SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Johnson*, 2015 NSSC 380

Date: 2016 02 29
Docket: CRH No. 430125
Registry: Halifax

Between:

Her Majesty the Queen

v.

Nathan Tremain Johnson

Temporary Deferred Publication Ban:

It is ordered that no person shall publish or broadcast any information in relation to all evidence tendered during this trial, all submissions of counsel, evidence tendered at the preliminary inquiry, verdict in this trial, sentence imposed if a guilty plea is rendered, the reasons for sentence, as well as all evidence, submissions and ruling on this application for a temporary deferred publication ban order. This order is in effect until the conclusion of Randy Riley's trial currently scheduled to be heard in March 2016 and relates to Nathan Tremain Johnson's two matters currently before the Court, C.R. No. 430125 and C.R. No. 445421.

CO-CONSPIRATORS' EXCEPTION TO HEARSAY DECISION

Judge:	The Honourable Justice Joshua Arnold
Heard:	November 24, 2015, in Halifax, Nova Scotia
Oral Decision	November 24, 2015
Final Written	February 29, 2016
Counsel:	Michelle James and Melanie Perry, for the Crown Patrick MacEwen, for the Defence

By the Court:

[1] The Crown seeks to introduce statements attributed to Randy Riley through Crown witness Paul Smith. During the trial I gave short oral reasons and reserved the right to supplement those reasons in writing. These are my written reasons.

[2] The Crown alleges that Nathan Johnson was present, riding in the back seat of a vehicle driven by Paul Smith, when certain statements were made by Randy Riley, who was in the front passenger seat. The defence objects, claiming the statements are hearsay. The Crown agrees that the statements are hearsay, but says they fall within the co-conspirators' exception to the hearsay rule. The statements, very generally, include:

1. "I need a lift…I am going to get a thing", and

2. "I had a problem with a pizza guy he beat me up with an object years ago. I am going to take care of it" (or words to that effect).

[3] The Crown also argues, in the alternative, that certain of the statements are not necessarily offered for the truth of their contents, but to show Mr. Johnson's state of mind.

[4] A *voir dire* was held during which Paul Smith testified that Mr. Riley made the comments in question and gave him directions to the Lake Banook/Superstore area. When they arrived at the Lake Banook address Mr. Riley left the SUV, then returned. When Mr. Riley returned to the vehicle the men resumed their previous seating arrangement: Mr. Riley again sat in the front passenger seat; Mr. Johnson was still in the back seat of the vehicle; and Paul Smith was driving. It appeared to Paul Smith that when Mr. Riley returned to the vehicle he had something long going down the inside of his pant leg and poking out of his pants. Mr. Riley also returned with surgical or doctor's gloves, which he put on. Mr. Riley provided a pair of surgical gloves to Mr. Johnson.

Hearsay

[5] Are the comments in question necessarily hearsay evidence? In Lederman, et al., *The Law of Evidence in Canada*, 3rd edn. (Markham, Ont: LexisNexis, 2009) at para. 6.2, the authors summarized the general hearsay rule:

> Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceedings in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein.

[6] *R. v. Khelawon*, [2006] 2 SCR 787, 2006 SCC 57, Charron J. stated, at para. 35:

> 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.

Are these statements hearsay?

[7] Nathan Johnson was present when Randy Riley made the comments to Paul Smith. "I need a lift…I am going to get a thing", could be categorized as an out-of-court statement made in the presence of the accused and offered for a limited purpose. This comment could be relied on to explain a subsequent course of conduct if not offered for the truth of its contents. Similarly, the phrase, "I had a problem with a pizza guy, he beat me up with an object years ago. I am going to take care of it", could go to Mr. Johnson's state of mind and state of knowledge during and after these statements were made by Mr. Riley. If so, the statements would be admissible without further analysis, as they would not be hearsay if not offered for the truth of their contents. Whether or not the claim that the "pizza guy" previously beat Mr. Riley up is true is not relevant. What is relevant is Mr. Riley's stated intention that he was going to take care of it.

[8] Noteworthy is the fact that Mr. Johnson never objected to Mr. Riley making these comments although they were made in his presence. Mr. Johnson never asked to get out the vehicle once the comments were made. Instead, he travelled with Mr. Riley to get a "thing", left with Mr. Riley knowing that Mr. Riley had something long hidden down his pants and was given surgical gloves by Mr. Riley.

