SCC File No. 36537

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

AND:

ROBERT DAVID NICHOLAS BRADSHAW

RESPONDENT
(Appellant)

- AND -

ATTORNEY GENRAL OF ONTARIO, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

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PART I – OVERVIEW

1. In this appeal, the British Columbia Civil Liberties Association (the "BCCLA") submits that hearsay evidence of an accomplice should not be admitted for the truth of its contents unless it is corroborated by independent evidence which establishes that a crime has been committed and connects or tends to connect the accused to the crime. This stringent analysis at the threshold reliability stage is warranted given the unique evidentiary frailties of accomplice statements which cannot be tested in the crucible of cross-examination, and is necessary to militate against the risk of civil liberties abuses, including but not limited to the risk of wrongful conviction.

2. The BCCLA makes no submission with respect to the result of the case at bar.

PART II - STATEMENT OF POINTS IN ISSUE

3. What is the proper threshold reliability analysis to apply to an out-of-court statement made after the alleged offence was committed (rather than a *res gestae* statement) and made by an accomplice of the accused?

PART III – STATEMENT OF ARGUMENT

4. The BCCLA submits that the issues raised in this appeal must be addressed in the context of this Court's existing jurisprudence on the inherent unreliability of hearsay statements and the inherent reliability of statements from accomplices, as well as careful consideration of the particular dangers which arise when these two categories of unreliable evidence are found together in the same impugned statement.

A. Inherent unreliability of hearsay statements

5. The common law has long accepted that out-of-court statements are not admissible for the truth of their contents, as the court cannot assess a declarant's perception, memory, narration or sincerity when the declarant does not take the witness stand.

R v Khelawon, 2006 SCC 57 at para 2 [*Khelawon*]

6. Therefore, hearsay statements are presumptively inadmissible unless the court can be satisfied that (a) the statement is necessary, and (b) adequate circumstances exist which satisfy the trial judge that the statement is reliable. Traditionally, this was accomplished through category-based exceptions to the rule against hearsay, but a principled approach which focuses

on the underlying concepts of necessity and reliability rather than formalistic categories has supplanted the categorical approach.

R v Mapara, 2005 SCC 23 at para 15 [*Mapara*]

7. Courts have recognized two paths to establishing the threshold reliability of a hearsay statement. First, the trial judge may be satisfied that there is sufficient basis to assess the truth and accuracy of the impugned statement using substitutes for cross-examination which takes place in the typical adversarial process. Second, the trial judge may be satisfied that the impugned statement was made in circumstances that provide guarantees that the statement is reliable or trustworthy, such as a *res gestae* statement.

Khelawon, *supra* at paras 48-49

B. Inherent unreliability of statements from accomplices

8. The common law has also long accepted that statements made by accomplices that implicate the accused are inherently unreliable and must be treated with great caution. An accomplice is more likely to falsely accuse another in order to avoid or minimize his or her own culpability, or that of a friend. Moreover, accomplices have themselves been involved in criminal activity, and therefore may be less worthy of belief than a typical witness.

R v Youvarajah, 2013 SCC 41 at para 62

C. Particular dangers presented by hearsay statements from accomplices

9. In *Khelawon,* Charron J held that the scope of the inquiry into threshold reliability "must be tailored to the particular dangers presented by the evidence." The impugned statement in the present case is located at the intersection of several serious threats to reliability: it is a hearsay statement which differs from prior statements made by an accomplice with a clear motive to lie. Moreover, it was elicited as a result of a Mr. Big sting operation, even though the statement was made to police after the ruse of the Mr. Big operation had been dropped. Any one of the aforementioned circumstances raises "particular dangers"; the confluence of these dangers makes this matter of first instance for this Court.

Khelawon, *supra* at para 4

10. Per *Khelawon*, the Court's analysis of threshold reliability in this case, and cases involving similar evidence, must be responsive to the fact that the impugned statement cannot be tested by cross-examination and is inherently less reliable than a statement from a declarant who has no motive to lie. The BCCLA submits that an increased level of scrutiny must be applied to out-of-court statements of accomplices at the threshold reliability stage to account for these two significant threats to reliability. This analysis applies *a fortiori* to statements adduced in the context of (or derivative from) a Mr. Big operation, where the impact of the Mr. Big operation further decreases the likelihood that the impugned statement is reliable.

