

IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

R. v. B.T., 2012 NSPC 87

Date: October 1, 2012

Docket: 2388561 -
2388565

Registry: Halifax

BETWEEN:

Her Majesty The Queen

v.

T.(B.)

**DECISION ON THE ADMISSIBILITY OF THE POLICE STATEMENT OF
JERRICHO UPSHAW**

JUDGE: The Honourable Anne S. Derrick

HEARD: September 20, 21, 24, 25, 26, and 27, 2012

DECISION: October 1, 2012

CHARGES: sections 235, 344, 355(b), 342(1)(c), and 88(1), of the *Criminal Code*

COUNSEL: Ronald Lacey and Kimberly McOnie, for the Crown
Luke Craggs, for T.(B.)

By the Court:

Introduction

[1] This is my decision on whether a statement given by Jerricho Upshaw to police on November 21 and 22, 2011 should be admitted into evidence at the first degree murder trial of T.(B.), a young person under the *Youth Criminal Justice Act*. Following Mr. Upshaw's refusal to testify at T.(B.)'s trial, the Crown applied to have the statement admitted as a principled exception to the hearsay rule.

[2] T.(B.)'s trial was heard from September 11 - 28. Final submissions are scheduled for October 4. On September 27, using the principled approach to hearsay set out in such decisions as *R. v. Khelawon*, [2006] S.C.J. No. 57; *R. v. Blackman*, [2008] S.C.J. No. 38; *R. v. Couture*, [2007] S.C.J. No. 28; *R. v. F.J. U.*, [1995] S.C.J. No. 82; *R. v. K.G.B.*, [1993] S.C.J. No. 22; *R. v. Smith*, [1992] S.C.J. No. 74; *R. v. Khan*, [1990] S.C.J. No. 81, and others, I rendered a decision on the admissibility of a statement given by T.(B.)'s girlfriend, C, to police on December 8, 2011. The following is the essential background to this case which is also set out in my decision on the C statement.

Relevant Background of the Case

[3] On November 19, 2011, Glenn Oakley died as a result of being shot in the abdomen. He was found in the early evening lying on the Drysdale Road bridge in Spryfield. The police investigation into his homicide led to the arrests of T.(B.) on November 20, Jerricho Upshaw on November 21, and Christopher Picco on November 22. Mr. Upshaw will be tried in Supreme Court with a jury on a charge of second degree murder in April 2013: Mr. Picco is charged as an accessory after the fact to murder and has a jury trial in June 2013.

[4] The Crown subpoenaed both Mr. Picco and Mr. Upshaw to testify as witnesses in T.(B.)'s trial. Mr. Picco testified on September 12, 2012. It was the Crown's intention to have Mr. Upshaw in the witness box on September 13.

[5] On September 13, Mr. Upshaw, through his counsel, Brian Church, Q.C., sought to quash his subpoena on the grounds that his fair trial rights would be compromised if he was compelled to testify. His application was first advanced before me and once I determined on September 14 that I did not have jurisdiction to deal with it (*R. v. Jobin*, [1995] S.C.J. No. 31, paragraph 28), pursued in the Nova Scotia Supreme Court. By September 19, Coady, J. had dismissed Mr. Upshaw's application to quash his subpoena and denied the alternate remedy of a ban on publication of any evidence he gave at T.(B.)'s trial.

[6] Mr. Upshaw was brought into court for T.(B.)'s trial on September 20 and affirmed. He then answered only the first question put to him by the Crown, following which he resolutely refused to answer any more. I ultimately cited Mr. Upshaw for contempt and set his show cause hearing for November 23, 2012, the earliest date when all counsel and the Court can be available.

[7] In the face of Mr. Upshaw's steadfast refusal to testify, the Crown launched a *Khelawon* application to have his statement to police admitted into evidence. A voir dire was commenced. Mr. Upshaw's videotaped statement was played in court and testimony was given by the three police officers involved in obtaining the statement: Cst. Bobby Clyke, who also had arrested Mr. Upshaw, Sgt. Dwayne Kelly, and Det/Cst. Anthony Blencowe. Police officers who had had contact with Mr. Upshaw on the day he was arrested and an officer who spoke to him briefly at the police station on the morning of November 22 also gave evidence. The Crown

rounded out the evidence on the voir dire by calling Mr. Upshaw's former girlfriend, Samantha Smith, and T.(B.)'s girlfriend, C.

[8] When questioned by the Crown, C purported to have no memory of November 19, 2011. She also purported to have no memory of what she told police when she was interviewed on December 8, 2011. Attempts to refresh her memory were unsuccessful. I granted the Crown's subsequent *Khelawon* application in relation to C's police statement and found it satisfied the requirements of necessity and threshold reliability permitting it to be used as evidence on the Upshaw *Khelawon* voir dire. I have also determined that it is admissible as evidence at T.(B.)'s trial proper, still to be subject to a determination of its ultimate reliability.

[9] For its Upshaw *Khelawon* application, the Crown has also relied on evidence I have been hearing in T.(B.)'s trial proper.

The Admissibility Issue

[10] Mr. Upshaw's statement is hearsay and therefore presumptively inadmissible. (*R. v. Khelawon*, [2006] S.C.J. No. 57, paragraph 59) The admission of a witness' statement will be permitted as a principled exception to the hearsay rule if the Crown succeeds in showing, on a balance of probabilities, that the statement's admission is (1) necessary and (2) reliable. (*Khelawon*, paragraph 42) A residual discretion to exclude the statement exists even where the criteria of necessity and reliability are made out if the statement's probative value is outweighed by its prejudicial effect. (*R. v. Blackman*, [2008] S.C.J. No. 38, paragraph 33) No such basis for exclusion was specifically sought in this application.

