R. v. Nurse, [2019] O.J. No. 1636

Ontario Judgments

Ontario Court of Appeal

D.H. Doherty, D.M. Brown and G.T. Trotter JJ.A.

Heard: October 24, 2018.

Judgment: April 2, 2019.

Dockets: C60975 and C61324

[2019] O.J. No. 1636 | 2019 ONCA 260

Between Her Majesty the Queen, Respondent, and Marlon Nurse and Darryl Plummer, Appellants

(149 paras.)

Case Summary

Appeal From:

On appeal from the conviction entered on June 25, 2014 by Justice Steve A. Coroza of the Superior Court of Justice, sitting with a jury.

Counsel

Catriona Verner, for the appellant Marlon Nurse.

Delmar Doucette and Andrew Furgiuele, for the appellant Darryl Plummer.

Randy Schwartz and Molly Flanagan, for the respondent.

[Editor's note: A correction was released by the Court April 5, 2019; the change has been made to the text and the correction is appended to this document.]

The judgment of the Court was delivered by

G.T. TROTTER J.A.

A. INTRODUCTION

1 The appellants were convicted of the first degree murder of Devinder Kumar. They appealed their convictions to this court. At the end of the hearing, their appeals were dismissed, with reasons to follow. These are those reasons.

B. OVERVIEW

2 Mr. Kumar was viciously stabbed at the side of a road in Caledon, Ontario, outside of a house that he rented to Nurse. The two perpetrators fled when a motorist approached. Emergency personnel soon arrived at the horrific scene. There was blood everywhere -- Mr. Kumar had been stabbed 29 times and was quickly succumbing to his injuries.

3 As EMS personnel desperately tried to save Mr. Kumar's life, Nurse approached. He told the police that he knew Mr. Kumar and said he saw three men dump his body from a car. Although his vocal chords had been severed, Mr. Kumar still tried to communicate. An officer on the scene said that Mr. Kumar pointed to an abdominal injury and then gestured towards Nurse. Nurse then said he had actually witnessed Mr. Kumar being attacked by a black man with dreadlocks. Shortly afterwards, Mr. Kumar died in the ambulance.

4 Plummer was apprehended down the road from the murder scene. He was covered in Mr. Kumar's blood. He had a cut on his hand. A knife that was recovered from a nearby creek had Mr. Kumar's blood on it. Plummer's DNA was found on the handle of the knife.

5 Nurse returned to the nearby house that he had been renting from Mr. Kumar. He too had Mr. Kumar's blood on his hand, and on his clothing. When he was formally interviewed by the police, he told inconsistent stories. He eventually settled on the version that Plummer was the killer.

6 Subsequent investigation uncovered Blackberry Messenger ("BBM") chats between the appellants in which they discussed luring Mr. Kumar to the home to kill him and steal his Range Rover.

7 The appellants raised two grounds of appeal. First, Nurse argued that Mr. Kumar's pointing gestures were wrongly admitted as evidence capable of identifying him as being involved in the killing. Second, both appellants argued that their BBM chats were inadmissible because, although data was extracted from their phones pursuant to a valid warrant, it was not fully analyzed until new forensic software was available a year later. This, they say, infringed their rights under s. 8 of the *Charter*, and ought to have led to exclusion of the evidence under s. 24(2) of the *Charter*.

8 I would dismiss both grounds of appeal.

C. BACKGROUND FACTS

(1) Introduction

9 Mr. Kumar was a 39-year-old real estate agent. A month before the killing, he rented a house to Nurse. Nurse gave Mr. Kumar two cheques that were returned "NSF" (i.e. insufficient funds). Mr. Kumar tired of Nurse's excuses for non-payment. Five days before he was killed, Mr. Kumar demanded that Nurse move out of the home.

10 This presented a serious problem for Nurse. He was falsely living a prosperous lifestyle. In reality, he had no money, and was in significant debt. Moreover, Nurse had told his girlfriend that he had actually owned the house that they were living in (with their newborn).

11 In the days preceding the murder, Mr. Kumar pressed Nurse to pay him. On November 9, 2011, Mr. Kumar demanded immediate payment of $3,600. This triggered the BBM exchange between Nurse and Plummer. It initially started as a plan to rob Mr. Kumar. As Mr. Kumar continued to demand payment, the plan changed to one of murder. The appellants originally spoke of obtaining guns; unable to locate any, they decided to use knives. Nurse advised Plummer that he had gloves that they could use. Nurse and Plummer also discussed the use of masks or bandanas in their BBM messages. In this discussion Nurse stated: "But no witnesses sooooo."

12 For his part, Plummer had never met Mr. Kumar. However, he was in desperate need of money. A few days before the murder, Plummer had been arrested for a failed scam to defraud a payday loans store. He was about to be kicked out of his motel room for failing to pay. Nurse promised him half of the proceeds of whatever they could steal from Mr. Kumar. Nurse also promised Plummer that he could keep Mr. Kumar's vehicle.

13 On November 10, 2011, Mr. Kumar again told the appellant he would have to leave by the end of the month. Minutes later, Nurse told Plummer that their plan had to be carried out immediately. Nurse asked Mr. Kumar to attend at the house to receive his money. Less than two hours later, Mr. Kumar was dying on the side of the road.

(2) The Meeting at the House

14 Before Mr. Kumar arrived at the house, Plummer arrived by taxi, paid for by Nurse. There was no direct evidence as to what happened when Mr. Kumar arrived at the house. However, it would appear that the attack started in the garage, but Mr. Kumar was able to escape. He was chased and attacked on the side of the road. Mr. Kumar's car had been left in the driveway.