D. Application of the *R v Baskerville* framework to hearsay statements of accomplices

11. The BCCLA does not propose a bright line rule rendering all post-offence hearsay statements from accomplices inadmissible. Rather, the BCCLA submits that independent corroborating evidence that (a) establishes that a crime has been committed and (b) connects or tends to connect the accused to the crime, should be required as it provides the necessary level of scrutiny to respond to the particular reliability dangers presented by this evidence.

12. The BCCLA submits that the only way for a trial judge to be reasonably satisfied that a hearsay statement from an accomplice is sufficiently reliable to be admitted is if the statement is supported by independent evidence that also connects the accused to the crime. Evidence that corroborates collateral aspects of the statement is unhelpful, as the connection of the accused to the crime is the specific point about which the accomplice has the most pressing motive to lie.

13. This was the approach taken in *R v Baskerville*, [1916] 2 KB 658 [*Baskerville*] in relation to the admissibility of *viva voce* testimony of accomplices. The English Court of Criminal Appeal reviewed and restated the law applicable to corroboration of the evidence of accomplices, and concluded that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the accused in relation to the crime:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.
>
> *Baskerville*, *supra* at 667

14. The rule in *Baskerville* was approved by numerous decisions of this Court until *R v Vetrovec*, [1982] 1 SCR 811 [*Vetrovec*] effectively put an end to this approach in Canada with respect to *viva voce* evidence. Dickson J (as he then was) acknowledged the inherent unreliability of accomplice evidence, but held that there was no special rule for its admissibility. Rather, accomplices are governed by the same rules governing all witnesses. Dickson J went on to hold that it may be appropriate in some circumstances for the trial judge to issue a "clear and sharp warning" to the jury cautioning against relying on the evidence of an accomplice without corroboration. He further held that there was "no magic in the term corroboration", and explicitly rejected the test for corroborating evidence in *Baskerville* which had previously governed.

Vetrovec at 831

15. Dickson J, writing for the Court, identified three problems with the rule in *Baskerville*. First, he held that the approach to corroboration in *Baskerville* obscured the purpose of an accomplice warning, which was merely to caution the jury against accepting the evidence of the accomplice absent evidence that bolstered the accomplice's credibility. This resulted in decision-makers losing sight of the real issue, which was to determine whether there is evidence that bolsters the credibility of an accomplice. Second, Dickson J wrote that the term "corroboration" had become a legal term of art, "not a word of common parlance," and "[w]hen explained to juries it is given a technical definition, the exact content of which is still a matter giving rise to difference of opinion among jurists". Third, the rule in *Baskerville* was "over-cautious" because "evidence which implicates the accused does indeed serve to [lend credibility to the evidence of the accomplice] but it cannot be said that this is the only sort of evidence which will accredit the accomplice" [Emphasis added].

Vetrovec, supra, at 824-826, 829, 831; see also *R v Kehler*, 2004 SCC 11 at paras 12-13, 16 [*Kehler*]

16. Since its decision in *Vetrovec*, this Court has affirmed that when tasked with assessing the ultimate reliability of an accomplice statement, the trier of fact is entitled to convict on the basis of evidence given by an accomplice that is corroborated in such a way that the trier of fact can believe that the witness is telling the truth. Alternatively, in the absence of corroboration, if the trier of fact is entitled to convict if he or she is satisfied in any event that the accomplice is telling the truth.

R v Khela, 2009 SCC 4 at para 37

17. Where a critical element of an accomplice's testimony carries a particular risk of being unreliable, the trier of fact must be satisfied that the accomplice's testimony can be relied upon as truthful in that regard. In *Kehler*, *supra*, this Court noted that an accomplice may be "evidently truthful as to his own participation in the offence charged, [but] subject to particular caution as regards his implication of the accused."

Kehler, *supra* at paras 20-21

18. The BCCLA's proposed use of the rule in *Baskerville* as a mechanism for assessing the threshold reliability of accomplice statements is consistent with *Vetrovec* and *Kehler*. *Vetrovec* did not purport to address the admissibility of out-of-court statements by accomplices, but rather contemplated an accomplice who provides *viva voce* evidence and undergoes cross-examination. In fact, the principles set out in *Vetrovec* and *Kehler*, namely the inherent unreliability of accomplice statements and the need for increased scrutiny on the aspects of an accomplice's testimony which carry a particular risk of being unreliable, support the application of the rule in *Baskerville* when an accomplice statement is addressed in the context of the principled approach to hearsay.