[11] The issue I must determine on this *Khelawon* application is whether Mr. Upshaw's police statement should be admitted as evidence before me or not. Only if I admit the statement does the question of the weight it should be accorded come into play, once I am engaged in an analysis of all of the evidence to determine whether the charges against Mr. Townsend have been proven by the Crown beyond a reasonable doubt. It is at this stage of ultimate reliability a hearsay statement that has cleared the threshold reliability hurdle is assessed by the trier of fact to see if it can be relied on in deciding the issues in the case.

[12] The challenge presented by hearsay is not one of relevance. The problem with hearsay statements is "the general inability to test their reliability." (*Khelawon*, paragraph 2) This point is made in numerous cases, see, for example, *R. v. Poulette*, [2008] N.S.J. No. 455 (C.A.), paragraph 19. The contents of a statement cannot be tested as a witness can be: the possibility of misperceptions, incorrect recollections, misrepresentations and lies cannot be explored. These factors, relevant to the credibility and reliability of a statement, can only be tested if the witness is in the witness box and subject to cross-examination.

[13] The fact that a witness' statement cannot be tested through cross-examination does not however preclude it being admitted as evidence for the truth of its contents. The inability to subject evidence to the crucible of cross-examination,

... does not bar the admission of the hearsay evidence when (i) there is no real concern about whether the statement is true or not because of the circumstances in which it was made; and/or (ii) circumstances are such that the trier of fact will be able to sufficiently test the truth and accuracy of the statement. These situations are not mutually exclusive alternatives and can both be considered in assessing the admissibility of a statement. (*Khelawon*, paragraphs 49 and 61-63.)

[14] The threshold criterion of reliability is about ensuring the integrity of the trial process. The admissibility inquiry in relation to hearsay evidence is focused on the dangers of admitting such evidence. (*Couture, paragraph 77, per Charron, J.*) The evidence, although determined to be necessary, is only admissible if it is “sufficiently reliable to overcome the dangers arising from the difficulty of testing it.” (*Khelawon, paragraph 49*) In addressing the matter of threshold reliability and whether the statement should even be allowed into evidence,

... all relevant factors should be considered, 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*)

The Principled Approach - Necessity

[15] The focus in this assessment of the admissibility of Mr. Upshaw’s statement is on its threshold reliability. As conceded by counsel, there is no issue about necessity where Mr. Upshaw’s testimony is unavailable because of his absolute refusal to testify. Notwithstanding that he was given several opportunities to do so, advised about his liability for contempt and the potential penalty of a prison term, he remained unmoved. There can be no doubting his resolve.

[16] The necessity criterion is to be given a flexible definition. (*Khelawon, paragraph 78*) Necessity is made out in this case on the basis of the unavailability of Mr. Upshaw’s testimony. (*Khelawon, paragraph 78*)

The Principled Approach - Reliability

Cross-Examination

[17] Mr. Upshaw's refusal to testify puts him beyond the reach of cross-examination. All that is available to serve the truth-seeking purpose of the trial is his police statement. Untested by cross-examination such a statement presents obvious dangers which only "reasonable assurances of inherent reliability" can moderate. (*Khelawon*, paragraph 7) As noted by the Supreme Court of Canada in *R. v. Smith*, [1992] S.C.J. No. 74, paragraph 31: "...reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination." *K.G.B.* expressed a similar sentiment: "Given other guarantees of trustworthiness [absence of cross-examination] should [not] be allowed to be a barrier to substantive admissibility." (*K.G.B.*, paragraph 105)

[18] More recently, in *R. v. Couture*, [2007] S.C.J. No. 28, paragraph 116, 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.

[19] Moreover, the constitutional right guaranteed by section 7 of the *Charter* “is not the right to confront or cross-examine adverse witnesses in itself.” As noted in *Khelawon*, the adversarial trial process, of which cross-examination is a component, “is but the means to achieve the end.” The end to be achieved is trial fairness, which “embraces more than the rights of the accused.” Trial fairness must be understood in the context of “broader societal concerns” which include “society’s interest in having the trial process arrive at the truth...” (*paragraph 48*)

[20] Undue emphasis on the absence of cross-examination as a basis for excluding a hearsay statement “may have the effect of leaving a witness’ otherwise reliable and relevant evidence altogether unutilized.” (*Couture, paragraph 117, per Rothstein, J.*) This would not serve the broader objectives to be achieved by the truth-seeking trial process.

Videotaping

[21] Indicia of credibility, and therefore reliability, are available to the trier of fact when the hearsay statement has been videotaped. Cues in the nature of the witness’ reaction to questions, hesitation, and degree of commitment to the statement being made, and features of the relationship between the interviewer and the witness, such as the extent to which the testimony of the witness is the product of the investigator’s questioning are available to be observed and assessed where there is a videotaped statement. (*R. v. K.G. B., [1993] S.C.J. No. 22, paragraph 100*) Videotaping was enthusiastically endorsed by the Supreme Court of Canada in *K.G.B.*:

...In other words, the experience of being in the room with the witness and the interviewing officer is recreated as fully as possible for the viewer. Not only does the trier of fact have access to the full range of non-verbal indicia of credibility, but there is also a reproduction of the statement

which is fully accurate, eliminating the danger of inaccurate recounting which motivates the rule against hearsay evidence. In a very real sense, the evidence ceases to be hearsay in this important respect, since the hearsay declarant is brought before the trier of fact. (*paragraph 100*)

An Accomplice is Not Inherently Untrustworthy

[22] As held by the British Columbia Court of Appeal in *R. v. Naicker*, [2007] B.C.J. No. 2626, *paragraph 44*, a case brought to my attention by the Crown, there is no rule of evidence that precludes the admission of the statement of an accomplice who is tried separately. The Court was clear in its view that the principled approach to hearsay “has been developed as a flexible approach not to be impaired by rigid, preconceived notions of reliability.” Where the criteria of necessity and reliability are satisfied, a statement obtained by police from an accomplice should not be treated as any less admissible for the truth of its content than a statement by any other witness. (*Naicker, paragraph 45*)

[23] *Naicker* referenced *R. v. Vetrovec*, [1982] 1 S.C.R. 811 which contains the following comments about the reliability of accomplice evidence, rejecting “a fixed and invariable rule” for all accomplices:

...All that can be established is that the testimony of some accomplices may be untrustworthy. But this can be said of many other categories of witness. There is nothing inherent in the evidence of an accomplice which automatically renders him untrustworthy.