15 Nurse told witnesses at the scene that he had been in his garage changing a car light. Other evidence confirmed this claim and also suggested that Mr. Kumar was attacked in the garage. For instance, his glasses were found in that location. There was also evidence of a struggle.

(3) At the Side of the Road

16 The home rented by Mr. Kumar to Nurse was on The Gore Road, a highly trafficked country road in Caledon. At about 11:30 a.m. that day, a motorist was driving on the road and saw two men crouched over a man who was laying on the road. The two men then ran across the road towards the house and into the bush. The motorist initially thought that the two men might have been trying to help Mr. Kumar. However, at trial, the motorist testified that he saw the two men moving their arms "like if you were beating on somebody". Nevertheless, he called 911. In the meantime, other motorists stopped to help.

17 Mr. Kumar had been stabbed 29 times. Among his most obvious injuries was a cut to his neck that exposed his vertebrae. Mr. Kumar also suffered a stab wound to his abdomen, through which his small intestine protruded out. His blood was all over the road. Despite the best efforts of the police and paramedics, Mr. Kumar died in the ambulance.

18 I will discuss the evidence of what happened at the side of the road in more detail below when discussing Mr. Kumar's gestures.

(4) Other Evidence Pointing to the Appellants

19 Other evidence connected the appellants to the murder.

20 Plummer was apprehended almost immediately, at gunpoint, just down the road from where Mr. Kumar was attacked. Mr. Kumar's blood was found on Plummer's clothing, shoes, cheek and a latex glove he was wearing. Similarly, Mr. Kumar's blood was found on Nurse's clothing, shoes and his left palm. It was also found on latex gloves that were discarded near Mr. Kumar's body, likely by Nurse. Nurse was wearing coveralls which the Crown alleged that he wore to protect his clothing from blood. The Crown suggested that the coveralls were not necessary for changing the light bulb in the car Nurse was working on. The Crown alleged that the latex gloves worn by both men were the gloves Nurse referenced in the BBM chats.

21 The knife used to kill Mr. Kumar was found in a creek in the backyard of a neighbouring property. It had Mr. Kumar's blood, and Plummer's DNA on it. Plummer had a cut on one of his fingers, which the forensic pathologist

said could have been caused when stabbing someone. Moreover, there was evidence that connected the knife to Nurse. Nurse told Plummer in the BBM chats he would have knives for the two of them. The knife recovered from the creek matched a recently purchased set of knives in Nurse's kitchen, a set that was missing one piece.

22 Neither of the appellants testified at the trial. However, Nurse talked a lot, both at the scene, and then later to the police. His statements at the scene, which were later found to be untrue, are addressed below. In the aftermath, while the police investigated, Nurse gave statements that suggested Plummer was responsible for the attack. He told the police that he did not know how Plummer got to his house that morning. However, the BBM chats revealed that Nurse paid for Plummer's taxi. Nurse also told the police that he had given $3,600 in cash to Mr. Kumar. However, this cash was nowhere to be found -- not on Mr. Kumar, nor in his car, nor on either of the appellants. It, too, was a lie.

23 Lastly, both appellants deleted all of the BBM messages related to the plan to rob and kill Mr. Kumar. In total, 549 messages were deleted. The last messages they exchanged were deleted at 10:44 a.m. on November 10, 2011, roughly 45 minutes before the murder. It would be a year before the police recovered the deleted messages through forensic analysis. They reveal a disturbing plan to lure Mr. Kumar to the house to be robbed and killed.

24 The foregoing is a condensed account of the evidence for the purpose of framing the discussion of the issues on appeal. Overwhelmingly, the evidence proved that the appellants planned to kill Mr. Kumar and then carried out their plan on November 10, 2011.

D. MR. KUMAR'S GESTURES

(1) Introduction

25 On appeal, the Crown argued (as it did at trial) that, when he made his gestures at the side of the road, Mr. Kumar was literally pointing the finger of blame at Nurse. By pointing to his abdominal injury and then pointing at Nurse, Mr. Kumar was trying to tell everyone that Nurse was responsible for his devastating injuries. The Crown tendered these gestures not just for their truth in establishing Nurse's involvement, but also to demonstrate that Nurse changed his story after Mr. Kumar pointed at him. The trial judge characterized this second purpose as a non-hearsay use because the "sole purpose" was to establish that Nurse changed his story.

26 Nurse argued that the interpretation of Mr. Kumar's actions is not nearly as clear as the Crown contends. Mr. Kumar's gestures were ambiguous at best and should not have been left with the jury as hearsay conduct. Nurse made no submissions on the alternative, non-hearsay use of this evidence advanced by the Crown.

(2) Evidence at the Scene

27 Needless to say, the scene at the side of the road was very dramatic. One bystander was crying, another went pale, and a third person appeared to be physically ill. A number of the officers remarked on how horrifying the scene was. One officer testified that he had never seen anything like it in his career. Another stated: "I've seen a lot of bad stuff, but this has ripped a hole in my gut." These were the circumstances in which Mr. Kumar made the gestures that were so contentious at trial. Thus, it is not surprising that there were slightly divergent accounts of what happened.

28 When he arrived on the scene, P.C. Andrew Mitchell immediately understood that Mr. Kumar had suffered serious injuries. He retrieved a first aid kit from his cruiser. P.C. Mitchell asked Mr. Kumar "who did this?" However, Mr. Kumar could not speak, and was having difficulty breathing. P.C. Mitchell turned Mr. Kumar onto his back, exposing a serious abdominal injury, through which his small intestine was protruding.

