NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Johnson*, 2004 NSCA 91

Date: 20040714
Docket: CAC 173767
Registry: Halifax

Between:

Wilfred Dwayne Johnson

Appellant

v.

Her Majesty the Queen

Respondent

Judge(s):	Bateman, Oland and Fichaud, JJ.A.
Appeal Heard:	February 2, 2004, in Halifax, Nova Scotia
Held:	Appeal against both conviction and sentence is dismissed per reasons for judgment of Oland, J.A.; Bateman and Fichaud, JJ.A. concurring.
Counsel:	Terrance G. Sheppard, for the Appellant William Delaney, for the Respondent

Reasons for judgment:

Introduction

[1] A jury found the appellant guilty of the second degree murder of Jennifer Long and her two month old daughter, Khieza Long. He received the automatic sentence of life imprisonment. The trial judge, Justice Robert W. Wright of the Supreme Court of Nova Scotia, imposed a parole ineligibility period of 21 years.

[2] The appellant appeals his convictions, arguing that the trial judge erred in admitting certain statements of Jennifer Long and in allowing a conviction to be sustained in regard to Khieza Long. He also appeals the parole ineligibility period, submitting that it is excessively harsh.

[3] For the reasons which follow, I would dismiss the appeal from conviction and the appeal against the length of the parole ineligibility period.

Background

[4] The appellant and Jennifer Long began their relationship in the winter of 1998. The couple argued frequently. Khieza was born on May 20, 1999. On occasion Ms. Long would say to the appellant that Khieza was not his baby and he appeared upset by these discussions. Sometimes after the two had argued, the appellant would leave but he would come back. On occasion he faced criminal charges arising out of their arguments and as a result served some time in jail. In July 1999 the appellant was jailed for an incident involving Ms. Long. He was released on July 27, 1999.

[5] The bodies of Jennifer and Khieza Long were discovered on July 30, 1999. That of the mother was on a mattress on the floor in the living room of her apartment. It was covered with a blanket. That of the infant was in a bassinet next to the mattress. It was covered with a sheet. Medical experts were of the opinion that Ms. Long's death was a homicide by strangulation or asphyxiation. They differed as to the possible causes of her daughter's death.

[6] The appellant was charged that between July 26, 1999 and July 31, 1999 he unlawfully caused the deaths of Jennifer and Khieza Long contrary to s. 235(1) of the *Criminal Code*. The Crown's case against him was a circumstantial one that

included five out-of-court statements given by Ms. Long to police officers. Those statements were ruled admissible by the trial judge following a *voir dire* at which Mary Ellen Long (Jennifer Long's sister), Marilee McInnes, Jennifer Gale, five police officers, including the four who took the statements, a social worker, and Juanita Flynn (the appellant's mother) testified.

[7] The theory of the Crown on these charges of first degree murder was that a reasonable inference could be drawn from, among other things, the violent domestic relationship between the appellant and Ms. Long, the acrimony about the paternity of Khieza, and the closeness in time between the appellant's release from jail and the likely time of the deaths of the mother and child. The defence maintained that the evidence was insufficient or inconclusive and that the Crown had not proven its case beyond a reasonable doubt.

[8] A jury returned verdicts in which the appellant was found guilty of the included offence of second degree murder of both Jennifer and Khieza Long. He was sentenced to the mandatory term of life imprisonment and the trial judge set the parole ineligibility period at 21 years.

Issues

[9] On the appeals against conviction, the appellant submits that:

1. the trial judge erred in law in admitting the statements of Jennifer Long from prior incidents;

2. he erred in law in allowing a conviction to be sustained regarding Khieza Long when not supported by the evidence; and

3. he erred in law in not properly instructing the jury on the use of circumstantial evidence.

With respect to the appeal against sentence, the appellant says that the sentence imposed by the trial judge was excessively harsh.

Analysis

Admissibility of Statements

[10] The appellant submits that the trial judge erred in law in admitting the five statements Jennifer Long gave to the police. These can be conveniently divided into two groups:

1. The three statements given in July and August 1998, as follows:

    (a) on July 18, 1998 to Constable Carr;

    (b) on July 21, 1998 to Constable Glendenning; and

    (c) on August 4, 1998 to Constable Foster.

2. The two statements given on June 10, 1999 to Constable Smith.

[11] The appellant argues that those statements lacked the requisite reliability for admission into evidence. He also submits that the trial judge erred in law by vastly overstating the probative value of the statements and vastly underestimating the prejudicial effect on the jury from those statements.

[12] In *R. v. P.S.B.,* [2004] N.S.J. 49 this court described standard of review at para. 37 as follows:

> Appellate review of the admission of these statements must accept the trial judge's findings of fact absent manifest error. However, the correctness standard of review applies to the questions of whether the judge invoked an incorrect legal standard, failed to consider a required element of a legal test or made some other error in principle. In addition, the judge's application of the legal principles to the facts will generally be reviewed for correctness in rulings such as this concerning the admissibility of evidence: **R. v. Merz** (1990), 140 C.C.C. (3d) 259 (Ont. C.A.) at para 49; **R. v. Underwood**, [2002] A.J. No 1558 (C.A.) at para 60 - 63.

[13] It is necessary that I briefly describe the circumstances surrounding the taking of each statement according to the witnesses who testified and its contents. I will begin with the three 1998 statements which were given within a three week period.

