Case Name:

R. v. P (R.)

[1990] O.J. No. 3418

58 C.C.C. (3d) 334

10 W.C.B. (2d) 279

Ontario High Court of Justice

Doherty J.

Judgment: May 28, 1990

(44 paras.)

Counsel:

W. G. Orr, Q.C., *R.M. Innes*, Q.C., and *G.R. Clewley*, for the Crown.

E Rowell, Q.C., *E.F. Hung*, and *A. Tierney*, for accused.

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1 DOHERTY J.:--I will begin with the reasons for my ruling with respect to the admissibility of utterances made by the deceased to various witnesses.

I. *The problem*

2 The Crown seeks to introduce several statements said to have been made by the deceased to various Crown witnesses. I have been provided with a summary of what the Crown anticipates these various witnesses will say was said to them by the deceased (ex. I). The deceased and the accused lived together for about three years prior to her disappearance in late February, 1988. These utterances by the deceased are said to be capable of demonstrating her state of mind. Some of the utterances also relate things which the deceased said Mr. P. did to her. Much of this reported conduct is reprehensible, and some of it could well be viewed as bizarre. The contents of some of these utterances suggest that Mr. P.'s treatment of the deceased was that of a domineering tyrant.

There is no suggestion of violence against the deceased by Mr. P. in these statements.

3 The Crown contends that the various utterances of the deceased go to her state of mind beginning at some point in 1987, and through to the days and weeks immediately preceding her disappearance in late February, 1988. The Crown argues that the statements are evidence of various mental states:

(1) the deceased's fear of Mr. R;

(2) her unhappiness and dissatisfaction with the relationship she had with Mr. E;

(3) her determination to end that relationship;

(4) her intention that the termination of the relationship would be permanent and that she would have no further involvement of any kind with Mr. P

4 After reviewing the statements, I am satisfied that the utterances do afford evidence of all but the first of these states of mind.

5 The Crown contends that these mental states are, in turn, circumstantially relevant to a material fact in issue. The Crown advances the following reasoning process:

(1) The identification of the killer is the ultimate material fact in issue in this trial;

(2) proof of motive is relevant to proof of identification: *Lewis v. The Queen* (1979), 47 C.C.C. (2d) 24 at p. 35, 98 D.L.R. (3d) 111, [1979] 2 S.C.R. 821;

(3) it will be alleged that Mr. E was motivated to kill the deceased because he was enraged by and felt humiliated by her decision to leave him and to terminate their relationship completely. According to the Crown, Mr. E killed the deceased as retribution for her decision to permanently sever their relationship;

(4) according to the Crown, the deceased's decision to permanently end their relationship is the event which triggered the motive which in turn led Mr. P. to kill her;

(5) evidence of the deceased's fear of Mr. P, her dissatisfaction and unhappiness

> with the relationship, her decision to end that relationship, and her resolve to have nothing more to do with Mr. P, provide circumstantial evidence which is probative of the state of their relationship, her termination of that relationship, and the permanent nature of that termination from her point of view. These facts are, in turn, probative of the existence of the alleged motive although standing alone they do not establish the motive.

II. *Some general observations*

6 Evidence is admissible if it is relevant and if it is not excluded by the operation of some rule of evidence. Consequently, a witness may testify as to statements made to that witness by someone else if those statements have relevance and if they are not rendered inadmissible by a rule of evidence: *Cloutier v. The Queen* (1979), 48 C.C.C. (2d) 1 at p. 28, 99 D.L.R. (3d) 577, [1979] 2 S.C.R. 709; *Morris v. The Queen* (1983), 7 C.C.C. (3d) 97 at pp. 104-6, 1 D.L.R. (4th) 385, [1983] 2 S.C.R. 190.

