

CANADA / JUDGMENT

R. v. Smith

[1992] 2 SCR 915

COURT

Supreme Court of Canada

DECIDED

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R. v. Smith

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Date

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Report

[1992] 2 SCR 915

Case number

22281

Judges

Lamer, Antonio; La Forest, Gérard V.; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank

On appeal from

Ontario

Subjects

Criminal law

Notes

SCC Case Information: 22281

Decision Content

R. v. Smith, [1992] 2 S.C.R. 915

Her Majesty The Queen Appellant

v.

Arthur Larry Smith Respondent

Indexed as: R. v. Smith

File No.: 22281.

1992: June 15; 1992: August 27.

Present: Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for ontario

Criminal law -- Evidence -- Hearsay -- Admissibility -- Deceased telephoning her mother on night she was murdered -- Whether statements made by deceased admissible as exception to hearsay rule -- Whether conviction should be upheld -- Criminal Code, R.S.C., 1985, c. C-46, s. 686(1) (b) (iii).

The accused was charged with murder. He and the deceased were both American citizens, ordinarily resident in the U.S. The evidence at trial showed that the accused had picked the deceased up at her mother's house and that they had driven to Canada, where they spent the weekend together in a hotel. The deceased's body was subsequently discovered near a service station. The Crown's theory was that the accused was a drug smuggler who had travelled to Canada with the deceased in order to obtain cocaine, and that he had asked her to take the cocaine back to the U.S. concealed in her body, but that she had refused. According to the Crown, he then abandoned her at the hotel, but later returned to pick her up, and drove her to a place where he strangled her. In support of this theory, the Crown relied upon evidence of four telephone calls made by the deceased to her mother. The deceased's mother testified that in the first call, her daughter said that the accused had abandoned her at the hotel and that she wanted a ride home. In the second call, the deceased told her mother that the accused had still not returned. The deceased's mother testified that in the third call her daughter told her that the accused had come back for her, and that she would not need a ride home after all. The fourth telephone call was traced to a pay telephone at the service station near which the deceased's body was found. Her mother testified that in this call her daughter told her that she was "on her way". The Crown also led evidence from a woman who had travelled with the accused to Canada in the month prior to the murder. She testified that the accused had asked her to smuggle illegal drugs back to the U.S. for him, and that when she refused, he drove her to a restaurant, where he abandoned her. The accused was convicted. The Court of Appeal allowed his appeal. It found that the evidence as to what was said by the deceased in the first two telephone conversations was admissible under an exception to the hearsay rule, but only for the purpose of establishing her state of mind when she made the calls. The evidence as to what was said in the third and fourth telephone conversations, however, fell within no exception to the hearsay rule, and was therefore not admissible for any purpose. Notwithstanding defence counsel's failure to object to the

evidence at trial, the Court of Appeal declined to apply the curative provision in s. 686(1) (b)(iii) of the Criminal Code , quashed the accused's conviction, and ordered a new trial.

Held: The appeal should be dismissed.

The statements made by the deceased in the first two telephone conversations are not admissible under the "present intentions" or "state of mind" exception to the hearsay rule to prove the truth of the factual assertion that the accused abandoned the deceased at the hotel on the night of her death. The statement in the third call would not have been admissible under the present intentions exception for any purpose at all. The fourth telephone conversation is not in issue here. While the Court of Appeal was thus not in error regarding the operation of the "present intentions" exception, the hearsay rule does not preclude the reception of hearsay evidence which does not fall within established categories of exceptions. It has long been understood that the circumstances under which the declarant makes a statement may be such as to guarantee its reliability, irrespective of the availability of cross-examination. This Court's decision in *R. v. Khan* should be understood as the triumph of a principled analysis over a set of ossified judicially created categories. It signalled a departure from a view of hearsay characterized by a general prohibition on the reception of such evidence, subject to a limited number of defined exceptions, and a movement toward an approach governed by the principles which underlie the rule and its exceptions alike. Hearsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements were made satisfy the criteria of necessity and reliability set out in *Khan*, and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might result to the accused. Here, the hearsay evidence of what the deceased told her mother in the first two telephone calls satisfied the criteria of necessity and reliability, and was properly admissible on that basis. While the contents of the third call satisfied the criterion of necessity as well, the events surrounding the making of that call do not provide that circumstantial guarantee of trustworthiness that would justify their admission without the possibility of cross-examination. This evidence was thus not admissible. The evidence of the other woman who had gone to Canada with the accused was also inadmissible because it was evidence going to character and was not relevant to the murder charge. It was admitted, however, and its effect on the jury may have been highly prejudicial. The trial judge's caution to the jury was inadequate to remove this possibility of prejudice. The order for a new trial must accordingly be affirmed.

Cases Cited

Considered: *R. v. Khan*, [1990] 2 S.C.R. 531; referred to: *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892); *R. v. Moore* (1984), 15 C.C.C. (3d) 541; *R. v. P. (R.)* (1990), 58 C.C.C. (3d) 334; *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965; *R. v. Blastland*, [1986] A.C. 41; *R. v. Kearley*, [1992] 2 All E.R. 345; *R. v. Wysochan* (1930), 54 C.C.C. 172; *Home v. Corbeil*, [1955] 4 D.L.R. 750; *Myers v. Director of Public Prosecutions*, [1965] A.C. 1001; *Ares v. Venner*, [1970] S.C.R. 608; *Cloutier v. The Queen*, [1979] 2 S.C.R. 709.