[9] Both the Crown and Mr. Johnson agree that these comments are hearsay. Mr. Johnson argues that they are not admissible through any exception. The Crown urges me to admit the statements under the co-conspirators' exception to the hearsay rule, leaving open the possibility of the jury relying on them for the truth of their contents. If so admitted, the jury would be given a very specific instruction as to their use.

Co-Conspirators' Exception

[10] I agree that the comments in question are hearsay and are admissible through the co-conspirators' exception to the hearsay rule, subject to the appropriate instructions to the jury, and they will be admitted on that basis.

[11] I have reviewed a number of authorities on this issue including: *R. v. Carter*, [1982] 1 S.C.R. 938; *R. v. Mapara*, [2005] 1 S.C.R. 358; *R. v. Magno*, 2015 ONCA 111, [2015] O.J. No. 725; *R. v. Chang*, (2003), 173 C.C.C. (3d) 397, [2003] O.J. No. 1076 (Ont. C.A.); *R. v. Hook*, [1975] 4 W.W.R. 659, [1975] A.J. No. 427 (Alta. S.C.A.D.); *R. v. Bogiatzis*, 2010 ONCA 902, [2010] O.J. No. 5628; Justice David Watt, *Watt's Manual of Criminal Evidence* (WestlawNext Canada), s. 27.11; and S. Casey Hill, David M. Tanovich and Louis P. Strezos, *McWilliams' Canadian Criminal Evidence* (WestlawNext Canada), s. 7:170.10.

[12] In *Carter*, the Supreme Court of Canada set out the proper method for a jury to analyse statements that might be admitted under the co-conspirators' exception to the hearsay rule. McIntyre J. stated:

> 10. I am in agreement with Martin J.A. in his rejection of the *voir dire* approach. I also agree with the concluding comment, quoted from his judgment in *Hobart* above, to the effect that the jury, despite the fact that the purpose of the *Carbo* approach is to separate the two issues, might well confuse the two and use the hearsay declarations to connect the accused with the conspiracy. The same danger, of course, applies where the jury must make this preliminary finding of membership in the conspiracy. They may equate proof of membership for the limited purpose of the application of the hearsay exception with proof of guilt of the accused upon the indictment. For this reason, it is my opinion that extreme care must be taken to keep the two issues separate and this involves the preservation of a two-stage approach in the charge to the jury.
>
> 11. The trial judge must bear in mind that in order to convict an accused upon a charge of conspiracy the jury, or other trier of fact, must be satisfied beyond a reasonable doubt that the conspiracy alleged in the indictment existed, and that the accused was a member of it. In deciding the issue of membership for the purpose of determining guilt or innocence on the charge contained in the indictment, the hearsay exception may be brought into effect, but only where there is some evidence of the accused's membership in the conspiracy directly admissible against him without reliance upon the hearsay exception raising the probability of his membership. It is not necessary that the directly admissible evidence be adduced first before any evidence of the acts and declarations of other conspirators may be received. The exigencies of the trial would make a

> chronological separation of the evidence impossible. At the end of the day, however, before the hearsay exception may apply, such evidence on the threshold issue of membership of the accused in the conspiracy must be present. In charging the jury on this question, the trial judge should instruct them to consider whether on all the evidence they are satisfied beyond a reasonable doubt that the conspiracy charged in the indictment existed. If they are not satisfied, then the accused charged with participation in the conspiracy must be acquitted. If, however, they conclude that a conspiracy as alleged did exist, they must then review the evidence and decide whether, on the basis of the evidence directly receivable against the accused, a probability is raised that he was a member of the conspiracy. If this conclusion is reached, they then become entitled to apply hearsay exception and consider evidence of the acts and declarations performed and made by the co-conspirators in furtherance of the objects of the conspiracy as evidence against the accused on the issue of his guilt. This evidence, taken with the other evidence, may be sufficient to satisfy the jury beyond a reasonable doubt that the accused was a member of the conspiracy and that he is accordingly guilty. They should be told, however, that this ultimate determination is for them alone and that the mere fact that they have found sufficient evidence directly admissible against the accused to enable them to consider his participation in the conspiracy probable, and to apply the hearsay exception, does not make a conviction automatic. They should be clearly told that it is only after they have become satisfied beyond a reasonable doubt on the whole of the evidence on both issues, that is, the existence of the conspiracy and the accused's membership in it, that they may convict, and that it is open to them, if they think it right or if they are not satisfied, to acquit the accused, even after reaching their initial determination of probable membership in the conspiracy which enabled the application of the hearsay exception. The trial judge should point out to the jury, as well, the evidence directly admissible against the accused on the threshold issue of his membership in the conspiracy to assist them in that determination. In my view, this approach is generally consistent with the approach adopted by Martin J.A. in *R. v. Baron and Wertman* (1976), 31 C.C.C. (2d) 525, and *Hobart v. R., supra*, in which case the general principles involved in the treatment of this question are set out and discussed and the authorities are collected.

