SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Melvin*, 2017 NSSC 268

Date: 2017/10/26
Docket: CRH 447189
Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

JAMES BERNARD MELVIN

LIBRARY HEADING

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	August 9, September 13 and 14, 2017, in Halifax, Nova Scotia
Written Decision:	October 26, 2017
Subject:	Admissibility of hearsay statements of deceased persons –*R. v. Bradshaw*, 2017 SCC 35
Summary:	Mr. Melvin is charged with the December 2, 2008 attempted murder of Terry Marriott Junior. Jason Hallett testified that he and Mr. Melvin were together that day, planned, and in the evening, attempted to carry out the murder. Near noon time he and Melvin travelled on foot from the area of Jessy's Pizza in Spryfield, Nova Scotia. They flagged down Michael Coombs, who drove them a short distance, where they next flagged down Trevor Hanna, who also drove them a short distance, before they continued their lengthy trek to Harrietsfield, where later that day, they armed themselves, and began the 13 km drive to where Terry Marriott Junior was present. Hanna and Coombs both gave verbal statements to police officers in

2011 that they had driven Hallett and Melvin as testified to by Jason Hallett. They died in 2013 and 2016. The Crown says their statements should be admissible for the jury to consider for the truth of their contents, as exceptions to the hearsay rule.

Issues: (1) Are either of the statements admissible as exceptions to the hearsay rule?

Result: Pursuant to the newly articulated principled exception to the hearsay rule in *R. v. Bradshaw*, 2017 SCC 35, both statements are admissible.

SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Melvin*, 2017 NSSC 268

Date: 2017/10/26
Docket: CRH 447189
Registry: Halifax

Between:

HER MAJESTY THE QUEEN

v.

JAMES BERNARD MELVIN

VOIR DIRE DECISION

Judge: The Honourable Justice Peter Rosinski

Heard: August 9 and September 13 and 14, 2017, in Halifax, Nova Scotia

Counsel: Rick Woodburn, Christine Driscoll, and Sean McCarroll, for the Provincial Crown

Patrick MacEwen, for the Accused

Introduction:

[1] The Crown says that the verbal statements of two deceased persons to police ought to be admissible for the truth of their contents so they can be considered by the jury. I agree and announced the result in court on September 27, 2017. These are my reasons.

Background

[2] Mr. Melvin is charged that on December 2, 2008, near Harrietsfield, Nova Scotia, he did attempt to murder Terry Marriott Junior, and did conspire with Jason Hallett, an unindicted co-conspirator, to commit the murder of Terry Marriott Junior. The jury trial herein started on September 11, 2017.

[3] The Crown's position is that on December 2, 2008, Mr. Melvin and Jason Hallett were at Jessy's Pizza shop on Herring Cove Road, Halifax. The two escaped out of that building to evade police in the area and approached Michael Coombs for a ride as he was leaving his place of work at the Spryfield hockey arena. He drove them to Tartan Drive, where they intercepted Trevor Hanna, and had him drive them a short distance to a wooded path in the area of Carson Street/Greystone Drive. From there they walked through the woods for a lengthy period of time until they ended up in Warren Clarke's residence. It is there that the conspiracy to kill Terry Marriott Junior began to unfold. Mssrs. Melvin, Hallett and Regan Henneberry left the residence armed with weapons and headed toward Derek MacPhee's home, where he and Terry Marriott Junior were present. Upon arrival they intended to kill Terry Marriott Junior, however, police cars were present. Their plan was interrupted after Derek MacPhee had received a warning, and phoned the police.

[4] The police were unaware of these details until Jason Hallett was caught revealing them in a judicially authorized wiretap on March 18, 2011, while speaking with his then ex-girlfriend, Vanessa Slaunwhite. Therein, he referenced Trevor Hanna and Michael Coombs.

[5] On June 14, 2011, Detective Constable John Mansvelt and Detective Constable Nicholas Pepler attended as earlier agreed with Trevor Hanna, at his home where they spoke to Trevor while his father was present in the vicinity. Trevor recounted verbally his contact with Mssrs. Melvin and Hallett on December 2, 2008. Constable Mansvelt took verbatim responses down in handwriting as Trevor spoke. Although he had an audio recorder, and they requested Trevor permit recording of his statements, he

refused to provide that, or a videotaped/written statement. Trevor Hanna did not testify to these events at any time, and died in May 2016.

[6] On September 28, 2011, Detective Constable John Mansvelt attended unannounced at Michael Coombs residence, 39 Sylvia Avenue, Spryfield, Nova Scotia. He called Michael on his phone from the parking lot, and he agreed to come out of his residence and speak with the Constable. Michael recounted verbally his contact with Messrs. Melvin and Hallett on December 2, 2008, indicating as he was leaving his work, they jumped into his car, and he drove them to Tartan Avenue and dropped them off. Constable Mansvelt recorded in handwriting Michael's verbal statements immediately after their short meeting. Michael refused to provide an audiotaped or written statement. Michael Coombs did not testify at any time to these events, and died March 2, 2013.

[7] The Crown requests that the court admit the verbal statements, recorded in writing by the officers, under the principled exception to the hearsay rule – *R. v. Khelawon*, 2006 SCC 57; *R. v. Bradshaw*, 2017 SCC 35.

