Citation: R v Okemow, 2019 MBCA 37 Date: 20190405
Docket: AR17-30-08857

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner
Madam Justice Karen I. Simonsen

B E T W E E N :

HER MAJESTY THE QUEEN	)	***B. F. Bonney*** *and* ***K. M. Henley*** *for the Appellant*
Respondent	)	***R. D. Lagimodière*** *and* ***C. P. R. Murray*** *for the Respondent*
- and -	)	
MICHAEL FRANK OKEMOW	)	*Appeal heard:* ***December 3, 2018***
(Accused) Appellant	)	*Judgment delivered:* ***April 5, 2019***

CAMERON JA

Introduction

[1] The accused appeals his convictions, after trial by judge and jury, for the second degree murder of Jordan Houle (the deceased) and attempted murder of Chad Hughes (Mr. Hughes). He was alleged to have shot each of them during the early morning hours of September 29, 2012, on a downtown Winnipeg street. He argues that the police violated his rights pursuant to section 8 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) to be secure against unreasonable search or seizure when they conducted a warrantless search of a residence at 650 Furby Street in Winnipeg (the

residence) in which he was located. That search resulted in the seizure of, among other items, a sawed-off rifle (the rifle) that the Crown contends was used in the shooting. As a result of the alleged breach, the accused asks that the evidence seized from the residence be excluded from admission in the proceedings against him.

[2] The accused also argues that the trial judge erred in declaring one of the Crown witnesses to be hostile and allowing the Crown to cross-examine the witness at large pursuant to the common law. He further submits that she erred when she admitted as evidence the police statement given by the witness pursuant to the principled approach to hearsay.

[3] For all of the reasons that follow, I am of the view that the accused did not have a reasonable expectation of privacy in the residence and therefore did not have standing to raise a section 8 argument. Alternatively, I would find that the search itself was lawful, having been conducted pursuant to the common law police duty and corresponding authority to keep the peace and preserve life in accordance with the test articulated in *R v Waterfield*, [1963] 3 All ER 659 (Ct Crim App); and *Dedman v The Queen*, [1985] 2 SCR 2.

[4] Finally, in my view, the trial judge did not err in declaring the witness to be hostile, allowing cross-examination of that witness or admitting his police statement in the trial.

[5] Therefore, for all of the reasons below, I would dismiss the appeal.

Background and Proceedings

[6] During the late night of September 28, 2012, the deceased, Mr. Hughes and Kyle Lessard (Mr. Lessard) were consuming alcohol and drugs on the second floor of a rooming house at 641 Sherbrook Street in Winnipeg. Around midnight on September 29, 2012, the three left to walk to a nearby beer vendor on Maryland Street (the vendor). At the same time, the accused, as well as Suede Soulier (Mr. Soulier), Todd Gustafson (Mr. Gustafson), Levi Anderson (Mr. Anderson), "Swag" and "Igor" were drinking in the yard and inside on the main floor of 641 Sherbrook Street. As the deceased, Mr. Hughes and Mr. Lessard were leaving the rooming house, Mr. Lessard became involved in a verbal confrontation with the accused, Igor and Mr. Anderson.

[7] After the confrontation, the deceased, Mr. Hughes and Mr. Lessard continued to walk to the vendor. As they were walking on the sidewalk on Maryland Street, someone fired shots at them. The deceased was hit and died of a single gunshot wound to the base of his head. Mr. Hughes sustained a gunshot wound to his leg. Mr. Lessard was able to escape unharmed.

[8] The police involvement began with a 911 call shortly after the incident. Their investigation of the scene resulted in the discovery of a bullet casing across the street from where the deceased was located.

[9] Later, during the evening of September 29, 2012, police received two calls relating to a male being sighted with a gun (the gun-seen calls). As later explained, each of these calls reported the sightings to be within the direct vicinity of each other and in the area where the shooting occurred.

[10] When responding to the second call, the police observed the accused outside of, and entering into, the residence. He was seen to be acting suspiciously. As I later elaborate, he appeared to be trying to hide something behind his back, shuffling sideways on the landing, entering the residence without turning his back to police. Upon the police attending to the residence and being allowed entry, the accused, along with a number of other individuals, were located inside. As a result of further police investigation, the accused was detained and the residence was searched. A live bullet was located on the stairs to the basement and the rifle with a casing inside was found in the basement. Police also located a sawed-off, 12-gauge shotgun in the basement.

[11] Prior to the commencement of the trial before the jury, a *voir dire* was held to determine the admissibility of the evidence seized at the residence. The accused argued, among other things, that the search of the residence violated his section 8 *Charter* right to be free from unreasonable search and seizure. The trial judge found that: i) the accused did not have standing to bring a section 8 application; ii) if the accused did have standing, the police search was lawful and carried out in a reasonable fashion, and iii) if the search was unreasonable, it would not be in the interests of justice to exclude the seized evidence pursuant to section 24.

[12] Expert firearms evidence showed that the casing seized from across the street from where the deceased was shot matched the rifle. The bullet extracted from the deceased had the same class characteristics as the rifle, but a comparison between that bullet and the rifle was inconclusive. However, the expert witness was able to confirm that the bullet extracted from the deceased was the same brand as the casing found across the street from the

scene of the shooting, the live bullet found on the stairs at the residence and the casing found inside the rifle at the residence.

[13] Aside from the above, the video-recorded police statements (the police statements) of Mr. Soulier, Mr. Gustafson and Mr. Anderson, as well as Mr. Gustafson's and Mr. Anderson's preliminary hearing transcripts, were entered as evidence. In their police statements, each of the witnesses provided evidence either implicating the accused as being in possession of a gun before or after the time of the incident or as being the shooter. Some of this evidence included admissions made by the accused to the witnesses that he had shot someone the night of the incident. These witnesses described the shooting as gang-related.

[14] A *voir dire* was held regarding the admission into evidence of Mr. Soulier's police statement. The trial judge declared Mr. Soulier to be a hostile witness pursuant to the common law and allowed him to be cross-examined at large. She admitted Mr. Soulier's police statement into evidence.

Grounds of Appeal

[15] The accused raises five grounds of appeal. The first three grounds relate to the dismissal of his *Charter* application to exclude the evidence seized from the residence. They are that the trial judge erred in determining that: 1) the accused did not have standing to assert a section 8 breach; 2) the search was lawful; and 3) the evidence should not be excluded pursuant to section 24(2). The two final grounds relate to the *voir dire* regarding Mr. Soulier's evidence. They are that the trial judge erred in: 4) declaring Mr. Soulier to be a hostile witness pursuant to the common law; and 5) admitting his police statement as evidence.

