

CANADA / JUDGMENT

R. v. Schneider

2021 BCCA 41

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 41 R. v. Schneider

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Schneider,

2021 BCCA 41

Date: 20210202

Docket: CA46000

Between:

Regina

Respondent

And

William Victor Schneider

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Goepel

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated October 19, 2018 (R. v. Schneider, Vancouver Docket 27343-2).

Counsel for the Appellant (via videoconference):

C.J. Nowlin

Counsel for the Respondent (via videoconference):

G.D. McKinnon, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

October 16, 19, 2020

Place and Date of Judgment:

Vancouver, British Columbia

February 2, 2021

Dissenting Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Written Reasons by:

The Honourable Mr. Justice Goepel (Page 49; para. 151)

Concurred in by:

The Honourable Madam Justice Saunders

Summary:

A jury found the appellant guilty of second degree murder. He appeals his conviction on the grounds that the trial judge: (1) erred in admitting an overheard telephone conversation; (2) failed to instruct the jury on the "concurrence" principle; and (3) failed to seek clarification on an ambiguous question posed by the jury, which was then answered incorrectly. The appellant contends that these errors, individually or cumulatively, warrant a new trial.

Held: Appeal from conviction allowed and new trial ordered.

Per Goepel and Saunders J.J.A.: The overheard telephone conversation should not have been admitted into evidence. Its admission amounts to reversible error and warrants a new trial. The utterances were not logically relevant, as they lacked sufficient context for the jury to be able to determine their meaning. Agree with and adopt the reasons of DeWitt-Van Oosten J.A. dismissing the second and third grounds of appeal.

Per DeWitt-Van Oosten J.A. (dissenting in part): The appeal from conviction should be dismissed. The overheard telephone conversation was properly admitted. It was logically relevant to an issue at trial and there is no principled basis on which to interfere with the judge's assessment of probative value and prejudicial effect. On the second and third grounds of appeal, this case did not require an instruction on the concurrence principle and the judge correctly answered the jury's question on the definition of "bodily harm" as applicable to the offences of murder and manslaughter.

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Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

INTRODUCTION

[1] Natsumi Kogawa was a 30-year-old Japanese citizen who came to Canada on a student visa. She was reported missing on September 12, 2016. Tragically, her body was located approximately two weeks later, folded into a suitcase hidden in some bushes in Vancouver's West End.

- [2] Following a jury trial, the appellant was convicted of second degree murder and interfering with Ms. Kogawa's body after her death, contrary to ss. 235(1) and 182(b) of the Criminal Code, R.S.C. 1985, c. C-46.
- [3] The appellant pleaded guilty to the second of these offences after the Crown closed its case. He admitted to being with Ms. Kogawa when she died and to disposing of her body. However, he disputed the Crown's contention that he killed her.
- [4] The appellant says the murder verdict should be set aside and a new trial ordered. He contends that the trial judge erred in admitting parts of an overheard telephone conversation; erred in her instructions to the jury; and mishandled a question posed by the jury.
- [5] For the reasons that follow, I would dismiss the appeal.

BACKGROUND

A. Overview of Evidence

- [6] On September 28, 2016, Natsumi Kogawa's naked body was found in a suitcase in Vancouver's West End. The suitcase was in some bushes on an unoccupied property that borders Nicola and Davie Streets. The area was overgrown and neglected, but passable.
- [7] An autopsy revealed that Ms. Kogawa had two medications in her body: Zopiclone (typically used as a sleeping medication) and Lorazepam (anti-anxiety medication with a sedative effect). When taken together, these medications will "promote the effect of sleepiness or decreased motor coordination, possibly dizziness and [affect] a person's judgment". Neither medication had been prescribed for Ms. Kogawa while living in Canada. The appellant had a prescription for Lorazepam, last filled on September 6, 2016.
- [8] Ms. Kogawa's body was in a state of decomposition. The autopsy found no "anatomic evidence of major injuries". A piece of cloth was "folded and stuffed within the anus, and the cloth was soiled a brown colour, [with] no obvious evidence of fresh blood". There were "tree branches and leaves that were scattered on the body, predominantly on the right side".
- [9] A pathologist was not able to determine the cause of death because of the "lack of specific anatomic or visible [injury], and the lack of specific toxicological findings that can explain death". She did not rule out overdose as a possible cause of death. She also testified that the absence of anatomic or visible injury was "not inconsistent with the cause of death being asphyxia by suffocation". She defined asphyxia as the "inability to utilize oxygen or to use oxygen" and said "[a]sphyxia cases oftentimes are not associated with specific visible findings at autopsy".

- [10] The pathologist testified that "not a large amount of force is necessary to just block the nose and mouth". More force is required to cause bruising. There was no sign of bruising to Ms. Kogawa's nose. Her frenulum (the tissue that connects the top lip to the middle of one's gums) was intact. There were no signs of petechial hemorrhaging to her mouth. Bruising, tearing of the frenulum, and petechial hemorrhaging are injuries that can occur when pressure is applied to the nose and mouth, depending on the degree of force used.
- [11] A toxicologist detected three compounds in Ms. Kogawa's liver and surrounding fluid: Zopiclone, 2-amino-5 Chloropyridine (a breakdown compound associated with Zopiclone), and Lorazepam. The toxicologist did not attempt to determine the concentration levels of these drugs. Because of complexities arising from body decomposition, any numbers generated by that analysis would not reliably indicate drug concentration at the time of death. At some time prior to her death, Ms. Kogawa consumed Zopiclone and Lorazepam. However, the toxicologist could not opine on whether Ms. Kogawa was "under the influence" of those drugs when she died.
- [12] Ms. Kogawa was reported missing on September 12, 2016. On September 27, police issued a news release seeking the public's assistance. It contained two video surveillance images taken on September 8, 2016. The images depicted Ms. Kogawa at a mall in downtown Vancouver with a then-unidentified man.
- [13] One day after the news release, the appellant's brother spoke with police in Vernon. He told police the appellant had talked to him about Ms. Kogawa. Among other things, the appellant told his brother the whereabouts of Ms. Kogawa's body. That information led police to the suitcase.
- [14] The appellant gave a statement to police on October 18, 2016. The Crown has summarized the statement in its factum:

the appellant talked about first meeting Ms. Kogawa mid-August and their dates . He said "this isn't a premeditated thing" . On their last date (September 8), they were going to have "really good sex" that they had talked about. He bought a tent for \$20 . He thought they had arranged to meet at 11 a.m. but she was late. He knew she had another appointment later that day . They had trouble setting up the tent, it was "really rushed"; they each drank three beers . At one point he said, " suddenly got very, very heated and, then went wrong". When asked to clarify he said, "I think it was time . the amount of time we'd given each other on that day" . At another point he said, " she's definitely a victim. It shouldn't have happened" .

When asked "How did she die?", the appellant said he didn't know "if her heart went or if it was her breath " . At that point he made a brief hand gesture, putting his fingers to his nose and cupping his mouth with his hand . He wasn't "actually certain that she passed when sh-, at the moment she did". He stepped out of the tent for a smoke and didn't think she was at that time. He asked the police if it was her heart or her breath . The appellant made a similar hand gesture shortly thereafter .

He told police he would send a letter with a "full confession" to Ms. Kogawa's family . At the end of the interview, in response to a police comment that he has been showing remorse from day one, the appellant said "But it is, it's my fault" .

[Respondent's factum at paras. 11-13; internal references omitted, emphasis added.]

[15] In their testimony, the officers who took the statement described the hand gestures made by the appellant:

he was quite engaged making eye contact with us throughout the -- the interview process. When we asked him question[s], as he's explaining this, he paused, brought his hand to -- towards his mouth, covered his palm over his mouth and put his index finger and his thumb to his nose like this, and he looked down and was in concentration as if, in my mind, recalling a memory.

He had his hand in his -- over his nose like this for about two or three seconds as he was talking through this , he was -- he brought his hand up, so he didn't press hard, obviously you can hear he's not talking like this. He'd bring his hand up and he was talking as he's doing this with his hand -- palm over his mouth.

he brought his hand again to his mouth and bring index finger and thumb back to his nose, put it up and then put it down again.

He used his finger and first finger -- or, sorry, thumb and first finger, cupped it to his nose, placed it to his nose, and then cupped the hand around the mouth like so as he -- whoops, sorry, as he spoke.

When [the appellant] demonstrated that gesture to us, he was talking as he did so. He talked to me and continued talking held his thumb and his finger to put to his nose, and his mouth he cupped -- cuffed -- sorry, cuffed around his mouth.

...

He placed his thumb and his finger to his nose, and he cuffed his hand around his mouth.

[16] The surveillance footage that captured Ms. Kogawa walking with the (now-identified) appellant on September 8 showed the appellant carrying what was believed to be a tent. At that time, the appellant was staying at a hostel on Cambie Street. Footage from the hostel's video system showed the appellant leaving the hostel the morning of September 8 carrying the tent and a shoulder bag. He returned that evening without the tent and appeared to be wearing different pants. He left the hostel again on the morning of September 9 and returned that evening carrying a large, unweighted suitcase. The next morning, the appellant left the hostel with the suitcase and returned in the afternoon without it, wearing different clothes. At trial, the appellant admitted to placing Ms. Kogawa's body in the suitcase.

[17] In a letter to his father, dated November 4, 2016, the appellant spoke of contact he had with Revenue Canada about a "late \$ return". He told his father "\$6-700 [was] expected at [his father's] address in the weeks ahead". He then said, "just like court proceedings that await me, please believe me that none of it was premeditated".

[18] The appellant did not testify.

B. Crown and Defence Theories

[19] At trial, the Crown's theory was that the appellant and Ms. Kogawa were on a date on September 8, 2016. He became angry because Ms. Kogawa had to leave for another appointment. "[I]n the heat of the moment", the appellant killed her by "smothering or asphyxiating" her, using his hand and fingers to cover or block her mouth and nose. The Crown said the evidence proved that when he assaulted Ms. Kogawa, the appellant either intended to kill her or intended to cause her bodily harm that he knew was likely to result in her death, and he was reckless as to whether death ensued (s. 229(a) of the Code). In Crown counsel's words: "[W]hen someone cuts off another's ability to breathe, they will undoubtedly die. Even a small child knows that."

[20] The Crown further argued that after the death, the appellant "took steps to cover his tracks so there wouldn't be a trail of evidence that not only would lead the police to him, but also hamper their ability to gather evidence which would implicate him in the death ". This included concealing Ms. Kogawa's body in a suitcase.

[21] The appellant's conversations with his brother, an attempted suicide, his statement to police, and the letter to his father were said to be consistent with the appellant knowing that he had committed an unlawful act causing Ms. Kogawa's death.

[22] In its closing submissions, the defence argued that the Crown had not proved that anyone caused Ms. Kogawa's death, let alone the appellant. There was no proof of an unlawful act that caused death, or that any such act--had it occurred--was committed with the intent required for murder. The pathologist did not know why Ms. Kogawa died. There were no autopsy findings consistent with the Crown's assertion of asphyxiation. Without a determined cause of death, "that's the end of it. It can't be said that this was a homicide".

[23] The defence argued that placing Ms. Kogawa's body in a suitcase and leaving the suitcase in bushes was not conduct from which the jury could reasonably infer consciousness of guilt for murder. It was equally consistent with the appellant panicking over the fact that Ms. Kogawa had died for some unknown reason and then making "very poor decisions" about how to respond.

[24] The things the appellant told his brother were said to prove nothing other than that he knew the whereabouts of Ms. Kogawa's body. His expressions of remorse and attempted suicide were equally consistent with feeling bad about interfering with the body. An overheard conversation with the appellant's wife (detailed later in these reasons), was a "very, very

undependable bit of conversation" to which the jury should attach no weight. The probative value of the hand gestures during the statement to police was not assessable in any meaningful way, as the officers did not video record the interview. The appellant admitted "fault" for his role in the events of September 8, 2016, but that admission did not extend to murder.

ISSUES ON APPEAL

- [25] The appellant raises three issues on appeal. He says the trial judge (1) erred in admitting parts of a phone conversation overheard by the appellant's brother; (2) erred in her instructions to the jury by not including direction on the "concurrence" principle; and (3) mishandled and incorrectly answered a question posed by the jury.
- [26] In his factum, the appellant also alleges a failure by the judge to provide reasons for admitting the overheard conversation. However, he abandoned that ground of appeal after it became apparent that reasons were available.

DISCUSSION

- [27] In resolving the issues advanced by the appellant, it will be necessary to refer to parts of the instructions to the jury. I will work primarily from the written version, distributed for use during deliberations. The appellant does not allege discrepancies between the written charge and its oral delivery.

A. Did the Trial Judge Err in Admitting the Overheard Conversation?

- [28] To answer this question, it is necessary to set out the related evidence in some detail.
- [29] Whether the overheard conversation was relevant to an issue at trial raises a question of law, reviewable on a standard of correctness: *R. v. Mohan*, [1994] 2 S.C.R. 9 at 20-21; *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8. Whether the evidence, if found relevant, should have been excluded because its probative value was overborne by its prejudicial effect, involved an exercise of discretion. That aspect of the judge's admissibility determination is entitled to "significant deference": *R. v. Araya*, 2015 SCC 11 at para. 31.

The Evidence

- [30] In his opening statement to the jury, Crown counsel at trial (not counsel on the appeal) told the jurors that they would hear testimony from the appellant's brother, Warren Schneider Jr. ("WS"). Among other things, WS would testify that the appellant borrowed his phone to call the appellant's wife, who was living in Japan. During the call, WS overheard the appellant "say to his wife, words to the effect of, 'Have you heard the news in relation to Natsumi's death?' and 'I did it' or 'I killed her.'"

