IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Burgess 2015 NSPC 39

Date: May 11, 2015

Docket: 2412884

Registry: Halifax

Between:

Her Majesty the Queen

v.

Vanessa Burgess

Decision on Admissibility of Hearsay Statements by Deceased

Judge:	The Honourable Judge Anne S. Derrick
Heard:	April 27 and 28, 2015
Decision:	May 11, 2015
Charges:	section 236(b) of the *Criminal Code*.
Counsel:	Susan MacKay and John T. Martin, for the Crown
	Joel Pink, Q.C. and Nasha Nijhawan, for Vanessa Burgess

By the Court:

Introduction

[1] Vanessa Burgess's father, David Burgess, died in hospital on July 26, 2011. The provincial Medical Examiner determined the cause of death to have been "blunt force injury of the head" and categorized the death as a "homicide." (*Exhibit 14, Medical Examiner Certificate*) Ms. Burgess was charged in January 2012 with manslaughter in her father's death.

[2] There is evidence to indicate that Mr. Burgess fell down a set of stairs at his home on the night of July 20, 2011. He was taken from there by EHS to hospital in the late afternoon on July 21.

[3] In July 2011 Ms. Burgess had been living at the family home with her father and mother. The Crown has led evidence that on the evening of July 20, 2011, Ms. Burgess' mother was at a meeting and only Ms. Burgess and her father were in the house.

[4] In a statement to police on January 25, 2012, Ms. Burgess said her father had made a phone call from the garage on the property on the evening of July 20 to his brother-in-law, David Crocker. David Crocker is married to Mr. Burgess' sister, Christine, making Ms. Burgess David Crocker's niece.

[5] Ms. Burgess' video- and audio-taped police statements (*Exhibits 19, 20 and 21*) were admitted by consent at the trial proper and put forward by the Defence as evidence at the *voir dire*. Also tendered as evidence by the Defence at the *voir dire* were text messages between Ms. Burgess and her cousin, Erin Crocker, David Crocker's daughter. (*Exhibit 17*) The Defence called no witnesses at the *voir dire*.

[6] Mr. Crocker testified as the Crown witness at the *voir dire* about a telephone conversation he had with Mr. Burgess on the evening of July 20, 2011. Mr. Burgess' statements are hearsay and presumptively inadmissible. The Crown submits that what Mr. Burgess said to Mr. Crocker is admissable into evidence for its truth on the basis of a traditional exception to the hearsay rule, state-of-mind evidence, and/or under the principled approach to hearsay.

[7] The Defence says there is no route to the admission of David Burgess' hearsay statements. It is the submission of the Defence that Mr. Burgess' statements to Mr. Crocker are not admissible under either the traditional exception that permits admission of statements to show the declarant's state-of-mind nor under a principled approach. The Defence further submits that even if after applying the principled approach I am satisfied the reliability of the statements has been established, they should be excluded on the basis that the prejudicial effect of their admission outweighs their probative value. (*R. v. Blackman, [2008] S.C.J. No. 38, paragraph 33*)

[8] The onus lies on the Crown to establish on a balance of probabilities that Mr. Burgess' statements to David Crocker are admissible. (*R. v. Khelawon, [2006] S.C.J. No. 57, paragraph 47*) Each statement the Crown wants admitted for its truth must be separately assessed for admissibility. The issues I will be addressing are these: (1) are any of the David Burgess' statements admissible under the state-of-mind exception to the hearsay rule? (2) are any of the statements admissible under the principled approach to hearsay? and (3) if any of the statements are admissible, should they be excluded notwithstanding on the basis that their probative value is outweighed by their prejudicial effect?

The Telephone Call

[9] David Crocker and his wife, Christine, lived quite close to the Burgess home. David Burgess had been to the Crocker's on the afternoon of July 20 to fix the air-conditioning unit in David Crocker's truck. They drank some beer together: Mr. Crocker recalls giving Mr. Burgess three beers from his beer fridge in the garage and testified it was possible Mr. Burgess helped himself to a fourth. Mr. Burgess went home around 4:00 p.m. or 4:30 p.m.

[10] David Crocker was home alone on the night of July 20 when the telephone rang. The caller was David Burgess. He wanted to speak to Christine. Mr. Crocker informed him Christine wasn't home.

[11] Mr. Burgess told Mr. Crocker he was having problems with Vanessa. He had been in a fight with her which Mr. Crocker understood to mean an argument. When Mr. Crocker asked Mr. Burgess what he and Vanessa had been fighting about Mr. Burgess said it was over the fact that Vanessa had been smoking

marijuana. Mr. Burgess told Mr. Crocker he didn't know what to do and said he didn't know whether to call 911 or what he should do.

[12] When Mr. Crocker asked Mr. Burgess why he would call 911, Mr. Burgess said: "Vanessa threatened to kill me."

[13] Mr. Burgess knew that Mr. Crocker did not smoke in the house and went out to his garage at the end of the driveway to have a cigarette. He believed something had transpired between Mr. Burgess and Vanessa in the garage and that "the argument was still going on" when they returned to the house.

[14] Mr. Crocker testified that his conversation with Mr. Burgess continued as follows:

> So I said, what do you mean, she said she's going to kill you. And he said, "well Vanessa said she's going to kill me." He said, "I'm afraid to go to sleep." And he said, "Because I don't have a lock on the bedroom door. I'm afraid to go to bed." I said, what time is Linda getting home and David said, "she's at a meeting until 10:00 o'clock." And that's why, when I looked at the clock between quarter after and 9:30, I looked at the clock and I said, if she's at a meeting until 10:00 o'clock she will be home somewhere around 10:30, so she's going to be less than an hour before she gets home. And he said, 'yes". And I said, stay away from Vanessa until Linda gets home and then you can sort it out. Just stay away from Vanessa.

