SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Barrett*, 2016 NSSC 43

Date: 2016-02-04
Docket: *Syd*. No. 434006
Registry: Sydney

Between:

Her Majesty the Queen

v.

Thomas Ted Barrett

Decision on Admissibility of Statement of Sheryl Flynn
Khelawon Application

Judge:	The Honourable Justice Robin C. Gogan
Heard:	February 3, 2016, in Sydney, Nova Scotia
Written Decision:	February 4, 2016
Counsel:	Kathy Pentz, Q.C. and Diane McGrath, Q.C., for the Crown Brian Bailey, for the Defence

By the Court:

Introduction

[1] Thomas Barrett stands charged on one count of second degree murder in the death of Brett Elizabeth MacKinnon. On November 8, 2012, Sheryl Flynn gave a ***KGB*** statement to the Cape Breton Regional Police Service. This statement implicated the accused in the murder of Brett MacKinnon. Sheryl Flynn died on October 13, 2013. The Crown seeks to rely on the statement given by Sheryl Flynn as part of its case against the accused.

[2] A *voir dire* was held to determine the admissibility of the statement. For the reasons that follow I am satisfied that the hearsay statement of Sheryl Flynn is admissible evidence in this proceeding. The ultimate worth of the evidence remains to be determined in the context of the totality of the trial evidence.

Background

[3] This is a ***Khelawon*** application advanced by the Crown. The death of Sheryl Flynn means that she is not available to testify during the course of the trial of Thomas Barrett. The Crown now seeks to rely on a statement made by Ms.

Flynn to the police on November 8, 2012. As I understand it, no issue is taken with the relevancy of the statement.

[4] It is acknowledged that the statement which the Crown seeks to admit into evidence is hearsay in that the Crown seeks to rely upon it as proof of the truth of the content of the statement. I note at this point that the statement sought to be admitted contains admissions purportedly made by the accused. These latter statements would be hearsay statements even if Sheryl Flynn were available to give evidence at trial. They are double hearsay in the present context. This particular issue will be addressed in the reasons that follow.

[5] Given the hearsay nature of the statement of Sheryl Flynn, it is presumptively inadmissible. The onus lies with the Crown to establish, on a balance of probabilities, that the statement by Sheryl Flynn to police is admissible. This requires consideration of the principled approach to hearsay. The principled approach requires analysis of the statement's necessity and reliability.

[6] If admissible under the principled approach, consideration must also be given to whether to exclude the statement on the basis that its prejudicial effect outweighs its probative value.

[7] Our Court of Appeal reviewed the general principles that apply in ***R. v. Poulette***, (2008) 239 CCC (3d) 111 at paras 19 and 20:

> The essential features of a hearsay statement are that it is tendered to prove the truth of its contents and there is no opportunity to contemporaneously examine the declarant. (*R. v. Khelawon* 2006 SCC 57, [2006] SCR 787 (SCC), at para 35). Hearsay is excluded not because it is irrelevant to the inquiry before the court, but due to the difficulty in testing its reliability. In *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144 (S.C.C.) at para. 159, Iaccobucci, J. writing for the majority of the Court, cited the following commentary from the Law Reform Commission of Canada in its 1975 Report on Evidence, pp 68-69, as descriptive of the problems attendant to hearsay evidence:
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> > Hearsay statements are excluded from evidence in trials because of the difficulty testing their reliability. If a person who actually observed a fact is not in court, but a statement he made to someone about it is introduced into evidence, there is no way of inquiring into that person's perception, memory, narration or sincerity. His statement about the evidence might be false because he misperceived it or did not remember it correctly, or he may have misled the person to whom it was made because he used words not commonly used, or he may have simply lied about it. These factors, which determine the reliability of his statement, can only be tested if he is in the courtroom and subject to cross- examination.
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> Admission of a statement which does not fall under any of the traditional exceptions to the hearsay rule is dependent upon the proponent establishing, on a balance of probabilities that its admission is: (i) necessary and (ii) that the statement is reliable. Even where those criteria are established, the judge has a residual discretion to exclude the evidence if its probative value is outweighed by its prejudicial effect…..This is known as the principled approach to the hearsay rule (*R. v. Blackman, supra*, at para. 33.)