[8] Jason Hallett is in the witness protection program. He provided a KGB videotaped statement on June 9, 2011, in relation to the allegations herein against Mr. Melvin. The statements of Mssrs. Hanna and Coombs would provide confirmation of Mr. Hallett's anticipated evidence regarding the events of December 2, 2008.

[9] I find these two statements admissible for the truth of their contents, as they both meet the necessity and reliability criteria, and their probative value is not overborne by the prejudicial effect of their admission on the fair trial rights of Mr. Melvin.

Finding of Facts

[10] Both Constables Mansvelt and (now Sgt.) Pepler testified. I have no hesitation in finding their testimony credible and reliable. I accept their evidence.

[11] In relation to the meeting with Trevor Hanna. I note the meeting was pre-arranged. Constable Pepler had attempted to contact him June 13, 2011, and left his business card for Trevor. Trevor returned his call that evening and they agreed to meet the next day at Trevor's father's residence, where he was living. He called Trevor around 11:00 a.m. on June 14, 2011, and told him over the phone it was regarding an incident involving Mr. Melvin, but nothing more detailed. Shortly thereafter the constables arrived at Trevor's residence, 1880 Old Sambro Road, Halifax, Nova Scotia.

[12] The evidence of both constables confirmed that:

- They met in the garage attached to the house and that Trevor's father, Ed Hanna, was present but not involved in the conversation;
- Constable Mansvelt had worked as a patrol officer in the Spryfield area earlier in his career and was familiar with Mr. Hanna as a result, though they both identified themselves to him as police officers, as they were dressed in plain clothes;
- Constable Pepler was talking to Trevor, and Constable Mansvelt was taking notes;
- Trevor was calm and sober;
- Constable Pepler told Trevor they were there about an incident a couple of years ago involving Mr. Melvin, and did he recall giving Mr. Melvin a drive? The constables said nothing more. Specifically, they made no reference to Jason Hallett. Trevor nodded and said "yup" and "just started talking" – "he locked onto" the day he drove Mr. Melvin and Hallett. He spontaneously recounted how Mssrs. Melvin and Hallett had jumped in front of his black Kia Sorrento while he was in the area of his girlfriend's residence at 33 Tartan Avenue, and then jumped into his truck. He made no mention of Michael Coombs. He believed that they were being pursued by the police and declined to take them very far, so Mr. Melvin told him to take them to the top of Carson Street (now Greystone Drive) which he did. He let them out and saw them enter the path near the school leading into the woods.
- Constable Mansvelt recorded as best he could verbatim what Trevor said; Trevor had good recall of what he told the officers;
- They advised Trevor the matter may go to court and he may have to be a witness and he said "he would do what he had to do" – he declined to give an audiotaped videotaped or formal written police statement – he indicated that he doesn't want to get involved;
- Mr. Hanna could see that Constable Mansvelt was making notes of what he was saying, but he was not asked to review the officer's notes and make any corrections, nor was he given an oath or affirmation before he made his statements, nor was he warned about the consequences of providing false information to the police;
- Constable Mansvelt stated that he did not have an independent recollection of each and every word spoken during their meeting but he "tried to capture

as much is possible of what Trevor Hanna said", and "if Constable Pepler said something significant I would write it down"; Constable Pepler left his business card with Trevor.

[13] Constable Mansvelt testified that on September 28, 2011, he met Michael Coombs in the parking lot near his residence. His evidence confirmed that:

- He had cold-called Mr. Coombs on his phone, identified himself, and told him he was standing in the parking lot outside his residence and would like to speak to him. Michael came outside and spoke to him for a couple of minutes around 1:00 p.m.; the Constable knew him from his patrol days where he dealt with him "a couple of times";
- He asked Michael if he remembered picking up Mr. Melvin on December 2, 2008 – he made no mention of Jason Hallett. Michael spontaneously stated "yeah – I was at work leaving to pick my kid up, they jumped into my car. I drove them to Tartan Avenue and dropped them off" – the Constable then asked "who" – and Michael responded "Jimmy Melvin and Jason Hallett", and added that Trevor Hanna "blamed me for dumping them off on him – but I didn't";
- Since he was speaking to Michael he could not simultaneously record in writing what he said, but he did so immediately thereafter;
- No oath or affirmation was administered, no warning was given regarding providing false information to the police, and Michael had no opportunity to review for accuracy the notes in which the Constable recorded Michael's statements;
- Though he could not recall a couple of minor details, he had good recall overall, and he was sober and slightly "stand-offish" initially;
- He declined to give an audiotaped, videotaped or formal written police statement – he was advised that he could be subpoenaed, and that Michael understood this, but did not want his family to become involved.

[14] In relation to both Mssrs. Hanna and Coombs, the officers conceded that it is possible that either of them may have spoken to each other (Michael did indicate that "Hanna blamed me for dropping them off on him…"), or spoken to other persons with knowledge of the events they described, or that they spoke to someone who had been given knowledge about December 2, 2008, by police interviewing them – though I note that Constable Mansvelt's practice is not to relay any detailed information to

persons he is interviewing, which I infer is for the purpose of not tainting any information or statement they might provide.