[13] In *Mapara*, McLachlin C.J. considered *Carter* and addressed the argument that the exception was inconsistent with the principled approach to hearsay*:*

> 18 I first address the appellant's main argument -- the co-conspirators' exception to the hearsay rule does not reflect the necessary indicia of necessity and reliability. In *R. v. Chang* (2003), 173 C.C.C. (3d) 397, the Ontario Court of Appeal, *per* O'Connor A.C.J.O. and Armstrong J.A., rejected this argument. The criterion of necessity poses little difficulty. As stated in *Chang*, "necessity will arise from the combined effect of the non-compellability of a co-accused declarant, the undesirability of trying alleged co-conspirators separately, and the

evidentiary value of contemporaneous declarations made in furtherance of an alleged conspiracy" (para. 105).

19 The criterion of reliability requires closer scrutiny. The appellant raises the concern that co-conspirators' statements tend to be inherently unreliable because of the character of the declarants and the suspicious activities in which they are engaged.

20 A preliminary issue arises at this stage. The federal Crown argues that the co-conspirators' exception is not grounded in a concern for reliability, but rests rather on the reasoning that once it is established that the people concerned were involved in the same conspiracy, then the statements of one are admissions against all. Thus, "the rationale for the rule in Canada was grounded in principles governing admissions by party litigants": *Chang*, at para. 82. This exception is grounded in "a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all": *R. v. Evans*, [1993] 3 S.C.R. 653, *per* Sopinka J., at p. 664. Sopinka J. went on to suggest that circumstantial guarantees of trustworthiness are irrelevant to the party admissions exception to the hearsay rule:

> 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.

It follows on this reasoning that if the appellant was a co-conspirator with the witness, Binahmad, the appellant cannot be heard to complain that what he said to Binahmad was unreliable. Similarly, it is argued, he cannot complain about the unreliability of what a third co-conspirator, Wasfi, said to Binahmad. They were all plotting together, and what each says can be used against the other. Having entered into a criminal conspiracy, the accused cannot in his defence rely on its very criminality and the unreliability of his co-conspirators.

21 The unique doctrinal roots of the co-conspirators' exception to the hearsay rule cannot be denied. However, as noted in *Chang*, "the fact that the co-conspirators' rule is grounded in those principles does not alter the fact that a statement that becomes admissible under the *Carter* process is hearsay and concerns about unreliability are very real" (para. 85). In this sense, the directive of *Starr* that the traditional exceptions should be examined for conformity with necessity and reliability remains pertinent.

22 I return, therefore, to the question of whether the co-conspirators' exception to the hearsay rule possesses sufficient circumstantial indicators of reliability. The *Carter* process allows the jury to consider a hearsay statement by a co-conspirator in furtherance of the conspiracy only after it has found (1) that the conspiracy existed beyond a reasonable doubt and (2) that the accused was

probably a member of the conspiracy, by virtue only of direct evidence against him.

23 The appellant argues that *Carter* cannot satisfy the reliability requirement because it amounts to using corroborating evidence to bolster the reliability of hearsay declarations against the accused, contrary to *Starr*, *per* Iacobucci J., at para. 217.

24 I do not agree. The question is whether the first two stages of the *Carter* process provide circumstantial indicators of reliability that do not amount to simply corroborating the statements in issue. In my view, they do. Proof that a conspiracy existed beyond a reasonable doubt and that the accused probably participated in it does not merely corroborate the statement in issue. Rather, it attests to a common enterprise that enhances the general reliability of what was said in the course of pursuing that enterprise. It is similar in its effect to the *res gestae* exception to the hearsay rule, where surrounding context furnishes circumstantial indicators of reliability. The concern is not with whether a particular statement is corroborated, but rather with circumstantial indicators of reliability.