Statutes and Regulations Cited

Criminal Code, R.S.C., 1985, c. C-46, ss. 686(1) (b)(iii), 693(1) .

Authors Cited

Wigmore, John Henry. A Treatise on the Anglo-American System of Evidence in Trials at Common Law, vol. III, 2nd ed. Boston: Little, Brown & Co., 1923, §§ 1420-22.

APPEAL from a judgment of the Ontario Court of Appeal (1990), 11 W.C.B. (2d) 497, quashing respondent's conviction on a charge of second degree murder. Appeal dismissed.

Milan Rupic, for the appellant.

D. Fletcher Dawson, for the respondent.

The judgment of the Court was delivered by

//Lamer C.J.//

Lamer C.J. -- The principal issue raised by this appeal is the admissibility of hearsay evidence as part of the Crown's case in a murder trial, when the declarant is dead.

The Facts

The respondent was convicted of the murder of Aritha Monalisa King and was sentenced to imprisonment for life with no parole eligibility for thirteen years. Both the respondent and Ms. King were American citizens, ordinarily resident in Detroit. At the respondent's trial, the evidence showed that on August 6, 1986, the respondent picked up Ms. King at her mother's house in Detroit. Together, they drove across the border to Canada. The respondent spent the weekend of August 9 and 10 with Ms. King in a hotel in London, Ontario. Ms. King's body was subsequently discovered at approximately 1:30 a.m. on August 11, near a service station at Beechville, Ontario. The body was found lying on a sheet which may have come from the hotel where Ms. King and the respondent had spent the night. Certain fibres found on the sheet matched fibres from the clothing of the respondent and Ms. King. The body's arms had been cut off, and were never found.

The theory of the Crown was that the respondent was a drug smuggler who had travelled to Canada with Ms. King in order to obtain cocaine. The Crown hypothesized that the respondent had asked Ms. King to take the cocaine back to the United States concealed in her body, but that she had refused. According to the Crown, he then abandoned her at the hotel in London. However, he later returned to pick her up, and drove her to a place where he strangled her, cut off her arms to impede identification, and dumped her body.

In support of this theory, the Crown relied upon evidence of four telephone calls made by the deceased to her mother in Detroit at 10:21 p.m., 11:21 p.m., 11:54 p.m. and 12:41 a.m. on the night between August 10 and August 11, 1986. The first two telephone calls were traced to the telephone in Ms. King's room at the hotel in London. Ms. King's mother testified that in the first

telephone call, her daughter said that Larry (the respondent) had abandoned her at the hotel in London and that she wanted a ride home. In the second call, Ms. King told her mother that Larry had still not returned. Her mother testified that she then telephoned from Detroit to a taxi company in London to attempt to arrange a ride home for her daughter. A taxi did arrive at the hotel, but refused to take Ms. King because the credit card that she had been using had been confiscated at the hotel.

The third call was traced to a pay telephone in the hotel lobby. Ms. King's mother testified that in this call her daughter told her that Larry had come back for her, and that she would not need a ride home after all. The fourth telephone call was traced to a pay telephone at the service station near which Ms. King's body was found. Ms. King's mother testified that in this call her daughter told her that she was "on her way".

In addition to these calls, there was evidence that a further telephone call had been made shortly after 1:00 a.m. on August 11 from a pay telephone at the service station near which Ms. King's body was later found. This call was traced to the respondent's residence in Detroit. There was no direct evidence as to who made this telephone call, or what was said. However, a witness at the service station testified that he had seen the respondent near the pay telephones at the service station around this time.

The Crown also led evidence from one Hope Denard, a woman who had travelled with the respondent from Detroit to Canada in the month prior to the murder. Ms. Denard testified that the respondent had asked her to smuggle illegal drugs back to the United States for him, and that when she refused, he drove her to Windsor and abandoned her at a restaurant.

The respondent did not testify at his trial, but set up a defence of alibi supported by the evidence of various witnesses who placed him in Windsor or Detroit at or around the time of the murder. Defence counsel did not object to the testimony by Ms. King's mother as to what her daughter told her in the first three telephone calls. Indeed, it was apparently the theory of the defence that the respondent actually did abandon Ms. King at the hotel in London, a hypothesis supported by the evidence of what Ms. King said in the first two telephone calls to her mother. However, the defence contended that after leaving Ms. King, the respondent returned to Detroit and did not return to the hotel, and therefore could not have been with her when she was murdered.

The respondent appealed his conviction to the Ontario Court of Appeal, which allowed the appeal and ordered a new trial. The Court of Appeal found that evidence as to what was said in the telephone calls made by Ms. King to her mother on the night of the murder was hearsay, and therefore was inadmissible unless it fell within some recognized exception to the hearsay rule. The Court of Appeal went on to decide that the evidence as to what was said by Ms. King in the first two telephone conversations was admissible under an exception to the hearsay rule, but only for the purpose of establishing her state of mind at the time when she made the calls, i.e., that she wanted to come home. The evidence as to what was said in the third telephone conversation, however, fell within no exception to the hearsay rule, and was therefore not admissible for any purpose.