- [31] On the morning of WS's testimony, defence counsel (not counsel on the appeal) took issue with the admissibility of the overheard conversation. WS told police about the phone call when interviewed by them in 2016, and he testified about it at the preliminary inquiry. However, the defence did not contest the admissibility of the evidence until WS was about to testify. Given the late notice, it was agreed that WS would start his testimony and be interrupted for an admissibility determination at the point at which the conversation arose.
- [32] WS took the witness stand. He explained that the appellant married in 2001. His wife's name is Hiroe. They have a child together. The appellant's wife and child live in Japan. At the end of August or early September 2016, the appellant phoned WS in the Okanagan and told him that he would be travelling to Kelowna. He arrived sometime around September 20. He contacted WS and they met in a park in Rutland. At one point, the appellant became upset. "He gathered his items and left, saying that he did something bad and -- and he walked off".
- [33] WS later found out that the appellant had gone to Vernon and was staying with their father, who lived there. He next saw his brother on September 23 at a celebration for their grandmother's birthday in Kelowna.
- [34] On September 27, WS received a phone call (or text message) from one of his daughters. She sent him a photo and asked, "Is this Willie?" WS looked at the photo (part of a news article) and recognized the appellant. The article was headed "Missing Japanese Student".
- [35] WS called his father's residence and spoke to the appellant. He told him there was a photo on the Internet of him and a missing Japanese student. The appellant did not say anything and hung up the phone.
- [36] WS travelled to Vernon that same day. He arrived at his father's residence at about 10:30 p.m. He "grabbed [his] brother" and they walked to the beer store. On the way back, the appellant said, "it's true". The appellant looked "[v]ery sad. Remorsefully sad" and "[g]lad to get it off his chest, per se."
- [37] The appellant shared some details with WS. He told WS that he had three dates with Ms. Kogawa. The third date was the last one. "[T]here was medication taken" by both of them. The appellant said Ms. Kogawa provided the medication. He told WS they had spoken about having sex in a tent in Stanley Park. WS also learned that Ms. Kogawa had been late for each of the three dates; she had another engagement or appointment on the day in question; and, in response to the suggestion that they have sex in Stanley Park, the appellant told Ms. Kogawa of "another spot". WS told the appellant he did not want to hear anything more and they would talk about it in the morning.

- [38] The next morning, the appellant told WS that "he planned on buying some heroin to take himself out in the bush and -- and kill himself out in the bush". They went to a beer store and purchased alcohol. The appellant also bought \$50 worth of heroin. The appellant "wanted to commit suicide, but he wanted [WS] at his side". They went to a park in Vernon. The appellant consumed the heroin "by needle". He "realized he got ripped-off. It wasn't strong enough and he didn't die".
- [39] WS testified that before the appellant injected the heroin, he told WS the location of Ms. Kogawa's body. It was at Nicola and Davie Streets in Vancouver, at a "construction site, or a restaurant". The appellant said the building was undergoing renovations. It was fenced-off and might look like a construction site, a place not intended for the public, or, as if no one was living there. The appellant said Ms. Kogawa's body was in a suitcase, and, after he killed himself, WS should tell the police. At this point, the testimony moved into a voir dire.
- [40] WS said that after the appellant failed to die from the heroin injection, he asked to use WS's phone and said he was going to call his wife. The appellant dialed a number and had a conversation with the person who answered. WS said the call lasted several minutes (a phone record showed the call lasted 13 minutes). WS was about ten feet away from the appellant at the time. He could only hear one side of the conversation. When asked to convey the content of the call, WS said he heard the appellant ask near the beginning of the conversation, "Did you see the news of the missing Japanese woman, student?" Then, about halfway through, the appellant said, "I did it" and "I killed her."
- [41] In cross-examination on the voir dire, WS confirmed that he could only hear one side of the conversation. As a result, he did not know if the appellant's wife was asking questions and the appellant was responding to them. The defence suggested to WS that he did not know the exact words spoken by the appellant. He testified that he could not recall "the full conversation, no". It was suggested that he did not know whether the appellant had, in fact, said "I did it". WS responded, "Yes, he said that." He said "[t]hat he killed her". WS's testimony at the preliminary inquiry was put to him, in which he said he "believe[d]" the words used by his brother were "I did it" or "I killed her". When asked to explain the difference between his evidence at the preliminary inquiry and his testimony on the voir dire, WS said:
- A. that's what I said there, "I did it" or "I killed her," but meaning that he's responsible for her death.
- Q. So you don't know the exact words he said?
- A. Not word-for-word, but the message that I got from that was --
- Q. Your feeling about it?
- A. Yes.
- A. Word-for-word, I don't know the exact words.

Q. Well, you don't know the words at all, do you?

A. Word-for-word, no.

Q. Well, when you say word-for-word, what do you mean by that?

A. In a sense, it seemed like he was admitting to the missing Japanese student's death. "I did it" or "I killed her," well, I guess that word "or" there. Overhearing a part of a conversation, "I did it. I killed her," it's along those lines, and word-for-word, maybe I was not missing a word, but it's word-for-word. I -- he did say "I did it."

Q. But what you -- you -- that's contrary to what you said in your last answer, sir, in that transcript I just read you when I said "What were the exact words," and you said, "I don't know the exact words," and that's true, isn't it?

A. Well, the whole conversation.

Q. It was your feeling about the impression you got, isn't that really it?

A. Yeah. Yes.

[42] Following submissions on the voir dire, the trial judge admitted the evidence surrounding the overheard conversation. In her ruling, she acknowledged that WS "could not remember the exact words [the appellant] used nor could he remember any other parts of the [telephone] conversation": R. v. Schneider, 2018 BCSC 2546 at para. 9 ("RFJ"). However, she was satisfied there was sufficient "context" surrounding the conversation that the evidence could be left with the jury:

[18] Although Warren Schneider Jr. was not actively trying to listen, he was present for [the] whole conversation and is able to give evidence about the context of the conversation. The context of the conversation was that he and Mr. Schneider had been discussing the missing Japanese woman. Prior to the conversation, Mr. Schneider had told Warren Schneider Jr. where Ms. Kogawa's body was located.

[19] As set out in [R. v. Ferris, [1994] 3 S.C.R. 756], the trial judge must be satisfied there is some evidence upon which a jury could conclude the meaning of the uttered words. As noted in [R. v. Bennight, 2012 BCCA 190], the possibility of incompleteness is a matter of weight for the jury.

[20] In my opinion, it is apparent from Warren Schneider Jr.'s evidence on the voir dire that there is some evidence on which a jury could conclude the meaning of the uttered words. While he was unable to recall the exact words, Warren Schneider Jr. testified about the context of the conversation and that the gist of the conversation was that Mr. Schneider was taking responsibility for Ms. Kogawa's death.

- [21] In my view, the probative value of the evidence outweighs the prejudicial effect that it might be used improperly. The prejudicial effect can be ameliorated by a strong caution to the jury about what use can be made of the evidence.
- [43] After this ruling, WS resumed his testimony before the jury and gave evidence about the phone call. In his direct examination, he said he heard the appellant say to his wife, "Did you hear the news about the missing Japanese student?" About halfway through the conversation, he also heard the appellant say, "I did it. I killed her." Crown counsel asked WS if those were the appellant's exact words. He replied "no". He only heard one side of the conversation and that was the "gist" of what was said.
- [44] In cross-examination, WS agreed that the phone call lasted 13 minutes and he had no knowledge of what the appellant's wife said during the call. He also agreed that he was purposefully trying not to eavesdrop. He said he was certain the appellant asked his wife whether she had "heard the news about the missing Japanese student" and that this question was posed at the start of the conversation. WS confirmed he did not know the exact words spoken by the appellant or if the appellant was being asked a question about Ms. Kogawa or something else when he was overheard to say "I did it". He agreed that portion of the conversation could have been completely unrelated to Ms. Kogawa. He did not know if the words "I did it" were said in the middle of a sentence, at the start of a sentence, or at the end.
- [45] WS testified that after the phone conversation, he and the appellant went back to the beer store and purchased more alcohol. The appellant said he wanted to buy more heroin, but did not do so. They took some pictures. They "hugged as if it would be [their] last hugs together". They cried. WS left the appellant and met their sister near the police station. WS subsequently told police about the location of Ms. Kogawa's body.

Positions of Parties on Admissibility

- [46] Relying on *R. v. Ferris*, 1994 ABCA 20, aff'd [1994] 3 S.C.R. 756, the appellant says the trial judge erred in admitting the evidence of the overheard telephone conversation. He contends that this evidence is subject to a "narrowly circumscribed, class-based inadmissibility principle" specific to fragments of one-sided conversations overheard by a third party that the Crown seeks to tender as an admission. The appellant says that before admitting this type of evidence, a trial judge must first determine whether the evidence constitutes an admission (potentially applying a standard of proof beyond a reasonable doubt). Only then will the evidence be logically relevant and open for consideration by the jury. If the judge is not satisfied that the words amount to an admission, because their meaning cannot be ascertained, the evidence is automatically inadmissible (appellant's factum at paras. 52, 57, 58, 65).

- [47] The appellant contends that the trial judge failed to make this mandated threshold enquiry. Instead, she improperly left it to the jury to decide whether the overheard words amounted to an admission. Had she conducted the proper analysis, the judge would have concluded that the words did not constitute an admission because it was impossible to ascertain their meaning. Having reached that conclusion, there would be no alternative but to keep the evidence from the jury (appellant's factum at para. 67).
- [48] Alternatively, the appellant says the judge was clearly wrong in her analysis of probative value and prejudicial effect. WS could only hear one side of the conversation and in snippets. He testified that he was trying not to listen to his brother. He did not hear what came before and after the impugned words and he could not recall the exact words spoken. The appellant says there is no real difference between this case and Ferris, and the prejudicial effect of admitting this evidence strongly outweighs its probative value.
- [49] The Crown says the admissibility ruling accords with the governing analytical principles and there is no basis for appellate intervention. The Crown sought to tender the overheard conversation as evidence of the appellant admitting his involvement in the death of Ms. Kogawa. In deciding whether that evidence should go before the jury, the judge properly asked whether there was some evidence by which the jury could determine the meaning of the words. Then she assessed the probative value of the evidence as against its prejudicial effect. This was all the judge was required to do. It was not the role of the judge to determine, as a fact, whether the impugned words did amount to an admission. If the judge admitted the evidence, that was for the jury to decide with the aid of proper instructions on how to assess the weight of the evidence and make use of it.
- [50] Relying on cases such as *R. v. Bennight*, 2012 BCCA 190 (inexact words spoken to a jail guard), the Crown says the circumstances surrounding WS's interactions with the appellant in Rutland, Kelowna and Vernon in September 2016 provided ample evidentiary support for the judge's decision to leave the overheard conversation with the jury. It offered sufficient context from which the jury could assess the meaning of the words and their weight.

Legal Principles

- [51] Counsel agree that Ferris is the jurisprudential starting point for the admissibility analysis.
- [52] Mr. Ferris was arrested for murder. While in police custody, he asked to call his father. During the call, a police officer overheard Mr. Ferris say the words "I've been arrested" and "I killed David". The officer could not hear what the father said to Mr. Ferris or any other parts of the conversation between the two men. The officer acknowledged there was conversation before, after, and in between the two sets of words he overheard. However, he did not know what it consisted of. He also did not know if the words "I killed David" came at the start, the end, or in the middle of a sentence: 1994 ABCA 20 at paras. 3-5.
- [53] The trial judge admitted the overheard remarks. The appeal court found that he erred. Conrad J.A. wrote for the majority and provided three bases for inadmissibility.

- [54] First, there was insufficient evidence from which a properly instructed jury could determine the meaning of the overheard remarks (at para. 27). The words "I killed David" were only relevant, and therefore admissible, if shown to be capable of supporting a conclusion that they amounted to an admission (at para. 31). If it was not possible to determine the meaning of the words, the Crown failed in its threshold burden to show that the words were relevant to an issue at trial (at para. 38). In Ferris, it was:
- [17] uncontradicted that the words were part of an utterance only, and that other words passed both before and after those words. It [was] uncontradicted that the words could have come at the beginning of a sentence or at the end of a sentence. In fact, the words may have been a part of a question such as "You don't think I killed David?" or a statement such as "They think I killed David" or "They think I killed David but I didn't". His father could have asked him what the police think he did and he could have replied "I killed David". Those utterances [did] not prove any fact in issue and [were] not an admission of guilt. Indeed, on the basis of the uncontradicted evidence, the possibility of statements with the words "... I killed David ..." contained therein [were] numerous. There [was] no way of determining the meaning or thought to be attributed to the words.
- [Emphasis added.]
- [55] The second basis for inadmissibility was a logical corollary of the first. The overheard conversation consisted of words spoken out-of-court. The Crown sought to tender the evidence for its truth, engaging the common law rule against hearsay. To have Mr. Ferris's utterances admitted, the Crown was required to establish that they fell within a traditional exception to the hearsay rule or were otherwise admissible under the principled exception, requiring determinations of "necessity" and "reliability".
- [56] The traditional exception engaged by the case was an admission. For the same reasons the Crown could not establish that the words "I killed David" were relevant to an issue at trial, the Crown could not show that they fell within the traditional exception (at para. 32). The utterances were not capable of interpretation as an admission. Conrad J.A. found that the utterances would also be inadmissible under the principled exception to the rule against hearsay as it stood at the material time. Because of the circumstances surrounding the overheard words, it would be "foolhardy" to find that they met the test for reliability (at para. 35). Nor was admitting evidence of an overheard, one-sided conversation necessary. The Crown could have called the father to testify about the contents of the phone call with Mr. Ferris (at para. 36). It chose not to.
- [57] Conrad J.A.'s third reason for finding the evidence inadmissible was that, even if shown to be relevant and admissible hearsay, the probative value of the overheard words was overborne by their prejudicial effect:

- [37] The last thing to consider is the balance between probative value and prejudicial effect. The statement "... I killed David ..." has no probative value given that we do not know the words which surrounded the utterance, the utterance was just as likely to be meaningless as inculpatory or even exculpatory. Also, as mentioned earlier, this evidence could never meet the test of probative value versus prejudicial effect. The extreme prejudice is so great its exclusion must be favoured.
- [58] The Crown appealed the majority decision in Ferris. The appeal was dismissed. In a short oral judgment, the Supreme Court did not engage in a substantive analysis of the three bases provided by Conrad J.A. for non-admissibility or discuss the relevant legal principles. Instead, the Court simply endorsed the third of the majority's conclusions, holding that if the utterance "I killed David" had any relevance, "its meaning was so speculative and its probative value so tenuous that the trial judge ought to have excluded it on the ground its prejudicial effect overbore its probative value" (at 756).
- [59] I do not agree with the appellant that in upholding the majority decision in Ferris, the Supreme Court established a "class-based inadmissibility principle" or exclusionary rule specific to overheard, one-sided utterances adduced by the Crown. Indeed, in decisions from this Court released after the Supreme Court's ruling, Ferris has consistently been approached as a case in which the impugned remarks were rendered inadmissible after a weighing of their probative value and prejudicial effect. See, for example, *R. v. Foerster*, 2017 BCCA 105 at para. 74; *Bennight* at para. 91; *R. v. Reiersen*, 2010 BCCA 381 at para. 39; and *R. v. Mooring*; *R. v. Woods*, 1999 BCCA 418. See also *R. v. Hummel*, 2002 YKCA 6 at paras. 29-32.
- [60] Furthermore, in *R. v. Alcantara*, 2015 ABCA 259, leave to appeal ref'd [2016] S.C.C.A. No. 14, the Court of Appeal of Alberta reviewed Ferris and explicitly rejected the proposition advanced by the appellant in this case. In *Alcantara*, police intercepted telephone conversations involving one of the accused. In one of those calls, words spoken by the accused were intelligible and recorded. However, "immediately preceding and following" those words were statements by the person to whom the accused was speaking. They were not intelligible (at para. 134). The accused's comments (consisting of three sentences) were admitted. On appeal, he contended that the trial judge erred in doing so. He said that as a matter of legal principle, when the Crown seeks to rely upon an incomplete utterance, it "may be impossible to ascertain the meaning of the words" and, because of that risk, the evidence is inadmissible or, at the very least, must not be given any weight (at para. 135).
- [61] The appeal court found that admitting the evidence was reasonably open to the trial judge (at para. 147). Moreover, it held that the majority judgment in Ferris did not "lay down a rule of inadmissibility (or zero weight) for any statement which is not complete, even if the statement comes without a live listener present" (at para. 140; emphasis added). Instead:
- [146] Orthodox rules of law for weighing prejudice and relevance apply, says the Supreme Court of Canada. The topic is entirely one of weight, before and after admission of the evidence.

[Emphasis added.]

- [62] In reaching this conclusion, the Alcantara division pointed to two appellate decisions the Alberta Court rendered post-Ferris: *R. v. Cador*, 2010 ABCA 232, and *R. v. Yates*, 2011 ABCA 43.
- [63] In *Cador*, the accused was charged with aggravated assault. The Crown tendered evidence of a phone call made to the accused by the complainant's sister the day after the alleged attack. In the call, the accused did not directly acknowledge involvement in the assault. She "basically just cried on the phone" and then said, "it wasn't supposed to be this bad" (at para. 3). On appeal, the accused argued that because the conversation was "incomplete and equivocal", it was not open for consideration by the trier of fact (at para. 16). The Court of Appeal disagreed:
- [16] Read in context, use of the word "basically" by [the witness] does not detract from the thrust and import of the Appellant's admission that "it wasn't supposed to be that bad". The statement was properly admitted and appropriately relied upon by the trial judge.
- [64] In *Yates*, the accused was charged with murder. A sheriff overheard him make incriminating comments while in a prisoners' van (at paras. 10, 14). The sheriff testified that he was not paying attention at the start of the accused's conversation with other prisoners; however, he did so once he realized that the accused was talking about the crime (at para. 17). Among other things, he heard the accused say, "He was skidding on my sister, so I shot him in the fucking head" (at para. 17). The trial judge admitted all of the comments into evidence. On appeal, the accused argued the evidence was wrongly admitted because it was "fragmented, not recorded verbatim, and incomplete in terms of context" (at para. 18). In addition, the judge should have excluded the utterances because their probative value was outweighed by their prejudicial effect and he failed to make that enquiry (at para. 18).
- [65] The Court of Appeal declined to intervene with the admissibility ruling. Unlike the circumstances in *Ferris*, the overheard comments represented "more than a small snippet of a statement" (at para. 20). They were "longer and more numerous" than the utterances overheard in *Ferris*, and they represented "more than partial thoughts" (at para. 20). The sheriff testified that he paid attention to the conversation once he realized the accused was talking about the crime. This testimony "add[ed] context to the utterances" (at para. 20). The defence did not press for a finding that the probative value of the comments was outweighed by their prejudicial effect, and the trial judge properly instructed the jury on the use it could make of them, including that it was up to the jury to decide "how much of the [sheriff's] testimony to believe" (at para. 22).

- [66] In my view, Ferris, Alcantara and other of the cases cited by counsel on this ground of appeal tell us that the admissibility of the appellant's phone conversation, as overheard by WS, was not subject to a unique exclusionary rule. Rather, first principles govern. The things said by the appellant were admissible as a recognized exception to the rule against hearsay if: (1) relevant to an issue in the case; and (2) their prejudicial effect did not outweigh their probative value.
- [67] See also *R. v. Hunter* (2001), 54 O.R. (3d) 695 (C.A.) at paras. 15-21 (overheard utterance made to the lawyer of the accused at the courthouse); and *R. v. Buttazzoni*, 2019 ONCA 645 at paras. 53-58 (utterances overheard by a police officer while hiding under a truck within earshot of the accused).
- [68] As explained by Charron J.A. (as she then was) in *R. v. Collins* (2001), 160 C.C.C. (3d) 85 (Ont. C.A.):
- [18] evidence that is relevant to an issue in the case will generally be admitted. Indeed, it is a fundamental principle of our law of evidence that any information that has any tendency to prove a fact in issue should be admitted in evidence unless its exclusion is justified on some other grounds: see *R. v. Corbett*, [1988] 1 S.C.R. 670 at 715; *R. v. Morris*, [1983] 2 S.C.R. 190 at 201; and *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 609.
- [19] The grounds that justify the exclusion of evidence that is otherwise relevant and material form the basis of many of our more specific rules of evidence. The rule against hearsay, the opinion rule and the similar fact rule are a few examples. Quite apart from these specific rules, evidence that is otherwise relevant and material may also be excluded by the exercise of the trial judge's general power to safeguard the fairness of the proceedings. Our law of evidence recognizes the general power of a judge to exclude relevant and material evidence where its probative value is outweighed by the prejudice caused by its admission, provided that where the evidence is tendered by the defence, it should not be excluded on that basis unless the prejudice substantially outweighs the value of the evidence: see *Seaboyer*, supra, at 390; and *R. v. B. (S.C.)* (1997), 119 C.C.C. (3d) 530 (Ont. C.A.) at 541. Prejudice in this context does not mean, of course, that the evidence will be detrimental to the other party's position. Rather, it is related to the detrimental effect that the evidence may have on the fairness and the integrity of the proceedings.

See also *R. v. Grant*, 2015 SCC 9 at paras. 18-19.

- [69] Applying this framework, the appellant is wrong to say that in assessing relevance, the trial judge was obliged to determine--in fact--whether the overheard words constituted an admission. Rather, the words said to have been spoken by the appellant were relevant if "capable of being an admission" (*Ferris* (C.A.) at paras. 26, 27, 29, 31, 38; emphasis added).
- [70] At this stage of the admissibility analysis, a trial judge is concerned with logical relevance. As explained by Doherty J.A. in *R. v. Abbey*, 2009 ONCA 624, leave to appeal ref'd [2010] S.C.C.A No. 125, logical relevance requires:

[82] that the evidence have a tendency as a matter of human experience and logic to make the existence or non-existence of a fact in issue more or less likely than it would be without that evidence . Given this meaning, relevance sets a low threshold for admissibility and reflects the inclusionary bias of our evidentiary rules .

[Internal references omitted; emphasis added.]

[71] In *R. v. Arp*, [1998] 3 S.C.R. 339, it was made clear that to be logically relevant, "an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to 'increase or diminish the probability of the existence of a fact in issue'. As a consequence, there is no minimum probative value required for evidence to be relevant" (at para. 38; internal references omitted; emphasis added). See also *R. v. Blackman*, 2008 SCC 37 at paras. 29-30.

[72] The Crown sought to tender the words overheard by WS as an admission of responsibility for the death of Ms. Kogawa. Clearly, that was a material issue at trial. To meet its burden on logical relevance, the Crown was required to show that those words were capable of interpretation as an admission. In assessing whether the Crown met that burden, the question for the judge to decide was whether there was "some evidence upon which [the] jury could conclude the meaning of the uttered words": *Alcantara* at paras. 138-139.

[73] If the answer was "yes", the judge was obliged to move to the second stage of the analysis and determine whether she should keep the evidence from the jury because its prejudicial effect outweighed its probative value. It is only then that a trial judge engages in a weighing of the evidence, albeit on a limited scale. The purpose of the limited weighing is to assess legal relevance. Again, with reference to para. 82 of *Abbey*:

Relevance can also refer to a requirement that evidence be not only logically relevant to a fact in issue, but also sufficiently probative to justify its admission despite the prejudice that may flow from its admission. This meaning of relevance is described as legal relevance and involves a limited weighing of the costs and benefits associated with admitting evidence that is undoubtedly logically relevant .

[Internal references omitted; emphasis added.]

[74] To understand the scope of the judge's role at the second stage of the analysis, I find *R. v. Hall*, 2018 MBCA 122, helpful. There, Mainella J.A. (writing for the Court) explained that:

[125] Determining whether the probative value of evidence outweighs its prejudicial effect requires a 'cost benefit analysis' (*R. v. Hart*, 2014 SCC 52 at para 94).

[126] Probative value is more than just the evidence having logical relevance; it is also about the prospective materiality of the evidence. The legal concept of relevance ensures that the ultimate factual inquiry is "reasonable, practical and fair" . Defining legal relevance requires the trial judge to assess "the degree to which the evidence would prove the fact in issue for which it was tendered" , as well as any "defects" in the evidence in terms of

credibility or reliability . In carrying out this analysis, the trial judge must weigh the evidence to a limited degree but without encroaching on the domain of the fact finder as to whether the evidence should be believed and relied upon. The overriding question is whether the evidence is 'worthy' of being heard by the fact finder .

[127] Prejudicial effect is assessed by identifying the dangers of the evidence and considering how real those dangers are to the fairness of the trial . Prejudice, however, does not refer to the mere fact that the evidence supports the moving party's case to the prejudice of the respondent .

[128] Some of the dangers otherwise admissible evidence may cause to the fairness of a trial are undue arousal of the jury's emotions, distraction, unnecessary delay or repetition, unfair surprise to a party and usurpation of the role of the jury .

[Internal references omitted; emphasis added.]

[75] It is apparent from the voir dire ruling in this case that the trial judge correctly instructed herself on the legal principles she was bound to apply in determining admissibility. She asked whether there was some evidence upon which the jury could conclude the meaning of the words conveyed through WS (at para. 19). Once satisfied the evidence was logically relevant, she went on to assess legal relevance by asking whether its probative value outweighed the "prejudicial effect that it might be used improperly" (at para. 21).

[76] After considering the totality of WS's testimony about his interaction with the appellant, up to and including completion of his evidence on the voir dire, I am satisfied the judge was correct in her finding of logical relevance.

[77] In my view, this case is qualitatively different from Ferris, which Conrad J.A. acknowledged to involve a "unique" set of facts (at para. 17). In Ferris, the Crown did not adduce any informing "context" from which the trier of fact could determine the meaning of the words "I killed David" (at para. 35). The evidence consisted of the fact of an arrest for murder, a phone call to the father of the accused while in police custody, and two overheard utterances: "I've been arrested" and "I killed David". There was no one on the voir dire who could "swear positively to the fact that the essence of the accused's words were an admission" (at para. 25). As a result, the "gist of the statement [was] unknown and, moreover, unascertainable" (at para. 25). The Crown did not tender any "independent evidence from which meaning [could] be drawn" (at para. 30).

[78] In this case, there was far greater context to inform the meaning of the overheard utterances, including evidence that:

- WS was the appellant's brother, had a pre-existing relationship with him and was familiar with his personal circumstances;

- WS met with the appellant at a Rutland park on September 20 (or thereabouts). During that visit, the appellant became upset, gathered his things and left the interaction, saying he had done "something bad";
- on September 27, WS contacted the appellant by phone and told him about the news article circulating with a picture of the appellant and Ms. Kogawa. In response, the appellant hung up the phone;
- WS travelled to Vernon that same day and spoke with the appellant. The appellant acknowledged the news release reporting Ms. Kogawa as missing ("it's true"); he acknowledged being with her; and he provided WS with information specific to their last "date" together. WS described the appellant's demeanour during this conversation as "[r]emorsefully sad". He seemed "[g]lad to get it off his chest";
- the next morning, in the context of the preceding conversations, the appellant told WS that he wanted to kill himself and he followed through on that intention in the presence of WS, purchasing heroin and injecting the heroin for the purpose of an overdose;
- he told WS about the location of Ms. Kogawa's body and asked that WS relay that information to police after he was dead;
- near the start of the phone call with the person WS believed to be the appellant's wife, the appellant referred to the "missing Japanese woman, student";
- during that same conversation, WS heard "I did it" or "I killed her", and understood that to mean "[the appellant's] responsible for her death"; and,
- although he did not recall the "full conversation", or what the appellant said "word-for-word", the "message" WS took from the phone call was that the appellant was admitting to Ms. Kogawa's death. That was the "impression" left with him.

[79] On this foundation, I cannot say there was no evidence from which the jury could conclude the meaning of the uttered words: Alcantara at paras. 138-139.

