SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Downey*, 2021 NSSC 50

Date: 20210212
Docket: Hfx No. 475442
Registry: Halifax

Between:

Her Majesty the Queen

v.

Markel Jason Downey

Restriction on Publication:

Sections 517 and 539 of the *Criminal Code* which have expired effective June 1, 2021.

Pursuant to subsection 110(1) of the *Youth Criminal Justice Act,* no person shall publish the name of a young person, or any other information related a young person, if it would identify the young person as having been dealt with under this *Act.* This decision complies with this restriction so that it can be published.

Voir Dire #3
Admissibility of KGB Statement of E.S.

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	November 16 - 23, 2020; and January 21, 2021, in Halifax, Nova Scotia
Last correspondence from Counsel:	February 8, 2021
Date of Decision:	February 12, 2021
Counsel:	Scott Morrison and Erica Koresawa, for the Provincial Crown Malcolm Jeffcock, Q.C. and Robert Jeffcock, for the Defence

By the Court:

Background

[1] Markel Jason Downey was tried on three counts of attempted murder contrary to Section 239 of the *Criminal Code*. The charges stemmed from events which occurred at a home invasion at Arklow Drive, Halifax Regional Municipality, Nova Scotia, on November 30, 2014 ("the Arklow Drive shooting"). On February 14, 2017, at the conclusion of a 12 day (judge alone) trial, he was acquitted of all charges. After considering the evidence, the trial Judge was left in reasonable doubt as to whether the identity of the accused, as the shooter of the three victims, had been established. Ashley MacLean was the only "identification witness" called by the Crown at this trial ("the first trial").

[2] On February 14, 2018, the Court of Appeal, in a decision reported as *R. v. Downey*, 2018 NSCA 33, allowed the Crown's appeal, and ordered a new trial.

[3] Tragically, on July 2, 2018, Ms. MacLean died. Her death is said to be directly and causally related to the gunshot wounds which she sustained on November 30, 2014.

[4] In the wake of Ms. MacLean's death, the Crown has preferred an indictment against Mr. Downey. He now faces charges:

a) pursuant to *Criminal Code* ("*CC*.") section 235(1) – first-degree murder of Ashley MacLean;

b) pursuant to *CC*. section 239 – attempted murder of Logan Starr;

c) pursuant to *CC*. section 239 – attempted murder of Jordan Langworthy.

[5] Only one of the above charges is new to Mr. Downey, but it is significant. This is the first-degree murder charge that he now faces in relation to Ms. MacLean. As a result of this new charge, Mr. Downey's second trial will take place before a Judge and jury. He has no right of election. Moreover, because the indictment has been preferred, there will not be a preliminary inquiry beforehand. There was one, however, prior to the first trial, because that one (with Ms. MacLean still alive at the time) involved three attempted murder (s. 239) charges.

[6] The trial itself (his second) is presently scheduled to begin on March 31, 2021.

[7] This is the third *voir dire* of a total of five. The first two have been dealt with in (thus far) unpublished decisions. In the first, I ruled that Ashley MacLean's testimony at Mr. Downey's first trial would be admissible in the second one (even though she is now deceased), pursuant to s. 715 of the *Criminal Code*. In the second, I ruled that a note provided by Mr. Downey to R.D. while both were incarcerated was also admissible as after the fact conduct.

[8] The origins of this *voir dire*, start with the fact that E.S. earlier admitted that he was one of the four participants in the home invasion of November 30, 2014, during which the three victims were shot. In 2014, he told the police he did not know the identity of the fourth participant, who was the shooter.

[9] On August 8, 2018 E.S. provided a statement to police in relation to this matter, this time identifying the accused, Markel Downey, as the shooter. By extension, he identified the accused as the person who both killed Ashley MacLean, and shot the other two victims who were in the residence that evening.

[10] On July 28, 2020, E.S. himself died.

[11] The Crown seeks a ruling on the admissibility of the KGB statement that he provided to police on August 8, 2018.

Issue

> *Has the Crown established that E.S.'s KGB statement may be admitted into evidence at trial pursuant to the principled exception to the hearsay rule?*

Analysis

(i) Summary of the law in general

[12] Hearsay is a statement made out of Court. The party proffering it intends that it be accepted for the truth of its contents. Although relevant, it is presumptively inadmissible. This is because the trier of fact is unable to assess its reliability in the usual manner, for example, by observing contemporaneous cross-examination of the speaker and also observing his/her demeanour.

[13] In *R. v. Khelawon*, [2006] 2 SCR 787, Charron, J. put it this way:

> 2. As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts.

[14] The modern, or "principled", approach to the determination of admissibility in this context is also articulated:

> ... When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gatekeeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder. (*Khelawon*, para. 2)
>
> [Emphasis added]

[15] Further elaboration is provided in *R. v. Bradshaw*, [2017] 1 SCR 865. For example:

> 24. By only admitting necessary and sufficiently reliable hearsay, the trial judge acts as an evidentiary gatekeeper. She protects trial fairness and the integrity of the truth-seeking process (*Youvarajah*, at paras. 23 and 25). In criminal proceedings, the threshold reliability analysis has a constitutional dimension because the difficulties of testing hearsay evidence can threaten the accused's right to a fair trial (*Khelawon*, at paras. 3 and 47). Even when the trial judge is satisfied that the hearsay is necessary and sufficiently reliable, she has discretion to exclude this evidence if its prejudicial effect outweighs its probative value.
>
> [Emphasis added]

[16] In this way, the principled approach adds to the other long standing categorical exceptions to the hearsay rule that have been carved out by the common law over time. The statement in question does not fall into one of these other categorical exceptions.

[17] So, I begin with the presumption which excludes this hearsay testimony. I then consider whether the Crown has rebutted the presumptive exclusion of this

evidence. To do so, I must examine the twin pillars of the principled exception: necessity and reliability.

(ii) The requirement of necessity

[18] It is common ground between the parties that this criterion is satisfied by the unavailability of E.S. to testify personally – he is dead. As noted in *R. v. Hawkins*, [1996] 3 SCR 1043, para. 72:

> For the purposes of these appeals, it will suffice to hold that the preliminary inquiry testimony of a witness will satisfy the criterion of necessity where the witness is generally unavailable to testify at trial. Without restricting the precise content of "unavailability", the categories of absence recognized under s. 715, specifically death, illness, and insanity, offer a helpful guide to the types of circumstances under which it will be sufficiently necessary to consider the admission of the witness's former testimony.

(iii) The requirement of reliability (in general)

[19] What I must decide is "threshold" rather than ultimate reliability. The latter is within the purview of the trier of fact which is, in this case, the jury. If admitted, they, not myself, will determine how much weight (if any) to assign to the hearsay statement when it is considered along with all of the other trial evidence. My decision with respect to the threshold reliability of E.S.'s statement simply determines whether the jury gets to hear it at all.