25 The evidence under the first two stages of *Carter* is not inherently corroborative of the hearsay statement, in the sense of confirming the truth of its contents. Indeed the evidence establishing the conspiracy and the accused's probable participation may conflict with the hearsay evidence subsequently adduced. More often than not, the trier of fact will find corroboration, rather than conflict, in the direct evidence implicating the accused. However, this ultimate use of the evidence should not be confused with its initial role in establishing threshold reliability. Here it is relevant with respect to the context of the hearsay evidence, and not to its contents. The use of the *Carter* approach in the present inquiry thus stays within the boundaries of threshold reliability, as explained in *Starr*.

26 In addition to these preliminary conditions, the final *Carter* requirement, i.e., only those hearsay statements made in furtherance of the conspiracy can be considered, provides guarantees of reliability in the more immediate circumstances under which the statement is made. "In furtherance" statements "have the reliability-enhancing qualities of spontaneity and contemporaneity to the events to which they relate" (*Chang*, at paras. 122-23). They have *res gestae*-type qualities, being "the very acts by which the conspiracy is formulated or implemented and are made in the course of the commission of the offence" (*Chang*, at para. 123). This "minimizes the motive and opportunity for contrivance" (*Chang*, at para. 124). The characters' doubtful reputation for veracity is not a factor at this stage of the analysis. Rather, it is to be taken into account by the jury when assessing the ultimate reliability of such characters' statements.

[14] McLachlin C.J. elaborated on the conclusion that the *Carter* rule provided "sufficient circumstantial guarantees of trustworthiness necessary to permit the evidence to be received" (para. 27):

> 28 This conclusion makes practical sense. First, the rule does not operate unfairly to accused persons. Indicia of reliability exist. In this way, unreliable evidence that is likely to mislead the jury can be excluded. It remains open to the accused to cross-examine the deponent, call contrary evidence, and argue the unreliability of the co-conspirators' evidence before the jury. Moreover, it is not unfair to expect people who enter into criminal conspiracies to accept that if they are charged, the evidence of their co-conspirators about what they said in furtherance of the conspiracy may be used against them. Finally, the hearsay rule is supplemented by the discretion of the trial judge to exclude evidence where its prejudicial effect outweighs its probative value, discussed below.
>
> 29 Second, the rule allows the Crown to effectively prosecute criminal conspiracies. It would become difficult and in many cases impossible to marshal the evidence of criminal conspiracy without the ability to use co-conspirators' statements of what was said in furtherance of the conspiracy against each other. To deprive the Crown of the right to use double hearsay evidence of co-conspirators as to what they variously said in furtherance of the conspiracy would mean that serious criminal conspiracies would often go unpunished.
>
> 30 Finally, to modify the *Carter* rule would increase delay and difficulties in trial procedure. Any approach that requires the trial judge to scrutinize the necessity and reliability of particular pieces of hearsay evidence in deciding its admissibility would undermine the efficiency of the traditional categories of exceptions to the hearsay rule and increase the number of *voir dire*. As stated in *Chang*:
>
> > We are concerned that conspiracy trials, many of which are already complicated, may become more so if every time the Crown seeks to introduce co-conspirators' declarations, the trial judge is required to hold a *voir dire* to determine if there is compliance with the principled approach. We do not anticipate that will be the case. A *voir dire* addressing the principled approach should be the exception. It will only be required when an accused is able to point to evidence raising serious and real concerns about reliability emerging from the circumstances in which a declaration was made, which concerns will not be adequately addressed by use of the *Carter* approach. As a general rule, the presumption that evidence that meets the *Carter* requirements also meets the principled approach should obviate the need for a *voir dire*. [para. 132]
>
> The appellant suggests simply that we make the *Carter* rule inapplicable to double hearsay evidence. However, the underlying rationale for doing so is that all hearsay evidence, even if it falls under an established exception, must be rejected

> if that particular piece of evidence does not meet the concerns of necessity and reliability. This implies a case-by-case vetting more resembling the ultimate reliability inquiry that is for the jury, than the threshold reliability inquiry relevant to admissibility.