7 Before descending into the specifics of the relevance requirement and the evidentiary rules governing the admission of these utterances, it must be recognized that these are statements made by a non-witness who was not under oath at the time the statements were made and who will not be subjected to cross-examination by counsel for Mr. R or to observation by the jury. This predicament immediately raises a "red flag" when considering admissibility: *Teper v. The Queen*, [1952] A.C. 480 at p. 486 (PC). Absent the admission of this evidence, however, the trier of fact will be deprived of potentially significant information as to the deceased's state of mind. If her mental states are relevant to a fact in issue, evidence of what she said may provide the only source of evidence as to her mental state. Certainly, it may be the best evidence of her states of mind: *R. v. Blastland*, [1985] 2 All E.R. 1095 (H.L.). Exclusion of that evidence could detract significantly from the accuracy of the jury's fact-finding process. It also appears that there is some circumstantial guarantee of trustworthiness attaching to these utterances as there is no suggestion that the deceased had reason to misrepresent her state of mind when she made these various statements to her sister and other close associates. The statements also provide unambiguous indications of her states of mind and do not require any interpretation. These observations as to the need for and the trustworthiness of the evidence suggest, assuming the state of the mind of the deceased is relevant, and assuming the admission of the utterances will not produce prejudicial side-effects which detract from the fact-finding process, that the utterances should be admissible.

8 To determine admissibility, I must consider:

(1) relevance;

(2) applicable rules of evidence, and

(3) the potential prejudice versus the potential probative value of the evidence.

III. *Are the utterances relevant?*

9 Relevant evidence can be defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence: *Morris v. The Queen, supra, per* Lamer J., at pp. 103-5 (dissenting on another ground); Rule 401, Federal Rules of Evidence (1974), cited in *McCormick on Evidence*, 3rd ed. (1984), p. 1055; R. Delisle, "*Evidence Principles and Problems*", 2nd ed. (1989), pp. 9-11.

10 In the case at bar, relevance has two aspects. Are the statements relevant to the deceased's state of mind in that they permit one to draw a reasonable conclusion as to her state of mind? If so, is her state of mind relevant directly or indirectly to the fact in issue?: *United States v. Brown*, 490 F. 2d 758 at pp. 774-5 (1974) (1st Cir.) I have already indicated that the statements clear the first relevance hurdle.

11 Relevance is a matter of inductive logic requiring that the trial judge examine the proffered evidence in light of his own knowledge and understanding of human conduct: *McCormick, ibid.*, p. 544; *Delisle, ibid.*, p. 10. Relevance is situational and depends not only on the ultimate issue in the case *(e.g.*, identification), but also on the other factual issues which either of the litigants raises as relevant to the ultimate issue. Consequently, the deceased's mental state may bear no direct relevance to the ultimate issue of identification but it will none the less be relevant to that issue if it is relevant to another fact (*e.g.*, motive) which is directly relevant to the ultimate issue of identification.

12 In this case, the deceased's various mental states as described above make it more probable that her relationship with Mr. P was unsatisfactory to her, that she determined to end it, and that she, in fact, did end it on what, in her mind, was a permanent basis, than would be the case if there was no evidence of her state of mind. These facts, in turn, make it more probable that Mr. P. had the motive ascribed to him by the Crown than would be the case without this evidence. By that, I mean the fact that his partner in the relationship was dissatisfied with the relationship, determined to end it, and had done so on what she believed to be a permanent basis, makes it more probable that the event which the Crown says precipitated Mr. P's motive (her departure and decision to permanently end the relationship) occurred. The occurrence of these events in turn makes it more probable that the motive existed than would be the case if the triggering event did not occur. This route to relevance does not depend on the accused knowing of the deceased's state of mind. If he is aware of her intentions, then the evidence has an added relevance and affords more direct proof of motive. The evidence of the utterances put before me does not prove Mr. P was aware of the deceased's state of mind, had formed the alleged motive, or that he acted as a result of that motive. Evidence may, however, be relevant even though it does not go directly to the proof of a material fact, or even

alone provide the basis for an inference that the material fact exists. Evidence may become relevant by its combination with other evidence adduced in the case. Such is the essence of circumstantial evidence. The utterances of the deceased, in so far as they describe or permit a reasonable inference as to her state of mind in the period immediately preceding her disappearance, with respect to her view of her relationship with Mr. P, her determination to end that relationship, and her decision to sever all connection with Mr. P are legally relevant as a step along the road to proof of the motive alleged. Alone, however, they are not capable of proving motive and if at the end of the day the Crown's case has moved no further down the road to proof of motive, the evidence of the deceased's state of mind will have no probative value. My ruling presumes, as indicated by the Crown in argument, that there will be evidence which permits the further inferences necessary to prove motive.