[80] The statements "I did it" or "I killed her" formed part of a telephone conversation that was said to explicitly reference the "missing Japanese woman, student", thereby connecting the conversation to the subject matter of the offence. The impugned words came after the appellant had already acknowledged to WS that Ms. Kogawa was missing, that he knew her, and that he had been with her. They also came after the appellant told WS he was aware of the location of her body and, by necessary implication, the fact that she was deceased. Up to this point, the appellant had not interacted with police about the matter, from whom he might have gleaned those details. The appellant had direct and peculiar knowledge of Ms. Kogawa's circumstances when she was reported missing, which would logically inform any inferences drawn by WS (or the "impressions" left with him) from the overheard conversation.

- [81] The appellant displayed a remorseful demeanour during his conversations with WS. He expressed an intention to kill himself, after which WS was free to tell police the location of the body. This evidence is consistent with an awareness of culpability for a wrongful act that was grave in nature. The appellant followed through on the intention to take his own life, although he did not succeed. WS provided evidence on the gist or essence of the words spoken during the phone call, describing them as taking responsibility for Ms. Kogawa's death. This impression formed after the appellant had already spoken directly with WS about Ms. Kogawa's disappearance and his knowledge of her whereabouts. As noted, the impugned words came before any police involvement with the appellant or allegations of wrongdoing against him. As such, unlike Ferris, there could be no suggestion here that during the phone call, the appellant was simply repeating accusations made by police or responding to questions asked by the person on the other end of the phone about what police alleged he had done.
- [82] I also find this case distinguishable from *R. v. O'Reilly*, 2017 BCSC 276, an authority cited by the appellant. Mr. O'Reilly was charged with two counts of first degree murder. At trial, the Crown sought to adduce portions of conversations between the accused and one of his then co-accused (later a cooperating Crown witness) that were overheard by two jail guards while Mr. O'Reilly was held in custody. One of the guards said she heard Mr. O'Reilly say "something to the effect" of "I'm not going down alone" (at para. 19). The other guard testified that she heard him say, "I was only there for 5W and that is when shit hit the fan" (at para. 25). When the second guard initially detailed these events to police, she also said she heard Mr. O'Reilly say, "I wasn't going down by myself" (at para. 28). On the admissibility voir dire, the guard did not recall the latter words, but acknowledged that the information she gave to police was accurate and truthful. As such, the Crown sought to have this portion of the guard's evidence admitted as past recollection recorded (at para. 28).
- [83] In opposing admissibility, the defence argued (among other things) that the meaning of the comments exchanged between Mr. O'Reilly and his co-accused could not be ascertained, and, as such, they had no probative value or "so little probative value as to be outweighed by their prejudicial effect" (at para. 37). The trial judge agreed:
- [46] I am not satisfied that the Crown has established that the fragmentary phrases that were allegedly overheard are relevant. The context is unknown and [the co-accused] was not able to provide any assistance in this regard. The statements Mr. O'Reilly is alleged to have made are "I was just there when crap went down"/"I was only there for 5W and that is when shit hit the fan" and "I'm not going down alone"/"I wasn't going down by myself". The meaning the Crown seeks to attribute to these utterances is purely speculative without the surrounding context. Neither [the guards], nor indeed [the co-accused] or any other witness called by the Crown on this voir dire, is able to say what Mr. O'Reilly meant when he allegedly said he was "there" or that he was not "going down" by himself. In my view, no meaning can be attributed to these dissevered words. Further, even if I am wrong and the utterances are relevant in that they are capable of supporting the meaning argued by the Crown, it seems

clear to me that their prejudicial impact far outweighs any probative value they may have; the impact of this evidence on the jury would simply be out of proportion to its reliability.

[Emphasis added.]

- [84] In reaching this conclusion, the judge in O'Reilly noted various difficulties with the proposed evidence, including that the guards did not hear the words spoken before or after the impugned utterances; they did not immediately make notes of what they heard, or everything they heard; and they acknowledged they may have some of the words wrong (at para. 44). In addition, the first guard was initially unable to identify Mr. O'Reilly on the voir dire. Nor could she describe the sound of his voice, even though she said she could recognize it (at para. 17). She further testified that she believed Mr. O'Reilly was talking to his co-accused about the events that formed the subject matter of the charge for murder, but "was not able to recall their exact words as she was distracted by other duties" (at para. 21). By the time of the voir dire, the second guard had no recall of one of the remarks said to have been overheard.
- [85] In my view, the evidential foundation surrounding the impugned statements in O'Reilly was far less detailed than the one in this case. Moreover, WS was personally familiar with the appellant; before the overheard call, he received information directly from the appellant that was specific to the disappearance of Ms. Kogawa; and, critically, the evidence of WS was able to connect the overheard phone conversation to the subject matter of the charged offence.
- [86] Whether there is some evidence upon which a jury could conclude the meaning of utterances the Crown seeks to tender is a case-specific enquiry, informed by the extent to which the circumstances surrounding those utterances (otherwise described as "context") offer an evidential foundation that has the capacity to support the ascertainment of their meaning. In Ferris, the exclusion of the words "I killed David" was "anchored" in the absence of context that could assist in "giving meaning to [the] spoken words" (Hunter at para. 19). That is not the situation here.
- [87] When assessing logical relevance, it is not proper to consider the impugned words in isolation. The threshold test for logical relevance is low. On the evidential foundation in this case, I agree with the trial judge that the Crown met that test.
- [88] I have had the privilege of reviewing a draft of the reasons provided by my colleague, Justice Goepel, specific to the admissibility of the overheard conversation. Although he does not take issue with the legal principles I have brought to bear in my analysis, we part company on whether the appellant's utterances, as relayed by WS, met the test for logical relevance. Goepel J.A. is of the view that the words "I did it" or "I killed her" were not capable of interpretation as an admission. In my view, in reaching that conclusion, my colleague has undervalued the informative role of what he refers to as the "macro-context" set out at para. 78 of my reasons, and, importantly, its proximity to the overheard conversation.

- [89] The utterances relayed by WS, as they stood at the time of the admissibility ruling, formed part of an ongoing interaction and dialogue between WS and his brother in which the appellant was also providing details of his relationship with Ms. Kogawa to WS, as well as information about circumstances surrounding her disappearance. In deciding logical relevance, the trial judge focused on that context, not the evidence of the case at large (see para. 18 of her RFJ). This is different from Ferris, in which the utterances stood alone, without any capacity to inform their meaning by reference to other information directly and contemporaneously received from the accused in relation to the deceased, or about events proximate to that individual's death.
- [90] My colleague holds that without "micro-context", which he defines as "the parts of something written or spoken that immediately precede and follow a word or passage and clarify its meaning", it was not possible to determine the meaning of the appellant's impugned words. That is, in my view, too narrow an approach to the logical relevance analysis. Arguably, in its practical application, it also means that an incomplete utterance will rarely, if ever, be admissible. The absence of surrounding words will generally be dispositive at the first stage of the analysis. Respectfully, that approach is inconsistent with the low threshold for logical relevance endorsed by the Supreme Court in Arp, and it risks "lay[ing] down a rule of inadmissibility" of the type explicitly rejected in Alcantara.
- [91] I am also satisfied the judge's conclusion that the probative value of the overheard conversation was not outweighed by its prejudicial effect should be respected. This aspect of her determination is entitled to significance deference: Araya at para. 31.
- [92] At this stage of the admissibility analysis, the judge's determination of logical relevance had already addressed (and accounted for) the concern that any meaning ascribed to the impugned words would be purely speculative. The finding of logical relevance necessarily rejected that proposition. The judge had determined (correctly, in my view) that the overheard words were capable of interpretation as an admission in light of the surrounding evidentiary context. She found that there was some evidence from which a properly instructed jury, acting reasonably, could find that the utterances "I did it" or "I killed her" amounted to an acknowledgment of the appellant's involvement in Ms. Kogawa's death. In other words, in ascribing meaning to the words, the jury would not be engaged in mere conjecture.
- [93] In weighing probative value and prejudicial effect, the trial judge was entitled to conduct her assessment with that finding in mind. The probative value of the evidence may not have been strong because of its associated frailties, but that did not preclude the trial judge from asking whether a "strong caution to the jury" about those frailties, the proper way in which to assess and assign weight to the evidence, and its use was sufficient to ameliorate the prejudicial effect.

- [94] In *R. v. Herntier*, 2020 MBCA 95, a decision released shortly before the hearing of this appeal, the trial judge admitted a statement made by the accused to a work associate in which the accused said he had "killed someone", but did not reveal who that person was, when the killing occurred, or the surrounding circumstances. The witness could not specify the date of the conversation or the words spoken immediately before or after the comments at issue (at paras. 231-34). The Crown sought to tender the statement as an admission in the accused's prosecution for murder. The defence opposed admissibility on Ferris grounds (at paras. 257, 265). The ruling to admit the statement was upheld on appeal. There was sufficient context to give "meaning to the words" (at paras. 267-74). In applying the applicable standard of review, the Manitoba Court stressed that "[t]he weighing of probative value and prejudicial effect takes place in the context of the evidence that has been called and the dynamics of the trial, and the trial judge is in the best position to assess those factors" (at para. 276; emphasis added). I agree.
- [95] In this case, the trial judge determined that the potential prejudice to the fairness and integrity of the trial arising from the fact that the overheard telephone conversation was one-sided and incomplete and that WS could not recall the exact words was mitigable with a strong ameliorative charge on proper use. In my view, that conclusion was reasonably open to her. Moreover, the evidence was not of the type that would unduly arouse emotions, lead to distraction, delay the proceedings or invite repetition: Hall at para. 128. Nor was the defence caught by surprise. It had known about this evidence from before the preliminary inquiry. Consistent with the appellate analysis brought to bear on the overheard utterances in *Buttazzoni*, I am satisfied the trial judge identified and applied the appropriate legal test for admission of the phone conversation, considered the frailties of the evidence, and reasonably left it to the jury to determine its weight. "The admission of such evidence is a discretionary call ." (*Buttazzoni* at para. 58).
- [96] After the admissibility ruling, WS repeated his evidence of the overheard conversation in the presence of the jury. In cross-examination, WS confirmed that he did not know the exact words spoken or whether the appellant said "I did it" in response to a question, and he agreed with the possibility that this portion of the conversation may have been unrelated to Ms. Kogawa.
- [97] In her final instructions, the trial judge made it clear to the jury that it could accept all, part or none of a witness's evidence (including, of course, that of WS). She told the jurors that in assessing the credibility of a particular witness, or deciding "how much to rely" on that person's evidence, questions to ask included whether the witness was "in a position to make accurate and complete observations about the event" (emphasis added). If the jury had a reasonable doubt about the appellant's guilt "arising from the credibility" of the witnesses, the jury was obliged to acquit.

- [98] The judge also provided the jury with a specific instruction on how to approach the overheard conversation, as well as the use that could be made of it. She acknowledged the deficiencies in the evidence and made it plain that if the jurors had any doubt about what the appellant said during the phone call, or what he meant by the words used, they should ignore the evidence:
- [79] You heard testimony from Warren Schneider Junior about a telephone conversation he overheard between Mr. Schneider and his wife. Warren Schneider Junior could not hear the other side of the conversation. He testified he only heard parts of the conversation and was trying not to eavesdrop. He did not hear what was said before or after the words he overheard and could not remember the exact words spoken by Mr. Schneider. This is something you need to bear in mind when you consider what, if any, weight can be given to Warren Schneider's evidence about the overheard conversation.
- [80] As well, Warren Schneider Junior testified that at the time Mr. Schneider phoned his wife he had drunk a mickey of vodka and had taken some heroin. You should consider whether Mr. Schneider's drug and alcohol use may have affected what he said. It is up to you to decide whether you believe Warren Schneider Junior about what Mr. Schneider said and what Mr. Schneider meant by the overheard words. If you are in doubt about any of that, you should ignore the evidence.
- [81] Unless you decide that Mr. Schneider made a particular remark or statement, you must not use it against him in deciding this case.
- [85] Occasionally during this trial a witness may have expressed his or her opinion about the state of mind of someone else, including Mr. Schneider. You must not rely upon such opinions for the truth or validity of the opinion. It is irrelevant if a witness had an opinion about another person's state of mind.
- [86] Another witness's opinion as to what Mr. Schneider meant by his words is irrelevant to the question of what he meant. It is your job and your job alone to decide the meanings of Mr. Schneider's words if you find he said them.

[Emphasis added.]

- [99] In addition to the final instructions, the jury was cautioned by Crown counsel about WS as a witness, based on the manner in which he gave his evidence:

Now, my submission to you is that you ought to approach Warren Schneider Junior's evidence with caution. He has a criminal record in the distant past, but my submission is that that does not bear greatly on his credibility, it's simply too old. I do say you can examine his demeanour and in my submission to you, his demeanour was not impressive. He was clearly, in my submission, conflicted between one, testifying, and the way he was asking frequently to refer to prior statements. You saw that. Request to, "Was it written," or, "Did I say it," or words to that effect. And also you must consider that he's testifying for the Crown in a second degree murder prosecution against his brother.

I would describe Warren Schneider Junior's demeanour as terse, hesitant, and then at one point or at points, offering unsolicited and unexpected evidence.

[100] And, in his closing submissions, defence counsel emphasized the evidentiary weaknesses inherent to a one-sided conversation:

That's the problem with only hearing one side of a conversation. He's telling her about the missing Japanese student. [The wife], you have no evidence from her. The other person on this call, you've not heard from. Was she saying, "What will they think you did?" And he said, "I," -- even if he said, "I killed," -- that, "I killed her," or, "I did it." And with respect, you can't even be satisfied he said that, because Mr. Warren Schneider Junior himself can't tell you what words were said. "I killed her," and, "I did it," in the context of this case, are very different things potentially. "I did it. I put the body in the suitcase"? Or, "I did it," as my friend would have you believe, "I killed her"? Or were the words, "I killed her"? Well, we don't know because Mr. Schneider Junior can't tell us what was said.

this is a very, very undependable bit of conversation that is taken completely out of context and we have no context because you don't have the person on the other end of the phone. And what we do have, we don't even know if that was what it was actually said because he doesn't know the exact words. With -- in my submission it leaves you with virtually nothing at the end of the day. It's contextually out of place and you can't affix any value to it, even if you did know what he overheard, and he doesn't know what you overheard -- what he overheard, so he can't -- you can't be convinced what he overheard.