July 18, 1998 Statement

[14] On this date Constable Carr met Jennifer Long in the parking lot of the R.C.M.P. headquarters in Halifax. She was in a vehicle with her sister. The officer noticed some reddish puffiness on her face and no sign of intoxication by alcohol or drugs. Ms. Long seemed scared and told him that she had been assaulted by her ex-boyfriend, the appellant. Her voice was shaking. In her statement she said the appellant had come up from behind, grabbed her by the hair, punched her twice under the left eye, and threatened to kill her. She described how she got away and called her mother and her sister who brought her to the police.

July 21, 1998 Statement

[15] Three days later Constable Glendenning visited Jennifer Long at her apartment. She was visibly upset and there was swelling on her nose. In her statement she said that the appellant had confronted her at the doorway of her apartment, put his hand over her mouth and pushed her into the apartment. According to Ms. Long, he punched her in the nose and banged her head against the wall. She got away, called the police and met with Constable Glendenning after returning from the hospital.

August 4, 1998 Statement

[16] Some two weeks afterwards, Constables Foster and Roach responded to a call regarding a dispute at the same apartment. They were met by Jennifer Long who appeared very panicky and upset. She showed them a red mark and a bump behind her left ear and stated that the appellant had hit her with his right hand. Constable Foster noticed no signs of impairment due to alcohol or drugs. In her statement Ms. Long said that when she opened a door in her building, the appellant wacked her in the head with something. She ran into another apartment and called the police.

[17] The appellant was charged with assault and uttering threats in relation to the incidents described in Jennifer Long's three 1998 statements. He pled guilty to those charges.

The June 10, 1999 Statements

[18] Jennifer Long gave two statements to Constable Smith on the same day, June 10, 1999. That day was some ten months after her 1998 statements and less than two months before her body was discovered. The appellant and Ms. Long had reconciled during that period.

[19] According to Ms. Long's first statement, the appellant had arrived at her apartment on June 8th wanting to see his daughter. He had an axe and threatened her bodily harm when she refused him entry. After she let him in he threatened, if she refused to take him back, to kill her and her newborn and then himself. Ms. Long said he became violent, smashed the phone, and threw a glass at her and the baby. He refused to leave the apartment and hit her in the head with his fist repeatedly through the night. She then described telephoning Jennifer Gale regarding baby formula and on June 9th a call from Marilee McInnes and a visit by Ms. Gale. She said that during an argument with Jennifer Gale, the appellant threw her friend's glasses out the door, grabbed Ms. Gale in the lower throat shoulder area, and pulled out and pointed a jackknife at her. The police arrived and arrested him.

[20] The second statement Ms. Long gave on June 10, 1999 was brief. In it she said that the appellant had called seven times that day. The first four times he said nothing but cried and the next three he threatened to kill her and the child, that way she wouldn't die alone. He also said he was sorry for anything he did and will do, and hung up.

[21] The testimony of Constable Smith and that of Jennifer Gale regarding the first June 10, 1999 statement differs, but both versions indicate that it was not obtained in the usual manner. That statement was not taken by the police on June 9th when officers attended at Ms. Long's apartment. Nor was it taken completely in their presence.

[22] According to Constable Smith, the officers had intended to return after booking the appellant to obtain her statement but could not reach Jennifer Long by phone. When they went back the next morning, Ms. Long and Ms. Gale were both at the apartment. Some 10 to 15 minutes into Ms. Long writing her statement, the officers had to leave for court. On their return that afternoon, Constable Smith read over Ms. Long's statement and asked her two questions which the officer wrote out together with her responses. Although the statement bears a signature Constable Smith could not recall if Ms. Long signed it in front of her. According

to Jennifer Gale, the police left the statement forms at the apartment the first day. She and Jennifer Long filled them out in each other's presence but did not read each other's statement until both were finished.

[23] The second June 10, 1999 statement was taken by Constable Smith during that same visit. The appellant had been released on an undertaking containing a no contact provision. Ms. Long told the officer that he had breached that condition of his release. After being directed to write down what she had said, in Constable Smith's presence Ms. Long wrote and signed a short statement.

The Decision following the *voir dire*

[24] According to the trial judge, the evidence contained in the statements of the adult deceased to the police would be admissible if tendered at trial accompanied by the appropriate limiting instruction to the jury. Since no such testimony could be given, the admissibility of those statements had to be further considered on the general criteria of necessity and reliability under the hearsay rule of exclusion. The trial judge was satisfied that for each of the three 1998 statements and the two 1999 statements, threshold reliability had been established for admissibility into evidence for identity, intent, motive and malice and as part of the narrative of the Crown and contextual background of the case.

[25] The trial judge decided that the prejudicial effect of this evidence did not outweigh its probative value. He allowed its admission into evidence after editing the hearsay statements by removing all of the passages that counsel asked be deleted. In a mid-trial instruction given after the presentation of the first statement, the trial judge cautioned the jury with respect to the limitations of the statements and the prohibited uses of such evidence. He cautioned again in his charge to the jury before it retired for deliberation.

Threshold Reliability

[26] The ground of appeal concerning the admissibility of statements given by the late Jennifer Long concerns the law regarding the principled exception to the hearsay rule. That exception has two components: necessity and reliability. It was uncontested that the necessity component had been met. The issue is whether the statements satisfy the reliability component.

