
CANADA / JUDGMENT

R. v. Atwal

2004 BCSC 1517

COURT

Supreme Court of British Columbia

DECIDED

19 November 2004

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2004BCSC1517

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Atwal,

2004 BCSC 1517

Date: 20041119

Docket: X066062

Registry: New Westminster

Regina

Against

Rajinder Singh Atwal

Before: The Honourable Madam Justice Wedge

Voir Dire Ruling #3:

Admissibility of Statements of the

Deceased, Amandeep Atwal

November 19, 2004

Counsel for Crown

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M.M. Salaysay

Counsel for Accused

D.G. Butcher

Place of Trial/Hearing:

October 18 - 22, 2004 (Terrace);

November 1, 2004 (Vancouver)

I. INTRODUCTION

- [1] Rajinder Atwal is charged with the second degree murder of his seventeen year old daughter, Amandeep. Mr. Atwal arrived in his car at Langley Memorial Hospital on the afternoon of July 30, 2003 with Amandeep, who was dead from multiple stab wounds. He told hospital personnel that Amandeep stabbed herself with a knife while she was travelling with him by car to Prince George.
- [2] Shortly before her death, Amandeep told her family she planned to move to Prince George to live with her boyfriend, Todd McIsaac, with whom she had been secretly involved for over two years. The Atwal family learned of the relationship approximately two months before Amandeep's death, and it was the source of considerable discord in the family. The theory of the Crown is that Mr. Atwal killed Amandeep to prevent her from proceeding with her plan to move to Prince George with Todd.
- [3] The trial is scheduled to be heard by a jury commencing November 29, 2004. A voir dire was conducted respecting statements alleged to have been made by Amandeep to various persons in the two years before her death. There is a ban on the publication of this ruling until the trial is completed and a verdict rendered.
- [4] The statements of Amandeep fall generally into two categories:
 - (a) statements concerning the conduct and attitude of Mr. Atwal toward his daughter in the two to three years before her death; and
 - (b) statements concerning Mr. Atwal's reaction to the discovery of Amandeep's relationship with Todd in the two months before her death, and his conduct toward Amandeep as a result of the discovery.
- [5] The Crown seeks the admission of the statements at trial under the principled exception to the hearsay rule. The position of the Crown is as follows:
 - (a) the statements are necessary and reliable;
 - (b) the statements are relevant and material, in that they may assist in identifying Mr. Atwal's animus toward his daughter, and hence are evidence of motive for the killing which, in turn, constitutes circumstantial evidence of identity and intent; and
 - (c) the events of the two to three year period before Amandeep's death are highly probative and reasonably proximate.

[6] The position of the defence is as follows:

- (a) the statements are largely inadmissible under the principled exception to the hearsay rule because:
 - (i) there is independent corroborative evidence available to be called by the Crown with respect to some of the statements, which renders the admissibility of those statements unnecessary;
 - (ii) most of the statements are not reliable because Amandeep had a motive to exaggerate or mislead, and her statements to the various witnesses are inconsistent;
- (b) even if the statements are admissible under the principled exception, most of them ought to be excluded because they are essentially evidence of discreditable conduct. As such, their prejudicial effect outweighs their probative value; and
- (c) most of the statements concern alleged events too remote in time to be probative. Only statements concerning events that occurred in the last two months of Amandeep's life are sufficiently proximate to have any probative value; and
- (d) most statements should not be admitted because there is a real danger that the sheer detail and volume of the evidence will be disproportionate to the evidence relating to the offence with which Mr. Atwal is charged.

II. THE LEGAL FRAMEWORK

(a) Necessity and Reliability

- [7] I will deal first with the legal principles governing the admission of the statements the Crown seeks to advance for a hearsay purpose at trial. Several decisions of the Supreme Court of Canada describe the analytical framework with respect to the admission of out of court statements advanced for their truth: *R v. Khan*, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92; *R. v. Smith*, [1992] 2 S.C.R. 915, 15 C.R. (4th) 133; *R. v. Starr* (2000), 147 C.C.C. (3d) 449, 2000 SCC 40.
- [8] In *Khan* and *Smith*, the Court allowed the admission of hearsay that did not fit within a traditional hearsay exception where it was sufficiently reliable and necessary to address the traditional hearsay dangers.

Necessity

- [9] In *Starr*, the Court observed that in the interest of fairness for the party against whom it is used, unreliable hearsay evidence should never be admitted. However, with respect to necessity, the Court went on to say the following at ¶ 206:

...a review of the traditional exceptions reveals that there are reasons beyond "pure" necessity why a court might wish to admit reliable hearsay evidence. This point was addressed by Lamer C.J. in *B.(K.G.)*... where he explained that the need to permit the admission of certain forms of hearsay can stem not only from the unavailability of the out-of-court declarant, but also from the

quality of the evidence itself. Lamer C.J. cited Professor Wigmore's explanation... that some hearsay evidence "may be such that we cannot expect, again, or at this time, to get evidence of the same value from the same or other sources"... Such hearsay may be admitted, where appropriate, less on the basis of necessity and more on the basis of "expedience or convenience". The traditional exceptions are useful, therefore, because they are instructive as to the types of situations that may produce hearsay that is the best evidence in the circumstances.

[10] Necessity, for purposes of the principled exception, means "reasonably necessary" (Khan, *supra* at 104). In Kahn, the infant complainant was not competent to testify. The Court observed at pp. 104-105 that the inadmissibility of the infant's evidence was one basis for a finding of necessity. However, the Court was careful to say that there may be other examples of circumstances that could establish the requirement of necessity, such as the potential trauma to a child of testifying in court.

[11] It is the unavailability of the declarant as a witness that satisfies the requirement of necessity. As noted by the Court in Smith at ¶ 35, the fact that there may be available to the Crown other evidence corroborative of the declarant's statements does not render the hearsay statements unnecessary:

If this were the case, uncorroborated hearsay evidence which satisfied the criterion of reliability would be admissible if uncorroborated, but might no longer be "necessary" to the prosecution's case if corroborated by other independent evidence. Such an interpretation of the criterion of "necessity" would thus produce the illogical result that uncorroborated hearsay evidence would be admissible, but could become inadmissible if corroborated. This is not what was intended by this court's decision in Khan.

[12] The gist of the Court's comments in Smith is that the criterion of necessity must be capable of flexible application in diverse situations. Necessity is established where the relevant direct evidence, for a variety of reasons, is not available. Citing Wigmore, the Court suggested at ¶ 36 the following (non-exhaustive) categories:

- (a) The declarant is dead, ill or otherwise unavailable for cross-examination;
- (b) The statement is such that the court cannot expect, again or at present, to obtain evidence of the same value from the same or other sources. In that case, expedience or convenience, rather than strict necessity, may dictate the admission of the evidence.

[13] I take from the case law that the existence of direct evidence, corroborative of the hearsay statements made by the witness who is now unavailable, does not render the admission of the hearsay statements unnecessary within the meaning of the principled exception. The unavailability of the declarant as a witness satisfies the necessity requirement (Starr; Smith; see also R. v. Franz, 2000 BCSC 227 (E.R.A. Edwards J.)).

[14] Necessity is a question of law for the trial judge to decide (Smith, at ¶ 36).

Reliability

- [15] The criterion of reliability under the principled approach means threshold reliability, as distinct from ultimate reliability. Ultimate reliability - that is, whether the statement is true or not - is for the trier of fact (in this case, the jury) to determine. Threshold reliability is concerned with whether the circumstances surrounding the making of the statement provide "circumstantial guarantees of trustworthiness". Those guarantees serve as a substitute for testing by cross-examination. For example, reliability may be established if the circumstances were such that the declarant could not have been mistaken about what she saw or heard, and had no motive to lie or mislead, or there were safeguards in place such that a mistake or lie could be discovered. (Starr, at ¶ 215).
- [16] It is for the party seeking to admit the hearsay statements to establish, on a balance of probabilities, that they possess sufficient reliability to be considered by the trier of fact.
- [17] Threshold reliability concerns only the circumstances in which the statements were made. It does not concern the declarant's general reputation for truthfulness, or any prior or subsequent statements made by the declarant, consistent or otherwise. Nor does it concern the presence of corroborating or conflicting evidence. Those are matters concerning ultimate reliability, which is the province of the trier of fact (Starr, at ¶ 217).
- [18] In the case of *R. v. P.V.* (2002) 167 C.C.C. (3d) 225, 2002 BCCA 464, our Court of Appeal cited Starr for the proposition that guarantees of trustworthiness concern only the circumstances under which the hearsay statement was made. The trial judge must not consider the consistency of the hearsay statement with other statements of the declarant or the evidence of other witnesses. Hall J.A. noted that the enquiry must focus on the circumstances of the hearsay statement, which "must carry its own badge of reliability" (at ¶ 48)
- [19] In that context, the Court in *P.V.* also referred to the decision of *R. v. Merz* (1999), 140 C.C.C. (3d) 259, 30 C.R. (5th) 313 (Ont. C.A.), in which Doherty J.A. stated the law as follows:

The reliability inquiry, when made in the context of determining the admissibility of a hearsay statement, looks to those factors surrounding the making of the statement which tend to diminish the risks associated with the admission of out-of-court statements. Evidence from other witnesses which is consistent with the substance of an out-of-court statement is not a circumstance surrounding the making of that statement and cannot generally be seen as diminishing the risks associated with the admission of hearsay evidence. [Emphasis added].