Issues

[8] What remains then is consideration of the following issues:

[9] Is the ***KGB*** statement of Sheryl Flynn dated November 8, 2012 admissible under the principled approach? If admissible, does the probative value outweigh the prejudicial effect?

Position of the Parties

The Crown

[10] The Crown says that the statement given by Sheryl Flynn is extremely relevant and should be admitted under the principled exception to the hearsay rule. The death of Sheryl Flynn makes her unavailable for trial and establishes the necessity criteria. The real issues are (1) threshold reliability and (2) the residual discretion to exclude the evidence.

[11] In terms of threshold reliability, it is argued that the absence of opportunity to cross-examine Ms. Flynn is only one factor to be considered. In the absence of cross-examination, the Court must look at the totality of the circumstances in order to determine whether there are sufficient guarantees of the trustworthiness of the statement. When such circumstances are properly considered, the Crown has established, on balance, that the statement survives the threshold reliability assessment.

The Defence

[12] The Defence is opposed to the admission of Sheryl Flynn's statement. They concede that the necessity prong of the principled approach is satisfied. However, threshold reliability cannot be established given that Sheryl Flynn had a motive to fabricate (criminal charges she wanted taken care of and animus toward the accused), substance abuse issues (misperception), lack of contemporaneity, and poor video quality, all combined with the absence of cross-examination.

Analysis

The Statement of Sheryl Flynn

[13] The parties agree that Brett Elizabeth MacKinnon died between June 13, 2006, and December 31, 2006. Her remains were discovered on November 21, 2008. As part of the investigation, the Cape Breton Regional Police Service was advised that Sheryl Flynn had information.

[14] The Crown offered the evidence of Staff Sgt. Philip Ross to explain the circumstances surrounding the ***KGB*** statement taken from Ms. Flynn on that day. As Staff Sgt. Ross explained, he and his partner Cst. Allan Shaw made contact with Ms. Flynn by telephone on November 8, 2012. Sheryl Flynn was told they

were investigating the death of Brett MacKinnon. Ms. Flynn agreed to meet with them that same day.

[15] The officers then went to Sydney Mines to meet Ms. Flynn. They picked her up at 2:13 p.m. and drove about 3-5 minutes to the local industrial park where they parked and talked. Staff Sgt. Ross testified that he initiated the specific discussion after parking by asking Ms. Flynn whether she had any information. She said that she did and then spent about an hour relating that information "narrative style" to police. No notes were taken by Staff Sgt. Ross during the conversation.

[16] During the entire time Staff Sgt. Ross, Cst. Shaw and Ms. Flynn remained in the unmarked police vehicle. Staff Sgt. Ross observed Ms. Flynn to be "fine" and "normal". Nothing about the meeting arrangements, the pickup, or the subsequent conversation caused him to be concerned about Sheryl Flynn being impaired.

[17] On the basis of the discussion in the police vehicle, it was decided that a formal statement should be taken. All three remained in the police vehicle and drove to the Cape Breton Regional Police Service Head Office. They arrived at the police station at 3:56 p.m. Ms. Flynn was taken to an interview room and remained there while the officers prepared for the statement to be taken. The

statement began at 4:32 p.m. with a ***KGB*** warning administered by Cst. Robert Davies. The statement was videotaped and tendered into evidence during the *voir dire* (*Exhibit VD* 5). A written transcript of the statement was also entered into evidence (*Exhibit VD* 4).

[18] The entire videotaped statement was played during the *voir dire*. However, counsel agreed that significant portions of the statement were not relevant and were therefore inadmissible. On that basis, the written transcript of the statement was redacted. The redacted portions of the written statement had no corresponding audio during the videotaped statement. Given the audio editing to the videotaped statement, at times, especially near the end, the audio and video are out of sync.