[15] The "Linda" Mr. Crocker was referring to was Mr. Burgess' wife and Vanessa's mother.

[16] In the course of the telephone call Mr. Crocker could not hear any sounds in the background and asked where Vanessa was. Mr. Burgess told him: "She's in her bedroom." It was Mr. Crocker's advice, "…don't go near her. Just leave her alone. Stay clear of her…" Mr. Crocker testified that he did not know where Mr. Burgess was when he made the call.

[17] On cross-examination Mr. Crocker testified that Mr. Burgess had told him Vanessa was "locked" in her bedroom and would not speak to him.

[18] The absence of background noise caused Mr. Crocker to think that "maybe things had blown over." He testified that he thought,

> …because it was quiet in the house and there was no yelling and screaming or anything else that was going on to that effect, I had thought maybe things had blown over. Maybe after the yelling and screaming at each other, they had gone their separate ways and okay, now it was over…

[19] Mr. Crocker described his thinking at the time:

> Thinking that Linda was going to be home soon. There was no fighting going on down there, so maybe some of this was being blown out of proportion or whatever and that was just the way I thought about it at the time.

[20] On cross-examination Mr. Crocker acknowledged that Mr. Burgess could exaggerate, and said: "…If – if he was upset about something, then yes he could embellish it a little bit as to what it was…And without hearing any yelling or screaming or anything in the background, I was thinking, okay, maybe he had this out of proportion a little bit through – because of being excited about the argument that he had had with Vanessa or for whatever reason…"

[21] Mr. Crocker testified it had crossed his mind that if Mr. Burgess had continued to drink at home that evening this could lead to him blowing the situation with Vanessa out of proportion. Mr. Crocker explained why he had this thought: "…we were dealing with an alcoholic." He recalled that "part of the argument" with Vanessa was "something about the drinking" so he asked Mr. Burgess "are you drinking?" Mr. Burgess said no.

[22] It was Mr. Crocker's evidence that he was "very definite" on the time of Mr. Burgess' telephone call because he had looked at the clock when Mr. Burgess said Linda would be returning home from her meeting around 10:30 that evening.

[23] Asked to describe how Mr. Burgess sounded during their telephone conversation, Mr. Crocker said, "concerned, he was worried. I wouldn't say he was scared, but he wasn't talking loud. It was like he was talking as if he didn't want

anybody else to hear him." It was Mr. Crocker's evidence that he heard "serious concern" in Mr. Burgess' voice.

[24] According to Mr. Crocker, the telephone call with Mr. Burgess lasted six or seven minutes. They discussed nothing else other than the concerns Mr. Burgess raised about Vanessa threatening him and what he should do about it.

[25] Mr. Crocker had never heard Mr. Burgess say anything like this before. He had never heard Mr. Burgess mention wanting to call 911 in any context before.

[26] Mr. Crocker testified that his wife and Mr. Burgess were close and that Mr. Burgess would "unload" on Christine Crocker "and talk to her" when he had been drinking or was hungover or needed to get something off his chest.

The Statements of David Burgess

[27] The Crown is seeking to have admitted into evidence the following statements that David Crocker alleges were made by David Burgess during their telephone conversation:

- That he had been in an argument (a "fight") with Vanessa about her smoking marijuana;
- That Vanessa had threatened to kill him;
- That he wondered whether he should call 911;
- That he was afraid to go to sleep because he did not have a lock on his bedroom door;
- That Vanessa was "locked" in her room and wouldn't speak to him.

[28] The statement by David Burgess that Vanessa was "locked" in her room and wouldn't speak to him is of interest to the Defence. The Defence says this is internally inconsistent with the suggestion that David Burgess had any reason to be fearful. This is relevant to the issue of the reliability of David Burgess' hearsay statements and I will discuss it in that context.

The Presumptive Inadmissibility of Hearsay

[29] Mr. Burgess' statements to Mr. Crocker are hearsay and presumptively inadmissible. *(Khelawon, paragraph 59)* Hearsay is presumptively inadmissible

because "its reliability cannot be tested." (*R. v. F.J. U., [1995] S.C.J. No. 82, paragraph 22; see also: R. v. Starr, [2000] S.C.J. No. 40, paragraph 159; Khelawon, paragraph 35; R. v. Devine, [2008] S.C.J. No. 36, paragraph 19*)

[30] There are four essential elements to the hearsay rule: (1) a declarant – in this case, David Burgess; (2) a recipient – in this case, David Crocker; (3) a statement – in this case what David Burgess said to David Crocker during the July 20 telephone call; and (4) a purpose. The purpose the Crown is seeking to have the statements of David Burgess serve is to prove that Vanessa Burgess told her father on the night of July 20 that she was going to kill him and to show that David Burgess was afraid of his daughter that night.

[31] Hearsay statements present a special challenge to our adversarial system of justice, where, as the Supreme Court of Canada has said in *Khelawon* a premium is placed

> … on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves. The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant. (*paragraph 35*)

[32] The "core dangers" of hearsay are: perception, memory, narration, and sincerity. (*R. v. Baldree, [2013] S.C.J. No. 35, paragraph 31*) I have taken the explanation for this from *Baldree* and substituted references to this case:

- Mr. Burgess may have misperceived the facts he described in the phone call with David Crocker;
- Even if he correctly perceived them, he may have wrongly remembered the relevant facts;
- Mr. Burgess may have narrated the relevant facts in an unintentionally misleading manner; (This could be by exaggerating or embellishing them, a tendency Mr. Burgess was said to have when he was drinking.)
- Mr. Burgess may have knowingly made a false assertion.

