



SUPREME COURT OF CANADA

CITATION: R. v. Schneider, 2022
SCC 34

APPEAL HEARD: December 10,
2021

JUDGMENT RENDERED:
October 7, 2022

DOCKET: 39559

BETWEEN:

His Majesty The King
Appellant

and

William Victor Schneider
Respondent

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,
Kasirer and Jamal JJ.

REASONS FOR JUDGMENT: Rowe J. (Wagner C.J. and Moldaver, Côté, Martin, Kasirer
and Jamal JJ. concurring)
(paras. 1 to 88)

JOINT DISSENTING REASONS: Karakatsanis and Brown JJ.
(paras. 89 to 97)

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His Majesty The King

Appellant

v.

William Victor Schneider

Respondent

Indexed as: R. v. Schneider

2022 SCC 34

File No.: 39559.

2021: December 10; 2022: October 7.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Evidence — Admissibility — Hearsay — Party admission — Accused charged with second degree murder — Crown seeking to adduce at trial hearsay evidence from accused's brother concerning incriminating statements he overheard accused make in telephone conversation with wife — Trial judge admitting brother's testimony into evidence — Accused convicted by jury — Whether trial judge erred in admitting overheard statements into evidence.

The accused was charged with second degree murder after the victim's body was recovered by police in a hidden suitcase following a tip from the accused's brother. At trial, the Crown sought to adduce hearsay evidence from the brother, who overheard the accused speaking on the phone with his wife. The trial judge held a *voir dire* regarding the admissibility of the brother's testimony, during which the brother testified that he could not remember word-for-word what the accused said to his wife but the statements made were along the lines of "I did it" or "I killed her". The trial judge ruled the testimony was admissible. The brother also testified at trial as to several critical conversations he had with the accused regarding the victim and the location of her body prior to the accused's phone call to his wife. The jury convicted the accused of second degree murder.

The accused appealed his conviction, arguing that the trial judge erred in admitting the brother's testimony as to the overheard conversation and in responding to a mid-deliberation question from the jury. The majority of the Court of Appeal allowed the appeal, set aside the conviction and ordered a new trial. It held that the testimony was not capable of meaning and therefore not relevant and should not have been admitted. In its view, only the micro context, i.e. the words said before and after the overheard admission, was pertinent in determining whether the admission had meaning, and the brother could not recall this context. The dissenting judge would have dismissed the appeal, as she saw all the evidence, including the brother's conversations with the accused leading up to the phone call, as capable of informing the meaning of the overheard words. The Court of Appeal unanimously dismissed the ground

pertaining to the question from the jury. The Crown appeals to the Court as of right. In response, the accused argues the trial judge erred in dealing with the jury's mid-deliberation question.

Held (Karakatsanis and Brown JJ. dissenting): The appeal should be allowed and the conviction restored.

Per Wagner C.J. and Moldaver, Côté, **Rowe**, Martin, Kasirer and Jamal JJ.: The trial judge did not err in admitting the brother's hearsay evidence. What the brother overheard the accused say on the phone was capable of non-speculative meaning such that it was relevant; it was admissible under the party admission exception to hearsay; and there is no basis to disturb the trial judge's discretionary balancing of probative value against prejudicial effect. In addition, there is substantial agreement with the Court of Appeal that the jury's question was not ambiguous and the trial judge answered it correctly.

The three-part test for admission of all evidence, including party admissions, that trial judges must consider is: (a) whether the evidence is relevant; (b) whether it is subject to an exclusionary rule; and (c) whether to exercise discretion to exclude it. While a *voir dire* is often needed when questions arise as to admissibility, it may not be necessary for party admission evidence; whether one is needed for such evidence is to be determined in the circumstances of each case.

First, to determine relevance, a judge must ask whether, in light of all the other evidence, the at-issue evidence logically tends to make a fact in issue more or less likely. The threshold is low and judges can admit evidence that has modest probative value. Concepts like ultimate reliability, believability, and probative weight have no place when deciding relevance; they are reserved for the finder of fact. The evidentiary context that trial judges can use to determine whether evidence is capable of meaning such that it could be relevant includes evidence that parties have adduced and evidence that a party indicates that they intend to adduce. This proposition applies to party admissions; there is no basis to treat them differently in the determination of relevance. Accordingly, there is no basis in law to differentiate between micro and macro context; all the evidence is capable of informing a judge's analysis of this question. Furthermore, party admissions, like other evidence, are not rendered inadmissible because the witness is equivocal in their testimony. To the extent that a witness's uncertainty or imperfect recollection is related to admissibility (rather than weight), they are properly to be considered by the trial judge when balancing probative value against prejudicial effect. Thus, the fact that a witness cannot recall the exact words used does not mean that such evidence has no relevance. The focus should remain on whether the jury can give meaning to the witness's testimony in a manner that is non-speculative.

Second, evidence that is relevant is ordinarily admissible, subject to various exclusionary rules. Hearsay evidence is subject to a general exclusionary rule and various exceptions. One such exception is the party admission exception. Party

admissions include any acts or words of a party offered as evidence against that party. In criminal trials, a party admission will be evidence that the Crown adduces against an accused. The common law justifies allowing party admissions into evidence on the basis that a party cannot complain of the unreliability of his or her own statements. Unlike many other exceptions, justification for allowing party admissions does not relate to necessity or reliability; accordingly, they are admissible without reference to necessity or reliability.

Third, judges must determine whether they should exercise their discretion to exclude evidence by balancing probative value against prejudicial effect. This weighing has been referred to as a cost benefit analysis. Probative value relates to the degree of relevance to trial issues and the strength of inference that can be drawn from evidence. Prejudicial effect relates to the likelihood that a jury will misuse the evidence. Judges sitting with juries should consider the extent to which the cost associated with the evidence (i.e., the prejudice) can be attenuated by appropriate instructions to the jury as to the use to which the evidence can properly be put. A trial judge's determination that the probative value of evidence outweighs its prejudicial effect is discretionary and should be reviewed with deference.

In the instant case, the trial judge did not err in admitting the brother's testimony as to what he overheard the accused say. There was sufficient context for the jury to give meaning to the words that the brother overheard, such that the evidence overcomes the low threshold for relevance. It is not fatal that the brother was uncertain

as to the exact words that he heard the accused say. The equivocal nature of the brother's testimony is a factor for consideration when weighing the probative value against the prejudicial effect. The brother's evidence, if believed by the jury, tends to increase the probability that the accused was responsible for the victim's death. In light of other evidence, the brother's evidence was capable of non-speculative meaning and relevant. Next, the evidence was that the accused had, by his words, admitted responsibility for the victim's death. This is a party admission, and therefore comes within a recognized exception to the general exclusionary rule for hearsay. Finally, the accused did not demonstrate an error in the trial judge's discretionary balancing of probative value against prejudicial effect, particularly in light of the well-structured jury instructions on appropriate use of the party admission, which effectively and adequately limited the possibility of prejudicial use.

Per Karakatsanis and Brown JJ. (dissenting): The appeal should be dismissed. There is agreement with the majority's framework for assessing relevance and probative value but disagreement with its application. The evidence of the overheard statements should not have been admitted as a jury could not ascertain their meaning or relevance. On the evidence before the jury, it was impossible to know what the accused said to his wife during the overheard phone call. The brother did not know the words that he heard, he was deliberately trying not to listen to the conversation, he neither participated in the conversation nor heard both sides of it, and he acknowledged that he did not know what was said or recall the substance of what was said. Assessing the relevance of the accused's brother's testimony is therefore an exercise in pure

speculation. While context beyond the immediate conversation can inform the meaning of statements made within the conversation, in the instant case, the contextual features beyond the conversation that were relied on were irrelevant and there was insufficient context arising from the conversation itself. In any event, when the potential for misuse is measured against the absence of any significant probative value, the result is that the evidence should have been removed from the jury's consideration.