[15] Constable Pepler, as a police officer had some earlier minor dealings with Trevor, and during this investigation became aware from social media monitoring that several years later (sometime between June 2013 – June 2015) it appeared that Trevor had a romantic relationship with Terry Marriott Junior's widow, Nadine Marriott.

[16] He further described the December 2, 2008, scenarios described by Michael Coombs and Trevor Hanna as consistent temporal links explaining how Mr. Melvin was transported from Jessy's Pizza to the top of Greystone Drive, where Mssrs. Hallett and Melvin were near a path by the Rockingstone School, which Mr. Hallett describes took them on a four hour trek on foot crossing over into the Harrietsfield area, and into Crystal Pizza, where Vanessa Slaunwhite picked them up and took them to Warren Clarke's house.

[17] No further statements, or relevant testimony were forthcoming from either Mr. Hanna or Mr. Coombs. They died, in May 2016, and March 2013, respectively.

[18] The criminal records for Mr. Hanna and Mr. Coombs were placed before the court by consent. If these witnesses testified at trial they would be subject to cross-examination seeking to undermine their credibility, based on their criminal records. This is arguably a factor that could affect an examination of whether they were truthful at the time they made their verbal statements to police or whether they might have a motive to be untruthful.

[19] Jason Hallett testified at trial. Counsel agreed to have his relevant trial testimony applied to the *voir dire*. I accept his evidence relied on by me, to be more likely than not, truthful and reliable.

[20] In summary, his evidence was that on December 2, 2008, in the morning he was at his sister's house, received a phone call from Jimmy Melvin asking him to meet Jimmy at Jessy's Pizza in Spryfield. He claimed to have a specific recollection of that and took a five minute cab drive to get to Jessy's Pizza.

[21] He testified that they did jump out of the second-story window of Jessy's Pizza and went to the old BC Silver School via a path through a fenced area at the back of the Jessy's Pizza lot, where they encountered Michael Coombs coming out of the Spryfield Lion's rink. He says Coombs did not want to drive them, but he did – "he had no choice". He drove them to the Tartan Avenue area – "my old subdivision". After getting out of that vehicle he says they saw "another buddy of ours, Trevor

Hanna." They got into his car and he took them up to the Greystone area were they got out and took a path near the Rockingstone school and continued on for four hours walking through the woods in very difficult terrain towards Harrietsfield. They ended up at Crystal Pizza, where Vanessa Slaunwhite picked them up. Then he says they went to Warren Clarke's residence where he and Mr. Melvin received firearms, which they then took with them in the evening, in a vehicle driven by Reagan Henneberry. They drove over to Derek MacPhee's house where they believed Terry Marriott Junior was present. Their intention was to kill him. When they were 200 yards away they noticed numerous marked police vehicles with their lights on in front of the house, and turned around and drove to a nearby house of a friend, Natalie.

[22] Regarding the date December 2, 2008, it is noteworthy that Hallett testified he was shot November 18, 2008, while he was at the IWK hospital parking lot by Aaron Marriott; and that on December 10, 2008, he did give a statement against Mr. Marriott for that offence. He testified that Mr. Marriott had twice before, in the six months preceding, attempted to murder him with a firearm. Jason Hallett also testified that he gave a police statement implicating Mr. Melvin herein on June 9, 2011, after he was heard on an intercepted conversation speaking to Vanessa Slaunwhite about December 2, 2008.

The Position of the Parties

[23] The necessity of admitting these hearsay statements is conceded. The reliability thereof is disputed.

Crown

[24] The Crown concedes that the statements do not meet the so-called *procedural* reliability requirements (e.g. cross-examination, the presence of an oath or affirmation, warning about the consequences of lying to the police, and the audio or videotaping of a statement) as set out in *R. v. Bradshaw*, 2017 SCC 35. However, counsel submits that both statements meet the threshold *substantive* (inherent) reliability requirements because:

1. There was no evidence of motive for either witness to lie or fabricate their statements;
2. The statements were spontaneous with little prompting from the police;
3. The statements were made to police officers who had a duty to record the statements accurately;

4. The statements were made voluntarily, and no threats, promises or inducements were made by police;
5. There is no evidence of collusion with other witnesses;
6. There is extrinsic evidence that supports the reliability of the police statements;
7. Although the incidents took place approximately 2½ years prior to their statements, the witnesses seemed to have a clear memory of the events in 2011;
8. The content of their statements are extremely innocuous. They merely identified two individuals that they gave a drive in the past;
9. The statements do not implicate the accused or anyone in criminal activity;
10. Statements are only a small link in a long chain of evidence;
11. While neither wished to give a written or audio/video statement, each indicated they did not want to become involved (Trevor – because Jimmy Melvin is "who he is"; Michael – he did not want his family involved); and
12. Statements are corroborated by another witness.

Defence

[25] In its written briefs of July 20 and September 19, 2017, the defence argues that neither statement (the material aspects of which are outlined in the written submissions of the Crown) is admissible on the claimed basis that they are substantively reliable.