29 It was at this point that Nurse came upon the scene behind P.C. Mitchell. Nurse said: "I know that guy, that's

Dev." P.C. Mitchell asked Nurse what happened. Nurse explained that he saw Mr. Kumar being dumped from a car "by three guys." P.C. Mitchell broadcast this information over the radio.

30 Nurse continued to talk. P.C. Mitchell testified that Nurse, positioned about half a meter behind him, asked more than once whether Mr. Kumar was going to survive. At one point, he told P.C. Mitchell that he had seen "a black guy with dreadlocks" stab Mr. Kumar. Nurse pointed to the house he rented from Mr. Kumar. P.C. Mitchell also broadcast this information.

31 In the meantime, and obviously in enormous distress, Mr. Kumar was flailing his arms and pointing to his abdominal injury. P.C. Mitchell testified that when Mr. Kumar was flailing his arms, Nurse was standing behind P.C. Mitchell. Nurse leaned in, and said from behind P.C. Mitchell's shoulder: "That's my buddy Dev." P.C. Mitchell tried to gather up Mr. Kumar's hands. Mr. Kumar shook off P.C. Mitchell's hands and pointed his right index finger to the area behind P.C. Mitchell, where Nurse was standing alone.

32 P.C. Mitchell also heard Nurse say something quite peculiar. Nurse held up his hands to reveal black latex gloves and said, "Thank God I've got these on."

33 P.C. Mitchell's partner, P.C. Robert Bucsis, gave a slightly different account. When he arrived on the scene, he noticed Nurse approach. He had blood on the top of one of his shoes. P.C. Bucsis asked the people who had gathered by the side of the road whether they had witnessed anything. Nurse said, "I know this guy" and "he's a good friend of mine." Nurse asked if he could leave and was told he needed to stay because he was a witness. P.C. Bucsis also heard Nurse's first version of Mr. Kumar having been dumped out of car, which P.C. Mitchell broadcast.

34 P.C. Bucsis testified that Mr. Kumar was trying to communicate with the officers. He saw Mr. Kumar point straight to P.C. Mitchell with his finger, then move it across to Nurse, and then repeatedly point to his stomach. It was right after Mr. Kumar pointed to Nurse that P.C. Bucsis heard Nurse say, for a second time, "I know this guy, he's a good friend of mine." Nurse then said that Mr. Kumar had come to his house to collect rent. He then saw Mr. Kumar being chased down the road by a black man with dreadlocks.

35 The testimony of P.C. Mitchell and P.C. Bucsis was similar in the sense that, at the time, they both thought that Mr. Kumar was pointing at Nurse because they were friends. Their testimony differed in terms of sequencing. P.C. Mitchell said that Nurse gave both the body dump story and the story of witnessing the attack by a black man with dreadlocks, prior to the pointing gestures. P.C. Bucsis testified that Nurse switched stories only after Mr. Kumar pointed at him.

(3) The Trial Judge's Rulings

36 The trial judge addressed the issue of Mr. Kumar's gestures in two rulings. In his first ruling, and at the request of counsel, the trial judge made a preliminary finding that Mr. Kumar's gestures fell within the dying declaration exception to the hearsay rule: see *R. v. Nurse and Plummer*, *2014 ONSC 2340* ("the first ruling"). In this ruling, he stopped short of finding that the gestures were admissible.

37 The trial judge identified the following criteria for admissibility under the dying declaration exception, at para. 32: (a) the deceased had a settled, hopeless expectation of almost immediate death; (b) the statement was about the circumstances of death; (c) the statement would be admissible if the deceased had been able to testify; and (d) the offence involved the homicide of the deceased. The trial judge found that all criteria had been established with respect to Mr. Kumar's gestures.

38 The only criterion that gave the trial judge pause for concern was (b) -- whether the statement was about the circumstances of the death. Defence counsel argued that the pointing gestures were equivocal and did not amount to a statement. He further argued that no previous case had admitted evidence of a gesture as a dying declaration.

39 The trial judge rejected both arguments. He noted, at para. 37, that "an out of court statement may be verbal, written or implied" and found that Mr. Kumar's gestures were "assertions by conduct". He further found that Mr. Nurse's actions had to be viewed "as part of a chain of circumstances of which it formed a part": at para. 38. The trial judge concluded, at para. 39, that the "total [chain of] circumstances when viewed in their entirety permit a reasonable inference that the assertion by conduct here was about the circumstances of the death."

40 In a subsequent ruling, the trial judge found that the gestures were also *res gestae* statements: *R. v. Nurse and Plummer*, *2014 ONSC 2437* ("the second ruling"). He said, at para. 22, that a dying declaration is a type of *res gestae* statement. Relying on *R. v. Khelawon*, *2006 SCC 57*, *[2006] 2 S.C.R. 787*, at para. 60, the trial judge held that, because the assertions by conduct fell "within one of the more traditional common law [hearsay] exceptions", the evidence was presumptively admissible: at para. 4.

41 Neither of the common law exceptions invoked in this case was categorically challenged. However, Nurse's counsel at trial argued that this was one of those "rare cases" where evidence that would otherwise be admissible under a traditional hearsay exception may be excluded because it fails to meet the requirements of necessity and/or reliability: see *R. v. Starr*, *2000 SCC 40*, *[2000] 2 S.C.R. 144*, at para. 214; and *R. v. Mapara*, *2005 SCC 23*, *[2005] 1 S.C.R. 358*, at para. 15. The trial judge considered this argument on the merits.