[15] Finally, McLachlin C.J. concluded:

> 32 The appellant also asks us to change the *Carter* rule to require the first two elements to be determined by the trial judge, rather than the jury, on the ground that allowing the jury to decide these elements renders the exception operationally unfair. While courts may adjust common law rules incrementally to avoid apparent injustice, they do so only where there is clear indication of a need to change the rule in the interests of justice. That is not established in this case. Indeed, the appellant's suggestion was considered and rejected in *Carter* precisely because of the danger that the jury might confuse the direct and the hearsay evidence against the accused and rely on the latter to convict the accused. The Court concluded that the three-stage approach was better suited to bring home to the jury the need to find independent evidence of the accused's participation in conspiracy. I would not accede to this request.
>
> 33 I conclude that the *Carter* rule stands and that the evidence in question was not excluded by the hearsay rule.

Independent Evidence

[16] Kaitlin Fuller has already testified during the trial proper. She told the court that after the shooting Mr. Johnson told her the following: he had been walking past a pizza shop with Mr. Riley when Mr. Riley told him that the pizza shop employee had previously hit him over the head with a hammer; Mr. Johnson suggested they go get him; Mr. Riley said no, he wanted to kill him; the pair then spent some time together; Mr. Riley then called Paul Smith to give them a drive; both Mr. Riley and Mr. Johnson got in Paul Smith's vehicle; Paul Smith drove them to pick up a gun; while picking up the gun they obtained gloves; Mr. Riley and Mr. Johnson discussed a good place to shoot Chad Smith; Mr. Johnson called the pizza shop from a payphone to lure the delivery person, Chad Smith, to an address in the Highfield Park area; Mr. Riley then shot and killed Chad Smith; after the shooting, Mr. Riley ran to where Mr. Johnson was waiting nearby and gave him the gun and gloves to hide.

[17] Mr. Johnson also told Ms. Fuller where he had disposed of the gun and gloves. Ms. Fuller said Mr. Johnson told her he had been wearing white Coogi jeans when the shooting occurred.

[18] The jury heard from Garth MacIntosh who described seeing a tall, thin man with bright white pants emerge from the woods behind his house. Mr. Johnson is tall and slim. White Coogi pants were later seized from an address known to Mr. Johnson.

[19] Kevin Cresswell saw two males using a payphone at the Ultramar close in time to when the call came into the pizza shop. The police and David Bryant, the pizza shop employee who took the call, testified that the call to the pizza shop came from that same payphone.

[20] David Bryant described getting a call for a pizza, eventually delivered by Chad Smith to 15 Joseph Young Street, Apartment 3, where Chad Smith was shot.

[21] A police dog followed a track from near where the shooting occurred, the rear area of 15 Joseph Young Street, through the woods toward Albro Lake. Subsequently, the police located a sawed-off shotgun and gloves near that track as described by Ms. Fuller. The white Coogi jeans were later found at a location known to Mr. Johnson, near to where the dog track ended and where Ms. Fuller says Mr. Johnson told her he went after the shooting.

[22] I have also considered whether Kaitlin Fuller's evidence is actually independent of Paul Smith's evidence considering the police method of obtaining Paul Smith's evidence. As Paul Smith stated during cross examination:

> Defence: Ok, um, and Det. Cst. Fairburn says he wants to talk to you in relation to Mr. Smith's murder, correct?
>
> Smith: Yep.
>
> Defence: And, uh, you invite him into your home?
>
> Smith: Yep.
>
> Defence: And he sits down with you and tells you that the police are aware of your involvement in this murder, correct?
>
> Smith: Yep
>
> Defence: And Det. Cst. Fairburn spends some time at your place, about an hour maybe a little more?
>
> Smith: Yeah, about an hour.

> Defence: Ok, and during the course of that hour, Det. Cst. Fairburn tells you that he is aware that you're involved in this murder and he lays out various aspects of the evidence for you, correct?
>
> Smith: Yeah, if you want to, yeah
>
> Defence: He tells you what the police know.
>
> Smith: Yeah
>
> Defence: And he tells you that he wants your co-operation, correct?
>
> Smith: Yes
>
> Defence: And, I'm going to suggest to you, at one point in time Det. Cst. Fairburn suggests to you that you can either be a witness with respect to this particular murder charge or you can be an accused with respect to this particular murder charge, correct?
>
> Smith: Yes

[23] Paul Smith initially refused to give the police a statement. It was only after the police arrested him that he cooperated in the prosecution of Nathan Johnson.