[26] Counsel notes:

(a) The hearsay dangers raised are that neither Mr. Coombs nor Mr. Hanna is available for cross-examination. Cross-examination may have revealed that the police influenced the answers provided, or that Hanna and Coombs were confused or uncertain about the date on which they drove Mssrs Hallett and Melvin. There is no accurate verbatim recording of what was said by police to each of these individuals during their questioning, nor the precise words used by Mssrs. Hanna and Coombs in response, or spontaneously spoken. Their statements in relation to the events of December 2, 2008, were given in June 2011 and September

2011 – this fact alone suggests their memory thereof may have been degraded to a point of insufficient reliability.

(b) Possible alternative or even speculative explanations for their statements do exist. It does appear that they had at least once discussed the matter, if one accepts Mr. Coombs statements to the officers that "Hanna blamed me for dropping them off on him – but I didn't". Moreover, it's possible they may have discussed the matter more often before June 2011. They both must have had some familiarity with Mssrs. Hallett and Melvin since they were able to identify them by name. It is possible that they had further discussed the matter with Mr. Hallett or Melvin. Both Hanna and Coombs themselves had previous involvements with the police, and in the opinion of the officers were not inclined to be cooperative with law enforcement – which was borne out by their comments that they would not provide the police with formal statements about that matter. At a trial this could affect their credibility.

(c) The dangers of allowing the unsworn, unrecorded utterances into evidence for their truth without the benefit of cross-examination, cannot be overcome by the fact that Mr. Hallett seems to confirm them and they confirm one another.

The Principled Exception to the Hearsay Rule after *R. v. Bradshaw*, 2017 SCC 35

[27] Recently the Supreme Court of Canada modified the principles regarding corroboration, in assessing the threshold reliability of a hearsay statement, while determining whether the statement is admissible as reasonably necessary and reliable – *R. v. Bradshaw*, 2017 SCC 35.

[28] In order to appreciate that change, it is instructive to consider the departure point – its decision in *R. v. Khelawon,* 2006 SCC 57, where the court overruled its earlier decision in *R. v. Starr*, 2000 SCC 40. The principles articulated in *Khelawon*, had steadfastly remained until *Bradshaw*. While the Supreme Court did consider the application of those principles to various factual circumstances in the interim, the principles themselves remained constant. Interestingly, in *R. v. Blackman*, 2008 SCC 37, Justice Charron stated:

> *Corroboration*
>
> 53 Before concluding, I would like to say a few words in response to counsel's submissions at the hearing on the question of corroboration. Both counsel argued that the analysis of threshold reliability may well have been different at trial with the

benefit of *Khelawon*'s clarification of the proper use to be made of corroborating or conflicting evidence on the admissibility *voir dire*.

54 It is important to emphasize that ***Khelawon*** did not broaden the scope of the admissibility inquiry; it merely refocused it. This Court **held that the relevant factors to be considered on the admissibility inquiry should no longer be categorized as going either to threshold or ultimate reliability. Rather, the Court stated that a functional approach should be adopted.** I repeat the words here (at para. 93):

> • As I trust it has become apparent from the preceding discussion, whether certain factors will go only to ultimate reliability will depend on the context. Hence, some of the comments at paras. 215 and 217 in *Starr* should no longer be followed. Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach as discussed above and **focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers.**

55 Hence, the Court clarified that in appropriate circumstances, **a corroborative item of evidence can be considered in assessing the threshold reliability of a statement.** Consider, on the one hand, the hearsay statement of a complainant who asserts that she was repeatedly stabbed but has no injury to show in support. The lack of corroborative evidence would seriously undermine the trustworthiness of the statement and, indeed, would likely be fatal to its admissibility. On the other hand, **an item of corroborative evidence can also substantiate the trustworthiness of a statement**. Recall the semen stain in *R. v. Khan*, [1990] 2 S.C.R. 531. **Where an item of evidence goes to the trustworthiness of the statement, *Khelawon* tells us that it should no longer be excluded simply on the basis that it is corroborative in nature.**

56 **However, the Court in *Khelawon* also emphasized the important differences between threshold and ultimate reliability and the principle bears repeating. Trial judges must be aware of the limited role they play in determining admissibility. It is essential to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility *voir dire***: see *Khelawon*, at para. 93.

57 For example, Crown counsel in this case submitted that it would be a "shocking coincidence" for Mr. Ellison to have falsely implicated Mr. Blackman's brother in the strip club shooting and then for Mr. Keene to identify Mr. Blackman as the man who killed the deceased. **The Crown offers as further "corroboration" the fact that the same gun was used in both the February and April incidents**. These items of evidence may indeed be supportive of the Crown's theory that Mr. Blackman is the person who killed Mr. Ellison and that he did so in retaliation for the stabbing. **However, the items of evidence can only take on this corroborative character when they are considered in the context of the evidence as a whole. This kind of inquiry goes far beyond the trial judge's role in determining whether Mr. Ellison's statements to his mother that the shooter outside the strip club was the**

> **brother of the person he stabbed are sufficiently reliable to warrant admission.** The admissibility *voir dire* must remain focused on the hearsay evidence in question. It is not intended, and cannot be allowed by trial judges, to become a full trial on the merits.
>
> [My emphasis added]