[20] Procedural reliability exists when the Court has been satisfied that there were satisfactory alternatives to cross-examination present, at the time E.S.'s statement was taken, so as to enable the trier of fact to rationally evaluate it.

[21] Substantive reliability is achieved when the Court has been satisfied that the statement is inherently trustworthy, having regard to the circumstances in which it was made, or/or other evidence which corroborates or conflicts with it.

[22] These sub-categories are not mutually exclusive, or segregated pigeonholes. Indicia of procedural reliability, even if not sufficient to establish (on their own) a basis for a conclusion that a statement possesses threshold reliability, may nonetheless augment or buttress the factors suggestive of substantive reliability, and vice versa, in an appropriate case.

[23] Sometimes, it is unhelpful to get caught up in whether an indicium is either "procedural" or "substantive" in nature. All presenting factors must be considered when a determination is made whether the individual statement in issue possesses threshold reliability.

[24] As our Court of Appeal pointed out in *R. v. Barrett*, 2020 NSCA 79:

> 18. These "testimonial attributes" were examined by the judge and permitted her to reach the conclusions she did about the safeguards present, despite the statement not being able to be tested by cross-examination. While she may not have specifically used the distinct labels of "procedural", and in turn, "substantive" reliability, the judge ultimately took into account the presenting factors concerning both. Although it also predated *Bradshaw*, the comments of Rosenberg J.A. in *R. v. Taylor*, 2012 ONCA 809 resonate:
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> > 26. I turn then to consideration of the admissibility of the hearsay evidence in this case. No question of necessity arises; the death of the complainant fulfills the necessity criterion. This case turns on whether the complainant's statement to the police had sufficient threshold reliability to warrant its reception. As is well known, threshold reliability may be demonstrated because of the circumstances in which it came about or because in the circumstances its truth and accuracy can nonetheless be sufficiently tested: *Khelawon*, at paras. 49, 62-63. However, these two different grounds are not watertight compartments: *Khelawon*, at para. 49.
> >
> > 27. The complainant's statement in this case had elements of both grounds. Like testimony in court, it was taken under oath and the trier of fact could observe the declarant's demeanour throughout because of the complete video recording. The complainant was warned of the criminal consequences of not telling the truth, which was an additional safeguard that is not explicitly found in courtroom testimony.
> >
> > [Emphasis in original]

(iv) Threshold Reliability:

a) Procedural aspects – discussion

[25] The Crown asserts that its case is primarily based upon substantive reliability, but points out that many features suggestive of procedural reliability coexist. For example, it is noted that, with respect to E.S.'s statement identifying the accused as the shooter, which he provided on August 8, 2018 (hereinafter referred to as either "the Downey statement" or "the second statement"):

i. It was taken under oath before a Commissioner of Oaths, and this oath was repeated on the KGB form which E.S. eventually signed;

ii. E.S. was warned on more than one occasion that criminal charges could result in the event that he lied and/or provided a false statement;

iii. A video recorded, so-called KGB statement was taken from him. As a consequence the trier of fact will be able to observe his demeanour and sobriety while he made it.

[26] Obviously, this being a statement provided to the police, E.S. was not subjected to contemporaneous cross-examination. Nor was he subjected to anything even remotely resembling vigorous questioning. The most that can be said is that the police officer to whom the Downey statement was given asked (in some cases) appropriate follow-up questions, and did make some attempt to clarify ambiguities.

[27] There is also the undeniable fact that the statement which the Crown seeks to admit came about as a result of E.S. reaching out to the police, rather than vice versa. Earlier, he had been a person of interest in another homicide, was picked up, and provided a lengthy statement over the course of three days to the police (albeit, different officers). During the course of that earlier statement (hereinafter referred to as either "the Bishop statement" or the "first statement") it is no exaggeration to observe that his narrative changed on multiple occasions with respect to key components of it. These contradictions generally occurred in the wake of the questioning to which he was subjected by the interviewing police officers (Stanton and Dooks).

[28] During the course of the Bishop statement, which was provided on August 1, 2, and 4, 2018, E.S. implicated R.D., expressed fear of retribution on the part of the accused, (at times) displayed significant emotional reactions, and admitted to both substance abuse and psychological issues. The Court spent a significant amount of time viewing this first statement.

[29] As noted, his statement implicating the accused in this matter (his second statement) occurred on August 8, 2018, three days after the conclusion of the first one. Here, he reached out to the police (although he had been invited to do so, if he wished, by one of the police officers as they drove him home after completing the Bishop statement). The second interview was conducted by a different officer. I am mindful of the Court's comments in *Barrett*, which drew a distinction (albeit, in the

circumstances of that case) between a situation where the police contact a witness and receive a statement, as opposed to one where the witness contacts the police "with a story to tell" (*Barrett*, para. 17).

[30] I also note that the procedural safeguards (ie. oath and warning) employed before the video recorded statements of E.S. were obtained in each case were identical. In particular, an oath was administered and he was warned of the criminal consequences of making false or misleading statements. Both statements were videotaped.

[31] Yet in the first statement, as earlier noted, E.S. significantly and patently changed his story and contradicted himself many times with respect to some important details. He was pushed hard by the police officers in that one and this vigour seemed to result in E.S. changing his story many times whenever he hit a "rough patch". This was particularly evident in relation to his whereabouts, and those of his cellphone, at the time of the Bishop homicide.

[32] In the second (or "Downey") statement, which occurred within mere days of the first one, the interview was conducted by a different officer. It was provided in response to much more sedate questioning.

(iv) Threshold Reliability:

b) Substantive aspects – discussion

[33] The Crown takes the position that this criterion is demonstrated when regard is had to the circumstances of E.S. when he made the statement and the content or particulars of the statement itself.

[34] In paraphrase, the Crown argues that the circumstances of the declarant that tend to demonstrate reliability consist of:

i. E.S. was neither under arrest, facing charges, nor could he be further penalized for the incident that resulted in the Arklow Drive shooting. At the time the second statement occurred (August 8, 2018) he was an admitted accomplice to that home invasion and sequelae, and had served his youth sentence in relation to that involvement;

ii. Although on August 1, 2018, he had been arrested and questioned on the unrelated (Bishop) homicide (during the

course of which he gave his first statement), he was not under arrest or facing charges with respect to that homicide, or in relation to any other incidents when he provided his second statement – the Downey statement. As a consequence, he did not receive the benefit of having any outstanding charges against him modified or dropped;

iii. E.S. received nothing in exchange prior to the provision of the second statement, nor was he promised anything;

iv. He received no promise of a future benefit either. Although he did receive a later benefit by way of an agreement to provide support in which the RCMP provided with some monetary benefits, this was not offered, nor did he have any way of knowing that it would be made available, at any time prior to the second statement;

v. in providing his statement to the police, E.S. risked compromising or losing his personal relationships with both the accused and R.D.; and

vi. he was warned of the requirement of, or the possibility of eventually testifying in court before providing his statement, and he agreed to do so.