- [20] I take from the case law that neither consistent or inconsistent statements nor corroboration (or lack of it) are to be considered when determining the threshold reliability of hearsay statements. The question is whether the circumstances in which the statements were made give rise to the apprehensions traditionally associated with hearsay evidence. The Court must consider whether there is any reason, given the circumstances, that the declarant might be untruthful or mistaken.

(b) Probative Value and Prejudicial Effect

[21] Under the principled exception to the hearsay rule, statements are admissible as evidence of their content if they are necessary and reliable, subject to the court's discretion to exclude evidence the prejudicial effect of which outweighs its probative value.

[22] The defence argues that much of the hearsay evidence sought to be admitted by the Crown in this case is evidence of discreditable conduct and propensity. Because of the highly prejudicial nature of such evidence, it is subject to exclusion unless it is so highly probative of the issues in the case as to outweigh the prejudice it may cause. In support of this position, the defence filed a number of authorities dealing with similar fact evidence. One such case is *R v. B.(C.R.)*, [1990] 1 S.C.R. 717, 55 C.C.C. (3d) 1, in which the Court said the following:

...evidence which is adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible. Whether the evidence in question constitutes an exception to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect. In a case such as the present, where the similar fact evidence sought to be adduced is prosecution evidence of a morally repugnant act committed by the accused, the potential prejudice is great and the probative value of the evidence must be high indeed to permit its reception. (¶ 63).

[23] The Crown argues that the test for the admission of similar fact evidence is not the same as that for the admission of hearsay statements of a deceased victim. The Crown is not advancing evidence of similar conduct with respect to complainants other than the person named in the indictment. The hearsay evidence in this case, submitted by the Crown, is being adduced to place the allegation of murder in the context of the overall relationship between Mr. Atwal and his daughter.

[24] In that context, the Crown argues that the test concerning the weighing of the probative value against the prejudicial effect of the evidence is that described in *Smith* at ¶ 45:

...[H]earsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements were made satisfy the criteria of necessity and reliability set out in *Khan*, and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might result to the accused. [Emphasis added]

[25] In *R. v. (B.L.)*, [1996] 9 C.R. (5th) 38, (Ont. C.A.) at ¶ 10, Charron J.A. (as she then was) described the principles governing the admissibility of evidence of discreditable conduct where it is tendered as similar fact evidence:

Because of the inherently prejudicial nature of evidence of discreditable conduct, it is subject to a general exclusionary rule unless the "scales tip in favour of probative value" ...The trial judge who is charged with the delicate process of balancing the probative value of the proposed evidence against its prejudicial effect should inquire into the following matters:

1. Is the conduct, which forms the subject-matter of the proposed evidence, that of the accused?
2. If so, is the proposed evidence relevant and material?
3. If relevant and material, is the proposed evidence discreditable to the accused?
4. If discreditable, does its probative value outweigh its prejudicial effect?

[26] In the present case, the first and third criteria described in B.(L.) are not in dispute. Clearly, the hearsay evidence describes the conduct of Mr. Atwal, and is discreditable to him. Materiality and relevance are in issue, as is the question of whether its probative value outweighs its prejudicial effect.

Relevance and Materiality

[27] The evidence sought to be admitted must be relevant to a fact in issue in the trial. To be relevant, the evidence must be probative of the fact in issue. In B.(L.), Charron J.A. observed at ¶ 17 that as a general rule, the threshold of relevance and materiality can be tested by asking "what inference is sought to be made from the proposed evidence and whether it has some tendency to advance the inquiry before the court."

Probative Value

[28] In assessing the probative value of the evidence, consideration should be given to the strength of the evidence, the extent to which it supports the inferences sought to be made, and the extent to which the matters it tends to prove are in issue.

[29] I turn first to the issue of the strength of the proposed evidence. As noted by the Court in B.(L.), the extent to which the discreditable conduct can be proven has a direct bearing on its probative value. In the words of the Court at ¶ 25, the strength of the proposed evidence relates to its probative value: "The more compelling the proof, the greater its probative value will be".

[30] In many similar fact cases, proof of the alleged similar conduct is not in issue. Either the accused has admitted the prior conduct, or the conduct will have been the subject matter of a conviction. Such evidence is often capable of proof beyond a reasonable doubt.

[31] The strength of the proposed evidence is particularly important in the context of this voir dire because of the nature of the evidence. All of the evidence of discreditable conduct is hearsay in nature. In B.(L.), Charron J.A. gave the following caution:

...[I]n determining the question of admissibility, the trial judge does not have to reach a conclusion as to the existence of collusion or any other factor affecting the veracity of the witnesses who will testify to the discreditable conduct. The issue will be one for the trier of fact to determine. While the trial judge does not have to make any preliminary findings of fact on the veracity of the proposed evidence, it is my view that the strength of the proposed evidence is nonetheless a factor to be considered in the assessment of its probative value for the purpose of determining admissibility. (¶ 30).

[32] In B.(L.), the issue before the Court was the admissibility of similar fact evidence that amounted to discreditable conduct, not, as in this case, evidence falling within the principled exception to the hearsay rule. Nevertheless, in my view the cautionary comments of Charron J.A. apply here. The strength of the proposed evidence must be considered when assessing its probative value.

[33] The extent to which the matter sought to be proved relates to an issue in the trial is also important to the assessment of probative value. The primary concern with respect to discreditable conduct evidence is that the jury may misuse it by inferring guilt on the basis of the bad character or disposition of the accused rather than the strength of the evidence which has a connection to the issues in the case. Hence the requirement that such evidence be admitted only if it is relevant to some other issue beyond disposition, and its probative value outweighs its prejudicial effect.

Prejudicial Effect

[34] As has been observed in other cases, the requirement that the evidence be relevant to some other issue beyond disposition is often subsumed in the balancing process that must be undertaken when weighing probative value and prejudicial effect. The requirement recognizes the potentially great prejudice inherent in evidence of discreditable conduct. Further, it must be applied rigorously to ensure that only evidence with a real connection to the case will be admitted.

[35] In assessing the prejudicial effect of the proposed evidence, consideration may be given to a broad range of factors, depending on the particular circumstances of the case. In B.(L.), the Court noted at ¶ 24 that among the factors to be considered are the following:

- (a) how discreditable the evidence is;
- (b) the extent to which it may support an inference of guilt based solely on bad character;
- (c) the extent to which it may confuse issues; and
- (d) the accused's ability to respond to it.

- [36] Discreditable conduct is admissible for the purpose of demonstrating the animus of the accused, and, therefore, motive for the commission of the offence. Evidence of motive is admissible to prove identity and intent. It is often tendered to demonstrate an animus on the part of the accused toward the victim that is consistent with the offence charged, and can be highly probative for that purpose (*R. v. F.(D.S.)* (1999), 132 C.C.C. (3d) 97, 169 D.L.R. (4th) 639 (Ont. C.A.).
- [37] In some cases, evidence of discreditable conduct has been found to be relevant for the purpose of setting out the contextual narrative in which the alleged events occurred. In *F.(D.S.)*, the evidence described a pattern of abusive behaviour toward the complainant. If accepted, it would be capable of assisting the jury in understanding why the appellant committed the offence alleged in the indictment. The evidence demonstrated an animus on the part of the accused toward the complainant "that was consistent with the offences with which he was charged" (at ¶ 25), and was admissible for that purpose.
- [38] Evidence of this type has been admitted on many occasions where the alleged offence concerns spousal or other domestic violence. In *R. v. S.B.* [1996] O.J. No. 1187 (Ont. H.C.J.), Hill J. admitted evidence of this type on the basis that it provides important narrative and context. At ¶ 30-31, Hill J. said the following:

Violence between strangers, as a general rule, involves narrative of circumstances of limited temporal duration. Violence within a relationship, spousal or otherwise, necessarily, and frequently, involves the complex dynamics and subtleties of the personalities of the principals within the context of their individual and shared experiences, understandings, roles and emotions.