[27] In *R v. Smith*, [1992] 2 S.C.R. 915 at p. 933 the Supreme Court of Canada described the reliability component of the principled exception as follows:

> The criterion of "reliability" – or, in Wigmore's terminology, the circumstantial guarantee of trustworthiness – is a function of the circumstances under which the statement in question was made. If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established.

[28] The appellant submits the circumstances under which Jennifer Long made the statements to the police were not such as to provide the circumstantial guarantee of trustworthiness that would justify their admission without the safeguard of cross-examination. He raises a number of arguments.

[29] The appellant emphasizes that all five statements were given following disputes in which Ms. Long said he had threatened or assaulted her. Since she was upset with him at those particular times, according to the appellant it was likely that her statements were exaggerated, immoderate, or otherwise unreliable. He points out that according to the *voir dire* evidence of Jennifer Gale and Constable Smith, the police did not advise or caution that it was a criminal offence to give a false statement to the police. Nor, according to Ms. Gale, did they ask whether a statement was true. No such advice or question appears on any of the statement forms signed by Ms. Long.

[30] The appellant submits that the evidence showed that Jennifer Long was capable of deceit. The social worker's testimony at the *voir dire* would indicate that Ms. Long lied on June 11 and 14, 1999, when she stated that the appellant had not assaulted her since she was three and a half months' pregnant with Khieza. The appellant says that she provided a false surname (Long-Tynes) on the 1998 statements and a false date of birth.

[31] The appellant stresses that Jennifer Long lied to Constable Smith on June 18, 1999. At trial the Constable testified that on that date she and another officer went back to Ms. Long's apartment, searching for the appellant in relation to a breach for which he was arrestable. Ms. Long invited them in. She said that he was not there and she did not know where he was but Constable Smith did not believe her.

After Ms. Long permitted them to look around, the police found the appellant in a bedroom closet.

[32] In his argument the appellant emphasized inconsistencies between the first of the two June 10, 1999 statements and the evidence of the police officers as to what Jennifer Long had told them the previous day. According to Constable Smith's evidence at trial, on June 9th Ms. Long advised that the police would not be able to get hold of her because her telephone ringer was broken. However the next day her statement indicated that the appellant had smashed her phone and a broken phone was shown to the police. Constable Smith also testified that on June 9th she saw neither an axe nor a knife and that Ms. Long did not mention either. Yet the next day an axe and a knife were in the apartment and Ms. Long referred to both in her statement. Jennifer Gale's testimony at the *voir dire* would dispute some of the officer's evidence. According to Ms. Gale, while she was at the apartment the appellant pulled the phone out of the wall and smashed it. She saw an axe and overheard Ms. Long tell the police that he had threatened her with an axe. Ms. Gale also testified that she herself had mentioned the knife to the police.

[33] The arguments raised by the appellant on the reliability issue require a consideration of threshold reliability and ultimate reliability. The difference between these concepts was discussed in the majority decision in *R. v. Starr*, (2000), 147 C.C.C. (3d) 449 (S.C.C.). Iacobucci, J. stated:

> 215 . . . Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness. This could be because the declarant had no motive to lie (see *Khan, supra; Smith, supra*), or because there were safeguards in place such that a lie could be discovered (see H*awkins, supra; U. (F.J.), supra; B. (K.G.), supra*).
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> 217 At the stage of hearsay admissibility the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. . . . (Emphasis added)

[34] One of the appellant's central arguments against the admission of the statements concerns Jennifer Long's truthfulness and seeks to establish her capacity for deceit. However whether or not the statements are true is not a matter which goes to threshold reliability, but rather to ultimate reliability. According to *Starr*, supra the declarant's reputation for truthfulness and confirmatory evidence are not to be considered at the *voir dire* stage or admissibility stage of the proceedings. Rather, there the focus remains on the circumstances surrounding the statement. It is the trier of fact who has the responsibility of determining ultimate reliability.

[35] I would also point out that many of the appellant's submissions in this regard were based on evidence that was presented, not at the *voir dire*, but at the trial. This included Constable Smith's testimony as to what she did or did not see and what she was told or not told on June 9, 1999 when the police attended at Jennifer Long's apartment and as to the June 18, 1999 discovery of the appellant in a closet there. A trial judge has, of course, only the evidence presented to him or her at a *voir dire* in determining admissibility. In hearing an appeal of his or her decision, this court considers the evidence that was before that judge and which formed the basis of his or her decision and not that which was adduced after that decision.