[19] The essence of the statement that Sheryl Flynn gave police was as follows: that she knew the accused since late 2005. In the summer of 2009, she picked the accused up from his then residence on Minto Street in Glace Bay, Nova Scotia and took him to a nearby Tim Hortons on the Sterling Road. As they sat in the car and talked, the accused said that he killed Brett MacKinnon and that it was an "adrenaline rush" to strangle somebody and watch them die. In her statement to police, Sheryl Flynn repeated the phrase "adrenaline rush" seven times as the words that she recalled the accused using to describe the effect of what he had done.

[20] In her statement, Sheryl Flynn denied having a relationship with the accused. She said that they spoke on the phone a lot, "for hours and hours and hours", that she received calls from him while he was in jail and that she visited him while he was in jail. She said that she recalled picking him up from Minto Street in Glace Bay and driving to the local Tim Hortons on four occasions in 2009. It was during one of those drives, Sheryl Flynn said, that the accused made the relevant admissions to her.

[21] During the statement, Ms. Flynn discussed the fact that she had some charges pending and that she needed to have them dropped so that she could talk to the accused. However, there were no offers made by the police to have those charges dropped. To the contrary, Ms. Flynn is told that she will have to "work through that with the Crown" and further that they would be dealt with during an upcoming court date.

[22] Sheryl Flynn concluded her statement to police at 6:31 p.m. During the entire period of the statement, Cst. Shaw monitored from another room. After the statement concluded, police made arrangements for her trip home in a taxi. None of the officers involved in Sheryl's Flynn's statement had any contact with her before or after the statement.

[23] Sheryl Flynn died on October 13, 2013, just shy of one year after providing her statement to police. The Report of the Medical Examiner dated February 5, 2014, was tendered into evidence by agreement (*Exhibit VD* 3). The cause of death, in layman's terms, was an accidental overdose of methadone and clonazepam.

[24] There was further evidence offered as part of the *voir dire* which I will refer to as I review the issue of threshold reliability in some detail

The Presumptive Inadmissibility of Hearsay

[25] As noted above, Sheryl Flynn's statement to police is a hearsay statement and presumptively inadmissible (see: ***R. v. Khelawon***, 2006 SCC 57, at para. 59). Hearsay is presumptively inadmissible because "its reliability cannot be tested." (***R. v. F.J.U.***, [1995] S.C.J. No. 82, at para. 22; see also ***R. v. Starr***, [2000] S.C.J. No. 40, para. 159; ***Khelawon***, *supra* at para 35; and ***R.v. Devine***, [2008] S.C.J. No. 36 at para. 19).

[26] As noted by Derrick J. in the recent decision of ***R. v. Burgess***, 2015 NSPC 39, at paras 31 - 33:

> [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 demeanor 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 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)…

[33] In *R. v. Couture,* [2007] S.C.J. No. 28, although contained in a dissenting judgement, 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, there 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 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).

[27] The decision of the Supreme Court of Canada in ***R. v. Khelawon***, *supra*, remains the leading authority on the principled approach to the admissibility of hearsay statements.

[28] In ***Khelawon***, the question before the Court was the admissibility of a statement from a deceased complainant. Charron J. writing for a unanimous Court, directed a functional approach to the admission of hearsay evidence. The functional approach requires a focus on the hearsay dangers and an assessment as to whether, in the particular circumstances, those dangers can be sufficiently overcome to justify admission. As Charron J. explained, the reliability requirement is usually met in two different ways, but that these methods are not mutually exclusive:

> [62] One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form.…
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> [63] Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested.…
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> …
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> [65] …in cases where the exclusionary rule is based on the usual hearsay dangers, this distinction between the two principle ways of satisfying the reliability requirement, although not by any means one that creates mutually exclusive categories, may assist in identifying what factors need to be considered on an admissibility inquiry.