13 I consider my view of the potential relevance of evidence of the deceased's state of mind to the question of motive as consistent with the majority position in *R. v. Collin* (1986), 55 C.R. (3d) 152, [1986] R.L. 361 (Que.C.A.); although that case arguably goes further than I do and holds that evidence of the victim's fear of the accused is directly relevant to prove the accused's animosity towards the victim.

14 I also find support for my conclusion that the deceased's state of mind is relevant to the question of the existence of motive in the analysis of Martin J.A. in *R. v. Malone* (1984), 11 C.C.C. (3d) 34 at p. 43 (Ont. C.A.); leave to appeal to the S.C.C. refused 55 N.R. 160*n*. That case was not concerned with statements by the deceased victim; however, it did deal with proof of motive. Martin J.A. refers to proof of "external circumstances which have probative value to show the probable excitement of the relevant emotion" as relevant to proof of motive. The deceased's state of mind can be an "external circumstance".

15 American jurisprudence which is far more developed than ours in this area provides support for my conclusion that the deceased's state of mind as regards her relationship with the accused can be relevant to the existence of motive in a case of domestic homicide: *State v. O'Daniel*, 616 P. 2d 1383 at pp. 1389-90 (1980) (Haw); *Gezmu v. United States*, 375 A. 2d 520 at p. 522 (1977) (D.C. App.); *Lowrey v. State*, 197 P. 2d 637 at pp. 651-2 (1948) (Okla.). Some American authorities appear to limit the admissibility of such evidence to cases where the defence advanced makes the deceased's state of mind directly relevant, as in cases where self-defence is pleaded, or it is alleged the victim committed suicide, or cases where the accused admits killing the deceased but denies he intended to do so, *e.g., United States v. Brown, supra*, at pp. 767-8; *People v. Madson*, 638 E 2d 18 at p. 28 (1981) (Colo.). On a close reading, however, these cases describe these three situations as those in which the evidence offers the strongest probative potential rather than as the only situations in which the evidence can be admitted in a homicide case.

IV. *Are the utterances excluded by any rule of evidence?*

16 Assuming relevance, evidence of utterances made by a deceased (although the rule is not

limited to deceased persons) which evidence her state of mind are admissible. If the statements are explicit statements of a state of mind, they are admitted as exceptions to the hearsay rule. If those statements permit an inference as to the speaker's state of mind, they are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred. The result is the same whichever route is taken, although circumstantial evidence of a state of mind poses added problems rising out of the inference drawing process: *R. v. Wysochan* (1930), 54 C.C.C. 172 at pp. 173-4 (Sask. C.A.); *Home v. Corbeil*, [1955] 4 D.L.R. 750, [1955] O.W.N. 842 (H.C.J.); affirmed without specific reference to this point 2 D.L.R. (2d) 543, [1956] O.W.N. 391 (C.A.); *Smith v. Shanklin* (1932), 5 M.ER. 204 at p. 221; affirmed [1933] 4 D.L.R. 815, [1933] S.C.R. 340; *R. v. Workman*, [1963] 1 C.C.C. 297 at pp. 307-8 (Alta. S.C.A.D.) affirmed, [1963] 2 C.C.C. 1, [1963] S.C.R. 266, 40 C.R. 1; *Wigmore on Evidence* (Chadbourn rev. 1976), vol. 6, at pp. 129-38, 320-2; *R. v. Maskery and Ditta*, an unreported judgment of Watt J., released November 28, 1985; *R. v. Burnett and Ruthbern Holdings Ltd.* (1986), 25 C.C.C. (3d) 111, 54 O.R. (2d) 65 (H.C.J.); *McCormick, ibid.*, p. 843ff.; *Federal Rules of Evidence* (1974), rule 803(3); Report of the Federal Provincial Task Force on Uniform Rules of Evidence (1982) at p. 201, 204-6; *R. v. Moghal* (1977), 65 Cr. App. R. 56 at pp. 63; *People v. Madson*, 638 E 2d 18 at pp. 26-8 (Colo.); *United States v. Brown, supra*, at pp. 762-3.

17 I acknowledge that there is authority to the contrary, none of which is, however, binding on me, *e.g., R. v. Thompson*, [1912] 3 K.B. 19.