42 The trial judge rejected arguments that the evidence should be excluded as unreliable because the precise meaning of the gestures could not be clarified through cross-examination. In approaching this question, the trial judge delineated the line between threshold reliability and ultimate reliability: at para. 15. He found that the circumstances in which the gestures were made provided an adequate context for the jury to determine their meaning and it was still open to the defence to argue that the gestures were ambiguous: at paras. 5-6, 33-35. Accordingly, the jury, as trier of fact, could properly assess the significance and ultimate reliability of the evidence of the gestures.

43 In assessing threshold reliability, the trial judge found that there were circumstantial guarantees of trustworthiness. Drawing on the elements of the dying declaration exception to the hearsay rule, the trial judge concluded, at para. 29: "In short, he [Mr. Kumar] was standing 'at death's door' and it is inconceivable that he turned his mind to gesture to Mr. Nurse for some ulterior purpose." He also observed that there was no evidence of a motive for Mr. Kumar to lie, the gestures were made shortly after the stabbing, and Mr. Kumar had to actively shake off P.C. Mitchell's hands to make his gesture, demonstrating an attempt to communicate with him: at para. 30. The trial judge concluded that any further reliability issues associated with the specific observations of the officers were matters of weight for the jury to consider in assessing ultimate reliability.

44 The trial judge also found that corroborating evidence substantiated the trustworthiness of Mr. Kumar's gestures and provided "an assurance of the threshold reliability". He pointed to the following evidence, at para. 32:

1) A series of chats between Mr. Nurse and Mr. Plummer planning the robbery and murder of Mr. Kumar;
2) Mr. Kumar's glasses are found in Mr. Nurse's garage;
3) Mr. Nurse provided a statement to police that Mr. Kumar was meeting him that morning at his residence;
4) Mr. Kumar was found lying on the roadway in close proximity to Mr. Nurse's residence;
5) Mr. Nurse was found at crime scene wearing black latex gloves and coveralls (Mr. Plummer was found 300 meters from Mr. Kumar's body wearing similar black latex gloves); and
6) Mr. Nurse's story to the police changed during the investigation. He was initially treated as a witness on the basis of what he told the police at the roadside. He was then arrested at the Caledon OPP station when the police found his version of events suspect.

45 The trial judge concluded his analysis by considering trial fairness, and balancing the probative value of the evidence against its prejudicial effect. On the issue of trial fairness, he found that the defence would be able to effectively combat any ambiguity in Mr. Kumar's gestures by cross-examining the Crown witnesses on their observations. The trial judge noted, at para. 33, that: "Indeed, both officers were subjected to a thorough cross examination on the voir dire."

46 In terms of the ultimate balancing of the probative value of the evidence against its prejudicial effect, the trial judge found that the gestures were highly relevant. He emphasized that two individuals were charged with murdering Mr. Kumar. There was much evidence of Plummer's involvement, including his own inculpatory statement. The gestures were relevant to whether Nurse was also involved in the killing. The trial judge concluded, at para. 35: "Ultimately, it is for the jury to decide what to make of the gesture."

(4) The Trial Judge's Instructions

47 In his final instructions to the jury, the trial judge decided on a cautious path in relation to the gestures. He outlined the positions of counsel. The Crown had urged the jury to find that Mr. Kumar pointed to Nurse to indicate that Nurse was involved in the attack. Counsel for Plummer supported this position. Counsel for Nurse relied on the inconsistencies in the evidence. The trial judge instructed the jury as follows:

> If you find that Mr. Kumar did point to Mr. Nurse, I do wish to caution you about placing undue weight on the alleged pointing as a piece of evidence from which you infer guilt. It is obvious that Mr. Kumar could not speak, so we do not have any direct evidence of what Mr. Kumar was thinking when he allegedly pointed at Mr. Nurse. ...
>
> It seems to me, if you are going to assess this evidence, you must need to first determine if Mr. Kumar did in fact point to Mr. Nurse. If you are satisfied that he did, consider if there are alternative explanations other than the one advanced by the Crown.
>
> Keep in mind that Constable Mitchell and Constable Bucsis both initially believed that Mr. Kumar was pointing to Mr. Nurse because he was trying to communicate with his friend. Take into account the circumstances and use your common sense when you assess this evidence.

No objection was taken to this instruction at trial.

(5) The Positions of the Parties on Appeal

48 On behalf of Nurse, Ms. Verner argued that the trial judge erred in admitting the gestures as evidence capable of implicating Nurse in Mr. Kumar's death. Ms. Verner did not challenge their admissibility under the traditional hearsay exceptions discussed above; she argued that Mr. Kumar's gestures were too ambiguous, and therefore unreliable, even at the threshold stage. Moreover, she submitted that the evidence against Nurse was not overwhelming and could not provide the necessary confirmation now required under *R. v. Bradshaw*, *2017 SCC 35*, *[2017] 1 S.C.R. 865*.

49 Ms. Verner also argued that the trial was rendered unfair by the Crown's use of this evidence in his closing address. She argued that the Crown improperly invited the jury to consider the evidence from the perspective of Mr. Kumar as he was dying. It is further argued that the jury was invited to reason back from guilt.

50 Counsel for Plummer did not make arguments concerning the admissibility of Mr. Kumar's gestures. However, Mr. Doucette submitted that, if Nurse is successful on this ground of appeal, his client should also get a new trial because, in its closing address, the Crown used this evidence to implicate both Nurse and Plummer. He further argued that the trial judge's instructions to the jury on this issue, while not specifically making reference to Plummer, failed to caution the jury about using this evidence against Plummer.

