WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.5(1), (2), (2.1), (3), (4), (5), (6), (7), (8) or (9) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

> 486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.
>
> (2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is in the interest of the proper administration of justice.
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> (2.1) The offences for the purposes of subsection (2) are
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> > (a) an offence under section 423.1, 467.11, 467.111, 467.12, or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;
> >
> > (b) a terrorism offence;
> >
> > (c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or
> >
> > (d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).
>
> (3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of

justice if it is not the purpose of the disclosure to make the information known in the community.

(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society’s interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

(8) An order may be subject to any conditions that the judge or justice thinks fit.

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings. 2005, c. 32, s. 15; 2015, c. 13, s. 19

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 1

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Mohamed, 2023 ONCA 104
DATE: 20230216
DOCKET: C66216 & 66217

Simmons, Paciocco and Zarnett JJ.A.

BETWEEN

His Majesty the King

Appellant

and

Mohamed Mohamed and Nedeljko Borozan

Respondents

Karen Papadopoulos, for the appellant

Diane Magas, for the respondent, Mohamed Mohamed

Eric Granger, for the respondent, Nedeljko Borozan

Heard: October 6, 2022

On appeal from the acquittals entered on November 2, 2018, by Justice Hugh R. McLean of the Superior Court of Justice, sitting with a jury.

Paciocco J.A.:

OVERVIEW

[1] The Crown appeals the acquittals of the respondents, Mohamed Mohamed and Nedeljko Borozan, of first-degree murder in the shooting death of Mohamed Najdi and of the kidnapping of Amirali Mohsen. The Crown alleges that both respondents participated in the abduction of Mr. Najdi and Mr. Mohsen, and that Mr. Mohamed shot Mr. Najdi with a firearm that Mr. Borozan had loaded. The Crown had intended to prosecute their case, in large measure, through the testimony of A.A., an alleged co-conspirator, who provided two police statements implicating Mr. Mohamed and Mr. Borozan. However, A.A. refused to testify. The Crown succeeded in securing the admission of prior statements of two other alleged co-conspirators, M.Y. and L.L., after they failed to testify consistently with those statements, but the trial judge denied the Crown's application to admit A.A.'s two police statements. The evidence that was called, including the prior statements of the two alleged co-conspirators and the testimony of Mr. Mohsen and other more peripheral witnesses, was ultimately judged by the jury to be insufficient, and both respondents were acquitted.

[2] The Crown argues that the trial judge erred in excluding A.A.'s police statements from evidence. For the reasons that follow, I disagree and would dismiss the Crown's appeal.

THE MATERIAL FACTS

[3] On January 10, 2016, Mr. Najdi and his friend, Mr. Mohsen, were lured to a parking lot on Claremont Avenue, in the city of Ottawa, and allegedly ambushed by six male co-conspirators, leading ultimately to Mr. Najdi being shot. The six alleged co-conspirators are A.A., M.Y., L.L., Ali Elenezi (aka, “Montana”), and the respondents, Mr. Mohamed (aka, “Shadow”) and Mr. Borozan. The Crown alleges that Mr. Borozan’s street name is “Boz”.

[4] The Crown alleges that the ambush was arranged at a meeting of the six co-conspirators that occurred at the residence of Brian Aikman, who was present with his girlfriend. The Crown contends that, during this “pre-ambush meeting”, four firearms – a handgun, two shotguns, and an AK-47-style, 22-calibre semi-automatic rifle – were placed on a table and a plan to abduct, ransom and punish Mr. Najdi, a suspected police informant, was discussed.

[5] The Crown alleges that M.Y. drove Mr. Najdi and Mr. Mohsen to the parking lot on Claremont Avenue in Mr. Aikman’s Mazda motor vehicle on the pretense that a drug deal would be taking place. The Mazda was allegedly boxed in by A.A.’s black Suburban SUV, and all five occupants of the SUV set upon Mr. Najdi and Mr. Mohsen, some of them carrying firearms. The Crown alleges Mr. Najdi and Mr. Mohsen were forcibly removed from the Mazda. In the course of doing so, one of the alleged co-conspirators, Mr. Elenezi, allegedly grabbed Mr. Najdi’s gold

necklace from his neck. Mr. Najdi briefly managed to escape. As he ran, Mr. Mohamed is alleged to have shot him twice from behind with the 22-calibre, AK-47-style rifle. One of those shots, which proved to be fatal, hit Mr. Najdi's back. Mr. Najdi died after collapsing in the doorway of a nearby residence. The police were called to the scene by a nearby resident at 10:38 p.m.

[6] The respondents allegedly collected the firearms and left in the Mazda. The Crown maintains that Mr. Mohsen was brought to the SUV after being beaten and struck with a shotgun, and he was bound with duct tape. He was then driven around, including to Mr. Najdi's apartment, so that it could be robbed of his valuable belongings. The Crown contends that the two respondents also made their way to Mr. Najdi's residence in the Mazda and stole items. Lana El-Bairman, Mr. Najdi's girlfriend, was present in the residence at the time. After the alleged co-conspirators left Mr. Najdi's residence, the Crown alleges that the two vehicles caravanned around Ottawa, with Mr. Mohamed dictating the route, before Mr. Mohsen was threatened to be quiet about what happened and released.