[24] While experience teaches us that testimony from a Crown witness in these circumstances must be approached with the greatest care and caution, nothing was revealed during Paul Smith's testimony to allow me to declare that it was not independent from the testimony of Kaitlin Fuller. Paul Smith testified that Cst. Fairburn told him about the police investigation prior to obtaining a statement from him, and also told him that he was at risk of being charged with the murder unless he co-operated. No evidence was elicited to show that the details of Kaitlin Fuller's testimony were revealed to Paul Smith prior to his providing a statement or testifying.

[25] Based on the totality of the evidence, excluding the proposed hearsay evidence the Crown is attempting to introduce through Paul Smith, there is sufficient evidence to show there was a common design to murder Chad Smith. There is sufficient evidence to move to "Stage 2" of the *Carter* and *Mapara* analysis.

[26] The direct evidence against Mr. Johnson is mainly comprised of the testimony of Kaitlin Fuller. The evidence of Ms. Fuller is sufficient to prove that Nathan Johnson was involved in a common design with Randy Riley to commit

murder. It is therefore proper to allow the jury to hear and consider the out of court statements made by Randy Riley to Paul Smith.

[27] The Crown's position is even stronger in this case than in many others, due to the simple fact that Mr. Johnson was within speaking and hearing range of Mr. Riley when the comments were made by Mr. Riley to Paul Smith. Mr. Johnson was in the back seat of the vehicle Paul Smith was driving. Mr. Riley was in the front passenger seat. Mr. Johnson would have been in a position to hear the conversation and to observe Mr. Riley's conduct while in the presence of Paul Smith during the ride to and from Lake Banook.

[28] Both phrases in question are admissible. The first comment, "I need a lift…I am going to get a thing", is Mr. Riley asking Paul Smith for assistance in furthering the common design and explains why the drive is needed. The second comment, "I had a problem with a pizza guy he beat me up with an object years ago. I am going to take care of it", is linked to the first comment. The second comment provides context to the first phrase and explains the state of mind of the co-conspirators.

[29] Ms. Fuller testified that Mr. Riley had already expressed a similar sentiment to Mr. Johnson prior to calling Mr. Smith. When walking by the pizza shop earlier in the day, she says, Mr. Riley told Mr. Johnson that the pizza guy had hit him over the head with a hammer years previously and that he wanted to kill him. Ms. Fuller's testimony in this regard explains why Mr. Johnson and Mr. Riley became involved together in the first place. That is, Mr. Riley told Mr. Johnson that he had a problem with the pizza guy because the pizza guy beat him up or hit him over the head with a hammer or object years ago and he wanted to kill him.

Necessity and Reliability

[30] The issue of necessity and reliability was also raised in the context of this analysis. In *Magno,* Hourigan J.A. discussed the reliability analysis in a situation where the trial judge finds it necessary to apply the principled approach to alleged co-conspirator statements:

> 57 The trial judge delivered lengthy reasons on the *voir dire* requested by the Crown to admit certain hearsay statements made by the alleged co-conspirators: see *R. v. Magno*, 2012 ONSC 4001. Due to serious concerns about the reliability of this evidence, the trial judge found this to be one of the exceptional cases where the co-conspirator exception to the inadmissibility of hearsay evidence

should not automatically apply, and a principled analysis was required. The trial judge was, therefore, clearly alive to the potential unreliability of this evidence and significantly limited the hearsay statements that were admitted for consideration by the jury. In particular, he refused to admit statements made by Paskalis on the basis that Paskalis is "an inveterate liar" and his statements are, therefore, not reliable (para. 82). The trial judge also excluded certain statements he found were not in furtherance of the conspiracy. In the end, after carefully establishing their necessity and reliability, the trial judge admitted only 13 of the 27 hearsay statements the Crown attempted to introduce under the co-conspirator exception.

58 In my view, there is no basis to interfere with the trial judge's ruling on the co-conspirator exception to the hearsay rule, as I agree with and adopt his reasoning. The arguments made on appeal were all made on the *voir dire* and the trial judge properly rejected them. I focus my analysis below on the three principal arguments made by the appellant in support of this ground of appeal.

59 First, the appellant submits that statements attributed to Roks in the testimony of Regaldo and McMaster should not be admitted. The trial judge admitted those statements on the basis that there was "very clear evidence" that Roks was involved both in the original arson conspiracy and the post-arson cover-up conspiracy, and that he would not be a co-operative witness (paras. 85-86). The appellant argues that the trial judge erred in this regard because there was no necessity that these statements be admitted since Roks was called as a witness and was not hostile.