Voluntariness and Other “Overriding Policy Considerations”

[24] As a starting point, as required by *K.G.B.*, I will consider the circumstances under which Mr. Upshaw’s statement was obtained to satisfy myself that it was made voluntarily. “... The test developed by [the Supreme Court of Canada] for the admission of confessions is well-suited to making a threshold determination of whether the circumstances under which the statement was made undermine the

veracity of the indicia of reliability." (*K.G.B., paragraph 115*) The Crown is required to establish that Mr. Upshaw's statement to police was not obtained as a result of any threats, promises, inducements, coercion, or oppression. (*R. v. K.G.B., [1993] S.C.J. No. 22, paragraph 117; R. v. F.J.U., [1995] S.C.J. No. 82, paragraph 49*) I find they have done so: the statement Mr. Upshaw eventually provided was voluntarily made. Therefore the statement cannot be said to be unreliable due to involuntariness.

[25] Although the conditions for Mr. Upshaw at the police station were uncomfortable - he spent over 20 hours in a brightly lit, windowless, cinderblock room with only a chair and, at times, a table, and he complained about being cold and showed signs of a respiratory illness - his needs were responded to promptly. He was given bathroom breaks, food, water, and a blanket when he requested them. Around 12:30 a.m. on November 22 he was left alone to go to sleep, which he did.

[26] Sgt. Kelly and Det/Cst. Blencowe pressed Mr. Upshaw hard over the approximately two and half hours they interrogated him on November 21, from 10 p.m. until almost 12:30 a.m. He actually held up very well, notwithstanding the fact that he was just a month past his 18th birthday. He was sober, not under the influence of any substances, and showed himself to possess a remarkably agile mind. The officers succeeded in winding him up, but Mr. Upshaw could not be provoked or enticed into talking. Det/Cst. Blencowe acknowledged that they got no admissions or inculpatory statements out of Mr. Upshaw that night. It was only the next day, in the friendlier company of Cst. Clyke that Mr. Upshaw started to talk.

[27] Mr. Upshaw was young but not a complete novice when it came to interacting with the police. Although the officers noted that this was "by far" the

most serious matter in which he had ever been involved, it appears he had once before been subject to a police interrogation as an adult. Sgt. Kelly reminds him that he had been questioned two weeks earlier in relation to having a handgun after a robbery in the neighbourhood. Cst. Clyde also mentions this incident when he talks to Mr. Upshaw the next day. The officers all remark on Mr. Upshaw having some history with the police, establishing that on November 21/22, 2011 he was not uninitiated when it came to dealings with them.

[28] Mr. Upshaw was accorded, and exercised his right to counsel. He had a duty counsel phone call and then met for approximately an hour and a half at the police station with a senior criminal lawyer.

[29] Throughout the first interrogation session conducted by Sgt. Kelly and Det/Cst. Blencowe on the night of November 21 Mr. Upshaw doggedly asserted his right to silence, invoking it by repeating “I have nothing to say” on approximately forty occasions. He also told police on a number of occasions that he wanted to go to sleep and to be left alone. He also said repeatedly that he wanted to talk to a lawyer again, which the police refused to facilitate as his jeopardy had not changed. In light of these facts, I raised with counsel and have considered whether there are right to silence/right to counsel considerations that must be factored into an assessment of threshold reliability. I believe the answer to that question is yes, on the right facts, but not in this case. In reflecting on this issue I have found the following commentary from the Ontario Court of Appeal in *R. v. Hamilton*, [2011] O.J. No. 2306, paragraph 155 to be helpful:

Khelawon, in our view, requires trial judges to ask two questions in deciding whether a witness statement should be admitted for its truth:

1. On the basis of the evidence presented, is the trier of fact able to sufficiently test the truth and accuracy of the statement in issue?
2. If the answer to question one is “yes”, are there overriding policy considerations that would prevent the statement from being admitted for its truth?

[30] This latter consideration is also reflected in *K.G.B.* where the Supreme Court refers to the requirement that the trial judge must, as part of the admissibility analysis, be satisfied that there are “no other factors which would tend to bring the administration of justice into disrepute if the statement was admitted as substantive evidence.” (*K.G.B.*, paragraph 122)

[31] This is not a situation where I am determining if Mr. Upshaw’s *Charter* rights were violated. Mr. Upshaw’s rights are not in issue before me. My narrow concern is with the conduct of the police interrogation and any “overriding policy considerations” that would tend to bring the administration of justice into disrepute if the statement was admitted as substantive evidence. As *Hamilton* notes, such overriding policy considerations that would prevent the statement from being admitted for its truth are to be considered once the issue of threshold reliability has been assessed. Even though I have dealt with the issue out of sequence, given the current state of the law relating to police interrogations, there is nothing in the circumstances of Mr. Upshaw’s that would justify my returning to this issue.

Appreciating the Seriousness of the Situation

[32] Mr. Upshaw was given a police caution by the investigators who also impressed on him the gravity of the situation. They told him not to lie. He was told he would be charged with first degree murder, which, as the police officers pointed out, is as serious as it gets.