The *Charter* Application to Exclude the Rifle

The Evidence

[16] The evidence on the *voir dire* regarding the search of the residence was mainly comprised of evidence from the police and the landlord of the residence. In her reasons relating to the *Charter* application, the trial judge stated the evidence as follows:

- Detective Comte was an Acting Patrol Sergeant during the evening of September 29, 2012. With him in his patrol car was then Chief of Police McCaskill, who was nearing his retirement and had decided to work a shift with some of his officers (see *R v Okemow*, 2015 MBQB 140 (*Okemow 2015*) at para 29);

- Both were aware of the shooting that had occurred on Maryland Street during the early morning hours of that day (see para 69);

- At approximately 7:10 p.m., Det. Comte heard a report over the police radio of a disturbance in front of 645 Sherbrook Street. At approximately 7:26 p.m. he heard a report that there was a group of males in front of that same address and that one of them had a gun in his back pocket. The male with the gun was described as an Aboriginal male with tattoos on his arms and wearing a red ball cap. The males were seen to be cutting through 624 Sherbrook Street and walking towards Maryland Street. Detective Comte and Chief McCaskill were

assigned to the call and began driving around the area looking for a man with a gun (see para 30).

- At 7:42 p.m. Det. Comte heard another call indicating that a man had gone into a dump truck parked behind 645 Sherbrook Street and was hiding from police. This male was said to have a black handgun in the front waistband of his pants. He was described as being a black male wearing a green hat (see para 31).

- Detective Comte and Chief McCaskill located and searched the dump truck to no avail. During the course of the search they had their firearms drawn and pointed to the ground (see para 31).

- After they searched the dump truck, Det. Comte saw the accused acting suspiciously at the rear of the residence, which was located across the alley from the truck. The accused looked shocked to see them and his eyes and mouth were opened wide. He shuffled sideways on a small landing outside of the residence to the back door. He awkwardly opened the door, never once turning his back to the police. In Det. Comte's view, the accused was trying to hide something (see para 32).

- Detective Comte believed that the accused met the suspect's description—an Aboriginal male. Detective Comte and Chief McCaskill went to the back door of the residence and looked

through the door window. They observed people inside, including the accused. Detective Comte knocked on the door and the accused answered. Detective Comte told the accused that they were investigating a gun incident in the area. In response to Det. Comte's request to enter the house to talk to him, the accused responded, "Sure. Come in" (at para 34).

- The accused falsely identified himself by using the name of Bret Michaels, which Det. Comte recognised as being the lead singer in a rock band called Poison. In response to police questioning, the accused said that he stayed at the residence, but did not know who owned it. All of the other people in the residence stated that they were just visiting and did not know who owned it (see para 34).

- Other officers attended the residence. At the direction of Det. Comte they searched for any other people who might be in the residence. Detective Comte directed the accused to go outside with Det. Motuz to confirm his identity (see para 35).

- As Det. Comte was leaving the residence, he noticed a bullet on the basement stairs. He and other officers searched the basement for people, instead finding two firearms, one of which was the rifle alleged to have been used in the shooting earlier that morning (see para 35).

[17] It was also established that, while documents relating to several other persons were located at the residence, no documents relating to the

accused were found. The accused did not have a key to the residence on him when he was taken into custody.

[18] The landlord's evidence showed that, at the time of the incident, the residence had been leased to another individual and that the names of other persons authorised to live at the residence were set out in the lease agreement. The accused's name was not included on that list. It also showed that the landlord did not know of the accused or his presence at the residence and had not given him a key.

[19] The accused did not testify or provide any evidence at the *voir dire*.

Ground 1—Did the Trial Judge Err in Finding That the Accused Did Not Have Standing to Assert a Section 8 Breach?

The Law

[20] In *R v Edwards*, [1996] 1 SCR 128, the two inquiries engaged by a section 8 challenge were articulated by Cory J: "The first is whether the accused had a reasonable expectation of privacy. The second is whether the search was an unreasonable intrusion on that right to privacy" (at para 33).

[21] The issue of standing involves the determination of whether a person has a reasonable expectation of privacy in the place searched or the item seized. The *Edwards* case involved the assertion of a reasonable expectation of privacy in the private dwelling of a third party. Writing for the majority, Cory J stated that, in considering whether a claimant has a reasonable expectation of privacy, the court must examine "the totality of the circumstances" (at paras 31, 45(5)). He specified (at para 45(6)):

> The factors to be considered in assessing the totality of the circumstances may include, but are not restricted to, the following:
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> (i) presence at the time of the search;
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> (ii) possession or control of the property or place searched;
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> (iii) ownership of the property or place;
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> (iv) historical use of the property or item;
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> (v) the ability to regulate access, including the right to admit or exclude others from the place;
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> (vi) the existence of a subjective expectation of privacy; and
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> (vii) the objective reasonableness of the expectation.

[22] In *R v Tessling*, 2004 SCC 67, Binnie J, writing for the Court, noted that the "'totality of the circumstances' [test], laid particular emphasis on" the factors of the subjective expectation of privacy and the objective reasonableness of that expectation (at para 19). As he explained, the concept of territorial privacy is not per se the interest protected by section 8, which protects people and not places. Rather, the territory or space in question serves as an analytical tool to evaluate the reasonableness of a person's expectation of privacy (see paras 18, 22). The degree to which a person may assert a reasonable expectation of privacy in a space is contextual and may be diluted dependent upon the space in question (see para 22).

[23] In *R v Cole*, 2012 SCC 53, Fish J, writing for the majority of the Court, emphasised that an expectation of privacy that has been found to be reasonable, although diminished, will still be protected by section 8, subject to intrusion only by a reasonable law (see para 9).

[24] At the time she made her decision, the trial judge did not have the benefit of the recent Supreme Court of Canada case in *R v Jones*, 2017 SCC 60. That decision reflects the reality of a citizen's expectation of privacy in a rapidly advancing world of technology. The *Jones* case involved the question of whether the sender of a text message maintained a privacy interest in the storage of the message by the recipient's telecommunications provider. The Court held that an accused could rely on the Crown's theory of the case or any fact that it intended to prove to establish a subjective expectation of privacy. This new method of analysis created an exception to the general rule that an accused must establish any interference with his or her *Charter* rights on a balance of probabilities (see paras 9,19, 32-33).