[29] In *R. v. Youvarajah*, 2013 SCC 41, the court was considering a prior inconsistent statement of a non-accused witness (albeit a co-accused who had already plead guilty based on an agreed statement of facts wherein he agreed that Youvarajah was a party to murder with him), as opposed to a mere statement of an unavailable (deceased) non-accused witness, such as in *Khelawon,* and the case at bar. That distinction was recognized early on by Lamer CJ in *R. v. KGB*, [1993] 1 SCR 740, at page 742, regarding recanting witnesses:

> **The focus of the inquiry in the case of prior inconsistent statements is on the comparative reliability of the prior statement and the testimony offered at trial. Additional indicia and guarantees of reliability to those outlined in *Khan* and *Smith* must thus be secured in order to bring the prior statement to a comparable standard of reliability** before such statements are admitted as substantive evidence.
>
> [my emphasis added]

[30] Both *Khan, [1990] 2 SCR 531*, and *Smith, [1992] 2 SCR 915,* involved witnesses who were unavailable: by virtue of young age, and death, respectively. In *Khelawon*, the witnesses were unavailable by virtue of diminished mental condition or death. As Justice Charron pointed out in *Khelawon, (*paras. 61 and 105), the central concern in such cases regarding hearsay statements is the inability to test the reliability of the statement during the court process.

[31] There is a real danger that wrongful convictions can arise when unreliable evidence is considered by the trier of fact. Implicit in the reference to "the reliability of the statement" is a concern regarding the honesty and reliability of the declarant. At trial, weaknesses in a witness's testimony, whether they be a matter of honesty or reliability, "can be best brought to light under the test of cross-examination." (para. 48).

[32] Although an accused's right to full answer and defence, pursuant to s. 7 of the Charter, only extends as far as the right to have a fundamentally fair trial, hearsay is presumptively inadmissible because of the dangers of potentially admitting such evidence.

[33] She concludes (para. 49 and 61-2):

> The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. 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. As we shall see, the reliability requirement will generally be met on the basis of two different grounds, neither of which excludes consideration of the other**. **In some cases, because of the circumstances in which it came about, the contents of the hearsay statement may be so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. In other cases, the evidence may not be so cogent but the circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination**. In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect.
>
> ...
>
> **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. As some courts and commentators of expressly noted, the reliability requirement is usually met in two different ways**…
>
> One way is to show that **there is no real concern about whether the statement is true or not because of the circumstances in which it came about**. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:
>
> 'There are many situations in which you can be easily seen that such a required test [i.e. cross examination] would add little as security, because its purposes had been already substantially accomplished. If the statement had been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), and a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured.'
>
> Another way of fulfilling the reliability requirement is to show that **no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested**.
>
> [My emphasis added]

[34] Regarding the use that may be made of corroborating or conflicting evidence in assessing threshold reliability of hearsay statements, in *Khelawon*, Justice Charron overruled the reasoning in *Starr* and stated:

> 97 *Idaho v. Wright*, 497 U.S. 805 (1990), is more on point. In that case, five of the nine justices of the United States Supreme Court were not persuaded that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness'" (p. 822). In the majority's view, the use of corroborating evidence for that purpose "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility" (p. 823). By way of example, the majority observed that a statement made under duress may happen to be true, but evidence tending to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at trial. The majority also raised the concern, arising mostly in child sexual abuse cases, that a jury may rely on the partial corroboration provided by medical evidence to mistakenly infer the trustworthiness of the entire allegation.
>
> 98 In his dissenting opinion, Kennedy J., with whom the remaining three justices concurred, strongly disagreed with the position of the majority on the potential use of supporting or conflicting evidence. In my view, his reasons echo much of the criticism that has been voiced about this Court's position in *Starr*. He said the following:
>
> > I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child's statements are reliable. It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence. In the context of child abuse, for example, if part of the child's hearsay statement is that the assailant tied her wrists or had a scar on his lower abdomen, and there is physical evidence or testimony to corroborate the child's statement, evidence which the child could not have fabricated, we are more likely to believe that what the child says is true. Conversely, one can imagine a situation in which a child makes a statement which is spontaneous or is otherwise made under circumstances indicating that it is reliable, but which also contains undisputed factual inaccuracies so great that the credibility of the child's statements is substantially undermined. Under the Court's analysis, the statement would satisfy the requirements of the Confrontation Clause despite substantial doubt about its reliability. [pp. 828-29]
>
> 99 Kennedy J. also strongly disagreed with the majority's view that only circumstances surrounding the making of the statement should be considered:
>
> > The [majority] does not offer any justification for barring the consideration of corroborating evidence, other than the suggestion that corroborating

