

CITATION: R. v. Youvarajah, 2011 ONCA 654

DATE: 20111020

DOCKET: C51970

COURT OF APPEAL FOR ONTARIO

Winkler C.J.O., and Moldaver and Simmons JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Yousanthan Youvarajah

Respondent

James K. Stewart, for the appellant

Philip Campbell and Jonathan Dawe, for the respondent

Heard: May 19, 2011

On appeal from the directed verdict of acquittal entered by Justice P. J. Flynn of the Superior Court of Justice, sitting with a jury, on March 17, 2010.

Simmons J.A.:

I. Overview

[1] The Crown appeals from a directed verdict of acquittal entered in favour of the respondent, Yousanthan Youvarajah, on a charge of first degree murder.

[2] Andrew Freake was shot and killed during a drug deal that went wrong. The respondent had arranged to buy marijuana from Freake and was accompanied to the deal by a young person, D.S., and two other young men. Various witnesses identified D.S. as the shooter. While accepting that D.S. was the shooter, the Crown alleged that the respondent arranged the shooting because Freake short-changed him on two previous drug transactions.

[3] D.S. and the respondent were arrested and charged with first degree murder within days of the shooting. However, because D.S. was a young person, their trials proceeded separately.

[4] After his youth court trial began, D.S. pleaded guilty to second degree murder with the consent of the Crown. D.S., his two trial counsel and the trial Crown all signed an agreed statement of facts that was read-in and filed during the guilty plea proceeding (the “Agreed Statement of Facts”).

[5] Among other things, the Agreed Statement of Facts stipulated that the respondent:

- gave D.S. the handgun used in the shooting;
- told D.S. to shoot Freake at some point during the drug deal; and
- demanded the handgun back shortly after the shooting.

[6] At the respondent’s trial, D.S. testified and confirmed that he shot Freake. However, contrary to the account set out in the Agreed Statement of Facts, he claimed that he obtained the murder weapon during a previous break and enter; that he shot

Freake because Freake was speaking disrespectfully; and that, after the shooting, he threw the murder weapon into a river.

[7] After D.S. recanted the portions of the Agreed Statement of Facts that were central to the Crown's case against the respondent, the Crown applied to have the Agreed Statement of Facts admitted as evidence capable of proving the truth of its contents.

[8] The trial judge dismissed the Crown's application, holding that the Agreed Statement of Facts did not meet the standard of threshold reliability necessary for admissions under the principled approach to hearsay evidence. At the close of the Crown's case, the trial judge granted the respondent's application for a directed verdict of acquittal.

[9] The main issue on appeal is whether the trial judge erred by refusing to admit the Agreed Statement of Facts as evidence capable of proving the truth of its contents.¹

[10] The Crown acknowledges that such a ruling involves a discretionary weighing of relevant factors. However, the Crown submits that the trial judge made three errors in law in assessing the threshold reliability of D.S.'s prior statement and that, absent such errors, the admissibility ruling may well have been different:

1. he treated the opportunity to cross-examine D.S. as largely illusory;
2. he failed to properly assess circumstantial indications of the reliability of the Agreed Statement of Facts; and

¹ During oral submissions, Crown counsel on the appeal indicated he was not pressing an alternate ground of appeal raised in his factum concerning whether the trial judge erred in directing a verdict of acquittal.

3. he treated motive to fabricate as going to threshold, rather than ultimate reliability.

[11] For the reasons that follow, I accept the Crown's first and second submissions. As I am satisfied that the trial judge's ruling on the admissibility of the Agreed Statement of Facts would not necessarily have been the same but for these errors, I would allow the appeal and order a new trial.

II. Background

(i) Evidence at the respondent's trial relating to the shooting

[12] It was admitted at the respondent's trial that 19-year-old Andrew Freake was killed between 8 and 9 p.m. on Thursday, October 11, 2007 at Clyde Park in the Township of North Dumfries (near Cambridge) and that the cause of death was a gunshot wound to the chest.

[13] Evidence was led at trial indicating that Freake was an occasional drug dealer and that, two days prior to his death, he short-changed the respondent by a gram or two on two separate sales of cocaine. In turn, the respondent hatched a plan to rob Freake. D.S. was present when the respondent discovered he had been short-changed and was a willing participant in the plan.

[14] The respondent called Freake and arranged to buy one and a half pounds of marijuana. The purchase was originally scheduled to take place on Wednesday, October 10, 2007 but was postponed to the next day. Freake obtained the marijuana "on

spot”, meaning he was to pay his supplier as soon as he completed his sale to the respondent.

[15] After an initial meeting with Freake in an apartment building and some other delays, the respondent directed his companions to a local social club where the deal could take place. The respondent’s group was in an SUV driven by Abishaik Shinde. D.S. was in the front passenger seat, the respondent was in the backseat behind D.S., and Raibeen Mohammad was in the backseat behind Shinde, the driver. Freake and two friends were in a car driven by Freake.

[16] When the parking lot at the social club proved too crowded to do a drug transaction, the respondent suggested a second social club and asked Freake to meet them there. When that location was also busy, the respondent told Shinde to drive to Clyde Park. Freake and company followed the respondent and his friends.

[17] Once at the park, Shinde pulled the SUV onto a grassy area and Freake parked in a parking lot. Freake and a friend, Josh DesRoches, approached the SUV carrying the marijuana contained in three plastic bags. Freake stood at the driver’s window of the SUV; DesRoches at the rear passenger window on the driver’s side.

[18] Two small bags of marijuana were passed into the SUV so the purchasers could test it. When Freake refused to pass a third bag into the car, D.S. pulled out a small handgun, extended his arm behind Shinde’s (the driver’s) head and shot Freake in the

chest. Shinde testified that the respondent was trying to pull a “wad of cash” from his pants pocket at the time the shot was fired.

[19] Shinde suffered a burst eardrum as a result of the shooting. However, he recalled both the respondent and Mohammad saying to D.S.: “Why the fuck did you do that?” Mohammad recalled the respondent telling D.S., “Get the fuck out of the car with that.” According to Shinde, during the drive home, the respondent threatened that anyone who said anything would “get fucked up” and he suggested that they needed to toss the gun.

[20] The next day Shinde went to the respondent’s house and found him reading news reports about the shooting on a computer. The respondent said that Freake was dead and “just kept saying like -- how [D.S.] was an idiot and shouldn't have done what he did and that we were all going to be responsible for -- for the shooting, for the death.”

[21] Shinde and the respondent discussed how they might conceal their involvement. They bought cleaning supplies and, after Shinde’s mother brought her SUV home from work, they drove it into the countryside and cleaned the interior. Even so, forensic examiners later found large quantities of gunshot residue both inside the SUV and on Shinde’s shirt.

(ii) Evidence that the respondent planned to rob Freake and that he possessed a gun

[22] Andrew Vongkham was with the respondent and D.S. at the time of the two cocaine purchases that preceded the shooting. He was the first witness at trial and gave evidence about the cocaine purchases from Freake, about the respondent being short-

changed by Freake and about the respondent's plan to steal drugs from Freake. He also claimed to have seen the respondent with a small handgun on two or possibly three occasions.