[7] The police uncovered circumstantial evidence from A.A.'s rented SUV, including a piece of duct tape and a balaclava. DNA was found on the duct tape consistent with Mr. Mohsen's and L.L.'s DNA profiles. A gold fragment was also found inside the SUV. DNA consistent with A.A.'s DNA profile was found on a balaclava located in the Claremont Avenue parking lot. A 22-calibre shell casing was found in the parking lot, and a 22-calibre bullet was retrieved from Mr. Najdi's

body. Cellphone tower evidence put Mr. Mohamed's phone within blocks of the pre-ambush meeting, and security video footage placed the Mazda and SUV east of the crime scene at 11:02 p.m., and west of the crime scene at 1:01 a.m.

[8] On April 9, 2016, the six alleged co-conspirators were arrested and charged with first-degree murder and kidnapping. After consulting with counsel, A.A. gave a cautioned, videotaped police statement. On April 12, 2016, in a follow-up videotaped meeting with the police, A.A. identified a photograph of Mr. Borozan as "Boz", a person he had described in his April 9, 2016, statement as having been involved in the alleged crimes. In this judgment, I refer to the April 9, 2016, and April 12, 2016, statements, together, as the "first statement", as the parties did during the appeal.

[9] All six alleged co-conspirators were directly indicted to stand trial.

[10] After A.A.'s counsel contacted Crown counsel, Crown counsel sent A.A. a letter, dated August 28, 2017 (the "Crown letter"), indicating the "parameters" for a sworn police statement that the Crown would "consider … along with all of the other evidence in the case in determining how to proceed with [A.A.'s] charges". A.A. would be required to provide "a complete, honest and unambiguous account of his knowledge and participation" in the killing and kidnapping, as well as identify all those who participated and their involvement. The letter expressed the agreement of the Crown that the contents of the statement would not be used "in

respect of his current murder and kidnapping charges", but that A.A. could be prosecuted for relevant offences "if there are grounds to believe that he either lied or actively attempted to mislead the police with the information he provides during the interview".

[11] On September 5, 2017, after having received Crown disclosure of the evidence in the case, A.A. provided what I refer to as the "second statement", which was given under oath and videotaped. On September 27, 2017, he pleaded guilty to manslaughter in the death of Mr. Najdi and received a sentence of 10 years imprisonment.

[12] L.L., M.Y., and Mr. Elenezi also pleaded guilty after signing substantially identical agreed statements of fact. They each received 12-year sentences. L.L. did so on March 27, 2018, Mr. Elenezi on April 5, 2018, and M.Y. on August 24, 2018.

[13] Mr. Mohamed and Mr. Borozan were tried jointly. On September 11, 2018, they were put in the charge of the jury. A.A. was the only alleged co-conspirator the Crown intended to call. His evidence took on particular importance to the Crown because, in his testimony, Mr. Mohsen failed to implicate the respondents. However, after swearing an oath to tell the truth and answering preliminary questions about his criminal record, A.A. refused to testify, even after he was cited for contempt. As a result, the Crown brought an application seeking the admission

of A.A.'s two police statements, pursuant to the principled hearsay exception. Two days of evidence were heard, and submissions were made on September 27, 2018.[1]

[14] The general principles that apply to the principled hearsay exception can be stated simply. In order to gain admission under this exception the Crown had to demonstrate that the twin criteria of necessity and threshold reliability were met on the balance of probabilities. The refusal by A.A. to testify satisfied the necessity requirement. Whether the threshold reliability requirement was met depended on the Crown showing that each statement satisfied the procedural reliability or substantive reliability standards, or a combination of the two.

[15] The Crown's "primary" position at trial was that "there are a combination of indicia both relating to procedural reliability and substantive reliability that warrant the admission of … [these] statements in this case". The Crown argued, however, that either procedural reliability or substantive reliability considerations would independently furnish the threshold reliability required for admission.

[16] To establish substantive reliability, the Crown relied heavily, but not exclusively, on evidence that "corroborated" A.A.'s statements. Indeed, in its overview of its position, the Crown said, "our position is that your Honour can look

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[1] On consent, the evidence already admitted during the trial was admitted during the *voir dire*. So, too, was evidence heard during a related *voir dire* for declarations that A.A. was an adverse and hostile witness.

at significant pieces of corroboration on the record before the court to corroborate both of [A.A.'s] statements", while making no comment about other indicia of substantive reliability. It was only during its submissions that the Crown made brief mention of other indicia of substantive reliability that it was relying upon, including that A.A. did not minimize his involvement but deeply incriminated himself, that there was no evidence he had a hostile animus against the respondents, and that his second statement began with a largely uninterrupted narrative of events.

[17] It is evident from the *voir dire* submissions that the Crown faced a number of challenges with its application, including: (1) A.A. was a *Vetrovec* witness; (2) the two statements had internal and external inconsistencies, and (3) the respondents had no opportunity to cross-examine A.A. I will elaborate on each of these challenges.

(1) A.A. was a *Vetrovec* Witness

[18] Where there are objective reasons to suspect the credibility of the testimony of a Crown witness, the witness is a *Vetrovec* witness, and the trial judge must, within the bounds of reasonable discretion, warn a jury to view their evidence with caution: *R. v. Carroll*, 2014 ONCA 2, 304 C.C.C. (3d) 252; *R. v. Deol*, 2017 ONCA 221, 352 C.C.C. (3d) 343. In *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, at para. 69, Karakatsanis J. noted, for the majority, that, "[g]iven that a *Vetrovec* witness cannot be trusted to tell the truth, even under oath …, establishing that

hearsay evidence from a *Vetrovec* witness is inherently trustworthy will be extremely challenging" (citations omitted).