18 The recent judgment in *R. v. Delafosse* (1988), 47 C.C.C. (3d) 165, 28 Q.A.C. 59, [1989] R.J.Q. 234; affirmed 52 C.C.C. (3d) 576n, [1990] 1 S.C.R. 114, 9 W.C.B. (2d) 735, does require further consideration as it may appear to be contrary to the propositions set out above. Delafosse was charged with murdering his girl-friend. In his statement to the police, which was adduced at trial by the Crown, Delafosse said that he had accidentally stabbed the deceased. He went on to say that he and she had made plans to resume cohabitation the day before the killing. The latter statement was offered to show the absence of any motive and hence the lack of any intention to kill the deceased. The Crown called the former husband of the deceased who testified, over an objection, that he and the deceased had met and planned to get back together shortly before her death. Crown counsel was not allowed to elicit evidence of what the deceased said to her former husband but was allowed to ask him what plans the two of them had made. Vallerand J.A. in dissent, held at p. 171: "... in so far as the evidence tended to have the divorced wife say she considered living again with her husband, the evidence is inadmissible". His lordship also rejected the admissibility of the evidence as bearing on the former husband's state of mind and as therefore being relevant to the credibility of the accused's statement that he and the deceased planned to live together.

19 Philippon J. *(ad hoc)* for the majority appears to have agreed that the evidence tendered was hearsay if offered to show that the deceased had formed the intention of returning to her husband. He implied that it was not only hearsay but was inadmissible for that purpose (at p. 183). Philippon J. went on to hold that the statement was admissible as evidence of the former husband's intention

and to counteract the accused's statement that he and the deceased intended to resume cohabitation.

20 On appeal to the Supreme Court of Canada, Lamer J. for the court said (at p. 576): "We find no error in the majority of the Court of Appeal in dismissing the accused's appeal."

21 The majority in *Delafosse* does not specifically advert to the admissibility of the statements in so far as they afforded evidence of the deceased's state of mind. Nor is any reference made to the relevance of the deceased's state of mind given the position advanced by the accused in his statement. The various authorities dealing with the admissibility of utterances by the deceased going to her state of mind were not canvassed. It appears that the trial judge precluded any resort to the evidence to establish the deceased's state of mind and that the Crown's questions to the witness were framed to avoid reference to the deceased's actual statements. It may be that the evidence could not be read as being capable of demonstrating the deceased's state of mind, in which case its admissibility fails the first test of relevance referred to in *United States v. Brown, supra,* at pp. 774-5. Nor does it appear that the Crown argued on appeal that the evidence was admissible to show the deceased's state of mind. Furthermore, the majority's approving reference to its earlier decision in *R. v. Collin, supra,* a case which recognized, if not extended the hearsay exception based on statements going to a deceased's state of mind, indicates to me that the majority did not intend to deny the admissibility of utterances going to show a deceased's state of mind where the state of mind was relevant, but rather decided the case on the basis that it was argued, that is, that the husband's state of mind was relevant.

22 Finally, even if the majority decision in *Delafosse* swims against the current of admissibility established by the authorities outlined above, I do not regard the decision of the Supreme Court of Canada affirming the result in that case as adopting the reasons of the majority in the Quebec Court of Appeal. The effect, if any, of the judgment of the court in *Delafosse* on the admissibility of utterances going to show the state of mind of a non-witness remains to be seen. I choose to see it as a case which does not deal with that particular evidentiary problem.

23 Evidence of the deceased's state of mind may, in turn, be relevant as circumstantial evidence that the deceased subsequently acted in accordance with that avowed state of mind. Where a deceased says, "I will go to Ottawa tomorrow", the statement affords direct evidence of the state of mind - an intention to go to Ottawa tomorrow - and circumstantial evidence that the deceased in fact went to Ottawa on that day. If either the state of mind, or the fact to be inferred from the existence of the state of mind is relevant, the evidence is receivable subject to objections based on undue prejudice. *R. v. Moore* (1984), 15 C.C.C. (3d) 541 at pp. 569-70 (Ont. C.A.); leave to appeal to the Supreme Court of Canada refused C.C.C. l*oc. cit.*, [1985] 1 S.C.R. x, 58 N.R. 312n; *Home v. Corbeil, supra; R. v. McKenzie* (1986), 32 C.C.C. (3d) 527 at pp. 532-5 (B.C.C.A.); *R. v. Belowitz*, an unreported judgment of Bowlby J. released October 22, 1987, at pp. 8-11; *R. v. Maskery and Ditta, supra;* McCormick, *ibid.*, pp. 846-51; *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 at p. 296 (1892); A. Sheppard, *Evidence* (1988), pp. 467-9.