[25] Despite the development of the law regarding the concept of privacy as it relates to advancing technology and protected spheres of personal information, the "totality of the circumstances" test continues to inform the reasonable expectation of privacy analysis (see, for example, *Tessling* at para 19; *Cole* at para 39; and *R v Reeves*, 2018 SCC 56 at para 12). That is, the factors identified in *Edwards* are still relevant to a privacy analysis today.

The Decision of the Trial Judge

[26] Applying *Edwards*, the trial judge found that the accused had not established that he had a reasonable expectation of privacy sufficient to ground a section 8 claim. She held that there was no evidence from the accused regarding his subjective expectation of privacy in the residence or his historical use of either the residence or the rifle seized. In her analysis of the accused's subjective expectation of privacy, the trial judge did not consider the theory of the Crown as the *Jones* case had not yet been decided.

[27] The trial judge rejected the accused's argument that significant weight should be attributed to the fact that he opened the door to allow the police entry, thereby demonstrating an ability to admit or exclude anyone from the residence. Regarding the accused's comments to the police to the effect that he stayed at the residence, the trial judge preferred the evidence of Det. Motuz, who clarified that the accused stated that he stayed at the residence but that he did not live there. The accused also stated that he did not know who the owner or renter of the residence was. In her view, a consideration of the "totality of the circumstances" as enunciated in *Edwards* (at para 31) led to the conclusion that the accused did not have a reasonable expectation of privacy in the residence and therefore did not have standing to assert that his section 8 rights were breached.

The Positions of the Parties

[28] The accused argues that the trial judge erred in refusing to find that he had a subjective expectation of privacy in the residence. He submits that she erred in considering that there was an absence of evidence confirming his subjective expectation of privacy. He emphasises that, pursuant to *Jones*, the theory of the Crown can now be relied on to establish a subjective expectation of privacy. He argues that the theory of the Crown was that the accused was in possession of the rifle, that he sent another associate to get the rifle from the residence just prior to the shooting and that the rifle was located in the residence at the same time as the accused. In his view, this theory was sufficient to ground a subjective expectation of privacy in the residence and the rifle.

[29] Next, the accused argues that the trial judge erred in refusing to find that the fact that the accused allowed the police into the residence was sufficient to establish control over who was permitted into, or excluded from, the residence.

[30] Finally, the accused argues that the trial judge placed too much emphasis on the fact that he did not provide evidence establishing a relationship between himself and the landlord, the lessee or the individuals named in the lease.

[31] The Crown agrees that *Jones* constitutes new law in the analysis of the subjective expectation of privacy. The Crown also reinforces that the exception created by *Jones* to the general law, that an accused must prove a *Charter* breach on a balance of probabilities, only applies to the consideration of an accused's subjective expectation of privacy and not the entire analysis as to whether that expectation was reasonable. The Crown argues that, applying the law as set out in *Jones*, the accused has not met the low threshold required to establish subjective intent.

[32] Finally, the Crown asserts that, even if a subjective expectation of privacy existed, it was not objectively reasonable. It maintains that an analysis of the "totality of the circumstances" leads to the conclusion that the accused did not have a reasonable expectation of privacy in the residence.

Standard of Review

[33] In *R v Farrah (D)*, 2011 MBCA 49, Chartier JA (as he then was) listed the components involved in appellate review of a judge's decision as to whether a *Charter* breach has occurred. He stated (at para 7):

> a) When examining a judge's decision on whether a *Charter* breach occurred, the appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.
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> b) The appellate court will then review the evidentiary foundation which forms the basis for the judge's decision to see whether there was an error. On this part of the review, the judge's decision is entitled to more deference and, absent palpable and overriding error, the facts as found by the judge should not be disturbed (see *Grant* [*R v Grant*, 2009 SCC 32] at para. 129).
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> c) The appellate court will also examine the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness (see *R. v. Shepherd*, 2009 SCC 35 at para. 20, [2009] 2 S.C.R. 527).

[34] In this case, the accused does not assert that the trial judge made a palpable and overriding error regarding the facts. Rather, he argues that she erred in her determination of the legal test to be applied and in her application of the facts to the legal test. Thus, the standard of correctness applies.

Analysis

[35] I agree with the accused that he is entitled to rely on the change in the law occasioned by *Jones* (see *R v Wigman*, [1987] 1 SCR 246 at paras 29-30). Thus, he is entitled to rely on the theory of the Crown in asserting that he had a subjective expectation of privacy in the residence.

[36] A review of the Crown's closing submission demonstrates that the Crown urged the jury to connect the accused to both the residence and the rifle. For example, the Crown relied on the following:

- When Mr. Soulier and the accused arrived at the residence on the night of the shooting the accused said to Mr. Soulier, "This is my place, welcome to my place."

- The rifle that Mr. Anderson and Mr. Gustafson described as being in the accused's possession on the night of the shooting was found "at [the residence] with [the accused] less than 24 hours after the shooting."

- The clothing that Mr. Gustafson said the accused was wearing at the time of the shooting was located underneath the steps leading to the residence.

- In submitting that it made sense for the accused to stash the rifle at the residence, the Crown stated its theory was that the rifle was the property of a local street gang of which the accused was a member and the residence was the gang's safe house. In this regard, the Crown stated that "[the rifle] stayed with [the accused] at his place."

[37] While more examples could be listed, it is evident that the Crown relied on the accused's connection to the residence and the rifle. In addition, it is important to recall the accused's repeated admissions to police at the time of the search that he "stayed" there (*Okemow 2015* at para 8). In my view, the above was sufficient to demonstrate the accused's subjective expectation

of privacy in accordance with the law enunciated in *Jones*, recognising that the standard to meet this requirement has never been "a high hurdle" (*Jones* at para 20 quoting *R v Patrick*, 2000 SCC 17 at para 37).

[38] Other factors favourable to the accused in an *Edwards* analysis include the fact that he was present at the time of the search and that he appeared to exercise some degree of control over the residence by allowing the police entry.

[39] On the other hand, in order to assess the objective reasonableness of the accused's expectation of privacy, it is helpful to remember the facts in the *Edwards* decision. That case involved the storage of drugs by an accused in his girlfriend's apartment. Despite the fact that the accused had a key to the apartment, stored some of his personal belongings there and was described by his girlfriend as a visitor who "stayed over occasionally" (at para 47), the majority of the Court determined that he did not have a reasonable expectation of privacy in the premises.

[40] In addition, there were factors which would negate the objective reasonableness of the accused's expectation of privacy. For example, he was not the owner of the residence. He did not lease the residence and was not listed on the lease as a person who was permitted to reside there. The person who had leased the residence in July 2012 had paid the rent up until the end of September 2012 and then ceased paying it. The landlord testified that he did not know the accused, had not met him, had not given him a key to the residence and did not receive any rent money from him. Upon his arrest, the accused was not in possession of a key to the property. There was no evidence of the accused's historical use of the property.