Cases Cited

By Rowe J.

Applied: *R. v. Ferris*, [1994] 3 S.C.R. 756; **considered:** *R. v. Ferris* (1994), 149 A.R. 1; *R. v. Bennight*, 2012 BCCA 190, 320 B.C.A.C. 195; *R. v. Buttazzoni*, 2019 ONCA 645; *R. v. Hummel*, 2002 YKCA 6, 166 C.C.C. (3d) 30; **referred to:** *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688; *R. v. Arp*, [1998] 3 S.C.R. 339; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544; *R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475; *R. v. Corbett*, [1988] 1 S.C.R. 670; *Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298; *R. v. Evans*, [1993] 3 S.C.R. 653; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144; *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520; *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517; *R. v. Bradshaw*,

2017 SCC 35, [2017] 1 S.C.R. 865; *R. v. Gordon Gray*, 2021 QCCA 882; *R. v. Foreman* (2002), 169 C.C.C. (3d) 489; *R. v. Osmar*, 2007 ONCA 50, 84 O.R. (3d) 321; *R. v. Lo*, 2020 ONCA 622, 152 O.R. (3d) 609; *R. v. Scott*, 2013 MBCA 7, 288 Man. R. (2d) 188; *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908; *R. v. Robertson*, [1987] 1 S.C.R. 918; *R. v. Khill*, 2021 SCC 37; *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42; *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581; *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26; *R. v. Reiersen*, 2010 BCCA 381, 259 C.C.C. (3d) 32; *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Miljevic*, 2011 SCC 8, [2011] 1 S.C.R. 203.

By Karakatsanis and Brown JJ. (dissenting)

R. v. Ferris (1994), 149 A.R. 1; *R. v. Arp*, [1998] 3 S.C.R. 339.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 2 “bodily harm”, 25(3), 182(b), 229(a)(ii), 235(1).

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APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Goepel and DeWitt-Van Oosten JJ.A.), 2021 BCCA 41, 400 C.C.C. (3d) 131, [2021] B.C.J. No. 151 (QL), 2021 CarswellBC 232 (WL), setting aside the conviction of the accused for second degree murder and ordering a new trial. Appeal allowed, Karakatsanis and Brown JJ. dissenting.

Mary T. Ainslie, K.C., and *Liliane Y. Bantourakis*, for the appellant.

Christopher Nowlin, Thomas Arbogast, K.C., and *Katherine Kirkpatrick*,
for the respondent.

The judgment of Wagner C.J. and Moldaver, Côté, Rowe, Martin, Kasirer and Jamal JJ. was delivered by

ROWE J. —

[1] This appeal concerns the admissibility of hearsay evidence, being testimony of an overheard phone conversation that included an admission of criminal responsibility. Central to these reasons is the view that the admissibility of such

evidence is governed by foundational legal principles, rather than some unique rule. Thus, in deciding this case I will consider relevance, hearsay and the discretionary weighing of probative value against prejudicial effect. It will be necessary, as well, to apply this Court's decision in *R. v. Ferris*, [1994] 3 S.C.R. 756.

[2] In deciding this appeal, I will answer three questions. First, whether what the witness overheard had meaning, such that it was relevant to an issue at trial. Second, whether what the witness overheard was admissible under an exception to the general exclusionary rule against hearsay. Third, whether the trial judge appropriately refused to exclude the evidence on the basis that the probative value outweighed the prejudicial effect. I answer each question in the affirmative. What the witness overheard the accused say on the phone was capable of non-speculative meaning such that it was relevant; it was admissible under the "party admission" exception to hearsay; and there is no basis to disturb the trial judge's decision to admit the evidence.

[3] The police charged the respondent, William Victor Schneider ("accused"), with second degree murder and interfering with a dead body contrary to ss. 235(1) and 182(b) of the *Criminal Code*, R.S.C. 1985, c. C-46. At trial, the Crown sought to adduce hearsay evidence from the accused's brother, Warren Schneider Jr. ("brother"), who overheard the accused speaking on the phone with his wife. The brother testified that, while he could not recall the precise words the accused said, during that call the accused admitted to killing the victim. This is the evidence at issue. At the close of the Crown's

case, the accused pleaded guilty to interfering with the body. Thus, this appeal deals only with the murder charge.

[4] The trial judge admitted the brother's testimony as to the overheard conversation. The jury convicted the accused of second degree murder. The accused appealed, arguing the trial judge erred, *inter alia*, by admitting the brother's testimony as to the overheard conversation. A majority of the British Columbia Court of Appeal allowed the appeal, set aside the conviction and ordered a new trial, holding that the at-issue testimony was inadmissible. The dissenting judge would have dismissed the appeal as she would have upheld the trial judge's admission of the evidence and affirmed the conviction.

[5] The judges of the Court of Appeal all agreed that *R. v. Ferris* (1994), 149 A.R. 1 (C.A.), as affirmed by this Court, governed whether the brother's testimony was admissible. All were of the view that the evidence was admissible if it was capable of meaning and, thus, relevant to an issue at trial. However, the judges disagreed as to what *other* trial evidence could inform the analysis of whether the evidence had meaning and was, thus, relevant. The majority drew a tight contextual circle around the evidence that could inform meaning. In doing so, the majority held that only the "micro" context, i.e. the words before and after the evidence at issue, was pertinent to meaning. The dissent saw all the evidence as capable of informing the meaning of what the brother overheard.

[6] The Crown asks this Court to allow the appeal and restore the conviction. I would do so. The trial judge did not err in admitting this part of the brother's evidence. There is no basis in law to differentiate between "micro" and "macro" context when determining whether evidence is capable of meaning and, therefore, relevant. All the evidence is capable of informing a judge's analysis of this question.

[7] In response to the Crown's as of right appeal, the accused raised an additional issue. He argues that the trial judge erred in dealing with a mid-deliberation question from the jury. On this point, I am in substantial agreement with the unanimous Court of Appeal. The jury's question was not ambiguous and the trial judge did not err in answering it.

I. Facts

[8] The victim, Ms. Natsumi Kogawa, was reported missing on 12 September 2016. Police issued a news release on 27 September 2016 with a picture showing Ms. Kogawa with an unidentified male at a mall. Police asked for the public's assistance identifying that man. Police then received a tip from the accused's brother as to the whereabouts of Ms. Kogawa's body. That tip led to police recovering Ms. Kogawa's body, two weeks after she was reported missing, in a suitcase hidden in Vancouver's West End. After investigation, police arrested the accused and charged him with second degree murder and interfering with Ms. Kogawa's body after death.

[9] Between the police news release and his tip to police, the brother had several critical conversations with the accused. I describe these below. As the accused did not testify, the descriptions come entirely from the brother's testimony.

A. *27 September 2016*

[10] On 27 September 2016, the brother's daughter brought the police news release to his attention. She asked if the unidentified man was the accused (her uncle). The brother said yes. He then called the accused to tell him about the police news release. The accused did not respond and hung up the phone.