[23] A firearms expert testified that the gun Vongkham described was one of the numerous models that could have fired the shot that killed Freake. However, there was no direct evidence at trial that the respondent's gun was actually the murder weapon or that he ever gave it to D.S.

[24] At its highest, Vongkham's evidence was capable of establishing that the respondent was in possession of a small black Colt Mustang handgun at some time prior to the murder, as well as on the day following the murder, and that a Colt Mustang could have been the murder weapon.

III. The Crown's Application to Admit the Agreed Statement of Facts for the Truth of its Contents

[25] D.S. was the second witness at the respondent's trial. Following some preliminary questions, he confirmed that he shot Freake and that he pleaded guilty to the second degree murder of Freake. However, when asked where he got the gun, he claimed to have had it for a long time and denied that anyone gave it to him.

[26] Although D.S. identified his signature on the Agreed Statement of Facts and read out the words "I have read and understand and agree to the facts contained in this agreed statement of fact" that appeared above his signature, he said he did not remember signing it. Further, he claimed he did not remember the facts read in at his guilty plea.

[27] As his examination in-chief progressed, D.S. explained that he got the murder weapon during a break and enter and that he sometimes carried it for protection. He said he shot Freake because Freake was speaking loudly and angrily and was refusing to pass any more marijuana into the car. He denied giving the gun to the respondent and said he threw it into the Grand River in downtown Cambridge. Apart from the shooting, he professed little memory of the events on the day of the shooting.

[28] During a break in the proceedings, the trial Crown indicated he intended to apply to cross-examine D.S. under s. 9(2) of the *Canada Evidence Act*. While acknowledging that D.S. now essentially disavowed the Agreed Statement of Facts, defence counsel conceded that it was proven² and that there were inconsistencies between the statement and D.S.'s trial testimony.

[29] However, defence counsel made it clear that he intended to exercise his right, under the s. 9(2) procedure, to cross-examine D.S. on the circumstances in which the statement was made – particularly about the extent to which D.S. was aware that “his signature meant that he was adopting as true the five or six pages [of the Agreed Statement of Facts]”.

² Defence counsel's concession was premised on the fact that D.S. identified his signature on the document as well as the fact that he anticipated that the Crown would be able to obtain a transcript of D.S.'s guilty plea proceeding at which the Agreed Statement of Fact was entered. Prior to the formal s. 9(2) ruling, Crown counsel in fact obtained the transcript.

[30] Such cross-examination would be aimed at determining whether the Agreed Statement of Facts was sufficiently reliable to permit even cross-examination by the Crown under s. 9(2). This, defence counsel said, would take them “knee deep” into questions about solicitor client privilege – and he suggested that D.S.’s trial counsel or an independent lawyer be put on notice to give D.S. independent legal advice about solicitor-client privilege. The trial judge asked the trial Crown to start that process.

[31] Crown counsel, in turn, indicated that depending how the defence cross-examination went, he would seek to call further witnesses on the s. 9(2) *voir dire*. For example, D.S.’s defence counsel at trial, or Sergeant Durval Goncalves, the investigating officer who was present when the Agreed Statement of Facts was drafted. Further, the trial Crown made his position clear that if D.S. answered questions, during the defence cross-examination, concerning whether it was explained to him that he was adopting the entire statement, the Crown would take the position that D.S. had waived solicitor-client privilege.

[32] As matters developed, D.S. was provided with legal advice about solicitor-client privilege by an independent lawyer, a Mr. Marentette. After speaking to D.S., Mr. Marentette advised the court that D.S. “does not intend in any way or on any item to waive solicitor-client privilege with respect to his dealings with trial counsel leading up to his plea and sentencing”.

[33] Upon hearing that D.S. did not intend to waive solicitor-client privilege, defence counsel indicated his cross-examination would “be greatly circumscribed” in that “the true meat of [his] potential cross-examination [was] now foreclosed.” Although he still intended to cross-examine D.S., he said that, as an officer of the court, he could not possibly now ask all the questions he had intended to ask. The trial judge responded, “I leave that to you.”

[34] Crown counsel too indicated that, in the light of D.S.’s position, he did not anticipate calling further witnesses. In response, the trial judge confirmed that D.S.’s lawyers at the guilty plea proceeding were not to be called as witnesses:

Crown counsel: And I don’t anticipate even now given the comments of Mr. Marentette I don’t anticipate needing to call further witnesses.

The Court: *Well, no legal witnesses that have spoken to this man anyway.*

Crown counsel: Right.

The Court: *Right. I mean we’re going to take Mr. Marentette’s word as the final word on that.*” [Emphasis added.]

[35] Defence counsel proceeded with his cross-examination of D.S. He began by telling D.S. that he was not going to ask any questions that would breach solicitor-client privilege, and that if he did so inadvertently, it would not be held by the court to be a breach of D.S.’s privilege.

[36] The bulk of defence counsel's cross-examination was directed at confirming that prior to his guilty plea on September 17, 2009, D.S. had never attempted to implicate the respondent in any way. D.S. was unable to recall whether he saw the Agreed Statement of Fact prior to September 17, 2009. He confirmed that, although he had an opportunity to read the Agreed Statement of Fact from start to finish, he encountered some difficulties when reading it – and when he did, he just moved on in the document. In re-examination by the Crown, D.S. confirmed he did not recall when he read the Agreed Statement of Fact.

[37] Following defence counsel's cross-examination of D.S., defence counsel essentially conceded the s. 9(2) application and acknowledged that the Crown should be entitled to cross-examine D.S. in the presence of the jury on the Agreed Statement of Facts.

[38] During the course of the Crown's cross-examination, D.S. confirmed that he remembered a number of the events set out in the Agreed Statement of Facts. He also confirmed that Crown counsel read out the Agreed Statement of Facts at his guilty plea proceeding. Further, D.S. agreed that following an inquiry by the presiding judge at the guilty plea proceeding, he "acknowledged" that the facts set out in the Agreed Statement of Facts were "accurate" in the following exchange:

The Court: [Mr. S.], through Mr. Smart, I take it by virtue of the signature and the fact that this is entitled agreed statement of fact that it is such but is there anything [Mr. S.], through you, Mr. Smart, wishes to say about the agreed statement of

fact or any other additional information you want to put forward?

Crown counsel: Sorry, your Honour, I'm just going to rise at this point and request that any statement at this point by [Mr. S.] not be made through Mr. Smart but be made by [Mr. S.] himself and the agreement to the facts be made by [Mr. S.] himself, on top of the signature.

Mr. Smart: Thank you, your Honour. I think I can take care of the concern of [Crown counsel] and of the Court. [Mr. S.] acknowledges that the facts set out in the agreed statement of fact are accurate and he stands behind them. Is that correct, sir?

D.S.: Yes.

[39] Later in his cross-examination, D.S. denied the respondent gave him a gun prior to the shooting. After doing so, D.S. confirmed: i) the Agreed Statement of Facts included a statement that the respondent gave him the gun; ii) he understood that statement in the Agreed Statement of Facts; and iii) he recalled the Agreed Statement of Facts being read out at his guilty plea proceeding. However, D.S. claimed he did not know what the words “acknowledge” and “accurate” mean.