Mr. Upshaw's Videotaped Statement on November 21 with Sgt. Kelly and Det/Cst. Blencowe

[33] The videotaping of Mr. Upshaw's statement provides the opportunity to observe his demeanor and responses during the interrogation. This assists the assessment of the statement's probable reliability. I have also looked closely at how the interrogation evolved and whether, as the Defence claims, what Mr. Upshaw eventually said to the police was nothing more than a re-packaging of what they had told him. It is very difficult to see how the Crown's application to have the Upshaw statement admitted could succeed if that was the case.

[34] On November 21, Sgt. Kelly and Det/Cst. Blencowe did most of the talking. They started out by informing Mr. Upshaw that a "very extensive investigation" had been conducted. They wasted no time telling him they had "uncovered a substantial amount of information" that pointed to him being responsible for Mr. Oakley's death. Mr. Upshaw was told T.(B.) had been arrested and interviewed "at length". Sgt. Kelly and Det/Cst. Blencowe said that Mr. Upshaw was frequently in the area where Mr. Oakley was found and suggested that he had seen Mr. Oakley in that area at the same time every night. They exaggerated the extent of the video footage of him and T.(B.) from the night of November 19, suggesting they had images of them "...roaming around and walking the trails and all that stuff..." Mr. Upshaw told them he had nothing to say when the officers asked him to describe what he had been doing on November 19, and again asserted his right to silence when they inquired about him having an alibi.

[35] Mr. Upshaw was told that there were police searching Christopher Picco's residence for a gun and a wallet. The officers indicated that they would be doing a ballistics analysis on the gun barrel and the bullet recovered from Mr. Oakley's

body. They showed him the video stills from the Royal Bank of Canada on Herring Cove Road. Mr. Upshaw responded with repeated statements that he had nothing to say when he was asked to identify the individuals shown in the photographs. The images from the Bank are, as has been conceded by Defence, T.(B.) and Mr. Upshaw.

[36] Sgt. Kelly then laid out the police theory of the homicide:

So we've got you and him together. You're out on the trail. And an old man comes stumbling by, an old man that you've got issues with, that you call a diddler and you call a whole bunch of things, and you tell this young 17 year old to shoot him, you tell him to shoot him. So you're creating the plan for this young 17 year old, who is a young person -- you're an adult. So you're giving this guy guidance, as the oldest person there, the person with the most experience with the police, and you're telling him to shoot this guy that you don't like because you think he's a diddler. And you also know that he comes by this very area every night at 7:00, 7:00 every night he walks that area, every single night. And several times a week you're underneath that bridge smoking dope, lighting fires, shooting guns, doing all sorts of things, drinking, doing stuff you're not supposed to be doing. And you've got this young, impressionable 17 year old, who is a follower -- he's not a leader, he's not any stretch of a leader. And when we talk to your friends, the first thing that they tell us, "Hey, Jericho, he's a leader, man, he's the leader. If anything is going down, Jericho is the one who's going to organize it, he's the man." So we've got this young kid with a gun that he cut the barrel off and cut the stock off in his bedroom, and he's out there, not really knowing what he's doing. And you get you, the more experienced guy, telling him, "Yeah, do it, man, do it, do it, shoot him." And he takes your advice, he takes your advice, he takes your order. You ordered the hit and he took it, he did it, he

followed, he shot him. You're halfway up the bank, you're halfway up the bank, he's standing on the railing, he's got his arms on the railing, there is yelling back and forth, and then, "Bang," and it's, "Holy fuck, let's the hell out of here," and you hightail it. Where do you go? Not very far, you don't go very far. Because it's not very long before you're back. And holy fuck, he's dead. He's as white as a ghost. He's as white as a ghost. So then you go up to Chris's and then you hit the bank. And "Oh-oh." What happens at the bank? Not what you expected. You don't get the big load that you think you were going to get, not at all.

[37] Sgt. Kelly goes on to tell Mr. Upshaw that they don't know if the shooting was planned months in advance, if Mr. Oakley had been targeted and it was a matter of waiting for the opportune time to come around, or if it was just Mr. Upshaw and T.(B.) "screwing around and things got out of control and it got to the point where it passed the point of no return and it just happened." Sometimes, as Sgt. Kelly puts it to Mr. Upshaw, "Accidents do happen."

[38] Det/Cst. Blencowe also has a go at putting the investigative theory to Mr. Upshaw. He includes the scenario of Mr. Oakley's wallet being taken:

Then you run off, you hide in the woods for a bit, then you come back. It wasn't bad enough you shot the old fella. Then you go and you rip the wallet off of him...And then like two little hyenas, you take that gun and you run back to Chris's house and you give it to Chris.

[39] Mr. Upshaw is also given a description of what the police know about the failed efforts at the Royal Bank ATM's. The police tell him they have pieced together that he told his girlfriend, Samantha Smith, about what happened, suggesting that perhaps he did so because his conscience was pricking at him, and that she and her mum then went for a walk, find Mr. Oakley, and call 911.

[40] At this point, Sgt. Kelly plays a portion of the re-enactment they conducted with T.(B.). I note that I previously ruled that re-enactment to be inadmissible evidence in this trial but that does not have a bearing on the police use of it in the questioning of Mr. Upshaw. The playing of the re-enactment is followed by a review of the police theory of Mr. Upshaw's involvement. Sgt. Kelly says: "It's all your plan, man. You told him to kill him, you told him to go back to rob him, you told him to take the cards up to the bank. It's all your story."