[Emphasis added.]

[101] In my view, the instructions about the overheard utterances, considered with the closing submissions, ensured the jurors were fully aware of the frailties of this evidence; equipped them with the tools they required to assess its weight; and accurately explained the use that could be made of the evidence. The appellant suggests that the judge incorrectly told the jury to consider all of the circumstances in the case to determine the meaning of the words, including other evidence supportive of the appellant's guilt (an instruction found to be erroneous by the Court of Appeal in *Ferris*, at para. 42). However, I do not read the judge's instructions that way. Instead, she told the jurors it was up to them to decide how much weight to give the evidence, and to remember that, whatever the amount of weight they assigned, the overheard conversation formed only "part of the evidence" in the case and was to be considered "along with and in the same way as all of the other evidence". I see nothing wrong with that instruction.

[102] The judge's charge included the language found adequate by this Court in *Bennight* (at para. 92). The appellant's trial counsel accepted the instructions as appropriate. The defence had an opportunity to make submissions on the charge, and after the judge completed her instructions, defence counsel did not seek clarification or redirection on this issue. At the hearing of the appeal, the Court asked appellant's counsel what the judge should have said about the overheard conversation that was not included in her charge. He was not able to

point to anything material. Instead, the appellant's complaint about this evidence is really about its admissibility.

[103] For the reasons given, I am of the view the trial judge correctly decided logical relevance. The appellant has not shown error (let alone overriding error) in the judge's exercise of discretion on legal relevance and the weighing of probative value and prejudicial effect. As such, the judge properly left the meaning of the impugned words and their weight with the jury. A functional review of the charge reveals that the instructions sufficiently cautioned the jury on use.

[104] As noted by Rothstein J. in *R. v. White*, 2011 SCC 13:

[56] once jurors are alerted to the risks that are not necessarily apparent to the average citizen, they can be trusted to properly weigh the evidence. Our jury system is predicated on the conviction that jurors are intelligent and reasonable fact-finders. It is contrary to this fundamental premise to assume that properly instructed jurors will weigh the evidence unreasonably or draw irrational and speculative conclusions from relevant evidence.

I would not accede to this ground of appeal.

B. Should the Charge Have Included a Concurrence Instruction?

[105] The appellant's second ground of appeal raises a question of law alone, reviewable on a standard of correctness: *R. v. Shevaley*, 2019 BCCA 296; *Housen* at para. 8.

[106] The appellant says the trial judge erred in not instructing the jury on the concurrence principle: *R. v. Cooper*, [1993] 1 S.C.R. 146. He contends the judge should have made it clear to the jury that before convicting the appellant of murder, the jury had to be satisfied beyond a reasonable doubt that the mens rea and the actus reus of the alleged offence coincided.

[107] The Crown says a concurrence instruction was not necessary in the circumstances of this case. Nor was one sought by the defence at trial. The prosecution did not allege that the appellant committed multiple unlawful physical acts against Ms. Kogawa that caused her death, sequentially or otherwise. Rather, the actus reus of the murder was said to consist of one act, namely, physically assaulting Ms. Kogawa by covering her nose and mouth, causing her to asphyxiate.

[108] In her final instructions, the judge told the jury that to find the appellant guilty of murder, the jury had to conclude that: (1) the appellant committed an unlawful act; (2) the unlawful act caused Ms. Kogawa's death; and (3) the appellant had the intent required for murder. She then specified the "unlawful act" in question:

[120] The Crown says the unlawful act in Count 1 [murder] is an assault. The Crown's theory is that Mr. Schneider asphyxiated or smothered Ms. Kogawa. I tell you as a matter of law that doing such a thing [constitutes] an assault contrary to the Criminal Code, and is an unlawful act.

[121] The Crown must prove beyond a reasonable doubt that Mr. Schneider committed the unlawful act of assault.

[Emphasis added.]

[109] The judge next instructed the jury on causation: "Did Mr. Schneider's Unlawful Act Cause Ms. Kogawa's Death?" (emphasis added). She then moved to the intent required for murder and explained the two forms of intent prescribed by s. 229(a) of the Code. Section 229(a) reads:

Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

[110] The judge told the jury that in deciding whether the Crown proved one of these forms of intent, the jury was obliged to "consider all the evidence, including the nature of the harm inflicted, and anything said or done in the circumstances" (emphasis added). She summarized the relevant evidence, and, in her summary, identified the physical harm attributable to the appellant by reference to the gestures he made during his statement to police, consistent with covering Ms. Kogawa's nose and mouth.

[111] After addressing Count 2 on the Indictment, the judge summarized the positions of the parties. The Crown's position on murder was stated this way:

Mr. Schneider caused the death of Ms. Kogawa on September 8th, 2016, by smothering or asphyxiating her. He assaulted her by blocking her ability to breathe by placing his hands and fingers over her mouth and nose. The assault killed her.

[Emphasis added.]

[112] This case was left with the jury as a case involving a single unlawful act--asphyxiation by covering the nose and mouth. Adopting the language of Frankel J.A. in Shevalev, the covering of the nose and mouth was the "starting and ending point of the actus reus" (at para. 74). A concurrence instruction is generally only required where death results from a series of unlawful acts (for example, repeated blows to the head over several minutes) and those acts formed part of a single or continuous transaction. In those circumstances it is necessary to explain to the jury that to convict of murder, the Crown must prove that one of the two intents for murder coincided at some point in time with the continuous transaction:

Cooper at 157-58, 160-61; Shevaley at paras. 53, 72. I agree with the Crown that in the context of this case it was not necessary for the trial judge to provide a concurrence instruction. In fact, doing so would have likely confused the jury.

[113] From the charge, I am satisfied the jury would have understood that to convict the appellant of murder, it had to find beyond a reasonable doubt that he committed the unlawful act of assault by covering Ms. Kogawa's nose and mouth. Furthermore, by doing so, he contributed significantly to her death. Finally, the jury had to find that when the appellant covered Ms. Kogawa's nose and mouth, he either intended to kill her, or intended to cause bodily harm that he knew was likely to result in her death, and he was reckless as to whether death ensued. There is nothing erroneous about this aspect of the judge's charge and it properly equipped the jury to decide the issue of intent.

[114] I would not give effect to this ground of appeal.

C. Did the Judge Mishandle a Question from the Jury?

[115] After she delivered her final instructions, the judge received a question from the jury:

Could you please expand on the definition of bodily harm in Q3 (intent required for murder) versus bodily harm as described in para 109./111 for manslaughter.

* Bodily Harm.

Any hurt or injury ..

Interfers [sic] health

More than just brief/minor.

*

Concept of bodily harm.

That the accused knows is "likely" to cause death and reckless

[Emphasis in the original.]

[116] "Question 3" in the written charge asked: "Did Mr. Schneider Have the Intent Required for Murder?" It was immediately followed by these two paragraphs:

[132] To prove that Mr. Schneider had the intent required for murder, the Crown must prove beyond a reasonable doubt one of two things, either:

1. that Mr. Schneider meant to cause Ms. Kogawa's death; or
2. that Mr. Schneider meant to cause Ms. Kogawa bodily harm that he knew was likely to cause her death and was reckless whether death ensued or not.

[133] In other words, you must decide whether the Crown has proved beyond a reasonable doubt either that Mr. Schneider meant to kill Ms. Kogawa, or that Mr. Schneider meant to cause Ms. Kogawa bodily harm that he knew was so dangerous and serious it was likely to kill Ms. Kogawa and proceeded despite his knowledge of that risk.

[Emphasis added.]

[117] Paragraphs 109-111 of the charge, also referred to in the jury's question, instructed on the fault for the included offence of manslaughter and explained the difference between murder and manslaughter:

[109] The criminal fault in manslaughter is the commission of the unlawful act which is objectively dangerous in the sense that a reasonable person, in the same circumstances as the accused, would recognize that the unlawful act would subject another person to the risk of bodily harm. "Bodily harm" is any hurt or injury that interferes with a person's health or comfort and is more than just brief or of a minor nature.

[110] In the offence of murder there is in addition to the unlawful act, the ingredient of either an intention to cause death or an intention to cause bodily harm that the accused knows is likely to cause death and is reckless as to whether death ensues. These are the legal differences between the offences of second degree murder and manslaughter.

[111] Therefore, what distinguishes murder from manslaughter is the mental state, or what we describe in criminal law as the intent of the person causing the death.

[Emphasis added.]

[118] Defence counsel interpreted the jury's question as seeking clarification on the meaning of "bodily harm" specific to murder:

[DEFENCE COUNSEL]: That's my read is they're asking of what type of -- what is bodily harm seems to be the -- is it that he knew it was so dangerous and so serious it was likely to kill her or is it -- is it what's described in 109 as any hurt or injury that interferes with a person's health or comfort and is more than just a brief or minor nature.

I don't read it that they're asking for an expanded definition of intent. I read it they're asking for an expanded definition of bodily harm.

in 109 it's talking about any hurt or injury that interferes with the person's health or comfort and is more than just brief or of a minor nature. And 133, it's bodily harm he knew was so dangerous and serious it was likely to kill her. So it may be that what they're really looking for is the definition of bodily harm which is defined in s. 2 of the Code.

THE COURT: And are you suggesting that I read out s. 2, the definition of bodily harm, in the Code?

[DEFENCE COUNSEL]: Yes. I'm saying that whether you're looking at 109 or 133, bodily harm is defined as this. It's the same -- however they're reading this, the term "bodily harm" in both paragraphs means the same thing.

[Emphasis added.]

[119] Ultimately, the judge, the defence and the Crown agreed that the correct way to answer the jury's question was to tell the jurors there is no difference in the definition of bodily harm as it applies to murder and manslaughter, and to provide them with the statutory definition of that term.

[120] The judge did precisely that, using s. 2 of the Code:

Members of the jury, you have asked us to expand on the definition of "bodily harm" in question 3 of intent required for murder versus bodily harm as described in paragraph 109 and 111.

The bodily harm in both is the same. Bodily harm is defined in the Criminal Code in the following manner:

Bodily harm means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.

And for paragraph 109, when bodily harm is mentioned in paragraph 109 and 110, and then in paragraph 134 [sic] under question 3, that is the definition of bodily harm. All right?

So hopefully that responds to your question. If you have any additional questions, we will assist you with those. All right?

Do you want that definition read again or ? You're fine with it?

A JUROR: [Indiscernible/not at microphone].

THE COURT: One more time? All right. I will read the definition one more time. "Bodily harm" is defined in the Criminal Code as meaning

any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature.

And whenever the words "bodily harm" are used in the charge, that is what is being referred to. All right?

So hopefully that answers your question and we'll adjourn. Thank you.

[Emphasis added.]

The jury posed no further questions. Instead, the judge was told that the jurors wanted to carry on with their deliberations.

- [121] The appellant says that in responding to the jury's question, the trial judge erred in two ways: (1) she should have asked the jury for clarification on the question because it was ambiguous; and (2) she failed to answer the question correctly. Both issues involve questions of law, reviewable on a standard of correctness: *R. v. Brydon*, [1995] 4 S.C.R. 253 at para. 2; *Housen* at para. 8.
- [122] On the first of the alleged errors, the appellant rightly states that a trial judge "has a duty to clarify a question from the jury where there is any ambiguity or room for doubt as to the meaning of the question": *R. v. Shannon*, 2011 BCCA 270 at para. 51. See also *R. v. Bradshaw*, 2020 BCCA 97 at paras. 19-27; *R. v. Penner*, 2019 BCCA 76 at para. 40; *R. v. Kahnpace*, 2010 BCCA 227 at paras. 49-52.
- [123] However, I agree with the Crown that in the circumstances of this case, seeking clarification was not necessary and the appellant has failed to establish reversible error on this aspect of his argument.
- [124] First, I do not see the question as ambiguous. The jury was plainly asking whether the definition of "bodily harm" is different for murder than it is for manslaughter: "Could you please expand on the definition of bodily harm for murder versus manslaughter" (emphasis added). Second, after discussing possible interpretations of the question, the trial judge and counsel reached consensus on what was likely troubling the jury, revealing that the question was understandable. Third, the consensus adopted the position of defence counsel. The appellant suggests that the jury's question was incapable of an answer in the absence of clarification; however, he raises that issue for the first time on appeal. Finally, the judge invited the jury to return with "additional questions" if necessary. The jury did not do so, suggesting there was no longer any confusion. This is a relevant factor for consideration in the error analysis: *R. v. Layton*, 2009 SCC 36 at para. 32.
- [125] On the second of the alleged errors, the appellant also rightly states that questions posed by a jury must be answered "clearly, correctly and comprehensively". That is so even where the original instruction was correct: *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521 at 530-31, 537; *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at 759-60; *R. v. Naglik*, [1993] 3 S.C.R. 122 at 138-39.
- [126] He contends that in this case, the answer provided by the trial judge was legally incorrect. The appellant says there is a substantive difference between the degree of bodily harm required to convict an accused of murder and the degree of bodily harm required to convict of manslaughter. It is his position that s. 229(a)(ii) of the Code requires factual proof of "very serious bodily harm", while a conviction for manslaughter requires proof of bodily harm that is "simply more than 'brief,' 'trivial,' 'trifling' or 'minor'" (appellant's factum at paras. 44-46). Consequently, the judge was wrong in law to tell the jury that the s. 2 Code definition of bodily harm applies to both offences.