[19] Had A.A. testified, he would doubtlessly have been a *Vetrovec* witness. His credibility, and even his reliability, fell under suspicion for a variety of reasons.

[20] First, he suffered from major mental illnesses, and had been diagnosed with schizophrenia and bipolar disorder. Indeed, he had been found not criminally responsible on account of mental disorder on September 2005 charges of uttering threats and possession of a weapon dangerous to the public peace after he was found to have been suffering from paranoid delusions.

[21] He also had a lengthy criminal record that included offences of dishonesty, and he was a long-time drug abuser who, according to a psychiatric report, dated only a few weeks before the alleged crimes, had been consuming a great deal of cocaine. In his first statement, he told the police that he had done lines of cocaine prior to the alleged crimes.

[22] Finally, A.A. was an alleged accomplice who provided his second statement on the understanding that it could result in a lesser charge, for which he would receive a lesser sentence.

(2) The Statements were internally and externally inconsistent

[23] It can fairly be said that A.A. effectively gave three versions of events.

[24] During what I will call the “first phase” of his first statement, consisting of approximately 100 pages of the 322-page interview transcript, A.A. denied any involvement and offered an alibi. When challenged, he denied lying, saying “Hand to God”.

[25] During the “second phase” of the first interview, after being told to “cut the bullshit” and in response to questions, he provided his second version, a limited statement about the events and his involvement.

[26] In his second statement A.A. provided the third version, a much more detailed account that included information he had previously denied knowing.

[27] The statements that A.A. provided contained numerous inconsistencies relating, for example, to whether he witnessed planning at the Aikman residence for the events that would follow and what the plan was; whether he saw weapons there and, if so, what those weapons were; whether Mr. Borozan was present; what role he himself played at the scene of the shooting, including in taking Mr. Mohsen hostage; his prior knowledge of Mr. Mohamed; his knowledge of balaclavas and who wore them; his role, if any, at Mr. Najdi’s residence; and where he went after leaving Mr. Najdi’s residence. Simply put, there were inconsistencies in his answers touching upon every stage of the alleged events.

[28] Although the Crown sought to have both of A.A.’s statements admitted as having sufficient threshold reliability, given the inconsistencies that I have

described, its position was, in substance, more nuanced. In essence, its position was that, although not everything said in the statements was reliable, a core narrative could be extracted from the statements that was reliable.

[29] The Crown relied heavily in support of this key narrative on commonalities between the statements and argued that they served as corroboration, a point that I will address below. Most importantly, it relied on the following features found in both statements:

- The Sequence of Events
    - Both statements include similar accounts of the pre-ambush meeting, the Mazda and A.A.'s SUV going to the Clarendon Avenue parking lot, the shooting that occurred there, the entry and theft at Mr. Najdi's residence, and driving around Ottawa afterwards.
- The Co-conspirators
    - A.A. referred to all five of the other co-conspirators in both statements, although, during his first statement, he used street names for some and said he did not know the shooter's name or street name. During his first statement, he selected Mr. Mohamed and L.L. from photographic lineups and, as indicated, two days later, he identified a photograph of Mr. Borozan as "Boz".
- The Account of the Shooting and Shooter
    - In both of his statements, A.A. included accounts of witnessing Mr. Najdi being shot twice from behind with a .22 calibre mini-AK-47. In his first statement, he said Mr. Najdi was shot by a "short, lanky, and black" man referred to as "evil eyes", and he selected Mr. Mohamed's photograph from a lineup as "the man who shot Najdi". Mr. Mohamed, who is Black, is 5'10". In his second statement, he referred to the shooter by name, as Mr. Mohamed, and by street name, as "Shadow".

[30] During the *voir dire*, the trial judge questioned how he should proceed if only one of the statements met the test for admissibility, given that it would be unfair to

leave the jury with an incomplete picture of the inconsistencies. The Crown position was that the trial judge had to evaluate each statement independently but should admit them both, since both statements satisfy the principled hearsay exception.

(3) No meaningful cross-examination had occurred

[31] Because they were directly indicted, the respondents did not have the benefit of a preliminary inquiry where A.A.'s evidence could be tested, and he refused to testify at their trial before the opportunity for a meaningful opportunity to cross-examine him arose. The case was litigated before the trial judge, correctly, on the footing that the respondents had no opportunity to cross-examine A.A. on the statements the Crown proposed to have admitted as evidence.

The *voir dire* decision and the verdicts

[32] The trial judge rendered his decision on September 28, 2018, the day after he heard submissions. He dismissed the application in a 16-page oral ruling and, as indicated, the respondents were ultimately acquitted. It is convenient to provide the material details of the trial judge's decision, and the applicable law, while analysing the appeal issues.

THE ISSUES

[33] The Crown appeals the acquittals, focusing solely on the trial judge's decision to exclude A.A.'s statements, which it claims was made in error and rendered with insufficient reasons.

[34] The Crown contends that this decision unfairly gutted its case. It argues that since those statements provide the only evidence that would have directly implicated the respondents, the verdict would not necessarily have been the same absent the error. On this basis, the Crown seeks a new trial.

[35] The issues raised by the Crown on appeal can best be organized, and addressed, in the following order:

A. Did the trial judge fail to consider adequately the indicia of procedural reliability and place undue emphasis on the inconsistencies?
B. Did the trial judge fail to provide adequate reasons on the issue of procedural reliability?
C. Did the trial judge fail to apply the correct test for evaluating substantive reliability factors?
D. Did the trial judge err by misapplying the *Bradshaw* framework for the analysis of corroborative evidence?
E. Did the trial judge err in treating A.A. as an identification witness?
F. Did the trial judge err by failing to consider the combined effect of procedural and substantive reliability?