[29] Respecting threshold and ultimate reliability, Charron J. reviewed the historical approaches and concluded at para. 93:

> [93] As I trust it has become apparent from the preceding discussion, whether certain factors will go only to ultimate reliability will depend on the context….the court should adopt a more functional approach as discussed above and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers. In addition, the trial judge must remain mindful of the limited role he or she plays in determining admissibility – it is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility *voir dire*.

The Hearsay Dangers and Double Hearsay – Functional Approach

[30] In the present case, the statement of Cheryl Flynn taken by police on November 8, 2012, was in the form of a ***KGB*** statement. The statement was given under oath, after a standardized caution was delivered. The statement was videotaped. Ms. Flynn died shortly before the preliminary inquiry in this matter. The real concern presented by these circumstances is that Ms. Flynn's evidence has not been tested in the traditional way and, if admitted, will not be subject to cross-examination. In the absence of cross-examination, the witness's perception, memory, narration, and sincerity are left untested.

[31] In this context, it is the Crown's submission that the statement of Sheryl Flynn should be admitted into evidence as the core hearsay dangers can be overcome. For the sake of analysis, the core dangers may be framed in the following way:

(1) Sheryl Flynn may have misperceived the statements made by the accused during the conversation she says took place in her vehicle while parked at the Tim Hortons' location on the Sterling Road;

(2) Even if she correctly perceived them, Ms. Flynn may have wrongly remembered them when she gave her statement to police;

(3) Sheryl Flynn may have related the facts in her statement in a misleading manner; and/ or

(4) Ms. Flynn may have knowingly made a false statement.

[32] To the foregoing list, I would add that the statement of Sheryl Flynn contains double hearsay in that Sheryl Flynn relates admissions made to her by the accused. For the Crown to be successful on this application, the "double hearsay" statements must be admissible as part of the evidence of Sheryl Flynn if she were available to testify.

Double Hearsay

[33] First, I will deal with the issue of double hearsay. In the statement of Sheryl Flynn, she says that the accused told her that he killed Brett MacKinnon. Sheryl Flynn expands by saying that the accused said that he strangled Brett MacKinnon

and that it gave him an "adrenaline rush". Sheryl Flynn says that these words and statements came from the accused. She is simply relating what he said as part of her statement.

[34] Derrick J. was faced with a similar issue in ***R. v. Burgess***, *supra*. In that case, the Crown sought to admit statements made by the deceased victim to a neighbour during a telephone call shortly before he died. The statement of the deceased included a statement that the accused had threatened to kill him. As Judge Derrick noted, the potential of admitting a hearsay statement that includes hearsay "constitutes a further layer to the hearsay onion".

[35] In the end, Judge Derrick admitted the double hearsay on the basis of the applicability of the rule governing the admissibility of admissions. This rule is an exception to the hearsay rule. In so concluding, reference was made to the Ontario Court of Appeal decision in ***R. v. Foreman***, [2002] O.J. No 4332 (leave to appeal to the Supreme Court of Canada dismissed at ***R. v. Foreman***, [2003] S.C.C.A. No. 199) and in particular the reasons of Doherty, J.A. beginning at para. 37:

> [37] 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:
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> > 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. 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….[emphasis in the original]
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> …
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> [39] 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 the 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 statement 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…

[36] I adopt the aforementioned reasons as well as those of Derrick J. on this point in ***R. v. Burgess***, *supra*, and likewise find no barrier to the admissibility of the Sheryl Flynn statement on the basis that it contains admissions from the accused. (See also: ***R v. K.G.B***, [1993] 1 SCR 740 at para. 78 and 79.)

[37] Before leaving this subject, I would briefly comment that the statement of Sheryl Flynn also contains hearsay relating to the temperament of the accused. At one point (see p. 9 of the transcript, *Exhibit VD* 4) she says that the accused is "a very, very dangerous man". She quickly acknowledges that she has had no personal experience on which to base such a statement. To the extent that Ms.

Flynn makes this and any other statement about the accused not based upon personal knowledge, I find it inadmissible.

