IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett

Docket: AR17-30-08871	)	
B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	***S. G. Paler***
	)	*for the Appellant*
Respondent	)	*D. L. Atkinson*
	)	
- and -	)	
	)	***Z. I. Garber***
DYLAN LENNON ATKINSON	)	*for the Appellant*
	)	*J. D. T. L. Kirton*
(Accused) Appellant	)	
	)	
- and -	)	***N. M. Cutler***
	)	*for the Respondent*
Docket: AR18-30-09031	)	
B E T W E E N:	)	
	)	*Appeals heard:*
HER MAJESTY THE QUEEN	)	***September 21, 2018***
	)	
Respondent	)	
	)	*Judgment delivered:*
- and -	)	***December 17, 2018***
	)	
JASON DAVID TONY LAWREN KIRTON	)	
	)	
(Accused) Appellant	)	

On appeal from 2017 MBQB 8; *R v Atkinson*, 2017 MBQB 80; and *R v Kirton*, 2018 MBQB 20

CAMERON JA

Introduction

[1] After being tried by judge alone on a joint indictment, Jason David Tony Lawren Kirton (Kirton) and his son Dylan Lennon Atkinson (Atkinson) (collectively, the accused) were convicted of committing the offence of breaking and entering into a dwelling-house and therein committing the indictable offences of robbery with a restricted firearm (sections 348(1)(b) and (d) of the *Criminal Code* (the *Code*)); aggravated assault (section 268), assault with a weapon (section 267(a)); and possession of a loaded restricted firearm (section 95(1)). In addition, Atkinson was convicted of one count of possession of a firearm contrary to a prohibition order (section 117.01) and Kirton was convicted of two counts of the same offence.

[2] It was alleged that, armed with a handgun, they broke into their cousin Brenda Dmytruk's (Dmytruk) apartment (the suite) and assaulted Maxim Garneau (Garneau) and Jessie Ducharme (Ducharme) with a pair of scissors and the handgun, while demanding money and drugs from them.

[3] The accused maintain that the only evidence as to what occurred inside the suite came from the admission of an audio recording of the sworn testimony given by Garneau at the preliminary inquiry of the charges (the Garneau evidence). They argue that the trial judge erred by admitting that evidence in their trial. They also argue that the trial judge erred in convicting them of the offence of break and enter as there was another reasonable explanation for them being in Dmytruk's suite—that they were invited. Finally, Kirton argues that the trial judge erred in his application of *R v W(D)*, [1991] 1 SCR 742.

[4] I have not been persuaded that the trial judge committed the errors alleged. Therefore, for the following reasons, I would dismiss the appeal.

Background and Proceedings

[5] Aside from the Garneau evidence, the evidence at the trial included video recordings from surveillance cameras situated on the outside of Dmytruk's apartment building (the building) as well as the inside hallway and stairway to the entrance of the suite. It also included the evidence of the police officers who chased the accused as they fled from the building (the police evidence). Finally, the evidence also included DNA evidence.

[6] Based on the video recordings and the police evidence, it was reasonably open to the trial judge to conclude that the accused were the persons who entered the suite as well as the persons who left the suite and the building immediately after the incident. The most important Crown evidence about what occurred inside the suite came from the admission of the Garneau evidence. The trial judge admitted that evidence pursuant to section 715(1) of the *Code* (section 715(1)) as well as the principled approach to the hearsay rule (the principled approach). Before considering the admissibility of the Garneau evidence in the trial, it is helpful to review the proceedings at the preliminary inquiry.

The Preliminary Inquiry

[7] At the preliminary inquiry, Garneau testified that, on the night of the incident, Dmytruk had invited him to the suite for a small party. He consumed some marihuana and alcohol and later fell asleep on a bed in the bedroom of the suite. He said that, aside from himself and Dmytruk, the only other person

in the suite at the time that he fell asleep was another female, later identified as Danielle Ryle (Ryle).

[8] Sometime after he fell asleep, Garneau stated that he woke up and saw Dmytruk run past the bed he was sleeping on and into the closet. He said that two men entered the room and one of them put a handgun to his forehead. He testified that the second male, who was in possession of a pair of scissors, demanded money and drugs from him and his friend Ducharme, who had also fallen asleep on the bed at a time unbeknownst to Garneau. The video-recorded and police evidence in this case reasonably allowed for the trial judge to find that the male in possession of the handgun was Atkinson and the one with the scissors was Kirton. Although not identified as such by Garneau, I will refer to each of them by their names in describing Garneau's narrative.

[9] Garneau testified that, while Atkinson was pointing the handgun at him and Ducharme, Kirton jumped on them, slashed their faces with the scissors and asked them where the money and drugs were. Garneau said that money and marihuana were taken from Ducharme. Next, he stated that the accused took him and Ducharme to the bathroom where Atkinson repeatedly hit them on the head with the back of the handgun. He said that Ducharme tried to protect himself by blocking his head with his hand, which became badly injured as a result of getting hit by the handgun. Garneau said that he and Ducharme fell to the floor, Ducharme unconscious and Garneau pretending to be unconscious, and the accused left.

[10] Garneau suffered significant injuries to his head which required several staples to close. He also suffered approximately six to eight slash marks on his face.

[11] At the conclusion of Garneau's direct examination, Kirton's counsel (the same as on the appeal) cross-examined him regarding his consumption of alcohol and drugs on the evening of the incident, the fact that he sold drugs, and that he really did not want to come to court to testify at the preliminary inquiry. Kirton's counsel did not ask any questions related to the substantive allegations concerning his client, nor did he cross-examine him regarding any inconsistencies that might have existed between his police statement and his testimony at the preliminary inquiry. Counsel for Atkinson (not the same as on the appeal) chose not to cross-examine Garneau.

[12] At the hearing of this appeal we were advised that, while Dmytruk and Ryle attended the preliminary inquiry, they did not give evidence.