While submissions of admissibility on the basis of mere narrative can, of course, be abused, to deny the triers-of-fact complete information regarding the prior history of the parties runs the risk of presenting an entirely sterile and antiseptic record devoid of the realities of the individual circumstances of the participants.

- [39] In assessing the prejudicial value of discreditable conduct evidence that is highly probative of facts in issue, Charron J.A. had this to say in *B.(L.)* at ¶ 50:

Evidence of discreditable conduct is inherently prejudicial. Indeed this feature forms the basis of the underlying rationale for the similar fact evidence rule. Again, in assessing the prejudice of the proposed evidence, it is important to keep in mind what is meant by prejudice in this context. It is the effect this kind of evidence may have in compelling a trier of fact to find the accused guilty not on the strength of the evidence marshalled against him in relation to the offence with which he is charged, but on the strength of the evidence of his bad character. Therefore, it follows that, in general, the higher the probative value of the evidence, the lesser the prejudicial effect. Conversely, any weaknesses which have been identified in the course of assessing the probative value of the evidence will generally increase the prejudicial effect.

- [40] The Court in Khan and Smith made general observations about the weighing of the probative value of the evidence against its prejudicial effect. Both cases involved the admission of evidence under the principled exception to the hearsay rule. However, I note that the evidence in those cases, unlike the evidence sought to be admitted in this case, was not evidence of discreditable conduct.
- [41] The potential prejudice inherent in discreditable conduct evidence is high. For that reason, I accept the defence submission that the probative value of the evidence sought to be adduced must be high in order to permit its reception. In order to be highly probative, the conduct must demonstrate an animus on the part of Mr. Atwal that is consistent with the charge of murder.
- [42] Further, I conclude that whether evidence is sufficiently proximate to the offence alleged in the indictment will depend on the circumstances of the particular case. Proximity cannot be determined solely by counting the months or years that have passed between the making of the statements and the commission of the offence. A statement that is reasonably proximate in the circumstances of one case may be entirely too remote in the circumstances of another. The question of proximity (or remoteness) must be resolved by examining the facts of the particular case and the nature of the offence with which the accused is charged.
- [43] I am also of the view that care must be taken to limit the detail and volume of the evidence sought to be admitted. In S.B., Hill J. ruled that the Crown could lead evidence from the complainant of prior marital discord and abuse, but cautioned at ¶ 58 that it must be done: [W]ithout disproportionate emphasis in terms of detail and trial time devoted to such subject matter compared to the evidence which relates directly to the charged offences.
- [44] Where, as in the present case, the Crown proposes to call many witnesses to testify about events spanning several years, a general restriction on the detail and amount of evidence is required to ensure not only that the jury will not use it improperly as propensity evidence, but to guard against the risk that its sheer volume will otherwise eclipse the evidence relating directly to the offence with which Mr. Atwal is charged.

III. THE EVIDENCE

- [45] The Crown seeks to have admitted at trial the evidence of fourteen witnesses to whom Amandeep spoke of her relationship with her father and her family generally, and events that occurred in the context of that relationship. The Crown provided a summary of the evidence of all of the witnesses who testified on the voir dire. A copy of the Crown's summary is appended to this ruling as Appendix A, primarily to demonstrate the nature and breadth of the evidence sought to be adduced by the Crown. I note the defence was not entirely in agreement as to the accuracy of the summary. For that reason, I have provided a summary of the evidence based on my review of the evidence.
- [46] I have divided the witnesses into the following groups:

- (a) Police officers who interviewed Amandeep as a result of a reported disturbance stemming from a family dispute (Cst. Peter Dionne; Cst. David Koga).
 - (b) Amandeep's boyfriend, Todd McIsaac, who testified to the nature of his relationship with Amandeep, statements Amandeep made about her father and family, and his observations of the Atwal family dynamic;
 - (c) Hugh McIsaac, Todd's father, who testified to his perspective of the relationship between Amandeep and Todd, and the statements Amandeep made about her relationship with her father and family;
 - (d) Childhood friends and school friends of Amandeep (Karla Eguia, Andrea Mendoza, Dee Ann Booth, Nicole Cabral) whose evidence concerned statements made by Amandeep about her parents and family. Andrea Mendoza also testified about her observations of the family when she visited the Atwal home;
 - (e) Persons connected to Amandeep through her after-school job (Christine Drabik, Laura Jankauskas), who testified about statements Amandeep made about her father;
 - (f) Friends of Amandeep through her relationship with Todd McIsaac (Dylan Reid, Andrea Spowart, Amber Guy, Deanna McArthur) whose evidence concerned primarily statements Amandeep made about her father;
- (a) Evidence of Cst. Dionne and Cst. Koga
- [47] The defence did not challenge the admissibility of the evidence of Cst. Dionne and Cst. Koga, both of whom attended at the home of Hugh McIsaac, Todd's father, on July 19, 2003, approximately two weeks before Amandeep's death. The police were answering a call from Hugh McIsaac concerning a disturbance at his home.
- [48] Amandeep had left the Atwal family home in Kitimat on that day, intending to catch a bus to Prince George with Todd McIsaac. She did not tell her parents in advance of leaving. She surreptitiously packed her bags and left a note. Todd and some friends picked her up at the Atwal home while her parents were out. Mrs. Atwal returned home to find Amandeep gone. She discovered an overnight bag Amandeep had forgotten. She immediately drove to Hugh McIsaac's, and parked her car in the driveway to prevent Amandeep from leaving. Todd, his father, Andrea Spowart, and Dylan Reid were present. Amandeep's younger sister, Tajinder, was in the car with Mrs. Atwal.
- [49] Amandeep and her mother engaged in a heated argument. Mrs. Atwal tried to stop Amandeep from leaving with Todd by attempting to pull her into the Atwal car. Hugh McIsaac called the police. When the police arrived, they interviewed both Amandeep and her mother. They determined that Amandeep was 17 years old and had just graduated from high school. She had tried to leave Kitimat to live with her boyfriend in Prince George without telling her parents or obtaining their permission.

- [50] Amandeep described the conflict between herself and her parents resulting from her relationship with Todd. Her family was moving to Vancouver, and she did not want to move with them. She said she kept the relationship, and her move to Prince George, a secret because her father would not understand and would never accept it. She was afraid to talk to her father and mother about the move, hence her attempt to leave town before they became aware of her plans.
- [51] Cst. Dionne asked Amandeep if there had been any abuse or violence in the family. Amandeep denied that any such instances had occurred.
- [52] The officers told Amandeep she should go home and talk to her parents about the move. They told Mrs. Atwal they could not force Amandeep to stay with her family. Amandeep eventually accepted what the officers were telling her, and agreed to return home to speak with her parents.
- [53] Much of the evidence the Crown proposed to call from the police officers is admissible without the application of the principled exception to hearsay. The hearsay statements of Amandeep meet the requirements of necessity and reliability, and are also admissible.
- (b) Evidence of Todd McIsaac
- [54] The defence did not challenge the admissibility of Todd McIsaac's evidence to the extent that it chronicled the two and a half year relationship between him and Amandeep. The challenge concerned the statements Amandeep allegedly made to Todd concerning her father's alcohol consumption and controlling or abusive behaviour, as well as events remote in time from Amandeep's death. A summary of the evidence of Todd the Crown seeks to adduce is as follows.
- [55] Todd met Amandeep in January of 2001, when he was in Grade 11 and Amandeep was in Grade 10. They attended the same high school in Kitimat, and met in a class they were taking together. They began dating in February or March of 2001.
- [56] Amandeep told Todd, soon after they began dating, that she was not permitted to date boys or attend dances, and could not stay out late. They had to keep their relationship secret, particularly because Amandeep's parents were of the Sikh faith, and Mr. Atwal was particularly concerned about his reputation in the Sikh community. Amandeep could not let her parents know she talked to Todd on the phone. They developed code names so that if her parents heard her on the phone, they would not know she was speaking to Todd. When they were out together, they were careful to ensure that neither Amandeep's parents, nor her parents' friends in the Sikh community, saw them together.
- [57] Amandeep and Todd began having a sexual relationship while Amandeep was in Grade 10. She spent a great deal of time at the McIsaac home, and managed to do so by telling her parents she was staying with various of her girlfriends.