[11] The brother went to where the accused was staying and the two went for a walk. During this walk, the accused described his relationship with Ms. Kogawa. He said that he had gone on three dates with her. He told his brother that on the third date they took "medication". The brother testified that the accused appeared "[r]emorsefully sad" during this conversation and that the accused told him "it's true" (A.R., vol. II, at pp. 113-14). The trial judge excluded the brother's evidence as to what he thought the accused meant by this statement. The brother told the accused that they should speak again in the morning.

B. *28 September 2016*

[12] The next morning, the accused told the brother that he intended to purchase heroin and use the drug to die by suicide. The accused asked the brother to be with him;

the brother agreed. They both purchased alcohol and the accused purchased heroin. Together, they went to a park.

[13] After arriving at the park, and before taking heroin, the accused told the brother the location of Ms. Kogawa's body. The brother was to inform the police of the body's location after the accused died by suicide. The accused then injected himself with heroin. However, he did not die.

[14] After this suicide attempt, the accused asked the brother for his cellphone. The accused called his wife, a non-compellable witness. This call is at the center of this appeal. Although the brother was about 10 feet away and "not actively trying to listen" (C.A. reasons, 2021 BCCA 41, 400 C.C.C. (3d) 131, at para. 42), he overheard portions of the accused's conversation. What the brother can testify to regarding what he overheard is the principal issue in this appeal.

II. Testimony at Issue

A. *The Brother's Voir Dire Testimony*

[15] The trial judge held a *voir dire* regarding the admissibility of the brother's testimony as to what he overheard the accused say to his wife.

[16] In the *voir dire* examination-in-chief, the brother testified that the accused began the call by saying "[d]id you see the news of the missing Japanese woman,

student?” (A.R., vol. II, at p. 135). He also testified that the accused later said, “I did it” *and* “I killed her” (*ibid.*).

[17] In the *voir dire* cross-examination, defence counsel confronted the brother with his preliminary inquiry testimony in which he had testified that he “believe[d]” the accused said “I did it” *or* “I killed her” (A.R., vol. II, at pp. 141 and 147). After seeing the preliminary inquiry transcript, the brother said that “word-for-word” he could not remember what the accused said, but that the statements made were “along those lines” (pp. 138-45).

[18] The trial judge ruled the testimony was admissible.

B. *The Brother’s Trial Testimony*

[19] During examination-in-chief, the brother stated that the accused, at the beginning of the phone conversation, said “[d]id you hear the news about the missing Japanese student?” (A.R., vol. II, at p. 170). He testified he did not know the exact words the accused said after, but thought that “[n]ear halfway through the conversation” the accused said that “he did it, he killed her” (*ibid.*). Although the brother heard only one side of the conversation, the gist of what he overheard was that the accused was taking responsibility for Ms. Kogawa’s death. The brother testified that the conversation “wasn’t . . . mild” or “loving” (A.R., vol. II, at p. 171).

[20] During cross-examination, the brother acknowledged that he did not recall the exact words that the accused used. Further, even if he was correct in remembering that the accused said “I did it” or “I killed her”, he was unaware what these phrases were said in response to. The brother could not be sure if the phrases were said in response to a question or if they related to Ms. Kogawa’s disappearance. The brother testified he was not trying to listen to the conversation, that he was under significant stress at the time, and that he had consumed alcohol.

III. Decisions in Issue

A. *The Voir Dire Ruling, 2018 BCSC 2546*

[21] The trial judge took the view that admissibility of the brother’s evidence hinged on whether: (1) there was “some evidence” (para. 19, reproduced in A.R., vol. I, at p. 5) that the jury could use to determine the meaning of the words the brother overheard, such that the words were relevant and (2) the probative value of the evidence outweighed the prejudicial effect.

[22] That the brother was unable to recall the exact words did not make his testimony inadmissible. He testified that the accused said “I killed her” or “I did it” and that he understood the “gist” of the conversation (paras. 16-17). There was sufficient context for the jury to give meaning to the words. The probative value of the evidence outweighed any prejudicial effect; as well, a “strong caution to the jury” could

ameliorate any issues associated with the evidence (para. 21). On this basis, the trial judge admitted the evidence.

B. *Answer to the Jury's Mid-Deliberation Question and Conviction*

[23] During deliberation, the jury sent a handwritten note to the court setting out the following question (see the reproduction in the appendix to these reasons):

Could you please expand on the definition of bodily harm in Q3 (intent required for murder) versus bodily harm as described in para 109./111 for manslaughter.

* Bodily Harm

Any hurt or injury . . .
Interfers [*sic*] health . . .
More than just brief/minor.

* Concept of Bodily Harm

That the accused knows is “likely” to cause death and reckless . . .
[Emphasis in original.]

(A.R., vol. IV, at p. 215; see also C.A. reasons, at para. 115.)

[24] The references to “Q3” and “para 109./111” are to the following passages in the jury instructions:

[109] The criminal fault in manslaughter is the commission of the unlawful act which is objectively dangerous in the sense that a reasonable person, in the same circumstances as the accused, would recognize that the unlawful act would subject another person to the risk of bodily harm. “Bodily harm” is any hurt or injury that interferes with a person’s health or comfort and is more than just brief or of a minor nature.

[110] In the offence of murder there is in addition to the unlawful act, the ingredient of either an intention to cause death or an intention to cause bodily harm that the accused knows is likely to cause death and is reckless as to whether death ensues. These are the legal differences between the offences of second degree murder and manslaughter.

[111] Therefore, what distinguishes murder from manslaughter is the mental state, or what we describe in criminal law as the intent of the person causing the death.

[Q3: Did Mr. Schneider Have the Intent Required for Murder?]

[132] To prove that Mr. Schneider had the intent required for murder, the Crown must prove beyond a reasonable doubt one of two things, either:

1. that Mr. Schneider meant to cause Ms. Kogawa's death; or
2. that Mr. Schneider meant to cause Ms. Kogawa bodily harm that he knew was likely to cause her death and was reckless whether death ensued or not.

[133] In other words, you must decide whether the Crown has proved beyond a reasonable doubt either that Mr. Schneider meant to kill Ms. Kogawa, or that Mr. Schneider meant to cause Ms. Kogawa bodily harm that he knew was so dangerous and serious it was likely to kill Ms. Kogawa and proceeded despite his knowledge of that risk. [Emphasis deleted.]

(See C.A. reasons, at paras. 116-17.)

[25] The trial judge conferred with counsel regarding the jury's question. She asked if they thought that she should provide the jury with an expanded definition of intent. Crown counsel replied that the jury "seem[ed] to be caught up that with bodily harm there must be some injury or bruising or something of that nature" (A.R., vol. III, at p. 327). Defence counsel recommended that the judge provide to the jury the definition of "bodily harm" set out in s. 2 of the *Criminal Code*. The judge agreed with

this and indicated that initially she had misread the jury's question. Although Crown counsel went on to suggest an expanded definition of intent, defence counsel was firm that this was not what the jury was asking about. The trial judge decided that she would "wait until [they] get there" on intent (A.R., vol. III, at p. 331). She called in the jury and twice read the definition of "bodily harm" from s. 2 of the *Criminal Code*. The jury asked no further questions and convicted the accused of second degree murder.

C. *British Columbia Court of Appeal, 2021 BCCA 41, 400 C.C.C. (3d) 131*

[26] The accused appealed his conviction on three grounds. Two are relevant to the appeal before this Court. He asked the Court of Appeal to consider if the trial judge erred:

(1) by admitting the brother's testimony regarding the overheard telephone conversation ("Admissibility Issue"); and

(2) in responding to the question from the jury ("Jury Question Issue").