60 I disagree. The issue of leading a co-conspirator's hearsay declaration when the witness is available to testify was raised but not answered in *R. v. Chang* (2003), 173 C.C.C. (3d) 397 (Ont. C.A.), at paras. 107, 110. However, as noted by Blair J.A. in *R. v. N.Y.*, 2012 ONCA 745, 270 C.R.R. (2d) 294, at para. 78, *Chang* did not say that non-compellability is required to satisfy the necessity requirement. Rather, "it is *the availability of the evidence, not the availability of the witness* that is of ultimate significance, and...while co-conspirators may be physically available, their testimony rarely is" (emphasis in original).

61 Our courts give the necessity criterion a flexible definition, capable of encompassing diverse situations: *R. v. Smith*, [1992] 2 S.C.R. 915, at pp. 933-34. The necessity criterion is satisfied where it cannot be expected that evidence of the same value from the same or other sources will be available. Thus, the necessity criterion is fact-specific and its precise limits remain to be established in the context of specific cases: *Chang*, at para. 105; *R. v B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 798.

62 In his ruling on the co-conspirator exception, the trial judge explicitly turned his mind to the fact that Roks was available to testify. He also noted that there must be an evidentiary basis for a finding of necessity and that it should not be based on mere speculation. The trial judge went on to consider Roks' particular

> circumstances: "His conviction for murder is currently under appeal, he has always maintained his innocence and, while he has previously testified, it is obvious that he will not admit making any statements that would implicate him in the conspiracy." The trial judge concluded that the necessity criterion was satisfied since Roks would not admit to making the statements. I see no flaw in this analysis. It was clear that Roks' evidence at trial would not be of the same value as the hearsay statements.

[31] According to the general principles outlined by the Supreme Court of Canada in *Carter* and *Mapara,* a principled analysis is generally not necessary in assessing whether a statement is admissible under the co-conspirators exception. Whether or not such an analysis is required in this case, the threshold for necessity and reliability have been met.

[32] The necessity issue was not argued in any detailed manner by Mr. Johnson. In fact, the issue of necessity was actually first raised by the court. Counsel confirmed that Randy Riley is facing his own first degree murder charge, has not provided a statement of any significance to the police and indicates to the court through his counsel during this hearing that he is in no way, shape or form interested in speaking to the police or the Crown or testifying in court. It is completely unrealistic in these circumstances to expect that Mr. Riley will provide any useful information if forced to take the witness stand. Necessity relates to the information, not the person who has the information.

[33] In relation to the reliability of Paul Smith's statements, no detailed objection was made by Mr. Johnson on this application. Counsel for Mr. Johnson did not cross-examine Paul Smith in such a way as to reveal an issue with his reliability regarding the accuracy of the statements made, the circumstances of hearing the statements or his reliability as a witness in this regard. Paul Smith did admit during cross-examination that the police threatened to charge him with the murder and then told him about "various aspects" of the investigation prior to obtaining a statement. No further details were elicited.

[34] While experience teaches us that testimony from a Crown witness in these circumstances must be approached with the greatest care and caution that does not render this testimony unreliable to the point of its being inadmissible in this case. While Paul Smith testified that Cst. Fairburn told him about the police investigation prior to obtaining a statement and also told him that he was at risk of being charged with the murder unless he co-operated, nothing was presented to the court to show that Paul Smith was an inveterate liar or that he provided his

statements under such conditions as to make them inadmissible. Considering the threshold stage we are dealing with here, reliability has been made out.

Conclusion

[35] The statements under scrutiny, "I need a lift…I am going to get thing" and "I had a problem with a pizza guy, he beat me up with an object years ago. I am going to take care of it", will be admitted under the co-conspirators' exception to the hearsay rule. Instructions will be given to the jury to explain how these statements are to be assessed by them. A *Vetrovec* warning will also be given to the jury during final instructions regarding the testimony of Paul Smith and Kaitlin Fuller as a whole.

[36] The Crown has also applied to ask Paul Smith what he took the word "thing" to mean in the context of "I need a lift…I am going to get thing". The Crown has not laid a proper foundation for this inquiry. While the Crown is permitted to conduct a relevant direct examination of Paul Smith, they are prohibited from attempting to elicit his understanding of the word "thing" in the context of his discussions with Randy Riley.

Arnold, J.