- [127] In making that argument, the appellant relies heavily on *R. v. Miljevic*, 2010 ABCA 115, aff'd 2011 SCC 8. In that case, a jury convicted the accused of second degree murder. The accused admitted to committing manslaughter, but denied he had the intent required for murder. In light of the admission, the trial judge did not charge the jury on the legal elements of manslaughter. Rather, he focused the jury's attention on whether the Crown proved the "state of mind required for murder" (at para. 39).
- [128] The primary issue on appeal was whether the judge "was obliged to instruct the jury on the elements of manslaughter when the accused had admitted the commission of that offence" (at para. 50). In dissent, O'Brien J.A. held that because manslaughter was a "choice left with the jury, it remained a relevant legal issue" and the trial judge "ought to have instructed more fully on that offence" (at para. 79). A full instruction was of added importance in *Miljevic* because after delivery of the final instructions, the jury returned with a question, asking for assistance on the difference between murder and manslaughter (at para. 42).
- [129] During the course of his analysis, O'Brien J.A. noted that Mr. Miljevic posited a theory about the origin of the jury's confusion. He said the jury's question arose from the definition of bodily harm that the trial judge used when explaining the secondary intent for murder under s. 229(a)(ii):
- [85] The appellant suggests on appeal that the question may have arisen because the distinction between murder and manslaughter had been blurred for the jury in a part of the charge instructing it on the secondary intent for murder under section 229(a)(ii) of the Criminal Code. That section speaks in terms of bodily harm that the accused knew was likely to kill. However, the trial judge, during this part of his charge while defining murder, expanded upon bodily harm as meaning:
- . . . any hurt or injury that interferes with health or comfort, and it has to be more than something that is just brief or fleeting or minor in nature.
- [86] This quality of bodily harm relates to the offence of manslaughter, not murder, and may have caused some confusion for the jury and caused the jury members to diminish the intent required to establish murder. This is especially so as this erroneous part was repeated to the jury in response to its question.
- [Emphasis added.]
- [130] O'Brien J.A. was not persuaded that the manner in which the trial judge defined "bodily harm" was the source of the confusion:
- [87] it is not at all clear that this brief passage in the charge was the source of confusion. The trial judge, in at least two other passages, had said that in the case of bodily harm for murder, there must be either intent to kill, or intent to cause bodily harm that the accused knew was likely to kill, and he was reckless whether the victim died.

[Emphasis added.]

- [131] However, he went on to note that Mr. Miljevic was not obliged to identify a reason for the jury's struggle before he could succeed on his ground of appeal. What mattered was that "the jury wanted to be informed as to what, as a matter of law, constituted manslaughter. The question was directed at a relevant and live issue and [he could] think of no good reason for depriving the jury of that instruction" (at para. 88). O'Brien J.A. considered the judge's response to the question to be inadequate (the judge simply referred the jury back to his original instructions on the intent for murder), and he would have ordered a new trial on that basis.
- [132] The majority in Miljevic held that "most of the grounds of appeal must fail for the reasons [given by O'Brien J.A.]" (at para. 1). This included "the defence suggestion that 'bodily harm' was misdefined in the charge", a contention that, from the majority's perspective, appeared to be "founded on yanking one sentence totally out of its context as a definition of one thing only" (at para. 1; emphasis added). The majority then reached a different conclusion from O'Brien J.A. on the adequacy of the response to the jury's question, finding that it was sufficient. Accordingly, they dismissed the appeal from conviction.
- [133] Mr. Miljevic appealed as of right to the Supreme Court. Cromwell J., writing for the majority, dismissed the appeal, concluding that the trial judge did not err in his answer to the question posed by the jury. There is no discussion by Cromwell J. of the definition of "bodily harm".
- [134] It is the appellant's position that Miljevic "authoritatively" established a legal principle that "subjective foresight is not the only significant difference between murder and manslaughter". He says the majority decision, upheld by the Supreme Court, agreed with O'Brien J.A. that "the degree of bodily harm required for second degree murder is qualitatively different than that required for manslaughter" (appellant's factum at paras. 46-47; emphasis added). As a result, it cannot be that the definition of "bodily harm" in s. 2 of the Code applies to both offences, and the trial judge's use of that definition in responding to the jury's question amounts to reversible error. The appellant says the judge was obliged to tell the jury that the appellant was only guilty of murder if the Crown proved beyond a reasonable doubt that he inflicted "dangerous and serious" harm on Ms. Kogawa.
- [135] With respect, I agree with the Crown that the appellant has misinterpreted Miljevic. As I read that decision, the majority did not find that the trial judge erred in defining bodily harm under s. 229(a)(ii) as "hurt or injury that interferes with health or comfort, and [that] has to be more than something that is just brief or fleeting or minor in nature" (cited at para. 85 of the decision). At para. 1 of their reasons, the majority explicitly rejected any suggestion that the trial judge had "misdefined" the term "bodily harm" in his charge on murder. I also agree with the Crown that in upholding the majority's decision, the Supreme Court impliedly adopted this same perspective. At paras. 2-3 of Justice Cromwell's reasons, he distinguishes between murder and manslaughter on the basis of the accused's mental

state, not because of a difference in the meaning of "bodily harm" as applicable to each offence (2011 SCC 8).

- [136] In my view, the trial judge in this case was correct to tell the jury, in answer to its question, that the definition of "bodily harm" is the same for murder and manslaughter. Section 2 of the Code applies, offering a generously worded definition that allows for a "broad spectrum" of physical hurts or injuries: Cooper at 150 (per Lamer C.J. in dissent). The term "bodily harm" has long been accepted in the Criminal Code context to encompass everything from non-transient or trifling minor injuries that resolve themselves relatively quickly, to injuries that are severe and permanent: R. v. Saulis, 2020 NBCA 36 at para. 12, citing R. v. Gejdos, 2017 ABCA 227.
- [137] In R. v. Murray (1994), 20 O.R. (3d) 156 (C.A.), both an original charge on murder and a recharge defined "bodily harm" under s. 229(a)(ii) using substantially the same language as s. 2. The appeal court found that the trial judge erred by not sufficiently relating the trial evidence to the subjective foreseeability of death; however, it did not take issue with the judge's definition of bodily harm.
- [138] The difference between proof of murder and proof of manslaughter lies not in the degree or type of bodily harm factually inflicted by the accused. Rather, what distinguishes these offences from one another is the knowledge that accompanies the harm. Section 229(a) requires proof beyond a reasonable doubt that the accused unlawfully inflicted bodily harm with the intent to kill, or that the accused knew the bodily harm was likely to cause death, and was reckless as to whether death ensued. Trial judges commonly explain the second of these two intents using language that mirrors the majority's discussion in Cooper: "the Crown must demonstrate that the accused intended to cause bodily harm that he knew was ultimately so dangerous and serious that it was likely to result in the death of the victim" (at 159; emphasis added). Indeed, this wording has been incorporated into the Canadian Judicial Council's model jury instruction on the intent for murder:

To prove that ([name of the accused]) had the intent required for murder, the Crown must prove beyond a reasonable doubt one of two things, either:

1. that (NOA) meant to cause ([name of complainant])'s death; or
2. that (NOA) meant to cause (NOC) bodily harm that s/he knew was likely to cause his/her death and was reckless whether death ensued or not.

In other words, you must decide whether the Crown has proved beyond a reasonable doubt either that (NOA) meant to kill (NOC), or that (NOA) meant to cause (NOC) bodily harm that s/he knew was so dangerous and serious that s/he knew it was likely to kill (NOC) and proceeded despite his/her knowledge of that risk.

[Model Jury Instructions (online), Offence 229(a): Second Degree Murder; emphasis added.]

- [139] However, the purpose of including words such as "dangerous" and "serious" is not to meet a legal requirement for factual proof of a higher degree of bodily harm, or a more serious type of bodily harm, than that required for the offence of manslaughter. Instead, the words are included to assist the jury with its deliberations on the subjective foreseeability of death arising from the bodily harm alleged to have been inflicted. It is proof of subjective foreseeability of death that distinguishes murder from manslaughter. Whatever the unlawful act may consist of in a murder prosecution, it is a "vital element" of the secondary intent for that offence (s. 229(a)(ii)) that the infliction of bodily harm as part of the act be accompanied by knowledge that it was likely to cause death: *R. v. Nygaard*, [1989] 2 S.C.R. 1074 at 1088. The emphasis is on the accused's awareness of the nature of the act committed against the victim, and its likely consequences, not proof of a particular form or level of bodily harm.
- [140] A proper instruction on the secondary intent for murder is one that ensures the jury understands that "the accused must foresee a likelihood of death flowing from the bodily harm that he or she is occasioning the victim": *R. v. McCracken*, 2016 ONCA 228 at para. 102 (internal references omitted; emphasis added). Describing that harm as "grave", "dangerous" or "serious" alerts the jurors to the need to consider the nature of the unlawful act alleged to have been committed when they decide whether the Crown has proved, beyond a reasonable doubt, foreseeability of death. As made clear by the trial judge at para. 135 of her written charge, if a jury has a reasonable doubt about that aspect of the case, it cannot convict of murder.
- [141] Under s. 229(a)(ii), the jury's focus is properly on what the accused foresaw at the time the act was committed, not the gradation of the bodily harm at issue, whether that bodily harm fell within a particular category, or whether it met a particular standard. In my view, the appellant's position on this third ground of appeal asks the Court to effectively rewrite s. 229(a)(ii) of the Code and introduce as an essential element of the offence of murder a bodily harm threshold along the s. 2 spectrum that, if not satisfied as a matter of proof, precludes a conviction. I am not prepared to do that. In *Cooper*, Lamer C.J. opined that the Code's definition of "bodily harm" provides "general guidance" on the interpretation of that term under s. 229(a)(ii) (then s. 212(a)(ii)) (at 150). In the absence of specific language from Parliament excluding the application of the definition for use in the murder provisions, I agree.
- [142] There is no indication from s. 229(a)(ii) that Parliament intended anything other than the s. 2 definition to apply. As aptly noted by the Crown, where Parliament has intended to qualify the term "bodily harm" for use with a particular offence, such as "grievous bodily harm" under s. 25(3) (protection of persons acting under authority), or, "serious bodily harm" under s. 83.02 (terrorism-related offence), it has made that intention explicit (respondent's factum at para. 68). There is no such qualification built into s. 229(a)(ii).

[143] In addition to providing the jurors with the statutory definition of "bodily harm", it would have been preferable, in my view, for the trial judge to remind the jurors, consistent with paras. 110-111 of the written charge, that "what distinguishes murder from manslaughter is the mental state" and that murder requires one of the two intents under s. 229(a). However, on the record in this case, I am satisfied that the absence of the additional explanation is not fatal.

[144] In his closing submissions, Crown counsel made it clear that the bodily harm the appellant was said to have inflicted on Ms. Kogawa was the blocking of her airways through pressure applied to her nose and mouth:

But the Crown doesn't necessarily have to prove the accused meant to kill Natsumi Kogawa. That's one way. It is sufficient if you're satisfied that he intended to cause Natsumi Kogawa bodily harm that he knew was likely to cause her death and was reckless whether death ensued or not.

Bodily harm is defined in the Criminal Code. It says:

bodily harm means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature

I say applying sufficient pressure to someone's airways for a sufficient duration to render them unconscious is beyond a doubt bodily harm and that everybody knows that death is likely if you do that.

[Emphasis added.]

[145] The judge told the jury that to convict of murder, it had to find that the bodily harm alleged by the Crown was inflicted with an intent to kill or knowledge that it was likely to cause Ms. Kogawa's death. The judge did not err in her instructions on the secondary intent for murder and they are not challenged in the appeal. In his closing submissions, trial counsel for the Crown also correctly informed the jury of the s. 229(a) requirements, at least four times.

[146] In explaining the included offence of manslaughter, the judge drew a clear distinction between murder and manslaughter based on their respective fault requirements. In her final instructions, she included the language that the appellant says is critical to the murder analysis. The judge told the jury that the Crown had to prove "Mr. Schneider meant to cause Ms. Kogawa bodily harm that he knew was so dangerous and serious it was likely to kill Ms. Kogawa and proceeded despite his knowledge of that risk" (emphasis added).

[147] Nothing in the answer to the jury's question is inconsistent with or detracts from the instructions in the main charge. In her answer, the trial judge drew the jury's attention back to her written charge, specifically referring to paras. 109-111. Those paragraphs included an explanation of the distinction between murder and manslaughter, with reference to the differences in intent. Trial counsel for the appellant did not ask for a further instruction. Nor did the jury return with additional questions, an avenue left open by the trial judge. The

fact that the jurors continued their deliberations with the availability of the written charge, including paras. 110 and 111, mitigates the possibility of prejudice: *R. v. Moo*, 2009 ONCA 645 at para. 62.

[148] In my view, this is not a case where the answer to the jury's question was inconsistent with what was said in the main charge, nor was it erroneous standing on its own: *Brydon* at para. 19. The main charge did not contain errors that required correction in the answer. Nor did the answer to the question exacerbate an existing error or give rise to a new one: *Kahnapace* at para. 58. On this record, I see no reasonable possibility of the jury having been misled and convicting the appellant of second degree murder based on a diminished form of intent.

[149] Accordingly, I would not accede to this ground of appeal.

DISPOSITION

[150] I would grant the appellant an extension of time to file his appeal from conviction to April 9, 2019. However, for the reasons provided, I would dismiss the appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[151] I have had the privilege of reading in draft form the reasons of my colleague Justice DeWitt-Van Oosten. I agree with and adopt her reasons dismissing the second and third grounds of appeal. With respect, however, to the first ground of appeal, I am unable to agree with her conclusion that the trial judge did not err in admitting evidence of the phone conversation overheard by the appellant's brother.

[152] For the reasons that follow, I conclude that the judge erred in admitting the phone conversation.

[153] Accordingly, I would allow the appeal and order a new trial.

BACKGROUND

[154] An overview of the evidence, the Crown and Defence theories, and the parties' positions on the issues underlying the appeal have been thoroughly set out by my colleague and need not be repeated in detail. That said, I will briefly review the background to the phone conversation on which my reasons focus.

[155] On September 27, 2016, after seeing a picture from a news article with the appellant and Ms. Kogawa together, the appellant's brother, Warren Schneider Jr. ("WS") travelled to Vernon to meet with the appellant. The appellant shared with WS some details about his relationship with Ms. Kogawa and their three dates together.