[33] In *R. v. Couture,* [2007] S.C.J. No. 28, although contained in a dissenting judgment, Rothstein, J.'s observations reiterate the principled approach to obtaining relevant evidence untested by cross-examination:

> While the importance of an oath and cross-examination cannot be disputed, their availability is by no means the *sine qua non* of admissibility under the principled approach to hearsay. *R. v. Khan*, [1990] 2 S.C.R. 531, and *R. v. Smith*, [1992] 2 S.C.R. 915, are both examples of cases where the hearsay statements were not made under oath and were not subject to cross-examination but were nevertheless found to meet the threshold reliability under the first method described in *Khelawon*. In other words, the hearsay evidence was made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken: *Smith*, at p. 933. (*paragraph 116*)

[34] The Crown submits the prohibition against hearsay can be overcome in this case: if the statements fall under the traditional exception to the hearsay rule for statements that show the declarant's state-of-mind, that is, the state of mind of David Burgess, and through the application of the principled approach to hearsay.

The Proper Approach to the Admissibility of Hearsay Evidence

[35] In *R. v. Mapara*, [2005] S.C.J. No. 23, the Supreme Court of Canada articulated the "framework" for considering the admissibility of hearsay evidence:

> (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
>
> (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
>
> (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
>
> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

The Relevance of the Proffered Evidence

[36] The Crown's case against Vanessa for manslaughter is based on evidence that Mr. Burgess fell down the stairs at his home as a result of being pushed. In other words, the Crown's theory is that Mr. Burgess was unlawfully assaulted by Vanessa which caused him to fall down the stairs and sustain fatal injuries.

[37] The Crown submits that the hearsay statements by David Burgess are relevant to show his state of mind and the nature of the argument he had been having with Vanessa close to the time when he fell down the stairs. In the Crown's submission Mr. Burgess' "serious concern" and fearfulness ("I'm afraid to go to bed") are relevant to a central issue in this case – Ms. Burgess' role in her father's

fall down the stairs. And what Mr. Burgess said is relevant to the assessment I will have to make with respect to Vanessa's statements to the police. I will have to assess her statements in accordance with *R. v. W.(D.), [1991] S.C.J. No. 26* – do I believe her evidence, even if I do not believe it, am I left in a reasonable doubt by it, or even if I am not left in doubt by it, on the basis of evidence which I do accept, am I convinced beyond a reasonable doubt by the evidence of her guilt? (*W.(D.), paragraph 28*)

[38] The Defence does not strenuously argue that the statements have no relevance to issues I will have to decide. Ms. Nijhawan referred me to what the Supreme Court of Canada said in *R. v. Blackman*:

> Relevance can only be fully assessed in the context of the other evidence at trial. However, as a threshold for admissibility, the assessment of relevance is an ongoing and dynamic process that cannot wait for the conclusion of the trial for resolution. Depending on the stage of the trial, the "context" within which an item of evidence is assessed for relevance may well be embryonic. Often, for pragmatic reasons, relevance must be determined on the basis of the submissions of counsel…establishing threshold relevance cannot be an exacting standard…(*paragraph 30*)

[39] The Defence concedes that the events surrounding Mr. Burgess' fall down the stairs would have been explored in cross-examination of Mr. Burgess had he survived and Ms. Burgess was being tried on a charge of aggravated assault. There is evidence that David Burgess and Vanessa were having conflict shortly before he fell down the stairs. In her statement to police Ms. Burgess said that on the night of July 21 her father was chasing her around the house "because he was drunk" and "just wanted to fight." (*July 23, 2011 statement to police, 9:24:13, 9:24:16, and 9:9:26:02*)

[40] And while I am satisfied that *intent* is not a relevant issue in this case, evidence of *motive* may be relevant. Although made in the context of a murder case, the comments by the Supreme Court of Canada in *R. v. Griffen,* [2009] S.C.J. No. 28 about motive and *animus* could also apply to a manslaughter case:

> … That the relationship between a deceased and an accused was acrimonious or that the two had engaged in a dispute in the period leading up to a murder are highly relevant to the issue of motive because such information may afford evidence of the accused's *animus*…to act against the victim…(*paragraph 63*)

[41] Motive can be relevant in a manslaughter-by-unlawful-act prosecution as a piece of circumstantial evidence. (*R. v. Roncaioli, [2011] O.J. No. 2167 (C.A.), paragraph 43; R. v. Rahman, [2012] N.S.J. No. 337 (S.C.), paragraph 333*) In *Roncaioli*, an unlawful-act (aggravated assault) manslaughter case, the Crown sought to prove that Roncaioli had a motive to want his wife dead because she had dissipated virtually all of their savings and the marriage was troubled. The Ontario Court of Appeal upheld the trial judge's charge to the jury on motive and said the following:

> Although motive is not an essential element of criminal responsibility, it is relevant in that it makes it more likely that the accused committed the crime. Here, although the appellant was not charged with murder -- a fact the Crown expressly told the jury -- the Crown could nonetheless rely on the appellant's motive to want his wife dead as a piece of circumstantial evidence showing that the appellant intentionally injected his wife with the anaesthetics and thus helping to prove manslaughter by an unlawful act. Whether he had a motive to want his wife dead and its role, if any, in proving the Crown's case were matters the trial judge correctly left for the jury to decide. (*paragraph 43*)

[42] The Defence acknowledges the statement evidence is relevant to a *W.(D.)* analysis. From the Defence perspective, the relevance of David Burgess' statements to issues I will have to decide assumes more significance in a probative-value-versus-prejudicial-effect assessment.