[35] I will also paraphrase the Crown's argument with respect to those circumstances of the second statement itself which are said to demonstrate reliability:

i. there was no manipulation, coercion, or application of pressure by the police;

ii. he had actually adverted to aspects of the subject matter of the home invasion while providing his earlier statement pertaining to the unrelated homicide;

iii. E.S. had not been provided with any information by the police about this incident prior to raising the subject matter and giving the statement implicating the accused; and

iv. the absence of collusion on E.S. part with any other witnesses.

[36] Finally, the Crown argues that the particulars of the second statement itself as provided by E.S. tend to demonstrate its reliability. For example (and once again I paraphrase):

i. the statement was not one which was prepared by someone else after hearing what he had to say. It is in his own words and is comprised of his answers to questions that were put to him;

ii. he was not asked leading questions – he was asked to provide as much detail as he could about the incident of November 30, 2014, and he did so. Follow-up questions were generally open-ended and aimed at clarification;

iii. the level of detail in the statement;

iv. E.S. did not appear to be intoxicated, nor is there evidence that he was acting under threat or manipulation;

v. he was thoroughly questioned to clarify any ambiguities; and

vi. the statement itself is internally consistent.

[37] I have considered all of these arguments, but will only deal with important points, in an omnibus fashion.

[38] First, it is convenient to repeat that E.S.'s statement of August 8, 2018, implicating the accused as the shooter at 152 Arklow Drive on November 30, 2014, came on the heels of his first statement, provided to the police on August 1, 2, and 4, 2018. During the time that he provided this first statement (in relation to the Bishop homicide) he was a person of interest in relation to same, and indeed had been picked up by the police because of that.

[39] The Crown's point (that he was not arrested or in legal jeopardy of any sort at the time that he provided the Downey (second) statement) is true only in a very narrow sense. He knew that he was under investigation in the Bishop homicide. Moreover, E.S. identified, during the course of the Bishop statement (after implicating R.D. in that murder) his fear that the accused would seek retribution against him when he got out of jail, because he (E.S.) was a "rat".

[40] It is also necessary to remark, yet again, upon the obvious difference in the intensity with which investigating officers questioned E.S. when he gave the Bishop

statement, as opposed to the manner in which they went about it in his second KGB statement. In the former, when repeatedly challenged, E.S. gave myriad versions of where he was and who he was with, particularly when the police told him that they had evidence of "tower signal readings" which placed his cell phone in proximity to the location of the Bishop homicide at the relevant time. In the Downey (or second) statement of August 8, 2018, he was not similarly pushed. Such could account for the fact that this second statement has a veneer of homogeneity, and /or consistency.

[41] Also in the Bishop statement, E.S. adverted to dependency and/or abandonment issues, other mental health and drug dependency issues. Standing on their own, these issues do not trigger a conclusion that the witness must be unreliable. However, they are certainly factors that could be explored on cross-examination of the witness in ordinary circumstances. In this case, obviously, the Defence will be unable to cross-examine the witness on these and other factors.

[42] The Crown also requests that the Court consider other extrinsic evidence, which it says tends to corroborate E.S.'s second statement, when its threshold reliability is determined.

Khelawon/Bradshaw redux

[43] Both *Khelawon* and *Bradshaw* have been interpreted on many occasions. The latter case, in a nutshell, leaves the process outlined in *Khelawon* untouched, however, adds to it by providing guidance as to how to interpret and assess the value of corroborative evidence within the *Khelawon* matrix.

[44] The Crown argues that there is extrinsic evidence present in this case which must be considered when determining whether the statement in question meets threshold reliability. Among other things, it is argued that when considered in its entirety, this extrinsic evidence buttresses or enhances the threshold reliability of E.S.'s Downey statement, and in particular, his evidence that:

i. the accused was the fourth member of the home invasion at 152 Arklow Drive on November 30, 2014;

ii. the accused was the shooter; and

iii. it was the accused's idea to bring the gun and that everyone should wear masks.

[45] The Crown says that this extrinsic evidence, when considered holistically, demonstrates that the only likely explanation for the hearsay statement "... is the

declarant's truthfulness about, or the accuracy of, the material aspects of the statement" (*Bradshaw*, para 44).

[46] Our Court of Appeal, in *Barrett*, discussed the manner in which corroborative evidence interacts with a *Khelawon* analysis:

> 40. … In our view, *Bradshaw* refines *Khelawon* in those circumstances where corroborative evidence is called to support the substantive reliability analysis. That said, in this case there was no corroborating evidence available at the threshold reliability stage. Given that corroborative evidence may not always be proffered at the threshold stage, it can only be that *Bradshaw* does not wholly replace *Khelawon*, but instead augments it. We adopt the reasoning of Mainella, J.A. in *Hall, supra*:
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> > 68. The *Bradshaw* rules as to corroborative evidence are more complex to apply than the single rule in *Starr* which prohibited altogether considering extrinsic evidence as corroborative of the hearsay evidence for the purpose of determining admissibility (see *Starr* at para. 217). The *Bradshaw* rules focus on the relevancy, sufficiency and reliability of the proposed corroborative evidence. According to the majority in *Bradshaw*, the purpose of these three rules is to preserve the distinction between the trial judge deciding threshold reliability and the trier of fact deciding ultimate reliability (at para. 42)**.**
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> > [Emphasis in *Barrett*]
> >
> > 69. As Newbury, J.A. explained in *R. v. Poony,* 2018 BCCA 356, the effect of *Bradshaw* is to create a "high bar" (at para 27) before evidence can be considered to be corroborative of hearsay in the analysis of threshold reliability...
> >
> > [Emphasis added]
> >
> > ...
> >
> > 75. Karakatsanis, J. summarized the framework for a trial judge to determine whether corroborative evidence is of assistance in the substantive reliability inquiry as follows (at para. 57):
> >
> > > 1. identify the material aspects of the hearsay statement that are tendered for their truth;
> > >
> > > 2. identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;
> > >
> > > 3. based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and
> > >
> > > 4. determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the

> statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.
>
> [Emphasis added]
>
> ...
>
> 77. Given some of the arguments advanced on this appeal, in my view, it is important not to stray too far afield from exactly what *Bradshaw* decided. The only point *Bradshaw* decides is clearly identified by Karakatsanis, J. as being, "When can a trial judge rely on corroborative evidence to conclude that the threshold reliability of a hearsay statement is established?" (at para. 3). *Khelawon* remains the leading decision on determining threshold reliability (see *Johnston* at para. 98; *Larue* at para. 98; and *Brousseau v. R.*, 2018 QCCA 1140 at paras. 21-22).
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> 78. Practically, the relevance of *Bradshaw* in a given case will depend primarily on how the moving party seeks to establish threshold reliability of the evidence in question; particularly if there is attempted reliance on corroborative evidence. If corroborative evidence of the statement is important to establishing threshold reliability, so, too, will be the *Bradshaw* rules regarding corroboration. If, however, the case is like this one, where corroborative evidence plays little, if any, role on the question of threshold reliability, *Bradshaw* will be of less significance.
>
> [Emphasis in original]

[47] And further, the Court in *Barrett* stressed:

> 42. While *Bradshaw* has served to refine the law on admissibility of hearsay evidence, we do not accept Mr. Barrett's argument that it supplants *Khelawon*, which in our view remains the standard for the necessity–reliability analysis. *Bradshaw* steers the analysis when there is corroborative evidence available to assist the trier of fact in assessing reliability at the threshold stage. Again, corroborative evidence was not available to the judge conducting the *voir dire* in this case.
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> [Emphasis added]

[48] Therefore, the approach outlined in *Bradshaw* (para. 57) provides the framework within which to consider the significance of what the Crown says is extrinsic evidence corroborative of E.S.'s second statement.

Application to case at bar

i) Material Aspects of the Statement

[49] I have earlier discussed the material parts of E.S.'s second statement that are being tendered for their truth. They consist of his assertions that the accused was the fourth member of the home invasion, that Mr. Downey shot the three victims, and that it was his idea to bring the gun and wear masks.

ii) Specific Hearsay Danger

[50] The specific hearsay danger is obvious. It relates to the declarant's sincerity. Truthfulness is the issue.

iii) Consideration of alternative, even speculative explanations for the statement.

[51] The word "speculative" requires some clarification in this context. While explanations for which there is no specific evidence may be permissibly considered, they cannot be implausible. This is a common sense limitation curbing flights of "outright fantasy", and is a logical extension of the approach employed in cases such as *R. v. Larue*, 2018 YKCA 9, and others.

[52] Some alternative explanations which could possibly account for E.S.'s statements in the circumstances of this case include:

(a) Fear

[53] On numerous occasions in the course of providing the Bishop statement, E.S. alluded to the fact that he would likely be perceived as a "rat" for implicating R.D. in that particular homicide, and expressed concern that the accused would come and kill him if he ever got out of jail (for example, Bishop statement, p. 44 of 67). At the time the accused was remanded with respect to the charges in this case. As a consequence, E.S. had an arguable motive to want to ensure that the accused remained behind bars, as opposed to (for example) being granted judicial interim release pending trial.

(b) Hope

[54] In the first interview, E.S. was picked up because he was a suspect or a person of interest with respect to the death of Mr. Bishop. The interviewing officers, during the course of the Bishop statement, did point out to E.S. that they were there to discuss only Mr. Bishop's homicide. However, on a few occasions they did make

comments which could possibly be taken to encourage the idea that there was some linkage between the two cases.

[55] For example Cst. Dooks said (Bishop statement, p. 275), "You have been through this process before... I truly believe you didn't precipitate it [the Arklow shooting], I know that file intimately... I know you wear it every day." She also returned to the topic of the Arklow Drive shooting (which led to the death of Ashley MacLean and gunshot wounds to the other two witnesses) at p. 276.

[56] As a consequence, it could be argued that E.S. had a motive to, first, offer up R.D. as the perpetrator in the Bishop homicide, and thereby divert attention from himself and his own whereabouts when that particular killing happened, and second, to ingratiate himself with the police by helping them out with another outstanding investigation so as to (as he may have perceived it) further separate himself from consideration in the Bishop homicide.

[57] Augmenting the above concern was the dialogue (Bishop statement – p. 58 of 67) where E.S., having earlier disavowed his attendance at the event (saying he had not been invited) changed his stance and stated that he did (in fact) go to a particular party at the Downey residence. During the course of this party, he said, R.D. confided that he had killed Mr. Bishop, and explained the circumstances that had led up to it. After this topic is raised, E.S. goes on to ask: "…what about the Baby J [Markel Downey] thing?" And the interviewing officer responds, "We will get to that <u>at a different time</u>" (*emphasis added*).

(c) More connectedness

[58] One of the officers who interviewed E.S. also testified that when they dropped E.S. home after the Bishop statement, he was invited to contact them if he ever wanted to discuss the Arklow Drive shooting (which he did, three days later). This could be taken to buttress the potential for E.S. to consider that his plight with respect to the Bishop homicide was somehow connected to the help he offered to the police in the case at bar.

(d) Revenge

[59] On several occasions E.S. expressed feelings tantamount to sadness and a sense of betrayal at what he perceived to be an attempt by R.D., the accused, and other members of their circle to implicate him in the Bishop homicide. He also expressed ambivalence (on occasion) with respect to his feelings about the accused,

R.D., and one other member of that circle. The latter two, along with himself, are known to have been at the scene of the Arklow Drive shooting. He sometimes referred to them as his "brothers", while on other occasions he disavowed any sentiment or friendly feelings towards them. More than once, he wondered aloud about what type of people "would do that to him" (try to implicate him in the Bishop homicide).

(e) Psychological/addictions issues

[60] E.S. adverted to feelings of paranoia, abandonment, other mental health and addiction issues. On occasion, the reactions displayed by E.S. during the course of the Bishop statement appeared to be "over-the-top". These were largely absent during the course of the Downey statement. Were these larger-than-life reactions prompted by any of the (admitted) psychological issues and/or intoxication, and/or more intense police questioning? If so, what are the implications for the contents and veracity of the two statements?

(f) Contradictions

[61] First, it has previously been noted that E.S. patently changed material aspects of his story several different times during the course of the Bishop statement. Indeed, the Defence argues that he never has provided a definitive statement to the police as to his whereabouts at the time of that homicide. This demonstrates that he is willing to lie after he has sworn an oath to tell the truth. When he was pushed by the interviewing police officers, he offered multiple completely different stories as to his whereabouts and who he was with. He was not pushed by the (different) officer to whom he provided the Downey statement. Would a more aggressive interview by the latter have produced similar vacillations?