- [156] The next morning, the appellant told WS he planned on buying some heroin with which to kill himself. They went to a beer store, purchased alcohol, and the appellant bought \$50 worth of heroin. Before the appellant injected the heroin, he told WS the location of Ms. Kogawa's body. The appellant said Ms. Kogawa's body was in a suitcase, and, after he killed himself, WS should tell the police the body's location. The appellant did not tell WS that he had killed Ms. Kogawa or had otherwise caused her death.
- [157] The appellant failed to die from the heroin injection. After the failed suicide attempt, the appellant asked to use WS's phone to call his wife in Japan. WS gave the appellant his phone and stood roughly ten feet away.
- [158] The telephone call lasted approximately 13 minutes. On voir dire, WS testified that he could only recall two specific fragments of the conversation: at the beginning, he heard the appellant ask, "Did you see the news of the missing Japanese woman, student?" and sometime in the middle of the conversation, he heard the appellant say, "I did it" and "I killed her." WS testified that he could not remember the exact words used, nor could he remember any part of the conversation other than the two fragments. The appellant's wife did not testify; she lives in Japan and is not a compellable witness.
- [159] On cross-examination on the voir dire, WS confirmed he did not recall the full conversation. He testified that he had been intentionally trying not to eavesdrop or hear what the appellant was saying. He had not heard anything the speaker on the other end of the phone had said. WS confirmed that he had given different testimony at the preliminary inquiry, where he had testified that the appellant had said, "have you heard the news in relation to Natsumi's death?" and "I did it" or "I killed her." WS confirmed he did not know the exact words used, but his "feeling" was that the appellant was admitting responsibility for Ms. Kogawa's death.
- [160] After the voir dire, the trial judge admitted the evidence, finding there was sufficient context to allow a jury to conclude the meaning of the uttered words: RFJ. She concluded:
- [20] In my opinion, it is apparent from Warren Schneider Jr.'s evidence on the voir dire that there is some evidence on which a jury could conclude the meaning of the uttered words. While he was unable to recall the exact words, Warren Schneider Jr. testified about the context of the conversation and that the gist of the conversation was that Mr. Schneider was taking responsibility for Ms. Kogawa's death.
- [21] In my view, the probative value of the evidence outweighs the prejudicial effect that it might be used improperly. The prejudicial effect can be ameliorated by a strong caution to the jury about what use can be made of the evidence.
- [161] After the voir dire, on cross-examination, WS confirmed that he had not overheard anything the appellant's wife had said and that he had been trying not to eavesdrop. WS was certain that the appellant had asked his wife at the start of the conversation if she had heard about Ms. Kogawa's disappearance. WS confirmed he did not know the exact words spoken by the

appellant or if the appellant had been asked a question about Ms. Kogawa or something else when he was overheard to say "I did it" or "I killed her." He agreed that portion of the conversation could have been completely unrelated to Ms. Kogawa. He testified that he did not know if the words "I did it" or "I killed her" had been said at the start, in the middle, or at the end of a sentence.

DISCUSSION

A. Overview

- [162] I am in general agreement with my colleague's review of the relevant legal principles. I agree with my colleague that Ferris--on which I will comment in greater detail below--is the jurisprudential starting point for the admissibility analysis. Like my colleague, I do not believe that Ferris established a "class-based inadmissibility principle" that precludes the admission of overheard, one-sided utterances. The conversation is admissible if it is relevant to an issue and its probative value is not outweighed by its prejudicial effect.
- [163] The Crown sought to tender the words overheard by WS as an admission of responsibility for Ms. Kogawa's death. I agree with my colleague that the trial judge was not required to determine whether the overheard utterances were, in fact, an admission; rather, she had to determine whether the words were capable of being an admission of responsibility for Ms. Kogawa's death.
- [164] This is where I part company with my colleague. I take the view that the uttered words were not capable of being an admission of responsibility for Ms. Kogawa's death--and are therefore not relevant and, accordingly, inadmissible. The evidence should not have been put before the jury.

B. Standard of Review

- [165] The threshold test for the admissibility of all evidence is logical relevance. For logical relevance, the standard is correctness: *R. v. Schwartz*, [1988] 2 S.C.R. 443 at 482.

C. The Ferris Decision

- [166] Before returning to the admissibility of the statements at issue in this case, I wish to first review in further detail the Ferris decision, which, as my colleague notes, is the starting point for the admissibility analysis. Mr. Ferris was charged with the murder of David Parker, his former romantic partner. Mr. Ferris was arrested for murder and taken into police custody. Staff Sergeant Schmidt was in charge of gathering and collecting evidence. Sgt. Schmidt entered the interview room that Mr. Ferris was in and advised him he would be charged with Mr. Parker's murder. Sgt. Schmidt advised Mr. Ferris of his right to silence and his right to counsel.

- [167] Mr. Ferris then asked to make a long-distance phone call to his father. Sgt. Schmidt placed the telephone call and, upon reaching the accused's father, handed the phone to Mr. Ferris. A common cloth divider separated Sgt. Schmidt's desk from the desk used by Mr. Ferris. As Sgt. Schmidt walked towards his own desk, he heard Mr. Ferris say the words: "I've been arrested." Sometime later, when Sgt. Schmidt was approximately 12 feet away from the accused, he heard him say the words: "I killed David." Sgt. Schmidt testified he had not heard what else was being said and that it had been his intent not to hear. He did not know if the words "I killed David" had come at the beginning, middle, or end of a sentence.
- [168] The trial judge admitted the evidence. He said the statements were made voluntarily. He found they were relevant to the charge before the court and that it was for the trier of fact to determine the weight to be given to the statement.
- [169] A majority of the Alberta Court of Appeal reversed the decision. Justice Conrad, writing for the majority, framed the issue as follows:
- [15] The issue here is not whether the officer is telling the truth that the accused uttered these words, but whether any meaning can be put on the words. Are they an admission? Certainly if they are, they are relevant and highly probative. While the jury ultimately makes that decision, the trial judge must determine whether there is evidence on which they could so decide.
- [170] Justice Conrad went on to conclude there were no circumstances or context from which the true meaning of the words could be inferred. In this regard, she said:
- [17] The facts of this case are unique in that there exist no circumstances or context from which the true meaning of the words can be inferred. It is uncontradicted that the words were part of an utterance only, and that other words passed both before and after those words. It is uncontradicted that the words could have come at the beginning of a sentence or at the end of a sentence. In fact, the words may have been a part of a question such as "You don't think I killed David?" or a statement such as "They think I killed David" or "They think I killed David but I didn't". His father could have asked him what the police think he did and he could have replied "I killed David". Those utterances do not prove any fact in issue and are not an admission of guilt. Indeed, on the basis of the uncontradicted evidence, the possibility of statements with the words "... I killed David ..." contained therein are numerous. There is no way of determining the meaning or thought to be attributed to the words. A trial judge could not ascertain, nor could the jury, the meaning of the words. The difficulty is compounded by the acknowledgement of Sergeant Schmidt that this accused was talking in a slow fashion, pausing, repeating himself or trailing off into nothing. The circumstances are all before the trial judge and he should determine whether or not the evidence is sufficient for a jury to conclude the meaning of the words. Without meaning being ascertainable the words are not relevant to any fact in issue and they have no probative value.

[Emphasis added.]

[171] Justice Conrad stressed that the issue was not whether the words were spoken, but whether they were capable of meaning, saying:

[26] In this case, however, it is not a question of whether the utterance was given. Here words were spoken. What is in issue here is whether or not the words were capable of meaning, for without meaning they have no relevance. The officer cannot testify as to the gist of Ferris' utterance, in this particular case it cannot be determined if "... I killed David ..." was in fact an admission he killed David. The onus rests on the Crown to prove the words have relevance.

[Emphasis in original.]

[172] In Justice Conrad's view, it was impossible to ascertain the meaning of the words. In this regard, she said:

[27] In my view, the trial judge, in his ruling following the voir dire, never directed his mind to the issue of completeness and whether or not words incapable of definitive meaning could be relevant to anything. He said in his ruling that all the circumstances could be brought out and the jury could assess the weight to be given to it. What circumstances? He had all the circumstances and it was his duty to determine whether or not on the evidence before him a properly instructed jury could determine from the fragmented utterance the meaning of the whole. He did not appear to direct his mind to that issue. This is not a question of weight. The question is whether or not this accused made a statement which is relevant. If it was an admission, I agree with McClung, J.A. that it is highly probative. However, because the Crown case makes it clear words were spoken before and after, and the utterance was incomplete, it is impossible to ascertain the meaning of the words. Thus no weight can be given to it and the prejudice of its introduction is easy to contemplate. There is a real prejudice of forbidden reasoning here. There would be an enormous temptation for any trier of fact to look at the outside evidence that tends to implicate the accused in the murder, use those facts to conclude that the accused probably committed the murder, and that therefore he admitted that he did. That finding would then be used to raise the probability of guilt to a conclusion of guilt. The danger implicit in that type of circuitous reasoning is obvious.

[Underline emphasis added; italic emphasis in original.]

[173] Justice Conrad held that it was impossible to conclude that the words were capable of constituting an admission. Accordingly, the words were not legally probative to a fact in issue. In this regard, she explained:

[31] The trial judge must be satisfied there is some evidence upon which a jury could conclude the meaning of the uttered words. On the evidence introduced at the voir dire it would be impossible for a properly instructed jury, acting reasonably, to come to a conclusion as to what these words meant on any standard of proof. A trier of fact could not ascertain the

accused's meaning when he uttered the words. Certainly, it would be impossible to conclude they constituted an admission made by the accused. Therefore the words are not logically probative of a fact in issue, are not relevant, are inadmissible and should not have been left with the jury.

[Emphasis added.]

[174] Justice Conrad then went on to consider the balance between probative value and prejudicial effect. In this regard, she said:

[37] The last thing to consider is the balance between probative value and prejudicial effect. The statement "... I killed David ..." has no probative value given that we do not know the words which surrounded the utterance, the utterance was just as likely to be meaningless as inculpatory or even exculpatory. In Smith, of course, they were dealing with a complete statement. Also, as mentioned earlier, this evidence could never meet the test of probative value versus prejudicial effect. The extreme prejudice is so great its exclusion must be favoured.

[175] Ferris was appealed to the Supreme Court of Canada: [1994] 3 S.C.R. 756. The Court did not call upon the accused to respond to the Crown's submissions. Justice Sopinka for the Court gave brief oral reasons dismissing the appeal. He held that even if the overheard utterance had any relevance, it should be excluded. In that regard, he said at 756:

In our opinion, with respect to the evidence that the respondent was overheard to say "I killed David", if it had any relevance, by reason of the circumstances fully outlined by Conrad J.A., its meaning was so speculative and its probative value so tenuous that the trial judge ought to have excluded it on the ground its prejudicial effect overbore its probative value.

D. Are the Words Capable of Being an Admission

[176] The starting point is whether the words "I did it" or "I killed her" are capable of interpretation as an admission of responsibility for Ms. Kogawa's death. This engages the question of logical relevance--whether the evidence tends to make a fact more or less likely: Arp at para. 38. While I agree with my colleague that logical relevance is a low threshold, in my opinion, a jury could not give meaning to the overheard fragment. Without an ascertainable meaning, the words are not relevant to any fact in issue, and they have no probative value. As such, I find that the evidence is irrelevant and thus inadmissible.

[177] In my opinion, this case is more problematic than Ferris because, in this case, the witness does not recall the actual words the accused is alleged to have spoken. Regarding the overheard fragment "I did it" or "I killed her," WS was unable to confirm exactly which of the two phrases the appellant had said on the phone call. "I did it" and "I killed her" carry vastly different ranges of meaning. Those words are qualitatively different. Even setting aside any words that may have come before or after, the two phrases raise very different implications.

- [178] I would respectfully suggest that the words "I did it" said six minutes into a conversation with no surrounding context are not capable of being an admission. The words may or may not have had anything to do with Ms. Kogawa's death. They could have had a completely innocent meaning, such as a response to a question from his wife along the lines of, "Did you send our son the game he wanted?" Answer: "I did it." Even if the words concerned Ms. Kogawa, they are not necessarily an admission of responsibility for her death. "I did it" could refer simply to placing Ms. Kogawa's body into the suitcase, which the appellant conceded to having done. For example, the wife could have asked, "Did you move the body?" Answer: "I did it."
- [179] The words "I killed her" are, of course, more problematic and prejudicial. One can envision several circumstances in which such words might well be an admission of guilt. However, that does not inevitably follow, as the reasons in Ferris make so clear. In this case, the exact same phrase as in Ferris is an issue. Like in Ferris, one can conjure various scenarios in which the words would not be an admission. For example, the appellant could have been asked, "Why didn't you go to the police?" Answer: "[They would think] I killed her."
- [180] The problem that arises from not knowing the exact words is highlighted by the jury charge. In this regard, the judge told the jury:
- [79] You heard testimony from Warren Schneider Jr. about a telephone conversation he overheard between Mr. Schneider and his wife. Warren Schneider Jr. could not hear the other side of the conversation. He testified he only heard parts of the conversation and was trying not to eavesdrop. He did not hear what was said before or after the words he overheard, and could not remember the exact words spoken by Mr. Schneider. This is something you need to bear in mind when you consider what, if any, weight can be given to Warren Schneider Jr.'s evidence about the overheard conversation.
- [80] As well, Warren Schneider Jr. testified that at the time Mr. Schneider phoned his wife he had drunk a mickey of vodka and had taken heroin. You should consider whether Mr. Schneider's drug and alcohol use may have affected what he said. It is up to you to decide whether you believe Warren Schneider Jr. about what Mr. Schneider said, and what Mr. Schneider meant by the overheard words. If you are in doubt about any of that, you should ignore the evidence.
- [81] Unless you decide that Mr. Schneider made a particular remark or statement, you must not use it against him in deciding this case.
- [86] Another witness's opinion as to what Mr. Schneider meant by his words is irrelevant to the question of what he meant. It is your job and your job alone to decide the meaning of Mr. Schneider's words, if you find he said them.
- [Emphasis added.]