The Trial

[13] The trial was scheduled for two weeks. Although he had been personally served with a subpoena, Garneau did not attend court on the first day scheduled for trial. That day, the trial judge issued a warrant for his arrest. The warrant was immediately sent for execution to Detective Sergeant Bauer (Sgt. Bauer), who had earlier served Garneau with the subpoena for the trial. The Crown indicated that, in the event that Garneau was not located or arrested, it intended to apply to have the evidence that he gave at the preliminary inquiry entered into evidence in the trial.

[14] The Crown presented video-recorded, police, identification, forensic and expert evidence over the course of the next three days. On the fourth day, when Sgt. Bauer was unable to locate Garneau, the Crown applied to have the evidence that he gave at the preliminary inquiry entered pursuant to section 715(1). Relevant to this case, that section allows for evidence

previously taken at a preliminary inquiry to be entered at the trial for the same charge in circumstances where a witness subsequently refuses to give evidence. As well, the Crown applied to have the Garneau evidence admitted pursuant to the principled approach on the basis that the requirements of necessity and reliability, as articulated in *R v Khelawon*, 2006 SCC 57, had been met.

[15] After hearing testimony from Sgt. Bauer regarding the circumstances surrounding his service of the subpoena on Garneau and his subsequent attempts to locate him as well as considering the wording of the subpoena, the trial judge admitted the evidence pursuant to both section 715(1) and the principled approach. After the admission of that evidence, the Crown closed its case.

[16] Kirton testified in his defence. He stated that he was contacted by his cousin Dmytruk who asked him to "get rid of two individuals in her suite who would not leave" (2017 MBQB 8 at para 55). Once there, he said that he called up to the suite to be let into the building. He testified that a person that he believed to be Ryle opened the door to let him into the building and that Atkinson ran around him, went up the stairs and entered the suite. Upon entering, he said that he saw two males, one of which had a pair of scissors in his hand. He pinned the male with the scissors to the bed and took the scissors while Atkinson took the other to the bathroom, and that he then pulled the male who originally had the scissors to the bathroom. He said that he and Atkinson heard that the cops had been called and decided to leave. However, he said that because he wanted to leave the suite before the two males, and that one of them was trying to get past him, he pushed that male to the floor causing him to hit his head on the toilet. He said that he did not know that

Atkinson had a handgun until they were leaving. He denied assaulting anyone with the scissors and stated that no one was struck with the handgun.

[17] Atkinson did not testify at the trial.

[18] Applying *W(D)*, the trial judge rejected Kirton's evidence and found that it had not raised a reasonable doubt as to the guilt of either Kirton or Atkinson. He considered the Garneau evidence in light of all of the evidence and convicted each accused.

The Grounds of Appeal

[19] The accused have two common grounds of appeal. First, they argue that the trial judge erred by admitting the Garneau evidence pursuant to section 715(1). They argue that the statutory conditions of the section were not met in that there was an insufficient basis from which it could be concluded that Garneau refused to testify. They also submit that the trial judge erred in not exercising his residual discretion to exclude the evidence on the basis of trial fairness. In support of that position, they maintain that the analysis regarding trial fairness subsumes or incorporates the most recent articulation of the principled approach as set out by the majority of the Supreme Court of Canada in *R v Bradshaw*, 2017 SCC 35. They further argue that the trial judge erred when he admitted the evidence pursuant to the principled approach.

[20] Second, the accused argue that the trial judge rendered an unreasonable verdict regarding the charge of breaking and entering.

[21] In addition, Kirton argues that the trial judge erred in his application of the test in *W(D)*.

Ground 1—Admission of the Garneau Evidence

Section 715(1)

[22] Before embarking on an analysis of the decision of the trial judge to admit the evidence, it is helpful to consider section 715(1) and the jurisprudence interpreting it.

[23] Section 715(1) provides:

> **Evidence at preliminary inquiry may be read at trial in certain cases**
> **715(1)** Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person
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> **(a)** is dead,
>
> **(b)** has since become and is insane,
>
> **(c)** is so ill that he is unable to travel or testify, or
>
> **(d)** is absent from Canada,
>
> and where it is proved that the evidence was taken in the presence of the accused, it may be admitted as evidence in the proceedings without further proof, unless the accused proves that the accused did not have full opportunity to cross-examine the witness.
>
> [emphasis added]

[24] In order for preliminary inquiry evidence to be admissible at a trial the Crown must satisfy the following statutory requirements on a balance of probabilities: i) that the evidence was given at the preliminary hearing; ii) that the witness was refusing to give evidence; and iii) that the preliminary inquiry evidence was given in the presence of the accused. Once this is shown, the evidence is admissible pursuant to section 715(1) unless the accused shows that he or she was not afforded a full opportunity to cross-examine the witness (see *R v Jones-Solomon*, 2015 ONCA 654 at para 40).

[25] In the leading case of *R v Potvin*, [1989] 1 SCR 525, the Supreme Court of Canada held that section 643(1) of the *Code*, RSC 1970, c C-34 (now RSC 1985, c C-46, section 715(1), as amended) did not breach section 7 of the *Canadian Charter of Rights and Freedoms*. It rejected the argument that a lack of contemporaneous cross-examination of a witness at a criminal trial breached a principle of fundamental justice. In examining section 715(1), the Court observed "that it is the opportunity to cross-examine [at the preliminary inquiry] and not the fact of cross-examination which is crucial" to the fair treatment of the accused (at p 543). Further, an accused is not deprived of his or her full opportunity to cross-examine a witness at a preliminary inquiry simply on the basis that his or her counsel failed to do so for tactical reasons (see p 546).