[41] The trial judge rejected the accused's argument that he had the authority to admit or exclude others on the basis that he opened the door when police arrived. She stated (*Okemow 2015* at para 19):

> In my view, little can be inferred from this bare fact in the absence of other evidence regarding his connection to the residence, and in the face of the evidence regarding others' occupancy of the residence. Less than three months prior to the search, the [residence] had been rented to Curtis Meeches who had listed three other people whom he expected would occupy the residence. They were authorized by the lease to occupy the [residence]. One of them was Gregory Myerion. An Indian Status card in his name found in a bedroom suggests that he may have been living or staying at the [residence]. There is no evidence of the relationship between the accused and Curtis Meeches, or between the accused and any of the other persons authorized to occupy the residence. Utility bills for the [residence] were apparently directed to another individual. While there is no direct evidence of who was living there, what this evidence suggests is that a number of people may have had access to the [residence]. It does not support the inference that the accused had the authority to regulate access to it.

[42] In finding that the accused did not have a reasonable expectation of privacy in the residence, the trial judge relied on *Edwards* and *R v Guiboche*, 2004 MBCA 16. She recognised that, in those cases, there was evidence that the accused actually lived somewhere other than the places searched, but had access to the premises in question. She noted that, in this case, there was no evidence as to where the accused lived. However, the trial judge accepted the evidence of Det. Motuz, who testified that the accused told him that he stayed at the residence but that he did not live there.

[43] Considering all of the above factors and applying the test as enunciated in *Edwards* and refined in *Jones*, in my view, while the accused

has established a subjective expectation of privacy in the residence, he has not established on a balance of probabilities that his expectation was objectively reasonable. Thus, I would not interfere with the finding of the trial judge that the accused did not have a reasonable expectation of privacy in the residence and therefore had no standing to make a section 8 application.

[44] However, if I am wrong in this conclusion, I will also consider whether the trial judge erred in finding that the search of the residence was lawful and reasonable.

Ground 2—Did the Trial Judge Err in Finding the Search Was Lawful?

The Decision of the Trial Judge

[45] Recognising that the search in this instance was warrantless and therefore presumptively unreasonable, the trial judge stated that the onus rested on the Crown to show on a balance of probabilities that the search was reasonable. She noted that reasonableness can be shown where either statutory or common law authorises the search. In this case, the search was not authorised by statute. Thus, relying on the test enunciated in *Waterfield* and *Dedman*, the trial judge considered whether the authority to search was ancillary to the common law police duties to protect life and property, as well as the investigation and prevention of crime.

[46] The trial judge considered the facts of this case to be similar to those in *R v Clayton*, 2007 SCC 32 (police detention of automobiles in response to a gun-seen call); and *Farrah* (search of residence for a gun resulting from a sniffer-dog search for an accused in a gun-related robbery). She found that the police were dealing with "an unknown, unpredictable, and potentially

dangerous situation" (*Okemow 2015* at para 70), and concluded it was reasonable for them to search the residence for other persons pursuant to their common law duty to keep the peace and preserve life.

Positions of the Parties

[47] The accused argues that the fact that Det. Comte did not hear that the male involved in the second call was black (as opposed to Aboriginal) erroneously led him to subjectively believe that the actions of the accused at the back door of the residence were suspicious. He says that, based on the fact that the accused is Aboriginal, the suspicion lacked objectivity.

[48] Next, the accused submits that Det. Comte was not justified in peering into the window of the residence before he knocked on the door. Relying on *R v Kokesch*, [1990] 3 SCR 3, he argues that such actions constituted a warrantless perimeter search.

[49] Finally, he argues that the trial judge erred in her application of the common law police powers to the facts of this case. In his view, *Clayton* and *Farrah* are distinguishable and should not have been relied on by the trial judge.

[50] The Crown disputes that the actions of the police constituted a warrantless perimeter search aimed at collecting evidence. Its position is that, given all of the circumstances, the police were duty-bound to investigate and approach the residence. It argues that the police had an implied licence to approach the residence, that they were invited into the residence and that, as the circumstances unfolded, the need for further measures, including the

search, arose. The Crown argues that the trial judge did not err in her application of the *Waterfield/Dedman* line of authority.

Analysis

[51] At the outset, in my view, the accused has not shown that the trial judge erred in not finding that Det. Comte was negligent in deciding to attempt to speak with him because the male described in the second call was said to be black while the accused is Aboriginal. As noted by the trial judge, two other officers testified that they missed that the second call described a black male. In any event, the first call described an Aboriginal male. As noted by the trial judge, the accused was observed in a location that was very close to each of the areas of interest, within three minutes of the second call being broadcast and within 20 minutes of the first call. In my view, it would have been negligent if Det. Comte had not tried to speak with the accused.

[52] Likewise, the argument that Det. Comte conducted an illegal perimeter search when he approached the residence, looked through the door window and knocked on the door can be disposed of summarily. In *Kokesch*, the police descended upon a 75 to 100 yard driveway to search the area surrounding a house that they suspected was involved in a marihuana grow-operation. The purpose of their attendance was to gather information that would support a search warrant. It was undisputed that they did not otherwise have sufficient grounds to obtain one. Once near the house, they made observations that bolstered their grounds for belief that there was a grow-operation inside of the residence and enabled them to obtain a search warrant. In those circumstances, the search was held to breach section 8 of the *Charter*.

[53] The trial judge distinguished the *Kokesch* decision. She found that Det. Comte attended the residence to speak to the accused and address a public safety concern. Relying on *R v MacDonald*, 2014 SCC 3 at para 26, she found that the police had an implied licence to approach the residence and knock on the door. She further found that the window was accessible to anyone who knocked on the door and that when Det. Comte looked through the window, he did not exceed the implied licence. Thus, she held that Det. Comte's actions in this regard did not constitute a search.

[54] In my view, the accused has not shown that the trial judge erred in distinguishing the *Kokesch* decision. The police did not approach the residence with a view to obtaining evidence. They were there to investigate the recent gun-seen calls that were in close proximity to the residence as well as to speak with the male that was seen acting suspiciously at the rear of the residence.