[43] I am satisfied that the hearsay statements of Mr. Burgess are relevant to issues in this trial.

The State-of-Mind Exception to the Hearsay Prohibition

[44] The traditional exceptions to the hearsay rule remain intact notwithstanding the developments in the law of hearsay although they are required to comply with the principled approach. (*Starr, paragraphs 201 and 202*)

[45] One such traditional exception is the state-of-mind exception, sometimes described as the "present intentions" exception – declarations of present intentions of the declarant. It is an exception to the hearsay prohibition that arises "when the declarant's statement is adduced in order to demonstrate the intentions, or state of mind, of the declarant at the time when the statement was made." (*R. v. Smith, [1992] S.C.J. No. 74, paragraph 22*) In this case, David Burgess' statements to David Crocker were statements of intention (perhaps he should call 911) and potential evidence of Mr. Burgess' frame of mind before his death (a state of apprehension because Vanessa threatened him.) According to David Crocker, Mr. Burgess expressed "serious concern" as a result of Vanessa threatening him and was afraid to go to bed. He was considering whether he should call 911. The Crown submits these statements should be admitted into evidence as they show that shortly before he fell down the stairs Mr. Burgess was considering making a call to 911 because of threats made to him by Vanessa.

[46] Ms. Nijhawan has made the point, relying on the Supreme Court of Canada's decision in *Starr* that a statement admitted under the state-of-mind exception cannot be used to prove the intentions or actions of a third party. Her submissions also require me to consider the issues of (1) double-hearsay, and (2) implied hearsay, and their application in this case.

[47] The state-of-mind exception analysis in this case evokes aspects of the principled approach to the admissibility of hearsay evidence. It is not possible to neatly separate the interwoven threads. This will be apparent as I discuss the issues of double-hearsay and implied hearsay.

Double-hearsay

[48] Ms. Nijhawah noted that *Starr* at paragraph 172 indicates the problem of double-hearsay if the statement is based on "a prior conversation with the accused." That is the situation here: Mr. Burgess's statement to Mr. Crocker that Vanessa had threatened to kill him is Mr. Burgess telling Mr. Crocker something that Vanessa told him which constitutes another layer to the hearsay onion.

[49] But the applicability of the rule governing the admissibility of admissions distinguishes this case from *Starr*. In *Starr*, the tendered statement could not be attributed to the accused. David Burgess' statements are more comparable to the statements considered by the Ontario Court of Appeal in *R. v. Foreman*, [2002] O.J. No. 4332.

[50] The *Foreman* case concerned the murder of Ms. Heimbecker. Foreman, her former boyfriend, admitted to shooting and killing Ms. Heimbecker and sought, unsuccessfully to enter a guilty plea to manslaughter. The Crown proceeded with a trial on a charge of first degree murder and sought to have certain statements of the deceased to friends admitted into evidence.

[51] Ms. Heimbecker made statements to Paul and Becky Litt. In a telephone conversation a few days before her death, Ms. Heimbecker told Mr. Litt that she was worried as Foreman had been phoning her regularly and threatening her. Foreman had said to her: "If I can't have you, nobody will." Mr. Litt and Ms. Heimbecker discussed the possibility of going to the police. (*Foreman, paragraph 22*)

[52] Becky Litt received a call from Ms. Heimbecker on the night she died. Ms. Heimbecker told Ms. Litt that Foreman had been calling her regularly, arguing with her and demanding to know who she was "sleeping with." Ms. Heimbecker told Ms. Litt that Foreman had threatened her. She was afraid and asked Ms. Litt's opinion about whether Foreman would make good on his threats. (*Foreman, paragraph 23*)

[53] Doherty, J.A. of the Ontario Court of Appeal dealt with the issue of whether Ms. Heimbecker's statements to the Litts were inadmissible as double-hearsay. The double-hearsay arises as follows: Foreman said to Ms. Heimbecker, "If I can't have you, nobody will" and Ms. Heimbecker told the Litts, "Foreman said to me, "If I can't have you, nobody will." (*paragraph 31*) Doherty, J.A., referring to *Starr*, reiterated that:

> The requirements for admissibility, whether under an established common law exception or under the principled approach, have to be examined in the context of the purpose for which the evidence is tendered. Hearsay evidence offered for

> one purpose may clear all admissibility hurdles, but the same evidence offered for a different purpose may not. (*paragraph 34*)

[54] Doherty, J.A. went on to find that the Crown was seeking to have Ms. Heimbecker's statements admitted as evidence to prove that Foreman actually uttered the threats she told the Litts he had made. He held that the tendering of the statements for that purpose required that "the admissibility of the statement allegedly made by [Foreman] to Ms. Heimbecker should have been addressed separately and in addition to the admissibility of the statement made by Ms. Heimbecker to the Litts." (*paragraph 35*)

[55] And this is where the "applicability of the rule governing the admissibility of admissions" comes into play, distinguishing cases like this one and *Foreman* from *Starr*. A threat by an accused is admissible in evidence as an exception to the hearsay prohibition. As Doherty, J.A. stated in *Foreman*:

> Admissions, which in the broad sense refer to any statement made by a litigant and tendered as evidence at trial by the opposing party, are admitted without any necessity/reliability analysis. As Sopinka J. explained in R. v. Evans (1993), 85 C.C.C. (3d) 97 at 104:
>
> > The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. <u>The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements…</u>[emphasis in the original] (*paragraph 37*)
>
> …