Threshold Reliability

[38] The remaining question is whether the statement of Sheryl Flynn survives an assessment of its threshold reliability. As I proceed, I am mindful that I am dealing only with admissibility of the statement at this stage. The ultimate reliability of the evidence depends first, on whether it is admitted on a threshold basis and second, how it then stacks up in the totality of the trial evidence.

[39] I note as I assess the statement of Sheryl Flynn that what I have for consideration is a formal videotaped statement, taken under oath, following a ***KGB*** warning. As a general comment, I find the videotape, notwithstanding the required editing, provides a sufficient video and audio record of the admissible parts of the statement. No issue was taken with the comprehension of the oath administered nor was any issue taken with the accuracy of the recording. The videotape provides a clear opportunity to assess the demeanor of the witness as she provides the statement. What is missing from a threshold standpoint is contemporaneous cross-examination.

[40] The concern which must be addressed in this case is whether the statement made by Sheryl Flynn was made in circumstances that satisfy the dangers that cross-examination would have addressed. I must consider all relevant factors with a focus on the concerns raised by the absence of an opportunity to test the evidence of the witness.

[41] It is well established that if the statement has threshold reliability, then the absence of cross-examination goes to weight and the trier of fact should be able to assess the evidence on that basis. (See: ***R. v. Smith***, [1992] S.C.J. No 74 (SCC) at para. 39.)

[42] I am not concerned at this point with determining whether the statement is true, however, I would say that if I am satisfied at this stage that it is not true, it will not be admitted into evidence.

The Perception Factor

[43] This factor examines whether Sheryl Flynn may have misunderstood or misperceived the statements made to her by Tom Barrett, or any of the other significant facts contained in her statement.

[44] There is no question that the essence of the statement and the reason for which the Crown seeks to admit it for its truth is that it relates admissions made by the accused. The remaining detail in the statement is there to provide context to the statement in terms of the relationship between Sheryl Flynn and the accused (and various other people) and orient the statements purportedly made by the accused in terms of time and place. I note at this point that when the witness is referred to the surrounding or contextual details at various points during the statement, her answers are readily given and internally consistent.

[45] In terms of the essence of the statement, it is very simple. It relates a conversation that took place during which Sheryl Flynn says, the accused admitted that he killed Brett MacKinnon, that he strangled her, that it gave him an "adrenaline rush" and that he disposed of the body. The phrase "adrenaline rush" was a significant one to Sheryl Flynn. As I already noted, she related it repeatedly during her statement. At one point during the statement she repeats the words in a hushed tone followed immediately by the words, "Never forget them words." (See *Exhibit VD* 4, at p. 18.)

[46] When asked about further immediate details, Ms. Flynn says she did not ask any questions and no more information was volunteered by Tom Barrett. Her answers once again are internally consistent. It appears from the contextual details

she provided that such an admission was surprising and made her careful if not fearful.

[47] There was evidence that Sheryl Flynn developed a drug addiction in the years before her death. She eventually died of accidental drug overdose in October of 2013. The evidence of the extent of her drug habit conflicted at times. The overall pattern was that the addiction issues began with pills and graduated at some point later to IV drug use. In her statement, she says that she continued some form of relationship with the accused until he "found out she was doing needles". Shaun Glazier said that they parted ways when he found her with a needle in her arm on December 24, 2011. There was evidence that she did detox programs. She denied doing drugs with the accused and said that on the day he made his admissions to her, that she thought they "were just going to have coffee, have a chit chat, catch up. Snort a pill or two. Never dreamt". Finally, I note that she was the driver on the day of the meeting with Tom Barrett. Of course, this doesn't mean that she was not taking drugs at the time, but it may provide some indication of her ability to function.

[48] Overall, I am satisfied that relative simplicity of the details recounted by Sheryl Flynn, along with her evidence as to the jarring and memorable nature of the conversation, make it very unlikely that she misperceived what was said to her

by Tom Barrett. Further, I am not satisfied on the evidence before me that drug use may have interfered with her perception of what was told to her.