[55] The real issue in this case is whether the search of the residence for other people, including the owners or anyone who might be injured or in possession of a gun, was lawful pursuant to the common law duty and corresponding authority of the police to keep the peace and preserve life. In circumstances such as this, the requirements to be met were summarised in *R v Gomboc*, 2010 SCC 55 (at para 144):

> The Crown attempts to show common law authorization by relying upon the ancillary police powers doctrine articulated in *R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.). To succeed, the Crown must show that (1) the search "fell within the general scope of the duties of a police officer under statute or common law"; and (2) the "interference with liberty (was) necessary for the carrying out of the particular police duty and (was) reasonable, having regard to the nature of the liberty interfered with and the

> importance of the public purpose served by the interference": *Dedman v The Queen*, [1985] 2 S.C.R. 2, at p. 35.

[56] In *R v Godoy*, [1999] 1 SCR 311, the Supreme Court of Canada recognised a common law duty to enter and search a residence in response to a 911 call, despite being refused entry by the occupant. Lamer CJC specifically recognised the duty of the police to "protect life and safety" (at para 23).

[57] In *Farrah*, Chartier JA (as he then was), quoting from *Godoy* and *R v Simpson* (1993), 79 CCC (3d) 482 (Ont CA), summarised the law in relation to the second prong of the test. He stated (at para 40):

> In *Godoy*, and more recently in *R. v. Clayton*, 2007 SCC 32 at para. 25, [2007] 2 S.C.R. 725, the Supreme Court of Canada adopted the factors developed by Doherty J.A. in *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) to determine the "justifiability" of police conduct when it interferes with individual liberties (*Godoy* at para. 18):
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> > In *Simpson*, *supra*, Doherty J.A. applied both *Waterfield*, *supra*, and *Dedman*, *supra*, and described what is meant by a "justifiable" use of police power as follows (at p. 499):
> >
> > > ... the justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference.

[58] Chartier JA further observed (at para 41):

> In addition to these "justifiability" factors, there must be an evidentiary basis underlying the police safety concern (see *R. v.*

> *Cornell*, 2010 SCC 31 at para. 20, [2010] 2 S.C.R. 142, and *R. v. Golub (D.J.)* (1997), 102 O.A.C. 176 at para. 48). The police must not be speculating or acting on a hunch. They must have reasonable grounds for the concern (see *Cornell* at paras. 20-22).

[59] In *MacDonald*, LeBel J, writing on behalf of a majority of the Supreme Court of Canada, affirmed that the "officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk" (at para 31 quoting *R v Mann*, 2004 SCC 52 at para 40).

[60] He explained (at para 32):

> A search that is reasonably necessary to eliminate threats to the safety of the public or the police — which I will term a "safety search" — will generally be conducted by the police as a reactionary measure. In other words, although such searches may arise in a wide variety of contexts, they will generally be unplanned, as they will be carried out in response to dangerous situations created by individuals, to which the police must react "on the sudden". Binnie J.'s observation in *A.M.* [*R v AM*, 2008 SCC 19] in relation to sniffer-dog searches that "the police are generally required to take quick action guided by on-the-spot observations" (at para. 90) is equally applicable to safety searches. Thus, safety searches will typically be warrantless, as the police will generally not have sufficient time to obtain prior judicial authorization for them. In a sense, such searches are driven by exigent circumstances. Even if exigent circumstances exist, however, "safety searches" must be authorized by law.

[61] In this case, the trial judge conducted a thorough review of the law. She engaged in a detailed analysis of how the law applied in the circumstances. She concluded that the police were acting in response to a real public safety concern and that their actions were justifiable and supported by the evidence. She stated (*Okemow 2015* at paras 69-70):

> [The police] were not merely speculating or acting on a hunch. There was information about an aboriginal male with a gun in the area of 645 Sherbrook Street, which is just across the back laneway from [the residence]. There was further information about a black male in that precise area hiding in a green dump truck with a gun. The information was confirmed to the extent that the truck was located where the caller said it would be. There had been a shooting in that area just the day before. The officers had reasonable grounds for their concern about public safety: ***Farrah***, *supra*, at para. 42.
>
> Within minutes of this information being received by the officers, the accused, fitting the first description given of a man in possession of a handgun, was observed to be acting in a manner that suggested he was trying to hide something on his person, and entering a residence. The officers did not use force to enter the house. They entered with the accused's consent. Upon doing so, the accused gave what appeared to be a false name, and the owner or lawful occupant of the home could not be identified. It was reasonable for the officers to search the residence for other persons. Like the officers in the ***Farrah*** case, the police were dealing with an unknown, unpredictable, and potentially dangerous situation.
>
> [emphasis added]

[62] In my view, the trial judge did not err in her assessment of the law or the application of the law to the facts.

[63] Having stated the above, I am also cognizant of the very high value that the Supreme Court of Canada has placed on territorial privacy within a dwelling house. I am also aware that this case is factually different in some respects than the type of cases which have been found to authorise a search on the basis of common law duty and authority of the police to preserve the peace and protect the public.

[64] For example, in *Godoy*, the police were responding to a 911 call relating to a private dwelling. In *Clayton*, the police were responding to a call about persons waving guns in the parking lot of a bar. In *Farrah*, the police used a sniffer-dog, which led them from the scene of the crime to the place searched. In each instance, the search in question was conducted as a result of a 911 call directly related to the residence searched (*Godoy*), a 911 call and subsequent suspicious activity (*Clayton*) or from reasonable grounds identifying the place searched as a result of a sniffer-dog search (*Farrah*).

[65] In this case, the police were responding to a call identifying a dump truck and one regarding 645 Sherbrook Street as the places of the concern—not the residence. However, based on all of the factual circumstances surrounding the search as found by the trial judge, in my view, it was reasonable for Det. Comte to approach the residence and ask to speak to the male he observed. It was the accused's actions in providing a false name and being unable to identify who was lawfully entitled to be in the residence that caused the situation to escalate. In light of the fact that no one else claimed any authority over the residence, considering the constellation of circumstances in this case, the following paragraph in *Farrah* applies (at para 44):

> Although the police had reasonable grounds for concern, they had no way of knowing, with certainty, who or what they would find upon entry into the suite. They were confronting an unpredictable and potentially volatile situation with a real possibility that the safety of the public or police officers may be imperilled if time were taken to obtain a warrant. Waiting for a warrant was simply not a viable option. There may have been an injured party in that suite, a hostage may have been taken or an armed suspect may have suddenly exited the suite. Immediate action was required to address these safety concerns. There is considerable authority on

> the need for the police to act quickly when a gun is involved to address the risk posed to the community and the police (see *R. v. Clayton*, 2007 SCC 32 at paras. 36, 108; [2007] 2 S.C.R. 725; *Reference re Firearms Act (Can.)*, 2000 S.C.C. 31 at para. 33; [2000] 1 S.C.R. 783, at para. 36; *R. v. M. (M. R.)*, [1998] 3 S.C.R. 393 at para. 52; and *R. v. Felawka*, [1993] 4 S.C.R. 199 at 211).