[41] Although the officers consistently emphasize their belief that Mr. Upshaw did not pull the trigger, they continue to press the theme that he gave the command that led to Mr. Oakley being shot by T.(B.). Mr. Craggs argued that in the interrogation, Mr. Upshaw shows an understanding of the parties doctrine but I do not see this. Mr. Upshaw wants to know from Det/Cst. Blencowe why, if the police believe that T.(B.) pulled the trigger, he – Jerricho Upshaw – is charged with murder. Det/Cst. Blencowe, seeing that he does not understand party liability, suggests he should have spent longer discussing this with his lawyer. (On November 22 when he is talking to Cst. Clyke, Mr. Upshaw is still struggling with why he is being charged with murder. After giving Cst. Clyke some details, he asks at approximately 11:08 a.m. on November 22, "Did anything I just say there lessen my charges?" I view this as a further example of Mr. Upshaw not understanding the parties doctrine: just before saying this he asked Cst. Clyke: "How come Picco and anybody else that knew isn't here, in this situation?")

[42] Returning to the Kelly/Blencowe interrogation the night before, Det/Cst. Blencowe tells Mr. Upshaw that perhaps he has a different version of events than T.(B.) even though T.(B.) seemed "pretty credible" to them. At this point, Mr. Upshaw wants to see the re-enactment again. The re-enactment video contains

information about Mr. Oakley lying on the bridge with his mouth open and the fact that his wallet had a chain attached to it. The re-enactment contains a sequencing of events: dropping the gun at Christopher Picco's, seeing the dead body and getting the wallet, taking the RBC client card and the credit card, and going to the Bank.

[43] The video is stopped. It is 11:55 p.m. The police have been talking to Mr. Upshaw for nearly two hours. Sgt. Kelly asks him: "Is there anything you can say to help yourself...or Ben? This is the point when Mr. Upshaw's demeanor seems to change. This time he answers the question by saying: "Not until I talk to...a lawyer." He asks for the re-enactment video to be played again, from the beginning, and the police oblige him by doing so.

[44] Once the video is played, Det/Cst. Blencowe puts it squarely to Mr. Upshaw:

He puts you there for the shooting, he puts you there with him afterwards, he puts you there with the gun being returned, he puts you there with the cards....That's enough to make you a party to the offence of murder.

[45] Mr. Upshaw still does not grasp how he can be a party to the murder. He now focuses on emphasizing that he wants to talk to a lawyer. He reiterates this approximately nine times despite being told that option is spent. He then returns to an earlier theme and tells the officers he has nothing to say. They suggest he should explain to them the reason for the shooting: "The only thing you can do right now is to get some motive behind it." They once again try to explain the parties doctrine to Mr. Upshaw. He doesn't get anywhere protesting the murder charge: he asks several times what he is liable for. Det/Cst. Blencowe reiterates: "You're getting charged with first degree murder."

[46] When urged at this point by the officers to tell them his side of the story, Mr. Upshaw says they probably wouldn't listen to him. Then once again, he emphasizes that he wants to speak to a lawyer. Plainly understanding that the police are not going to facilitate that for him, Mr. Upshaw says he'll talk to a lawyer "tomorrow at the courthouse." When it is suggested that he doesn't care where the "wheel" he is "spinning", lands, Mr. Upshaw replies: "I do, but I need to talk to a lawyer about it." This is the concluding theme as the interrogation ends for the night, with Mr. Upshaw saying that Mr. Oakley did not die by his hand.

[47] The reason I am reviewing the content of Mr. Upshaw's interrogation in such detail is because, as I noted earlier, it is the Defence submission that the interrogation produced a statement that is inherently unreliable, that Mr. Upshaw was supplied with information that he then turned around as his version of events. I am being invited to view Mr. Upshaw's statement as simply a re-modeled version of T.(B.)'s earlier statement to police, not a version borne of Mr. Upshaw's direct involvement. The Defence argues that Mr. Upshaw grasped what is involved in being a party to a murder and crafted a story that demonstrated he played no such role. It is the contention of the Defence that Mr. Upshaw gave the police admissions that cannot be trusted, that placed the lion's share of culpability at T.(B.)'s feet and diminished his own involvement. These submissions require me to examine what Mr. Upshaw eventually told police about his role in what happened on the night of November 19. To admit Mr. Upshaw's hearsay statement I must be satisfied either that because of the way it came about its contents can be trusted or that the circumstances permit me to sufficiently assess its worth.

Mr. Upshaw's Videotaped Statement on November 22 with Cst. Clyke and Sgt. Kelly

[48] At the resumption of the interrogation on November 22, which was also videotaped, the police adopted a different and more profitable approach. They brought in Cst. Clyke, an officer well known to Mr. Upshaw who enjoyed a positive rapport with him. Mr. Upshaw was clearly more at ease with Cst. Clyke, who does not antagonize him the way Sgt. Kelly in particular had done the night before.

[49] Mr. Upshaw tells Cst. Clyke he does not understand why he is still in custody. "I'm not the one [who] pulled the trigger", he says. He reiterates that he does not want to talk, that he is doing what his lawyer told him to do. Not long after this, Mr. Upshaw begins to open up only to pull back, saying "I said as much as I want to say, man. I just really want--I'm going to talk to my lawyer." When Cst. Clyke emphasizes that he needs to tell his side of the story, Mr. Upshaw makes a reluctant start, interspersing tentatively offered details with repeated assertions that he wants to talk to his lawyer. He tells Cst. Clyke that: he wasn't that close to where Mr. Oakley was standing, T.(B.) didn't talk after he pulled the trigger and they just ran, he told his girlfriend, Sam because "she is good" – "Look, I needed someone to talk to about it, and I knew if I talked to Sam,...Sam would do something." Mr. Upshaw describes himself as a horrified witness: "I was just there, Bobby", he says to Cst. Clyke. He admits to going back to look at Mr. Oakley: "Because I just wanted to see if—what happened...Like, yeah, I wanted to know if he was dead." He denied taking the wallet saying that was T.(B.) and said he did not stay to watch T.(B.) take it. He emphasizes that he did not tell T.(B.) to kill Mr. Oakley. He mentions the gun, saying to Cst. Clyke: "And I didn't know B had that 22 when we were walking..."