19. Moreover, the specific problems with the *Baskerville* approach identified in *Vetrovec* simply do not arise when applied to an out-of-court statement made by an accomplice. Concerns about a jury's ability to wrestle with the proper definition of corroboration do not arise because an analysis of the reliability of a hearsay statement is a question of threshold admissibility which is resolved by the trial judge in his or her capacity as "gate-keeper." The proposed *Baskerville* approach to an out-of-court statement would be applied at a *voir dire* determination by the trial judge of whether the hearsay statement is sufficiently reliable to be admitted into evidence. If the trial judge admits the evidence and determines that a *Vetrovec* warning is necessary, it can be given prior to the jury's assessment of ultimate reliability.

20. Concerns about the rule in *Baskerville* being "over-cautious" do not arise at the threshold reliability stage. The concern in this regard expressed by Dickson J in *Vetrovec* was that requiring independent evidence connecting the accused to the offence unnecessarily limited the

trier of fact from considering other evidence that may bolster the credibility of an accomplice witness, such as that accomplice's demeanour while giving *viva voce* evidence in direct and cross-examination.

21. The focus at the threshold reliability stage is not on the credibility of the accomplice witness, which is an issue to be considered by the trier of fact in determining the ultimate reliability of the statement, but rather on whether the statement itself is sufficiently reliable to be admitted into evidence. The trial judge does not engage in an assessment of the credibility of the accomplice witness when determining threshold reliability. Moreover, there is no opportunity to observe an accomplice's demeanour on the witness stand and under cross-examination when the accomplice does not take the stand.

22. Similarly, the application of *Baskerville* to the type of evidence at issue in this case does not risk the "blind and empty formalism" referred to in *Vetrovec*. The BCCLA does not propose that trial judges apply a bright line rule. Instead, a trial judge's role is to assess the threshold reliability of the impugned statement in light of the available corroborating evidence. Requiring independent corroborating evidence that implicates the accused has the effect of providing a clear mechanism to assess the threshold reliability of evidence that presents a unique set of reliability concerns, not imposing a universal rule which is to be blindly followed. No "ritualistic incantation" or quota of corroboration need be recited, and the trial judge retains the ability to properly engage the principled approach to hearsay evidence.

Vetrovec, supra, at 812

23. Given the concerns with the unreliability of both hearsay evidence and accomplice evidence, the BCCLA submits that the approach to corroboration in *Vetrovec* and *Kehler* used for the evidence of an accomplice who gives *viva voce* evidence does not provide the court with sufficient tools to assess threshold reliability for an out-of-court statement made by an accomplice. As was noted by Lord Abinger CB in *R v Farler*:

> A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all. ... It would not at all tend to shew that the party accused participated in it.

R v Silverstone, [1934] 1 DLR 726 (Ont CA) at 728, citing *R v Farler*, 8 C & P 106 at 107

24. Requiring independent corroborating evidence that connects, or tends to connect, the accused with the commission of the offence ensures that convictions do not result from hearsay evidence given by a declarant with a motive to lie without corroboration of the key point about which the declarant is likely to lie.

D. Other examples of enhanced reliability threshold for hearsay statements

25. If this Court applies the *Baskerville* analysis in the circumstances of this case, it would not be the first time that a unique evidentiary threshold has been applied to the admissibility of hearsay evidence from declarants who participated in the crime with the accused. Indeed, while the law in Canada has developed to avoid rigid admissibility rules for hearsay evidence, these examples demonstrate that courts have been content to create certain admissibility rules when the identity of the declarant and his or her role in the crime increases the likelihood that the impugned statement is unreliable. This is consistent with the holding of Charron J in *Khelawon* that the threshold reliability analysis "must be tailored to the particular dangers presented by the evidence."

Khelawon, *supra* at para 4

26. What follows are two examples where the common law has developed to account for the inherent risks associated with the admission of hearsay evidence from accomplices in certain contexts. The BCCLA submits that the following approaches are consistent with enhanced scrutiny of out-of-court accomplice statements implicating an accused by applying the *Baskerville* approach.