[26] In *R v Saleh*, 2013 ONCA 742, Watt JA explained that, because the opportunity to cross-examine is contemporaneous with the provision of evidence at the preliminary inquiry, so too must be the lack of full opportunity to cross-examine. For example, improper judicial interference during the course of the witness's testimony may render the ability to fully cross-examine inadequate (see para 71). On the other hand, information capable of

impeaching the witness that comes to light after the preliminary inquiry has been concluded does not constitute a basis to exclude the previously given testimony for the reason that there was not a full opportunity to cross-examine (see para 72).

[27] In *Potvin*, the Court held that, even where the requirements for admissibility have been met pursuant to section 715(1), the court still retains discretion not to admit the previously given evidence where its inclusion would operate unfairly to the accused (see pp 547-48). In *Saleh*, Watt JA concisely explained (at paras 74-75):

> The exclusionary discretion in s. 715(1) is directed at two principal types of mischief: unfairness in the manner in which the preliminary inquiry evidence was obtained, and unfairness in the trial itself caused by the admission of the preliminary inquiry evidence: *Potvin*, at pp. 551-552. A trial judge should only exercise this discretion after weighing two competing and frequently conflicting concerns (*Potvin*, at pp. 552-553):
>
> - fair treatment of the accused; and
>
> - society's interest in the admission of probative evidence to get at the truth of the allegations in issue.
>
> The focus of the trial judge's concern must be on the protection of the accused from unfairness, rather than the admission of probative evidence without too much regard for the fairness of the adjudicative process: *Potvin*, at p. 553.

[28] In *Jones-Solomon*, Brown JA for the Ontario Court of Appeal considered *Saleh* and *Potvin*, repeating the caution that the circumstances in which the exercise of discretion to exclude evidence pursuant to section 715(1) are "comparatively rare" (at para 43). He noted that, in deciding whether to exclude evidence, the trial judge may consider "the

crucial nature of that evidence and the crucial nature of the credibility of the witness who gave the evidence" (*ibid*). He also observed that, in *Potvin*, the Supreme Court of Canada rejected the notion that the importance of the evidence in a case required its exclusion.

[29] Absent an error in principle or a misapprehension of the evidence, a trial judge's exercise of discretion pursuant to section 715(1) is subject to review on the standard of deference (see *Saleh* at paras 87, 90; and *Jones-Solomon* at para 46).

[30] In *R v Hawkins*, [1996] 3 SCR 1043, the Supreme Court of Canada held that section 715(1) was not a comprehensive code dealing with the admissibility of evidence previously given at a preliminary inquiry. If a party wishing to tender the evidence is unable to meet the statutory requirements of section 715(1), it could alternatively rely on the principled approach. The hearsay evidence will be admissible if it meets the separate requirements of necessity and reliability (see paras 57-67).

[31] As I later explain, some courts have found that the principled approach to the hearsay rule does more than merely provide an alternate route for the admission of previously given evidence. Rather, those courts have held that the concepts underlying the principled approach also inform the trial fairness analysis under section 715(1). However, before considering the interaction between trial fairness and the principled approach, I will first deal with the accused's argument that the statutory requirements of section 715(1) were not met.

Refusal to Testify—Was the Statutory Requirement Met?

[32] The accused assert that the trial judge erred by inferring that Garneau's failure to appear in answer to the subpoena amounted to a refusal to testify as required by section 715(1). In support of this argument, they maintain that the Crown and police did not do enough to ascertain Garneau's whereabouts that would allow such an inference to be drawn. They argue that Garneau may not have attended court for a number of reasons. For example, they argue that after the preliminary inquiry, Garneau was charged with a number of serious offences and after he was subpoenaed, a warrant issued for his arrest. They reason that he may not have attended because he did not want to be arrested on that warrant as opposed to refusing to testify. They also argue that he could have been in the hospital or in custody.

[33] The Crown argues that Garneau's failure to attend court, contact the Crown or police or provide a forwarding address constituted a refusal pursuant to section 715(1). It relies on the evidence that it tendered at trial in support of its position.

[34] As earlier stated, the Crown called Sgt. Bauer in support of its application pursuant to section 715(1). Sergeant Bauer was familiar with Garneau. He testified that, when the subpoena for trial could not be served in the normal course by the commissionaires, it was forwarded to him for service. After checking for updated addresses on the police system, he was able to locate and serve Garneau. When he served the subpoena on Garneau he confirmed that Garneau knew what the case was about and remembered it. He also provided Garneau with phone numbers at which he could contact both Sgt. Bauer and the Crown Attorney assigned to the prosecution. Garneau was

served with the subpoena approximately five and one-half weeks prior to the commencement of the trial. At that time, he was pending on a number of charges that had arisen after the preliminary inquiry, but there was no warrant out for his arrest.

[35] Just short of two weeks after the subpoena was served, a warrant issued for Garneau for the charges on which he was pending. Sergeant Bauer indicated that the warrant was unendorsed, meaning that, if executed, Garneau could not have been released by police. The warrant was still outstanding as of the date that the section 715(1) application was made. This indicated to Sgt. Bauer that the police had not had contact with Garneau since the warrant was issued.

[36] In addition, Sgt. Bauer confirmed that the Crown attempted to contact Garneau by sending two letters to him, one by regular post and one by registered mail, to the address where he was served.

[37] In his attempts to locate Garneau, Sgt. Bauer went to two addresses associated with Garneau. Garneau was no longer at either of them. Next, he went to an address where he believed Garneau's family members lived. In addition, he checked an address outside of Winnipeg where Garneau had been staying at the time of the preliminary inquiry. Finally, he checked Garneau's social media account (Facebook). None of the above led him to Garneau. It was only on the fourth day of the trial, after all of the above efforts had been made, that the Crown applied to have the Garneau evidence read in.

[38] In his reasons on the *voir dire* rejecting the submission that there was no evidence that Garneau was refusing to testify, the trial judge noted that the subpoena stated that it was a court order to attend the trial "[t]o give

evidence". Regarding the argument that a failure to respond to the subpoena was distinguishable from a situation wherein a witness evades service in order to avoid testifying, he stated:

> In my opinion that is a distinction without a difference for the purposes of [section 715(1)] even where there is no evidence of a deliberate attempt to evade service. Often it is not possible to uncover evidence of a deliberate attempt to evade service because the witness has left without leaving a trail or any indication why he's leaving. The witness, as appears to be the case here, has simply disappeared.