[66] The Supreme Court of Canada has reinforced that section 8 does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present (see *R v Cornell*, 2010 SCC 31 at para 20 quoting Slatter JA in *R v Cornell*, 2009 ABCA 147 at para 24).

[67] Therefore, while this case may be somewhat factually different in that the place searched was not the same place as was identified in the calls, the trial judge did not err in finding that the police had reasonable grounds to search for people in the residence due to safety concerns.

Ground 3—Did the Trial Judge Err in Refusing to Exclude the Evidence Pursuant to Section 24(2) of the *Charter*?

[68] The accused argues that the trial judge erred in finding that, if she was wrong regarding the legality of the search, the evidence should not be excluded pursuant to section 24(2).

[69] Based on my finding that the search was reasonable, it is not necessary to engage in a full section 24(2) analysis. Nonetheless, I would note that, while the decision of whether to exclude evidence is a question of law, where the appropriate factors have been considered by the trial judge in a section 24(2) assessment, the standard of review is one of considerable deference (see *Farrah* at a para 7(d)). A review of the trial judge's reasons

evidences that she correctly applied the test as set out in *R v Grant*, 2009 SCC 32, and considered all of the appropriate factors. Her decision is entitled to deference.

[70] Therefore, for all of the above reasons, I would not disturb the trial judge's decision dismissing the accused's *Charter* motion.

Ground 4—Did the Trial Judge Err in Declaring Mr. Soulier to Be a Hostile Witness Pursuant to the Common Law?

Background

[71] On October 1, 2012, Mr. Soulier was identified as a person who might have information regarding the shooting. After engaging in an interview with police that was not video-recorded, Mr. Soulier agreed to give a sworn video-recorded statement (the statement).

[72] In the statement, Mr. Soulier said that, at the time of the incident, his aunt resided at 645 Sherbrook Street. He said that the accused was his cousin's boyfriend. On the evening prior to the shooting, Mr. Soulier was on his way to his aunt's when he was chased by the accused and others. Apparently, the accused believed that Mr. Soulier belonged to a rival gang. After straightening out the misunderstanding and confirming that the two knew each other through Mr. Soulier's cousin, Mr. Soulier went with the accused to 641 Sherbrook Street. There, he was introduced to Mr. Anderson, Igor and Swag. He stated that he observed Igor give the accused a weapon and the accused put it under his sweater. He said it looked like a shotgun.

[73] Mr. Soulier said that, after he observed the weapon exchange, the accused and Swag left, heading towards the Maryland vendor. While they were gone, he heard a gunshot. Next, the accused came running up to 641 Sherbrook. At the suggestion of the accused, they went across the back lane to the residence. The accused indicated to Mr. Soulier that it was his place. Later, at the request of the accused, Mr. Soulier walked with him to the Maryland vendor to get some beer. Mr. Soulier said there were police cruisers and tape in the area. On the way back from the vendor, Mr. Soulier said the accused stated, "I killed a guy, man" and "Yeah, man, I'm a fuckin' killer, you know . . . I fuckin' killed a guy and I fuckin' don't give a fuck." He also said, "That gunshot you heard man that was me when I went and shot a guy."

[74] Mr. Soulier was called as a witness at the trial. During his direct examination he denied any memory of having heard a gunshot. He also stated that he could not remember the incriminating comments that the accused had made to him. He said that if the accused did make those comments, he was not serious. In response to questioning by the Crown, Mr. Soulier stated that a review of the statement would not help him refresh his memory. During a break in Mr. Soulier's direct examination, the Crown initially indicated that it was seeking to cross-examine him pursuant to section 9(2) of the *Canada Evidence Act*, RSC 1985, c C-5 (the *CEA*). The Crown said that it intended to commence a *voir dire* on a blended application with a section 9(2) *CEA* and a "K.G.B." application to have the statement admitted pursuant to the principled approach to hearsay (see *R v B (KG)*, [1993] 1 SCR 740). At that point, the trial judge reviewed the statement and determined that there were indeed inconsistencies between his evidence in direct examination and the

statement. The trial judge then invited defence counsel to cross-examine Mr. Soulier with respect to whether the statement had been proven.

[75] During the course of cross-examination by defence counsel, Mr. Soulier stated that he did not have a good memory about what happened on the evening of the shooting or of when he gave the statement. He said that he felt that police were trying to put words in his mouth when they interviewed him.

[76] After Mr. Soulier was cross-examined by defence counsel regarding the circumstances under which he had made the statement, but before submissions on the section 9(2) *CEA* motion were complete, the Crown applied to cross-examine Mr. Soulier as a hostile witness pursuant to the common law.

[77] The trial judge conducted a careful analysis of the common law regarding hostile witnesses and its interplay with sections 9(1) and 9(2) of the *CEA* (see *R v Okemow*, 2017 MBQB 150 (*Okemow 2017*)).

[78] Briefly, she determined that she would not follow the concurring judgment of Dysart JA in the Manitoba Court of Appeal case of *Rex v Deacon*, (1948), 91 CCC 1. In that case, Dysart JA held that when a witness was found to be adverse pursuant to section 9(1) of the then *CEA* (of 1927) he or she was "subject to such cross-examination as fully and freely as though he were the witness of the opposite party" (at p 15). The trial judge noted that the wording of section 9(1) of the current *CEA* is the same as it was in 1927.

[79] Next, the trial judge considered S Casey Hill, Louis P Strezos & David M Tanovich, *McWilliams' Canadian Criminal Evidence*, 5th ed

(Toronto: Thomson Reuters, 2013) vol 2 (loose-leaf, date accessed 2017) and subsequent jurisprudence stating that a finding of adversity pursuant to section 9(1) of the *CEA* only permits a limited form of cross-examination. She noted that it forbids "cross-examination aimed at eliciting favourable evidence as opposed to neutralizing the harmful testimony that the witness has already given, or restricting cross-examination to matters pertaining to a prior inconsistent statement" (at para 10 quoting *McWilliams* at para 21:20.30.60.40).

[80] Citing *Wawanesa Mutual Insurance Co v Hanes* (1961), 1 CCC 176 (Ont CA), the trial judge noted that jurisprudence subsequent to *Deacon* has found a difference between a hostile witness at common law and a witness found to be adverse under section 9(1) of the *CEA*. See, for example, *R v Vivar*, 2004 CarswellOnt 5 (Sup Ct J); *R v Ethier* (2005), 197 CCC (3d) 435 (Ont Sup Ct J); and *R v McAllister*, 2008 NSCA 103.