The Court of Appeal concluded that the inadmissible hearsay evidence had been so gravely prejudicial to the respondent that it could not say that, had it not been admitted, the verdict would necessarily have been the same. Therefore, notwithstanding the failure of defence counsel to object to the evidence at trial, the Court of Appeal declined to apply the curative provision in s. 686(1) (b)(iii) of the Criminal Code, R.S.C., 1985, c. C-46, quashed the respondent's conviction, and ordered a new trial: (1990), 11 W.C.B. (2d) 497.

The Crown sought leave to appeal to this Court under s. 693(1) of the Criminal Code, and leave to appeal was granted (Lamer C.J. and Sopinka and McLachlin JJ.) on May 9, 1991: [1991] 1 S.C.R. xiii.

Judgments Below

Ontario Court of Appeal

The Ontario Court of Appeal (per Brooke J.A., Houlden and Labrosse JJ.A. concurring) noted that the Crown's case at trial rested upon two hypotheses: first, that the respondent had abandoned Ms. King at the hotel in London on the night of August 10, an act consistent with there having been some dispute between them; secondly, that the respondent returned to her later that night, or early the following morning, which would place him with her near the time when she was murdered. The hearsay evidence as to what Ms. King said to her mother when she telephoned her on the night of her death was therefore very important to the Crown's case.

The Court of Appeal proceeded from the premise that, as hearsay, all this evidence was inadmissible unless it fell within some recognized exception to the hearsay rule. Referring to *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892), and *R. v. Moore* (1984), 15 C.C.C. (3d) 541 (Ont. C.A.), the Court of Appeal concluded that there did exist an exception to the hearsay rule where the declarant's statements were adduced to indicate the intention, or state of mind, of the declarant at the time the statements were made.

However, the Court of Appeal rejected the Crown's argument that all the evidence of what Ms. King said to her mother on the telephone fell within this exception. Citing *R. v. P. (R.)* (1990), 58 C.C.C. (3d) 334 (Ont. H.C.), the Court of Appeal noted that while hearsay evidence was potentially admissible to prove the state of mind of the declarant when the statements were made, such evidence was not admissible to prove the intentions or state of mind of persons other than the declarant, or that such persons acted in accordance with the declarant's expectations, or, indeed, to prove the truth of the factual assertions contained in the declarant's statements of intention. Consequently, the Court of Appeal concluded that the hearsay evidence relating to the first two telephone calls (Larry has left me; I need a ride home) was admissible, but only to show Ms. King's state of mind at the time she telephoned her mother, i.e., that she wanted to come home. This evidence was not admissible, however, to prove the factual assertion that the respondent had abandoned her. The Court of Appeal concluded, further, that the hearsay evidence of the third telephone call (Larry has come back) was not admissible for any purpose at all, and could not be introduced to prove that the respondent later returned and picked up Ms. King.

The Court of Appeal went on to conclude that the inadmissible hearsay evidence relating to the telephone conversations had been of vital importance to the Crown's case. In particular, it had been used to place the respondent with Ms. King around the time of her death, which had the effect of buttressing certain identification evidence of questionable reliability which placed the respondent at the service station near which the body was found. Concluding, therefore, that the inadmissible hearsay evidence had been prejudicial to the respondent, the Court of Appeal decided that it could not be said that the verdict would necessarily have been the same had the evidence not been admitted, and, therefore, refused to apply the curative provision in s. 686(1) (b) (iii) of the Criminal Code to dismiss the appeal notwithstanding the error.

In respect of the evidence of Ms. Denard, the Court of Appeal concluded that the history of the respondent as a drug dealer was relevant, if at all, to show the context in which the events between August 6 and August 11 occurred. However, the evidence was only put to the jury as going to the respondent's motive to commit the murder, for which purpose it had no probative value. Indeed, the court concluded that this problem had been exacerbated by remarks made by the Crown in its closing address to the jury, which could have been interpreted as suggesting that the jury ought to conclude that the respondent, having the "character" of a drug smuggler, was more likely to have committed this murder.

The Court of Appeal concluded that the trial judge's charge to the jury was inadequate to cure this defect, and consequently ordered a new trial on this additional ground as well.

Grounds for Appeal

The Crown now appeals to this Court under s. 693(1) of the Criminal Code against the decision of the Ontario Court of Appeal quashing the respondent's conviction and ordering a new trial. The grounds for appeal are as follows:

1. Whether the Court of Appeal for Ontario erred in law in holding that evidence of statements of the deceased during the first and second telephone conversations were admissible only to show her state of mind, and that evidence of the statement of the deceased during the third telephone conversation was hearsay and inadmissible for any purpose.
2. Whether or not the Court of Appeal erred in law in holding that, in the circumstances of the case, the proviso in s. 686(1) (b)(iii) had no application.