51 In response, the Crown argued that the trial judge did not err in admitting Mr. Kumar's gestures under the principled exception to the hearsay rule. Ms. Flanagan submitted that there were circumstantial guarantees of trustworthiness that justified the reception of this evidence. She also argued that the case against Nurse was overwhelming and provided powerful confirmation of Mr. Kumar's attempt to identify one of his killers. If the evidence was wrongly admitted, the Crown seeks to invoke the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46.

(6) The Admissibility of the Gestures

(a) Introduction

52 I am of the view that the trial judge did not err in admitting the gestures under the traditional hearsay exceptions. Moreover, to the extent that it was necessary to do so, the trial judge did not err in admitting the gestures under the principled approach to hearsay. While Nurse submitted that the evidence of the gestures was ambiguous and thus unreliable, he did not challenge the trial judge's finding that the evidence was admissible under the traditional hearsay exceptions. Nor did he speak to the significance of this finding as it related to the application of the principled approach. In my view, these issues are not so easily divorced or compartmentalized. A finding that the gestures were assertions by conduct and admissible under two traditional hearsay exceptions is relevant to an assessment of the reliability of the evidence.

53 Accordingly, my analysis of this issue will begin by considering the nature of the gestures as assertions by conduct and their admissibility under the traditional exceptions. In light of this discussion, I will then consider the question of whether in these circumstances, absent a categorical challenge to the exceptions, a resort to the principled approach was necessary. Finally, I will address the admissibility of the evidence under the principled approach.

(b) A Statement or Utterance?

54 The first order of business is to determine whether Mr. Kumar's gestures are capable of being characterized as a statement or utterance. While statements and utterances are usually verbal, consisting of the spoken word, conduct may also convey meaning. As David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law, 2015) observe at p. 119: "The nod of the head or the pointing of a finger speak loudly and are intended to communicate a message." Such conduct is described as "assertive conduct", to be contrasted with "non-assertive conduct" which asks the trier of fact to infer a statement based on the declarant's belief: *R. v. H.B.*, *2016 ONCA 953*, *345 C.C.C. (3d) 206*, at paras. 80-81.

55 In *R. v. Badgerow*, *2014 ONCA 272*, *119 O.R. (3d) 399*, leave to appeal refused, *[2014] S.C.C.A. No. 254*, Strathy J.A. (now C.J.O.) discussed assertions by conduct. He provided the following helpful illustrations, at para. 107:

> Assertive conduct refers to non-verbal conduct that is *intended* as an assertion. Some examples include: nodding the head (indicating "yes" -- *Chandrasekera v. The King*, [1937] A.C. 220 (P.C.)); pointing to someone ("he's the one who did it" -- *R. v. Underwood*, *2002 ABCA 310*, 130 C.C.C. (3d) 500); pointing at something ("that's it" -- *R. v. Perciballi* *(2001), 54 O.R. (3d) 346* (C.A.)); shrugging the shoulders ("I don't know"); or showing something to someone, without accompanying words (*R. v. MacKinnon*, *2002 BCCA 249*, *165 C.C.C. (3d) 73*). In these cases, the conduct is tendered in evidence to prove the truth of an assertion. The trier of fact must determine the meaning of words the "declarant" intended to convey by the conduct. [Emphasis in the original.]

See also *H.B.*, at para. 80; and *R. v. Tran*, *2014 BCCA 343*, *316 C.C.C. (3d) 270*, at para. 90.

56 Similar to *R. v. Underwood*, *2002 ABCA 310*, *170 C.C.C. (3d) 500*, and *R. v. Perciballi* *(2001), 54 O.R. (3d) 346*

(C.A.), aff'd *2002 SCC 51*, *[2002] 2 S.C.R. 761* (both referred to in para. 107 of *Badgerow* quoted above), the question is whether Mr. Kumar's pointing gestures could be considered to be assertive conduct. I accept that Mr. Kumar's intended meaning may not have been as straightforward as those two cases. However, it was open to the trial judge to conclude that Mr. Kumar's gestures were capable of conveying the strong incriminatory assertions that "Nurse did this" or "Nurse was involved".

57 Moreover, the trial judge appreciated that the entire context in which the gestures were made would be before the jury, including the evidence that tied Nurse to Mr. Kumar, and the reason for Mr. Kumar's attendance at the house on that day. The jury would also be apprised of how events transpired at the side of the road, beginning with P.C. Mitchell's inquiry to Mr. Kumar ("who did this?"), followed by Nurse inserting himself into the situation in direct view of Mr. Kumar, and culminating in Mr. Kumar's manifest intention to reveal something to the police and actively shaking off P.C. Mitchell's attempts to restrain his hands in order to do so. It was an assertion by conduct. And like any assertion, verbal or otherwise, it would be up to the jury to determine its meaning. But this assertion by conduct was also hearsay. As Iacobucci J. stated at para. 162 of *Starr*, hearsay evidence is not defined by the nature of the evidence but rather by the use to which the evidence is sought to be put. In this case, the Crown sought to use the assertions to implicate Nurse in the murder of Mr. Kumar.

(c) The Hearsay Exceptions

58 The trial judge analyzed the admissibility of the utterances under two common law hearsay exceptions (i.e., dying declaration and spontaneous utterance, also known as *res gestae*), as well as the principled approach to hearsay.