> Had the trial judge given separate consideration to the admissibility of the alleged statement made by [Foreman] to Ms. Heimbecker, he would have concluded that the hearsay rule posed no obstruction to the admissibility of that statement. The real hearsay problem arose because Ms. Heimbecker, the person to whom the threat was allegedly made, was not available to testify at trial. The crucial question was whether the circumstances in which Ms. Heimbecker made the statements to the Litts provided sufficient indicia of trustworthiness to permit the Litts to tell the jury what Ms. Heimbecker had said, even though Ms. Heimbecker was unavailable for cross-examination…(*paragraph 39*)

[56] In *Foreman* the Ontario Court of Appeal upheld the trial judge's determination that Ms. Heimbecker's statements to Paul and Becky Litts should be admitted into evidence. The Supreme Court of Canada dismissed Foreman's application for leave to appeal. (*R. v. Foreman, [2003] S.C.C.A. No. 199*)

[57] My point in discussing *Foreman* is this: Mr. Burgess' statement to David Crocker that Vanessa threatened him clears the double-hearsay hurdle because of the applicability of the rule governing the admissibility of admissions. Vanessa's alleged statement to David Burgess which he repeated to Mr. Crocker falls under the admissions exception to the hearsay prohibition.

Implied Hearsay

[58] In her submissions that David Burgess' statements are inadmissible, Ms. Nijhawan invoked the Supreme Court of Canada decision of *R. v. Baldree*, [2013] S.C.J. No. 35 and its finding that the hearsay prohibition extends to implied assertions as well as express ones. The Defence submits that David Burgess' statements that he is afraid to go to bed and is considering calling 911 implies that Vanessa did something to make him fearful. This, says the Defence, makes it inappropriate to consider the statements as coming within the "state-of-mind" exception to hearsay.

[59] I find that *Baldree* does not add anything to the analysis required in this case. That is because I do not find this to be a case of "implied hearsay."

[60] The statements in *Baldree* were made by a caller to the cell phone of Mr. Baldree who had just been arrested. Baldree's phone was in the possession of the police and it was a police officer who took the call. The caller wanted to buy "one ounce of weed." The Crown sought to have this hearsay statement admitted to show that Baldree was a drug dealer. The caller's request implied that Baldree was a drug dealer. The Supreme Court found that no traditional exception to the hearsay rule applied and subjected the statement to a principled analysis.

[61] This is not a case of statements with an implied meaning. David Burgess' statements were express statements. He told David Crocker explicitly that he was considering calling 911 because Vanessa threatened him. As I have noted, when Mr. Crocker asked Mr. Burgess why he would call 911, Mr. Burgess said: "Vanessa threatened to kill me."

[62] This case is also not like *R. v. Griffen*, [2009] S.C.J. No. 28 where the statement in issue was made by the deceased, Poirier, to Williams, a relative of the accused, Griffen. Poirier said to Williams: "If anything happens to me, it's your family." The Supreme Court of Canada held that Poirier's statement did not provide the basis for his belief that if he was harmed, Griffen would be responsible, and therefore it was not admissible to prove Griffen's intentions. (*paragraph 58*)

[63] David Burgess' statements to David Crocker are different. He explicitly said that Vanessa had threatened him which left him afraid to go to bed and pondering the option of calling 911. I find this indicates state of mind and present intention, which fall under a traditional exception to the prohibition against hearsay. However I have determined that the principled analysis should be undertaken notwithstanding. And I am satisfied that certain principles applicable to the state-of-mind exception will be squarely addressed by the principled analysis. What I am referring to is the requirement that for the statement to be admitted it "must have been made in a natural manner and not under circumstances of suspicion." (*R. v. Starr, paragraph 168, per Iaccobucci referring to Wigmore*) These considerations fit comfortably within the threshold reliability analysis.

The Principled Analysis – Necessity and Reliability

[64] Hearsay that fits within a traditional hearsay exception "may still be inadmissible if it is not sufficiently reliable and necessary." (*Starr, paragraph 106*) As stated by Iacobucci, J. in *Starr*: "The traditional exception must therefore yield to comply with the principled approach" and "…in the event of a conflict between the two, it is the principled approach that must prevail." (*Starr, paragraphs 106 and 155*) The requirements of necessity and reliability must be satisfied for hearsay evidence to be admitted.

[65] Necessity is conceded in this case. David Burgess is dead. That settles the necessity issue. There is no other way, except through David Crocker's mouth, to obtain the evidence.

Threshold Reliability

[66] The threshold reliability requirement is concerned with "the integrity of the trial process." (*Khelawon, paragraph 49*) As I have noted, the "central underlying concern" about David Burgess' hearsay statements is the inability to cross-examine him about their truth and accuracy. (*Blackman, S.C.C., paragraph 35*) "Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity." (*Khelawon, paragraph 2*) I repeat, hearsay is presumptively inadmissible. However, "a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy…" (*Khelawon, paragraph 2*) As the Supreme Court of Canada has said in *Khelawon*: "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." (*paragraph 62*)

[67] At this juncture, I am concerned with the admissibility of the Burgess' statements, not their ultimate reliability. Whether I should rely on the evidence to decide the issues in this case is a matter to be decided "in the context of the entirety of the evidence." (*Khelawon, paragraph 3*)

[68] In determining whether hearsay is admissible judges are to adopt "a more functional approach" and "focus on the particular dangers" raised by the hearsay evidence and the "attributes and circumstances" which are said to overcome those dangers. (*Khelawon, paragraph 93*) I am required to examine whether the statements made by David Burgess were made under circumstances that satisfy the

concerns cross-examination would have addressed. (*Khelawon, paragraph 62*) My assessment must consider,