> evidence does not bolster the "inherent trustworthiness" of the statements. But for purposes of determining the reliability of the statements, I can discern no difference between the factors that the Court believes indicate "inherent trustworthiness" and those, like corroborating evidence, that apparently do not. Even the factors endorsed by the Court will involve consideration of the very evidence the Court purports to exclude from the reliability analysis. The Court notes that one test of reliability is whether the child "use[d] ... terminology unexpected of a child of similar age." But making this determination requires consideration of the child's vocabulary skills and past opportunity, or lack thereof, to learn the terminology at issue. And, when all of the extrinsic circumstances of a case are considered, it may be shown that use of a particular word or vocabulary in fact supports the inference of prolonged contact with the defendant, who was known to use the vocabulary in question. As a further example, the Court notes that motive to fabricate is an index of reliability. But if the suspect charges that a third person concocted a false case against him and coached the child, surely it is relevant to show that the third person had no contact with the child or no opportunity to suggest false testimony. Given the contradictions inherent in the Court's test when measured against its own examples, I expect its holding will soon prove to be as unworkable as it is illogical.
>
> **The short of the matter is that both the circumstances existing at the time the child makes the statements and the existence of corroborating evidence indicate, to a greater or lesser degree, whether the statements are reliable.** If the Court means to suggest that the circumstances surrounding the making of a statement are the best indicators of reliability, I doubt this is so in every instance. And, if it were true in a particular case, that does not warrant ignoring other indicators of reliability such as corroborating evidence, absent some other reason for excluding it. If anything, I should think that **corroborating evidence in the form of testimony or physical evidence, apart from the narrow circumstances in which the statement was made, would be a preferred means of determining a statement's reliability for purposes of the Confrontation Clause**, for the simple reason that, unlike other indicators of trustworthiness, corroborating evidence can be addressed by the defendant and assessed by the trial court in an objective and critical way. [References omitted; pp. 833-34.]

100 In my view, the opinion of Kennedy J. better reflects the Canadian experience on this question. **It has proven difficult and at times counterintuitive to limit the inquiry to the circumstances surrounding the making of the statement.** This Court itself has not always followed this restrictive approach. Further, I do not find the majority's concern over the "bootstrapping" nature of corroborating evidence convincing. On this point, I agree with Professor Paciocco who commented on the reasoning of the majority in *Idaho v. Wright* as follows (at p. 36):

> The final rationale offered is that it would involve "bootstrapping" to admit evidence simply because it is shown by other evidence to be reliable. In fact, the "bootstrapping" label is usually reserved to circular arguments in which a

> questionable piece of evidence "picks itself up by its own bootstraps" to fit within an exception. For example, a party claims it can rely on a hearsay statement because the statement was made under such pressure or involvement that the prospect of concoction can fairly be disregarded, but then relies on the contents of the hearsay statement to prove the existence of that pressure or involvement: *Ratten v. The Queen*, [1972] A.C. 378. Or, a party claims it can rely on the truth of the contents of a statement because it was a statement made by an opposing party litigant, but then relies on the contents of the statement to prove it was made by an opposing party litigant: see *R. v. Evans*, [1991] 1 S.C.R. 869. Looking to *other* evidence to confirm the reliability of evidence, the thing *Idaho v. Wright* purports to prevent, is the very antithesis of "bootstrapping".
>
> [my emphasis added]

[35] The circumstances of *Bradshaw* have some parallels with *Youvarajah*. In *Bradshaw*, two people were shot to death. Mr. T initially admitted he shot both victims, then indicated that he had shot only one of the victims and that Mr. Bradshaw had shot the other. Mr. T was arrested and later performed a re-enactment of the murders implicating Mr. Bradshaw. Mr. T pled guilty to second-degree murder, but refused to give sworn testimony at Mr. Bradshaw's trial. The Crown successfully sought to have his video re-enactment presented as evidence to the jury using the principled exception to the hearsay rule. He was convicted of two counts of first-degree murder. Both the majority of the Court of Appeal and the Supreme Court of Canada majority per Karakatsanis J, agreed a new trial was required. A vigorous dissent was registered by Moldaver and Côte JJ.

[36] Justice Karakatsanis put the issue as follows: "when can a trial judge rely on corroborative evidence to conclude that the threshold reliability of the hearsay statement is established?" She answered (para. 4):

> In my view, **corroborative evidence may be used to assess threshold reliability if it overcomes the specific hearsay dangers presented by the statement**. These dangers may be overcome on the basis of corroborative evidence **if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement**. The material aspects are those relied on by the moving party for the truth of their contents.
>
> [my emphasis added]

[37] She went on to say (paras. 26-7):

> To determine whether he 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,* at para 49). The 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*; R v Hawkins,* [1996] 3 SCR 1043, at para 75). The dangers relate to the difficulties of assessing the declarant's perception, memory, narration, or sincerity and should be defined with precision to permit a realistic evaluation of whether they had been overcome.
>
> **The hearsay dangers can be overcome and threshold reliability can be established by showing that** (1) there are adequate substitutes for testing truth and accuracy (**procedural reliability**) **or** (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (**substantive reliability**) (*Khelawon,* at paras 61-2; *Youvarajah,* at para 30)
>
> …
>
> (at para. 30)
>
> A hearsay statement is also admissible if ***substantive* reliability** is established, that is, if the statement is inherently trustworthy (*Youvarajah*, at para. 30; *R. v. Smith*, [1992] 2 SCR 915 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… at para. 55).
>
> …
>
> (at para. 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).
>
> …
>
> (at para. 57)
>
> In sum, **to determine whether corroborative evidence is of assistance in the substantive reliability inquiry, a trial judge should**:
>
> 1. identify the material aspects of the hearsay statement that are tendered for their truth.
> 2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case.