[40] Nonetheless, D.S. subsequently confirmed that he had agreed, at his guilty plea proceeding, to statements in the Agreed Statement of Facts to the effect that the respondent told him to shoot Freake when he gave D.S. the gun and also that, following the shooting, the respondent demanded the return of the gun – facts that D.S. now denied.

[41] In re-examination by defence counsel, D.S. said he did not remember everything that happened on September 17, 2009 very clearly, but he confirmed that he understood

that if he pleaded guilty to second degree murder the police would not require a statement from him and that motivated him to plead guilty.

[42] Following his cross-examination of D.S. in the presence of the jury, Crown counsel called Sergeant Durval Goncalves to provide evidence on the Crown's application to have the Agreed Statement of Facts admitted for the truth of its content.

[43] According to Sergeant Goncalves, the trial Crown was primarily responsible for drafting the Agreed Statement of Facts. However, the trial Crown did so in the presence of, and with some input from, D.S.'s defence counsel. Two or more drafts of the Agreed Statement of Facts were prepared. Both the trial Crown and defence counsel reviewed the drafts. One of the defence counsel took the drafts away as they were prepared and later returned with minor editing changes.

[44] Sergeant Goncalves also confirmed that he informed defence counsel that the police would not require a statement from D.S. to support his plea.

[45] In re-examination, Sergeant Goncalves testified that it was defence counsel who provided the information concerning where the gun came from.

[46] Although the Crown had alluded, earlier in the proceeding, to the possibility of making an application under s. 9(1) of the *Canada Evidence Act* to have D.S. declared adverse, he did not pursue that application.

IV. The Trial Judge's Reasons for Dismissing the Crown's Application to Admit the Agreed Statement of Facts for the Truth of its Content

[47] The trial judge began the analysis portion of his reasons by observing that, because D.S. had recanted material portions of the Agreed Statement of Facts, defence counsel had properly conceded that the necessity criterion for substantive admissibility of the statement was satisfied.

[48] Therefore, the sole issue to be determined was “reliability, that the circumstances of its making make the contents of the [Agreed Statement of Facts] trustworthy and will permit the ultimate trier of fact to assess its worth.”

[49] The trial judge noted that in *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, the Supreme Court of Canada changed the law by replacing “the [previous] orthodox rule” under which prior inconsistent statements could only be used to impeach the credibility of a witness. Instead, the Supreme Court introduced a principled approach permitting the substantive admissibility of prior inconsistent statements “in circumstances where the hearsay dangers had been adequately addressed”.

[50] The trial judge said “[t]his rule was meant to assist in putting the triers of fact in the position of fair comparison, vis-a-vis the reliability of the prior inconsistent statement with the witness’s testimony at trial.”

[51] The trial judge acknowledged that the new approach does not require “strict adherence to some formulaic rule”, but indicated that generally it requires three indicia of reliability, or adequate substitutes for them, before such statements can be admitted as

substantive evidence. He identified the three indicia of reliability as: the recital of an oath or an affirmation when the statement is made; presence or the ability of the trier of fact to assess demeanour, hence the credibility of the declarant when the statement was made, such as in a video; and the ability to cross-examine the declarant at trial.

[52] Citing *R. v. Trieu* (2005), 74 O.R. (3d) 481 (C.A.), in which this court affirmed a decision to admit a prior inconsistent statement where no oath had been administered, the trial judge acknowledged that in some circumstances, all three indicia of reliability need not be present.

[53] After reviewing the positions of the parties, the trial judge said that if “all that were weak or missing here” was the oath, he might very well have granted the Crown’s application. However, he observed that there were “defects in the other indicia [of reliability] proffered by the Crown.”

[54] The trial judge noted that the prosecutor and the police made a deliberate choice not to seek a videotaped statement from D.S. prior to his guilty plea or at any time thereafter. The jury would therefore have no opportunity to be “present” to experience D.S.’s demeanour at the time the Agreed Statement of Facts was read into evidence or when his counsel subsequently asked him to acknowledge that the facts were accurate. The trial judge accordingly rejected the Crown’s submission that the transcript of the guilty plea proceedings was a suitable substitute for presence.

[55] The trial judge also observed that D.S. had never confessed or implicated the respondent in the almost two years between his arrest and his guilty plea. In these circumstances, the trial judge found it significant that solicitor-client privilege precluded questioning D.S. or his trial counsel about how the Agreed Statement of Facts came into being. Further, the Agreed Statement of Facts was not spontaneous and was not even in D.S.'s own words. In fact, D.S. testified he did not understand some of the words used. These factors undermined not just the ultimate reliability of the statement, but its threshold reliability as well.

[56] As for the third indicia, while acknowledging that D.S. was available for cross-examination at trial, the trial judge accepted defence counsel's submission, premised on *R. v. Conway* (1997), 36 O.R. (3d) 579 (C.A.), that cross-examination would be of little value. D.S. had not only recanted his prior statement but also had significant memory lapses concerning some of the details set out in the Agreed Statement of Facts and also concerning its presentation in court.

[57] The trial judge cautioned himself to examine all the circumstances under which the Agreed Statement of Facts was made. He observed that while there was no direct evidence of a motive to lie, he could infer such a motive from the circumstances. Moreover, D.S. was neither sworn nor warned of penal consequences if he later recanted when he signed the Agreed Statement of Facts. Further, the police told D.S.'s counsel they did not require any other statement from him. The trial judge said that these factors

may have created an impetus for D.S. “to accept the Agreed Statement of Facts without question”.

[58] Finally, the trial judge observed that the weaknesses in the indicia of reliability could have been easily cured “had the prosecution insisted ... [on] a properly sworn and warned *K.G.B.* video statement.”

V. Analysis

1. Standard of Review

[59] The issue on this appeal relates to the admissibility for substantive purposes of a prior inconsistent statement of a witness who is not an accused person in the proceeding.

[60] As this court noted in *R. v. S. (S.)* (2008), 232 C.C.C. (3d) 158 (Ont. C.A.), the admissibility of a hearsay statement for substantive use is ultimately a question of law and, therefore, reviewable on a correctness standard.

[61] However, a significant part of the admissibility inquiry requires the trial judge to engage in a discretionary weighing of the various factors relevant to the inquiry. Accordingly, so long as the trial judge addresses the factors germane to the reliability of the hearsay statement, does not fall into any material misapprehension of the evidence relevant to those factors and makes a reasonable assessment of the weight to be assigned to the various factors, the trial judge’s ruling on admissibility is entitled to deference on appeal: *S. (S.)* at para. 30.

2. Did the Trial Judge Err by Refusing to Admit the Agreed Statement of Facts for the Truth of its Content?

(i) Did the trial judge err in holding that the opportunity to cross-examine D.S. was illusory?