Analysis

1. Hearsay Evidence

This is not the proper context in which to attempt to undertake an exhaustive definition of "hearsay evidence." However, for present purposes, the following formulation found in *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965 (P.C.), at p. 970, is helpful to establish the parameters of the debate:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

This statement of the "hearsay rule" is a useful illustration of the circumstances in which statements made by persons who are not called as witnesses have traditionally been considered inadmissible. When such statements are introduced to prove the truth of their contents, they have generally been considered to be inadmissible. However, when introduced simply to prove that they were made, they have traditionally been regarded as admissible, either under an "exception" to the hearsay rule, or more correctly from an analytical point of view because they fall outside the definition of hearsay. What is important is that the evidentiary dangers traditionally associated with statements by persons not called as witnesses -- principally, the unavailability of the declarant for cross-examination -- are not present, or are present to a far less significant degree, when the relevance of such statements lies simply in the fact that they were made.

Clearly, therefore, on the traditional view of hearsay, the statements made by Ms. King to her mother on the night of her death -- (1) "Larry has gone away"; (2) "Larry has not come back and I need a ride home"; (3) "Larry has come back and I no longer need a ride"; and (4) "I am on my way" -- are hearsay, and inadmissible, if introduced to prove the truth of the assertions they contain. However, as noted above, such statements are not hearsay if they are adduced simply to prove that they were made. The fact that the statement was made, however, would in itself have to be relevant for the statement to be received on this ground.

One exception to the hearsay rule arises when the declarant's statement is adduced in order to demonstrate the intentions, or state of mind, of the declarant at the time when the statement was made. The "current intentions" exception to the hearsay rule was set out by the Supreme Court of the United States in *Mutual Life Insurance Co. v. Hillmon*, *supra*. In that case, the appellant insurance company resisted payment under a policy on the life of the respondent's husband, arguing that there had been a conspiracy to fake the death of the husband, and that the body discovered was actually that of a third person. This third person had written a letter to his family, in which he indicated his intention to go travelling with the respondent's husband. The letter could not be located, but a witness was prepared to testify as to its contents. The issue, therefore, was whether the evidence of the contents of the letter could be received in evidence. Writing for the court, Gray J. decided that testimony as to the contents of the letter, while technically hearsay, was admissible both to prove the intention of the third person to go travelling with the respondent's husband, and to support the inference that he had acted on this intention.

It would appear that at least the "state of mind" exception to the hearsay rule has been accepted in the English common law of evidence. The position seems to be that where the intentions or state of mind of the declarant are relevant to a fact in issue, hearsay evidence is admissible, and, indeed, may be the best evidence to prove this. In *R. v. Blastland*, [1986] A.C. 41 (H.L.), Lord Bridge of Harwick said, at p. 54, that:

It is, of course, elementary that statements made to a witness by a third party are not excluded by the hearsay rule when they are put in evidence solely to prove the state of mind either of the maker of the statement or of the person to whom it was made. What a person said or heard said may well be the best and most direct evidence of that person's state of mind. This principle can only apply, however, when the state of mind evidenced by the statement is either itself directly in issue at the trial or of direct and immediate relevance to an issue which arises at the trial.

However, the Hillmon formulation of the "present intentions" exception, which allows inferences to be drawn concerning subsequent acts of the declarant, does not appear to have been accepted in English law. See *R. v. Kearley*, [1992] 2 All E.R. 345 (H.L.).

The "present intentions" or "state of mind" exception to the hearsay rule has been recognized in the Canadian law of evidence as well: *R. v. Wysochan* (1930), 54 C.C.C. 172 (Sask. C.A.): statements made by a dying person found admissible to prove how the death occurred; *Home v. Corbeil*, [1955] 4 D.L.R. 750 (Ont. H.C.): statements made by an estranged husband found relevant to his intention to resume cohabitation with his wife, and therefore to his wife's pecuniary interest in his continuing life. Most recently, in *R. v. P. (R.)*, supra, Doherty J. summarized the case law and outlined the scope of the exception, and its limitations, at pp. 343-44, when he said:

An utterance indicating that a deceased had a certain intention or design will afford evidence that the deceased acted in accordance with that stated intention or plan where it is reasonable to infer that the deceased did so. The reasonableness of the inference will depend on a number of variables including the nature of the plan described in the utterance, and the proximity in time between the statement as to the plan and the proposed implementation of the plan.

The rules of evidence as developed to this point do not exclude evidence of utterances by a deceased which reveal her state of mind, but rather appear to provide specifically for their admission where relevant. The evidence is not, however, admissible to show the state of mind of persons other than the deceased (unless they were aware of the statements), or to show that persons other than the deceased acted in accordance with the deceased's stated intentions, save perhaps cases where the act was a joint one involving the deceased and another person. The evidence is also not admissible to establish that past acts or events referred to in the utterances occurred. [Emphasis added.]

Against this background, it is possible to evaluate the appellant's first argument, that the hearsay evidence relating to the statements made by Ms. King in telephone conversations on the night of her murder was admissible under the "present intentions" or "state of mind" exception to the hearsay rule. With respect, I am of the opinion that statement 1 ("Larry has left me") and statement 2 ("Larry has not come back and I need a ride") are not admissible under the "present

intentions" exception, or, to be more precise, they are certainly not admissible, by virtue of the "present intentions" exception, to prove the truth of the factual assertion that the respondent abandoned Ms. King at the hotel in London on the night of her death. To conclude otherwise would be to admit the statements for the purpose of proving "that past acts or events referred to in the utterances occurred." At its highest, therefore, the "present intentions" exception to the hearsay rule invoked by the appellant would operate only to allow the first two statements into evidence for the purpose of proving that the deceased wanted to return home.