> ... all relevant factors…including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility. (*Khelawon, paragraph 4*)

[69] I will now discuss David Burgess' statements in relation to each of the "testimonial factors" I identified at paragraph 32 of these reasons. (*R. v. Smith, [2007] N.S.J. No. 56 (C.A.), paragraph 172*)

Mr. Burgess may have Misperceived the Facts He Described in the Phone Call with David Crocker – the Perception Factor

[70] David Crocker's evidence indicates that David Burgess called him at a time that was proximate to the argument he described having with Vanessa. He did not call to discuss events that had happened some time before. There is no realistic concern that Mr. Burgess was not able to accurately describe the unambiguous facts of what he had just experienced – a threat that made him concerned and worried and contemplating a 911 call.

Even if He Correctly Perceived Them, Mr. Burgess may have Wrongly Remembered the Relevant Facts – the Memory Factor

[71] David Burgess' statements to David Crocker were simple and straight-forward. There was nothing complicated to remember and what was being relayed were not distant events. They were events that would have been fresh in Mr. Burgess' memory.

Mr. Burgess may have Narrated the Relevant Facts in an Unintentionally Misleading Manner – the Use of Language Factor

[72] The evidence indicates that Mr. Burgess had no difficulty providing a clear, linear account of the events that propelled his decision to call his sister and speak with Mr. Crocker. Again, the events were fresh events. There was nothing that would have complicated their accurate narration. Mr. Burgess required no prompting and responded directly and coherently to Mr. Crocker's questions.

[73] The Defence raised a concern that is relevant to all the testimonial factors in this case which I will deal with here. The Defence posits the possibility that Mr. Burgess may have indulged in further drinking once he returned home after visiting Mr. Crocker on the afternoon of July 20. Mr. Burgess was an alcoholic. During his visit to the Crockers', he had had three, possibly four beers. Ms. Nijhawan points to Mr. Crocker's evidence about the phone call with Mr. Burgess: that he considered Mr. Burgess might be overstating the conflict with Vanessa because of two factors - the absence of any background noise suggestive of conflict and the possibility that Mr. Burgess, an alcoholic, might have continued to drink once he got home and, under the influence of the additional alcohol, was exaggerating.

[74] When on the phone with Mr. Burgess David Crocker heard nothing in the background at the Burgess' home - no yelling or screaming - to indicate there was any conflict going on. And he knew Mr. Burgess to have a tendency to exaggerate when he was drinking, to make a story more dramatic.

[75] It was Mr. Crocker's evidence that, judging from the sound of Mr. Burgess' voice, he had not been drinking since they had last seen each other. This was different from what he had told the police in a statement taken on July 23, 2011. At that time he had said he could tell in Mr. Burgess' voice that he had "maybe a couple of more beer when he got home." Although in cross-examination Mr. Crocker agreed that this was what he had said to the police, he insisted it had not sounded to him that Mr. Burgess "had continued drinking after he left my property."

[76] It is reasonable to think that Mr. Burgess, an alcoholic, may have continued to drink after he returned home and that David Crocker detected the signs of this when speaking to him. Vanessa told the police that her father was drunk that night. She told police her father was "intoxicated" when he returned from visiting the

Crocker's (*July 23 statement, 9:29:23*) and "drunk right through that entire morning". (*January 25 statement, page 136*) Based on this evidence the Defence has submitted that Mr. Burgess was significantly under the influence of alcohol when he spoke to David Crocker on the telephone, undermining the reliability of his statements.

[77] But even if Mr. Burgess had been drinking, he was able to place a call to the Crocker's and explain to David Crocker, without difficulty, what was or had been going on at his home. It was Mr. Crocker's evidence that the conversation with Mr. Burgess unfolded in a logical, coherent fashion. A problem was identified and possible options canvassed. In six or seven minutes the mission of the call was accomplished.

[78] I find there is no reason to be concerned that on the evening of July 20, 2011 David Burgess's perception, memory, or narrative coherence were impaired by alcohol. Even if he did continue drinking after he got home, I am satisfied the evidence indicates circumstantial guarantees of reliable perception, memory, and narration - each of which I have discussed - in relation to the statements he made to David Crocker during the telephone call. Nor have I found any evidence that on this occasion Mr. Burgess' alcohol consumption made him prone to exaggeration. I find nothing that suggests this was an instance of Mr. Burgess engaging in embellishment.

[79] I have also considered the issue raised by Ms. Nijhawan that the absence of any noise in the background during the call, coupled with the statement by Mr. Burgess that Vanessa was locked in her room, indicates no imminent threat and undermines the reliability of Mr. Burgess' statement about being threatened. I do not find these details raise a reliability concern. Common sense tells me that background quiet is consistent with the peak of the storm between Mr. Burgess and Vanessa having passed. It is reasonable to think that made it feasible for Mr. Burgess to place the call. And what Mr. Burgess said is that he was afraid to go to bed because he *had been* threatened not that he was, at the time of the call, *being* threatened: "Vanessa threatened to kill me", not "Vanessa is threatening to kill me."

Mr. Burgess may have Knowingly Made a False Assertion – the Sincerity Factor

[80] The Defence submits that the content of the Crocker/Burgess telephone conversation on the night of July 20 is suspect and unreliable because Mr. Burgess' motivations may have been malicious and his claim that Vanessa had threatened him, a fabrication.