[62] In his ruling, the trial judge appears to have concluded, for two reasons, that the opportunity to cross-examine D.S. was illusory concerning which of the versions of the events, if either, was the truth. First, this case was analogous to the situation in *Conway*, in which this court held that the opportunity to cross-examine a recanting witness was illusory. Second, impediments created by solicitor-client privilege precluded certain avenues of cross-examination.

[63] Concerning the first reason, the trial judge said:

The third indicium required by *K.G.B.* focuses on the extent to which the declarant is subject to cross-examination on his prior statement. *I agree with [defence counsel] when he argues that this third strand of the reliability analysis can be rendered valueless in circumstances where the declarant recants such as here. [Defence counsel] cited the case in R. v. Conway [citation omitted] for the missing integer in the equation, when he asks how can one cross-examine a witness who recants their prior statement and specifically denies knowledge?*

Mr. Justice Labrosse in *Conway* cites Justice Lamer in *U. (F.J.)*:

When a witness takes the stand at the trial and under oath gives a different version of the story than one previously recorded, doubt is cast on the credibility of the witness and on the truth of both versions of the story. This is what effective cross-examiners hope to achieve.

The witness here, [D.S.], had significant memory lapses on some of the details set out in his agreed statement of facts. Indeed he had significant memory lapses on the presentation of the statement in court. And most importantly he testified here at complete odds with the facts set out in the guilty plea agreed statement of facts with respect to the critical parts of the statement which implicate [the respondent] by testifying that the gun which killed Andrew Freake was his gun all along, one he obtained in a break and enter which he committed with someone called Sean which he disposed of in the Grand River after the shooting.

...

Finally I would resort to the words of Mr. Justice Labrosse in his judgment for the Court in Conway, para. 39:

That the statement had clear indicia of reliability is not supported by the evidence. There was no oath, there was no videotape and the opportunity for effective cross-examination at trial was to a large extent illusory.

[Emphasis added.]

[64] Earlier in his reasons, when addressing the oath and presence requirements set out in *B. (K.G.)*, the trial judge touched on the solicitor-client privilege issue and concluded that solicitor-client privilege effectively precluded a determination of how the Agreed Statement of Facts came into being:

Solicitor/client privilege precluded questions to or from [D.S.] or indeed of his counsel about how it came to be that this concession from [D.S.] as the shooter and his implication of the accused as the person who provided him with the gun and directed him to do the shooting was made on the day of his guilty plea almost two years after his arrest when he had never confessed or implicated [the respondent] in all that time.

[65] Respectfully, in my view, the trial judge erred in relying on both of his identified reasons as a basis for concluding that the opportunity to cross-examine was illusory.

[66] This case is a far cry from the situation in *Conway*.

[67] In *Conway*, two men were charged with the second degree murder of an elderly man who was killed during the course of a break and enter. They offered a plea of guilty to manslaughter but denied they had the requisite intent for murder because they were high on intoxicating substances at the time.

[68] A witness to certain comments by the accused gave two contradictory written statements to the police. In his initial written statement, the witness denied any knowledge of the killings. In a subsequent written statement given a few days later, the witness implicated the accused in the murder.

[69] The day after giving the second written statement, the witness refused to give a further statement with the *K.G.B.*- recommended safeguards (oath, caution and videotape) in place. At trial, the witness could not recall giving either written statement to police. The trial judge admitted the witness's second statement for the truth of its content.

[70] The context for Labrosse J.A.'s comments in *Conway* about the availability of the witness for cross-examination that were relied on by the trial judge is important. Labrosse J.A. began by noting that, in *B. (K.G.)*, Lamer C.J. identified lack of contemporaneous cross-examination as the most important of the hearsay dangers.

Significantly, Lamer C.J. also said that it is the most easily remedied danger – because it can be remedied by the opportunity to cross-examine at trial.

[71] It was in that context that, in *Conway*, Labrosse J.A. set out the quote from Lamer C.J. in *U. (F.J.)* to the effect that, when a witness gives evidence of a prior inconsistent statement by that witness, doubt is cast on both versions of the story. Importantly, Labrosse J.A. stated, “This case is different. There are not two versions.”

[72] Labrosse J.A. went on to emphasize that cross-examination was ineffective in *Conway* for the very reason that there were not two versions of the story. The witness claimed a lack of knowledge of his prior statement. In the result, cross-examination of the witness at trial would not “afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement”.

[73] I appreciate that, in this case, D.S. initially claimed he did not recall signing the Agreed Statement of Facts and the facts read-in at his guilty plea.

[74] However, when cross-examined by the Crown, he confirmed that he remembered a number of the events set out in the Agreed Statement of Facts. The trial judge acknowledged as much in the early part of his reasons when setting out the facts. He said:

When cross-examined by the Crown, [D.S.] admitted making many of the statements in the agreed statement of fact and conceded that many of those statements were true.

[75] D.S. also confirmed that Crown counsel read out the Agreed Statement of Fact at his guilty plea proceeding. In addition, although he claimed not to understand the

meaning of the words “acknowledged” and “accurate” in the exchange between him and his counsel at the guilty plea proceeding, he recalled the exchange and gave an explanation for it – lack of understanding of the words “acknowledged” and “accurate”. His explanation would therefore be available for the jury to assess.

[76] Further, although D.S. denied the truth of the key facts in the Agreed Statement of Facts (the respondent gave him the gun, told him to shoot Freake and later demanded the return of the gun), he did not dispute that he understood them. On the contrary, he specifically agreed, for example, that the Agreed Statement of Facts included a statement that the respondent gave him the gun; that he understood that statement; and that he recalled the Agreed Statement of Facts being read out at his guilty plea proceeding.

[77] On the *K.G.B.* application, defence counsel at trial did not cross-examine D.S. about his possible motive to lie at the guilty plea proceeding. Nonetheless, the trial judge had no difficulty in drawing an inference concerning what that motive might be.

[78] Taking account of these circumstances, in my view, the trial judge’s blanket reliance on *Conway* was misplaced. This was not a situation where the witness had no recollection of his prior statement. D.S. recalled many of the details in the Agreed Statement of Facts. Moreover, he acknowledged that he remembered the Agreed Statement of Facts being read out in court – including the key portions that he claimed at trial were not true.

[79] In my opinion, the trial judge erred in law by failing to closely examine what D.S. remembered about the prior statement and its presentation in court and by failing to assess:

- whether it could properly be said that two versions of the events were before the court; and
- whether the extent of D.S.'s recollection would afford sufficient scope to assist the jury in assessing which, if either, version was true.

[80] The trial judge's second reason for concluding that the opportunity to cross-examine was illusory was that solicitor-client privilege precluded questioning D.S. and his counsel about the circumstances under which D.S. came to plead guilty and implicate the respondent after maintaining his innocence for about two years – in other words, about the circumstances under which the Agreed Statement of Facts came into being.

[81] Respectfully, this reflects a misunderstanding of the scope of solicitor-client privilege. Many questions could have been put to both D.S. and his counsel about the circumstances under which the Agreed Statement of Facts came into being without infringing solicitor-client privilege.