[27] The Court of Appeal unanimously dismissed the Jury Question Issue but divided on the Admissibility Issue. The majority held that the brother's testimony as to the overheard telephone conversation was inadmissible; DeWitt-Van Oosten J.A., in dissent, held that the trial judge did not err in admitting this testimony.

(1) The Admissibility Issue

[28] The Court of Appeal judges agreed that the brother's testimony was admissible if: (1) it was relevant; and (2) the probative value outweighed the prejudicial effect. However, the majority and dissent differed as to the context that a trial judge could use to decide whether the party admission was capable of meaning and, therefore, relevant. The majority held there are two facets to context: "micro" and "macro" (para. 203). Only the micro context, i.e. the words said before and after the overheard admission, were pertinent in determining whether the admission had meaning. As the brother could not recall "what was said before or after the overheard words[,] no properly instructed jury could conclude that the overheard fragment was an admission" (paras. 205-6). The testimony was not relevant and, accordingly, should not have been admitted.

[29] Justice DeWitt-Van Oosten, in dissent, would have held that trial judges can consider all the evidence when determining if the words had meaning and, thus, are relevant. In this case, there was significant evidence (beyond the "micro" context) to inform the meaning of the words the brother overheard. The brother had several conversations with the accused leading up to the phone call; the accused responded to the brother's questions about the news release identifying a missing woman by saying "it's true"; the accused had informed the brother of the location of Ms. Kogawa's body; the accused displayed a remorseful demeanour during interactions that he had with the brother leading up to the phone call. The words the brother overheard "formed part of an ongoing interaction and dialogue" (para. 89). From the entirety of the evidence, a

properly instructed jury would be able to give meaning to the words overheard in a manner that was not speculative. As such, the brother's testimony was relevant.

[30] Considering the next step of admissibility, DeWitt-Van Oosten J.A. held the trial judge's weighing of probative value against prejudicial effect was entitled to deference. Further, any prejudice that might have arisen had been limited by appropriate jury instructions explaining the proper use of the party admission. In the result, DeWitt-Van Oosten J.A. would have dismissed this ground of appeal.

(2) The Jury Question Issue

[31] The accused argued that the trial judge erred in two ways: first, by failing to ask the jury for clarification of the question, as it was ambiguous; and, second, by failing to answer it correctly. The panel unanimously dismissed this ground of appeal. The question was not ambiguous and there was no validity to the accused's suggestion that the definition of bodily harm was different for manslaughter than for murder. Principles of statutory interpretation demand that the same definition for bodily harm apply to both offences. The difference between the two offences is not in the degree of bodily harm an accused inflicts, but rather in the intent that accompanies the act. The panel concluded there was "no reasonable possibility of the jury having been misled and convicting the [accused] of second degree murder based on a diminished form of intent" (para. 148).

IV. Issues on Appeal

[32] The Crown appealed the Court of Appeal's decision on the Admissibility Issue as of right. The accused raised the Jury Question Issue as an alternative basis on which this Court could uphold the order from the Court of Appeal.

V. Analysis

[33] I address this appeal in two parts. First, I address the Admissibility Issue. I conclude that the trial judge did not err in admitting the brother's testimony. Second, I address the Jury Question Issue. On this issue I am in substantial agreement with the unanimous reasons of the Court of Appeal. Like them, I conclude that the jury's question was not ambiguous and that the trial judge did not err in answering it. In the result, I would allow the Crown's appeal, set aside the Court of Appeal decision and restore the accused's conviction for second degree murder.

A. *Admissibility Issue*

[34] The Court of Appeal focused on the fact that the evidence is a party admission. While being mindful of this, my analysis situates the Admissibility Issue in the broader context of the law of evidence, rather than treating it as a unique or niche issue.

[35] I proceed first by describing what I consider to be settled law as to the general procedure for determining admissibility of evidence at a criminal trial, including party admissions. I then apply the foregoing to the brother's testimony, concluding that the trial judge did not err in admitting the evidence.

(1) Legal Framework for Admissibility of Evidence at a Criminal Trial

[36] Evidence that is relevant to an issue at trial is admissible, as long as it is not subject to an exclusionary rule and the trial judge does not exercise their discretion to exclude it (*R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 2; D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 32; S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶2.48; M. Vauclair and T. Desjardins, in collaboration with P. Lachance, *Traité général de preuve et de procédure pénales 2022* (29th ed. 2022), at pp. 905-6). This is the three-part test for admission of all evidence. Judges must consider: (a) whether the evidence is relevant; (b) whether it is subject to an exclusionary rule; and (c) whether to exercise their discretion to exclude the evidence.

[37] When questions arise as to the admissibility of evidence, a *voir dire* is often needed. That said, this Court has noted in *obiter* that a *voir dire* may not be necessary for party admission evidence (*R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688, at

para. 20). Whether a *voir dire* is needed for such evidence is to be determined in the circumstances of each case.

(a) *Determine Whether the Evidence Is Relevant to an Issue at Trial*

[38] The first step in determining admissibility is considering whether the evidence is relevant. At this stage, this is often referred to as “logical relevance”. However, I will use the word “relevance” (rather than “logical relevance”) in this decision.

[39] To determine relevance, a judge must ask whether the evidence tends to increase or decrease the probability of a fact at issue (*R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38). Beyond this, there is no “legal test” for relevance (Paciocco, Paciocco and Stuesser, at p. 35). Judges, acting in their gatekeeping role, are to evaluate relevance “as a matter of logic and human experience” (*R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 44). When doing so, they should take care not to usurp the role of the finder of fact, although this evaluation will necessitate some weighing of the evidence, which is typically reserved for the jury (Vauclair and Desjardins, at p. 687, citing *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, at paras. 95 and 98). The evidence does not need to “firmly establish . . . the truth or falsity of a fact in issue” (*Arp*, at para. 38), although the evidence may be too speculative or equivocal to be relevant (*White*, at para. 44). The threshold for relevance is low and judges can admit evidence that has modest probative value (*Arp*, at para. 38; *R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R.

475, at para. 18). A judge's consideration of relevance "does not involve considerations of sufficiency of probative value" and "admissibility . . . must not be confused with weight" (*R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 715, per La Forest J., dissenting, but not on this point, quoting *Morris v. The Queen*, [1983] 2 S.C.R. 190, at p. 192). Concepts like ultimate reliability, believability, and probative weight have no place when deciding relevance. Whether evidence is relevant is a question of law, reviewable on the standard of correctness (*R. v. Mohan*, [1994] 2 S.C.R. 9, at pp. 20-21).

[40] This leads to the issue that divided the court below: what evidentiary context can a trial judge use to determine whether the evidence is capable of meaning, such that it could be relevant? Justice Charron addressed this in *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 30:

Relevance can only be fully assessed in the context of the other evidence at trial. However, as a threshold for admissibility, the assessment of relevance is an ongoing and dynamic process that cannot wait for the conclusion of the trial for resolution. Depending on the stage of the trial, the "context" within which an item of evidence is assessed for relevance may well be embryonic. Often, for pragmatic reasons, relevance must be determined on the basis of the submissions of counsel. The reality that establishing threshold relevance cannot be an exacting standard is explained by Professors D. M. Paciocco and L. Stuesser in *The Law of Evidence* (4th ed. 2005), at p. 29, and, as the authors point out, is well captured in the following statement of Cory J. in *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38:

To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue". [Emphasis deleted.]

