circumstances in which it was made, there may be other assurances to justify its admission. For example, Charron J. noted that the availability for cross-examination, providing an opportunity to test the evidence, may in some situations, lessen concerns with admitting a hearsay statement (*Khelawon,* at paragraph 41).

[44] That the criteria "co-exist" in a "symbiotic relationship" and work "in tandem", as described in *Bridgman*, supports that there is flexibility in the assessment of reliability. Likewise, the potential for one of the criterion to impact the other, as explained in *Khelawon,* invokes a level of flexibility in the assessment of both criteria. In engaging in a flexible approach, the trial judge may find that the assessment of the reliability of a statement is impacted by the degree to which it is necessary; always keeping in mind that the hearsay concerns must be sufficiently ameliorated, and the trial judge be satisfied on the balance of probabilities that there is a circumstantial guarantee of trustworthiness in the evidence. As stated by Charron J.:

> [61] Since the central underlying concern is the inability to test hearsay evidence, it follows that under the principled approach the reliability requirement is aimed at identifying those cases where this difficulty is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule…

[45] The excerpt quoted by the trial judge from 7th edition of *The Law of Evidence* must be seen through the lens that there is flexibility in the assessment of the criteria; that the two criteria are interrelated and operate "in tandem". The criteria are not so "fluid" that where the establishment of necessity is clear (for example where a person is deceased), there is no need to assess reliability, but there is flexibility to the assessment of reliability as it relates to necessity. This is what "in tandem" means.

[46] Further, the assessment of the reliability of the statement at the *voir dire* stage is for the purpose of determining its admissibility, not its ultimate reliability. The concerns with reliability are ever present, but the assessment of reliability for the purposes of admission, and for the ultimate uses of the evidence are different assessments. As stated in *Khelawon*, at paragraph 3:

> [3] The distinction between threshold and ultimate reliability reflects the important difference between admission and reliance. Admissibility is determined by the trial judge based on the governing rules of evidence. Whether the evidence is relied upon to decide the issues in the case is a matter reserved for the ultimate trier of fact to decide in the context of the entirety of the evidence. The failure to respect this distinction

> would not only result in the undue prolongation of admissibility hearings, it would distort the fact-finding process. …

[47] The trial judge must be careful "that the question of ultimate reliability not be pre-determined on the admissibility *voir dire*" (*Khelawon*, at paragraph 93; see also paragraphs 90 and 92).

[48] The difference in the assessment of reliability for the purposes of admissibility as opposed to its ultimate reliability illustrates that the reliability of a statement exists on a continuum depending on the stage at which it is being assessed.

[49] At the stage of determining admissibility, what is clear is that there must be a circumstantial guarantee of trustworthiness in the statement; whether because the circumstances of the making of the statement support that the statement is reliable, or there are other means to assess the veracity of the statement, or a combination of both considerations, such that the hearsay concerns regarding reliability of the proposed evidence are overcome. If the evidence possesses these qualities, the evidence crosses the line of threshold reliability. The evidence is no less admissible because it does not soar over the bar as highly reliable.

ANALYSIS

The principles were correctly applied by the trial judge

[50] Given that there is flexibility to the assessment of reliability, the trial judge did not inappropriately "relax" the reliability assessment in these circumstances. The statements of the trial judge that where necessity criteria is "high, less reliability is required", or that the deficits in reliability were "offset by the high degree of necessity", cannot be taken in isolation from the whole of her decision. When viewed in the context of her decision as a whole, it is clear the impugned references mean no more than the trial judge acknowledging the related and flexible assessment of both criteria as discussed above.

[51] Firstly, at the outset of the decision, the trial judge reviewed the applicable principles. She stated that hearsay was presumptively inadmissible (paragraph 4) and recognized that the principled approach required an assessment of necessity and reliability of the statement (paragraphs 7-8). She considered the appropriate factors that one might consider in assessing the reliability of a statement (paragraph 11). The trial judge also acknowledged that the approach must include both "skepticism" and "caution" (paragraph 14) given

the concerns with such evidence. The trial judge also properly stated that there is a difference between the reliability of evidence to meet the threshold for the admissibility of evidence and its ultimate reliability (paragraph 12).

[52] At paragraph 25, the trial judge reiterated the test to be applied:

> [25] The issue for determination is whether the statement is sufficiently reliable that it meets the requirements for threshold reliability.

[53] Then, after reviewing the applicable principles, the trial judge undertook a detailed assessment of the statement and the surrounding circumstances that may have a bearing on its reliability (paragraphs 28-43). Because the main concern was the unavailability of the declarant for cross-examination, the trial judge considered whether there were sufficient indicia of reliability to overcome the absence of cross-examination.

[54] The trial judge observed that the statement was not under oath and that this would have been preferable to an unsworn statement. However, she also observed that the statement was recorded on video. This meant that the trial judge had the opportunity to see and hear the declarant. This was relevant to assessing the hearsay concerns regarding perception and memory of the declarant in making the statement. The trial judge considered the decision of her colleague Flynn P.C.J. in *R. v. Hannaford*, [2019] N.J. No. 401 (NLPC), in which, similar to the circumstances here, an unsworn but video recorded statement was ruled admissible. There was also no issue as to the capacity of the declarant to make the statement, or his mental state, as was present in *Khelawon*, for example. Nor, as in *Khelawon*, was there concern that the declarant had been unduly influenced by another witness.