[39] The trial judge concluded that the evidence given by Sgt. Bauer, as well as the fact that Garneau was served with a subpoena, satisfied him that Garneau "understood the significance of what he was required to do to satisfy the command set out in that subpoena." In other words, his refusal to attend amounted to a refusal to testify.

[40] The accused have not satisfied me that the trial judge erred in drawing the inference that Garneau was refusing to testify. First, I agree with the Crown that an analogy may be made to the decision of *R v Williams and Khamis*, 2015 ONSC 6884. In that case, the witness, who had testified at the preliminary hearing, could not be located for service of a subpoena to attend the trial. The Court held that the evasion of service by the witness to avoid testifying at a trial constituted a refusal to testify within the meaning of section 715(1). Also see *R v Brown*, 1997 CarswellOnt 260 (CA).

[41] Second, I do not agree that insufficient efforts were made to locate Garneau in order for the inference to be drawn that he was refusing to testify. While I acknowledge that Sgt. Bauer did not call all of the local hospitals to

determine if Garneau had been admitted, in my view, that is not fatal. Efforts were made to locate Garneau at the addresses with which he was associated, a warrant for his arrest had been in existence for four weeks prior to the trial and there had been no police contact with him. He did not contact the Crown or the police despite having been provided with phone numbers at which they could be reached. The evidence supported the inference that Garneau was refusing to testify.

[42] Based on the above, I would dismiss this ground of appeal.

Trial Fairness and the Principled Approach

Positions of the Parties

[43] The accused argue that the trial judge erred in refusing to exercise his residual discretion to exclude the Garneau evidence on the ground of trial fairness. They argue that trial fairness subsumes or incorporates the necessity/reliability requirements for the admission of hearsay evidence pursuant to the principled approach most recently enunciated by the Supreme Court of Canada in *Bradshaw*. In their view, neither of the requirements of necessity nor reliability were met. I would pause here to note that *Bradshaw* was not decided until after the trial had concluded and the trial judge did not have the benefit of it at the time he made his ruling.

[44] The Crown argues that the fact that Garneau's testimony was given under oath combined with the opportunity for contemporaneous cross-examination established that it met the test for admissibility as set out in *Hawkins*. It argues that the absence of the witness at the trial goes to the weight of the testimony and not its admissibility (see *Hawkins* at para 79). It

maintains that, to the extent that the trial fairness analysis is informed by the requirements for necessity and reliability pursuant to the principled approach, that threshold has been met.

Analysis

[45] One of the first cases to consider trial fairness and its interplay with the principled approach was *R v Li*, 2012 ONCA 291. In that case, the Ontario Court of Appeal considered the issue of whether a consideration of trial fairness in the section 715(1) analysis included the requirements of necessity and reliability as required by the principled approach. The issue in that case concerned the admission at trial of testimony given at a preliminary hearing by a witness who had subsequently left the country and refused to return to give testimony at the trial. The accused in that case argued that the Crown had not proven that it was necessary for the Court to consider the evidence in accordance with the principled approach enunciated in *R v Starr*, 2000 SCC 40, and later jurisprudence indicating that "necessity could be established only where admitting the hearsay would be the only way the evidence could be heard" (at para 36).

[46] Writing on behalf of the Court in *Li*, Feldman JA noted that *Potvin* had been decided before *Starr*. However, she noted that, in *Potvin*, the Court found that trial unfairness could arise from a consideration of the manner in which the proffered evidence was obtained, "where the witness is temporarily absent from Canada and 'the Crown could have obtained the witness's attendance at trial with a minimal degree of effort'" (at para 29 quoting *Potvin* at p 551). In Feldman JA's view, the above constituted an example of a more

general consideration of "the way the authorities attempted but failed to obtain the evidence for trial" in the determination of unfairness (at para 44).

[47] Feldman JA found that, while it was not necessary to determine whether the requirement for necessity under the principled approach ought to be read into section 715(1)(d), the considerations that inform the principled approach may also inform the exercise of discretion under section 715(1). In the case before her, she found that trial fairness was not met as the Crown made no effort to pursue options such as teleconferencing or taking commission evidence from a witness who was out of the country.

[48] In *Saleh*, the Ontario Court of Appeal confirmed that the principled approach to the hearsay rule had a role to play in the interpretation of section 715(1), but noted that it may "exert a greater influence on the issue of necessity than on that of reliability" (at para 76). See also *Jones-Solomon* at para 44.

[49] Aside from Ontario, few appellate courts have considered whether the section 715(1) analysis requires full compliance with the requirements of the principled approach. For example in *R v Alcantara*, 2015 ABCA 259, the Court distinguished *Saleh* on its facts, yet still considered the law of hearsay on the basis that the trial judge had made some use of that law when admitting evidence pursuant to section 715(1). In reaching its decision, the Court did not consider whether the principled approach informed the section 715(1) analysis.

[50] While not an appellate decision, in *R v Christhurajah*, 2017 BCSC 991, Wedge J considered *Li* and *Potvin* in the context of an argument that the requirement of necessity was not met insofar as there was no other way to get

video-conference testimony before the court. In her view, *Saleh* was authority "for the proposition that the principled approach to hearsay may, depending on the circumstances, have a role in determining the issue of trial fairness since the focus of the exclusionary discretion must be on the protection of the accused from unfairness" (at para 74).

[51] I agree with the above statement. While the principled approach may inform the section 715(1) trial fairness analysis, I would not go so far as to say that it incorporates it.