- [181] The judge told the jury it was up to them to decide whether the appellant made a particular remark or statement and that they must not use it against him unless they decided he made a particular remark. With respect, there was no way the jury could determine whether or not the accused said "I did it" or "I killed her" because the witness who testified was unable to recollect what was said.
- [182] This problem was compounded when WS testified that it seemed to him that the appellant was "admitting" to the missing Japanese student's death. WS's opinion as to what the appellant meant by his words is, as the trial judge correctly told the jury, irrelevant. It was for the jury to decide the meaning of the accused's words, and without evidence of the words spoken, it was impossible for the jury to determine the meaning of the appellant's words.
- [183] In this case, there is no way of knowing what potentially was said before or after the overheard utterances. WS was also unable to overhear the other half of the conversation. Lacking these key pieces of context, there is nothing that would allow a jury to determine the meaning of the utterances in a way that is not dangerously speculative.
- [184] In Ferris, not knowing what preceded or followed the phrase "I killed David" made it impossible to determine if the phrase was inculpatory or exculpatory--for example: "the police think I killed David." My colleague notes that, unlike in Ferris, the conversation in this case occurred before any police involvement, so there was no possibility that the appellant was repeating police charges or responding to a question about police allegations. The implication is the absence of police involvement eliminates the possibility that the appellant was responding to questions about what the police had thought he had done or any accusations.
- [185] Respectfully, I do not accede to this implication and cannot meaningfully separate this case from Ferris on that point. It is entirely possible that the appellant's utterance was in response to anticipated police proceedings or a question from his wife about the consequences of Ms. Kogawa's death regarding the appellant. For example, in response to the question "what will the police think?" the appellant could very well have responded, "[they will think because I hid the body that] I killed her." Without knowing the words immediately before or after the overheard fragment, there is no way of knowing whether the fragment was part of an exculpatory or inculpatory sentence. As in Ferris, the recipient of the call did not testify to the utterance's meaning. As such, any potential meaning is speculative at best.
- [186] In my view, the mere fact that WS's "impression" or "feeling" that the appellant's words were an admission of responsibility for Ms. Kogawa's death is insufficient to provide a meaningful context from which meaning can be drawn, and, as will be addressed later, risks the jury engaging in forbidden reasoning to conclude the appellant's guilt.

- [187] In Ferris, Justice Conrad noted that in confession cases, the "person to whom the accused speaks generally testifies as to the gist of the words spoken, notwithstanding the fact that the evidence may not be fully recorded, or that it cannot be repeated word for word. There is someone who can swear positively to the fact that the essence of the accused's words were the admission": Ferris at para. 25.
- [188] In many of the cases where the exclusion of evidence on Ferris grounds was unsuccessfully sought, the witness having been a participant in the conversation was a key factor in favour of admission.
- [189] In Bennight, the accused allegedly had a conversation with the jail supervisor after his arrest. The accused had asked the supervisor about the victim's condition and said that he had not intended to hurt them so badly. On voir dire, the supervisor could not recall the exact words used by the accused, testifying that it was something "along the lines" that he had been fighting but "didn't mean to beat them up that bad": Bennight at paras. 22-23. The defence sought to exclude the evidence on Ferris grounds, arguing that the lack of context made the statements too vague to support more than speculative meaning. On appeal, this Court upheld the trial judge's admission of the evidence, distinguishing the situation from that in Ferris, saying:
- [92] In the instant case, by contrast, the witness could testify to both the "gist" of the statement and the context in which it was made. The fact that Special Constable Cardinal-Mitchell was unable to recall the exact words spoken does not in and of itself render the statement inadmissible; the possibility of incompleteness was a matter of weight for the jury
- [190] In Mooring, the accused and co-accused had arrived at the witness' house and asked him to store guns that had recently been used in the commission of a murder. The witness had limited recall of the conversation and was unsure of the exact wording used. On appeal, this Court rejected the argument that the evidence should be excluded for lack of context, finding:
- [25] In my view, the evidence of Mr. MacDonald's conversation with Mr. Mooring did not suffer from the lack of context which was found to be fatal to the admissibility of the statement in Ferris. Here, the statements made by Mr. Mooring were made directly to Mr. MacDonald within a short time of the robbery and killing of Mr. Kimberley. The statements were made in the context of Mr. Mooring's request to store two guns at Mr. MacDonald's residence. One of those guns was proven by other evidence to have been that which was used to shoot Mr. Choquette.

[Emphasis added.]

- [191] In both Bennight and Mooring, the witness had been an active participant in the conversation--they had not merely overheard a conversation fragment. Their testifying as to the gist of the conversation was relevant because their impression had been formed by hearing the entirety of the conversation in context. Despite the lack of complete recollection in either case, the evidence was properly left with the jury to assess, with the incompleteness going to weight.
- [192] Unlike Bennight, however, the issue in this case is not one of completeness but one of relevance. WS was not a party to the conversation. He had been, by his own admission, trying not to eavesdrop on the conversation, and he could recall only the smallest fragments of the conversation--the exact wording of which he was not even able to recall. That he testified to the gist of the conversation is, at best, speculative, as he had been unable to overhear the full conversation in context, lacking the words being said on the other end of the phone.
- [193] The above is not to imply that one-sided overheard conversations are presumptively inadmissible. However, the inability to hear both sides of the conversation increases the difficulty of ascribing meaning to any overheard utterances.
- [194] In Alcantara, the court upheld as admissible overheard sentences despite the other half of the conversation being indiscernible. In Alcantara, phone conversations between the accused and various other people had been intercepted by police. In one of these conversations, three complete sentences by the accused had been recorded. However, immediately before and after were unintelligible statements made by the person with whom the accused was speaking. The accused's sentences had been recorded in full, so there was no difficulty in ascribing meaning to them, even if the other half of the conversation had not been recorded. Further, the impugned statements were not the only intercepted communications. Dozens of communications had been intercepted, allowing a better understanding of what the overheard sentences intended to communicate.
- [195] In Yates, a sheriff had overheard part of a conversation between the accused and two other prisoners in the back of the sheriff's van. The sheriff overheard and recorded in his notebook within an hour after the statements were made several comments by the accused, who sought to exclude them on Ferris grounds. The court distinguished Ferris as having only contained a small snippet of a statement, further noting that while the witness did not overhear the entirety of the conversation, he actively "paid attention to the conversation once he determined [Mr. Yates] was talking about his crime": Yates at para. 20.
- [196] I do not think this is a case similar to Yates or Alcantara. In both Yates and Alcantara, full sentences were recorded, limiting, if not obviating, the need for the witness to testify as to their gist. Meaning could readily be drawn from them, and they did not suffer from the problems posed by the fragments in Ferris and in this case.

- [197] My colleague relies on *Herntier*, where the accused had told a witness before he was charged with any offence that he had killed someone. The accused argued that the statement had no, or little, probative value because it lacked context, in that the witness could not provide either a date for the statement or an explanation of the surrounding discussion to link the statement to the killing of the deceased. The Manitoba Court of Appeal distinguished *Ferris* and the Ontario Court of Appeal decision in *Hunter* and held the evidence was properly admitted because there was context that gave meaning to the words. They reasoned:
- [267] In the present case, there is context that gives meaning to the words. The words "I killed someone" could constitute an admission. The context that distinguishes this case from *Ferris* and *Hunter* is the phrase that immediately followed, that "nobody would miss this person; scum, piece of shit person." This addresses the issue of an innocent explanation for the words.
- [198] There is a distinction between a third-party overhearing part of a conversation and the incomplete recollections of a party to the conversation. If the witness was a party to the conversation, their testimony as to the gist is equivalent to their testifying as to what was said--albeit in a less persuasive fashion than if they had recalled the exact words spoken to them. But, crucially, they were still the party to whom the accused was speaking. A third-party testifying as to the gist of a conversation in which they only overheard one speaker is engaged not in recollection but speculation. In this case, WS is necessarily speculating as to what meaning "I did it" or "I killed her" had.
- [199] Unlike my colleague, I am unable to substantially distinguish the present case from the circumstances in *O'Reilly*. While I concede that the evidentiary foundation in *O'Reilly* was less detailed than in the present case, the key deficiencies present in *O'Reilly* are also present here. WS did not hear the words spoken before or after the key fragment. He admitted that he did not know the exact words used, and he testified that he was intentionally trying not to hear what was being said.
- [200] I would also refer to the Ontario Court of Appeal decision in *Hunter*. In *Hunter*, the accused was convicted of using a firearm while committing an indictable offence, aggravated assault, and possession of a prohibited weapon. On the day of the appellant's preliminary hearing, a bystander testified that he overheard the appellant say to his lawyer, "I had the gun, but I didn't point it." After a *voir dire*, the trial judge admitted the evidence despite the words before and after the overheard utterance not being before the court. He found the jury could determine the meaning of the overheard words and that it was for them to decide if the accused had made the statement and what value it should be given.

- [201] The court noted that the facts before it closely paralleled those in Ferris. They referenced Justice Conrad's reasons and her conclusion that a properly instructed jury could not determine from the fragmented utterance the meaning, either of the whole thought or the overheard words themselves. Hence, the words were not probative to a fact in issue and were therefore irrelevant and inadmissible. The court, applying principles derived from Ferris, excluded the evidence. In that regard, they said:
- [19] In my view, Sopinka J.'s reasoning is anchored in the important role that context can play in giving meaning to spoken words. Where an overheard utterance is known to have a verbal context, but that context is itself unknown, it may be impossible to know the meaning of the overheard words or to otherwise conclude that those words represent a complete thought regardless of context. Even if the overheard words can be said to have any relevance, where their meaning is speculative and their probative value therefore tenuous yet their prejudicial effect substantial, the overheard words should be excluded.
- [20] When the principles derived from Ferris are applied to this case, I think the evidence must be excluded as it was in Ferris. The only possible relevance of the overheard utterance is if it could be found to constitute an admission by the appellant that he had a gun. Here, as in Ferris, the trial judge found that the overheard utterance had a verbal context, which is unknown and that it was part of a fuller statement. That statement may have been a statement such as "I could say I had a gun, but I didn't point it, but I won't because it is not true" or "What if the jury finds I had a gun but I didn't point it - is that aggravated assault?" Neither would constitute an admission. Indeed, given the reasoning of the trial judge, had these possibilities been pointed out to him he might well have reached a different conclusion.
- [21] In my view, without the surrounding words, it would be impossible for a properly instructed jury to conclude that the overheard utterance was an admission or perhaps even what it meant. Clearly its meaning remains highly speculative. The trier of fact would have to guess at the words that came before and after to fix on a meaning. Since its meaning is highly speculative, its probative value is correspondingly tenuous. However, the substantial prejudicial effect is obvious. This balance clearly favours exclusion of the overheard utterance and, as in Ferris, that should have been the result.
- [202] My colleague suggests that this case is qualitatively different from Ferris because in Ferris, the Crown did not adduce any "informing context" from which the trier of fact could determine the meaning of the words, "I killed David." In her reasons, she indicates that in this case, there was far greater context to inform the meaning of the utterances, identifying several items to that effect.

[203] The term "context" must be used with care. The New Oxford Dictionary of English defines context as "the circumstances that form the setting for an event, statement, or idea" and also as "the parts of something written or spoken that immediately precede and follow a word or passage and clarify its meaning." I will refer to the first definition as "macro-context" and the second as "micro-context."

[204] The items referenced by my colleague are all part of the macro-context. They form the setting for the appellant's statement. An examination of the two judgments in the Alberta Court of Appeal indicates that the macro-context in Ferris was not dissimilar to the case at bar. Those circumstances include:

Staff Sergeant Schmidt's job was to gather and corroborate the evidence. Mr. Ferris and David Parker had, at some time before the killing, shared an apartment in a romantic relationship. At the time of the killing, they had separated, and Mr. Ferris had left the apartment and was living in a hotel room. Mr. Ferris reported the death of Mr. Parker by telephone to the city police on the morning of October 22, 1989. When the police arrived at Mr. Parker's apartment, they found Mr. Ferris beside Mr. Parker's dead body. Mr. Ferris was spotted with the deceased's blood. Mr. Parker's death had been caused by ten stab wounds. He had not been robbed. The suite had not been forcibly entered, but there was evidence of a violent struggle having taken place within it. Upon his arrest, Mr. Ferris admitted having been in Mr. Parker's apartment the night of the murder. Mr. Ferris was taken into custody. He was in an interview room when Sgt. Schmidt entered the room and advised him he would be charged with murder and advised him of his rights to silence and counsel. Mr. Ferris asked to make a long-distance telephone call to his father. Mr. Schmidt placed the telephone call to Mr. Ferris' father and, upon reaching the accused's father, handed the phone to Mr. Ferris. Mr. Schmidt walked away. He heard the accused say the words, "I've been arrested." Sometime later in the conversation, Sgt. Schmidt heard Mr. Ferris say the words, "I killed David." Sgt. Schmidt did not hear the conversation before, after, or in-between the two overheard fragments.

[205] What was missing, however, in Ferris and in the case at bar, is any micro-context. In neither case is it known what was said before or after the overheard words. Absent such micro-context, it is not possible to determine the meaning of the spoken words. As the Ontario Court of Appeal said in *Hunter*, "without the surrounding words, it would be impossible for a properly instructed jury to conclude that the overheard utterance was an admission": *Hunter* at para. 21.

[206] I am of the view that no properly instructed jury could conclude that the overheard fragment was an admission. Accordingly, it is not relevant and should not have been put before the jury. It was an error to admit the evidence.

[207] Given this conclusion I need not consider the appellant's alternative submission that the evidence should have been excluded on the basis that its prejudicial effect outweighed its probative value.

DISPOSITION

[208] In the result, therefore, I would grant the appellant an extension to file his appeal from conviction, allow the appeal, and order a new trial.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Saunders"

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