In my opinion, the third statement ("Larry has come back") would not have been admissible under the present intention exception to the hearsay rule for any purpose at all. The appellant argued that the statement "Larry has come back" was admissible to show that Ms. King intended to continue her journey with the respondent. With respect, this presupposes the truth of the anterior factual assertion that the respondent had in fact come back to the hotel. Under the "present intentions" exception, hearsay evidence is not admissible for this purpose. Consequently, I conclude that the "present intentions" exception to the hearsay rule would not have supported the admission of the third statement for the sole purpose for which the Crown desired to adduce it. As the Crown did not appeal on the matter of the admissibility of the contents of the fourth telephone call ("I am on my way"), I need not consider it. Once again, this would amount to an inference from a hearsay statement going beyond what can be supported under the "present intentions" exception to the hearsay rule. Consequently, I conclude that, in respect of the operation of the "present intentions" or "state of mind" exception to the hearsay rule, the Court of Appeal was not in error.

This, however, is not fatal to the appellant's case. This Court has not taken the position that the hearsay rule precludes the reception of hearsay evidence unless it falls within established categories of exceptions, such as "present intentions" or "state of mind." Indeed, in our recent decision in *R. v. Khan*, [1990] 2 S.C.R. 531, we indicated that the categorical approach to exceptions to the hearsay rule has the potential to undermine, rather than further, the policy of avoiding the frailties of certain types of evidence which the hearsay rule was originally fashioned to avoid.

It has long been recognized that the principles which underlie the hearsay rule are the same as those that underlie the exceptions to it. Indeed, *Wigmore on Evidence* (2nd ed. 1923), vol. III, described the rule and its exceptions at §1420 in the following terms:

The purpose and reason of the Hearsay rule is the key to the exceptions to it. The theory of the Hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment -- for example, by reason of the death of the declarant --, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. These two considerations -- a

Circumstantial Guarantee of Trustworthiness, and a Necessity, for the evidence -- may be examined more closely. . . .

Of the criterion of necessity, Wigmore stated:

Where the test of cross-examination is impossible of application, by reason of the declarant's death or some other cause rendering him now unavailable as a witness on the stand, we are faced with the alternatives of receiving his statements without that test, or of leaving his knowledge altogether unutilized. The question arises whether the interests of truth would suffer more by adopting the latter or the former alternative. . . . [I]t is clear at least that, so far as in a given instance some substitute for cross-examination is found to have been present, there is ground for making an exception. [Emphasis in original.]

And of the companion principle of reliability -- the circumstantial guarantee of trustworthiness -- the following:

There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured.

Well before the decision of this Court in Khan, therefore, it was understood that the circumstances under which the declarant makes a statement may be such as to guarantee its reliability, irrespective of the availability of cross-examination. "Guarantee", as the word is used in the phrase "circumstantial guarantee of trustworthiness", does not require that reliability be established with absolute certainty. Rather it suggests that where the circumstances are not such as to give rise to the apprehensions traditionally associated with hearsay evidence, such evidence should be admissible even if cross-examination is impossible. According to Wigmore, while it was not possible to generalize as to all cases in which other circumstances would provide a functional substitute for testing by cross-examination, certain broad categories could be identified:

§1422 . . . Though no judicial generalizations have been made, there is ample authority in judicial utterances for naming the following different classes of reasons underlying the exceptions:

- a. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;
- b. Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force;
- c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

The principled basis of the hearsay rule, and its exceptions, was thus understood by commentators on the common law of evidence early in this century. The decision of this Court in *Khan*, therefore, should be understood as the triumph of a principled analysis over a set of ossified judicially created categories. *Khan* was a sexual assault case, in which the infant complainant described the criminal act to her mother shortly after it occurred. The child was not permitted to testify at trial, and the issue was whether her mother would be permitted to testify as to the statements made to her by the child shortly after the event. Writing for the Court, McLachlin J. concluded, at p. 540, that the hearsay evidence of the child's statements ought to have been admitted at trial, and rejected the approach to hearsay evidence based on categorical exceptions to an inflexible prohibition:

The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions.

McLachlin J. proceeded to observe that, while in England the House of Lords decided in *Myers v. Director of Public Prosecutions*, [1965] A.C. 1001, that the development of further exceptions to the hearsay rule required intervention by Parliament, this Court in *Ares v. Venner*, [1970] S.C.R. 608, declined to follow the majority in *Myers*, preferring instead the dissenting opinion of Lord Donovan where he said, at p. 1047, that "[t]he common law is moulded by the judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds." Having concluded that it is open to the courts to create new exceptions to the hearsay rule on the basis of principle, McLachlin J. stated the principles that should govern the creation of such exceptions, and the admission of such evidence, to be the "necessity" of the evidence to prove a fact in issue, and the "reliability" of this evidence (at pp. 546-47):

The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as "reasonably necessary". The inadmissibility of the child's evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances which could establish the requirement of necessity.

The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. [Emphasis added.]