[52] Section 715(1) is a long-standing statutory codification of what was a developing common law exception to the rule against hearsay (see *Hawkins* at paras 62-65). Full analysis pursuant to the principled approach is not necessarily required when considering the traditional exceptions to the rule against hearsay. As was observed by Mainella JA in *R v Hall*, 2018 MBCA 122, even in its recent decision in *Bradshaw* regarding the principled approach, the Supreme Court of Canada did not address long-standing jurisprudence which confirms that "evidence falling under a traditional exception to the hearsay rule automatically satisfies the principled approach to the hearsay rule save in the rare case" (at para 84). That interpretation is consistent with *Potvin* and subsequent case law that I have earlier reviewed confirming that it is rare that evidence that falls within section 715(1) will not be admitted.

[53] Thus, in my view, the focus of the exercise of discretion to exclude evidence that is otherwise admissible must remain on trial fairness. To do otherwise would render section 715(1) and, arguably, the traditional exceptions to the hearsay rule, meaningless. To the extent that issues of

necessity and reliability impact trial fairness, they inform the section 715(1) trial fairness analysis. In this case, the arguments of the accused largely relied on lack of compliance with the necessity and reliability requirements of the principled approach.

Necessity and Reliability

[54] At the outset, it is helpful to recognise that the requirements of necessity and reliability are not separate thresholds, but rather work in tandem (see *R v Baldree*, 2013 SCC 35 at para 72). In *Fawley et al v Moslenko*, 2017 MBCA 47, the Court explained that, "The circumstances of the given case will determine where a particular strength or weakness in one of the characteristics is accommodated by the opposite quality of the other characteristic" (at para 99). See also *Hall* at para 61.

Necessity

[55] Necessity is invoked when a witness is unavailable to testify or otherwise unable to testify. As noted by David M Paciocco & Lee Stuesser in *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015), the requirement is that the evidence be "reasonably necessary" and the fulfillment of that condition "requires that 'reasonable efforts' be undertaken to obtain the direct evidence of the witness" (at p 131). Also see *R v Khan*, [1990] 2 SCR 531 at 547 and *R v Smith*, [1992] 2 SCR 915 at 934.

[56] The accused assert that the necessity requirement of the principled approach was not met in that neither Sgt. Bauer nor the Crown made sufficient efforts to locate Garneau prior to applying for the admission of the recording of the testimony that he gave at the preliminary inquiry. As earlier stated, they

say that Sgt. Bauer could have done more to ascertain the whereabouts of Garneau. They also argue that the Crown should have applied to adjourn the trial to the following week, which was also reserved, in order to give it more time to try to locate Garneau. They submit that other witnesses such as Ryle, Dmytruk and even Ducharme could have been called, thus the Garneau evidence was not necessary. They argue that the simple failure by Garneau to answer the subpoena is not sufficient to satisfy the necessity requirement.

[57] When linking the concept of necessity under the principled approach to jurisprudence interpreting the notion of unfairness in the manner in which the evidence was obtained in *Li*, Feldman JA noted that, in that case, "the trial judge's discretionary consideration of the minimal efforts that must be taken by the Crown under s. 715(1) overlapped with the necessity analysis of the principled approach" (at para 60).

[58] In this case, the trial judge considered the efforts to locate Garneau in the context of the necessity requirement under the principled approach as well as trial fairness. He concluded that the efforts made were reasonable and appropriate. He found that, in the circumstances, there was nothing approaching bad faith or even a lack of diligence in the manner in which the Crown or the police had proceeded. In my view, the trial judge did not err in his assessment.

[59] To the extent that necessity plays a role in the manner in which the evidence is brought to the court, in light of Garneau's non-attendance at the trial, and the inability to locate him, there was no other way that his evidence could have been presented to the court and, therefore, it was reasonably necessary to admit his preliminary inquiry evidence at trial. In my view, the

Crown and the police exercised due diligence in locating and serving Garneau with a subpoena sufficiently close to the trial date. His recollection of the event was confirmed. Contact information was provided to him. A warrant was requested for his arrest when he did not comply with the subpoena. Once it was granted, the warrant was immediately acted upon. In response, Garneau chose not to contact the authorities as requested, disregarded the subpoena and ensured that his whereabouts were unknown.

[60] Despite the fact that the accused argued that the Crown should have asked for an adjournment to locate Garneau, in my view, to do so would have unnecessarily delayed the proceedings. By this point, a warrant had already been out for his arrest for four weeks on his pending charges. He was not located by the fourth day of trial, and there is no evidence that he had been located by the end of the trial.

[61] As to the argument that there were other witnesses to the events, Ryle did not attend the trial in response to her subpoena, and the trial judge issued a warrant for her arrest. As of the date that the Crown made its application to admit the Garneau evidence, Ryle had not been "found". As for Dmytruk, we were advised that she could not be located for service of a subpoena to attend the trial. A review of the transcript further evidences that, as of the date of the trial, the Crown had been unable to locate Ducharme, but indicated to the Court that it did not believe that it had "the basis upon which to request a warrant" for his arrest.

[62] Furthermore, the evidence supports the conclusion that Ryle and Dmytruk did not witness the events alleged to have occurred in the suite. According to the Garneau evidence, Dmytruk was in the closet when the

assaults were alleged to have occurred. Kirton denied seeing Dmytruk in the suite. The person who Kirton believed to be Ryle exited the building as soon as she let him and Atkinson in. The video-recorded evidence shows that she did not return to the suite until after the accused left. Therefore, neither of those witnesses could have provided evidence as to the events.

[63] Based on all of the above, in my view, I am not convinced that the trial judge erred when he found that the Garneau evidence was necessary.

Reliability

[64] As I next discuss, there 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).