59 Since adopting the principled approach to hearsay, the Supreme Court has confirmed the continuing relevance of the traditional exceptions to the hearsay rule: see *Starr*, at paras. 202-207, per Iacobucci J.; *Mapara*, at para. 15; and *Khelawon*, at paras. 42, 60. In *Khelawon*, at para. 60, Charron J. held that, if a trial judge determines that evidence falls within one of the common law exceptions, this finding is "conclusive", and the evidence is admissible.

60 In *Mapara*, the court recognized that this conclusion may be displaced when the exception itself is challenged: at para. 15; see also *Khelawon*, at para. 60. That is not the case here; neither exception is under attack on a categorical basis.

61 The Supreme Court has also recognized that, in "rare cases", evidence that would otherwise fall within a valid hearsay exception may be excluded if it does not meet the requirements of necessity and reliability in the particular circumstances of the case. In *Starr*, Iacobucci J. wrote, at para. 214: "However, I wish to emphasize that these cases will no doubt be unusual, and that the party challenging the admissibility of evidence falling within a traditional exception will bear the burden of showing that the evidence should nevertheless be inadmissible." See also *Mapara*, at para. 15.

62 In this court, the parties placed little emphasis on the role of the traditional exceptions. Rather, they accepted the applicability of both exceptions, but focused their submissions solely on the principled approach to hearsay.

63 In my view, it is important to explore why the evidence is admissible under the two common law exceptions in play in this case, and how those exceptions themselves address reliability concerns associated with hearsay evidence. As I will discuss further, and Iacobucci J. noted in *Starr* at para. 212, evidence falling within a traditional exception to the hearsay rule is presumptively admissible, as these exceptions "traditionally incorporate an inherent reliability component." Both exceptions engaged in this case are rooted in an acceptance that the circumstances in which the exception will be met are ones in which there is only a remote possibility of fabrication or concoction. The requirements or "test" for meeting these exceptions are strictly adhered to by courts, presumably in an effort to ensure that the exception is only applied in cases that remain true to the rationale underpinning the exception.

64 As noted above, in "rare cases" it is possible that despite falling with a traditional exception, the evidence may

not meet the requirements of necessity and reliability. Indeed, Iacobucci J. recognized at para. 155 of *Starr* that "in the event of a conflict between the two, it is the principled approach that must prevail". However, the party challenging the presumptive admissibility of the evidence bears the burden of establishing a "rare case".

65 In the circumstances of the case at bar, the trial judge did not explain why he found that the "rare cases" threshold set out in *Starr* and *Mapara* had been met such that it was appropriate to consider the otherwise admissible hearsay evidence under the principled approach.

(i) Dying Declaration

66 As discussed above, one of the two traditional exceptions relied upon by the Crown was the dying declaration exception. The dying declaration exception is often traced back to *The King v. Woodcock* (1789), 1 Leach 500, 168 E.R. 352 (K.B.). Chief Baron Eyre explained the principle underlying the exception in *Woodcock*, at p. 502:

> Now the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice. [Emphasis added.]

In an early decision from this court in *The King v. Sunfield* *(1907), 13 C.C.C. 1* (Ont. C.A.), Moss C.J.O. followed a similar approach, relying on another English case, *The Queen v. Jenkins* (1869), L.R. 1 C.C.R. 187, at p. 192. He accepted "any one or all" of the following formulations as capturing the essence of the exception: "every hope of this world gone"; "settled, hopeless expectation of death"; and "any hope of recovery, however slight, renders the evidence of such declarations inadmissible": at pp. 5-6.[1]

67 The Supreme Court has discussed the dying declaration exception from time to time. In *Chapdelaine v. The King*, *[1935] S.C.R. 53*, Duff C.J. pronounced the test for admissibility in the following way, at p. 58:

> First of all, he must determine the question whether or not the declarant at the time of the declaration entertained a settled, hopeless expectation that he was about to die almost immediately. Then, he must consider whether or not the statement would be evidence if the person making it were a witness.

See also *Schwartzenhauer v. The King*, *[1935] S.C.R. 367*.

68 In the ensuing years, the Supreme Court has occasionally made reference to the dying declaration exception; however, the court has not been called upon to apply this hearsay exception: see *R. v. McGloan*, *[1976] 2 S.C.R. 842*, at pp. 849-850, per Ritchie J., where the exception was referred to in passing.

69 Reference is most often made to dying declarations in the Supreme Court's developing jurisprudence on the principled approach to hearsay, providing a handy example of the former approach, based on categories or pigeon-hole exceptions: see e.g. *R. v. Khan*, *[1990] 2 S.C.R. 531*, at p. 540; *R. v. Blackman*, *2008 SCC 37*, *[2008] 2 S.C.R. 298*, at para. 34.

70 In *Starr*, Iacobucci J. referred to dying declarations as an example of a hearsay exception that does not negate hearsay dangers, but "provides circumstantial guarantees of reliability": at para. 212; see also *Khelawon*, at para. 64. In her majority reasons in *Bradshaw*, Karakatsanis J. said, at para. 22: "These traditional exceptions are based on admitting types of evidence that were considered necessary and reliable, such as dying declarations". Pursuing a similar theme in *R. v. Youvarajah*, *2013 SCC 41*, *[2013] 2 S.C.R. 720*, Karakatsanis J. said, at para. 20: "Exceptions to the hearsay rule developed for statements carrying certain guarantees of inherent trustworthiness, often because of the circumstances in which they were made (for example, dying declarations and declarations that are adverse in interest)."