[41] As Charron J. explained, trial judges can consider relevance having regard to evidence that parties have adduced, as well as evidence that a party indicates that they *intend* to adduce. The judge can admit the evidence at issue conditional on counsel's undertaking as to evidence to be adduced (Lederman, Fuerst and Stewart, at ¶2.72). Given the connection between meaning and relevance, Charron J.'s writing in *Blackman* logically extends to evidence that can inform meaning.

[42] This general proposition applies to party admissions. There is no basis to treat party admissions differently in the determination of relevance. At this stage in the analysis, trial judges do not need to have classified the evidence as a party admission. In drawing a tight circle around what other evidence can be taken into account in determining the relevance of party admissions (the "micro" versus "macro" distinction), the Court of Appeal majority erred in law.

[43] In making this point, I am mindful that evidence does not need to be unequivocal to be relevant. In *R. v. Evans*, [1993] 3 S.C.R. 653, Sopinka J. underlined that while questions of admissibility are for the trial judge, *whether a statement was made* and whether it is true are questions for the trier of fact (pp. 664-66; see also *Vauclair and Desjardins*, at pp. 865-66). Party admissions, like other evidence, are not rendered inadmissible because the witness is equivocal in their testimony. Witnesses often have imperfect recollection and express uncertainty in their testimony. To the extent that these are matters related to admissibility (rather than the weight that the trier of fact gives to the evidence), they are properly to be considered by the trial judge when

balancing probative value against prejudicial effect. Thus, the fact that a witness cannot recall the exact words used does not mean that such evidence has no relevance.

[44] Of course, parties are not permitted to “bootstrap” their argument on the admissibility of a party admission to any and all evidence. The party seeking to admit the proposed evidence should limit their submissions to the evidentiary context that is relevant to determining the meaning of the statement at issue. In a criminal case, the Crown may not argue that *any* evidence pointing towards the accused’s guilt provides relevant context. The focus should remain on whether the jury can give meaning to the witness’s testimony in a manner that is non-speculative, not the overall strength of the Crown’s case.

[45] In summary, judges determine relevance by asking whether, in light of all the other evidence, the at-issue evidence logically tends to make a fact in issue more or less likely. This standard applies to all evidence in criminal trials.

(b) *Determine Whether the Evidence Is Subject to an Exclusionary Rule*

[46] Evidence that is relevant is ordinarily admissible, subject to various exclusionary rules. Hearsay evidence, which is at issue in this appeal, is subject to an exclusionary rule and various exceptions.

[47] Hearsay evidence has three components: (1) a statement (or action) made outside of court by a declarant; (2) which a party seeks to adduce in court for the truth of its content; (3) without the ability of the other party to contemporaneously cross-examine the declarant (*Khelawon*, at para. 35; *Evans*, at pp. 661-62; see also *R. v. Smith*, [1992] 2 S.C.R. 915, at p. 924).

[48] Historically, the common law excluded hearsay evidence (*Smith*, at pp. 924-25; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, at para. 153; *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358, at para. 13). Courts premised this exclusion on two primary concerns. First, hearsay evidence may be unreliable and does not afford parties the ability to test reliability by cross-examination (*Khelawon*, at para. 2; *Mapara*, at para. 14). Second, direct evidence is preferable and, thus, hearsay evidence may not be the best available (*Mapara*, at para. 14). Accordingly, as a general proposition, hearsay evidence was excluded as a safeguard against inaccurate fact finding.

[49] However, excluding hearsay in some circumstances impeded rather than assisted accurate fact finding (*Khelawon*, at para. 2; *Mapara*, at para. 14). Over time, courts created exceptions to the general exclusionary bar against hearsay (*Mapara*, at para. 14). Often referred to as pigeonholes, such exceptions developed where hearsay evidence arose in circumstances that lessened concerns of reliability or where hearsay evidence was the best available. These exceptions “became rigid” and formalism abounded (*Mapara*, at para. 14; *Paciocco, Paciocco and Stuesser*, at p. 151). The law

of hearsay became a complex array of categories each defined by narrow rules, on occasion giving rise to arbitrary results and detracting from accurate fact finding.

[50] In response, this Court developed a principled approach to hearsay in *R. v. Khan*, [1990] 2 S.C.R. 531 (*Mapara*, at para. 12). This was intended to arrest the development of circumstance-specific exceptions to hearsay — pigeonholes — and “introduce a measure of flexibility into the hearsay rule” to avoid arbitrary outcomes (*Mapara*, at para. 15). The principled approach provides for hearsay evidence to be admitted on the basis of two factors: necessity and reliability (*Khan*, at pp. 540-42; *Starr*, at para. 153; *Paciocco, Paciocco and Stuesser*, at pp. 152-54; *Vauclair and Desjardins*, at pp. 1078-89).

[51] In *Mapara*, the Court provided that recognized exceptions remain presumptively operative (para. 15, as confirmed in *Khelawon*, at para. 42; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, at para. 34). However, litigants can challenge an exception on the basis that it is not “supported by indicia of necessity and reliability” (*Mapara*, at para. 15).

[52] The exception at issue in this case is a party admission. These include any “acts or words of a party offered as evidence against that party” (*Paciocco, Paciocco and Stuesser*, at p. 191 (emphasis added)). Although there has been debate as to whether party admissions are hearsay, I agree with the prevailing view set out by Charron J.: “. . . admissions from an accused fall within a well-recognized exception to the hearsay

rule” (*R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at para. 75; see also Paciocco, Paciocco and Stuesser, at p. 192).

[53] In criminal trials, a party admission will be evidence that the Crown adduces against an accused. As explained in *Evans*, the common law justifies allowing party admissions into evidence on the basis that a party cannot “complain of the unreliability of his or her own statements” (*Evans*, at p. 664). Unlike many other exceptions, justification for allowing party admissions does not relate to necessity or reliability (*Vauclair and Desjardins*, at p. 911). This is one aspect in which party admissions do not conform to general rules.

[54] This was confirmed by Charron J. in *Khelawon*: “Some of the traditional exceptions stand on a different footing, such as admissions from parties [T]he criteria for admissibility are not established in the same way” (para. 65). See also *Hart*, at para. 63; *Couture*, at para. 75; *S.G.T.*, at para. 20; *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, at para. 82.

[55] Accordingly, party admissions are admissible without reference to necessity and reliability (*R. v. Gordon Gray*, 2021 QCCA 882, at paras. 27-28 (CanLII); *R. v. Foreman* (2002), 169 C.C.C. (3d) 489 (Ont. C.A.), at para. 37; *R. v. Osmar*, 2007 ONCA 50, 84 O.R. (3d) 321, at para. 53; *R. v. Lo*, 2020 ONCA 622, 152 O.R. (3d) 609, at para. 81). Thus, with the exception of the “rare cas[e]” where judges retain discretion to exclude *any* hearsay evidence on the basis that it is unreliable or

unnecessary (*Mapara*, at para. 15), reliability and necessity are not relevant to the admissibility of a party admission.

[56] I digress briefly to underline a point. The party admission exception to the hearsay rule should not be confused with other exceptions that bear some similarity, for example a declaration against interest by a non-party. See *Lo*, at paras. 65-66; *Paciocco, Paciocco and Stuesser* at p. 192. Party admissions include “acts or words of a party offered as evidence against that party” (*Paciocco, Paciocco and Stuesser*, at p. 191 (emphasis added)). In contrast, declarations against interest are not adduced *against* the person who made the statement, as that person is not party to the litigation. Party admissions and declarations against interest have unique foundations. Courts began to permit the admission of declarations against interest on the presumption that “people do not readily make statements that admit facts contrary to their interests, unless those statements are true” (*Paciocco, Paciocco and Stuesser*, at p. 208). As stated earlier, courts allow party admissions on the basis that “what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements” (*Evans*, at p. 664). The unique foundation of each leads to different preconditions for admission.