Procedural Reliability

[65] 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*, at para. 75;

> *Youvarajah* [*R v Youvarajah*, 2013 SCC 41], 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.)* [*R v B (KG)*, [1993] 1 SCR 740], 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).
>
> [emphasis added]

[66] The accused say that, despite the fact that the Garneau evidence was given under oath at the preliminary hearing, it did not meet the procedural reliability standard. They maintain that no significance can be attached to the fact that Garneau gave his evidence under oath and was available for cross-examination because he was an admitted drug dealer who was later charged with criminal offences. They argue that Garneau would not be the type of person to respect an oath. In their view, such crucial testimony that is heavily dependent on the credibility of the witness must be accompanied by contemporaneous cross-examination. Based on the above, they reason that the indicia of procedural reliability are not present.

[67] The Crown maintains that the accused had full opportunity to cross-examine Garneau at the preliminary inquiry. It argues that counsel for Kirton made a tactical decision not to cross-examine him regarding the substance of what he said occurred in the suite and that Atkinson declined to cross-examine him at all. In oral argument, the Crown further observed that counsel for each of the accused continued in the decision not to cross-examine Garneau regarding the substance of the allegations despite the fact that, while being

cross-examined by Kirton's counsel, Garneau clearly stated that he did not want to be at the preliminary inquiry.

[68] I do not agree with the accused's suggestion that the above-quoted statement in *Bradshaw* stands for the proposition that there must always be some form of cross-examination in order for procedural reliability or trial fairness to exist. Indeed, in referencing the fact that there is usually some form of cross-examination of the declarant, Karakatsanis J specifically references *Hawkins*. In *Hawkins*, the Court considered that evidence previously recorded at a preliminary inquiry was sufficiently reliable to be admitted pursuant to the principled approach in light of the circumstances it is given including "the presence of an oath or affirmation and the opportunity for contemporaneous cross-examination" (at para 79) (emphasis added).

[69] Furthermore, the *Couture* case referenced above by Karakatsanis J dealt with police statements that were not made under oath by a witness who later married the accused. In that case, Charron J, writing for a majority of the Court, held that, absent the availability of the witness for cross-examination, there could be no basis for the court to adequately test the truth of those statements (see para 91). Indeed, she referenced *Hawkins* with approval noting that the opportunity to cross-examine was a crucial factor in the decision to admit the evidence under the principled approach (see para 92).

[70] Based on the above, it is the opportunity to cross-examine on evidence given at a preliminary inquiry that gives rise to procedural reliability pursuant to the principled approach. This is consistent with the interpretation of section 715(1), enunciated in *Potvin* and *Saleh*.

[71] In this case, the trial judge was aware that Garneau admitted to being a drug dealer. He was also informed of the charges that had been laid against Garneau after he testified at the preliminary hearing. Garneau's evidence was given under oath and each accused had the full opportunity to cross-examine him. In my view, the failure to cross-examine for tactical reasons does not detract from the procedural reliability of the Garneau evidence.

Substantive Reliability

[72] Substantive reliability goes to the trustworthiness of the evidence. In *Bradshaw*, Karakatsanis J, writing for the majority, explained (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).

[73] The concept of trustworthiness is somewhat comparable to credibility considerations included in a section 715(1) trial fairness analysis. In *Saleh*, Watt JA observed (at para 77):

> Among the relevant factors a trial judge might consider in deciding whether to exclude preliminary inquiry evidence that would otherwise qualify for admission under s. 715(1) is the crucial nature of the evidence itself: *Michaud* [*R v Michaud* (2000), 144 CCC (3d) 62 (NB CA)], at para. 26. Equally relevant is the crucial nature of the credibility of the witness whose evidence is tendered for admission: *R. v. Tourangeau* (1994), 128 Sask. R. 101 (C.A.), at para. 18; and *R. v. Castanheira*, [1996] O.J. No. 3006 (C.A.), at para. 2.

[74] In my view, unfairness would be established where the proffered evidence is unreliable or incredible to the extent that it is not trustworthy. Indeed, in *Saleh*, one of the errors made by the trial judge in that case was his failure to consider the "manifest unreliability" of the witness in his analysis of trial fairness (at para 91).

[75] The accused argue that, based on the alleged criminal activity with which Garneau was charged and the fact that he was an admitted drug dealer and gang member who had consumed intoxicants the night prior to the incident, the trial judge should have considered his evidence to be substantially unreliable, untrustworthy and subject to *Vetrovec* concerns (see *Vetrovec v The Queen*, [1982] 1 SCR 811). They note that, in *Bradshaw*, the majority of the Court held that establishing that hearsay evidence from such a witness is inherently trustworthy will be extremely challenging (*Bradshaw* at paras 68-69). In their view, there was no corroborative evidence as to what exactly transpired in the suite as required by *Bradshaw*. Further, they argue that the absence of accounts of the events from other witnesses such as Dmytruk and Ryle deprived the trial judge of "a sufficient substitute basis for testing the evidence".

[76] The Crown argues that, in this case, Garneau was a victim and that there was nothing inherently untrustworthy about his evidence. It distinguishes cases such as *Saleh*, where the witness was a co-accused who had given differing versions of the relevant events and had a motive to lie. It argues that the video-recorded evidence, coupled with the DNA evidence and the injuries suffered by Garneau and Ducharme are sufficient to test the evidence.

[77] I would start by noting that the cautions identified in *Vetrovec* and concerns regarding substantive reliability are similar. *Vetrovec*, however, is concerned with the weight to be assigned to evidence of a suspect or unsavoury witness. It cautions the trier of fact to look for "confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged" (at p 829 quoting *Director of Public Prosecutions v Hester*, [1972] 3 All ER 1056 at 1073).

[78] *Bradshaw* deals with the admission of evidence. In that case, the majority of the Court rejected the argument that confirmatory evidence similar to that in *Vetrovec* would be sufficient to satisfy substantive threshold reliability. *Bradshaw* demands a higher standard than is required by *Vetrovec* on the basis that it requires corroboration of the "truthfulness" or "material aspects of the [hearsay] statement" (at para 44).