[55] The trial judge further considered that the statement was given close in time to the events it was alleged to describe. This was also relevant to assessing concerns about the accuracy of the declarant's memory and perception of the events. She also found there was no evidence of fabrication. She also candidly acknowledged that while there were inconsistencies within the statement, the declarant's assertions were corroborated by physical evidence, such as DNA, the presence of weapons as alleged, as well as evidence of injuries as alleged. The declarant was also corroborated by other witnesses regarding not only the allegations themselves, but circumstances surrounding the allegations.

[56] It was only after this detailed assessment of whether or not the hearsay concerns could be overcome that the trial judge determined that the statement was reliable enough to admit into evidence. Even then, before so doing, the trial

judge reminded herself the level of reliability of which she had to be satisfied to admit the statement:

> [45] In conclusion, all of the considerations put forward by the Crown and by the Defence go into the mix to determine if, on a principled approach, **threshold reliability has been proven on a balance of probabilities** by the Crown.
>
> (Emphasis added.)

[57] And it is only then she made the first of the two impugned statements about the purported improper relaxation of the reliability threshold, at paragraph 46:

> [46] In all of the circumstances, I find that the statement made to the police is admissible despite being presumptively inadmissible as hearsay. The circumstances surrounding the taking of the statement support the indicia of necessity and reliability required by the principled approach and I find that contemporaneous cross-examination, while preferable as in any case, would not likely add much to the process of determining the truth of what Paul Worrall said in his statement. I am mindful of the final note put forward by Paciocco and Stuesser that in situations such as the instant, where necessity is high, less reliability is required.

And at paragraph 47:

> [47] I find that the statement of Paul Worrall does meet the threshold for inherent reliability. Any deficits are offset by the high degree of necessity. Whether what Paul Worrall said in his police statement was true will ultimately be left to be determined by me as finder of fact after all of the evidence has been seen and heard.

[58] The trial judge's explicit statements that the threshold to be met was the balance of probabilities and the detailed analysis conducted by her of the reliability of the statement, contradict that she unduly relaxed the reliability threshold or admitted the statement on the basis of necessity. When taken in context, her statement that "any deficits are offset by the high degree of necessity" does no more than reflect her application of a flexible approach to the assessment of reliability, and that the two criteria work "in tandem" as stated by the Supreme Court.

[59] In so doing, the trial judge was alive to the delicate balancing between the competing fair trial interests: the need to get at the "truth of the matter" and the need to admit only reliable evidence to ensure a fair trial for the accused. The sensitivity to this balancing is further supported by the fact that upon admitting the statement, the trial judge acknowledged that she was satisfied of "threshold" admissibility; not the statement's "ultimate" reliability. This is

reinforced in her judgment at the end of trial when she assessed the "ultimate" weight to be given to the evidence. The trial judge stated:

> … The consequence of my decision on the voir dire was to place Paul Worrall's statement into the mix of evidence on the trial proper for evaluation of the truth of its contents, along with all of the other evidence at the trial.
>
> (Trial Transcript, at 525)

[60] When assessing the statement for its ultimate reliability, it was then the trial judge considered whether any frailties in the evidence impacted the weight to be attributed in rendering her decision. The trial judge stated:

> … I admitted into evidence the statement that Paul Worrall gave to police based upon the principle of threshold reliability; however, I do have some concerns about his recount of the events, given that he appears very tired and hungry, and he was likely under the influence of some substance. There was also the clear animus evidence as part -- as evident as well as the exaggeration. There was also the evidence that he had conflated parts of the two incidents…
>
> (Trial Transcript, at 543)

[61] That the trial judge acknowledged frailties in the statement as far as its ultimate weight does not mean that she applied the wrong test in determining its admissibility. As stated by Watt J.A. in *R. v. Carroll*, 2014 ONCA 2, at paragraph 93:

> [93] A party who seeks to admit hearsay evidence need not eliminate all possible hearsay dangers to satisfy the reliability requirement. For this would be to impose a requirement of ultimate reliability as a prerequisite to admissibility. The party need only show that the trier of fact has the necessary tools available to it to evaluate the worth of the evidence. This burden can be discharged by demonstrating that the circumstances in which the statements were made reduce the hearsay dangers to a point at which the trier of fact could test the reliability of the statements without the personal appearance of the declarant. This is threshold reliability.

[62] The above shows that the trial judge was alive to the entire process of the principled approach to hearsay; from the presumptive inadmissibility of such evidence, how that inadmissibility must be overcome by establishing both necessity and reliability, including the extent to which she could "test" the evidence, to how to consider the reliability of the evidence in terms of its ultimate use. I see no error in admitting the statement.

[63] The trial judge having properly stated the principles, as well as applied them in the assessment of the statement, this Court sitting as an appeal court must show deference to her application of these principles and her decision to admit the evidence. As stated in *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720:

> [31] The admissibility of hearsay evidence, such as the prior inconsistent statement in this case, is a question of law. Of course, the factual findings that go into that determination are entitled to deference and are not challenged in this case. As well, a trial judge is well placed to assess the hearsay dangers in a particular case and the effectiveness of any safeguards to assist in overcoming them. Thus, absent an error in principle, the trial judge's determination of threshold reliability is entitled to deference: *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at para. 81.

CONCLUSION

[64] For the above reasons, I am of the view the trial judge committed no error in her application of the principled approach to the hearsay evidence in these circumstances. The trial judge engaged in the “skeptical” and “cautious” analysis that was required of her before admitting the statement; including that the two criterion of necessity and reliability must be assessed in tandem and with flexibility.

[65] I would dismiss the appeal from conviction.

F. J. Knickle J.A.