[81] Importantly, she relied on the more recent case of *R v Figliola*, 2011 ONCA 457. In that case, after reviewing the jurisprudence (including some of the cases mentioned above) regarding the difference between a ruling of adversity pursuant to section 9(1) of the *CEA* and a common law declaration of hostility, the Court stated (at paras 50-51):

> This jurisprudence confirms that an "adverse" witness is one who is opposed in interest or unfavourable in the sense of opposite in position to the party calling that witness, whereas a "hostile" witness is one who demonstrates an antagonistic attitude or hostile mind toward the party calling him or her. In R. v. Coffin, [1956] S.C.R. 191, [1956] S.C.J. No. 1, 114 C.C.C. 1, at p. 213 S.C.R., p. 24 C.C.C., Kellock J. described a hostile witness as one who does not give his or her evidence fairly and with a . . . desire to tell the truth because of a hostile animus towards the prosecution.

> The common law right of a party to cross-examine his or her own witness at large with leave of the trial judge, if in the judge's opinion the witness is "hostile", is not affected by s. 9(1) of the Canada Evidence Act: Cassibo, per Martin J.A., at p. 302 O.R. Section 9 makes no reference to a witness "proving hostile" and contains no suggestion of a right to cross-examine at large. As Porter C.J.O. pointed out in Wawanesa, a declaration of hostility and its consequences are something that arise "in addition (to)" a finding of adversity. At pp. 507-508 O.R., after reviewing the steps to be taken by a judge in deciding whether to make a declaration of adversity and the factors to be considered, he stated that "(t)he Judge, if he declared the witness hostile, might, in addition permit him to be cross-examined" (emphasis added). It follows that a declaration of adversity pursuant to s. 9(1) was not, itself, sufficient to trigger a right in the Crown to cross-examine [the witness] generally as to all matters in issue.
>
> [emphasis added]

[82] In my view, the trial judge did not err in her review of the law and the finding that there is a difference between an adverse witness pursuant to section 9(1) of the *CEA* and a finding that a witness is hostile pursuant to the common law. More is required to find a witness hostile and thereby permit the party calling him or her to cross-examine at large.

[83] Indeed, the accused does not take exception to the law as outlined by the trial judge. It is his submission that, while Mr. Soulier may have been adverse, there was no basis for a finding of hostility. This was the same argument that he made before the trial judge.

[84] In determining the issue of hostility, the trial judge considered the following factors listed in *McWilliams* (at para 21:20.30.50.10):

> [T]he demeanour and general attitude of the witness, the substance of his or her evidence, any motive for animosity against the calling party or favouritism towards that party's opponent, a prior inconsistent statement and the circumstances in which it was made, any explanation for recanting a prior inconsistent statement, a failure to tell the calling party that the prior inconsistent statement would be recanted at trial, a refusal to attempt to refresh his or her memory.

[85] She stated (*Okemow 2017* at para 21):

> [Mr.] Soulier was a witness hostile to the prosecution. I made that finding based on the inconsistencies between Mr. Soulier's testimony and his statement to the police, the answers he gave in direct examination by the Crown and in the *voir dire*, and his manner when he testified. Mr. Soulier's motivation was unclear and may have included any number of personal considerations, but his intention to undermine the Crown's case was clear. I found that he was manifestly hostile and held a demonstrated animus towards the prosecution.

[86] The trial judge acknowledged that Mr. Soulier was not "aggressive or angry in his manner of giving evidence" (at para 26). However, she rejected the accused's argument that a finding of hostility required that she find that Mr. Soulier be motivated by dislike or enmity towards the police or Crown. She also rejected his argument that a desire for self-protection on behalf of the witness could not support a finding of hostility. She concluded that, while the motivation of the witness may be a factor to consider, "[w]hat is required is an intention to undermine or thwart the prosecution's case" (at para 28). In her view, it was clear that Mr. Soulier had attempted to thwart the Crown's case (see para 29).

[87] In my view, the trial judge undertook a detailed examination of the law. She did not err in law in determining that it was not a requirement that

Mr. Soulier be motivated by dislike or enmity in order for a finding of hostility to be made. She gave clear, accurate and considered reasons for declaring Mr. Soulier hostile.

[88] Having found that the trial judge did not err in her analysis of the law nor her application of it, her determination to allow the Crown to cross-examine Mr. Soulier was discretionary and entitled to deference (see *R v Pires; R v Lising*, 2005 SCC 66 at para 46). Therefore, I would not interfere with it.

Ground 5—Did the Trial Judge Err in Admitting the Statement as Evidence?

[89] After the trial judge's ruling regarding hostility, the Crown was permitted to cross-examine Mr. Soulier at large. The Crown then applied to have the statement admitted pursuant to the principled exception to the hearsay rule (see *B (KG)*; *R v U (FJ)*, [1995] 3 SCR 764; *R v Khelawon*, 2006 SCC 57; and *R v Youvarajah*, 2013 SCC 41). Of note, at that time, the Supreme Court of Canada had not yet released its decision in *R v Bradshaw*, 2017 SCC 35.

[90] Pursuant to the principled exception to the hearsay rule, an out-of-court statement may be admitted on the basis of necessity and reliability (see *Khelawon* at para 1). As stated in *Khelawon* (at para 2), "The trial judge acts as a gatekeeper in making this preliminary assessment of the 'threshold reliability' of the hearsay statement and leaves the ultimate determination of its worth to the fact finder" (see also para 3).

[91] The accused admits that necessity was shown. However, he argues that the threshold reliability has not been shown. First, as he did at trial, he submits that the statement did not meet the test of threshold reliability because Mr. Soulier was subject to a somewhat lengthy, pre-statement interview that was not video-recorded.

[92] The trial judge stated that the decision of the police in this regard was "difficult to understand." She said that none of the proffered reasons for not recording the pre-statement interview "struck [her] as compelling."