[50] At this point, Mr. Upshaw starts to describe being out walking with T.(B.) and seeing Mr. Oakley up on the bridge, staring down at them. T.(B.) was behind him, there was a shot and Mr. Upshaw “took off like a bat out of hell.” This disclosure leads to Mr. Upshaw crying and talking about being traumatized by the experience. He says the reason he went to Sam’s house and told her was because he knew she would do something, which she did by going for a walk with her mother leading to them discovering Mr. Oakley and Mr. Lamond calling 911. He continues crying, at times quite heavily.

[51] By now, Cst. Clyde is getting more out of Mr. Upshaw. Mr. Upshaw admits to going to Christopher Picco’s apartment on River Road after the shooting although he says “I didn’t tell Picco...I’m not the one that told Picco.” He acknowledges he went to the bank with T.(B.) He continues to deny giving T.(B.) any order to shoot Mr. Oakley and despite forceful, aggressive questioning from Sgt. Kelly who takes over the interrogation, Mr. Upshaw refuses to admit to knowing about the gun.

[52] Mr. Upshaw does show that he is familiar with the sawed off .22. He demonstrates to Sgt. Kelly how big it is: “Do you want to know how big it is? It’s about that big.” And he tells him that where it “fits perfectly” is “right down your pants.”

[53] It also comes out that Mr. Upshaw had seen Mr. Oakley walking over the Drysdale Road bridge quite often. When Sgt. Kelly asks him why, when he and T.(B.) left Christopher Picco’s, T.(B.)’s girlfriend didn’t go with them, Mr. Upshaw’s answer indicates he knew she was there that evening, he just says he doesn’t know why she stayed behind.

[54] Mr. Upshaw tells Sgt. Kelly that he was walking on the path with T.(B.), and had climbed up the path ahead of T.(B.) when the shooting occurred. Other answers that come out as Sgt. Kelly continues the questioning are: that Mr. Upshaw told his girlfriend, Sam, he saw Mr. Oakley get shot; that his girlfriend was “going off” at him, calling him “an idiot”; that the conversation happened “out by the driveway”; that Mr. Upshaw didn’t tell Sam’s mother about what he had seen and that he knew Sam and her mother went for a walk with her dog. In response to Sgt. Kelly dismissing his claim that he did not know T.(B.) had the gun, Mr. Upshaw talks about “fooling around” at Chris Picco’s place with “one of the pellet guns that looks kind of real.” He later describes this as an Airsoft pellet gun. A little later he confirms Cst. Clyke’s statement that there were guns being “passed around” at the Picco apartment before he and T.(B.) went out for their walk to the bridge. Mr. Upshaw says: “That was my first time being there that they were ever passing around a gun.” He doesn’t admit to what he is told Mr. Picco has said, that he gave him the wallet. Mr. Upshaw tells Cst. Clyke he witnessed T.(B.) handing the wallet to Mr. Picco in the bedroom.

[55] Mr. Upshaw also tells Cst. Clyke and Sgt. Kelly that after the shooting, when he and T.(B.) were running, T.(B.) held on to the gun. He claimed not to know what happened to it once they got to Christopher Picco’s. He says to Cst. Clyke that he can only remember Christopher Picco being at the apartment when he and T.(B.) got there. He and T.(B.) then go back to see what had happened to Mr. Oakley. Mr. Upshaw says he only saw Mr. Oakley’s face and when asked what that looked like, tells Cst. Clyke: “...his mouth was wide open.” He then admits to seeing T.(B.) take the wallet, pulling on a chain to retrieve it. After this they return to Mr. Picco’s apartment. At the apartment, Mr. Upshaw says T.(B.) was showing people the wallet. They next go to the bank. Mr. Upshaw says he had

the credit card, given to him by T.(B.) T.(B.) had the RBC client card. Mr. Upshaw eventually admits that it was after this that he went and told Sam what had happened. There were too many people around at the Picco apartment to do so before.

[56] Cst. Clyke asked Mr. Upshaw very specifically what he said to Sam when he told her:

CST. CLYKE: ... what did you tell Sam when you robbed somebody?

MR. UPSHAW: I don't know. What did I tell Sam?

CST. CLYKE: What was the phrase? "We robbed him," and then she asked something and you said, "Well, you don't have to worry about him being a diddler anymore."

MR. UPSHAW: I didn't say that. What I said was, "This is" -- I brought up the -- how I brought up, it happened, and, uh, I said, "You know that guy that everybody says is a diddler?" and she said, "Yeah," and I said, "Well, nobody's going to -- nobody's going to be saying he's a diddler anymore," and she's like, "What do you mean?" and then I told her, and then she started freaking and I was, like, "Yeah." And then she started freaking some more and I was, like, "You don't got to tell me," blah, blah, blah, blah.

CST. CLYKE: But you know what, man?

MR. UPSHAW: And then I...

CST. CLYKE: Saying that, it doesn't sound like someone that's scared. If I just watched someone get popped, that's not how I'd be telling my girlfriend.

MR. UPSHAW: I didn't know how to say it. How do you say something like that? How do you say something like that?

CST. CLYKE: "Oh my God, Ben just shot someone." Not, "Well, you know that guy that's a diddler? Well, he's not going to be diddler anymore."

MR. UPSHAW: Well, I didn't say that. I said, "You know that guy that people call a diddler?" And she said, "Who, Glenn?" And I said, "Yeah." And she said, "What

about him?” and I said, “People can’t call him a diddler anymore,” or something like that....

[57] What is notable about this exchange is that Mr. Upshaw did not simply adopt what Cst. Clyke put to him as the content of what he said to his girlfriend. Mr. Upshaw twice re-stated what Cst. Clyke suggested had been his words, making it clear what he had actually said. This is not indicative of a person who is parroting what he has been or is being told.