[57] In this appeal the party admission was something the accused said, that the witness overheard, and that the Crown tendered as evidence of the accused’s guilt (*Evans*, at p. 664; *Paciocco, Paciocco and Stuesser*, at pp. 191-92). However, party admissions can constitute more than words; the common law has held party admissions

to include, *inter alia*, silence, actions, and demeanour (see, e.g., *R. v. Scott*, 2013 MBCA 7, 288 Man. R. (2d) 188; see also Lederman, Fuerst and Stewart, at ¶¶6.470-6.512; Vauclair and Desjardins, at p. 911). As noted by Professor I. Younger, a rule of thumb is that “[a]nything the other side ever said or did will be admissible so long as it has something to do with the case” (*An Irreverent Introduction to Hearsay* (1977), at p. 24, cited in Paciocco, Paciocco and Stuesser, at pp. 191-92). I do not seek to describe here the precise boundaries of party admissions, as that is not at issue.

[58] A trial judge’s determination that evidence is hearsay but falls within an exception from the general exclusionary rule is a question of law, reviewable on a standard of correctness.

(c) *Determine Whether to Use Judicial Discretion to Exclude the Evidence*

[59] Finally, judges must determine whether they should exercise their discretion to exclude evidence by balancing probative value against prejudicial effect. Judges sitting with juries should consider the extent to which any prejudicial effect can be attenuated by appropriate instructions to the jury as to the use to which the evidence can properly be put. In addition, evidence can be excluded where there was a significant unfairness associated with obtaining it, such that it would render the accused’s trial unfair (*Mohan*; Paciocco, Paciocco and Stuesser, at pp. 47-48; Lederman, Fuerst and Stewart, at ¶¶2.75-2.77; Vauclair and Desjardins, at pp. 905-6). No such consideration arises in the circumstances of this case.

[60] Probative value relates to the degree of relevance to trial issues and the strength of inference that can be drawn from evidence (*R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 26, citing *R. v. Robertson*, [1987] 1 S.C.R. 918, at p. 943; *Hart*, at paras. 94-98). Prejudicial effect relates to the likelihood that a jury will misuse the evidence (*Hart*, at para. 106; *Paciocco, Paciocco and Stuesser*, at p. 52). Weighing probative value against prejudicial effect has been referred to as a “cost benefit analysis” (*Mohan*, at pp. 21-22; *Hart*, at para. 94; *Vauclair and Desjardins*, at pp. 905-6).

[61] As noted, the “cost” associated with the evidence (i.e. the prejudice) can be attenuated by appropriate jury instructions. Proper instructions can effectively equip juries with an understanding of how to use evidence in a judicial manner (*R. v. Khill*, 2021 SCC 37, at para. 116; *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, at para. 69).

[62] A trial judge’s determination that the probative value of evidence outweighs its prejudicial effect is discretionary and should be reviewed with deference (*R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581, at para. 31; *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33, at para. 73). In addition, appellate courts are to review alleged errors in jury instructions “in the context of the entire charge and of the trial as a whole” (*R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 32, as cited in *Araya*, at para. 39) so as to afford trial judges “some flexibility in crafting the language of jury instructions” (*Araya*, at para. 39). I would underscore the importance of trial judges

providing clear analysis on the probative value and prejudicial effect of the evidence to facilitate appellate review.

(2) Application of the Legal Framework to the Circumstances of This Case

(a) *The Evidence Was Relevant*

[63] The brother's testimony regarding the overheard conversation was relevant. First, there was sufficient context for the jury to give meaning to the words that the brother overheard, such that the evidence overcomes the low threshold for (logical) relevance. Second, it is not fatal that the brother was uncertain as to the exact words that he heard the accused say. The equivocal nature of the brother's testimony is a factor for consideration when weighing the probative value against the prejudicial effect. It also relates to ultimate reliability and believability; but those are for the trier of fact in weighing the evidence, rather than the judge in the relevance analysis.

[64] The trial judge needed to determine whether, on the basis of all the evidence, the jury could give meaning (in a way that was not speculative) to what the brother testified that he overheard. The context extended beyond the narrow scope that the majority of the Court of Appeal applied. Other evidence properly informed the brother's testimony as to what he overheard. In the days leading up to the phone call at issue, the accused and the brother had spoken about the victim. During these conversations, the accused admitted he had done "something bad", told the brother that

it was “true” (A.R., vol. II, at pp. 107, 111 and 113), and the brother said that the accused was “remorsefully sad. Glad to get it off his chest, per se” (p. 121). On the day of the phone call: the accused told the brother where the victim’s body was; the brother was with the accused when he attempted suicide; and the brother was with the accused in the time leading up to the phone call to his wife. Finally, the brother testified that the accused referred to the victim at the opening of the call. The brother was present, although standing approximately 10 feet away, for the entire call.

[65] I turn now to *Ferris*, the decision of this Court that the trial judge and Court of Appeal below agreed governed the admissibility of the evidence.

[66] *Ferris* concerned admissibility of hearsay evidence that the Crown sought to adduce as a party admission. Police arrested Mr. Ferris for murder and brought him to the station. Mr. Ferris asked to make a phone call. An officer placed the call, handed Mr. Ferris the phone, then walked towards his desk. As the officer walked away, he overheard Mr. Ferris say “I’ve been arrested” and then, sometime later, “I killed David” (*Ferris (C.A.)*, at para. 7). The trial judge admitted the officer’s testimony as to what he heard Mr. Ferris say. Mr. Ferris was convicted by a jury of second degree murder.

[67] The Alberta Court of Appeal overturned the trial decision, holding that a properly instructed jury would be unable to ascribe *meaning* to the words the officer overheard. Words that were incapable of meaning could not be probative of any issue, and, therefore, were not relevant. Evidence that was not relevant was not admissible.

The issue was not what weight to ascribe to the officer's testimony, but whether the words he overheard had *any* meaning. The Court observed that "hearsay rules do not do away with the requirement of relevancy" (para. 32).

[68] The Court of Appeal explained that the phrase "I killed David" could have been an admission. It also could have been part of a reply to the question "what [do] the police think [you] did?" (para. 17). The words, "on their own", did not "allow for the proper understanding and appreciation of the meaning of the statement" (para. 24). The officer's testimony was inadmissible because the jury could not interpret the meaning of the words without "gross speculation" (para. 49).

[69] This Court upheld the Court of Appeal's decision in *Ferris* in the result. In a short, oral judgment, Sopinka J. stated that even if the evidence had relevance, its meaning was "so speculative and its probative value so tenuous that the trial judge ought to have excluded it on the ground its prejudicial effect overbore its probative value" (p. 756). On a careful reading, what Sopinka J. said was *not* that the evidence was inadmissible based on relevance. This Court did not affirm the Court of Appeal's relevance analysis or their application of the principled approach. Rather, Sopinka J. said that even if the testimony was relevant, it should have been excluded after balancing probative value against prejudicial effect.

[70] The trial evidence in *Ferris* was dissimilar to the evidence in this case. In *Ferris*, the accused and the police officer were strangers. There was nothing at all like

the circumstances, sequence of events and conversations that led up to what in this case the brother overheard in the accused's conversation with his wife.