[36] Since I would reject all of the grounds of appeal, I need not consider whether the Crown would have been entitled to a new trial, pursuant to the principles identified in *R. v. Graveline*, 2006 SCC 16, [2006] S.C.R. 609, at paras. 14-16, had an error occurred.

ANALYSIS

[37] The admission of hearsay evidence is a question of law and the legal principles a trial judge utilizes are to be reviewed on a correctness standard. However, absent material misapprehensions of evidence or unreasonable decisions, deference is to be given to findings of fact made by the trial judge, including determinations of threshold reliability: *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 31; *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at para. 81.

A. DID THE TRIAL JUDGE FAIL TO CONSIDER ADEQUATELY THE INDICIA OF PROCEDURAL RELIABILITY AND PLACE UNDUE EMPHASIS ON THE INCONSISTENCIES?

[38] I would dismiss the Crown's claim that the trial judge failed to consider adequately the indicia of procedural reliability that were in place, or that he gave undue emphasis to the inconsistencies in the evidence.

[39] The trial judge's decision was released within hours of receiving the party's submissions, with which the trial judge had been heavily engaged. The Crown submissions relating to procedural reliability, which he clearly understood, would have been fresh in his mind. It is also clear that the trial judge understood the legal principles to be applied, which he correctly described.[2]

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[2] There is no need to address the principles of threshold procedural reliability in this judgment. They are not in controversy and reference to the law is not required to explain my decision.

[40] In its submissions during the *voir dire*, the Crown enumerated what it described as “five” indicia of procedural reliability:

- With respect to both statements, A.A. had been cautioned to tell the truth and was aware of the consequences of making a false statement to the police.
- A.A. had spoken to legal counsel before making each of the statements.
- The second statement was made under oath.
- Prior to making the second statement, A.A. had received the Crown letter, cautioning him that he could be prosecuted for perjury or related offences based on the contents of the statement.
- All three statements were video-recorded providing jurors with an opportunity to observe A.A.’s demeanour.

[41] In his ruling on the *voir dire*, the trial judge referred to most of these factors. He explicitly recognized that the statements had been videotaped, that the second statement was made under oath, and that both statements had been made “under warning”. Although he did not mention the Crown letter explicitly, the Crown relies on that letter to confirm that A.A. was under warning before his second statement and, as I have indicated, the trial judge mentioned expressly that the statements were made “under warning”.

[42] The only “indicium of procedural reliability” relied upon by the Crown at trial that the trial judge did not mention, expressly or by clear implication, was A.A.’s consultations with counsel before, and during, the first interview, and before his second interview. Although consultation with counsel may reinforce the already obvious seriousness of the interviews, I am not persuaded that this is an indicium of procedural reliability that required mention. It is unclear to me how prior legal

advice can provide a meaningful basis for evaluating the truthfulness of a statement, given that the content of legal advice will generally be unknown. This is particularly so where voluntariness is conceded. In any event, even if the presence of legal advice can serve as an indicium of procedural reliability, it would, at most, be a secondary consideration. I would not fault the trial judge for failing to mention it.

[43] In its appeal factum, the Crown has moved from its position at trial and now describes fourteen “indicia of procedural reliability” that it contends the trial judge missed. I need not address whether the Crown should be permitted to raise these arguments for the first time on appeal, because the revised list does not add material weight to the case for threshold procedural reliability. Most of the fourteen proposed indicia of reliability are subsumed by the five indicia the Crown relied upon at trial. In my view, with the exception of the voluntariness concession, which the trial judge did not mention, the balance of the “indicia of procedural reliability” are of limited importance, both in isolation and together. For example:

- The cautions A.A. received before examining photo lineups relate solely to three photo identifications that occurred, but the Crown was seeking admission of A.A.’s entire statements.
- The suggestion that the information provided was not in response to leading or suggestive questions is controversial, given that A.A. was clearly prompted and confronted with evidence to secure key responses and that, prior to his second statement, he had been given access to disclosure that contained much of the information that his second statement did.

- The suggestion that the jury could compare the two statements is circular because it assumes that both statements would meet the requirements of admission.
- Submissions and jury directions can guide jurors in understanding how to use indicia of reliability to evaluate statements, but I do not see submissions and jury directions as procedural indicium of the reliability of statements.

[44] The one significant "indicia of procedural reliability" that the Crown added during submissions on appeal – the concession of the respondents that A.A.'s statement was voluntary – was not referred to by the trial judge. However, I am not prepared to find, given that this concession was expressly noted during the *voir dire*, that the trial judge failed to consider it.

[45] In support of its position that the trial judge failed to give adequate consideration to the available indicia of procedural reliability, the Crown relies heavily on the manner in which the trial judge expressed the following conclusion: "it would seem that given the fact that that there is no cross-examination with those contradictions, that procedural reliability is not made out". The Crown submits that this incomplete analysis was the sole consideration driving the trial judge's conclusion. I disagree.

[46] First, as pointed out, the trial judge made this comment after mentioning the key indicia of procedural reliability that the Crown had relied upon at trial. When the *voir dire* decision is read as a whole, there is no basis for inferring that the absence of some form of cross-examination was the sole factor the trial judge considered.