[36] This court recently considered threshold and ultimate reliability in *R. v. P.S.B.*, supra. At issue there were two out-of-court statements given by a child to his mother. After reiterating that threshold reliability focuses on whether the circumstances concerning a statement sought to be admitted counteracts the traditional "dangers" surrounding hearsay evidence, Cromwell, J.A. continued:

> [34] Circumstantial guarantees of trustworthiness generally fall into two categories of factors which are not mutually exclusive. The first group of factors are those which tend to show that there is a greater likelihood that the evidence is reliable in the sense that it is true and accurate. The second group consists of factors which tend to enhance the ability of the trier of fact to judge whether the evidence is reliable or not. This Court summed up the effect of a number of the leading cases in **R. v. Wilcox** (2001), 192 N.S.R. (2d) 159; N.S.J. No. 85 (Q.L.) at para. 66:

> [66] Threshold reliability is not directly concerned with whether the contents of the statement are true, but with whether the circumstances surrounding the statement provide circumstantial guarantees of its trustworthiness: see **Starr** *per* Iacobucci J. at p. 534. The question of whether such guarantees are present has two aspects which reflect the underlying rationalia of the hearsay rule and most of its traditional exceptions. The first concerns whether the statement was made in circumstances tending to negate inaccuracy or fabrication. Factors such as the absence of any motive on the part of the declarant to fabricate the evidence are relevant to this inquiry: see e.g. **Starr, supra**, at [paragraph] 214 - 215. The second aspect of threshold reliability is concerned with whether the statement was made in circumstances which provide the trier of fact with a satisfactory basis for evaluating the truth of the statement: see e.g. **Hawkins, supra** at [paragraph] 75. Consideration of threshold reliability requires an examination of the specific hearsay dangers raised by the statement and determination of whether the facts surrounding it "...offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers.": see **Hawkins, supra** at [paragraph] 75. The focus, however, remains on circumstances related to the statement itself, not on extraneous matters relevant to ultimate reliability such as whether there is other confirmatory evidence or on the reputation for truthfulness of the declarant.

[35] In the first category of circumstances – those tending to negate inaccuracy or fabrication – a number of factors have been identified in the cases. These include the possibility of mistake, the presence or absence of a motive to lie, the mental capacity of the maker of the statement and his or her ability to perceive, recall and recount accurately: see, e.g., *R. v. Parrott*, [2001] 1 S.C.R. 178 at para. 70. Where the declarant is a young child, the need for examination of the child's demeanor, personality, intelligence and understanding has been stressed: *R. v. Khan*, [1990] 2 S.C.R. 531 at 537. At the end of the day, the question is whether the circumstances in which the statement was made compensate for the traditional "dangers" of permitting the trier of fact to consider evidence adduced in the form of hearsay.

[36] In the second category of circumstances – those which compensate for loss of the usual ways of evaluating testimony given in court – the cases have also identified a number of factors. If the out-of-court statement was given under oath and/or video-taped, the trier can see the demeanour of the witness while making the statement and the oath replicates the trial condition of sworn evidence. If there is a full record of the statement and evidence relating to the way in which it was elicited and given these factors compensate for the inability of the trier of fact to

> observe the declarant while testifying. If the declarant testifies at trial, the availability of cross-examination at trial compensates to a degree for the absence of cross-examination at the time the statement was made.

[37] I will first consider factors tending to negate inaccuracy or fabrication surrounding the statements of the adult deceased. Each of the three 1998 statements was made very shortly after the events in question, was largely in narrative form, was recounted to a police officer, and was signed. Jennifer Long's demeanour each time was one of fear and upset. In each case the officer who took her statement noticed some physical injury and did not see any indication of intoxication or the influence of drugs. The trial judge found as a fact that there was no apparent reason or motive for the adult deceased to fabricate the allegations contained in these statements.

[38] Whether one accepts the testimony of Constable Smith or that of Jennifer Gale as to how the first of the June 10, 1999 statements was given, the evidence includes elements which tend to show a greater likelihood that the statement is true and accurate. Marilee McInnes testified that she called the police after speaking with the adult deceased that day. When the officers arrived outside Ms. Long's apartment, they heard loud noises. Once inside they found Jennifer Long crying and visibly upset, Khieza Long, Jennifer Gale and the appellant. The statement is a narrative form, including only a few questions from the police, and is signed. The trial judge found that in all of the circumstances, the adult deceased had no motive to fabricate the statement.

[39] As indicated earlier, the second of the June 10, 1999 statements is short. It was given to the police soon after the alleged threats, is completely in narrative form, and is signed.

[40] I will now consider factors which compensate for loss of the usual ways to evaluate testimony given in court. All five statements were given in circumstances which compensate, to some degree, for the appellant's inability to cross-examine the declarant or the trier's inability to assess her demeanour. At the *voir dire* all of the officers who took the statements and Jennifer Gale testified as to how the statements were elicited. While the statements were not sworn, they are narratives as recounted by the adult deceased and were signed by her. The officers who took the statements believed her.

[41] While the appellant had pled guilty to charges arising out of the 1998 incidents described in the statements relating to them, such a plea in relation to a victim's statements carries with it an admission of the essential legal ingredients of the offence admitted by the plea, and nothing more: see *R. v. Gardiner*, [1982] 68 C.C.C. (2d) 477 (S.C.C.) at p. 514. However from the adult deceased's experience in giving statements which led to the 1998 charges, it is reasonable to assume that the adult deceased understood that her June 10, 1999 statements could lead to charges being laid against the appellant. This would mean that she would have to testify in court and be subjected to cross-examination.