[62] Second, in 2014, in the aftermath of the Arklow Drive shooting which left the three victims seriously wounded, and eventually led to the death of Ashley MacLean, E.S. had also provided a statement to police. In it, he disavowed any knowledge of the identity of the fourth person present (the shooter). Yet, on August 8, 2018, E.S. identified the accused as the fourth person, and hence, the shooter (Downey Statement).

(iv) What is the corroborative evidence, and does it rule out these alternate explanations so that the only remaining likely explanation is that E.S. was truthful with respect to the material aspects of his statement?

[63] The Crown argues that E.S.'s statement is sufficiently corroborated by other significant pieces of extrinsic evidence. Together, these pieces are said to attenuate the concerns raised by the above noted possible alternative explanations. By virtue of this corroborative evidence, it is argued that E.S.'s second (or Downey) statement should pass muster at the threshold reliability stage.

[64] The first significant piece of corroborative evidence in this context is said to consist of the fact that gunshot residue (GSR) was located by the forensic investigators upon the steering wheel of the accused's vehicle, and upon his right hand. The second piece results from the similarity of the material aspects of E.S.'s (Downey) statement to those provided by Ashley MacLean (since deceased) at Mr. Downey's first trial.

[65] As I consider this evidence, I remind myself (again) that I am not dealing with a threshold of certainty here, nor one of ultimate reliability. I must not conflate "threshold reliability" with one of these higher standards.

[66] I will now consider each in turn.

A) Gunshot residue

[67] The first witness called by the Crown in this matter was Dr. Claude Dalpe, a forensic specialist in gunshot residue (GSR). He had been qualified as a Court expert in this field on multiple occasions between 2016 and 2020. His qualification to express opinion with respect to the nature of GSR and its transmissibility were acknowledged by the Defence.

[68] GSR consists of the expended rimfire primer associated with the discharge of a firearm, whereby microscopic particles escape from any breaches in the weapon. The size and proportion of the residue generated by different firearms varies. The extent and direction of the discharge may be influenced by many different factors, such as whether the shooting occurred indoors or outdoors, and, if the latter, wind direction, temperature, humidity and other factors. This precludes the notion of an invariable GSR "fingerprint" associated with the discharge of a particular weapon.

[69] GSR particles are relatively heavy for their size (10 µm) because they contain lead. In addition to lead, they also contain barium and antimony compounds. The particles are formed out of the components of the primer powder when the weapon is discharged. They may become trapped in clothing fibers, and also may adhere to uncovered skin and body parts, as well as inanimate objects.

[70] Discharge from a revolver may proceed down range, laterally, and/or backwards. Indoors, GSR may travel up to a few meters in any direction. There is no real model that can identify how much particulate will be generated by a given firearm discharge. Similarly, it cannot even be said that a larger weapon will invariably discharge more residue than a smaller one (or vice versa) in all circumstances.

[71] GSR removes from skin very easily. Simple washing will often remove it in its entirety. The particles themselves, however, last indefinitely unless dissolved in a strong acid.

[72] If testing reveals that a person has GSR adhering to their clothing or person, three possibilities exist. Either:

i. they have discharged a firearm;

ii. they were in close proximity to the discharge of a firearm; or

iii. the residue has been transmitted to them via contact with some other source of the residue, such as a person in scenario i) or ii) above, or an object to which GSR had adhered.

[73] Dr. Dalpe's evidence was that GSR may be easily transferred from hand-to-hand. He referenced a study conducted in the United Kingdom, during the course of which someone had discharged a firearm, tested positive for residue right after the discharge, then touched a second person. That person (in turn) touched a third, all within five minutes of the discharge. All three participants ended up having some measure of GSR adherence.

[74] Time, however, is one of the major variables. Generally speaking, the longer the period of time that has elapsed between the shooting and the sample taken, the harder GSR is to detect, regardless of whether it was a primary transfer from the shooting itself, or secondary transfer received from contact with someone or something else.

[75] Moreover, no hard and fast rules can be laid down as to how much of the GSR that has originally settled on people will dissipate or shed during any given period of time. Factors such as whether people have washed either themselves or their clothing, whether they have been moving or sedentary, whether they have rubbed themselves or their clothing, whether they have been outdoors in the elements, and

whether they have transmitted some of it to secondary contacts, are some of the variables which preclude an invariable, straight-line temporal correlation.

[76] In the case at bar, we know that the accused intends, at a minimum, to introduce alibi evidence. He plans to lead evidence that he was home babysitting a relative at the relevant time. We know that within 90 minutes of the Arklow Drive shooting of Ms. MacLean and the others, the police arrived at the Downey residence and located the accused's vehicle. The accused, R.D., E.S., and another friend (the latter three subsequently admitted their involvement in the home invasion and their presence at Arklow Drive when the shooting occurred) were all indoors in close proximity to one another.

[77] Following the analysis of samples taken at the scene on November 30, 2014, a few particles of GSR were found on the steering wheel of the accused's vehicle and on the driver's side door of his car, which was parked outside his home. One particle was also found on his right hand.

[78] Standing on their own, the presence of one GSR particle on Mr. Downey's right hand, the presence of the particles found on the steering wheel of his vehicle, and on the driver's side door do not provide satisfactory corroboration of the reliability of E.S.'s statement identifying the accused as the shooter. He was in the presence of three individuals who are known to have been present during the shooting at Arklow Drive earlier that evening. The ease with which such particulate is transmissible, in the evidence of Dr. Dalpe, and given the proximity of these three others (when the police first encountered the accused that evening), provides the Court with less than "threshold" comfort as to the corroborative value of this evidence, on its own.

[79] Nonetheless, the presence of particulate on Mr. Downey's person and on his vehicle is at least consistent with the Crown's theory and E.S.'s statement that he was the shooter. I also bear in mind that I must not subject each portion of the corroborative evidence to a piecemeal analysis. I must consider it in its entirety, on a balance of probabilities. Perhaps the value of the presence of the GSR will be strengthened, in the circumstances, after the significance of the second piece of corroborative evidence is considered.

B. Do the material aspects of E.S.'s second (or Downey) statement possess sufficient similarity to the testimony of Ms. MacLean at the first trial so as to assist the former to attain threshold reliability?

[80] The Crown argues that the answer to the question above is a resounding "yes". Counsel points to what they consider to be evident and striking similarities between E.S.'s evidence as provided in his second statement, when juxtaposed with that of Ms. MacLean at the first trial.

[81] Buttressing the value of that similarity, the Crown argues, is the fact that it is unlikely that E.S. was aware of what Ms. MacLean said at the first trial, and it is also unlikely that the "similarity is due to outside influence", two factors which were considered to have some significance in *Bradshaw* (see para. 84, for example).