[81] A known motive to lie is a factor to be considered in the threshold reliability analysis. (*Starr, paragraph 215; R. v. Smith, [1992] S.C.J. No. 74, paragraph 38*) Vanessa told police her father lied about being threatened because he was "desperate" and wanted something more than the satisfaction of "verbally assaulting" her. She described the call to David Crocker as "some kind of special frosting and sprinkles" that Mr. Burgess was looking for out of the conflict they were having that night. (*January 25 statement to police, pages 206 – 207*)

[82] The absence of evidence of a motive to lie is a relevant consideration on the issue of a hearsay statement's reliability: "…while obviously of significantly less probative value than evidence that the declarant had no motive to lie, [it] is still part of the overall evidentiary picture to be assessed when determining the reliability of the hearsay statement." (*R. v. Polimac, [2010] O.J. No. 1983 (C.A.), paragraph 80;* (*leave to appeal denied, [2010] S.C.C.A. No. 263*)

[83] In determining whether the declarant of a hearsay statement may have had a motive to lie it is relevant to consider the nature of the relationship between the declarant and the person to whom the statement is made, the context in which the statements were made, whether the declarant had anything to gain by falsifying allegations, and the contemporaneous nature of the statement. (*Blackman (S.C.C.), paragraph 43*)

[84] Ms. Nijhawan points to a text-message denial by Ms. Burgess of the threat against her father as evidence that Mr. Burgess was fabricating. In a text exchange on July 23, 2011 with Erin Crocker, which has been admitted by consent, Ms. Burgess said the following: "Im be charged with agervated asalt for my father please don't say anything cause ur dad helped my dad when he called him and told him he was sceared for his life and ur dad was putting shit in my dads head what fuckin bull shit! I didn't even say i was goin to do anything to him I wouldn't fight with him and he couldn't get a reaction from me. And the drunks needed to keep playin this fuckin sick game…" (*Exhibit 17*)

[85] In Ms. Nijhawan's submission the text message indicates the threat was never made and that Mr. Crocker and Mr. Burgess had been engaged in a nefarious scheme of some kind intended to falsely implicate Vanessa. The text is similar to what Vanessa said to police on January 25, that her father was lying as part of a vicious campaign of harassment against her. But there are several reasons why I do not find this evidence raises concerns about Mr. Burgess' sincerity in the call to David Crocker.

[86] The statements made by Mr. Burgess were to his brother-in-law with whom he enjoyed a close relationship. He had called looking for his sister, someone he relied on for support. Mr. Crocker testified that he knew Mr. Burgess to reach out to his sister when he wanted to "unload" about something.

[87] Mr. Burgess stood to gain nothing by making a malicious claim to David Crocker that Vanessa had threatened him. If he had wanted to concoct an allegation that would get Vanessa into trouble calling Mr. Crocker made no sense. Calling 911 directly would better serve a sinister purpose. Instead Mr. Burgess called for advice about a contemporaneous event and got it.

[88] Notwithstanding Vanessa's statements to police about her father's treatment of her on the night of July 20 and their fraught relationship, there is no evidence that he used false allegations as part of a mean-spirited, sadistic campaign against her. According to Vanessa's July 23 statement to police, her father had had her removed from the property on other occasions – "…he's done it tons of times since I was like 15, 16…" (*9:26:41*) There is no evidence that Mr. Burgess used false allegations of threats on those occasions. Vanessa told the police investigator she was under no conditions ("I'm a good person." *9:26:52*) and made no mention in either of her statements of any history of police involvement in the course of her relationship with her father.

[89] And if Mr. Burgess had just wanted to get Vanessa removed from the house, he did not need to call David Crocker. He could have simply dialed 911. As for Vanessa's text to Erin Crocker on July 23 where she referred to a "sick game" being played by "drunks" with Mr. Crocker "putting shit" in Mr. Burgess' head, the call by Mr. Burgess to Mr. Crocker was not characterized by these elements. Although Vanessa told police "They came up with a plan" (*January 25 statement*

to police, page 252), there is no evidence of a plan between Mr. Burgess and Mr. Crocker to do anything.

[90] Mr. Burgess called with a specific focus. He explained his concerns to Mr. Crocker. The discussion about the concerns and what Mr. Burgess might do about them lasted only six or seven minutes. It was an economical call. Mr. Crocker played a benign, advisory role. Nothing about the conversation suggests there was a vindictive motivation behind the call or scheming engaged in by the two men.

[91] According to Mr. Crocker the call from David Burgess was unprecedented. He had never before heard his brother-in-law mention calling 911.

Corroboration

[92] It is legitimate to consider whether there is corroborating evidence that supports the reliability of the hearsay statements. (*Khelawon, paragraph 100*) In this case, there is no physical evidence to corroborate Mr. Burgess' statements such as there was in *R. v. Khan*, [1990] S.C.J. No. 81 where a semen stain corroborated the hearsay statements. However some corroboration is found in what Ms. Burgess said in her January 25 statement to police. She told police about July 20: "I know that afternoon I was smoking a joint and he wanted to fight." (*January 25 statement to police, page 141*)

[93] In the telephone conversation when Mr. Crocker asked Mr. Burgess what he and Vanessa had been fighting about, Mr. Burgess said she had been smoking marijuana. The elements of Mr. Burgess and Vanessa "fighting" and Vanessa smoking marijuana are present in one of the hearsay statements and in what Vanessa told police.

[94] I do not find it undermines the corroborative power of Ms. Burgess' statement about smoking a joint that the call to David Crocker occurred in the evening, not the afternoon of July 20. Ms. Burgess described to police protracted conflict with her father that continued well after he returned from his visit to the Crocker's. There is enough of a nexus between what Vanessa said to police and Mr. Burgess' statement to David Crocker to constitute corroboration.