[71] Again, we must bear in mind the difference between relevance and ultimate reliability. How well the brother could recall the words said by the accused relates to the latter, which is a question for the trier of fact. Few people would remember the exact words used in a recent conversation that they listened to intently. Nonetheless, many of us would be able to recall the gist of that conversation. The rules of evidence must respond to this reality. Probative value analysis and the weight given to the evidence by the trier of fact are sufficient mechanisms to address frailties of memory. These frailties do not *also* need to be addressed when determining relevance.

[72] *Ferris* is good law, but must be carefully read. Indeed, [TRANSLATION] “[e]xclusion of a partial conversation is . . . not automatic and the analysis is above all a contextual one” (Vauclair and Desjardins, at p. 970). I would note its application in three decisions: *R. v. Bennight*, 2012 BCCA 190, 320 B.C.A.C. 195, *R. v. Buttazzoni*, 2019 ONCA 645, and *R. v. Hummel*, 2002 YKCA 6, 166 C.C.C. (3d) 30. See also *R. v. Reiersen*, 2010 BCCA 381, 259 C.C.C. (3d) 32, at para. 40.

[73] *Bennight* is factually somewhat similar to this case. The British Columbia Court of Appeal allowed testimony from a corrections officer who could not recall the particular words that the offender said to her. The court held it was sufficient that “the witness could testify to both the ‘gist’ of the statement and the context in which it was

made” (para. 92). That the officer was unable to remember the precise words said was not pertinent to the judge’s relevance analysis: incompleteness was a matter of weight for the jury. The accused argued before this Court that *Bennight* was different because the corrections officer heard both sides of the conversation. I find this to be a distinction without a difference. What matters is whether the evidence tends to increase or decrease the probability of a fact, not the particular circumstances in which the evidence arose.

[74] In *Buttazzoni*, the Ontario Court of Appeal determined that the trial judge properly admitted “recounted utterances [that] were described as ‘almost verbatim’”, and *also* properly admitted recounted utterances that were a “paraphrased synopsis” (para. 56). Issues with accuracy of recollection did not relate to relevance, but were an issue of weight for the trier of fact. Similarly to *Bennight*, the witness overheard both sides of the conversation. However, as noted, that is not a principled basis on which to distinguish these decisions from the circumstances in this appeal.

[75] The accused in *Hummel* argued on appeal that the trial judge improperly admitted testimony that suggested he said “I hear a woman’s voice calling my name” and “from a grave” (para. 8). The Yukon Court of Appeal held there was “ample context in which the words could be considered”, as the accused had uttered the words the morning after the victim was last seen alive and there was other evidence connecting him to the victim’s disappearance (para. 32). The jury could infer the accused was expressing remorse through these words.

[76] These decisions illustrate that *Ferris* should not be understood as standing for the proposition that incomplete recollection of a party admission leads to exclusion of such evidence or that it is only “micro context” that can inform meaning and, thus, relevance. In assessing (logical) relevance, what matters is whether the evidence tends to increase or decrease the probability of the existence of a fact at issue (*Arp*, at para. 38).

[77] Although he could not remember the exact words the accused said, the brother’s testimony was that he overheard a phone call in which the accused admitted to killing Ms. Kogawa. The brother’s recollection of the phone call, if believed by the jury, (to use the words from *Arp*) “tend[s] to ‘increase . . . the probability’” that the accused was responsible for the victim’s death. In light of other evidence, the brother’s evidence was capable of non-speculative meaning and relevant.

(b) *The Evidence Was Hearsay, but Subject to the Party Admissions Exception to the Exclusionary Rule*

[78] The Crown adduced the brother’s evidence for the purpose of showing that the accused admitted to killing Ms. Kogawa. This evidence was hearsay and, thus, inadmissible under the general exclusionary rule. However, the brother’s evidence was that the accused had, by his words, admitted responsibility for Ms. Kogawa’s death. This evidence is something that a party said or did and relates to an issue at trial (see *Paciocco, Paciocco and Stuesser*, at pp. 191-92; *Younger*, at p. 24). As such, the

evidence is a party admission and comes within a recognized exception to the general exclusionary rule.

(c) *In Light of the Comprehensive Jury Instructions, the Trial Judge Did Not Err by Admitting the Evidence*

[79] The balancing of probative weight against prejudicial effect can be critical in deciding the admissibility of a party admission. This is a discretionary decision by the trial judge. Such decisions are to be reviewed with deference. The accused has not shown error in this exercise of the trial judge's discretion. This is particularly so in light of the well-structured instructions provided to the jury on appropriate use of the party admission.

[80] The brother's testimony contained weaknesses. He was unsure of the particular words that the accused said. He testified that he was not trying to listen and that he only heard one side of the conversation. He did not know whether the accused was responding to questions from his wife. The brother admitted he consumed alcohol before and after the call and that the accused was under the influence of intoxicants. The brother testified that the accused's speech was impacted by the heroin he had taken. These factors decreased the probative value of the party admission.

[81] With respect to the prejudicial effect, I agree with Arbour J., dissenting, but not on this point, that juries are likely to give significant weight to confession-like evidence (*R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, at para. 146). This Court has

recognized the significant potential for prejudicial use of confessions (see, e.g., *Hart*, at para. 106) and this party admission was akin to a confession. The possibility for prejudicial use by the jury was real.

[82] When balancing the probative value and prejudicial effect, the trial judge noted “[t]he prejudicial effect can be ameliorated by a strong caution to the jury about what use can be made of the evidence” (para. 21). The trial judge provided such a caution on the proper use of the admission at issue. This demonstrates the trial judge was mindful of potential prejudice. The trial judge told the jury that it was up to them to decide whether the statements attributed by the brother to the accused had been made. They were to “[c]onsider the circumstances in which the conversation took place [and to b]ear in mind anything else that may make the witness’s evidence more or less reliable” (A.R., vol. IV, at p. 197). The trial judge methodically addressed the weaknesses in the brother’s testimony in the jury instructions. She emphasized that the brother heard only one side of the conversation and that he did not recall the exact words that the accused said. She noted that the accused had consumed alcohol and heroin prior to the call, and that those intoxicants could have affected what he said. The judge made clear that it was for the jury to determine whether the accused had used a particular phrase and what was meant by it. The judge told the jury they could ignore the admission if they were uncertain as to what was said or what it meant. She told the jury that they could not rely on the brother’s testimony as to the accused’s state of mind. Rather, it was for the jury to consider such matters.

[83] The trial judge provided the jury with clear and effective instructions on proper use of the brother's testimony. The instructions gave the jury the guidance needed to weigh the evidence in accordance with legal principles. As such, the instructions effectively and adequately limited the possibility of prejudicial use.

[84] In light of the foregoing, the trial judge did not err in admitting the brother's testimony as to what he overheard the accused say.

B. *Jury Question Issue*

[85] I am in substantial agreement with the reasons of the Court of Appeal on the Jury Question Issue. The jury's question was not ambiguous and the trial judge answered it correctly. Notwithstanding my agreement, I wish to underscore two points.

[86] First, the accused argues on appeal that the jury question demonstrated confusion as to the intent needed for murder and that needed for manslaughter. However, the accused's counsel at trial (not appellate counsel) was adamant that this was *not* what the jury's question related to. That trial counsel advocated for a certain response to a jury's question is not determinative of the issue on appeal, but it is an important factor for consideration (*R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 38; *Araya*, at para. 51). While the burden of perfection should not be placed on trial counsel, they are the ones most attuned to the accused's interests. In this case, trial counsel pivoted away from intent and suggested that the trial judge provide to the jury

an “expanded definition of bodily harm” (A.R., vol. III, at p. 330). This approach likely represented trial counsel’s view as to how to answer the question correctly, in a manner beneficial to his client. I see no error in the trial judge’s handling of the question, particularly in light of trial counsel’s submissions on this point.