[82] The Crown adverts to the absence of evidence that Ms. MacLean had discussed her evidence with E.S., or that the latter had access to her testimony, such as might be found in a transcript or a recording of some sort. Counsel also points out that, in the evidence of Cst. Stanton, E.S. was not present in Court when Ms. MacLean gave her evidence at the first trial. (*Brief, para. 50*)

[83] The Crown has provided a chart illustrating what it considers to be the strikingly similar aspects of Ms. MacLean's testimony, to E.S.'s (second, or "Downey") KGB statement. I have simply added the numbers on the far left for ease of reference to each allegedly corresponding statement. Recall that "Baby J" is the accused's nickname.

[84] The result is this:

	Ashley MacLean's Evidence	**August 8, 2018 ("Downey") Statement**
1.	"Logan and Jordan went into the living room to play on the PlayStation, so I stayed in the bedroom" – p. 1425	"Logan's on the couch" – p. 19 "Jordan and Ashley were, like… they were playing a game" – p. 22

2.	Logan and Jordan came into the bedroom, behind them "Jason, E.S. R.D. and D.B. that all came into the bedroom and kind of, like, took different positions" – p. 1425	"Baby J tells Logan to come to the room. So he follows him to the room and then we all go to the room" – p. 12 "…we're looking for stuff. So like, money, weed. And Logan is saying, like, he has nothing. And then Baby J tells him to go to the room. So he….so he walks into….he go….he walks into the room first and then Baby J is walking towards the room. We follow and then we go in and we're just looking for shit…" – p. 22
3.	When Logan and Jordan came in, Ashley moved to another spot on the bed – p. 1463	"…Ashley was, like, sitting down by the bed…on the bed, on the same…so was…and Logan was sitting on the bed. Jordan was sitting on the bed…" – p. 37
4.	Jason was holding a gun, "he was holding it in his right hand and he had it, like, kind of like to his stomach and it was, like, facing towards the wall" – p. 1425, 1474	"when I turned around to see…like, when I turned around and I would have seen Quan in the hallway. He would…he took it out like that (gesturing to right side)." – p. 23 E.S demonstrates how the gun was held when taken out: using his right hand, E.S. creates

		a gun-like shape pointing his index finger away from himself and his thumb upwards, holding his hand in that shape near his stomach/hip – timestamp 21:38:56
5.	The order they entered the room "was Jason and then E.S., R.D. and D.B. took kind of a position by the door beside each other, so they was kind of like blocking the doorway." – p. 1434	"Me and Baby J were in the room and I was looking for….for shit, and I guess them guys were still out there looking for stuff and then, like, when….couldn't find nothing. Seen Quan in the hallway. That's when Baby J asked him to turn off the light and told us to get out, to get out of the room." – p. 22 "…when I turned around I would have seen Quan in the hallway…" p. 23
6.	Jason "got Jordan and Logan to sit down on the bed" – p. 1426	Ashley, Logan, and Jordan were sitting on the bed – p. 37
7.	"And then E.S. came in and he came and sat on the bed in front of me and beside Logan, and he -- and he was digging through all the stuff trying to, like, find Logan's money and stuff to take."; E.S.	"Me and Baby J were in the room and I was looking for ... for shit, and I guess them guys were still out there looking for stuff and then, like, when ... couldn't find nothing." – p. 22

	started to laugh with Jason – p. 1426; 1434	
8.	“I was like, "There's no reason to shoot us, like, you could get caught for it." And he said, "How am I going to get caught?" He goes, "Well, who's snitching?"” – p. 1426	Ashley “was saying that ... that he wouldn't get away with it and then he ... and he said ... he said like, Well, who's ratting?” – p. 24
9.	“And Jason was more, like, kind of close up to the bed. So he was kind of like standing, kind of like in front of me but, like, more like maybe six feet away, so just kind of like right in front of the bed.” – p. 1434	“Me and Baby J were in the room…” – p. 22
10.	Jason “got R.D. and D.B. to shut out the lights” – p. 1427 “The lights were on the whole time until it came down to when they were going to shoot us, and then Jason told them to turn the lights out.” – p. 1456	“Baby J’s like, D.B., turn off the light” – p. 12 “…he told D.B. to turn off the light….” – p. 24 “…Baby J shot them for sure. He turned…he made us leave out the room and turn off the light…” – p. 36
11.	When they turned out the lights, E.S moved beside Jason – p. 1468	“he told D.B. to turn off the light. Then he told us to get out. Then we left the room and then we were leaving the room” – p. 24 “…Baby J’s like, D.B., turn off the light. And then he’s like, you…and he’s like, get out…guys, get

		out of the room. So then we get…so then we get out of the room and then turn around…" – p.12
12.	The light was the ceiling light – p. 1457	"…a bedroom light. Like a light switch" – p. 36
13.	"I started freaking out. And they turned the lights back on" after 5 or 10 seconds or 35 seconds – p. 1427; 1456-7; 1635	It was dark in the room when "he starts firing" – p. 12 "….she was like….she was scared…" – p. 24
14.	Don't know how many shots were fired, just know that the shooter "emptied the clip" – p. 1458	E.S heard "five, six" shots and then he was "the first one out the door" – p. 25
15.	"Jason was, like, the one that was, like, standing, like, right in the bedroom and I could see that he was holding a gun in his hand" – p. 1425 "And then he just shot me." – p. 1427	"Baby J shot them for sure" – p. 36
16.	"after, like, it was all done, like, they were gone out of the room, the room is kind of smoky from all the gunshots" – p. 1428	"…..before he was done, me and D.B. and R.D. were already, like…..were already running to the door. And then he runs behind us and then we all run away…" – p. 13.

17.	"E.S., D.B and R.D. were all wearing black, so it was like black jogging, black -- black jogging pants, a black -- black hoodies, black mittens and they were wearing black hats and black bandanas with those white swirl designs that they all have, but Jason was wearing red. He was wearing like a red hoodie and red pants and then black gloves, and he was wearing a black bandana." – p. 1435 E.S., D.B. and R.D. had on black gloves too – p. 1605	R.D. was wearing "black jogging pants, black hoodie. Pretty sure, like, every ... almost everybody had black on." – p. 13 R.D. told E.S. to put on "Bandana, jogging pants, and gloves. I never had gloves at the time…. Somebody supplied them." E.S. had on "a black hoodie and, like… and grey jogging pants." – p. 19 "Baby J had, like, ski goggles on and he "had, like ... like, a light brown-ish, tan-ish, like, jacket, like winter jacket, kind of, and black jeans." – p. 19 The ski goggles were orange-ish and covered his eyes – p. 19 E.S. thinks the goggles were up on his forehead – p. 49
18.	The bandannas they all wore covered "the tip of the nose, and then it kind of dipped down past their cheekbones." – p. 1436; 1612	"….I just had a bandana….I'm pretty sure D.B. had a bandana….everyone has something over their face…" – p. 47 and 48
19.	Markel wore the hood of his hoodie up and his bandanna in the same way the others did – p. 1440, 1441	Markel "definitely had something covered… for his face" – p. 48