71 In Canada, academics have operationalized this hearsay exception in slightly different, but essentially similar ways. In Sidney L. Lederman, Alan W. Bryant & Michelle K. Fuerst, *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis, 2018), the authors list the following three requirements, at pp. 377-379: (a) a settled or hopeless expectation of death; (b) the accused must be charged with homicide; and (c) the injuries are those of the declarant and are the subject of the charge.

72 In *The Law of Evidence*, Paciocco and Stuesser list four requirements, at p. 177: (a) the deceased had a settled, hopeless expectation of almost immediate death; (b) the statement was about the circumstances of the death; (c) the statement would have been admissible if the deceased had been able to testify; and (d) the offence involved is the homicide of the deceased. This formulation was favoured by the trial judge in this case.

73 Dying declarations can be very powerful. After all, the statements come from the very person who was killed, speaking about the circumstances of their death, often moments before the solemn event of their death. However, these inherent strengths are counterbalanced against the obvious inability to cross-examine the declarant. It is for this reason that the "courts have insisted on strict adherence to the prerequisites of the exception before granting admissibility": see Lederman, Bryant & Fuerst, at p. 377. Davis J. in *Schwartzenhauer*, at p. 369, underscored this caution by adopting the following passage from Byles J. in *Reg. v. Jenkins* (1869), 11 Cox's Cr. C. 250:

> These dying declarations are to be received with scrupulous, I had almost said with superstitious, care. The declarant is subject to no cross-examination. No oath need be administered. There can be no prosecution for perjury. There is always danger of a mistake that cannot be corrected.

74 In recent times, at least in Canada, this exception is not engaged very often: see, however, *R. v. Aziga* *(2006), 42 C.R. (6th) 42* (Ont. S.C.); *R. v. Hall*, *2011 ONSC 5628*. Nevertheless, there is no reason to question the continued legitimacy of this hearsay exception. This is demonstrated in the concurring reasons of Moldaver J. in *R. v. Baldree*, *2013 SCC 35*, *[2013] 2 S.C.R. 520*, in which he rejected the defence suggestion that the drug purchase call in question was a disingenuous, fabricated call, designed to deflect attention away from the true drug dealer. Moldaver J. said the following, at para. 115:

> I caution thus against inferring suspicious circumstances in these types of cases absent any evidence suggesting as much. If that were our approach, many of our time-tested hearsay exceptions would unravel. To state the obvious, a dying man does not lose his ability to lie. And yet, in the case of dying declarations, we do not indulge in speculation about potential fabrication. Instead, the law recognizes that a motive to lie in such circumstances is at best remote (*R. v. Woodcock* (1789), 1 Leach 500, 168 E.R. 352 (K.B.), at p. 353). In other words, we recognize a norm of human behaviour for what it is -- a norm.

75 I acknowledge that this passage focuses on declarant sincerity, which is not the issue in this case. Nevertheless, this passage stands as a compelling recent endorsement of underlying principles for the dying declaration exception to the hearsay rule as enunciated in *Woodcock*.

76 There can be no doubt that the trial judge correctly identified and applied the test for admissibility under this exception. Apart from this case involving an assertion by conduct, the attending circumstances were paradigmatic of a dying declaration at common law. Mr. Kumar's gestures were admissible under this exception.

(ii) Spontaneous Utterance[2]

77 The gestures were equally admissible under the spontaneous utterance exception to the hearsay rule, although this exception seemed to play a lessor role in the trial judge's analysis.

78 Like the dying declaration exception, the spontaneous utterance exception has long been recognized in Canada. It is sometimes referred to alongside dying declarations, probably because they share certain functional

features. The trial judge noted, at para. 22 of the second ruling, that a dying declaration is an example of a spontaneous utterance. While this may not always be the case, the two exceptions sometimes overlap, as they did in this case.

79 The rationale for the spontaneous utterance exception was explained in the well-known case of *R. v. Khan* (1988), 42 C.C.C. (3d) 197 (Ont. C.A.), aff'd [1990] 2 S.C.R. 531, in which a medical doctor was accused of sexually assaulting a child in his care. In acquitting the accused, the trial judge excluded a statement made by the child to her mother, shortly after the alleged incident. The trial judge found that the statement lacked sufficient contemporaneity to be admitted as a spontaneous utterance.

80 This court allowed an appeal from acquittal, partly on the basis that the trial judge had construed the spontaneous utterance exception too narrowly. Relying on *Ratten v. The Queen*, [1972] A.C. 378 (P.C.), Robins J.A. described the exception in the following way, at p. 207:

> ...a spontaneous statement made under the stress or pressure of a dramatic or startling act or event and relating to such an occasion may be admissible as an exception to the hearsay rule. The stress or pressure of the act or event must be such that the possibility of concoction or deception can be safely discounted. The statement need not be made strictly contemporaneous to the occurrence so long as the stress or pressure created by it is ongoing and the statement is made before there has been time to contrive and misrepresent. The admissibility of such statements is dependent on the possibility of concoction or fabrication. Where the spontaneity of the statement is clear and the danger of fabrication is remote, the evidence should be received. [Emphasis added.]

The Privy Council's decision in *Ratten* was previously adopted by this court in *R. v. Clark* (1983), 42 O.R. (2d) 609 (C.A.), leave to appeal refused, [1983] S.C.C.A. No. 253.