[87] Second, there is no merit to the accused’s argument that the definition of “bodily harm” in s. 2 of the *Criminal Code* does not apply to s. 229(a)(ii), which defines murder. The meaning of the phrase “bodily harm” is consistent throughout the *Criminal Code*. When Parliament means to deviate from the meaning of “bodily harm”, it does so by adding qualifying words (e.g., “grievous bodily harm” in s. 25(3)). No authority from this Court, including *R. v. Miljevic*, 2011 SCC 8, [2011] 1 S.C.R. 203, should be read as suggesting otherwise. The accused’s argument that murder requires bodily harm that is serious, dangerous or grave seems to stem from an inaccurate understanding of the model jury instructions. The words that he suggests describe bodily harm — dangerous, serious, grave — concern foreseeability. To reiterate, the definition of “bodily harm” set out in s. 2 applies to s. 229(a)(ii).

VI. Conclusion

[88] I would allow the Crown’s appeal, set aside the order of the Court of Appeal, and restore the accused’s conviction for second degree murder.

The following are the reasons delivered by

KARAKATSANIS AND BROWN JJ. —

[89] We would dismiss this appeal. We do not disagree with our colleagues' framework for assessing relevance and probative value. What divides us is its application here. In our view, for the reasons of Justice Goepel at the Court of Appeal, a jury could not ascertain the meaning or relevance of the overheard statements (2021 BCCA 41, 400 C.C.C. (3d) 131). As well, their prejudicial effect outweighed any tenuous probative value they may have had. The overheard statements were inadmissible.

[90] On the evidence before the jury, it was impossible to know what Schneider said to his wife during the overheard phone call. The witness, Schneider's brother, did not know the words that he heard. He was deliberately trying *not* to listen to the 13-minute conversation. He neither participated in the conversation nor heard both sides of it. He acknowledged that he did not know what was said, and did not even recall knowing the substance of what was said. Initially, he testified in examination-in-chief that he heard Schneider say, "I did it. I killed her" about half-way into the phone call (A.R., vol. II, at p. 170). He then clarified that he could not say those were the exact words spoken but that this was "the gist" of Schneider's side of the conversation (A.R., vol. II, at p. 171). It appears that this "gist" was derived from a statement he had heard six or seven minutes earlier in the conversation and, the Crown says, from the trauma of having accompanied his brother during a suicide attempt. In

cross-examination, the witness confirmed that because he did not know Schneider's exact words, they may have just been something like "I did it" and that the words — whatever they were — could have come at the beginning, middle or end of a longer sentence (A.R., vol. II, at pp. 189-90).

[91] At trial, the Crown sought to tender the words overheard by Schneider's brother as an admission of responsibility for the death of the victim, Natsumi Kogawa. In closing submissions, the Crown stated that Schneider was overheard telling his wife "I did it" or "I killed her" — though also acknowledging the exact words spoken were unknown — and told the jury that "you can infer from these words that he intended to kill Natsumi Kogawa or meant to kill Natsumi Kogawa" (A.R., vol. III, at p. 286).

[92] Assessing the relevance of Schneider's brother's testimony (including the Crown's own interpretive gloss thereon) is an exercise in pure speculation. The Crown's reliance on "context" to assist in identifying the relevance of the witness's "gist" of the conversation is not only a strain; it is also far more harmful than it is helpful. For the Crown, this "context" includes the fact that the brother knew Schneider, that they had talked about the victim in the days leading up to the phone call, that Schneider told his brother some details of his relationship with Ms. Kogawa and that her body could be found in a suitcase prior to the phone conversation, that the brother was physically present for the phone conversation and the attempted suicide, and that he had an understanding of the "tone" of the conversation. These factors add nothing to the assessment of what had been said during the phone call.

[93] Our colleagues overstate the significance of the Court of Appeal’s references to the “macro” and “micro” contexts (Rowe J.’s reasons, at paras. 6, 28 and 42). These statements were not intended to alter assessments of relevance. Rather, they were simply shorthand for what the majority and the dissent considered to be the relevant context. Justice DeWitt-Van Oosten took a broader view of the relevant context (which, in our respectful view, overreached by considering the same irrelevant factors as the Crown), while Justice Goepel (correctly) confined himself to considering the context arising from the conversation itself. This is not to say that context beyond the immediate conversation can never inform the meaning of statements made within the conversation. Rather, in this case, the Crown relies on contextual features beyond the conversation itself that were irrelevant, and there was insufficient context arising from the conversation itself to inform the meaning of the overheard statements.

[94] In our view, the Crown relies on “context” that is not only irrelevant, but which augments the prejudicial effect of admitting the statements even if they were relevant. The jury may have focused on aspects of the context which tended to implicate Schneider in the death — such as his statement about where Ms. Kogawa’s body was located — to reason that Schneider must have therefore admitted responsibility for the death. In *R. v. Ferris* (1994), 149 A.R. 1 (C.A.), at para. 27, Conrad J.A. described the danger involved in this type of reasoning as follows:

There would be an enormous temptation for any trier of fact to look at the outside evidence that tends to implicate the accused in the murder, use those facts to conclude that the accused probably committed the murder, and that therefore he admitted that he did. That finding would then be used

to raise the probability of guilt to a conclusion of guilt. The danger implicit in that type of circuitous reasoning is obvious.

This very concern arises in the instant case where the jury was left to assess the logical relevance of a “gist”, unaccompanied by any recollection of what was said, or at least any recollection of the substance of what was said.

[95] The trial judge did not explicitly identify any dangers of admitting the evidence of the overheard statements or how they might impact the fairness of the trial. She simply concluded that “[t]he prejudicial effect can be ameliorated by a strong caution to the jury about what use can be made of the evidence” (2018 BCSC 2546, at para. 21, reproduced in A.R., vol. I, at p. 5). In our view, the jury instruction did not cure the prejudice. It presupposed that the jury could decide what Schneider said despite having no basis in the evidence to do so.

[96] We conclude that the evidence of the overheard statements should not have been admitted. We acknowledge that the threshold for logical relevance is low. But it is still *a threshold*, in that it must “increase or diminish the probability of the existence of a fact in issue” (*R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38, citing R. Eggleston, *Evidence, Proof and Probability* (2nd ed. 1978), at p. 83). If Schneider’s brother’s testimony meets this threshold, it would be difficult to conceive of anything Schneider might have said (or might be felt to have said), howsoever partial, oblique or indistinct, that would *not* be “relevant”. In any event, when the potential for misuse is measured

against the absence of any significant probative value, the result is that the evidence should have been removed from the jury's consideration altogether.

[97] We would therefore dismiss the appeal.

APPENDIX

Could you please expand on
the definition of Bodily Harm
in ~~Part 3~~ ^Q Intent Required
for Murder) versus Bodily Harm
as described in para 109/111
for manslaughter.

* Bodily Harm.
Any hurt or injury...
interferes health...
more than just baict / minor.

*

CONCEPT OF BODILY HARM.
THAT THE ACCUSED KNOWS ^{or} likely TO
CAUSE DEATH AND RECKLESS...!

Appeal allowed, KARAKATSANIS and BROWN JJ. dissenting.

*Solicitor for the appellant: Attorney General of British Columbia,
Vancouver.*

Solicitors for the respondent: DG Barristers, Vancouver.