[47] Second, the trial judge made this comment after noting, correctly, that some form of cross-examination of the declarant is usually required to provide threshold procedural reliability in the case of a recanting witness: *Bradshaw,* at para. 28; *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at paras. 92, 95. He was, therefore, correct in law to pay close attention to the absence of cross-examination. This is particularly so, given the inconsistencies in A.A.'s statements. Those inconsistencies would have provided fertile ground for cross-examination. The trial judge did not give those inconsistencies undue emphasis. He was entitled to remain unpersuaded that oaths, cautions, and video-recordings could, in this case, overcome the gap left by the absence of any form of defence cross-examination.

[48] Therefore, I see no basis for interfering with the trial judge's finding that the indicia of procedural reliability offered by the Crown did not provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the statements, as is required: *Bradshaw*, at para 28. The decision is entitled to deference. I would dismiss this ground of appeal.

B. DID THE TRIAL JUDGE FAIL TO PROVIDE ADEQUATE REASONS ON THE ISSUE OF PROCEDURAL RELIABILITY?

[49] It is unnecessary to comment on the jurisprudence relating to when reasons are required on evidentiary rulings: see *R. v. Tsekouras*, 2017 ONCA 290, 353 C.C.C. (3d) 349, at para. 156; *R. v. Woodward*, 2009 MBCA 42, 245 C.C.C. (3d) 522, at paras. 22, 24-25. In my view, even if the robust standard that is applied to

assess the sufficiency of trial verdicts was to be applied, it would be met. As the foregoing discussion illustrates, I am persuaded that a functional and contextual reading of the trial judge's *voir dire* ruling makes discernible the basis for the trial judge's finding that the procedural indicia of reliability were inadequate to meet threshold reliability, thereby permitting appellate review: *R. v. G.F.*, 2021 SCC 20, 404 C.C.C. (3d) 1, at para. 69. I would dismiss this ground of appeal.

C. DID THE TRIAL JUDGE FAIL TO APPLY THE CORRECT TEST FOR EVALUATING SUBSTANTIVE RELIABILITY FACTORS?

[50] The Crown argues that the trial judge committed three legal errors in identifying the test to be applied in assessing threshold substantive reliability. Before identifying and analysing those alleged errors, it is helpful to set out the material propositions of law that apply to this, and the related grounds of appeal that follow.

[51] Threshold substantive reliability "is concerned with whether the circumstances [in which the statement was made], and any corroborative evidence, provide a rational basis to *reject* alternative explanations for the statement, other than the declarant's truthfulness and accuracy" (emphasis in original): *Bradshaw*, at para. 40. If the Crown establishes that this is so, presumptive inadmissibility will be overcome because the hearsay evidence will be so inherently trustworthy "that contemporaneous cross-examination of the declarant would add little if anything to the process": *Bradshaw*, at para. 31;

R. v. McMorris, 2020 ONCA 844, 398 C.C.C. (3d) 179, at para. 30; *R v. Barrett*, 2020 NSCA 79, at para. 21. This question – whether in-court cross-examination of the declarant would add anything to the trial process – is to be the trial judge's "preoccupation": *Bradshaw*, at para. 40; *R v. S.S.*, 2022 ONCA 305, at paras. 48-53.

[52] Thus, when assessing threshold reliability, the trial judge is required to "identify the specific hearsay dangers presented by the statement and consider any means of overcoming them": *Bradshaw*, at para. 26.

[53] Where corroborative evidence is relied upon in demonstrating threshold substantive reliability, the corroborative evidence must overcome the specific hearsay dangers presented by the material aspects of the contents of the statement that the party wants to rely upon: *Bradshaw*, at paras. 45-47; *McMorris*, at paras. 80-81. It will do so when, considered as a whole, along with other indicia of reliability, the corroborative evidence shows that the only "likely explanation" for the hearsay statement is the declarant's truthfulness and the accuracy of the material aspects of the statement, such that the material aspects of the statement are unlikely to change under cross-examination, making cross-examination unnecessary: *Bradshaw*, at paras. 4, 44, 47; *R v Tsega*, 2019 ONCA 111, 372 C.C.C. (3d) 1, at paras. 26, 44, leave to appeal denied, [2019] S.C.C.A. No. 106; *R. v. Bernard*, 2018 ABCA 396; 368 C.C.C. (3d) 437, at para. 23; *R. v. Newsham*,

2019 BCCA 126, at paras. 31, 36; *R. v.* Hall, 2018 MBCA 122, 368 C.C.C. (3d) 520, at para. 70.

[54] "Corroborative evidence that is 'equally consistent' with the truthfulness and accuracy of the statement as well as another hypothesis is [therefore] of no assistance": *Bradshaw*, at paras. 48-49. As a result, the requirements of substantive reliability will be met if, "in the circumstances of the case, [the corroborative evidence shows] that the *only likely explanation* for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement" (emphasis in original): *Bradshaw*, at para. 47.

[55] Of significance, information that merely supports the truthfulness of the statement or supports the allegation or corroborates the declarant's credibility is not enough: *Bradshaw*, at paras. 34-36, 42, 44; *Tsega*, at paras. 44-50. "The function of the corroborative evidence at the threshold reliability stage is to mitigate the need for cross-examination, not generally, but *on the point* that the hearsay is tendered to prove" (emphasis in original): *Bradshaw*, at para. 46.

[56] A four-step analysis should, therefore, be undertaken when corroborative evidence is relied upon. As described in *Bradshaw*, at para. 57, the trial judge should:

1) identify the material aspects of the hearsay statement that are tendered for their truth;

2) identify the specific hearsay dangers raised by those aspects of the statement in the particular circumstances of the case;

3) based on the circumstances and these dangers, consider alternative, even speculative, explanations for the statement; and

4) determine whether, given the circumstances of the case, the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

(a) Did the trial judge conflate the test for substantive reliability with the standards for assessing corroboration?