[82] In the absence of waiver or a recognized exception, solicitor-client privilege prohibits disclosure of oral or documentary communications between solicitor and client where the communications are made in connection with obtaining or providing legal advice and are intended to be confidential: Sopinka, Lederman & Bryant, *The Law of*

Evidence in Canada, 3rd ed. (Markham, Ont.: LexisNexis Canada, 2009) at 14.43; Hubbard et al, *The Law of Privilege in Canada*, Vol. 2, looseleaf (Aurora, Ont.: Canada Law Book, 2011) at 11:10.

[83] See also *Wigmore on Evidence*, vol. 8, (McNaughton rev. 1961), sec. 2292, at p. 554, where the following is stated:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

[84] However, solicitor-client privilege did not prohibit questioning D.S. about his understanding of the Agreed Statement of Facts, any conditions that may have been attached to the plea deal (such as whether he would be required to testify at the respondent's trial) and the consequences of misleading the police, the Crown and the court; it did not prohibit questioning D.S. about his motives for making what he now claimed were three false statements in the Agreed Statement of Facts; and it did not prohibit questioning D.S. about matters he instructed his counsel to communicate to the Crown and to the court.

[85] The first two areas of questions related to what was in D.S.'s mind. Although his understanding of the Agreed Statement of Facts and the plea deal and his motivation for entering into it may have been informed at least to some extent by solicitor-client

communications, the questions and answers in these areas need not have revealed those communications.

[86] For example, at least some questions concerning D.S.'s understanding of the Agreed Statement of Facts were put to him by the Crown without any difficulties over solicitor-client privilege. As an example, D.S. claimed not to have understood certain portions of the Agreed Statement of Facts. Nonetheless, he agreed that he understood the phrase: "Yousanthan Youvarajah gave D.S. a small black handgun." He also agreed that that phrase was read out at his guilty plea proceeding.

[87] And while D.S. claimed not to understand the words "acknowledge" and "accurate" used by his counsel during the guilty plea proceeding, in the following exchange, he acknowledged that he had agreed, at the guilty plea proceeding, to the correctness of certain facts:

Q. Okay. I'm going to read you a little from the agreed statement of fact, okay?

When he was given the gun, [D.S.] was told by Yousanthan Youvarajah to shoot Mr Freake sometime during the course of the drug rip-off.

Do you remember me reading that out?

A. Yes.

Q. Okay. And you remember you agreed to the facts later on?

A. Yes.

Q. When your – when your counsel asks you is that correct, sir, you're saying yes?

A. Yeah.

[88] Further, although defence counsel claimed that the “true meat of [his] potential cross-examination [was] ... foreclosed” because D.S. would not waive solicitor-client privilege, he had no difficulty eliciting evidence that one of the factors that led D.S. to plead guilty was the fact that he would not have to provide a statement. Further, during cross-examination after the trial judge’s ruling declining to admit the Agreed Statement of Facts for the truth of its content, defence counsel had no difficulty eliciting evidence about D.S.’s motive to lie at the guilty plea proceeding:

Q. You'll also agree with me, sir, that the document that you signed contained information which you knew to be wrong and you still signed it, true?

A. Yes.

Q. And you did all of this, sir, because it was allowing you to get to the end game that day which was pleading to second degree murder, correct?

A. Yes.

[89] Concerning the third area of questions (D.S.’s instructions to counsel concerning matters to be communicated to the Crown or to the court), communications between solicitor and client that are not intended to be confidential are not subject to privilege. Accordingly, solicitor-client privilege was not a bar to asking D.S. questions about what he instructed his counsel to communicate to the Crown or to the court; about when he

provided those instructions; and about what he knew about the Crown theory at the time he provided his instructions.

[90] Similarly, solicitor-client privilege did not prevent questioning D.S.'s counsel about their discussions with the Crown – either about things they advised the Crown on D.S.'s instructions or about things the Crown said to them.

[91] Nor did solicitor-client privilege prevent questioning D.S.'s counsel concerning the instructions they had from D.S. about what they could say in open court during the guilty plea proceeding – in particular, concerning D.S.'s understanding of the Agreed Statement of Facts. Finally, solicitor-client privilege did not prevent questioning D.S.'s counsel, or anyone else present, about D.S.'s demeanour during the guilty plea proceeding: *B. (K.G.)* at para. 101.

[92] It seems to me that these areas of questions presented a potentially broad scope for cross-examination about the circumstances under which the Agreed Statement of Facts came into being and about its presentation in court.

[93] Unfortunately however, from the moment that the issue of solicitor-client privilege arose, counsel and the trial judge appear to have been of the mistaken view that it would preclude at least some of this questioning.

[94] Defence counsel expressed that view when he said, “the true meat of [his] potential cross-examination [was] now foreclosed.” The Crown did so as well when he

indicated, after hearing from Mr. Marentette, that he did not anticipate needing to call further witnesses.

[95] Finally, the trial judge put his stamp of approval on this approach – and effectively prevented the Crown from reconsidering calling D.S.’s counsel – when he said “no legal witnesses that have spoken to this man” should be called.

[96] The result of this mistaken understanding appears to have been at least twofold. First, it appears that the Crown refrained from calling D.S.’s counsel as witnesses.

[97] Second, the trial judge erred in law when he made the blanket statement that solicitor-client privilege precluded questioning D.S. or his counsel about how it came to be that, after two years of maintaining his innocence, D.S. chose to plead guilty and implicate the respondent.

[98] Although I acknowledge that issues about solicitor-client privilege might have arisen, depending on D.S.’s (or his counsel’s responses) to questions asked in the areas I have identified, the fact remains that many more questions could have been asked and answered without infringing solicitor-client privilege.

[99] If issues about solicitor-client privilege had arisen, it would have been for the trial judge, at that point, to assess the scope of solicitor-client privilege and also to determine whether D.S.’s answers amounted to an implicit waiver. I will return later to the subject of implicit waiver of solicitor-client privilege.

(ii) Did the trial judge fail to properly assess circumstantial indications of the reliability of the Agreed Statement of Facts?

[100] In addition to finding that the opportunity for cross-examination was illusory, the trial judge relied on the following factors as detracting from the threshold reliability of the Agreed Statement of Facts:

- the lack of presence in that the jury would have no opportunity to be “present” to experience D.S.’s demeanour when the Agreed Statement of Facts was read into evidence or when his counsel subsequently asked him to acknowledge that the facts were true;
- the Agreed Statement of Facts was not spontaneous, it was not in D.S.’s own words and D.S. claimed he did not understand some of the words used in the Agreed Statement of Facts;
- when he signed the Agreed Statement of Facts, D.S. was neither sworn nor warned of the penal consequences if he later recanted;
- the police told D.S.’s counsel they would not require any other statement from D.S.; and
- although there was no direct evidence of a motive to lie, the trial judge was able to infer one from the circumstances.

[101] I will deal with the significance of the presence of a motive to lie in the next section. Concerning the other factors, respectfully, in my opinion, the trial judge erred by

focusing unduly on the level of compliance with the *B. (K.G.)* recommended safeguards for ensuring threshold reliability and by failing to consider whether other factors present in this case were sufficient to support substantive admissibility of the Agreed Statement of Facts.