It is no accident that the criteria identified by McLachlin J. in *Khan* bear a close resemblance to the principle of necessity, and the circumstantial guarantee of reliability, referred to by Wigmore. Clearly, the facts of *Khan* are not similar to the facts on the present appeal. *Khan* was a case of hearsay evidence of statements made by a child, alleged to have been sexually assaulted, who was found to be insufficiently mature to be a competent witness. In the present case, the declarant would have been a competent witness had she been available to give evidence, but she is dead. However, *Khan* should not be understood as turning on its particular facts, but, instead, must be seen as a particular expression of the fundamental principles that underlie the hearsay rule and the exceptions to it. What is important, in my view, is the departure signalled by *Khan* from a view of hearsay characterized by a general prohibition on the reception of such evidence, subject to a limited number of defined categorical exceptions, and a movement towards an approach governed by the principles which underlie the rule and its exceptions alike. The movement towards a flexible approach was motivated by the realization that, as a general rule, reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination. The preliminary determination of reliability is to be made exclusively by the trial judge before the evidence is admitted.

This Court's decision in *Khan*, therefore, signalled an end to the old categorical approach to the admission of hearsay evidence. Hearsay evidence is now admissible on a principled basis, the governing principles being the reliability of the evidence, and its necessity. A few words about these criteria are in order.

The criterion of "reliability" -- or, in Wigmore's terminology, the circumstantial guarantee of trustworthiness -- is a function of the circumstances under which the statement in question was made. If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established. The evidence of the infant complainant in *Khan* was found to be reliable on this basis.

The companion criterion of "necessity" refers to the necessity of the hearsay evidence to prove a fact in issue. Thus, in *Khan*, the infant complainant was found by the trial judge not to be competent to testify herself. In this sense, hearsay evidence of her statements was necessary, in that what she said to her mother could not be adduced through her. It was her inability to testify that governed the situation.

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

As indicated above, the criterion of necessity must be given a flexible definition, capable of encompassing diverse situations. What these situations will have in common is that the relevant direct evidence is not, for a variety of reasons, available. Necessity of this nature may arise in a number of situations. Wigmore, while not attempting an exhaustive enumeration, suggested at §1421 the following categories:

- (1) The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing [by cross-examination]. This is the commoner and more palpable reason. . . .
- (2) The assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources The necessity is not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same.

Clearly the categories of necessity are not closed. In *Khan*, for instance, this Court recognized the necessity of receiving hearsay evidence of a child's statements when the child was not herself a competent witness. We also suggested that such hearsay evidence might become necessary when the emotional trauma that would result to the child if forced to give viva voce testimony would be great. Whether a necessity of this kind arises, however, is a question of law for determination by the trial judge.

It is now necessary to apply these principles to the evidence in question in this case. In my opinion, the hearsay evidence of what Ms. King said to her mother in the first two telephone conversations on the night of her murder satisfied the criteria of necessity and reliability set out by this Court in *Khan*. In my view, this evidence falls within the same principles. Ms. King is dead, and will never be able to testify as to what happened on the night of August 10 to August 11, 1986. The relevant direct evidence is therefore unavailable. Ms. King's mother's evidence as to what her daughter told her on the telephone that night was clearly necessary, in the sense that there was no possibility that evidence of what was said could be adduced through the declarant.

Moreover, in respect of the first two telephone conversations, there is no reason to doubt Ms. King's veracity. She had no known reason to lie. In my view, the hearsay evidence relating to the first two telephone conversations between Ms. King and her mother could reasonably be relied upon by the jury, as the traditional dangers associated with hearsay evidence -- perception, memory and credibility -- were not present to any significant degree.

In my view, it would be neither sensible nor just to deprive the jury of this highly relevant evidence on the basis of an arcane rule against hearsay, founded on a lack of faith in the capacity of the trier of fact properly to evaluate evidence of a statement, made under circumstances which do not give rise to apprehensions about its reliability, simply because the declarant is unavailable for cross-examination. Where the criteria of necessity and reliability are satisfied, the lack of testing by cross-examination goes to weight, not admissibility, and a properly cautioned jury should be able to evaluate the evidence on that basis.

However, I arrive at a different conclusion in respect of the contents of the third telephone conversation ("Larry has come back and I no longer need a ride"). While, as in the case of the first two telephone conversations, the unavailability of the declarant to testify satisfies the criterion of necessity, the conditions under which the statement was made do not, in my view, provide that circumstantial guarantee of trustworthiness that would justify its admission without the possibility of cross-examination. On the evidence, I cannot say that I am without apprehensions that Ms. King may have been mistaken, or, indeed, might have intended to deceive her mother on this account.

The evidence at trial disclosed that after making the second telephone call to her mother, Ms. King was observed to leave the hotel and get into a taxi that her mother had arranged to pick her up. She attempted to negotiate a fare to Detroit, but the taxi would not take her because, at this stage, she no longer had a credit card. She was then observed to leave the taxi and proceed immediately to the telephone booth from which she made the third telephone call. It is not, therefore, unreasonable to ask whether she actually had time to observe the respondent's return. It is at least possible that she was mistaken, and had simply observed a car which resembled the respondent's car. In any case, it does seem somewhat curious that she would make the statement "Larry has come back and I no longer need a ride" before having spoken to the respondent to ascertain whether he proposed to allow her to continue to travel with him.