- [58] Amandeep spoke to Todd about her home life. She told him her father was strict and controlling. He and Amandeep quarrelled, particularly when he drank alcohol. Amandeep was of the view that her father drank excessively.
- [59] Todd could not recall Amandeep speaking of any instances of physical abuse by her father in the year immediately preceding her death, but he recounted two or three occasions on which Amandeep arrived at school in Grade 11, approximately two years before her death, upset and tearful about altercations with her father in which he had been physically abusive. Amandeep spoke of another instance of abuse which she said occurred before she met Todd.
- [60] On one occasion in Grade 11, Amandeep arrived at the McIsaac home upset and crying. She ran into the bedroom. Amandeep's parents arrived at the front door shortly thereafter, looking for her. Todd's father went to the door and spoke to them, after which they left. Amandeep stayed for a few hours, then went home.
- [61] Todd believed that Amandeep's parents did not know about their relationship until early June 2003, about two months before Amandeep's death. Amandeep was driving the family car, and Todd was with her. She lost control of the car and rolled it into a ditch. The car was a total loss. Todd was not wearing a seat belt and was thrown from the car. He was seriously injured, and spent about two weeks in the hospital. The police told Mr. and Mrs. Atwal that Amandeep and Todd were both in the car at the time of the accident.
- [62] Amandeep visited Todd in the hospital shortly after the accident. She told him her father was not upset about the loss of the car, but was very upset about her relationship with Todd. She said Mr. Atwal told her he wished she and Todd had died in the accident.
- [63] For some time before the accident, Todd and Amandeep had talked about moving to Prince George. Todd's older brother and girlfriend were moving there at the end of June 2003, and were willing to have Todd and Amandeep stay with them until they found work and a place of their own. They decided they would leave on July 19, 2003. Before then, Amandeep began gradually moving some of her clothes and other belongings to the McIsaac house. On July 19, Todd and his friends, Dylan Reid and Andrea Spowart, picked Amandeep up at her house while her father was at work and her mother was running errands. They went to the McIsaac house and were going to leave for Prince George by bus later in the afternoon.
- [64] Shortly after they arrived at the McIsaac house, Amandeep's mother arrived. She had Tajinder with her in the car. She parked the car in the driveway, blocking the path of the vehicle containing Amandeep's bags. She started taking Amandeep's bags and tried to pull Amandeep toward her car. Mrs. Atwal was shouting at Amandeep, who shouted back. Mrs. Atwal hit Todd with her shoe, and told him that he was the problem. Todd's father told Todd to call the police.
- [65] When the police arrived, they spoke separately to Amandeep and Mrs. Atwal. They asked Amandeep why she wanted to leave home. She replied that it was because of her father. The police asked whether there had ever been any instances of violence or abuse in the Atwal

home. Amandeep looked at Todd, then replied, "No". When he heard that response, Todd stormed into the house, angry that Amandeep had not told the police the truth. When he asked her later why she had denied any abuse, she said she did not want to ruin her sister's life; her father was the family's means of support.

[66] After the police left, Todd, Amandeep, Dylan Reid and Andrea Spowart drove to the Atwal home. Amandeep went in to speak to her parents. The others remained in the car. At one point, Andrea Spowart used her cell phone to call Amandeep and ask her if she was alright. Amandeep assured her that she was fine. After a couple of hours, Amandeep came back to the car. She told Todd that her father had suddenly agreed she could move to Prince George. However, she had to agree to go to Vancouver with her parents for a two week holiday. She also had to agree to tell the Atwals' relatives in Vancouver that she was moving to Prince George to attend school, not to live with Todd.

[67] Later that night, Todd and Amandeep travelled to Prince George by bus. They stayed with Deanna McArthur, the girlfriend of Todd's older brother. They spent a few days sightseeing and shopping. Amandeep's parents were travelling from Kitimat to Vancouver for their two week holiday with relatives, and had arranged to pick up Amandeep on their way. They arrived at Deanna McArthur's apartment, as planned. Todd recalled Mr. Atwal rang the bell at the apartment entrance, and Todd accompanied Amandeep to the Atwal car.

[68] Todd had met Mrs. Atwal, who visited him once after the accident while he was in the hospital. He had never met Mr. Atwal. When Todd accompanied Amandeep to the car, Mr. Atwal was standing on the sidewalk. He said nothing to Todd. He put his arm around Amandeep and "glared" at Todd. Todd was upset and crying. Mr. Atwal's expression made Todd feel strange.

[69] Amandeep called Todd every day from Vancouver. She told Todd her relatives were ignoring her and making her feel very uncomfortable. She wanted to return to Prince George before the end of the two weeks.

[70] After about a week, she called to say she was returning the next morning. She had told her parents she could not stay in Vancouver any longer and wanted to go back to Prince George. Her parents eventually agreed, and her father insisted on driving her back. She said they would be leaving at about 8:00 a.m. the following morning, and would arrive in Prince George at about 5:00 p.m. That was the last time Todd spoke with Amandeep.

(c) Evidence of Hugh McIsaac

[71] The defence challenged the admissibility of Hugh McIsaac's evidence on the basis that the statements made to him by Amandeep were not reliable given the circumstances in which they were made. The submission of the defence was that Amandeep had good reason to exaggerate her difficulties with her father. She was a teenage girl who much preferred the unsupervised atmosphere of the McIsaac home, and exaggerated or falsified accounts of Mr. Atwal's conduct toward her in order to gain sympathy and support, as well as permission to

break her curfew and stay overnight with her boyfriend.

- [72] Hugh works at Alcan, where Mr. Atwal worked. Alcan is a large plant, and they did not work the same shift. He and Mr. Atwal were acquaintances, but not friends. Hugh saw Mr. Atwal from time to time at the gym.
- [73] Hugh testified that Todd lived with him throughout the time Amandeep and Todd were seeing each other. For the first eighteen months of the relationship, the McIsaacs lived in a small apartment. About a year before Amandeep died, the McIsaac family moved to a house on Finch Street in Kitimat. After they moved to the house, Amandeep began spending a great deal of time with the McIsaacs. She would come over after school to visit. Hugh liked Amandeep a great deal, and was happy that she was dating his son.
- [74] When she first started spending a lot of time at the house, Amandeep did not talk a great deal to Hugh. He was aware that Amandeep wished to keep her relationship with Todd a secret. Amandeep had told him that her father would not approve of Todd because he was not Sikh.
- [75] After they had been living at the Finch Street house for a few months, Amandeep began telling Hugh things he did not believe at first. She said she was afraid of her father, and afraid to go home after staying out late visiting Todd. She said her father often "blew up" at her for no apparent reason. Initially, Hugh thought she was just a teenager trying to avoid the consequences of breaking her curfew. Amandeep was 16 years of age, and now staying overnight with Todd on a regular basis. Hugh had told her she should let her parents know she was staying overnight with Todd. It was after Hugh raised the issue of Amandeep telling her parents about the relationship that Amandeep began telling him about the difficulties she was having with her father.
- [76] Amandeep told Hugh she wanted to keep her relationship with Todd a secret because she was afraid her father might be violent if he found out. In the four or five months before her death, she said she was afraid her father might kill her. She said this on several occasions, more adamantly after the car accident in June 2003. Hugh recalled that Amandeep was shaken and upset when telling him about her fears.
- [77] Amandeep told her parents that the McIsaac house was the home of one of Amandeep's friends, Krista. Whenever the Atwals phoned the house, or came to pick up Amandeep, they thought she was at Krista's house.
- [78] One night shortly before Grade 12 graduation in June 2003, Amandeep's parents arrived at the McIsaac house. Amandeep was in Todd's bedroom. They were both upset, and asked Hugh to conceal the fact that Amandeep was there. Hugh went to the door and told the Atwals Amandeep was not there. The Atwals then left.