The Memory Factor

[49] The evidence indicates that Sheryl Flynn made her statement to police on November 8, 2012. In her statement she says that the accused made his admission to her in the summer of 2009. The time gap between the key conversation and the statement is just over three years. Such a considerable gap in time deserves consideration in the assessment of the witness' memory as she gave her statement. It is conventional wisdom that memories fade over time.

[50] In spite of the gap in time, no serious issue was made as to Sheryl Flynn's memory. In my view, the most significant reason for this relates to the nature of the statements. As referenced earlier, the key statements are straightforward, jarring and memorable. She said that she was "mortified", "shocked", "terrified" and "never dreamt" (see *Exhibit VD* 4, at pp. 6, 9, 10 and 11) and, as noted above, that she would "never forget them words" (p. 18). These words speak to the impact and memorability of the conversation. Although the events were not fresh when related to the police, I find that the nature of the statements made were such

that there exists little risk that they would not be remembered correctly even years later.

[51] For further comfort as to the accuracy of Sheryl Flynn's memory, I reference her ability to recount surrounding details. For example, she was able to narrow down the time frame of the key conversation by quickly running through her personal history. She recalled where she was living at the time of the conversation and where the accused was living. She was able to say that she was driving a burgundy 1988 Beretta. She recalled her state of mind before going on the drive with the accused, during the key conversation (i.e. "I can clearly remember him saying I know it'll go to your grave": see *Exhibit VD* 4, p. 6) and after.

[52] Overall, I find little danger associated with the inability to test Sheryl Flynn's memory of the statements made to her by Tom Barrett. I find it unlikely, given the nature of the statements, that the witness's memory on the key points would change if she were cross-examined.

The Narrative Factor

[53] This factor relates to the possibility that Sheryl Flynn unintentionally related the facts in an inaccurate way or that the statement was inaccurately recorded.

[54] First, given the benefit of the fact that Sheryl Flynn's statement was video and audio recorded, no issue was taken with the accuracy of the recording of the statement. In other words, no issue was taken with the accuracy of the content of Sheryl Flynn's statement. It is available as if she were giving her direct evidence in court. The questions being asked are open ended, not leading. Staff Sgt. Ross revisits the key parts of her evidence several times and her evidence is consistent throughout. During the statement, the witness' demeanor is easily observed.

[55] The Defence submitted that the accuracy of the statement may be impacted by the fact that Sheryl Flynn was taking drugs and/or that she was addicted to drugs at the time the statement was provided. I find no cogent evidence that Ms. Flynn's statement was given while she was under the influence of drugs. I say so for a number of reasons.

[56] First, I find no nexus between the day of the statement (November 8, 2012) and the fact that Sheryl Flynn died of an accidental drug overdose on October 13, 2013.

[57] Second, Staff Sgt. Ross was of the view that Sheryl Flynn was not impaired as she gave her statement. He was an officer with, at the time, 14 years of experience. He had the opportunity to observe Ms. Flynn over an extended period

on November 8, 2012, over four hours, and testified to having no concerns about impairment. He said that she appeared "fine" and "normal" and that "he had no indications of substance abuse or use". He said if there had been concerns on that day, the statement would not have been taken. The evidence given by Cst. Davies (who administered the oath and ***KGB*** warning) was consistent in that there were no concerns about impairment.

[58] Finally, I rely on the demeanor of the witness as she gave her statement to police. On this issue I agree with the Crown submission that Ms. Flynn's demeanor is consistent throughout the statement. She appears relaxed, focused, alert and engaged. She was able to recount details in a clear, concise and sequential manner without any obvious difficulty. She appears appropriately dressed and is seen to move about during the statement and use her phone during breaks.

[59] Overall I find no risk to the accuracy of her statement by virtue of impairment. In so concluding, I have considered the defence submission that Sheryl Flynn was sniffling throughout the interview which suggests withdrawal. I find no merit in this submission on the evidence presented.