27. First, in *Mapara*, this Court upheld the rule in *R v Carter*, [1982] 1 SCR 938 [*Carter*] that a co-conspirator's hearsay statements are admissible against an accused "only if the trier of fact is satisfied beyond a reasonable doubt that a conspiracy existed and if independent evidence, directly admissible against the accused, establishes on a balance of probabilities that the accused was a member of the conspiracy."

Mapara, *supra* at para 8

28. The appellant in *Mapara* argued that the co-conspirator's exception to the hearsay rule went against the principled approach to hearsay by using corroborating evidence to bolster the reliability of out-of-court statements. This Court found that the *Carter* rule does not just corroborate the hearsay statement, but "attests to a common enterprise that enhances the general reliability of what was said in the course of pursuing that enterprise", similar to a *res gestae* statement where the context of spontaneity and contemporaneity provide circumstantial indicia of reliability.

Mapara, supra at paras 23, 26

29. The statement at issue in this case was made after the alleged offences and not in furtherance of a common purpose, and accordingly the co-conspirator exception to hearsay does not apply. The BCCLA makes no submissions with respect to that exception.

30. Nevertheless, the *Carter* requirement for direct and independent corroborative evidence to establish that the accused was a member of the conspiracy demonstrates that in certain circumstances courts are willing to introduce a corroboration requirement at the threshold reliability stage in order to protect against the likelihood that evidence from an accomplice will not be reliable. The BCCLA submits that a similar blending of the law with respect to corroboration of accomplice statements and the admissibility of hearsay statements is warranted in the present case.

31. Second, the law is clear that a hearsay statement of a co-defendant cannot be used against an accused in a joint trial. The rationale for this rule was set out by Brennan J of the United States Supreme Court in *Bruton v US*:

> Such a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

Bruton v US, 391 US 123 (1968) at 135; see also *R v Parberry* (2005), 202 CCC (3d) 307 (Ont CA) at para 15; *R v C(B)* (1993),

80 CCC (3d) 467 (Ont CA) at 476; *McFall v The Queen*, [1980] 1 SCR 321 at 338

32. The rationale for the rule against admitting hearsay statements of co-defendants for the truth of their contents in joint trials underscores some of the dangers identified by the BCCLA in admitting hearsay statements of accomplices which implicate the accused. Much like the impugned statement in *Bruton*, the impugned statement in the present case is inherently unreliable and its lack of reliability is "intolerably compounded" when the statement cannot be tested in the crucible of cross-examination.

E. Impact of Mr. Big investigation

33. The BCCLA's submission in this appeal applies to all post-offence hearsay statements of accomplices. It is not limited to circumstances similar to the present case, where the impugned statement was derivative of evidence obtained in the course of a Mr Big sting operation. However, the BCCLA submits that the above analysis applies *a fortiori* in situations where the evidence in question is obtained through a Mr Big operation, or is derivative of evidence obtained through such an operation.

34. In *R v Hart*, 2014 SCC 52 [*Hart*] this Court recognized a new common law rule of evidence for assessing the admissibility of out-of-court confessions made during a Mr Big sting investigation. Prior to this, Mr Big confessions were admissible against the accused under the party admissions exception to the hearsay rule. Defence counsel were therefore limited to challenging the admissibility of Mr Big confessions under the abuse of process doctrine or pursuant to the trial judge's general discretion to exclude evidence.

35. In *Hart*, the Court held that statements made in the course of Mr Big investigations are presumptively inadmissible and placed the burden on the Crown to establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. In altering this state of affairs, this Court recognised that Mr Big investigations can produce unreliable confessions and therefore raise a risk of wrongful convictions and other civil liberties abuses.

Hart, *supra* at para 10

36. The reliability concerns endemic to Mr Big investigations add to the existing reliability concerns associated with out-of-court statements by accomplices that are outlined above, further

militating in favour of the stringent threshold reliability analysis for which the BCCLA advocates.

PART IV – COSTS

37. The BCCLA seeks no order for costs and asks that none be made against it.

PART V – NATURE OF ORDER SOUGHT

38. The BCCLA seeks leave to present oral argument for a period of ten minutes at the hearing.

DATED: September 2, 2016 Greg J. Allen For: Caily A. DiPuma

Counsel for the intervener, British Columbia Civil Liberties Association

PART VI – TABLE OF AUTHORITIES

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PART VII – LEGISLATON AT ISSUE

N/A