- [79] Hugh recalled the car accident occurring shortly before graduation. He went to the hospital and found that Todd was badly hurt. Amandeep was sitting by herself; her parents were not there. Hugh stayed with Todd throughout his hospitalization. A couple of days after the accident, Amandeep came to visit. She said her father had told her he wished that she and Todd had died in the accident.
- [80] Amandeep brought her mother and sister to see Todd in the hospital. Mr. Atwal did not visit. Hugh understood from Amandeep that her parents found out about her relationship with Todd as a result of the accident.
- [81] A few days after graduation, Amandeep was visiting Todd at the house. She told Hugh that her older brother had arrived in Kitimat at around the time of her graduation, and had pushed her down a flight of stairs at her house. She also said he had played with guns in front of her.
- [82] Hugh recalled Amandeep and Todd discussing the move to Prince George a few months before the accident. They were planning to stay with Deanna McArthur, the girlfriend of Todd's older brother. The day they planned to leave, Amandeep and Todd arrived at the house at about 10:00 a.m. A friend was going to take them to the bus depot in Terrace. Shortly after they arrived, Mrs. Atwal appeared in the driveway. She was crying and very upset. Amandeep was trying to tell her mother that she loved Todd. Hugh was concerned things were getting out of hand, so he called the police. After the police arrived and discussed the matter with Mrs. Atwal and Amandeep, Mrs. Atwal left.
- (d) Childhood friends and School Friends (Karla Eguia, Andrea Mendoza, Nicole Cabral, Dee Ann Booth)
- [83] The defence objected to the hearsay evidence the Crown proposed to call through these witnesses on the basis that some of the events were too remote in time and others were too trivial. According to the defence, much of the evidence was far more prejudicial than probative, and some of it was irrelevant to the Crown's case. With respect to statements made by Amandeep to Andrea Mendoza, the defence argued the criterion of necessity was not met because Amandeep's sister, Tajinder, is available to testify to the events in question.

Karla Eguia

- [84] Karla Eguia was a childhood friend of Amandeep. She played soccer with Amandeep in Grades 7 and 8. She got to know Amandeep quite well in Grade 9, but saw less of her once Amandeep began dating Todd. In Grade 9, Amandeep and Karla went to each other's houses for lunch. The girls would go to each other's houses after school to visit.
- [85] Amandeep's parents were very strict. Karla knew Amandeep was not allowed to date, and was aware she was hiding her relationship with Todd from her parents. Amandeep often used Karla as an excuse to see Todd. Amandeep told Karla that when she looked after her uncle's house for him, Todd would visit her there.

- [86] Amandeep told Karla she pushed her dresser drawer in front of her bedroom door once when her parents were fighting about Todd.

Andrea Mendoza

- [87] Andrea Mendoza was also a childhood friend. She lived across the street from the Atwals for many years. She was closer in age to Amandeep's younger sister, Tajinder, but the three of them spent a great deal of time together, either at the Mendoza's or the Atwal's. Amandeep and Andrea were close friends until Andrea was in Grade 9. At that time, Amandeep was in Grade 10, and had begun dating Todd. After that, they did not see each other as often, but they still went to each other's homes quite regularly. Andrea saw more of Tajinder than Amandeep, but sometimes Amandeep would come over on her own for a visit at Andrea's house.
- [88] Andrea never saw any fighting or aggressive behaviour on the part of Amandeep's parents. She observed that the family seemed to get along well. Mr. and Mrs. Atwal were always very kind to her, and seemed to be loving parents to Amandeep and Tajinder.
- [89] Andrea was aware the Atwals were strict with Amandeep. She knew from her discussions with Amandeep that she was dating Todd, and that her parents did not know about the relationship. Amandeep told Andrea that she argued a lot with her parents about going out at night.
- [90] On one occasion in the spring or summer that Amandeep was in Grade 12, Tajinder arrived at Andrea's house. Andrea was in the family computer room. Tajinder told Andrea that her father had overheard a telephone conversation between Amandeep and Todd. Mr. Atwal heard Amandeep tell Todd she loved him. He became very angry, and he and Amandeep fought. Eventually he chased Amandeep with a knife. Amandeep ran into the bathroom and locked the door.
- [91] Tajinder seemed frightened. Andrea, shocked to hear this, asked Tajinder if she was exaggerating. Tajinder denied that she was. About twenty minutes later, Amandeep came over. Andrea asked her if she was alright. Amandeep, too, was frightened. She said she had been on the phone to Todd when she thought she heard someone else come on the line. She told Todd she loved him, and hung up. Her parents were very angry, and began arguing with her. The argument escalated, and Amandeep's father got a knife and came after her with it. Amandeep locked herself in the bathroom.
- [92] Tajinder and Amandeep stayed with Andrea for about an hour, and then returned to their house. Andrea told her parents about the incident. They seemed very surprised, but to Andrea's knowledge, did not follow up on it.
- [93] Andrea was aware Amandeep had a car accident a few months before she died. She could not recall whether it was before or after the car accident that Tajinder and Amandeep told her about the incident involving the knife.

Nicole Cabral

- [94] Nicole Cabral was a year older than Amandeep. She returned to high school in the fall of 2002 to pick up a class. Amandeep was starting Grade 12 at the time, and was in the same class. The two girls sat together in class, and as a result became friends. Amandeep also got Nicole a job at a family restaurant, Rosario's, where Amandeep had a job as a waitress after school and weekends. They worked together two or three times per week.
- [95] During the year she knew Amandeep, she learned of the relationship with Todd. Amandeep told Nicole the relationship was a secret. She said that when she first began dating Todd, her parents learned of it and became very angry, so Amandeep told them Todd had moved away. She then continued dating him without her parents' knowledge.
- [96] On one occasion in the fall of 2002, Amandeep told Nicole that her father used to watch her sleep; she would awake, and he would be standing there. Once, when she awoke, he said "I could kill you and get away with it". After that, she slept with the dresser in front of her door.
- [97] Amandeep told Nicole on another occasion that her father knocked on her bedroom door one night, and she climbed out the bedroom window and went to find her mother, who was away from the home working that night.
- [98] Amandeep told Nicole about her plan to move to Prince George with Todd, and that she was not going to tell her parents. She was very stressed about the situation. She also told Nicole, after the car accident, that her parents now knew about Todd.

Dee Ann Booth

- [99] Dee Ann Booth met Amandeep in high school. They attended school together from Grade 8 to Grade 12, but did not get to know her well until Grade 11. They saw a lot of each other at school. In Grade 12, they became ever closer. They had biology class together, and worked on a graduation project together. They did not see each other outside school. Dee Ann was not a part of the circle of friends Amandeep knew through Todd.
- [100] Amandeep told Dee Ann a great deal about her relationship with Todd. Dee Ann knew Amandeep's parents were unaware of the relationship, and that Amandeep was afraid of the consequences if they found out about it.
- [101] After the accident, Amandeep told Dee Ann her parents now knew about the relationship. She was planning to move to Prince George, but was not telling her parents because they would not allow her to go.
- (e) Friends of Amandeep Through Her Employment (Christine Drabik, Laura Jankauskas)

- [102] The defence argues that the prejudicial effect of some of the hearsay statements to which these witnesses testified outweighed their probative value. According to the defence, some statements are prejudicial because are devoid of context and are therefore potentially misleading. Others are too remote in time, or are trifling in significance.

Christine Drabik

- [103] Christine Drabik owns Rosario's restaurant, where Amandeep worked as a waitress for approximately three years. Some time in 2002, Amandeep stopped working at the restaurant. She went on vacation and did not return to work. She called Christine to say her father was ill. Then Amandeep's mother called to say Amandeep would not be returning to work. Christine urged Amandeep to tell her father that her work had nothing to do with Todd. Amandeep returned to work shortly after that.
- [104] Christine knew Amandeep hid her relationship with Todd from her family. Todd often came to the restaurant to see Amandeep. Amandeep's parents never came into the restaurant, but always dropped her off and picked her up.
- [105] Amandeep told Christine she was planning to leave with Todd in July 2003. Christine urged Amandeep to tell her parents, but she would not. She said her mother may understand but her father never would.