[79] Regarding the lack of corroborating evidence, the accused argue the following:

- No other person who was in the suite at the time of the incident was called to provide corroborative evidence of the events;
- Garneau described the handgun as silver and dingy whereas the handgun recovered by the police appeared to be black;
- Despite Garneau's testimony that he and Ducharme were originally cut on their faces by the scissors while they were lying on the bed, there was no blood on the bed and no blood was found on Kirton's hands;

- Despite Garneau's testimony that he and Ducharme were hit on the head with the handle of the handgun, there was insufficient DNA evidence found on the handle of the handgun for testing;

- Garneau stated that Ducharme was robbed of drugs, but none were found on either Kirton or Atkinson when they were captured.

[80] The Crown points to the following as confirmatory or corroborative evidence:

- Garneau accurately described what each accused was wearing and which accused had which weapon, as is evidenced by the video recording showing Kirton putting down the scissors as he is leaving the suite and Atkinson with the handgun when entering and exiting the suite;

- Garneau described the handgun as a revolver or a pistol and that is what was recovered by the police after they observed Atkinson discard it as he was fleeing;

- Garneau and Ducharme each had injuries on their faces consistent with being slashed with scissors;

- Garneau's DNA was found on the scissors;

- Garneau received significant injuries to his head requiring several staples while Ducharme received injuries to his head and his hand;

- Garneau's blood was found in the bathroom by the kitty litter where he said that he fell and pretended that he was unconscious;

- At the time the pool of blood by the kitty litter was swabbed by police it was still damp, thereby indicating the timing as to when the incident occurred;

- Ducharme's blood was found near the toilet in the bathroom where Garneau said Ducharme fell and broke part of the toilet after being hit with the handgun;

- Blood was found on the windowsill and radiator in the bedroom where Garneau said the initial attack occurred;

- Garneau's blood was found on Kirton's clothes.

[81] All of the above was argued before the trial judge. While his analysis of reliability was brief, a review of the record shows that he was alive to these issues when he decided to admit the Garneau evidence pursuant to both section 715(1) and the principled approach. When the trial judge made his decision concerning admissibility, he had knowledge of all of the outstanding charges that Garneau was facing. He stated to Kirton's counsel that he was well aware that Garneau was not "a man of stellar character." Despite this, he held that it would not be unfair to admit the evidence.

[82] Having said that, the trial judge did not have the benefit of *Bradshaw* at the time he made his decision. Therefore, he may not have considered the distinction between confirmatory evidence and evidence which corroborated Garneau's evidence as to what occurred in the suite. Nonetheless, in my view, the discovery of Garneau's blood by the kitty litter and Ducharme's blood at the base of the toilet confirms both the truthfulness and a material aspect of that evidence.

[83] In this case, evidence that Garneau was charged criminally subsequent to the preliminary inquiry does not relate to his credibility or reliability insofar that he gave differing versions of the incident. There is no suggestion that Garneau anticipated or received any consideration for his testimony. He was not a co-accused. There was no evidence to suggest that he even knew the accused prior to this event. Rather, the attack on his credibility was based on his character.

[84] As was stated in *Hall,* in situations where a common law exception to the hearsay rule is relied upon for admissibility (or, I would add, a statutory exception to the hearsay rule based on a common law exception) "corroborative evidence plays little, if any, role on the question of threshold reliability" (at para 78).

[85] Finally, the accused argue that *Bradshaw* requires the court to consider alternative, even speculative, explanations for the truth or accuracy of the evidence as part of the assessment of substantive reliability (see para 48). They submit that a scenario such as the one described by Kirton in his testimony would be equally consistent with the evidence as a whole.

[86] I would reject this argument. Kirton's evidence was that he and Atkinson simply entered into the suite to remove the two men and found them with, what turned out to be, significant injuries. His evidence was that the only violence inflicted occurred when he took a pair of scissors from one of the men and pushed the other to the ground. This evidence was not equally consistent with all of the other evidence.

[87] Based on all of the above, to the extent that substantive reliability informs the consideration of trial fairness, I have not been convinced that the

trial judge erred when he admitted the evidence pursuant to section 715(1). Nor have the accused convinced me that the evidence is not admissible on the basis that it does not meet the necessity and reliability requirements as most recently enunciated in *Bradshaw*.

Conclusion—Admissibility of the Garneau Evidence

[88] To summarise, in this case the Crown and police exercised due diligence before applying to have the Garneau evidence admitted. The evidence was reasonably necessary. It was given under oath where an opportunity to cross-examine existed, thereby invoking prima facie admissibility pursuant to section 715(1), as well as providing a strong indicator of procedural reliability. There is also other evidence that confirms a significant number of what are arguably non-material aspects of the Garneau evidence as well as evidence corroborating material aspects of it. The Garneau evidence was highly probative. The trial judge considered whether it would be unfair to the accused to admit the evidence in the trial, and he concluded that it would not be. Absent an error in law or in principle, that decision is entitled to deference. I have not been persuaded that the trial judge erred when he admitted the Garneau evidence pursuant to section 715(1) or the principled approach.

Ground 2—Unreasonable Verdict—The Break and Enter

[89] The accused argue that there was insufficient evidence to convict them of the offence of breaking and entering. They argue that the Crown did not call Dmytruk, the actual tenant of the suite, to testify. Further, Garneau did not observe them enter as he was asleep at the time. They underscore that the case against them was purely circumstantial and based on an interpretation

of the video-recorded evidence of them entering the building and the suite. They argue that a review of the video-recorded evidence leads to the conclusion that there were other reasonable interpretations of that evidence, including that Dmytruk invited them to the suite. In support of their argument, they note that they were allowed into the building by a female Kirton presumed was Ryle and that there were no signs of forced entry to the suite itself.