> 3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement.
> 4. determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.
>
> [my emphasis added]

[38] In the case at bar it is suggested that the hearsay statements of the deceaseds, Mssrs. Hanna and Coombs, complement each other since Mr. Coombs carrying Mssrs. Melvin and Hallett in his car ends with them getting out of his vehicle and immediately encountering Mr. Hanna. Relevant to that factual overlap are the following comments of the court in *Bradshaw* (at para. 54):

> In *U. (FJ)*, a hearsay statement was admissible in part because it was corroborated by a strikingly similar statement. The strikingly similar statement was capable of supporting the threshold reliability of the hearsay statement because the court was able to rule out the possibilities that the similarity was purely coincidental that the second declarant had heard the first statement and modelled her statement off of it, and that either statement was the result of collusion or outside influence. Importantly, **Lamer CJ** was concerned with rejecting, not the hypothesis that the second statement was *in fact* based on the first, but the possibility that it *could have been* based on the first. He **concluded that the only likely explanation for the similarity between the two statements was the truthfulness of the hearsay declarant** (*U.(FJ*) at paras. 40 and 53).

[39] This language mirrors the newly restricted use of corroborative evidence in assessing threshold reliability (para. 57, *Bradshaw*):

> determine whether, given the circumstances of the case, the **corroborative evidence** led at the *voir dire* **rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or accuracy of, the material aspects of the statement**.

[40] I would respectfully suggest that this lengthy review of the Supreme Court's jurisprudence confirms that the principles regarding the admissibility of hearsay articulated in *Bradshaw*, are consistent with those in *Khelawon* (that nominally at least, the two approaches to establishing threshold reliability, procedural and substantive reliability, "are not mutually exclusive and factors relevant to one can complement the other"), *except* for the above-noted newly restricted use of corroborative evidence.

[41] Unfortunately, the court does not expressly indicate *why* a more restricted use of corroborative evidence was generally necessary.

[42] An insight for courts and counsels in that respect arises from the court's further comments at para. 32:

> That said, the threshold reliability standard always remains high – the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents… **For example, in *U (FJ)***, where the court drew on elements of substantive and procedural reliability to justify the admission of a hearsay statement, **both cross-examination of the recanting witness and corroborative evidence were required to meet threshold reliability, though neither on its own would have sufficed** (see also *Blackman*, at paras 37 – 52). **I know of no other example from this court's jurisprudence of substantive and procedural reliability complementing each other to justify the admission of a hearsay statement. 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.**
>
> [My emphasis added]

[43] Notably, regarding corroboration of the *substantive* reliability criterion, Justice Karakatsanis went on to state at para. 51:

> **The jurisprudence of this court provides two examples of corroborative evidence that could be relied on to establish threshold reliability.**
>
> [ie: *R. v. Khan*, [1990] 2 SCR 531, where a very young child's hearsay statement about a sexual assault was ruled admissible because it was corroborated by a semen stain on the child's clothes; and *R v U (FJ)*, [1995] 3 SCR 764, where a sexual assault complainant's hearsay statement was admissible in part because it was corroborated by a strikingly similar statement where the court was able to rule out the possibilities that the similarity was purely coincidental, that the second declarant had heard the first statement and modelled her statement off of it, and that either statement was a result of collusion or outside influence. Thus, Lamer CJ concluded that the *only likely explanation* for the similarity between the two statements was the truthfulness of the hearsay declarant (paras 40 and 53)].

Why both statements are admissible

[44] The facts of the case at bar are certainly much different than they were in *Bradshaw* [2012 BCSC 2025, decided before *R. v. Hart*, 2014 SCC 52, which ruled "Mr. Big" confessions presumptively inadmissible]. Mr. T, the witness who implicated Mr. Bradshaw and had himself pled guilty to the same two murders, initially divulged his involvement as a result of a "Mr. Big" operation and had

provided inconsistent statements throughout. He was an extremely unsavoury and inherently untrustworthy witness, who then refused to testify against Mr. Bradshaw, necessitating reliance on his video re-enactments of the two murders at Mr. Bradshaw's trial. The fact that the Crown tendered re-enactments, an arguably more powerful form of evidence than an audiotaped or written statement, may also have heightened the court's unease in finding them admissible. Ultimately, *Bradshaw* involved a fact pattern where contemporaneous cross-examination was possible, and arguably was the only means of providing the jury with the necessary tools to assess the declarant's truthfulness or accuracy.

1. Identifying the material aspects of the hearsay statement that are tendered for their truth

[45] The Crown wishes to have the hearsay statements of the deceased declarants ruled admissible, to the extent that the ultimate triers may conclude there from: that on December 2, 2008, Michael Coombs was approached by Jason Hallett and Jimmy Melvin outside the Spryfield Lions Rink while leaving work, and he took them into his vehicle and drove them to the area of Tartan Avenue; where in short order, they found themselves in Trevor Hanna's vehicle, and he drove them to the area of Greystone Drive, where there is a path near the Rockingstone school which leads into the woods lying between Spryfield and Harrietsfield.

2./3. Identify the specific hearsay dangers raised by those aspects of the statements in the particular circumstances of the case, and consider alternative, even speculative alternative explanations for the making of those statements.