[95] Ms. Burgess' statement to the police confirmed the fact of the call. When a police investigator asked if her father had gone out to the garage she said: "That's

where he called Dave from." (*January 25 statement to police, page 175*) This would also explain why David Crocker heard no background noise during his conversation with Mr. Burgess. And while this statement by Vanessa does not corroborate any of the content of the call, another echo of what David Burgess said to David Crocker is found in the discussions Vanessa had with police about the call. She said that when her father called Mr. Crocker she was in her room (*January 25 statement to police, page 177*) and that when Mr. Burgess was "outside" making the call she was "completely leaving him alone." (*page 207*)

[96] Ms. Nijhawan has argued that Mr. Burgess' statement to Mr. Crocker that Vanessa was locked in her room and wouldn't speak to him cuts against the reliability of his claim that she had threatened him, that is to say, these statements suggest Mr. Burgess had nothing to fear, contradicting the hearsay evidence and tainting its reliability. I do not agree. As I said earlier, these statements are consistent with a threat being made and the person making the threat withdrawing, at least temporarily. It could explain why David Crocker assessed Mr. Burgess as "concerned and worried" at the time of the call but not "scared." And, as I have noted, Mr. Burgess' statement about Vanessa's whereabouts is corroborated by what Vanessa herself told police.

Weighing Probative Value against Prejudicial Effect – The Cost/Benefit Analysis

[97] As the Supreme Court of Canada stated in *Blackman*: "…evidence may only be admitted if it relates logically to an issue in the case. Without this relationship, the proposed evidence, regardless of whether it is in hearsay form or not, has no probative value and is therefore inadmissible." (*paragraph 29*) Even admissible, logically probative evidence can be excluded where its potential probative value is slight and its potential prejudicial effect on the fair trial of the accused is significant.

[98] The claim that the prejudicial effect of the evidence exceeds its probative value is a weighing exercise that is usually best conducted at the ultimate reliability assessment stage. (*R. v. Spackman, [2012] O.J. No. 6127 (C.A.), paragraph 118*) The probative-value-versus-prejudicial-effect assessment involves a "case-specific factual inquiry." The relevant factors in the assessment of probative value can

include: "…the strength of the evidence, the extent to which the facts the evidence tends to establish are at issue in the proceedings, and the extent to which the evidence supports the inferences advanced." A prejudicial effect assessment may engage considerations of "whether the evidence reveals discreditable conduct not charged in the indictment, confusion of issues, the ability of the accused to respond to the evidence, [and] whether the evidence is apt to give rise to an inference of guilt through propensity reasoning…" (*Spackman, paragraph 116*) Evidence should be excluded where, rather than establishing what an accused may have done, it invites inferences to be drawn about the accused's character. (*Spackman, paragraph 117*)

[99] I find the David Burgess hearsay evidence is probative of issues I will be deciding. As I have previously discussed, the issue of motive or *animus* is relevant. The evidence is relevant to the issue of what was happening around 9 p.m. on July 20, 2011 at the Burgess home, and to the assessment of Ms. Burgess' statements about that, that is, the *W.(D.)* analysis. I am satisfied there is probative value in the evidence while being mindful that the admissibility *voir dire* "…is not intended, and cannot be allowed by trial judges, to become a full trial on the merits." (*Blackman (S.C.C.), paragraph 57*)

[100] I find the hearsay evidence carries no prejudicial-effect risks. I am well aware that hearsay statements about a threat having been made cannot be used to infer that Ms. Burgess was of bad character and therefore more likely to have assaulted her father. It is not evidence that will confuse any of the issues I have to determine and, on the issue of Ms. Burgess being able to respond to it, I note that what Mr. Crocker alleges Mr. Burgess said to him was put to Vanessa by police on January 25, 2012 when she was interviewed; what she said in that statement - a denial of threatening her father - being evidence before me.

[101] And as I mentioned, Ms. Burgess denied the threat allegation in the text exchange with Erin Crocker on July 23. (*Exhibit 17*)

[102] The Vanessa Burgess/Erin Crocker texts is evidence to be considered at the ultimate reliability stage. In the probative value/prejudicial effect analysis Vanessa's text to her cousin is another example of her having been able to provide

a response to the allegation that she had threatened her father – "I didn't even say i was goin to do anything to him".

[103] Another issue best addressed at the ultimate reliability stage is the reliability of the narrator's evidence. At this point there is nothing about Mr. Crocker's evidence that causes me to conclude it "is so deficient that it robs the out-of-court statement of any potential probative value." (*R. v. Humaid, [2006] O.J. No. 1507 (C.A.), paragraph 57*) I have already dealt with, for admissibility purposes, the apparent inconsistency between what Mr. Crocker said to police and what he now says about whether he detected in Mr. Burgess' voice evidence of additional alcohol consumption. Any further consideration of this issue should occur when I am weighing all the evidence. And, furthermore, Mr. Crocker was cross-examined which equips me to assess the veracity and reliability of his evidence at the ultimate reliability stage. (*Blackman, S.C.C., paragraph 50*)

Conclusion

[104] I am satisfied all the hearsay statements made by David Burgess to David Crocker in the telephone call of July 20, 2011 clear the reliability hurdle under the principled analysis and should not be excluded under a probative value/prejudicial effect assessment. There are sufficient circumstantial guarantees of their truthfulness and accuracy notwithstanding the unavailability of David Burgess for cross-examination. The statements are relevant, reliable evidence for me to consider.

[105] My thanks to Mr. Martin and Ms. Nijhawan for their helpful written and oral submissions.