SUPREME COURT OF CANADA

CITATION: R. *v.* Furey, 2022 SCC 52

APPEAL HEARD: December 2, 2022
JUDGMENT RENDERED: December 2, 2022
DOCKET: 40038

BETWEEN:

His Majesty The King
Appellant

and

David Edward Furey
Respondent

CORAM: Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and O'Bonsawin JJ.

UNANIMOUS JUDGMENT READ BY: Karakatsanis J.
(para. 1 to 7)

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His Majesty The King *Appellant*

v.

David Edward Furey *Respondent*

Indexed as: R. *v.* Furey

2022 SCC 52

File No.: 40038.

2022: December 2.

Present: Karakatsanis, Côté, Brown, Rowe, Martin, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL OF NEWFOUNDLAND AND LABRADOR

Criminal law — Evidence — Admissibility — Hearsay — Out-of-court statement — Reliability — Accused convicted of several offences resulting from altercations with two complainants — Accused appealing convictions on basis that trial judge erred in admitting out-

of-court statement given by complainant who died of unrelated causes before trial for truth of its contents — Majority of Court of Appeal holding that trial judge applied incorrect principle of law to assess threshold reliability of statement and determine its admissibility — Majority quashing convictions and ordering new trial — Dissenting judge finding that trial judge committed no error in application of principled approach to hearsay evidence and in admitting statement — Convictions restored.

Cases Cited

Referred to: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520; *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764; *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865; *R. v. Smith*, [1992] 2 S.C.R. 915.

APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Welsh, White and Knickle JJ.A.), 2021 NLCA 59, 476 D.L.R. (4th) 197, [2021] N.J. No. 338 (QL), 2021 CarswellNfld 424 (WL), quashing the convictions of the accused and ordering a new trial. Appeal allowed.

Arnold Hussey, *K.C.*, for the appellant.

Jason Edwards, for the respondent.

The judgment of the Court was delivered orally by

[1] KARAKATSANIS J. — We are of the view that the appeal should be allowed. The trial judge did not err in admitting the hearsay evidence on the *voir dire*.

[2] However, we would emphasize that the necessity of receiving hearsay evidence is never so great that the principled approach's requirement of threshold reliability can be sacrificed. Admitting unreliable hearsay evidence against an accused compromises trial fairness, risks wrongful convictions and undermines the integrity of the trial process (*R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at paras. 47-49).

[3] This Court has recognized that necessity and reliability — making up the principled approach to hearsay evidence — "work in tandem"; in particular, "if the reliability of the evidence is sufficiently established, the necessity requirement can be relaxed" (*R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, at para. 72). Indeed, "[i]n the interest of seeking the truth, the very high reliability of the statement [can] rende[r] its substantive admission necessary" (*Khelawon*, at para. 86, citing *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764).

[4] However, this Court has never said that reliability becomes more flexible as necessity increases. While the indicia of reliability required to address specific hearsay concerns may vary with the circumstances of each case (*Khelawon*, at para. 78), threshold reliability must be established in every case. As this Court affirmed in *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, "the threshold reliability standard always remains high — the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents" (para. 32, citing *Khelawon*, at para. 49). Indeed, where this Court has considered the out-of-court statements of deceased

declarants, we have consistently insisted on "circumstantial guarantee[s] of trustworthiness" (*R. v. Smith*, [1992] 2 S.C.R. 915, at pp. 937-38), or "a sufficient substitute basis for testing the evidence" (*Khelawon*, at para. 105). Thus, in all cases, whatever may be the degree of necessity, such evidence must meet the requirement of threshold reliability in order to be admissible.

[5] That said, we do not read the trial judge's reasons as based on a relaxed threshold of reliability. Rather, they show that she applied the reliability threshold described by this Court in *Bradshaw*, at para. 31. She remarked that the statement was video-recorded, "reasonably contemporaneous with the events and was given to police without hesitation" (*voir dire* reasons, at paras. 28-29, reproduced in A.R., vol. I, at p. 12). She also considered corroborative evidence, and determined that the explanations alternative to the statement's truth "would seem unlikely" (para. 44). Based on these considerations, she concluded "that contemporaneous cross-examination, while preferable as in any case, would not likely add much to the process of determining the truth of what [the declarant] said in his statement" (para. 46).

[6] Thus, we are satisfied that the trial judge's reasons, read as a whole, show that she properly applied the law relating to the admission of hearsay evidence, and did not relax the minimum threshold of reliability. We agree with the dissent in the Court of Appeal that the references in the final paragraphs of the trial judge's reasons do not undermine her previous conclusion that threshold reliability was established.

[7] For these reasons, we allow the appeal, set aside the order of the Court of Appeal, and restore the respondent's convictions.

Judgment accordingly.

Solicitor for the appellant: Crown Attorneys' Office, Dept. of Justice and Public Safety, Clarenville, N.L.

Solicitor for the respondent: Legal Aid NL, St. John's.