Assessing Threshold Reliability

[58] The Defence characterizes Mr. Upshaw’s statement as unreliable due to his motivation to lie and the manner in which the statement was obtained. The Defence contends that when Mr. Upshaw did start talking he simply fed the police what they had previously told him and that he was lying in order to minimize his own culpability. In the Crown’s submission, Mr. Upshaw had information acquired from direct involvement that he eventually decided to share. In deciding whether to admit Mr. Upshaw’s statement I must “start from the premise that [it is] presumptively inadmissible and then search for indicia of trustworthiness that can overcome the general exclusionary rule.” (*Couture, paragraph 85, per Charron, J.*)

[59] While it can be seen that some of what Mr. Upshaw said to police bears a resemblance to what they told him about at various points in the interrogation, aspects of Mr. Upshaw’s statement can be verified from other sources of evidence. These confirmatory details imbue Mr. Upshaw’s statement to police with probable reliability. They provide the comfort I need to be satisfied Mr. Upshaw’s statement clears the threshold reliability hurdle and should be admitted into evidence.

[60] The following is the corroborative evidence that satisfies me that the Crown has established the threshold reliability of Mr. Upshaw's statement on a balance of probabilities:

- Mr. Picco's evidence corroborates aspects of Mr. Upshaw's statement. I note that when the police were interrogating Mr. Upshaw, Mr. Picco had not yet been arrested and questioned. This means that what details the police told Mr. Upshaw did not come from Mr. Picco.
- Mr. Upshaw vigorously denied there was any plan to shoot Mr. Oakley. This is consistent with Mr. Picco's evidence that there was no such plan although Mr. Picco did say T.(B.) and Mr. Upshaw left with the gun to test it.
- Mr. Upshaw told police that T.(B.) shot Mr. Oakley. Mr. Picco testified that this is what T.(B.) told him. Mr. Upshaw said he did not tell Mr. Picco. This is consistent with Mr. Picco's evidence.
- Mr. Upshaw told police that after the shooting T.(B.) ran with the gun and they went back to Mr. Picco's apartment. This means that according to Mr. Upshaw, he and T.(B.) arrived back at Mr. Picco's with the gun. Mr. Picco's evidence corroborates this. He testified that T.(B.) and Mr. Upshaw came back to his apartment with the gun and T.(B.) told him he had shot someone. Mr. Picco then stashed the gun. He moved it later to the basement laundry room in his building where police seized it.
- Mr. Upshaw told police the gun was a .22. The police officers had not mentioned this before Mr. Upshaw said it. The gun that was seized from Mr. Picco's apartment building is a .22 rifle. Mr. Upshaw gave Sgt. Kelly and Det/Cst. Blencowe an indication of its dimensions which approximate the

size of the gun in its sawed-off condition. The police had not shown him anything depicting the gun.

- The gun that Mr. Upshaw said was used to shoot Mr. Oakley is according to Mr. Picco the same gun hidden by him and seized by police. The firearms and toolmark specialist, Terry Pipes, testified that the bullet recovered from Mr. Oakley's body cannot be eliminated as coming from the .22 Ruger rifle that was seized from Mr. Picco's apartment building.
- Mr. Upshaw acknowledges in his statement to the police that he saw the gun being passed around at Mr. Picco's apartment and touched it which is consistent with Mr. Picco's description of the gun being out and handled before T.(B.) and Mr. Upshaw left the apartment with it.
- Mr. Upshaw also told police that he was "fooling around" at Chris Picco's place with "one of the pellet guns that looks kind of real." A little later, he refers to this as an "Airsoft" pellet gun. The police seized a CO2 pellet gun from Mr. Picco's apartment during the execution of a search warrant there in the small hours of the morning on November 22.
- Mr. Upshaw's description of how Mr. Oakley was shot, from a location below the bridge where he was standing, is reflected in the expert opinion of Dr. Marnie Wood, the forensic pathologist and medical examiner. She gave evidence that if Mr. Oakley had been in the standard anatomical position (i.e. standing up) when shot, the bullet travelled upwards in the body. The bullet would have had this trajectory if fired, as Mr. Upshaw told police it was, from below the bridge where Mr. Oakley was seen standing. Mr. Oakley's stance – standing on the bridge looking down – is information Sgt.

Kelly and Det/Cst. Blencowe mentioned to Mr. Upshaw but it is also a detail Mr. Upshaw described repeatedly without variation once he started talking about what happened at the bridge.

- Mr. Upshaw told police that when he saw Mr. Oakley's body, Mr. Oakley's mouth was wide open. This is also the description given by John Lamond, who lived near the Drysdale Bridge and saw Mr. Oakley lying there. This is a detail that Mr. Upshaw could have absorbed the night before when Sgt. Kelly and Det/Cst. Blencowe played him the re-enactment. Yet when Mr. Upshaw mentions the "open mouth" to Cst. Clyke on November 22 it is in the context of Cst. Clyke asking him: "What did his face look like?" Mr. Upshaw answered: "Um, his mouth was wide open." Mr. Upshaw did not mention other descriptive details contained in the re-enactment video that included Mr. Oakley's face being "as white as a ghost" and closed eyes. This indicates that by the time Mr. Upshaw was talking to Cst. Clyke and describing Mr. Oakley's open mouth, he was not just repeating what he had heard many hours before.
- Another detail that Mr. Upshaw knew from the Sgt. Kelly and Det/Cst. Blencowe interrogation was that Mr. Oakley's wallet was on a chain. This is established by the photographs of the recovered wallet and from Mrs. Oakley's testimony. By the time Mr. Upshaw discloses that he saw T.(B.) take Mr. Oakley's wallet, something he had been denying, it is 2:30 p.m. on November 22 and he has been in custody for approaching 24 hours. It has been some time at this point since the chain came up during the Kelly/Blencowe interrogation the night before. The context in which Mr. Upshaw refers to this detail undermines any suggestion that this was a

regurgitated detail. Cst. Clyke had been asking Mr. Upshaw if anyone had checked Mr. Oakley to see if he was alive. Mr. Upshaw responded by saying: “No. Like, he – like that, to his hand, and moved his hand and just pulled a, uh, a chain.” Mr. Upshaw did not merely mention the wallet chain; he stretched his hand out to describe what he was saying he observed.