[57] Substantive indicia of reliability and corroboration are distinct considerations that can work together to achieve threshold substantive reliability. As its first alleged error, the Crown argues that the trial judge conflated indicia of substantive reliability arising from the circumstances in which a statement was made and corroboration. The Crown argues that the trial judge committed this error when describing a passage from *Bradshaw* about corroborative evidence as the *Bradshaw* court's "outline for the analysis of substantive reliability". Relatedly, the Crown submits that the trial judge erred by not referring to the non-corroborative substantive indicia of reliability that exist in this case, a further indication that he

had mistakenly used the test for corroboration as the standard for threshold substantive reliability.

[58] I would not accept these submissions. I am persuaded that, when the trial judge described the *Bradshaw* corroboration passage as an "outline for the analysis of substantive reliability", he simply misspoke.

[59] First, the trial judge expressly recognized, before making this comment, that, in determining substantive reliability, "the trial judge can consider the circumstances in which [the statement] was made and the evidence, if any, that corroborates or conflicts with that statement." He was clearly aware that substantive reliability can be established either by the circumstances in which the statement was made, or by corroboration, or by both.

[60] Second, it is clear, from the context in which this impugned comment was made, that the trial judge was addressing the issue of corroboration. Immediately before the impugned passage, he rehearsed what was undoubtedly the Crown's primary submission, noting that "the corroboration for the statement is so overwhelming that the need for contemporaneous cross-examination of the declarant would add little if anything to the process". When he made the impugned comment, he was identifying the legal principles required to address that submission, not purporting to state a general test for all substantive reliability issues.

[61] Nor do I take anything from the fact that the trial judge did not rehearse the circumstantial indicia of reliability that the trial Crown identified in its submissions, specifically: (1) that A.A. deeply incriminated himself in both statements, (2) that there was no evidence of a hostile animus against either of the respondents, and (3) that, in his second statement, A.A. provided a largely uninterrupted narrative of the events. I make three points.

[62] First, the failure by a trial judge to mention a submission is not always a dependable indication that he failed to consider the submission. This is particularly so in a case, such as this, where the decision followed only hours after those submissions were made.

[63] Second, as I have indicated, although the trial Crown relied upon circumstantial indicia of reliability, it focused primarily on corroboration as its route to persuading the trial judge that the statements were substantively reliable. In his *voir dire* ruling, provided in the midst of a jury trial, it is not surprising that the trial judge focused in his reasons on the heart of the Crown submission.

[64] Third, the non-corroborative circumstantial indicia of reliability that were available were not so compelling as to call out for express recognition by the trial judge. Specifically, A.A. incriminated himself gradually as he was confronted with evidence against him, and most of that self-incriminating detail was provided in the second statement, after he was promised that the information in that statement

would not be used to incriminate him. With respect to the “absence of animus” indicium, in his first statement A.A. described having exchanged threats with “Boz”, which could well lead to a potential animus against him. Finally, the uninterrupted narrative came only after A.A. had been interviewed at length during the first interview, after he was provided with disclosure, and after he had been made aware that the interviewing officer was dissatisfied with his first statement.

[65] Simply put, the trial judge was not obliged to refer specifically to these submissions. Would it have been better if he had done so? Of course, but I cannot find that his failure to do so is an error, or that it verifies that he misapprehended the test for substantive reliability.

(b) Did the trial judge err by failing to confine his analysis to “likely” possibilities?

[66] The second error the Crown submits the trial judge made in identifying the test for substantive reliability allegedly occurred when the trial judge was summarizing his conclusion on the sufficiency of corroboration. As indicated, where corroborative evidence is relied upon, the requirements of substantive reliability will be met if, “considered in the circumstances of the case, [the corroborative evidence] shows that the *only likely explanation* for the hearsay statement is the declarant’s truthfulness about, or the accuracy of, the material aspects of the statement” (emphasis added): *Bradshaw*, at para. 47. When the trial judge was describing the application of this test in the summary of his findings, he

omitted the word “likely”. Specifically, he said that he was “simply not satisfied on the balance of probabilities that all alternative or speculative explanations are dealt with, and that the only remaining explanation of the statement is the declarant’s truthfulness about the accuracy of the material aspects of the statement”. The Crown relies upon the omission, in this passage, of the word “likely” as establishing that the trial judge applied the wrong test.

[67] I am not persuaded that the trial judge applied the wrong test. Earlier in his reasons, the trial judge correctly articulated the relevant inquiry, including the word “likely”. Moreover, before the impugned passage, he had communicated that he found it difficult to see how the corroboration, identified by the Crown, addressed the likely possibilities that A.A. was attempting to “manipulate the process” in giving statements for the purpose of minimizing his own criminal liability, and that he may have used the disclosure to tailor his account. I accept that the trial judge could have expressed himself more clearly, but a fair reading of the material passages is that he considered that these alternative explanations remained realistic, or likely, possibilities, even in the face of the evidence relied upon as corroboration. I am satisfied that, although he did not include the word “likely” in his final summary, the trial judge analysed the case by considering whether truthfulness was the only likely explanation.

(c) Did the trial judge err by considering implausible speculative possibilities?

[68] The Crown's third related submission is that the trial judge erred by considering, as potential alternatives to truth, "speculative" possibilities, instead of "plausible" possibilities. The Crown buttresses its position by noting that the trial judge said that whether the second statement "is affected by disclosure is problematic," and that, when he spoke of other possibilities, he referred only to "speculative possibilities", not plausible ones.