[42] In arguing against the reliability of the statements, the appellant maintains that Jennifer Long had reason for fabrication. He relies upon *R. v. Cassidy* (1993), 26 C.R. (4th) 252 (Ont. Gen. Ct.) where statements made by the deceased victim to four different witnesses a couple of days before her death were held to be inadmissible. Some of the statements contained allegations of threats made by the accused to the victim. After the evidence was determined to be relevant to the issue of intent and necessity established, Gravely, J. stated:

> ¶3 I understand that to mean that before letting in hearsay evidence a trial judge is required to conduct a search for hypotheses that could explain the evidence in a fashion inconsistent with reliability. The search must extend to the point of speculation. Only if that search fails can it be said that the evidence meets the test of substantial equivalence to the reliability afforded by cross-examination; or as in the excerpt from *Wigmore* quoted by the Chief Justice at p. 145, where cross-examination "would be a work of supererogation".
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> ¶4 The facts of this case are that the accused had been in a tumultuous emotional relationship with the deceased for some time. It is not unlikely that under the circumstances, the victim's objective judgment could be clouded or her statements made to friends or her family about the accused be exaggerated, immoderate or otherwise unreliable. These then, are not, in my opinion, the kinds of rather straightforward uncomplicated statements given in a situation where reliability is guaranteed as contemplated in *Smith* and in *Kahn* or indeed in their predecessor, *Ares* v. *Venner*. Without cross-examination here, defence counsel would be virtually powerless to deal effectively with those statements. ...

[43] In his submissions, the appellant went so far as to suggest that this court should take judicial notice that statements given after domestic disputes are unreliable. With respect I do not agree that such statements, whether given shortly

after an alleged incident or even some hours later, are inherently unreliable. In my view the fact that a declarant may have been upset shortly before or at the time a statement is given is not of itself determinative. The emotional context is but one of the circumstances surrounding the statement which are to be examined for *indicia* of reliability. The declarant may have reason to fear repercussions from the giving of the statement, and in such circumstances there can hardly be a presumed motive to fabricate it.

[44] *Cassidy*, supra is a short decision and supplies few particulars as to the relationship between the accused and the deceased victim. For the reasons just expressed and in the absence of some factual background of the "tumultuous emotional relationship" which formed the basis in that decision that the statements could be unreliable, I am not prepared to accept the appellant's argument.

[45] In summary, I see no error by the trial judge in his determination on the admissibility of the hearsay statements of the adult deceased. An examination of the circumstances surrounding the giving of those statements shows factors sufficient to satisfy the requirements of threshold reliability.

Prejudice and Probative Value

[46] Even where a hearsay statement satisfies the criteria for necessity and reliability, the trial judge has a residual discretion to exclude the statement from admission into evidence where, in his or her opinion, "its probative value is slight and undue prejudice might result to the accused": *R. v. Smith*, supra at p. 937 and *R. v. Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.). In considering whether their prejudicial effect outweighed the probative value of the statements, the trial judge stated:

> I conclude that the probative value of this evidence to be entered for purposes of establishing the identity of the accused, intent, motive, and malice is such that it cannot be properly excluded in this a case resting heavily on circumstantial evidence. While it also carries with it a prejudicial effect to the accused, that must be contained by the necessary editing of the written statements and, even more importantly, a forceful instruction to the jury as to its limited use so that the jury does not engage in propensity reasoning.

[47] The appellant argues that the statements had little probative value. Not only had he and Ms. Long reconciled after the last of the 1998 statements but, as shown by her hiding him from the police afterwards, they had also reconciled after her June 10, 1999 statements. He submits that the statements, describing as they do various assaults by him and threats made by him, including threats to kill her and her child, are clearly inflammatory. According to the appellant, their nature is such that the jury in this emotionally charged trial concerning the deaths of a young mother and her infant may have fallen into forbidden propensity reasoning or based a guilty verdict upon past bad acts rather than the crimes charged.

[48] A trial judge's decision whether or not to exclude evidence on the basis that its prejudicial effect outweighs its probative value is one which an appellate court reviews with deference: see *R. v. D.A.H.* (1997), 161 N.S.R. (2d) 204 (N.S.C.A.) at para. 62.

[49] I am of the opinion that the hearsay statements were relevant to intent, motive and malice. The evidence was highly probative in the context of a circumstantial case where the original charges were first degree murder.

[50] In this case the trial judge was conscious of the prejudicial effect of the hearsay statements and took some pains towards minimizing it. He edited or disallowed portions of the statements, all as counsel requested, prior to their admission at trial. In addition, during the trial he told the jury why such statements are usually inadmissible. Before it retired, he again instructed the jury as to the dangers of allowing such statements to lead to improper inferences such as propensity reasoning. At the post charge conference, counsel for the appellant did not make any submissions with respect to errors or omissions in the charge to the jury in relation to the statements. Nor does the appellant challenge the trial judge's instructions to the jury on this appeal.

[51] I find no error in the trial judge's exercise of his discretion, after balancing probative value and prejudicial effect, to admit the statements as evidence. In concluding this portion of my decision on the admissibility of hearsay statements, I would refer to *Smith*, supra at p. 957 where Lamer, C.J.C. for the court stated:

> . . . as this Court has made clear in its decisions in *Ares v. Venner, supra*, and *R. v. Khan, supra*, the approach that excludes hearsay evidence, even when highly

> probative, out of the fear that the trier of fact will not understand how to deal with such evidence, is no longer appropriate. In my opinion, hearsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements were made satisfy the criteria of necessity and reliability set out in *Khan*, and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might result to the accused. Properly cautioned by the trial judge, juries are perfectly capable of determining what weight ought to be attached to such evidence, and of drawing reasonable inferences therefrom.