24 An utterance indicating that a deceased had a certain intention or design will afford evidence that the deceased acted in accordance with that stated intention or plan where it is reasonable to infer that the deceased did so. The reasonableness of the inference will depend on a number of variables including the nature of the plan described in the utterance, and the proximity in time between the statement as to the plan and the proposed implementation of the plan.

25 The rules of evidence as developed to this point do not exclude evidence of utterances by a deceased which reveal her state of mind, but rather appear to provide specifically for their admission where relevant. The evidence is not, however, admissible to show the state of mind of persons other than the deceased (unless they were aware of the statements), or to show that persons other than the deceased acted in accordance with the deceased's stated intentions, save perhaps cases where the act was a joint one involving the deceased and another person. The evidence is also not admissible to establish that past acts or events referred to in the utterances occurred. *McCormick, ibid.*, pp. 845, 851-4; *Giles v. United States*, 432 A. 2d 739 at pp. 745-6 (1981) (D.C. App.); *People v. Madson, supra; United States v. Brown, supra*, at pp. 762-3.

26 Before I turn to the final question, which is whether the accused has established that all or part of this evidence, though otherwise admissible, should be excluded because of its prejudicial potential, I will review the substance of the evidence proffered.

27 S.S., the sister of the deceased, had conversations with the deceased some time in 1987, during which the deceased expressed her dissatisfaction with her relationship with Mr. P, and her fear that Mr. P. would report her to the immigration authorities. In these conversations, the deceased also said that Mr. P. had taped her telephone calls, opened her mail, and required her to write letters of apology to Mr. P with promises of future good behaviour. These statements were made in the context of the deceased explaining her dissatisfaction with her relationship with Mr. P.

28 In January and February, 1988, S. S. spoke to her sister on a number of occasions. In January, her sister indicated that she intended to move out of the residence she shared with Mr. P Later in February, after she had apparently moved out, she instructed her sister not to reveal her telephone number or her address to P and still later in the month of February, she indicated she was happy to be free of Mr. P and had no desire to ever see him again. The deceased indicated that she wished to start a new life without Mr. R There was a final conversation on February 17, 1988, during which the deceased indicated she would meet her sister on February 21st to celebrate the beginning of her new life. She also indicated to her sister that she had told Mr. P. that it was her intention to pick up her remaining belongings at Mr. P. 's residence.

29 The deceased also befriended one Robert Fisher in January, 1988. In late January, she told Mr. Fisher she intended to move out of Mr. P's residence. She also said that Mr. P treated her "like a slave". She went on to indicate that Mr. P was a jealous man who did not allow her to have friends, and who listened to her telephone conversations. The deceased said that Mr. P would tell people that she was not home, when in fact she was, and that he regularly threatened to turn her over to the

Department of Immigration. The deceased advised Mr. Fisher that she was planning to leave Mr. P and to visit the Department of Immigration, presumably to pre-empt any efforts by Mr. E to put her immigration status in jeopardy.

30 Between February 15 and February 19, 1988, the deceased spoke to a friend, Ms. Kil. She indicated that she was not going to return to her boy-friend and that her new telephone number and address were not to be given to her boy-friend. Ms. Kil did not know the identity of the boy-friend.

31 In February, 1988, the deceased spoke to Sabrina Dao, also a friend, and told her not to give her telephone number or address to Mr. P

32 In late January, 1988, the deceased spoke to a person named Peter Carpenter and told him that she planned to move to a new residence in Scarborough.

33 Beginning with the last utterance first, the statement to Mr. Carpenter clearly comes within the rule which permits statements going to evidence, a plan or design on the part of the speaker. The statement also affords evidence that the deceased did move. The statements to Ms. Dao and Ms. Kil constitute circumstantial evidence from which a trier of fact could infer that as of the dates of those conversations, the deceased had formed a fixed intention to remain permanently away from Mr. P. and to keep Mr. P out of her life.