20.	The gun was a .22 calibre, "revolver, so it was a really small gun and it was, like, silver, kind of like a silvery colour." – p. 1454	The gun was a brown revolver – p. 23
21.	"E.S. was more around us than any of the others, because he actually hung out with us like two weeks before the shooting even happened." – p. 1566	"…we were, like, we weren't best friends, but we were friends. She dated. She dated my best friend. So like, whenever she had, like, cigarettes and…and shit she would always, like, hook me up with, like a smoke and stuff." – p. 55

(*Crown brief, voir dire #3, para. 51, pp. 21 -23*)

Similarity of MacLean and E.S.'s statements

[85] It is certainly the case that a hearsay statement may be corroborated by one which is "strikingly" similar to another (*Bradshaw, paras. 51 and 54*). Other cases (beside *Bradshaw*) have also considered the requisite degree of correspondence between the two statements necessary for them to be "strikingly similar".

[86] For example, in *R v. U (FJ),* [1995] 3 SCR 764; affirming (1994), 90 CCC (3d) 541 (Ont. C.A.) the Court considered in what circumstances such a level of "striking similarity" might be attained (although in that case, it must be borne in mind that the witness was available for cross-examination). It is said to exist:

> a) where both statements contain the same or similar statements of a unique nature; or
>
> b) where the aggregate or accumulation of sufficiently similar points renders the correlation distinctive enough, such that mere coincidence becomes unlikely.

[87] The Crown argues, as we have seen, that this degree of similarity between the two statements cannot be explained by any known collaboration between E.S. and Ms. MacLean, nor by his presence at Mr. Downey's first trial when the latter testified.

[88] There is however, the fact that E.S. entered a guilty plea with respect to his involvement in the November 30, 2014 home invasion, during which the shootings of Ms. MacLean and the others took place. An Agreed Statement of Facts was prepared for consideration of the Youth Court Judge who sentenced the declarant. The Agreed Statement of Facts would have contained many of the particulars which E.S. later provided in the Downey statement on August 8, 2018. He would likely have been given a copy by his counsel at the time.

[89] There is (in my respectful view) an even more poignant or telling reason for the degree of similarity between the two statements (such as it is). Simply put, we know for a fact that both E.S. and Ms. MacLean were actually present when the described events took place. This, on its own, would suffice to provide the basis of many of the correspondences between the two.

[90] If we return to the correspondence chart, numbers 1 - 3, 4, 6, 7, 8, 10 - 13, 14, 15, 19, 20, and 21, and focus on the similarities (as opposed to the discrepancies) contained in some of these, most of the correspondence can be explained simply by the fact that E.S. and Ms. MacLean were both right there when the shooting occurred.

[91] And still, some of what the two have to say is patently contradictory. For example, and most significant, was the manner in which the two describe the clothing worn by the shooter (whom Ms. MacLean also identified as Markel Downey), at number 17:

> Ms. MacLean: "E.S., D.B. and R.D. were all wearing black, so it was like black jogging, black.. jogging pants, black hoodies, black mittens and they were wearing black hats and black bandannas with those white swirl designs that they all have, but Jason [Markel Downey] was wearing red. He was wearing like a red hoodie and red pants and then black gloves and he was wearing a black bandanna."
>
> E.S.: "... Pretty sure every... almost everybody had black on...
>
> Baby J had, like, ski goggles on and he had ... A light brown-ish, tan-ish jacket, like winter jacket, kind of, and black jeans ... The ski goggles were orange-ish and covered his eyes ..." He thought the goggles were up on the accused's forehead.
>
> [Emphasis added]

[92] And at number 20:

> Ms. MacLean: Markel wore the hood of his hoodie up and his bandanna in the same way the others did.

> E.S.: the accused "definitely had something covered... for his face".

[93] And at number 21:

> Ms. MacLean: described the gun as a 22 calibre revolver, and went on to describe it as "... a really small gun and it was like, silver, kind of like a silvery colour."
>
> E.S.: described it as a brown revolver.

[94] Ashley MacLean described, in other portions of her evidence, the distinctiveness of Mr. Downey's eyes, as well as other uncovered portions of his face, and how they assisted her recognition of him. At no time did she mention that he wore goggles of any sort, whether covering his eyes, or upon his forehead. This is significant, even if, by some stretch, the "red clothing" that she (in part) describes the accused as wearing could somehow be equated with the "tannish" or "brownish" descriptors used by E.S. (I pause to observe that it is at least accurate to say that both Ms. MacLean and E.S. agree that the accused was dressed somewhat differently from the others.)

[95] I couple this with the often slight correspondence between the excerpted statements of the two particularly at numbers 1, 2, 5, 9, 12 and conclude that the statements, when all of the circumstances are considered, are not strikingly similar. Those similarities that do exist are significantly attenuated by the fact that both declarants actually witnessed the events, a fact which is already known.

[96] Even when considered in concert with the presence of a particle of gunshot residue on the accused's right hand, and some on his vehicle, this evidence does not rise sufficiently high to assuage (to the necessary degree) the concerns raised by the alternative (albeit, somewhat speculative) explanations which I have earlier discussed at some length.

[97] When considered holistically, the "corroborative evidence" offered by the Crown does not demonstrate, on a balance of probabilities, that the only likely explanation for the Downey statement provided by E.S. is that E.S. was being truthful or accurate when he named Markel Downey as the fourth member of the home invasion. Nor, that the accused was the shooter of the three victims, nor that it was his idea to bring the gun and wear masks.

Teanna Hillison's testimony – the "Snapchat" evidence

[98] Although I have considered this evidence in concert with all the rest of it, I have not specifically discussed it in these reasons as of yet. This evidence received a unique amount of attention from counsel for reasons which will become clear.

[99] Ms. Hillison is or was the girlfriend of the accused. In any event, she was his girlfriend at the time that the Crown made disclosure of the fact that it had a KGB statement from E.S. identifying the accused as the shooter on November 30, 2014. She took the stand during this *voir dire* and testified that she had accepted "T" (E.S.'s nickname) as a "friend" in her Snapchat and had spoken to him previously using the accounts reflected by the paper record which was presented in her evidence. Her testimony was that she believed she was communicating with E.S.

[100] The contents of these communications appear in Exhibit "VD1-18", and are reproduced below:

> ***** REDACTED AS PER S. 110(1) OF THE *YOUTH CRIMINAL JUSTICE ACT* *****

[101] Initially, it was the position of the Defence that these communications ought to be accepted by the Court for the truth of their contents. On that basis, it followed that a "sub"- *voir dire* would be necessary in order to determine whether this was so. Extensive written submissions ensued from counsel on that point.