[46] The Crown here does not rely upon an argument that there is procedural reliability by itself sufficient to meet the threshold reliability test. It relies upon what it says is sufficient substantive reliability. Importantly, *Bradshaw* does not insist on corroborative evidence as a pre-condition to the admissibility of a statement as substantively reliable.

[47] Justice Karakatsanis' comments at para. 30 – 31 are particularly significant in this respect:

> 30 A hearsay statement is also admissible if *substantive* reliability is established, that is, if the statement is inherently trustworthy (*Youvarajah*, at para. 30; *R. v. Smith*, [1992] 2 S.C.R. 915, 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, at para. 55).
>
> 31 While the standard for substantive reliability is high, guarantee "as the word is used in the phrase 'circumstantial guarantee of trustworthiness', does not require that reliability be established with absolute certainty" (*Smith*, at p. 930). Rather, **the trial judge must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process"** (*Khelawon*, at para. 49). **The level of certainty required has been articulated in different ways throughout this Court's jurisprudence.** 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 sceptical 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).
>
> [my emphasis added]

[48] I bear in mind the concerns reiterated by Justice Karakatsanis in *Bradshaw* at para. 20:

> Allowing a trier of fact to consider hearsay can therefore compromise trial fairness and the trial's truth-seeking process. The hearsay statement may be inaccurately recorded and the trier of fact cannot easily investigate the declarant's perception, memory, narration or sincerity (*Khelawon* ,at para 2). As Justice Fish explains in *R v Baldree*, 2013 SCC 35, [2013] 2 SCR 520:
>
> > First, the declarant may have *misperceived* the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been *wrongly remembered*; third, the declarant may have narrated the relevant facts in an in an *unintentionally misleading manner*; and finally, the declarant may have knowingly made a *false assertion*. The opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross examination [emphasis in original; para. 32]

[49] I conclude that, were the declarants still living, cross-examination of them would be unlikely to materially change the statements proffered by the Crown in this *voir dire*. Their statements are sufficiently reliable – the circumstances substantially negate the possibility that the declarants were untruthful or mistaken. I say this because:

1. I have accepted the testimony of the officer(s) that their encounter with each of Hanna and Coombs was low-key, and they asked open-ended questions, initially not even mentioning Mr. Hallett's name – both declarants mentioned Mr. Hallett's name without prompting. I note that the officers had a duty to accurately record the statements, and did so to the best of their ability here – no material facts were not recorded they testified;
2. The content of the declarant's statements are about simple matters over a very short time period , and by themselves not significant – they are not inculpatory, nor even suggestive of any criminality – thus the concerns about the motivations of the declarants to be untruthful or misleading are insignificant;
3. Both declarants were sober, calm, and had good recollection of the core facts being presented as admissible hearsay;
4. There is no evidence that there was any significant prior or later connection or contacts between the declarants and Mr. Hallett or Mr. Melvin – the evidence suggests each knew who the other was – moreover, in December 2008 Mr. Melvin was a notoriously well-known individual, not just in Spryfield, but in the Halifax Regional Municipality, and Nova Scotia – being requested to drive him in your vehicle would be a memorable event to anyone who recognized him;
5. Both declarants had good immediate recall of their contact with Mr. Hallett and Melvin that day;
6. While both declarants have criminal records, and would be subject to cross-examination thereon, the statements they made are not of a nature that their truthfulness would be materially compromised by their having limited criminal records; and
7. While it appears they may have discussed the matter at least once among themselves, and it is possible that they may have discussed it more often, or with other persons, because their statements are so simple and innocuous, the possibility for confusion by them, collusion by them, or infusion of inaccurate or untruthful information is insignificant.

4. The corroborative evidence rules out alternative explanations for making the statements

Jason Hallett testified that on December 2, 2008, he and Jimmy Melvin did get into the vehicles of Michael Coombs and Trevor Hanna in

> succession, and travel on the routes exactly as suggested by Coombs and Hanna. Although, corroborative evidence itself must be truthworthy to be relevant to the substantive reliability inquiry (*Bradshaw*, para. 50), I note that the hearsay statements of Hanna and Coombs present "minimal dangers, and [their] *exclusion* rather than [their] admission, would impede accurate fact finding" [*Bradshaw*, para. 95]. I find that the need for corroboration here is significantly lessened, particularly in light of preceding factors. Moreover, each of Hanna's and Coombs' statements are not inconsistent with other statements by that witness, (in which case they therefore would have required a comparative reliability analysis), therefore, are not as inherently suspect as the former. The statements of Hanna and Coombs mutually cross-corroborate each other such that the likelihood of collusion, untruthfulness or inaccuracy are lessened to the point that I find it is more likely than not that the possibility that they lied or were inaccurate is substantially negated. The only remaining likely explanation for the statements by Trevor Hanna and Michael Coombs is that they were truthful about, and accurate in, reporting to the police officers the material aspects of their statements given in 2011 regarding the events of December 2, 2008.

Conclusion

[50] I am satisfied that the verbal statements of both deceased declarants, Trevor Hanna and Michael Coombs, provided to the police officers on June 14 and September 28, 2011 respectively, are admissible at trial for the truth of their contents. An assessment of their probative value and potential, if admitted, for prejudicing Mr. Melvin's right to a fundamentally fair trial does not change my conclusion.

Rosinski, J.