Khieza Long

[52] According to the appellant, a reasonable jury, properly instructed, could not reasonably conclude that he was responsible for the death of Khieza Long. He argued that the Crown failed to establish that there was any foul play involved in the infant's death. In particular, he says that the two expert witnesses came to different conclusions as to whether it may have been a sudden infant death syndrome (SIDS) death. He further maintains that the Crown had not shown that he had either the exclusive opportunity or the motive.

[53] I will deal first with the appellant's submission that evidence of motive and opportunity, unless it is exclusive opportunity, is not enough to sustain a conviction. The appellant relies upon *R. v. Ferainz*, [1962] O.W.N. 40, 37 C.R. 37 (Ont. C.A.) which was followed in *R. v. Yebes* (1987), 36 C.C.C. (3d) 417. However, his submission is based on an incomplete reading of *Yebes*. After citing passages from *Ferianz* and other case authority, the Supreme Court of Canada stated in *Yebes* at p. 432:

> It may then be concluded that where it is shown that a crime has been committed and the incriminating evidence against the accused is primarily evidence of opportunity, the guilt of the accused is not the only rational inference which can be drawn unless the accused had exclusive opportunity. <u>In a case, however, where evidence of opportunity is accompanied by other inculpatory evidence, something less than exclusive opportunity may suffice</u>. This was the view expressed by Lacourciere J.A. in R. v. Monteleone (1982), 67 C.C.C. (2d) 489 at p. 493, 137 D.L.R. (3d) 243 at p. 247, 38 O.R. (2d) 651 (Ont. C.A.), where he said: "It is not mandatory for the prosecution to prove that the respondent had the exclusive

> opportunity in a case where other inculpatory circumstances are proved." It is also supported by further comments of Martin J.A. in R. v. Stevens (1984), 11 C.C.C. (3d) 518 at p. 534 et seq., and see, as well, Imrich v. The Queen (1977), 34 C.C.C. (2d) 143 at p. 147, 75 D.L.R. (3d) 243 at pp. 247-8, [1978] 1 S.C.R. 622 at p. 627, per Ritchie J. (Emphasis added)

This court relied upon those reasons in *R. v. Francis*, [1994] N.S.J. No. 14 (N.S.C.A.) for the proposition that where evidence of opportunity is accompanied by other inculpatory evidence, something less than exclusive opportunity may suffice.

[54] I turn now to the appellant's submission of unreasonable verdict. When this ground is raised on appeal the court is to determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered: *Yebes*, supra, at p. 430. In doing so, it is not to merely substitute its own view for that of the jury but must re-examine and to some extent re-weigh and consider the effect of the evidence.

[55] Khieza Long's body was found lying on its back close to the mattress holding the body of her mother. Apart from two tiny abrasions side by side on the tip of the infant's nose, there was no evidence of external injury. The autopsy did not disclose any abnormality in the major organs that would have caused a natural death. The decomposition of the body indicated that at least 24 to 36 hours had elapsed from the time of death to its discovery on July 30, 1999. Her diaper showed minimal staining by faecal material and urine.

[56] The experts who testified as to the possible causes of Khieza Long's death were Dr. Joanne Murphy, an anatomical pathologist who conducted the autopsy on the baby's body, and Dr. John Butt, a forensic pathologist. Both experts described a diagnosis of SIDS as one of exclusion; that is, it is not made unless every other cause is excluded.

[57] Dr. Murphy was of the opinion that Khieza did not die of SIDS. She noted that here there were no physical indicators to distinguish between a homicide and SIDS. According to this expert, in a SIDS death a cared-for baby dies unexpectedly and is discovered within hours before the body has any chance to

decompose. As this was not the situation in this case, the definition of SIDS could not be applied.

[58] Dr. Butt described SIDS as a natural condition. He could not categorically say whether or not this was a SIDS death. Nor could he categorically say that this was not a smothering. In the view of this expert, the circumstances in which the infant's body was found would be a concern.

[59] Having re-examined and to some extent re-weighed and considered the evidence, I am not persuaded that the jury verdict was unreasonable. The evidence presented at trial was such that a properly instructed jury could find that Khieza's death was a homicide. The family doctor testified that when he saw her for immunization on July 22, 1999, Khieza was well. The tenant in the apartment directly below the one in which Jennifer Long lived testified as to banging and screaming from Ms. Long's apartment in the early hours of July 28, 1999. She did not hear a baby crying. The fact that there was little faecal material or urine in the baby's diaper could have been taken by the jury to mean that either the baby had died before its mother or she had not lived long afterwards.

[60] The dead infant and her mother were found lying side by side with their bodies covered in a similar manner. In combination with the expert evidence that the mother had been strangled, that fact could suggest that both were killed by the same person. The jury could have taken the threats the appellant made to kill Khieza, according to her mother's statements to the police, as establishing motive and malice. A finding in that regard could also have been supported by the evidence of Jennifer Long's sister, the appellant's half-brother and his stepfather that Ms. Long would sometimes tell the appellant that Khieza was his child and other times that she was not, and that she played games with him regarding the paternity of the baby. As to evidence of opportunity, the jury found beyond a reasonable doubt that Khieza's mother had been murdered by the appellant, a verdict which he has not challenged as unreasonable. Therefore the jury could have reasonably concluded that the appellant had an opportunity to kill Khieza.