In my view, it is highly significant that it was suggested in the course of the previous telephone conversations that one Philip come to pick up Ms. King and drive her back to Detroit. She was vehemently opposed to this suggestion, and there was some evidence that Philip had assaulted her on a previous occasion. When faced with the choice between a ride home with a person for whom she apparently had a great dislike, and of whom she was quite possibly frightened, on the one hand, and with telling her mother that Larry would take her home, on the other, Ms. King might well have preferred the latter alternative.

Moreover, with all due respect, it must be recalled that Ms. King was travelling under an assumed name and using a credit card which she knew was either stolen or forged. She was, therefore, at least capable of deceit. It may have been that she decided to lie to her mother to conceal some aspect of her activities or circumstances, or, indeed, simply to allay her mother's fears.

I wish to emphasize that I do not advance these alternative hypotheses as accurate reconstructions of what occurred on the night of Ms. King's murder. I engage in such speculation only for the purpose of showing that the circumstances under which Ms. King made the third telephone call to her mother were not such as to provide that circumstantial guarantee of trustworthiness that would justify the admission of its contents by way of hearsay evidence, without the possibility of cross-examination. Indeed, at the highest, it can only be said that hearsay evidence of the third telephone call is equally consistent with the accuracy of Ms. King's statements, and also with a number of other hypotheses. I cannot say that this evidence could not reasonably have been expected to have changed significantly had Ms. King been available to give evidence in person and subjected to cross-examination. I conclude, therefore, that the hearsay evidence of the contents of the third telephone conversation did not satisfy the criterion of

reliability set out in Khan, and therefore was not admissible on that basis.

To conclude, as this Court has made clear in its decisions in *Ares v. Venner*, *supra*, and *R. v. Khan*, *supra*, the approach that excludes hearsay evidence, even when highly probative, out of the fear that the trier of fact will not understand how to deal with such evidence, is no longer appropriate. In my opinion, hearsay evidence of statements made by persons who are not available to give evidence at trial ought generally to be admissible, where the circumstances under which the statements were made satisfy the criteria of necessity and reliability set out in Khan, and subject to the residual discretion of the trial judge to exclude the evidence when its probative value is slight and undue prejudice might result to the accused. Properly cautioned by the trial judge, juries are perfectly capable of determining what weight ought to be attached to such evidence, and of drawing reasonable inferences therefrom.

In the result, therefore, I conclude that the hearsay evidence of what Ms. King told her mother in the first two telephone calls satisfied the criteria of necessity and reliability set out in Khan, and was properly admissible on that basis. While the contents of the third telephone call satisfied the criterion of necessity as well, the events surrounding the making of that call were not sufficient to provide that circumstantial guarantee of trustworthiness which would justify their admission without the test of cross-examination. The Crown did not appeal in respect of the fourth telephone conversation, and therefore I make no comment as to the admissibility of hearsay evidence of its contents, other than to say that, in the event of a new trial, it will be governed by the same principles.

2. Other Grounds of Appeal

In my view the order for a new trial must be affirmed on the basis of at least one of two supplementary grounds of appeal raised by the respondent, as well as on the basis of my above conclusion in respect of the hearsay evidence of the third telephone call received at trial.

(a) Evidence of Hope Denard

As indicated above, the Crown led evidence from the witness Hope Denard, who testified that in the month prior to the murder she had gone on a trip to Canada with the respondent. On this trip, he apparently abandoned her at a restaurant after she refused to assist him in smuggling illegal drugs from Canada back to Detroit for him. In his closing remarks to the jury, counsel for the Crown made the following statement:

The accused, in my submission, was going to use Aritha King [the deceased] just like he did Hope Denard, to get a package of cocaine into the United States from Canada. The lifestyle of this accused is important in this case. We are talking about a murder. We are talking about a vicious murder and a mutilation.

The respondent argued that the evidence of Hope Denard had no relevance to motive and had the sole effect of suggesting to the jury that a person of the respondent's "lifestyle" or "character" would be more likely to commit a murder of this kind. The appellant's position, in contrast, is that this evidence was very relevant to establish the "context" in which the crime occurred, by suggesting a possible reason why Ms. King would have been travelling from Detroit to Canada with the respondent.

In his charge to the jury, the trial judge cautioned the jury with respect to the evidence of Hope Denard in the following terms:

Members of the jury, you have heard evidence that described Mr. Smith as a person whose activities and conduct may not be entirely acceptable to you and some of which may involve illegal activity. I refer to the admitted dealing with girls and drugs, etc. I wish to caution you, members of the jury, that the fact that he has dealt in drugs, etc. is no basis for a conviction for murder. This man is on trial for murder. He is not on trial for any other activity. Under no circumstances can you allow yourselves to be influenced by such conduct in your verdict on a charge of murder. I cannot ask you to ignore the conduct completely because it forms a part of the Crown's theory. You will recall the Crown's references to Menard [sic], etc. Therefore his conduct should only be considered together with all of the other evidence to determine whether he killed Miss King or not, as suggested by the Crown in his theory. The fact that he dealt with girls or drugs does not mean that he could kill or does not mean that he killed anyone. That, as I say, can only be considered with all of the other evidence on the issue of murder and only to the extent that it forms part of the Crown's theory. As I said, and I repeat, he is not on trial for dealing in drugs or girls. He is on trial for murder.