Laura Jankauskas

- [106] Laura Jankauskas worked with Amandeep at Rosario's for two years. Amandeep babysat Laura's infant son for a period of about 4 months. Amandeep confided in Laura about Todd. Laura knew Amandeep's parents were not aware of the relationship. Amandeep told Laura her parents were very strict. While they were working together, Amandeep got a tattoo on her shoulder. Her mother knew about it but they kept it a secret from her father.
- [107] On one occasion, Amandeep arrived at the restaurant laughing about something her father had just said to her. She told Laura her father said "I could kill you and get away with it." Amandeep was smiling as she spoke to Laura. Laura was quite upset, and told Amandeep he should not have said that to her, but Amandeep still did not seem to take it seriously at all.
- [108] Laura knew Amandeep was planning to move to Prince George with Todd, and was going to leave her parents a note rather than telling them before she left.
- (f) Friends Amandeep Knew Through Todd (Amber Guy, Dylan Reid, Andrea Spowart, Deanna McArthur)

[109] The Defence argued that these witnesses had a particularly slanted view of the relationship between Amandeep and her father because of their close friendship with Todd. Many of the statements made by Amandeep to these witnesses were inconsistent, said the defence, varying from witness to witness. Some of the evidence, such as evidence of Mr. Atwal's alcohol consumption, was immaterial to the offence with which he was charged, or was too remote in time, and was therefore highly prejudicial.

Amber Guy

[110] Amber Guy is one year older than Amandeep, and attended the same high school, but the two did not become friends until Amber was in Grade 12 and Amandeep was in Grade 11. They began seeing each other because Amber's boyfriend was a friend of Todd. Amber also saw Tajinder from time to time, when Tajinder accompanied her sister on visits.

[111] Amber knew Amandeep kept her relationship with Todd a secret. Amber often acted as a "go-between" for Amandeep and Todd. When Todd wanted to speak with Amandeep, Amber would call and let Amandeep know.

[112] Amandeep told Amber that she and Tajinder often covered for each other.

[113] After the car accident, Amandeep told Amber that her father was very upset. Amandeep's father told her she should have died in the accident, and that she was a disgrace to the family and the Sikh community.

Andrea Spowart

[114] Andrea Spowart knew Amandeep throughout high school, but it was not until Grade 12 that they became close friends. Andrea's boyfriend, Dylan Reid, was a close friend of Todd. The four of them spent a lot of time together during and after school.

[115] Amandeep told Andrea that she and Todd began dating in Grade 10. A teacher contacted Amandeep's parents and told them about Todd. Her parents became very angry, and Amandeep told them Todd had moved away. Since then, her relationship with Todd had been a secret.

[116] Andrea recalled Amandeep telling her, sometime in Grade 12, that she and her father fought over various things. One time he got on top of her and tried to strangle her, but her mother intervened and pulled him off.

[117] Amandeep said that her father drank a lot, and they fought more when he drank. He was mean-tempered. She told Andrea that her father was very strict. She hid many of her activities from him, such as going out late, going to dances, and getting a tattoo.

[118] Amandeep told Andrea that when she and Todd were in the accident, her father told her he wished she had died so he would not have to deal with her, and that it was a disgrace that she was with Todd.

- [119] Andrea knew of Amandeep's plan to live with Todd in Prince George. Amandeep's family was planning to move to Vancouver, and Amandeep did not want to go with them. A couple of weeks before they were to leave, Amandeep began taking her belongings out of the house. The day she and Todd were leaving, Andrea and Dylan drove to Amandeep's house and picked her up. She had her bags hidden at the side of the house. They then went to the McIsaac house and parked in the driveway. Andrea was going to take Todd and Amandeep to the bus depot in Terrace.
- [120] Andrea was present when Mrs. Atwal arrived and tried to take Amandeep home. She heard the conversations between the police and Amandeep. The police asked Amandeep if there was any abuse in the home. Amandeep said "No". Dylan and Todd were there, too. After the police left, Andrea asked Amandeep why she had lied to the police. She said she did not want any more things to come between her and her father.
- [121] Andrea drove Amandeep back to her house. Dylan and Todd were with them. Amandeep went in the house and the others waited outside. Andrea left for a short time, then returned. She called Amandeep from a cell phone to ensure that she was alright.
- [122] When Amandeep returned to the car, she said her parents told her she could go with Todd to Prince George. She said her father had started crying, and hugged her. He tried at first to talk her out of leaving, but she said "No, if I do not leave now, I will never leave." Her father then said that if Amandeep would go with the family to Vancouver for two weeks, he would drive her to Prince George. She said he told her he would tell the family she was going to Prince George to school, otherwise it would disgrace the family.
- [123] Andrea drove Todd and Amandeep to the bus depot in Terrace later that day. Andrea received an e-mail from Amandeep while she was in Vancouver, shortly before she was to return to Prince George.

Dylan Reid

- [124] Dylan Reid became friends with Amandeep as a result of his close friendship with Todd. He and Andrea spent much of their time together with Amandeep and Todd. Much of Dylan's evidence concerned the secretive nature of Todd and Amandeep's relationship.
- [125] Dylan took seriously some of what Amandeep said, but not other things. For example, Amandeep said that if her father found out the things she was doing - dating, and so on - "he would kill me." But she said it with a bit of a smile. It was more a figure of speech than anything.
- [126] Dylan's evidence concerning the statements Amandeep made to him was similar in most respects to the evidence given by Andrea Spowart on the voir dire. The repetitive nature of his evidence may be attributable to the fact that he and Andreas Spowart were often together when Amandeep spoke to them about her relationship with her father. Dylan's evidence is accurately summarized by the Crown in Appendix A.

Deanna McArthur

- [127] Deanna McArthur is a friend of Todd McIsaac. She dated Todd's older brother. She knew Amandeep for about two and half years. Amandeep was three or four years younger than Deanna. Because of Amandeep's relationship with Todd, Deanna saw her quite regularly. Deanna never met Amandeep's parents, and never visited their house.
- [128] Amandeep told Deanna that her relationship with her father was not very good. They argued about the way she dressed, which was constantly an issue. Shortly after Deanna met Amandeep, when she was in Grade 10, Amandeep told her that she and her father had argued, and that he had struck her. Amandeep was very upset.
- [129] Amandeep's parents did not want her to have boyfriends. Her relationship with Todd was a secret. She was afraid to go home on many occasions, afraid her father would find out that she had been seeing Todd. She said that because Todd was not of the same religion, the family would be disgraced. It was Deanna's understanding that after the car accident, Amandeep told her parents about the relationship.
- [130] Amandeep told Deanna she was afraid for Tajinder. She said she was worried her father would treat Tajinder the way he treated Amandeep if he found out Tajinder knew about her relationship with Todd. She also said that by dating Todd, she was disgracing her family, and that they may be shunned by their church.
- [131] Deanna moved to Prince George in July 2003. She wanted to find work. Todd and Amandeep planned to move to Prince George as well. They were going to live with Deanna until they found work and had money to rent their own apartment.
- [132] Deanna went to the bus depot in Prince George to pick up Amandeep and Todd when they arrived. They spent a few days together. Amandeep kept her address and phone number in Prince George a secret from her family. Deanna did not want the family to know where she was staying. She would use "*67" to block the number when she called her family in Vancouver.
- [133] Amandeep spoke to her parents by phone about the vacation in Vancouver. She did not want to go with them. When she hung up the phone, she was upset. She said her parents had invited Todd to go with them. Amandeep and Todd talked about it, but Amandeep thought it was not a good idea. She was going to Vancouver because her parents wanted her to tell their relatives that she was going to school in Prince George. It was a means of letting her live in Prince George with Todd.
- [134] Deanna was in the apartment when Amandeep's parents came to pick her up. It was her recollection that she, Todd and Amandeep went downstairs and waited on the sidewalk for the Atwals to arrive.

- [135] While Amandeep was in Vancouver, Deanna spoke with her twice. Amandeep called Deanna shortly after arriving in Vancouver. She said she was a bit afraid because her relatives were acting strangely toward her. She said her brother was in Vancouver, and had told her she had made a lot of mistakes and would regret them. He was loading a gun at the time, or passing the gun from one hand to the other.
- [136] Amandeep called Deanna again on July 29, 2003. She said she was returning to Prince George the next day. She said her father would give her a ride, and she should arrive at about 9:00 p.m. She told Deanna that her sister, Tajinder, had climbed into bed with her and was crying because she was worried that, as a result of a conversation she overheard between her parents, she would never see Amandeep again.