[61] It is also possible that the jury considered that it was unlikely that Khieza may have died before the death of her mother. In that case one would have expected Jennifer Long to contact someone about her baby's death. Nor, on the evidence, was there a plausible scenario in which someone other than the appellant killed the baby after killing the mother.

[62] Finally, the expert medical witnesses did not come to the same conclusion as to whether Khieza might have died of SIDS. However it remained open to the jury to accept the evidence of Dr. Murray and to reject that of Dr. Butt.

[63] Having considered the whole of the evidence in regard to Khieza Long's death and having re-examined and to some extent re-weighed and considered its effect, I have not been persuaded that the verdict of the jury in finding the appellant guilty of second degree murder was an unreasonable one.

Circumstantial Evidence

[64] While his appeal includes an argument that the trial judge erred in law in not properly instructing the jury on the use of circumstantial evidence, the appellant acknowledges that the charge to the jury here was such that of itself this ground of appeal appears insufficient to overturn the convictions. The trial judge made it clear that before a conviction could be based on circumstantial evidence, the jury must be satisfied beyond a reasonable doubt that the guilt of the accused was the only reasonable inference to be drawn from the proven facts: see *R. v. MacDonald* (1989), 48 C.C.C. (3d) 230 (N.S.C.A.). However the appellant suggests that if a new trial should be granted on the other grounds, this court may direct that the trial judge give a fuller and more detailed explanation of circumstantial evidence in the charge to the jury. Since I have not been persuaded that a new trial should be ordered, it is not necessary that I deal with this ground of appeal.

Parole Ineligibility Period

[65] Section 745(c) of the *Criminal Code* mandates a term of life imprisonment for a conviction for second degree murder. Before the jury which finds an accused guilty of this offence is discharged, the trial judge must ask whether the jury wishes to make any recommendation for his consideration in setting the parole eligibility period: s. 745.2. The jury in this case declined. The trial judge then proceeded pursuant to s. 745.4 which reads in part:

> 745.4 Subject to section 745.5, at the time of the sentencing under section 745 of an offender who is convicted of second degree murder, the judge who presided at the trial of the offender . . . may, having regard to the character of the offender,

> the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.2, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as the judge deems fit in the circumstances.

[66] As well as hearing the submissions of counsel, the trial judge considered a pre-sentence report, the appellant's criminal record, and victim impact statements from the mother and sister of the adult deceased. When sentenced, the appellant was 25 years old. According to the pre-sentence report, he grew up in several public housing locations and it appears that the Halifax Children's Aid Society was involved for some time. He was often in trouble with the law as an adolescent and his problems in school, which might be related to learning disabilities, resulted in his being asked to leave at age 17. He has been employed in short term construction jobs, seasonal landscaping work, and whatever he could find to earn a living. The pre-sentence report indicated that the appellant has serious difficulty dealing with anger and that he has not been able to acknowledge that he has a problem with violence. His criminal record shows 21 convictions, in relation to seven incidents, 16 as an adult. Those included convictions for property offences, a weapons offence, uttering threats, assault, assault causing bodily harm, and breaches of probation and undertakings. The assaults were upon a previous girlfriend and his sister as well as the adult deceased.

[67] After referring to the pre-sentence report, the appellant's history of problems with the educational and criminal justice systems, and his adult criminal record the trial judge continued:

> Mr. Johnson has frequently shown disrespect for the law by repeated violations of probation orders by commission of further offences, including violent offences. This trait of violence demonstrates that he poses a further danger to society.
>
> As to the nature of the offence and the circumstances surrounding its commission, Mr. Johnson has been convicted by a jury of having committed the murders of Jennifer Long and Khieza Long, her two-month old daughter.
>
> No one, except Mr. Johnson, knows exactly what happened that night, but in light of the history of his relationship with Jennifer Long, which was characterized by episodes of violence followed by periods of reconciliation, the likelihood is that a

> heated argument developed which raised Mr. Johnson's anger to such a level of violence that he committed these two brutal murders.
>
> Jennifer Long died a horrible death, having been beaten, bitten, and strangled with some form of ligature.
>
> Khieza Long, who from time to time Mr. Johnson had helped to look after, was smothered to death at the tender age of two months. The senseless killing of an innocent and defenceless infant is a particularly aggravating factor for the court to take into account.
>
> The weight of all the foregoing factors leaves me with no hesitation in deciding that the proper exercise of my discretion calls for an increase, and a substantial increase, in the minimum period to be imposed without eligibility for parole.

[68] After citing *R. v. Muise* (1994), (94) C.C.C. (3d) 119 (N.S.C.A.) and noting that counsel had referred him to over two dozen sentencing decisions, the trial judge stated that the highest parole ineligibility period among them was 22 years imposed by the Ontario Court of Appeal in *R. v. Sarao*, [1995] O.J. No. 1027 where the accused had pled guilty to second degree murder of his wife and in-laws. The highest in this province was the 21 years in *R. v. Mitchell* (1987), 39 C.C.C. (3d) 141 (N.S.S.C.) where the accused had pled guilty to second degree murder of a two year old child. That child died after being severely beaten and mistreated over a period of several weeks by the accused who had assumed a parental role. In *Mitchell* Justice Hart stated at p. 170 that he found it difficult to believe that there could be a more brutal, painful and prolonged murder of a defenceless child.