The Sincerity Factor – A Motive to Lie

[60] This was the factor most relied on by the Defence to exclude the statement of Sheryl Flynn. It was strenuously argued that Sheryl Flynn had a motive to lie when she gave her statement to police on November 8, 2012. On this basis, the Defence says the statement is too unreliable to be admitted.

[61] The motive to lie argument has three aspects: (1) that Sheryl Flynn bore *animus* toward Tom Barrett, (2) that she could have come forward with her information much sooner than she did, and (3) that she came forward with her statement at a time when she was facing her own criminal charges.

[62] Without question, a known motive to lie is a factor to be considered on an assessment of threshold reliability. Moreover, a motive to lie in conjunction with the absence of cross-examination is at times fatal to threshold reliability. (See: ***R. v. Starr***, [2000] 2 S.C.R. 144 at para. 215, ***R. v. Smith***, [1992] S.C.J. No 74, paragraph 38, ***R. v. Blackman*** [2008] 2 S.C.R. 298, ***R. v. Scott*** (2005), 191 C.C.C. 183 (NSCA) and ***R. v. Tower,*** 2006 NSSC 220).

[63] The decision in ***R. v. Tower***, *supra*, is an instance where a deceased's statement was not admitted into evidence. In that case, the Crown sought admission of a ***KGB*** statement given by a witness who subsequently disappeared.

At the time the statement was given, the declarant was under arrest for the same manslaughter offence for which the accused was subsequently charged. Justice Wright found that at the time of the statement the declarant would have known he was one of two suspects and that he was subject to a very leading first interview by police respecting his role in the offence.

[64] Wright J. considered the balance between the reliability benefits and the factors establishing a reliability deficit and concluded that the absence of cross-examination along with a motive to lie created a reliability deficit that could not be overcome. In coming to his conclusion Wright J. relied on the reasons of Fichaud, J.A. in ***R. v. Scott***, supra, at para. 85

> The judge should measure the seriousness of the reliability deficit in the traditional safeguards. He should balance the reliability benefit of the substitute factors against the reliability deficit to determine whether the substitutes provide a circumstantial guarantee of trustworthiness. [citations omitted]

[65] And further at para. 105 of ***Scott***:

> As noted in the case law set out earlier, the declarant's motive to lie is central to the analysis of threshold reliability and cross-examination is the most important safeguard. Motive to lie, compounded by no cross-examination (neither contemporaneous nor at trial), exponentially extends the reliability deficit. In the present case, in my view, the combination was lethal to threshold reliably.

[66] In ***R. v. Blackman***, *supra*, the statement of the deceased was admitted and the accused convicted of murder. In upholding the conviction on appeal, the Supreme Court of Canada reasoned as follows respecting the role of motive to lie at para. 42:

> There is no doubt that the presence or absence of a motive to lie is a relevant consideration in assessing whether the circumstances in which the statements came about provide sufficient comfort in their truth and accuracy to warrant admission. It is important to keep in mind however, that motive is but one factor to consider in the determining of threshold reliability, albeit one which may be significant depending on the circumstances. The focus of the admissibility inquiry in all cases must be, not on the presence or absence of motive, but on the particular dangers arising from the hearsay nature of the case.

[67] The Court in ***Blackman*** then went on to consider several factors in order to determine whether a hearsay declarant may have had a motive to lie, including the nature of the relationship between the declarant and the person to whom the statement is made, the context in which the statement is made, whether the declarant had anything to gain by making false allegations and the contemporaneous nature of the statement. These are all relevant factors for consideration in the present case.

[68] Starting with the contemporaneity of the statement, it is clear that much time passed between the purported key conversation and the eventual statement Ms. Flynn gave to police. This time gap begs the question of why it took so long for

Ms. Flynn to come forward. The evidence established that she had opportunity to come forward and that she had ongoing contact with the police during the gap period. As the argument goes, if Sheryl Flynn really had such critical information, she had plenty of opportunity to disclose it and did not. I am invited to infer that she did not have the information that she later claimed to have.