Other Evidence

- [137] The Crown also tendered, with the consent of the defence for purposes of the voir dire, the transcript of an interview of Tajinder Atwal, Amandeep's fifteen year old sister, conducted by police within a few hours of Amandeep's death. Tajinder was very reluctant to speak to police about her father or her family dynamic, and denied any instances of violence or abuse by Mr. Atwal toward Amandeep or other family members.
- [138] The defence filed statements obtained by police from four witnesses: Dr. Li Huang, the Atwal family physician; Richard Velho, a neighbour of the Atwals; Jose Vehol, an employee of Alcan who supervised Mr. Atwal during the last few years of his employment at Alcan; and Satnum Sangha, a close friend of the Atwals. All four witnesses spoke in very positive terms about Mr. Atwal. None had seen any indication of aggressive or abusive behaviour on his part. From the perspective of all four, Mr. Atwal was a loving parent and husband, and a devoted family man.

IV. DISCUSSION

- [139] The evidence of many of the witnesses concerned, in part, their own observations of events as they unfolded. That evidence is admissible, so long as it is relevant, without the application of the principled exception to the hearsay rule. Only the statements of Amandeep are hearsay, and therefore the subject of review on the voir dire under the principled exception.

Necessity

- [140] On the basis of the case law reviewed earlier in these reasons, I am satisfied that the hearsay evidence sought to be admitted by the Crown meets the criterion of necessity: Amandeep is dead.

- [141] The defence argued that Andrea Mendoza's evidence concerning statements made by Tajinder and Amandeep about the incident with the knife is not necessary within the principled exception to hearsay because Tajinder remains available to give direct evidence about the alleged incident. I cannot agree. First, it is clear from Smith and Starr that the fact a declarant's statements may be corroborated by other evidence does not render them unnecessary.
- [142] Second, Tajinder was unwilling to speak to police. That is hardly surprising, given her age and dependence on her family, and the implications for her father - and her family as a whole - were she to testify to the incident she allegedly disclosed to Andrea Mendoza. At the very least, the evidence falls within the second Wigmore category discussed by the Court in Smith (at ¶ 36) and Starr (at ¶ 206). In the circumstances, "the Court cannot expect, again or at present, to obtain evidence of the same value from the same or other source."

Reliability

- [143] I turn then to the question of reliability. It is not for the Court to determine ultimate reliability. Determination as to the veracity of the various witnesses to whom Amandeep may have spoken is the province of the jury, as is consideration as to the consistency or inconsistency of those statements and the significance of whether they are corroborated. My task is limited to determining whether the statements "bear their own badge of reliability" based on the circumstances in which they were made.
- [144] Amandeep made statements to a spectrum of persons: her boyfriend and his father, her boyfriend's cohorts, childhood and school friends, work colleagues. In the circumstances of this case, the question is whether Amandeep had reason to mislead these individuals about her relationship with her father, or exaggerate their conflicts.
- [145] The defence argued that Amandeep was a teenager, and teenagers are known to exaggerate their difficulties with their parents, and often possess a distorted view of the seriousness of the conflicts they have with their parents. Amandeep, said the defence, was a young woman known to be practiced in deception: she spent three years deceiving her parents about her relationship with Todd, and had ample incentive and opportunity to mislead others about the alleged controlling and abusive conduct of her father.
- [146] The submissions of the defence have a certain resonance, and I have spent a great deal of time considering the issue of threshold reliability particularly as it concerns Amandeep's statements to Hugh McIsaac. The central issue is whether the circumstances in which Amandeep's statements were made give rise to the apprehensions traditionally associated with hearsay evidence.
- [147] I do not accept, as a general proposition, that teenagers lie or exaggerate about their relationships with their parents. I accept that, as a matter of experience and common sense, some do exaggerate and magnify conflicts with parents, while others do not.

- [148] In the course of the voir dire, I heard evidence of common complaints teenagers have about their parents - resistance to seemingly innocuous things like tattoos and body piercings - which stem largely from generational differences. Those complaints, trifling in nature, ought not to be put before the jury for reasons other than threshold reliability. I also heard evidence of conflicts between Amandeep and her father that are too remote in time to bear directly on the offence alleged in the indictment. Finally, I heard evidence that is simply not material to the murder charge, such as Amandeep's complaints about Mr. Atwal's alcohol consumption. These are all examples of statements that are highly prejudicial and lacking in probative value, and which are inadmissible even though they may be admissible under the principled exception to hearsay.
- [149] I have limited my review concerning threshold reliability to the statements made by Amandeep that are sufficiently probative to the Crown's case against Mr. Atwal. I have concluded that her statements to a significant number of witnesses do not possess sufficient probative value to be admitted, an issue to which I will turn in due course, and for that reason I will not set out any analysis as to their threshold reliability.
- [150] I have considered the threshold reliability of Amandeep's statements to the following witnesses because, if reliable, they are sufficiently probative to be admitted at trial:
- (a) Constable Dionne and Cst. Koga;
 - (b) Todd McIsaac;
 - (c) Hugh McIsaac;
 - (d) Andrea Mendoza; and
 - (e) Andrea Spowart.
- [151] As noted earlier, the defence did not challenge the admissibility of the evidence of the two police officers, Cst. Dionne and Cst. Koga. The evidence is both necessary and reliable. It is reasonably proximate to the events concerning the offence alleged in the indictment, and, in light of the Crown's theory of the case, is highly probative.
- [152] As already noted, the defence did not challenge much of Todd McIsaac's evidence. Objection was made to Amandeep's statements concerning events which, in the opinion of the defence, were too remote, too trifling or immaterial to the charge of murder.
- [153] The defence did challenge the evidence of Andrea Mendoza, and I will turn now to the reliability of that evidence. Amandeep arrived at Mendoza's house, unannounced and shaken, allegedly having just been chased with a knife by her father. This occurred within months of her death. Why tell such a story to Mendoza, who was her neighbour and childhood friend, but was not a member of her peer group? Why tell this to Andrea, who had been in the Atwal household many, many times, and would critically examine the truth of the story, based on her own observations of the Atwal family? Amandeep had no reason, and no opportunity, to concoct an event such as the one she described to Andrea. The

evidence has its own badge of reality.

- [154] Mendoza's evidence is also reasonably proximate to the date of Amandeep's death. She was certain that the incident concerning the knife occurred in the spring or summer that Amandeep died.
- [155] Finally, the evidence is clearly probative of an animus on the part of Mr. Atwal toward Amandeep that is consistent with the offence charged. Amandeep told Mendoza that a telephone conversation between herself and Todd, overheard by Mr. Atwal, precipitated the altercation with the knife.
- [156] I turn now to the evidence of Andrea Spowart. Spowart became a close friend of Amandeep in the two years before Amandeep's death, and particularly in the last year. For the most part, the statements the Crown seeks to lead through Spowart were made in the year before Amandeep's death. Amandeep had nothing to gain by misleading Spowart, who appears to have been her closest female friend, about specific events occurring in the Atwal household during that time. I have concluded that the statements, bearing in mind the circumstances in which they were made, have their own badge of reliability. Some of the statements are not material or sufficiently proximate, but I will address those concerns later in these reasons.
- [157] I had considerably more difficulty when determining whether Amandeep had a motive to mislead Hugh McIsaac, or give him an exaggerated or distorted view of her ongoing conflicts with Mr. Atwal. Hugh was frank to say that initially he wondered if Amandeep's complaints were those of a teenager who was breaking her curfew. Amandeep, after all, had considerable incentive to gain Hugh's support. In the McIsaac household, she was able to maintain the hours she pleased and stay overnight with Todd.
- [158] After much deliberation, I have decided there is a real possibility that Amandeep consciously or unconsciously exaggerated her difficulties with her father in order to gain entry to the unsupervised and relaxed atmosphere of the McIsaac home. For that reason, I have concluded the circumstances surrounding Amandeep's statements to Hugh concerning her fear that her father would "kill her" are not sufficiently trustworthy to achieve threshold reliability. Accordingly, those statements are not admissible at trial.

Probative Value/Prejudicial Effect

- [159] As already noted, Amandeep's statements to the police officers, Todd McIsaac, Andrea Mendoza and Andrea Spowart are necessary and reliable, and are therefore prima facie admissible under the principled exception to hearsay.
- [160] However, even with respect to the evidence of these witnesses, the court must not lose sight of the Crown's theory concerning Amandeep's death on July 30, 2003. The Crown alleges that Mr. Atwal killed his daughter to prevent her from carrying out her plan to live with her boyfriend because the relationship did not accord with his ambitions for her, or the culture

and values of his community. The evidence the Crown seeks to adduce is discreditable conduct, and to be probative it must demonstrate an animus on the part of the accused toward the victim that is consistent with the offence charged. In this case, the charge is murder, and the alleged motive is as I have just described.