[102] Following correspondence from the Court, counsel clarified two things:

i. First, Defence counsel clarified that, upon reflection, this evidence was only being introduced for the Court to consider, when it determined whether, on the basis of all of the evidence tendered at the *voir dire*, the Crown had established on the balance of probabilities that E.S.'s KGB statement implicating Mr. Downey had met the requirements of threshold reliability. As such, a sub-*voir dire* was unnecessary.

ii. Second, the Crown agreed that if the communication was not submitted for the truth of its contents, then it was just one more piece of evidence for the Court to evaluate and consider in this *voir dire*.

[103] I did not accept Ms. Hillison's testimony in this respect. She could not say when she received the text, merely that, when received, she passed a copy along to Mr. Downey's (then) lawyer. She also said she didn't realize that it was very important, or at least attempted to deprecate the importance that she initially attached to it, until she spoke to Mr. Downey. Her evidence was to the effect that, in passing it along to Mr. Downey's counsel, she had done enough, since it didn't affect her. She had no reason to remember more particulars related to her receipt of the communication from "T". She also said she "lost" the phone upon which she received these communications. Finally, she testified that she and Mr. Downey are no longer seeing one another.

[104] As will be seen from the above, the individual "T" (with whom Ms. Tillison indicates she was in correspondence) among other things, offered to go to the police and recant his testimony implicating the accused if she would "leave him [Markel] and be my girl" and "be wit me". The Defence argued that this latter must be understood in a sexual sense, and it would appear to be so.

[105] With respect, this Snapchat evidence must be considered in tandem with the other evidence tendered. In particular, with respect to E.S.'s circumstances at the time the Crown revealed to Mr. Downey and his (then) counsel that E.S. (or "T") had provided a KGB statement implicating the accused in this matter. From Cst. Stanton's testimony, it is apparent that this occurred either in late spring or summer of 2019, a time when E.S. is known to have been residing out of province.

[106] Indeed, although residing in New Brunswick in early May of that year, he subsequently moved to reside in Niagara Falls, Ontario, spent some time in a psychiatric facility in Toronto, and also a homeless shelter in that city, and later went out west. By the date of his death on July 28, 2020, E.S. had returned to New Brunswick.

[107] The only evidence that I was able to locate that placed him in Halifax after August 18, 2018 was that of Cst. Stanton, whereby the latter testified that he was able to meet with him in person on December 8, 2018, a date which precedes the disclosure of the KGB statement by over six months. Apparently, E.S. was visiting a family member in the Halifax area on that date and had no means with which to get back to Moncton, New Brunswick, so he had discussed with Cst. Stanton whether he could be provided with the requisite fare.

[108] I consider it unlikely in the extreme that Ms. Tillison would have been invited by E.S. to "be with him" while they were in different provinces. I also consider it

similarly unlikely that she would have received such Snapchat messages and have been unable to indicate even the year (it had to be no earlier than mid-2019) in which she received them.

[109] As well, her demeanor was evasive, to the point where she appeared at times to be feigning indifference to Mr. Downey and his plight, as a possible explanation of why she did not retain more details with respect to an exchange so important to his welfare.

[110] What impact does all of this have on the ultimate outcome of this *voir dire*? It is simply one piece of evidence whose authenticity I do not accept. I do not, and must not go down the road of questioning why an attempt to introduce such evidence might be made in the first place.

[111] First, my decision not to accept a piece of evidence does not mean that it was manufactured, or that the person who proffered it was lying. It simply means that I did not accept its *bona fides* for the purposes of this *voir dire*. But I could (of course) be mistaken.

[112] Second, even if it could be said to have been definitely and deliberately contrived to mislead the Court, the evidence was led through Ms. Tillison, not Mr. Downey, albeit in his supposed interest.

[113] Third, even if Mr. Downey's involvement could be inferred, it may reflect nothing more than a lack of trust in the Court's ability to come to a fair decision "unaided".

[114] Finally (and most importantly), speculations that lead down the path of "why would Mr. Downey do or be involved in such and such a thing?" involve specious reasoning. They blur the bright line that must be followed as I consider whether to admit E.S.'s KGB statement. That bright line is, as previously indicated, "has the Crown satisfied me on a balance of probabilities that the material aspects of the statement in question should be admitted as a principled exception to the presumptive exclusion of this hearsay evidence"?

[115] Put differently, are there sufficient indicators of the statement's threshold reliability? Notwithstanding the unavailability of contemporaneous cross-examination of E.S. with respect to the veracity of what he says, have those material aspects of his statement been shown to be sufficiently reliable to be admitted for consideration by the jury, who would, in such a case, decide its ultimate reliability?

[116] To speculate as to possible reasons that the accused or Ms. Tillison might have to lead this evidence may distract the Court, and could reverse the burden of proof, or at least remove it from the shoulders of the Crown, where it properly belongs.

[117] To repeat, the Snapchat was simply one piece of evidence which I considered, along with everything else, when I determined whether or not the Crown has discharged its burden.

Conclusion

[118] The Crown has not discharged its burden. As I have discussed earlier, E.S. first (Bishop) statement was replete with patent contradictions in its material aspects. He literally could not be telling the truth in many instances because of these contradictions. The fact that identical procedural precautions (i.e. administration of oath, warning of criminal consequences attendant upon making false or misleading statements, videotaping) occurred preliminary to both the Bishop statement, and the second (or Downey) statement, which was given three days later, provides no degree of comfort to the Court as to the threshold reliability of the contents of the second, in these circumstances.

[119] This is only reinforced when considered in tandem with the circumstances argued by the Crown to provide *indicia* of threshold substantive reliability, as I have earlier discussed.

[120] Finally, the extrinsic corroborative evidence, argued by the Crown to sufficiently reduce the concerns raised by the possible alternative explanations or reasons (that E.S. may have had to implicate the accused as the shooter) does not sufficiently achieve that purpose, in order to enable me to conclude that E.S.'s second KGB statement ought to be accorded threshold reliability.

[121] At its strongest, it is merely consistent with the Crown's theory of the case, and, in some instances, with what Ms. MacLean had to say. But it does not enable me to conclude that the only "remaining <u>likely</u> explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement". (*Bradshaw*, para. 57)

[122] The presumptive inadmissibility of E.S.’s Downey statement has not been rebutted by the Crown. Therefore, it will not be admitted into evidence for consideration by the jury in this case. Because of this finding, a "probative value versus prejudice" analysis is unnecessary.

Gabriel, J.