[102] *B. (K.G.)* no doubt provides an appropriate starting point for gauging the admissibility for substantive use of a prior inconsistent statement of a non-accused witness.

[103] However, *B. (K.G.)*, and the Supreme Court's subsequent decisions in *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764 and *R. v. Khelawon*, [2006] 2 S.C.R. 787, all make it clear that the *B. (K.G.)* recommended safeguards were never intended to create an exclusive category for the admissibility of prior inconsistent statements. I will briefly review those cases before turning to my discussion of this issue.

(a) *B. (K.G.)*, *U. (F.J.)* and *Khelawon*

[104] *B. (K.G.)* followed on the heels of the Supreme Court of Canada's decisions in *R. v. Khan*, [1990] 2 S.C.R. 531 and *R. v. Smith*, [1992] 2 S.C.R. 915, in which the Supreme Court of Canada adopted a principled approach to the admissibility of hearsay evidence premised on establishing sufficient necessity and reliability to justify its admission.

[105] In *B. (K.G.)*, the Supreme Court of Canada revisited the orthodox rule prohibiting substantive use of unadopted prior inconsistent statements and held that such statements could be admissible for substantive use if the principles of necessity and reliability

underlying the new principled approach to hearsay outlined in *Khan* and *Smith* could be satisfied.

[106] However, given the particular problems raised by prior inconsistent statements, Lamer C.J.C. stated that the factors of reliability and necessity must be adapted and refined [in that context]: *B. (K.G.)* at para. 73.

[107] In the case of a recanting witness, necessity arises because “the recanting witness holds the prior statement, and thus the relevant evidence, ‘hostage’”: *B. (K.G.)* at para. 110.

[108] As for reliability, Lamer C.J.C. noted at para. 82 that “[t]he reliability concern is sharpened in the case of prior inconsistent statements because the trier of fact is asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one account from the declarant is tendered.”

[109] Because “the focus of the inquiry in the case of prior inconsistent statements is on the comparative reliability of the prior statement and the testimony offered at trial” Lamer C.J.C. concluded that “additional indicia and guarantees of reliability to those outlined in *Khan* and *Smith* must thus be secured in order to bring the prior statement to a comparable standard of reliability before such statements are admitted as substantive evidence.”

[110] Having previously identified the traditional hearsay dangers at para. 32 (the absence of an oath or solemn affirmation when the statement was made, the inability of

the trier of fact to assess the demeanour and therefore the credibility of the declarant when the statement was made (as well as the trier's inability to ensure that the witness actually said what is claimed), and a lack of contemporaneous cross-examination by the opponent), Lamer C.J.C. proceeded to consider “what ‘substitute’ indicia of trustworthiness might suffice to permit reception of prior inconsistent statements.”

[111] Ultimately, Lamer C.J.C. formulated a revised rule containing three components that would provide sufficient guarantees of trustworthiness to warrant the admission of a prior inconsistent statement: i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation; ii) the statement is videotaped in its entirety; and iii) the opposing party, whether the Crown or the defence, has a full opportunity to cross-examine the witness respecting the statement. See paras. 86-104.

[112] However, Lamer C.J.C. emphasized throughout his discussion that there could be other circumstantial guarantees of reliability that would suffice to render such statements substantively admissible. See, for example, paras. 96, 101 and 104.

[113] In the subsequent case of *U. (F.J.)*, the recanting witness was available for cross-examination at trial but her statement was not videotaped, nor was it taken under oath and there was no warning. In that case, Lamer C.J.C. placed considerable reliance on the availability of the witness for cross-examination but also maintained the requirement for some additional indicia of reliability. In *U. (F.J.)*, he found that indicium in the fact that

the recanting witness's prior statement was strikingly similar to the accused's own statement.

[114] Importantly, Lamer C.J.C. emphasized, at para. 39 of *U. (F.J.)*, that in certain particular circumstances a prior inconsistent statement could be admitted even in the absence of an oath and a video record, but not in the absence of cross-examination.

[115] In *Khelawon*, an issue was raised concerning whether the "*U. (F.J.)*" exception could be extended to the facts of that case. At para. 45 of *Khelawon*, Charron J. went to some lengths to explain that "neither *B. (K.G.)* nor *U. (F.J.)* should be interpreted as creating categorical exceptions to the rule against hearsay based on fixed criteria." Rather, she indicated that these cases should be viewed as "provid[ing] guidance -- not fixed categories -- on the application of the principled case-by-case approach [to the admission of hearsay evidence] by identifying the relevant concerns and the factors to be considered in determining admissibility": *Khelawon* at para. 45.

[116] Importantly, Charron J. noted at para. 61 of *Khelawon* that under the principled approach, the reliability requirement is aimed at identifying those cases where the central underlying concern about the inability to test hearsay evidence is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule.

[117] She also observed that the reliability requirement is usually met in two different ways. One way is to show that there is no real concern about whether the statement is true because of the circumstances in which it came about. Another way is to show that no real

concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, truth and accuracy can nonetheless be sufficiently tested: *Khelawon* at paras. 62 and 63.

[118] Charron J. cited *B. (K.G.)* as an example of a case where the admissibility of prior inconsistent statements was based on the presence of adequate substitutes for testing the evidence. In *U. (F.J.)*, on the other hand, “the Court considered both those circumstances tending to show that the statement was true and the presence of adequate substitutes for testing the evidence”: *Khelawon* at para. 66.

[119] At para. 76 of *Khelawon*, Charron J. noted that the most important contextual factor in *B. (K.G.)* is the availability of the declarant for cross-examination. Accordingly, “[t]he admissibility inquiry into threshold reliability ... *is not so focussed on the question whether there is reason to believe the statement is true, as it is on the question whether the trier of fact will be in a position to rationally evaluate the evidence*” (emphasis added).

[120] Charron J. also noted at para. 78 that even though the declarant was available for cross-examination in *B. (K.G.)*, Lamer C.J.C. emphasized that where the hearsay evidence is a prior inconsistent statement, “the focus of the inquiry ... is on the comparative reliability of the prior statement and the testimony offered at trial” and therefore “additional indicia and guarantees of reliability to those outlined in *Khan* and

Smith must be secured in order to bring the prior statement to a comparable standard of reliability”: *B. (K.G.)* at para. 82.

[121] As I have said, in *B. (K.G.)*, Lamer C.J.C. considered the general attributes of in court testimony that provide safeguards for reliability and formulated a revised approach to the admissibility of prior inconsistent statements that would provide adequate substitutes for those safeguards such that there would be sufficient circumstantial guarantees of reliability to render the prior inconsistent statement substantively admissible.

[122] Importantly however, at para. 80 of *Khelawon*, Charron J. observed that “[t]o say that a statement is sufficiently reliable because it is made under oath, in person, and the maker is cross-examined is somewhat of a misnomer.” This is because “[a] lot of courtroom testimony proves to be totally unreliable.” She added: “[h]owever, therein lies the safeguard -- in the *process* that has uncovered its untrustworthiness. Hence the presence of adequate substitutes for that process establishes a threshold of reliability and makes it safe to admit the evidence” (emphasis in original).