[161] With those considerations in mind, I have concluded that some of Amandeep's statements to Todd McIsaac and Andrea Spowart are not sufficiently probative in light of the offence charged in the indictment. Mr. Atwal's attitude toward matters such as boyfriends, dating, tattoos, body piercing, curfews, and the like, may be indicative of a controlling or strict approach with respect to his daughter, or of particular cultural attitudes and religious beliefs. However, they are not consistent with or demonstrative of an animus on his part toward Amandeep that is consistent with the charge of murder. Accordingly, Amandeep's statements concerning those matters have little probative value and considerable prejudicial effect, and cannot be admitted at trial.

[162] The next question is whether Amandeep's statements concerning her conflicts with her father are too remote in time. The evidence of Todd McIsaac and Andrea Spowart is that Mr. Atwal did not learn of Amandeep's relationship with Todd until the car accident, which occurred in early June 2003. I accept the submission of the defence that in general terms, evidence of conflicts between Mr. Atwal and Amandeep before that time is too remote. It bears repeating that the theory of the Crown is that Mr. Atwal killed his daughter to prevent her from carrying out her plan to move to Prince George with Todd. Evidence of father-daughter conflicts before the illicit relationship was discovered is too remote to be relevant.

[163] Also inadmissible, due to its highly prejudicial nature and lack of probative value, are statements of Amandeep in which she complained in general terms about her father's bad temper and mean-spirited behaviour, and her statements concerning her father's alcohol consumption. Alcohol consumption is not material to the offence charged in the indictment. It is not material to the theory of the Crown, nor is it material to Mr. Atwal's defence. He has entered a plea of not guilty to the charge.

[164] On the same basis, I have concluded that all of Amandeep's statements to Karla Eguia, Dee Ann Booth, Nicole Cabral and Amber Guy should be excluded. With the exception of two statements to Nicole Cabral, the subject of most of Amandeep's statements to these witnesses is Mr. Atwal's reaction, rooted in his cultural heritage and religious beliefs, to Amandeep's expressions of adolescent independence. In my view, Amandeep's complaints about her father to these witnesses do not demonstrate an animus consistent with the offence of murder. The balance of the evidence of these witnesses concerns the secret nature of Amandeep's relationship with Todd, a matter to which all of the witnesses whose evidence has been admitted will testify.

- [165] Amandeep allegedly told Nicole Cabral that on one occasion Mr. Atwal came into her room while she was sleeping; when she awoke, he said "I could kill you and get away with it." Cabral could not say when this occurred, or what provoked the comment. There is simply no evidence to provide a context for the comment. In the absence of any contextual evidence to assess its probative value, the statement is too prejudicial to admit at trial.
- [166] I have concluded that the evidence of Christine Drabik and Laura Jankauskas ought to be excluded on the basis that Amandeep's statements to these witnesses are not sufficiently probative: they, too, are not demonstrative of an animus on the part of Mr. Atwal that is consistent with the charge of murder. Further, Amandeep's statement to Laura Jankauskas ("My father said he could kill me and get away with it") must be excluded on the further basis that it was not accompanied by any evidence as to the context in which Mr. Atwal's comment was made or the circumstances surrounding it. Amandeep made the comment in an offhand manner and apparently showed no concern about it. For that reason, the statement is extremely prejudicial and its probative value is slight.
- [167] I have concluded that the statements made by Amandeep to Deanna McArthur are inadmissible on several bases. First, Amandeep's statements about her relationship with her father while she was in Grades 10 and 11 are too remote to be probative. Those statements are also inadmissible because they consist of general complaints about her father's rigid and controlling behaviour at that time, and are not probative of the offence charged in the indictment.
- [168] I had more difficulty deciding whether to admit Deanna's evidence concerning her telephone conversations with Amandeep the night before her death. Ultimately, I have decided the evidence should not be admitted. The first conversation, in which Amandeep complained that her extended family was being unfriendly and ignoring her, is not sufficiently probative of the matters in issue.
- [169] In the second conversation with Deanna, Amandeep repeated a statement made to her by her younger sister. She said Tajinder overheard a conversation between her parents which caused her to fear she would never see Amandeep again. Tajinder's statement is double hearsay. There is no evidence of the context in which the overheard conversation took place, nor is there evidence as to the substance of the conversation. There is simply not enough contextual evidence to assess the probative value of the Tajinder's statement to Amandeep, and Amandeep's statement to Deanna. At the same time, the statement is highly prejudicial. For that reason, I have decided the statement must be excluded.
- [170] There are other dangers posed by the evidence of the witnesses whose evidence I have excluded. I am concerned about the prejudice to Mr. Atwal that is likely to accrue as a result of the sheer volume and detail of the hearsay statements sought to be adduced by the Crown. Evidence concerning Mr. Atwal's conduct toward Amandeep after he discovered her relationship with Todd is relevant to issues of motive and identity. However, in excess it will overshadow the evidence concerning the events that occurred on July 30, 2003, when Mr.

Atwal and Amandeep were travelling to Prince George. Ultimately, the issue for the jury is whether Mr. Atwal killed his daughter as alleged in the indictment.

[171] In this context, I am reminded of the caution expressed by Hill J. in S.B: the leading of evidence of the previous relationship between the complainant and the accused must be done without a disproportionate amount of trial time spent on it.

[172] With that caution in mind, I have concluded that the evidence of Dylan Reid should also be excluded. The jury will hear the evidence of Andrea Spowart. Dylan Reid's evidence is, for the most part, simply repetitive of Spowart's evidence. That is not surprising, given his evidence that he and Spowart spent much of their time together with Amandeep and Todd. Spowart's evidence is sufficient to provide the jury with the narrative required to understand the dynamic of the relationship between Mr. Atwal and his daughter.

Other Evidence

[173] The defence may call at trial, on the issue of the ultimate reliability of the statements of Amandeep ruled admissible on the voir dire, the evidence of the four witnesses whose statements it filed in the voir dire.

V. SUMMARY OF FINDINGS

[174] I have reached the following conclusions concerning the admissibility of the evidence heard in the voir dire:

- (1) All of the statements of Amandeep sought to be adduced by the Crown at trial meet the requirement of necessity.
- (2) Amandeep's statements to Hugh McIsaac do not meet the threshold requirement of reliability, and will be excluded at trial on that basis.
- (3) The hearsay statements sought to be adduced by the Crown at trial constitute evidence of discreditable conduct. The prejudice inherent in discreditable conduct evidence is high. The probative value of the evidence must therefore be high in order to permit its reception. The evidence must demonstrate an animus on the part of the accused that is consistent with the offence charged, which in this case is murder. It must also be reasonably proximate in time to the offence. The following evidence meets those requirements, and is admissible at trial:
 - (a) the evidence of Cst. Dionne and Cst. Koga;
 - (b) the evidence of Andrea Mendoza;
 - (c) the evidence of Todd McIsaac concerning his relationship with Amandeep, and statements made to him by Amandeep concerning Mr. Atwal's conduct toward her from the beginning of June 2003, when he learned of the relationship;

- (d) the evidence of Andrea Spowart concerning her friendship with Amandeep, and Amandeep's statements to her concerning Mr. Atwal's conduct toward her from the beginning of June 2003, when he learned of her relationship with Todd.
- (4) The admissible evidence of these five witnesses is relevant and material. The inferences sought to be made from their evidence will advance the inquiry before the jury because it is capable of demonstrating an animus on the part of Mr. Atwal toward Amandeep that is consistent with the offence charged. It is sufficient narrative to give the jury the context and dynamic of the relationship between Mr. Atwal and Amandeep.
- (5) A significant amount of the evidence sought to be admitted by the Crown does not meet the highly probative standard. Further, to admit all of it would, in my view, tend to support an inference of guilt based solely on bad character. Finally, the general restriction on the detail and amount of evidence is necessary to ensure that its sheer volume will not overtake the evidence concerning the events of July 30, 2003, when Amandeep was killed. With those principles in mind, Amandeep's statements to Karla Eguia, Nicole Cabral, Dee Ann Booth, Amber Guy, Christine Drabik, Laura Jankausas, Dylan Reid and Deanna McArthur will be excluded at trial.

"C.A. Wedge, J."

The Honourable Madam Justice C.A. Wedge

SCHEDULE A

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Prepared on 25 October 2026 · Esheria