- At around 2:42 p.m. on November 22 Mr. Upshaw tells Cst. Clyke about going to the Bank, and says that T.(B.) gave him the credit card from the wallet. Det/Cst. Blencowe had put it to Mr. Upshaw the night before that he and B.(T.) had visited the Bank, T.(B.) with the Royal Bank client card and Mr. Upshaw with the credit card. For the purposes of assessing reliability, it really doesn't matter that this information was given to Mr. Upshaw during his interrogation: the RBC video stills confirm it and the documentary evidence (Exhibit 55) indicates that attempts were made to withdraw money in the 8:25 – 8:26 p.m. range on November 21, 2011 at an ATM at the Herring Cove Royal Bank. The ATM is identified in this evidence as the ATM which Mr. Upshaw can be seen at in the video stills. What Mr. Upshaw told police about going to the Bank he knew because he was there, trying to use Mr. Oakley's credit card.
- Various parts of Mr. Upshaw's disclosures to police are corroborated by Samantha Smith's testimony. She testified that Mr. Upshaw and T.(B.) were at Christopher Picco's on the evening of November 19. She saw the stolen credit card. She remonstrated with Mr. Upshaw, telling him not to be so stupid as to try and use it as that was being discussed. Ms. Smith confirms that Mr. Upshaw told her what happened on the Drysdale Bridge in the driveway of her house a little before 10 p.m. Her description of this conversation

corroborates Mr. Upshaw's. She described Mr. Upshaw referring to Mr. Oakley not being a "diddler" anymore. This echoes what Mr. Upshaw explained in precise terms to Cst. Clyke. That Ms. Smith had heard nothing about this earlier at Mr. Picco's is consistent with Mr. Upshaw telling Cst. Clyke that he didn't say anything to Ms. Smith there because other people were around at the time.

- Mr. Upshaw's police statement indicates that he believed Ms. Smith would do the right thing and check out what he was telling her. I know from the evidence that she did so, going for a walk with her mother to the Drysdale Bridge which resulted in John Lamond calling 911. The first responders, Cst. John McLeod and EHS were dispatched at 10:30 p.m. and 10:32 p.m. respectively. This corroborates Mr. Upshaw finally admitting that he went and spoke to Ms. Smith, as she has testified, *after* he had been to the bank, which the RBC video stills confirm was around 8:30 p.m.
- A few, crucial details of Mr. Upshaw's statement are also corroborated by C, T.(B.)'s girlfriend. In her statements to police she described Mr. Upshaw and B.(T.) being at Mr. Picco's apartment. She said they left and came back. In C's statement she confirmed to police that T.(B.) told her he was responsible for what happened to Mr. Oakley, which is consistent with what Mr. Upshaw said in his statement, that it was T.(B.) who pulled the trigger. And also corroborating Mr. Upshaw, C told police what had happened had not been planned.

[61] There is no question that in his police interrogation Mr. Upshaw reveals a nimble mind. He catches the police when they contradict themselves and is quite

articulate. However I find that what he told police is not a clever re-formulation of the information they had supplied.

[62] The Defence has also pointed to Mr. Upshaw having a motive to lie to police and minimize his own involvement in Mr. Oakley's death. That is a reasonable concern to be confronted in determining whether to admit his statement. He does resist the concerted efforts of the police officers to get him to admit that he told T.(B.) to shoot Mr. Oakley. The other major accusation he denies is having knowledge of T.(B.) having the gun. However he otherwise admits to being present with T.(B.) when Mr. Oakley was shot, going back to Mr. Picco's apartment with T.(B.), returning to view Mr. Oakley's body and being there when his wallet is taken, returning to Mr. Picco's, taking possession of the credit card, and going to the Royal Bank. This is not the stage where I am to determine the ultimate reliability of Mr. Upshaw's statement. I am looking for indicators of trustworthiness that can overcome the statement's presumptive inadmissibility. For the reasons I have given, I am satisfied those indicators are present. If a motive to lie was a sufficient reason by itself to exclude the statement of an accomplice then this hearsay evidence would never be available to the trier of fact when an accomplice refuses to testify or claims not to remember or cannot be located or is dead.

[63] What can be seen from watching the videotape of Mr. Upshaw's statement is this: the police had to work to extract a statement from him. He put up an effective resistance to their many techniques, some of which he was astute enough to recognize. He did eventually talk, boxed in by the evidence the police had collected. His interrogation unspools slowly with little progress until dividends start to be produced with Cst. Clyde's involvement on November 22. Cst. Clyde's

rapport with Mr. Upshaw keeps Mr. Upshaw engaged. Mr. Upshaw talks, gradually admitting to things he had been denying. He expresses concern about what Cst. Clyde may think of him and seeks reassurance. As he reveals certain details he says to Cst. Clyde: “You’re making me seem like a monster, Bobby. Am I a monster, Bobby?” I have just shown that many details of what Mr. Upshaw says can be confirmed. I am satisfied that there are sufficient assurances of the trustworthiness of Mr. Upshaw’s November 21/22 statement that it is safe for me to admit it into evidence and consider it along with the rest of the Crown’s case against Mr. Townsend.