(b) Discussion

[123] One of the key principles that emerges from a review of the *B. (K.G.)*, *U. (F.J.)* and *Khelawon* decisions is that the focus of the threshold reliability inquiry can change depending on the circumstances of the case.

[124] In this case, the Crown could not establish that the *B. (K.G.)* recommended safeguards had been complied with. Instead, the Crown offered an Agreed Statement of Facts tendered to support a guilty plea in a separate proceeding. However, the Agreed Statement of Facts was signed by D.S. and his counsel; D.S. had the opportunity to review the statement in private with his counsel; and at least some of the crucial information contained in the Agreed Statement of Facts was provided to the Crown by defence counsel.

[125] In these circumstances, D.S.'s availability for meaningful cross-examination was crucial to determining whether the Agreed Statement of Facts met the standard of threshold reliability. As I have said, in my view, the trial judge erred in his assessment of that issue.

[126] However, having regard to Charron J.'s comments in *Khelawon*, the additional question for the trial judge was whether, in the particular circumstances of this case, there were adequate substitutes present for the other customary court processes that either promote reliability or root out untrustworthiness to support the admissibility of the Agreed Statement of Facts.

[127] Viewed in this light, some of the factors the trial judge relied on as detracting from threshold reliability are of relatively little importance – and the trial judge made no mention of other factors that appear to be important.

[128] For example, the lack of “presence” when the Agreed Statement of Facts was read-in at the guilty plea proceeding would seem to take on a diminished level of importance where D.S.’s participation in the proceeding was limited to saying “yes” in response to two questions from his counsel – the first question was aimed at confirming D.S.’s plea of guilty to second degree murder and the second question was aimed at confirming that the facts set out in the Agreed Statement of Facts were accurate.

[129] Further, the fact that the Agreed Statement of Fact was not spontaneous is of little moment in the circumstances of this case. Spontaneity goes to the inherent reliability of a statement arising from the circumstances in which it was made. However, inherent reliability arising from spontaneity was not the Crown’s theory of threshold reliability.

[130] In addition, it is difficult to understand how the specific language used in the Agreed Statement of Facts was of much importance in the circumstances.

[131] The key assertions in the Agreed Statement of Facts for the purposes of the respondent’s trial were: the respondent gave D.S. the gun; the respondent told D.S. to shoot Freake during the drug deal; and the respondent demanded the return of the gun after the shooting.

[132] D.S.’s trial testimony was at complete odds with these assertions – and the differences were not matters of language. D.S. claimed he shot Freake with his own gun; that he did so because of the way Freake was speaking; and that he (D.S.) threw the gun

into a river after the shooting. Moreover, D.S. did not deny that he understood these three central components of the Agreed Statement of Facts.

[133] Although it is undisputed that D.S. was not sworn when he signed the Agreed Statement of Facts, there is no evidentiary foundation for the trial judge's finding that D.S. was not cautioned about the penal consequences of recanting. There was no evidence at trial concerning whether D.S. anticipated testifying at the respondent's trial, and therefore no basis for drawing an inference concerning whether D.S.'s counsel would have cautioned him about that issue.

[134] Lamer C.J.C. referred to the existence of such consequences at para. 88 of *B. (K.G.)* where he said, in part, the following: "A witness who tells one story to the police and another at trial is currently exposed to prosecution under ss. 139 (obstructing justice) and 140 (public mischief) of the *Criminal Code*, R.S.C., 1985, c. C-46."³

[135] In *Trieu*, Rosenberg J.A. noted at para. 36 that the *B. (K.G.)* witnesses who were accompanied by counsel "would have had the opportunity to obtain legal advice, advice that would presumably have warned the witnesses of the consequences of lying to the police."

[136] Further, at para. 99 of *Trieu*, Moldaver J.A., speaking for the majority, indicated that "it could be taken as a given" that a co-perpetrator's counsel "would have explained

³ Lamer C.J.C.'s comment was made in the context of statements by non-accused witnesses to the police. However, I see no reason why the same consequences would not apply to statements implicating another individual in an offence contained in an Agreed Statement of Fact signed by an accused person to support a guilty plea to a reduced charge, where such statements are patently within the knowledge of the accused person.

to him the need to be honest and forthright with the court [at his guilty plea proceeding], not only in terms of his role in the home invasion but the role of others as well.” In part, the reason for this was “the possibility of further criminal charges.”

[137] In my view, the trial judge’s erroneous conclusion that D.S. was not warned about the penal consequences of recanting demonstrates that he failed to adequately consider important features of this case that potentially favoured threshold reliability – the participation of experienced defence counsel in the preparation and presentation of the Agreed Statement of Facts and the solemnity of the occasion on which the Agreed Statement of Facts was presented.

[138] Rather than emanating from a police interrogation, the Agreed Statement of Facts was the product of discussion(s) between the trial Crown and defence counsel. Importantly, there was evidence that at least one critical component of the Agreed Statement of Facts was provided by defence counsel – the fact that the respondent gave D.S. the gun. And instead of being interrogated by the police, D.S. had the benefit of consulting defence counsel in private about the contents of the Agreed Statement of Facts. Presumptively, defence counsel would not have been complicit in the presentation of an Agreed Statement of Facts that he knew was untrue.

[139] Further, the Agreed Statement of Facts was presented and read-in in court in solemn circumstances in support of D.S.’s guilty plea to second degree murder.

[140] During the course of the guilty plea proceeding, when the Crown asked that D.S. agree to the facts himself, experienced defence counsel rose and indicated D.S. “acknowledges the facts set out in the agreed statement of fact are accurate and he stands behind them.” Defence counsel then asked D.S. to confirm that assertion.

[141] Presumptively, defence counsel was acting on instructions and certifying that D.S. was aware of the contents of the Agreed Statement of Facts and, if there was evidence that it was part of the plea arrangement that D.S. would have to testify at the respondent’s trial, of the potential consequences of a subsequent recantation.

[142] The circumstances of this case are distinguishable from the circumstances in *R. v. Tran* (2010), 257 C.C.C. (3d) 18 (Ont. C.A.). In *Tran*, Epstein J.A., speaking for this court, stated at para. 43 that “to admit facts acknowledged to be ‘substantially’ correct on a guilty plea in a later trial against other accused persons appears ... to be so fraught with danger that it should be refused in all but the most exceptional cases.”

[143] In this case, D.S. signed the Agreed Statement of Facts along with his counsel after having had an opportunity to review the document with his counsel. As I have said, there was evidence indicating a crucial fact (the source of the gun) in the Agreed Statement of Facts came from defence counsel. Moreover, rather than acknowledging that facts merely read-in were substantially correct, as was the case in *Tran*, both D.S. and his counsel asserted that D.S. “stood behind” the facts contained in the Agreed Statement of Facts.

[144] Assuming an opportunity for meaningful cross-examination, in my opinion, the trial judge erred in law by failing to consider whether the circumstances surrounding the preparation and presentation of the Agreed Statement of Facts provided adequate substitutes for customary court processes to meet the standard of threshold reliability. Moreover, taking account of all the circumstances, I am satisfied that the Crown has demonstrated that the trial judge's ruling on the admissibility of the Agreed Statement of Facts would not necessarily have been the same but for the errors in law I have found.