34 The deceased's statements to Mr. Fisher in January, 1988, also constitute evidence of the deceased's intention, design or plan to leave Mr. P They go much further in that they provide detail as to why she had reached that decision. In providing that detail, her utterances refer to prior conduct on the part of Mr. P Clearly, the statements are not admissible to prove that Mr. P engaged in that prior conduct. Their inadmissibility for that purpose does not, however, render them any less relevant as evidence of the deceased's state of mind: *United States v. Brown, supra*, at p. 763.

35 The statement to S.S. on February 17, 1988, evidences that the deceased was happy to have left Mr. P and determined to remain separate from him. The earlier statements to S.S. in February, 1988, also provide evidence of the deceased's determination to permanently terminate her relationship with Mr. P

36 The statement to S.S. in January, 1988, regarding the deceased's intention to move out of Mr. P.'s residence is a classic familiar example of a statement showing intention or design which is admissible both to show the intention and design and as evidence that the speaker followed through with that intention or design.

37 The statements made some time in 1987 to S.S. go to show the deceased's dissatisfaction with her relationship with Mr. P. They also contain considerable detail concerning conduct which Mr. P. allegedly engaged in which led to the deceased's dissatisfaction. While these statements may come within the rules which permit statements going to a speaker's state of mind, they are significantly less probative in that they relate to a state of mind at some point in 1987, rather than a state of mind

in January and February, 1988. Some of the comments made in 1987 also describe discreditable conduct on the part of Mr. P. The evidence is, of course, not admissible to prove that those events occurred.

V. *Should any of the utterances be excluded because of their prejudicial potential?*

38 A trial judge may, in his discretion, exclude evidence which is otherwise admissible where the potential prejudicial effect of that evidence outweighs its potential probative force: *R. v. B. (C.R.)*, an unreported decision of the Supreme Court of Canada released April 12, 1990 [Since reported 55 C.C.C. (3d) 1, [1990] 1 S.C.R. 717, 76 C.R. (3d) 1]; *R. v. D. (L.E.)* (1989), 50 C.C.C. (3d) 142 at pp. 156-7, [1989] 2 S.C.R. 111, 71 C.R. (3d) 1; *R. v. Potvin* (1989), 47 C.C.C. (3d) 289 at pp. 313-5, [1989] 1 S.C.R. 525, 68 C.R. (3d) 193, *per* La Forest J.

39 Prejudice can refer to several things. In the context of this case, it means the danger, despite instructions to the contrary, that the jury will use the evidence of the deceased's utterances for purposes other than drawing inferences and conclusions as to her state of mind and as to her subsequent conduct. In particular, the jury may infer from some of the utterances that Mr. P. was a tyrannical person, obsessed with controlling the deceased even to the extent of engaging in illegal and bizarre conduct. From that, they may infer that he is the sort of person who would kill someone who dared challenge his authority over that person. This line of reasoning, while not illogical, is not permitted: *R. v. D. (L.E.), supra* at p. 157.

40 The balancing process envisioned by the claim that prejudicial potential outweighs probative potential is no longer designed only to root out the most extreme cases where prejudicial potential is "grave" and probative value is "trifling": *R. v. Wray*, [1970] 4 C.C.C. 1 at p. 17, 11 D.L.R. (3d) 673, [1971] S.C.R. 272. The onus, however, is on the accused to demonstrate that the balance favours exclusion of otherwise admissible evidence. Where the prejudice asserted rests in the potential misuse of the evidence by the jury, one's assessment of the jury's ability to properly follow directions will play a key role in determining whether the accused has shown that the balance favours exclusion. Views as to the jury's ability to follow the law rather than their instincts or prejudices differ: *R. v. Corbett* (1988), 41 C.C.C. (3d) 385 at pp. 403 and 426, [1988] 1 S.C.R. 670, 64 C.R. (3d) 1; *Shepard v. United States*, 290 U.S. 96 at p. 104 (1933); *People v. Hamilton*, 362 E 2d 473 at pp. 481 and 478 (1961); *R. v. Belowitz, supra*, at pp. 20-1. I incline to the view that lawyers and judges tend to underestimate the intellectual power and discipline of juries.