[93] On the other hand, quoting *Youvarajah* at para 35, she noted that the fact that the witness was available for cross-examination was "[t]he most important factor supporting the admissibility of a prior inconsistent statement of a non-accused witness for the truth of its contents". Citing *B (KG)*, she also remarked on the importance of the fact that the statement was given pursuant to an affirmation, after having been advised of the consequences of giving such a statement and that it was video-recorded. She also stated:

> [T]he witness affirmed to tell the truth; the interview on video was conducted mostly using open-ended rather than leading questions; while there is some reference in the statement to the pre-statement interview, these references are minimal and there are no more than a handful; the references that are made to the prior interview or what was said before are not presented to the witness in a challenging way; the pre-statement interview, while not recorded verbatim, was recorded in notes by Officer Philippot, and the witness acknowledged their accuracy by endorsing the notes with his initials; the witness appears, during the statement, to be engaged, relaxed and cooperative throughout; while the witness said that he felt pressured, this is not evidenced in the video; the witness does not allege any specific threatening, aggressive or abusive conduct on the part of the officers.

[94] Based on all of the above, the trial judge found the statement to have met the test of threshold reliability. She continued to find it voluntary and therefore admissible. In my view, she did not err in finding that the failure to video record the pre-statement interview was outweighed by all of the other traditionally accepted indicia of procedural reliability.

[95] On appeal, the accused also relies on the most recent statement of the law regarding the principled approach outlined in *Bradshaw*. He argues that, because the Crown did not call evidence corroborating Mr. Soulier's statement, it could not be proven to be substantively reliable.

[96] As explained in *R v Atkinson et al*, 2018 MBCA 136 (at para 64):

> [T]here are two approaches to establishing threshold reliability—procedural reliability and substantive reliability. While the two are somewhat distinct concepts, each are geared to showing that the hearsay in question is "sufficiently reliable to overcome the specific hearsay dangers it presents" (*Bradshaw* at para 32 citing *Khelawon* at para 49). However, it is important to recognise that these concepts are not mutually exclusive and "factors relevant to one can complement the other" (*Bradshaw* at para 32 quoting *R v Couture*, 2007 SCC 28 at para 80).

[97] In *Bradshaw*, Karakatsanis J described procedural reliability as follows (at para 28):

> *Procedural* reliability is established when "there are adequate substitutes for testing the evidence", given that the declarant has not "state(d) the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination" (*Khelawon*, at para. 63). These substitutes must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement (*Khelawon*, at para. 76; *Hawkins* [*R v Hawkins*, [1996] 3 SCR 1043], at para. 75; *Youvarajah* at para. 36). Substitutes for traditional safeguards include a video recording of

> the statement, the presence of an oath, and a warning about the consequences of lying (*B. (K.G.)*, at pp. 795-96). However, some form of cross-examination of the declarant, such as preliminary inquiry testimony (*Hawkins*) or cross-examination of a recanting witness at trial (*B. (K.G.)*; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764), is usually required (*R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at paras. 92 and 95). In this respect, I disagree with the Court of Appeal's categorical assertion that safeguards relevant to assessing procedural reliability are only "those in place when the statement is taken" (para. 30). Some safeguards imposed at trial, such as cross-examination of a recanting witness before the trier of fact, may provide a satisfactory basis for testing the evidence.

[98] The significance of substantive reliability was considered in *Bradshaw* (at para 30):

> A hearsay statement is also admissible if *substantive* reliability is established, that is, if the statement is inherently trustworthy (*Youvarajah*, at para. 30; *R. v. Smith*, [1992] 2 S.C.R. 915, at p. 929). To determine whether the statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement (*Khelawon*, at paras. 4, 62 and 94-100; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 55).

[99] The heart of the decision in *Bradshaw* concerned the nature of evidence required in the analysis of substantive reliability. Karakatsanis J clarified that, in order to satisfy substantive reliability, "corroborative evidence must go to the truthfulness or accuracy of the *material aspects* of the hearsay statement" (at para 45).

[100] I agree that, depending on the hearsay proffered, a determination of threshold reliability may include a significant consideration of the substantive reliability of the evidence (see *Khelawon* at para 4). However, in my view,

Bradshaw does not stand for the principle that, in each case, despite there being substantial indicia of procedural reliability, substantive reliability must also be proven. As stated by Mainella JA in *R v Hall*, 2018 MBCA 122 (at paras 77-78):

> The only point *Bradshaw* decides is clearly identified by Karakatsanis J as being, "When can a trial judge rely on corroborative evidence to conclude that the threshold reliability of a hearsay statement is established?" (at para 3). *Khelawon* remains the leading decision on determining threshold reliability (see *Johnston* [*R v Johnston*, 2018 MBCA 8] at para 98; *Larue* [*R v Larue*, 2018 YKCA 9] at para 98; and *Brousseau c R*, 2018 QCCA 1140 at paras 21-22).
>
> Practically, the relevance of *Bradshaw* in a given case will depend primarily on how the moving party seeks to establish threshold reliability of the evidence in question; particularly if there is attempted reliance on corroborative evidence. If corroborative evidence of the statement is important to establishing threshold reliability, so, too, will be the *Bradshaw* rules regarding corroboration. If, however, the case is like this one, where corroborative evidence plays little, if any, role on the question of threshold reliability, *Bradshaw* will be of less significance.

[101] There is no issue that threshold reliability can be established solely on the basis of procedural reliability (see *Bradshaw* at para 28).

[102] Based on the above, in my view, the trial judge did not err in failing to consider whether the statement was substantively reliable. Substantive reliability was not required to be shown because of the significant indicia of procedural reliability in this case, including the ability of the accused to cross-examine Mr. Soulier.

[103] In any event, I would simply note that, had substantive reliability been an issue, there was clearly evidence available that the Crown could have

called on the *voir dire* that would have corroborated material aspects of Mr. Soulier's version of events. These included:

- The statement from Mr. Gustafson that he passed the rifle to the accused at 641 Sherbrook Street, that he heard gunshots at the time the accused was initially absent from 641 Sherbrook Street and that, shortly after returning, the accused used slang language that indicated to Mr. Gustafson that he had shot a rival gang member;

- The statement of Mr. Anderson that, on the night of the incident, the accused was looking for "the gun" and that he later told Mr. Anderson that he "let off a shot at someone" and that "I think we might have got him."

[104] In my view, the above would have satisfied the requirement for material corroboration as envisioned in *Bradshaw*.

[105] In summary, if a judge's decision on the admissibility of hearsay evidence is informed by the correct legal principles, it is entitled to deference on appeal absent a palpable and overriding error (see *R v Johnston*, 2018 MBCA 8 at para 96). I agree with the Crown that no such error has been shown here. In my view, the trial judge correctly stated the legal principles regarding the admissibility of the statement based on procedural reliability. If required, a consideration of substantive reliability would have only enhanced the basis for its admission in this case.

[106] Therefore, for all of the above reasons, the appeal is dismissed.

Cameron JA

I agree: Pfuetzner JA

I agree: Simonsen JA