[145] In reaching this conclusion, I recognize that issues of solicitor-client privilege could arise at a new trial concerning whether D.S.'s counsel properly advised D.S. about the consequences of signing the Agreed Statement of Facts and whether they were acting on instructions in their communications with the Crown and the court. Should that occur, it will be for the trial judge to determine whether D.S.'s evidence at the new trial amounts to an implied waiver of solicitor-client privilege in the circumstances. Although the implied waiver issue was not fully argued before us, I will make some brief comments on the subject to attempt to provide assistance should the issue arise at the new trial.

[146] An express waiver of privilege will occur where the holder of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive it: *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] 4 W.W.R. 762 (B.C.S.C.) per McLachlin J.

[147] Despite these requirements, an implied waiver of solicitor-client privilege may occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it. Importantly, a limited implied waiver may arise where a client alleges a breach of duty by his counsel.

[148] According to *Wigmore on Evidence*, vol. 8, (McNaughton rev. 1961), sec. 2327 pp. 635 – 38, in relation to voluntary testimony, waiver can be implied where fairness demands it. One such circumstance arises where a client alleges misconduct on the part of his counsel:

§2327 Waiver in general; Voluntary testimony as a waiver.

What constitutes a waiver by implication?

Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. *A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege will cease whether he intended that result or not.* He cannot be allowed after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final. As a fair canon of decision, the following distinctions may be suggested:

...

(6) *When the client alleges a breach of duty to him by the attorney, the privilege is waived as*

to all communications relevant to that issue.

[Emphasis added.]

[149] However, in *S & K Processors Ltd.*, McLachlin J. expressed the view that “[i]n the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent.”

[150] In that case, McLachlin J. held that production of an accountant’s report did not constitute waiver of privilege as to communications between the expert, the instructing solicitor and the client in the course of preparation of the report because the report was produced under compulsion by statute.

[151] Similarly, in *R. v. Campbell*, [1999] 1 S.C.R. 565, Binnie J. noted that the mere fact that an RCMP officer confirmed in cross-examination that he obtained the opinion of a Department of Justice lawyer to verify his own understanding of the legality of a reverse-sting operation was not sufficient to constitute a waiver of privilege. The officer “was simply responding to questions crafted by the appellant’s, as he was required to do.”

[152] Rather it was the officer’s evidence in-chief, asserting his belief in the legality of the reverse sting operation, and the reliance by the RCMP and the Crown on the legal opinion as a factor weighing against the imposition of a stay, that gave rise to an implied waiver of solicitor-client privilege.

[153] Nonetheless, implied waiver has been found to occur in situations where a party “brings the suit or raises an affirmative defence that makes his intent and knowledge of

the law relevant”⁴ and in a case where a co-accused in a criminal trial testified that his counsel had suggested that he lie to facilitate a plea bargain.⁵

[154] We, of course, have no way of knowing how the evidence will unfold at a new trial. And we recognize that issues of implied waiver involve fact specific determinations.

[155] Thus, in my opinion, the mere fact that D.S. claimed, in his evidence in the court below, that he did not understand some of the words in the Agreed Statement of Facts and that he did not understand the words “acknowledges” and “accurate” that were put to him by his counsel at the guilty plea proceeding could not amount to an implied waiver of solicitor-client privilege. It was never made clear what other words he did not understand and he did not claim to have discussed those particular words with his counsel. Moreover, he was not asked about the instructions he gave his counsel concerning communications to be made in court.

[156] However, if it should happen that D.S. testifies at the new trial in a manner that alleges misconduct on the part of his counsel at the guilty plea proceeding, in my opinion, a strong argument would arise that he had impliedly waived solicitor-client privilege to the extent necessary to permit his counsel to offer an explanation.

[157] I recognize that D.S. will be testifying under subpoena and that the type of testimony I have referred to may arise during cross-examination – factors that could

⁴ *Rogers v. Bank of Montreal*, [1985] 4 W.W.R. 508 (B.C.C.A.) at p. 513, citing *United States v. Exxon Corp.*, 94 F.R.D. 246 (1981) at pp. 248-49.

⁵ *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.) at para. 67 citing *Wigmore on Evidence*, vol. 8, (McNaughton rev. 1961) at p. 638. I note, however, that *Dunbar* has been questioned. See *R. v. Chan*, [2002] A.J. No. 1019 (Q.B.).

potentially go to the voluntariness of his testimony: *R. v. Creswell*, 2000 BCCA 583; *R. v. Chan*. I also recognize that “solicitor-client-privilege must be as close to absolute as possible” and that “it will only yield in certain clearly defined circumstances”: *R. v. McClure*, [2001] 1 S.C.R. 445 at para. 35.

[158] Nonetheless, it will be for the trial judge at the new trial, with the benefit of fulsome submissions from counsel, to resolve questions concerning implied waiver of solicitor-client privilege, should they arise, having regard to the specifics of D.S.’s testimony. As I have said, this will involve a fact specific determination that may include an assessment of issues such as the reasonable inferences arising from D.S.’s testimony and whether particular evidence was voluntary or compelled even if given under cross-examination.

(iii) Did the trial judge err by treating motive to fabricate as going to threshold, rather than ultimate reliability?

[159] Near the end of the analysis section of his reasons for refusing to admit the Agreed Statement of Facts for the truth of its content, the trial judge stated that while no direct evidence of a motive to lie had been presented he could infer such a motive in the circumstances.

[160] The Crown submits that because D.S. was available for meaningful cross-examination, motive to lie went to ultimate, rather than threshold, reliability of the Agreed Statement of Facts. Accordingly, the Crown contends that the trial judge erred in considering the presence of a motive to lie as part of the admissibility inquiry.

[161] In my view, this is a question for the trial judge at the new trial to determine based on the trial judge's view of whether the threshold reliability requirement has been satisfied based on D.S.'s availability for cross-examination and the process that was followed in putting the Agreed Statement of Fact before the court when D.S. pled guilty.

[162] *Khelawon* makes it clear that the question of whether particular factors go to threshold or ultimate reliability depends "on the particular dangers arising from the hearsay nature of the statement and the available means, if any, of overcoming them": *Khelawon* at para. 55.

[163] If the trial judge at the new trial is satisfied that "the [threshold] reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the ... truth and accuracy [of the Agreed Statement of Facts]" based on D.S.'s availability for cross-examination and the process that was followed in putting the Agreed Statement of Facts before the court, "there is no need to inquire further into the likely truth of the [Agreed Statement of Facts]."

[164] On the other hand, if the trial judge concludes that threshold "reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not": *Khelawon* at para. 92.

VI. Disposition

[165] Based on the foregoing reasons, I would allow the appeal, set aside the respondent's acquittal and order a new trial.

Signed: "Janet Simmons J.A."

"I agree W. Winkler C.J.O."

"I agree M. J. Moldaver J.A."

RELEASED: "WW" OCTOBER 20, 2011