[69] The contrast between "speculative" possibilities and "plausible" possibilities arises as an issue because the two expressions were used alternatively in *Bradshaw*. When describing the third analytical stage in assessing the sufficiency of corroborative evidence, as set out above in para. 56 of this judgment, Karakatsanis J. said that the trial judge "must therefore identify alternative, *even speculative*, explanations for the hearsay statement … [C]orroborative evidence that is 'equally consistent' with the truthfulness and accuracy of the statement as well as another [such] hypothesis is of no assistance" (emphasis added): *Bradshaw*, at para. 48. But, when speaking of the fourth analytical stage, she said, at para. 49, "the trial judge must be able to rule out any *plausible alternative explanations* on a balance of probabilities" (emphasis added).

[70] There is broad agreement in the subsequent case law that, when *Bradshaw* is read as a whole, corroborative evidence need not rule out implausible

speculative possibilities to support a finding of substantive reliability. It need only rule out plausible possibilities: see, for example, *McMorris*, at paras. 33-34. I, therefore, agree with the Crown that it would have been an error had the trial judge found the corroborative evidence to be inadequate because it did not rule out implausible possibilities. However, I am not persuaded that the trial judge committed this error.

[71] First, there was a plausible evidentiary basis for the concern that A.A. could be providing false information in order to secure a more favourable outcome on his own charges. During the first interview, A.A. was made plainly aware that there was solid evidence implicating him in the attack on Mr. Najdi, and he was clearly preoccupied with his jeopardy from that point on. He had every incentive to cast primary blame on others. Moreover, within days of providing the police with a statement that it promised could not be used to prosecute him for Mr. Najdi's death, the Crown agreed to a manslaughter plea for A.A. that included a joint sentencing position that was more favourable than the sentence his co-conspirators received. I am not suggesting that the Crown acted inappropriately by doing so, but this is circumstantial evidence that A.A. may have provided the statement he did with that kind of outcome in mind.

[72] There was also a plausible evidentiary basis for the possibility that A.A.'s second statement was influenced by disclosure. The trial judge noted, with good reason, that, much more so than his first statement, his second statement

conformed closely to the other evidence in the case. Indeed, at the end of the first interview, it was made known to A.A. that the interviewing officer considered that there were “holes in [his] story that … we still need to fill”, and he was told that he would “start to get pieces of disclosure”, and that they would “go from there” and “speak again”.

D. DID THE TRIAL JUDGE ERR BY MISAPPLYING THE *BRADSHAW* FRAMEWORK FOR THE ANALYSIS OF CORROBORATIVE EVIDENCE?

[73] The Crown argues that the trial judge misapplied the *Bradshaw* framework for analyzing corroborative evidence. The Crown is not suggesting that the trial judge failed to consider any of the four steps in the analysis, which are recounted above in para. 56. Instead, it is the Crown’s position that the trial judge did not analyse the second, third and fourth steps properly. I have already addressed and rejected two of the Crown’s related submissions – that the trial judge considered implausible speculative possibilities and that he erred by failing to consider whether the explanations alternative to the truth for A.A.’s statements were “likely”. The Crown’s remaining arguments are that the trial judge did not correctly evaluate A.A.’s credibility in determining threshold reliability, and that his analysis of the sufficiency of corroboration was inadequate.

[74] With respect to the trial judge’s analysis of A.A.’s credibility, the Crown concedes the relevance of the credibility factors the trial judge identified, but

argues that the trial judge overstepped by deciding credibility at the admissibility stage. I disagree. The trial judge merely listed a series of material difficulties with A.A.'s credibility, including his mental illness, his history of drug use, his criminal record, and his interest in reducing his own jeopardy. There is no indication that the trial judge was resolving the underlying issue of whether A.A. was, in fact, being honest. Moreover, the trial judge repeatedly stressed in his decision that he was engaging in a threshold reliability finding. I see no basis for concluding that the trial judge overstepped his role by deciding A.A.'s credibility.

[75] The Crown also argues that the trial judge failed to consider factors that support A.A.'s credibility, including his "good health", his calm, coherent and cooperative demeanour at the time of the statements, and that A.A. had been taking his medication and was not under the influence of substances. A number of these observations are controversial, most significantly the claim that A.A. had been taking his medication. As the trial judge noted, A.A. expressed concern throughout the first statement about getting his medication, and there was no indication that this happened.

[76] More importantly, in his decision, the trial judge was explaining why the hearsay statements were not admissible. In doing so he identified the credibility concerns that contributed to that decision. It is not entirely surprising that he did not mention the modest indicia of credibility the Crown relies upon. Trial judges have been cautioned to maintain the distinction between the contained threshold

reliability evaluations that are to be undertaken during a *voir dire* and the comprehensive determinations of ultimate reliability that are to be made during the trial: *Bradshaw*, at paras. 41-42. In my view, the trial judge was not required to engage in the kind of close credibility evaluation suggested by the Crown submissions.

[77] The Crown's primary submission is that the trial judge ignored material pieces of corroborative evidence in his ruling, thereby failing to consider the "full force" of the corroborative evidence. The "corroborative evidence" the Crown was relying upon was listed by the Crown in an appendix, filed before the trial judge. It included forensic evidence confirming A.A.'s description of the firearm used in the shooting; his claim that Mr. Najdi was struck by two shots that were fired from behind him; cellphone tower evidence offering circumstantial support that some of the players were in the general areas where some of the events occurred; the overlap between elements of A.A.'s statements and the statements of other witnesses; and the overlap between elements of A.A.'s statements and the facts adopted during the guilty pleas.