In my opinion, the evidence of Hope Denard was inadmissible, because it was irrelevant to the charge of murder against the respondent. It was evidence going to character, the implication being that a person who had the "character" of a drug smuggler would be more likely to have committed this murder. Such evidence, in my view, was not admissible to establish that the respondent committed this murder.

In *Cloutier v. The Queen*, [1979] 2 S.C.R. 709, the appellant was charged with importing a narcotic into Canada. The trial judge refused to admit into evidence certain items seized at the appellant's residence which included, inter alia, a manuscript extolling the virtues of marijuana, a metric scale, tweezers, and three pipes. The appellant was acquitted and the Court of Appeal ordered a new trial. On an appeal to this Court, it was decided that the articles in question were relevant only to show that the appellant had used marijuana, and, therefore, that they had no probative value in respect of the specific charge that he had committed the offence of importing a narcotic. Writing for the majority, Pratte J. said, at pp. 730-31, that:

The general rule as to the admissibility of evidence is that it must be relevant. . . .

For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter. . . .

Thus, apart from certain exceptions which are not applicable here, evidence is not admissible if its only purpose is to prove that the accused is the type of man who is more likely to commit a crime of the kind with which he is charged; such evidence is viewed as having no real probative value with regard to the specific crime attributed to the accused: there is no sufficient logical connection between the one and the other.

Pratte J. then proceeded, at p. 734, to apply this principle to the case before him:

The question to be resolved in the case at bar is whether the fact that the accused uses marijuana creates a logical inference that he knew or ought to have known that the dresser contained a narcotic at the time it was imported. To me there is no connection or nexus between either of these two facts. The use of marijuana by the accused certainly established that he knew of this narcotic, that he was in a position to identify it, but it had no probative value in relation to the guilty knowledge which must be proven by the prosecution. The evidence that the prosecution sought to introduce can have only one effect: that of raising suspicions against the accused solely for the reason that a marijuana user is more likely to import the substance illegally than someone who does not use the narcotic. In my view, this is precisely the type of evidence which cannot be admitted.

I would respectfully adopt the reasoning of the majority in Cloutier as applicable in the present case. The evidence of the respondent's past activities involving illegal drugs could only have had one effect: that of raising suspicions against him solely for the reason that a person who is involved in smuggling drugs is more likely to commit murder than a person who has not engaged in that activity. In my view, there was no sufficient nexus between the respondent's alleged drug smuggling activities and the ultimate issue at his trial: whether he murdered Aritha King. Consequently, this evidence ought not to have been admitted.

However, the evidence of Hope Denard was admitted, and its effect on the jury may have been highly prejudicial. In my opinion, moreover, the trial judge's caution to the jury was inadequate to remove this possibility of prejudice. Indeed, this prejudice could not have been eliminated except by an instruction to the jury that they must ignore the Crown's theory in respect of the evidence of Hope Denard altogether. The learned trial judge did not go this far.

I am unable to say that, had the evidence of Hope Denard not been received at trial, the verdict returned would necessarily have been the same. Consequently, I would not apply the curative provision of s. 686(1) (b)(iii) of the Criminal Code , and I would affirm the order of the Court of Appeal for a new trial.

(b)Use of Prior Statements by Witnesses

Certain witnesses, called by both parties, previously had made statements to the police, or testified at the preliminary inquiry. The respondent argued in his factum that the learned trial judge did not adequately instruct the jury as to the use to be made of past, unadopted, statements and testimony by these witnesses.

Specifically, Amy King, the mother of Aritha King, testified at the preliminary inquiry and at the trial that her daughter told her on the telephone that the respondent had returned to her at the hotel. Prior to the preliminary inquiry, she had made statements to the police which may have been inconsistent with her subsequent testimony. The trial judge failed to instruct the jury on the use they could properly make of these statements to the police.

Two of the witnesses relied upon by the respondent at trial to support his defence of alibi gave evidence at the preliminary inquiry which also may have been inconsistent with their trial testimony. When confronted with the apparent discrepancies in cross-examination, both maintained that their trial testimony was a correct statement of the events in question. The trial judge did not instruct the jury that they could not rely upon the earlier testimony of these witnesses unless they adopted it in the course of their trial testimony.

Finally, the trial judge correctly instructed the jury that they could accept and rely upon those portions of the respondent's statements to the police that they found to be true. However, in the absence of the appropriate limiting instructions, this may have been taken by the jury as a general instruction that they could rely upon the past testimony and statements of other witnesses, whether adopted or not at the trial, provided they found them to be true.

This supplementary ground of appeal was not pressed before us in argument, and in view of the conclusions I have reached in respect of hearsay evidence and the evidence of Hope Denard, it is not necessary to decide this ground as well. Indeed, as we have not been invited to reconsider the principles governing the differential use that may be made of past statements by an accused and by other witnesses, in my view it would not be desirable to make a pronouncement on this issue in the present appeal.

Conclusion

In the result, in view of my conclusions with respect to the admissibility of the hearsay evidence of the contents of the third telephone conversation, and in relation to the evidence of Hope Denard, I am of the opinion that the conviction should be quashed and a new trial ordered. The Crown's appeal is dismissed.

Appeal dismissed.

Solicitor for the appellant: The Attorney General for Ontario, Toronto.

Solicitors for the respondent: Cohen, Highley, Vogel & Dawson, London.

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