[90] The trial judge carefully reviewed the video-recorded evidence. It shows that the accused were outside the building and that Kirton made attempts to get the attention of someone who could allow them into the building. At that time, a woman exited Dmytruk's suite and went down the stairs. Dmytruk also exited her suite and was standing at the top of the stairs. Outside, Atkinson already had the handgun out in full view. The woman who went down the stairs opened the street door entrance to the building. Kirton held the door open and Atkinson ran around him and both entered the building and began running up the stairs. Atkinson had one hand on the stair bannister and the handgun in his other hand. The woman who opened the door fled outside the building. Meanwhile, as the accused were running up the stairs, Dmytruk rushed back into her suite and appeared to have closed the door. When Atkinson entered the suite, he made a motion as if he were turning a knob to open the door. The trial judge found that the video-recorded evidence was consistent with Garneau's evidence that he saw Dmytruk run past him and jump into a closet where she stayed for the entire incident. He noted that Garneau's testimony was that, immediately after Dmytruk entered the suite, the accused entered the bedroom, threatened Garneau and Ducharme with the handgun and demanded to know where the drugs and money were.

[91] After considering the video-recorded evidence along with the totality of the evidence, the trial judge concluded that the accused were not in the suite "with the consent or permission of Dmytruk, and that they were prepared to take all necessary steps to carry out an agenda of their own" (2017 MBQB 8 at para 87). Thus, he concluded beyond a reasonable doubt that the accused broke into the suite.

[92] The findings of a trial judge with respect to video-recorded evidence are to be treated as findings of fact. Therefore, the standard of review is palpable and overriding error (see *R v Melnychuk*, 2008 ABCA 189 at para 5; *R v Abdi*, 2011 ONCA 446 at para 6; and *R v Moyse; R v Ens*, 2013 MBCA 71 at para 20).

[93] The standard of review for the reasonableness of the verdict was explained in *R v Villaroman*, 2016 SCC 33 (at para 55):

> A verdict is reasonable if it is one that a properly instructed jury acting judicially could reasonably have rendered: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381. Applying this standard requires the appellate court to re-examine and to some extent reweigh and consider the effect of the evidence: *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 186. This limited weighing of the evidence on appeal must be done in light of the standard of proof in a criminal case. Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence.

[94] In my view, the accused have not shown that the trial judge made any palpable, let alone overriding error in finding the facts that he did from his examination of the video-recorded evidence. A review of the video-

recorded entry to the building and the suite supports the conclusion reached by the trial judge.

[95] Furthermore, the trial judge reached his conclusion after specifically rejecting Kirton's evidence that he was there at the request of Dmytruk simply to remove Garneau and Ducharme. A verdict is not unreasonable simply because "the alternatives do not raise a doubt" (see *R v Dipnarine*, 2014 ABCA 328 at para 22). As noted in *Villaroman*, "it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation. The trier of fact's assessment can be set aside only where it is unreasonable" (at para 71). See also *R v Schenkels*, 2017 MBCA 62 at para 115.

[96] Thus, based on all of the above, I would dismiss this ground of appeal.

Ground 3—Failure to Properly Apply *W(D)*

[97] Kirton argues that, while the trial judge correctly stated the principles in *W(D)*, he did not correctly apply them. He argues that the trial judge erred by comparing the Garneau evidence with his evidence. He submits that his evidence as to why he attended the suite was supported by the fact that he and Atkinson were allowed entry into the building. He says that the Garneau evidence should have been rejected based on the absence of blood found on Kirton's hands or on the bed despite the fact that Garneau said that Kirton slashed him while he was on the bed.

[98] The accused argue that the trial judge erred in accepting the Garneau evidence because Garneau described the handgun as dingy and silver, when it

appeared to be black. They further argue that there is a lack of evidence supporting Garneau's assertion that he and Ducharme were hit with the handgun because there was no DNA on the handle of it.

[99] As summarised in *R v Menow,* 2013 MBCA 72 at para 16, in *W(D)* the Supreme Court of Canada emphasised that verdicts of guilt should not be based on whether the trier of fact believes the Crown or defence evidence. The paramount question is whether the trier is left with a reasonable doubt as to guilt.

[100] In order to focus the analysis in *W(D)* the Court stated that the trier of fact should first determine if the evidence of the accused is believed. If so, an acquittal must be entered. If not, the trier of fact must consider whether the evidence has raised a reasonable doubt. If the evidence has not raised a reasonable doubt, the trier of fact must consider whether the evidence accepted proves guilt beyond a reasonable doubt (see p 758).

[101] In *R v WRB*, 2011 MBCA 17, Chartier JA (as he then was) explained the approach to be taken in a case where it is alleged that the trial judge failed to properly apply the test in *W(D)*. He explained (at para 2):

> In such cases, an appellate court will review the reasons to satisfy itself that the trial judge did not err by allowing the burden to shift away from the Crown simply because the accused was not believed (described by Binnie J. in *R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152 at para. 9 as the "credibility contest error.") As he explained in *J.H.S.*, "(t)he main point is that lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt" (at para. 13).

[102] In my view, the reasons demonstrate that the trial judge respected the substance of the *W(D)* analysis, did not shift the burden of proof and correctly applied the principle of reasonable doubt in the context of his credibility assessment. In his reasons, the trial judge stated that he embarked on his analysis of all of the evidence in the case, bearing the principles of *W(D)* in mind. He stated that he would consider the Garneau evidence with the same caution as outlined in *Vetrovec*. He found that the DNA evidence, video-recorded evidence and police evidence confirmed Garneau's version of the incident. When he completed his analysis of the accused's evidence in light of all of the evidence, he rejected it. He was entitled to do so (see *Menow* at paras 21, 23). While it would have been preferable if the trial judge had mentioned more specific reasons for rejecting the accused's evidence, it is apparent that he considered it to be untruthful in light of the video-recorded evidence, the police evidence and the Garneau evidence. In my view, it has not been shown that the trial judge erred.

Disposition

[103] In the result, I would dismiss the appeal.

Cameron JA

I agree: Steel JA

I agree: Burnett JA