41 In determining where the balances lies in this case, I adopt the approach detailed by Mr. Marc Rosenberg in his most enlightening paper, "Rationalizing the Rules of Evidence: The Supreme Court Revolution", delivered in November, 1989, to the Ontario Criminal Lawyers Association annual convention. Mr. Rosenberg writes at p. 49:

> ... the steps which the trial judge must go through are as follows:

1. The judge must determine the probative value of the evidence by assessing its tendency to prove a fact in issue in the case including the credibility of witnesses.

2. The judge must determine the prejudicial effect of the evidence because of its tendency to prove matters which are not in issue [or I add because of the risk that the jury may use the evidence improperly to prove a fact in issue].

3. The judge must balance the probative value against the prejudicial effect having regard to the importance of the issues for which the evidence is legitimately offered against the risk that the jury will use it for other improper purposes, taking into account the effectiveness of any limiting instructions.

42 The American case-law reveals an extensive experience in balancing probative force against prejudicial effect in cases where utterances of the deceased victim are tendered by the Crown through other witnesses, *e.g.*, see *United States v. Brown, supra*, at pp. 764-6 and 773-81, and cases referred to therein. These authorities pronounce an approach which is consistent with Mr. Rosenberg's. They also recognize the editing of potentially prejudicial and otherwise irrelevant parts of the utterances as a means short of exclusion which may reduce the potential prejudice to a tolerable level: *United States v. Brown, supra*, at p. 779; *People v. Madson, supra*, at p. 31, note 16.

43 Following that approach, I conclude:

(1) The utterances made in 1987 are not of great probative value. They refer not to any plan or design, but to a state of mind existing in 1987. While a state of mind in 1987 may have some value in determining the deceased's state of mind in January and February, 1988, that value is limited. The statements in this case are also rendered redundant for that purpose in that there are several statements alleged to have been made in January and February, 1988, which speak to the deceased's state of mind at that time. Some of the 1987 statements also refer to the prior conduct of Mr. P As I have indicated, that conduct is such that the jury could draw the conclusion that Mr. P was a possessive tyrant, determined to control the deceased at all costs. There is a high risk that the jury would use this evidence for the improper purpose of concluding that Mr. P. had acted improperly and bizarrely towards the deceased in the past and that he was therefore disposed to act in the same manner towards her when she left him. The balance favours exclusion of these utterances.

(2) The statements made in January and February, 1988, have considerable probative potential both as they relate to the deceased's state of mind and as circumstantial evidence that she had terminated her relationship with Mr. P. on a

permanent basis. The statements made to S.S. in January and February, 1988, carry little, if any, potential for prejudice to the accused. The same is true of the statements made to Ms. Kil, Ms. Dao and Mr. Carpenter. The balance favours admission of these utterances.

(3) The utterances made to Mr. Fisher in January, 1988, have considerable probative potential in the same way as the statements made to other witnesses in January and February, 1988. The utterances to Fisher were, however, combined with statements as to what Mr. P. had done to the deceased in the past. These parts of the utterances have considerable potential to prejudice the case against Mr. P. for the same reasons as set out in respect to the 1987 utterances. I propose to dissect the deceased's utterances to Mr. Fisher so as to differentiate for admissibility purposes between her utterances which reveal her state of mind and her statements as to the conduct of the accused which, according to her, precipitated that state of mind. I will admit her statements to the effect that she planned to leave Mr. P.'s residence, and her statements that her plans to leave his residence and her plans to go to the Department of Immigration were to remain a secret. I will not permit evidence through Mr. Fisher of the deceased's statements concerning Mr. P.'s treatment of her and his conduct towards her. In particular, her reference to P treating her "like a slave" will not be admitted nor will the evidence concerning P.'s interference with her privacy.

VI. *Conclusions*

44 For the convenience of counsel, I will relate my conclusions to the excerpts found in ex. I:

-- the 1987 utterances are inadmissible.

-- the 1988 utterances to S. S. are admissible.

-- the January, 1988, utterances to Robert Fisher are admissible in part. Crown counsel may elicit evidence from Mr. Fisher that the deceased told him that she planned to leave P's residence. He may also elicit evidence that the deceased told him that her plans to leave P as well as her plans to go to the Department of Immigration were to remain a secret. The rest of the utterances are inadmissible.

-- the utterances to Ms. Kil, Ms. Dao and Mr. Carpenter as summarized in ex. I are admissible.