[69] However, I find that a time gap alone, even a significant one, is not evidence of motive to lie. The Crown submitted, and I agree, that there could be many reasons why Sheryl Flynn waited to disclose information to police. In her statement she said that she did not come forward because she was "terrified…like my life's going to be at stake". On its face that explanation seems reasonable. There are however, other factors to consider which provide context to the eventual statement to police.

[70] The Defence pointed to the fact that Ms. Flynn's statement contains negative references to the accused. These negative statements were characterized as *animus*. The court is asked to draw an inference from the negative statements that such *animus* exists and that it is evidence of a reason for Sheryl Flynn to come forward and present a fabricated statement to police. Having reviewed the entirety of the statement multiple times, I do not agree. While there are clearly negative characterizations of the accused in the statement, it also contains positive

statements about the redeeming qualities of the accused. At times, it seems Ms. Flynn felt it necessary to point out something positive to give balance or context to the statement. Overall, I find it is not established on the evidence that Sheryl Flynn bore *animus* to the accused sufficient, on its own, to support a motive to lie.

[71] There remains the consideration of the timing of Sheryl Flynn's eventual statement. At the time she came forward, she had no criminal record but she did have charges pending against her. These charges involved thefts from local Walmart and Needs stores. The evidence on the *voir dire* was that these were very minor offences. Eventually, those matters were referred to Adult Restorative Justice. Sheryl Flynn died before completing the program and the charges against her were withdrawn after her death.

[72] There is no evidence to support the conclusion that Sheryl Flynn was offered anything in return for her statement to police. There were no promises or inducements and this is confirmed in her statement. The Defence submits, however, that this does not mean that she did not hope to gain something by coming forward with information about the accused.

[73] I agree with the Defence submission to the extent that Sheryl Flynn continued to raise the charges against her and offer to go and talk to the accused

during the course of her statement. It could be that she hoped to gain something. She may have hoped that the charges would be "dealt with" by the police in return for her information. That does not mean however, that the content of her statement is not true. In other words, a motive to lie is not the only conclusion to be drawn from her hoping to have her charges dealt with at that time.

[74] In coming to this conclusion, I am in agreement with the Crown submission that common sense does not support the view that Sheryl Flynn would fabricate the allegations against the accused in order to deal with very minor charges. The risk does not seem proportionate to the reward.

[75] Overall then, in my view, the *voir dire* evidence does not support a motive to lie. It is important to note that the absence of evidence of a motive to lie does not equate to the absence of motive. It does however, somewhat neutralize this argument in the overall assessment of threshold reliably. (See ***Blackman***, supra, at para. 40.)

Conclusion on Hearsay Dangers

[76] Having considered all of the foregoing, I find that the Crown has established, on a balance of probabilities, that the statement of Sheryl Flynn has sufficient indicia of reliability to meet the requirements of threshold reliability.

Probative Value v. Prejudicial Effect

[77] Lastly, I must consider whether to exercise the residual discretion to exclude the evidence. This is the stage otherwise known as the "cost-benefit analysis". The question here is whether the statement has probative value and, if so, whether this value is outweighed by the risk of prejudice from its admission. The nature of this exercise was concisely stated by Derrick J. in ***R. v. Burgess,*** *supra*:

> [98]…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 the 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…" Evidence should be excluded where, rather than establishing what the accused may have done, it invites inferences to be drawn about the accused's character.
>
> (citations omitted but references are from ***R. v. Spackman***, [2012] O.J. No. 6127 (C.A.) at paras 116-118).

[78] The statement of Sheryl Flynn clearly has probative value. The real consideration is one of prejudice to the accused in the sense of the evidence being misused and impairing the right of the accused to a fair trial.

[79] I have considered the nature of the evidence and find little risk of prejudice to the accused. Accordingly, I decline to exercise my discretion to exclude. The

statement of Sheryl Flynn shall be admitted into evidence. The ultimate weight to be assigned to it remains to be determined.

Gogan, J.