[78] I am not persuaded that the trial judge ignored this evidence. Some of the evidence the Crown relies upon is not corroborative. The statements of fact accepted during the guilty pleas were based, in large measure, on A.A.'s statements. It would be circular to treat them as corroborative of those statements. Moreover, A.A.'s statements both derive from the same source – himself. Although

his first statement could be used to rebut recent fabrication concerns related to the second statement, the two statements cannot corroborate one another.

[79] To be sure, some of the remaining corroborative evidence could confirm the truthfulness of some of what A.A. said. This evidence could, thereby, give an ultimate trier of fact increased confidence in his credibility generally. But, as Karakatsanis J. stressed in *Bradshaw*, at paras. 4, 45 and 47, corroborative information that accomplishes only these things is insufficient to meet the threshold reliability standard. To meet the requisite standard, the corroborative evidence must overcome the specific hearsay dangers presented by the material aspects of the contents of the statement that the Crown wants to rely upon: *Bradshaw*, paras. 45-47. Yet, none of the corroborative evidence mitigated the need for cross-examination on the point that the hearsay was tendered to prove, namely, that Mr. Borozan was linked to guns during the alleged events or that Mr. Mohammed was the shooter: see *Bradshaw*, at para. 46. None of the corroborative evidence rendered unlikely the plausible possibilities that A.A. falsely identified Mr. Mohammed as the shooter, or falsely described Mr. Borozan's link to the weapons, in order to secure more favourable treatment for himself. Further, none of the corroboration rendered unlikely the plausible possibility that A.A. used the disclosure to craft details introduced in his second statement.

[80] In my view, on the record before him, the trial judge was entitled to conclude that he was not satisfied that the corroborative evidence established, on the

balance of probabilities, that the only remaining likely explanation for the statements was A.A.'s truthfulness. In the circumstances, the trial judge was not required to describe, and then explicitly discount, the inadequate corroboration, item by item. His reasoning path is readily apparent, and his conclusion derives reasonably from the evidence before him.

E. DID THE TRIAL JUDGE ERR IN TREATING A.A. AS AN IDENTIFICATION WITNESS?

[81] After expressing and explaining his conclusion that the corroborative evidence did not establish threshold reliability, the trial judge continued:

> The Court is simply not satisfied by this. The Court is also concerned with the fact that the statements deal with identification evidence, which as we are all aware, has inherent concerns, and that of course would also involve a testing, which the Court is not satisfied is here.

[82] The "testing" the trial judge was referring to was obviously cross-examination. The Crown argues that the trial judge erred in this regard by exaggerating the need for cross-examination about A.A.'s identification of Mr. Mohamed and Mr. Borozan's photographs, since he knew both men. This was therefore a recognition case, and not an identification case.

[83] I would not give effect to this ground of appeal. First, this concern by the trial judge was clearly secondary. He had already concluded that there were inadequate indicia of substantive reliability before going on to offer this additional expression of concern. Moreover, A.A. gave inconsistent accounts relating to the

degree of his familiarity with the two men. Finally, this court has made clear that recognition evidence is a form of identification evidence, and "the usual dangers of eyewitness identification exist in a case of alleged recognition": *R. v. Chafe*, 2019 ONCA 113, 145 O.R. (3d) 783, at paras. 30, 32.

F. DID THE TRIAL JUDGE ERR BY FAILING TO CONSIDER THE COMBINED EFFECT OF PROCEDURAL AND SUBSTATIVE RELIABILITY?

[84] I would reject the Crown's submission that the trial judge erred by failing to consider the combined effect of procedural and substantive reliability. The trial judge explicitly recognized that the Crown was relying on the combined effect of indicia of substantive and procedural reliability, and that "the two ways in analyzing both procedural and substantive reliability may work together". The fact that he did not explicitly address the combined impact of the indicia of reliability he identified is not a basis for finding error. This is particularly so, given that, during submissions, the trial Crown agreed with the trial judge's position that, although he could look at the combined effect of substantive and procedural reliability, for the purposes of analysis, "it's best to keep them distinct".

CONCLUSION

[85] The Crown's admissibility application was difficult. The witness it was relying upon was a *Vetrovec* witness and, as I have stated, "establishing that hearsay evidence from a *Vetrovec* witness is inherently trustworthy will be extremely

challenging”: *Bradshaw*, at para. 69. The Crown was seeking the admission of statements that contained material inconsistencies. A.A.’s account became more elaborate as his jeopardy became clearer, and the opportunity to reduce that jeopardy by cooperating became plainer. Moreover, there had been no cross-examination of A.A. because the Crown had made the tactical choice to directly indict the respondents, and there would be no opportunity to cross-examine A.A. before the jury. Finally, the corroboration that was available, while it could potentially enhance the general credibility of A.A. and that of his account, did not address, let alone overcome, the specific hearsay dangers presented by the material aspects of the contents of the statement that the Crown wanted to rely upon.

[86] In these circumstances, the trial judge’s decision was entirely reasonable and, although it was not expressed with perfection, it did not have to be. His analysis was readily discernible and entirely supported on the record.

[87] I would dismiss the Crown’s appeal.

Released: February 16, 2023 “J.S.”

“David M. Paciocco J.A.”
“I agree. Janet Simmons J.A.”
“I agree. B. Zarnett J.A.”