[69] After referring to *Mitchell* the trial judge stated:

> In my view the offender in this case, Mr. Johnson, is deserving of no less an increase of 21 years as a minimum period for ineligibility for parole for the two brutal murders perpetrated by him. The various factors I have reviewed clearly call for Mr. Johnson's sentence to fall within the high range as denoted by Justice Hallett [in *R. v. Muise*, [1994] N.S.J. 487 at ¶ 93] above mentioned.

[70] The standard of review for a discretionary order pertaining to parole ineligibility was set out in *R. v. Muise*, supra at p. 124 as follows:

> . . . sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive. In reviewing a period of ineligibility for parole as determined by a sentencing judge, an appeal court should consider if the period is clearly inadequate or too long.

[71] The appellant does not challenge the parole ineligibility period by alleging an error of law in the application of sentencing principles. The only sentencing issue then is the fitness of the parole ineligibility period. The appellant submits that 21 years is excessive and that on its facts, *Mitchell*, supra is significantly different from this case. He argues that according to the case law, the median average is closer to the ten year minimum in s. 745.4 and that rarely, even in cases of double homicide, is the high end of parole ineligibility used. Given the case law and the facts of this case, he suggests that 15 years of ineligibility would be appropriate.

[72] In my view, the parole ineligibility period of 21 years imposed by the trial judge is not excessively harsh.

[73] The appeal sentence in *R. v. Shropshire*, [1995] 102 C.C.C. (3d) 193 (S.C.C.) involved a period of parole ineligibility. In rejecting a suggestion that more than the ten years minimum would not be justified unless unusual circumstances exist, Iacobucci, J. stated:

> [27] In my opinion, a more appropriate standard, which would better reflect the intentions of parliament, can be stated in this manner: as general rule the period of parole eligibility shall be for ten years, but that can ousted by determination of the trial judge that, according to the criteria enumerated in s.744 [now 745.4], the offender should wait a longer period before having his suitability to be released into the general public assessed. To this end, an extension of the period of parole ineligibility would not be "unusual", although it may be that, in the medium number of cases, a period of ten years might still be awarded.

> [28] I am supported in this conclusion by a review of the legislative history, academic commentary, and judicial interpretation of s. 744, and the sentencing scheme for second degree murder.
>
> [29] Section 742(b) of the *Criminal Code* provides that a person sentenced to life imprisonment for second degree murder shall not be eligible for parole "until he has served at least ten years of his sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 744". In permitting a sliding scale of parole ineligibility, Parliament intended to recognize that, within the category of second degree murder, there will be a broad range of seriousness reflecting varying degrees of moral culpability. As a result, the period of parole ineligibility for second degree murder will run anywhere between a minimum of 10 years and a maximum of 25, the latter being equal to that prescribed for first degree murder. The mere fact that the median period gravitates towards the10-year minimum does not, *ipso facto*, mean that any other period of time is "unusual". (Emphasis added)

[74] The parole ineligibility period in this case is at the high end of the mid range or the low end of the high range in *R. v. Muise*, supra. In considering the acceptable range of parole ineligibility for second degree murder, Hallett, J.A. for the majority stated at p. 126 that:

> One might say that the low range for the period of ineligibility for second degree murder would be somewhere between 10 and 15 years, the mid range 15 to 20 and the high range 20 to 25 years. This case clearly falls within the high range. As previously stated, this court has adopted and consistently followed a policy that it will not interfere with the sentence on a Crown appeal which simply alleges the period of incarceration is too short unless the sentence is clearly inadequate.

[75] While the cases show a range in parole ineligibility periods, this court has approved or imposed periods in the 20 to 21 year range where the accused was convicted of second degree murder of one person. These cases include *R. v. King*, [1985] N.S.J. No. 203 (N.S.C.A.); *R. v. Smith* (1986), 72 N.S.R. (2d) 359 (N.S.C.A.); *R. v. Laidlaw* (1990), 93 N.S.R. (2d) 333 (N.S.C.A.) and *R. v. Francis*, [1994] N.S.J. No. 14 (N.S.C.A.).

[76] Prior to the appellant's release from jail on July 27, 1999 he had been on remand awaiting trial on charges, including assaulting the adult deceased with a

weapon and uttering death threats to her. The evidence at trial suggests that she was killed by him in the early hours of July 28, 1999.

[77] The appellant was convicted of two murders. The murder of the adult deceased arose in the context of a domestic relationship. The evidence at trial established that the appellant had acted in a parental role towards the infant. In both instances, serious breaches of trust were involved.

[78] The adult deceased died a violent death. The evidence of the witnesses who lived in the apartment below recounted a prolonged attack. The brutality of the murder is also borne out by the bite marks on the body and the evidence of strangulation. As the trial judge stated, the killing of baby Khieza is a particularly aggravating factor.

[79] At trial counsel for the appellant suggested parole ineligibility of 20 years.

[80] In all the circumstances of this case, a parole ineligibility period of 21 years is not clearly unreasonable. The nature of the offences, the circumstances surrounding their commission, and the character of the offender make the sentence under appeal a fit and proper one.

Disposition

[81] I would dismiss both the appeal against conviction and that against sentence.

Oland, J.A.

Concurred in:

Bateman, J.A.

Fichaud, J.A.