81 The decision of this court in *Khan* was upheld by the Supreme Court, but for different reasons. The Supreme Court held that the trial judge had correctly excluded the mother's evidence as to the child's statements based on the spontaneous utterance exception. McLachlin J. (as she then was) explained, at p. 540:

> I am satisfied that applying the traditional tests for spontaneous declarations, the trial judge correctly rejected the mother's [evidence as to the child's] statement. The statement was not contemporaneous, being made fifteen minutes after leaving the doctor's office and probably one-half hour after the offence was committed. Nor was it made under pressure or emotional intensity which would give the guarantee of reliability upon which the spontaneous declaration rule has traditionally rested. [Emphasis added.]

The court then introduced the principled approach to hearsay evidence, finding that the child's statement to her mother was nevertheless admissible on the basis of necessity and reliability.

82 This court revisited the scope of the spontaneous utterance exception in *R. v. Dakin* (1995), 80 O.A.C. 253 (C.A.). The appellant argued that *Khan* had made the test for admission more stringent by insisting on strict contemporaneity. In a judgment released "By the Court", it was held, at para. 20:

> We do not accept the submission that the Supreme Court of Canada decision in *Khan* - in which there appears no reference to *Clark* - has changed the law regarding spontaneous declarations as stated in *Clark* and has reinstated the principle of strict contemporaneity enunciated in some earlier authorities. The admissibility of the declaration is assessed not simply by mechanical reference to time but rather in the context of all of the circumstances obtaining at the time, including those which tell against the possibility of concoction or distortion: *McCormick on Evidence*, 4th ed. (1992), para. 272, at pp. 218-219.

See also *R. v. Nicholas* (2004), 70 O.R. (3d) 1, at pp. 22-23 (C.A.), leave to appeal refused, [2004] S.C.C.A. No. 225; *R. v. Nguyen*, 2015 ONCA 278, 125 O.R. (3d) 321, at paras. 144-153, leave to appeal refused, [2015]

S.C.C.A. No. 365; *R. v. Carty*, 2017 ONCA 770, 356 C.C.C. (3d) 309, at paras. 8-12; and *R. v. Khan*, 2017 ONCA 114, 136 O.R. (3d) 520, at para. 15, leave to appeal refused, [2017] S.C.C.A. No. 139.

83 Mr. Kumar's assertions by conduct fell squarely within this exception. His gestures were made within minutes of the attack, just after his attackers had fled. The gestures were made as a direct result of the harrowing event that he continued to experience, while he lay on the road dying. Completely overcome by the events, there was no opportunity for concoction or speculation. Nurse does not submit otherwise. Again, the question returns to the alleged ambiguity of the gesture.

84 In considering the application of this exception, I refer to *R. v. Andrews*, [1987] A.C. 281, [1987] 1 All E.R. 513 (H.L.), the facts of which bear some similarity to this case. Donald Andrews was charged with the murder of Alexander Morrow. Mr. Morrow had been stabbed in his apartment. Shortly afterwards, he was found on the landing on the floor below his apartment bleeding profusely from a deep stomach wound. Two police officers arrived and started to perform first aid. Mr. Morrow was asked how he received his injuries. One officer testified that Mr. Morrow identified two attackers, including a man he knew as "Donald". The other officer, who was not positioned as close to Mr. Morrow, thought that he said "Donovan" and wrote this down in his notebook. Upon seeing this notation, the first officer told the second that he was wrong. When the second officer testified at trial, he said that he heard the name "Don" quite clearly, but Mr. Morrow's voice "mellowed and got quieter" while completing the name. Moreover, he spoke with a Scottish accent. Ultimately, the evidence was admitted as a spontaneous utterance. The decision of the trial judge was upheld in the Court of Appeal (Criminal Division).

85 In further upholding the decision, the House of Lords clarified the law governing the spontaneous utterance exception, going so far as to provide trial judges with guidelines for admissibility on this basis: see pp. 300-301. I need not repeat them here. However, I note that their Lordships endorsed a functional approach. As Lord Ackner said, at p. 301: "Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading." These words have direct application in this case.

86 *Andrews* shares another feature with this case -- a dispute between two police officers about what the victim actually said (*Andrews*) or did (i.e., the sequence of Mr. Kumar's gestures). Like this case, the two officers in *Andrews* were primarily focused on their lifesaving efforts. As Lord Ackner said, at p. 301: "As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not the admissibility of the statement and is therefore a matter for the jury."

87 Mr. Kumar made his gestures moments after being viciously attacked. The trial judge acknowledged that there was not strict contemporaneity. He said, at para. 22 of the second ruling: "While not contemporaneous, there is a close enough temporal connection that I am satisfied that the gesture is closely associated to the stabbing." All other requirements were easily satisfied. Moreover, the admission of these gestures for their truth was well aligned with the rationale of the spontaneous utterance exception -- they were made in response to being attacked where there was no realistic concern about concoction or fabrication.

88 The trial judge was right to conclude that Mr. Kumar's gestures were admissible under the spontaneous utterance exception to the hearsay rule.

(iii) Resort to the Principled Approach: Is This a "Rare Case"?

89 In this court, no submissions were directed to when it is appropriate to go beyond the traditional exceptions and consider threshold admissibility in accordance with the principled approach to hearsay. It is not automatic. In *Starr*, and then *Mapara*, the Supreme Court insisted that the occasions on which this will be appropriate are "rare" or "unusual". The trial judge thoroughly canvassed this issue with the parties during argument. He made passing reference to it in his second ruling, at para. 5, noting that Nurse's counsel at trial contended that this was a rare case.

90 There is little guidance in the case law as to what constitutes a "rare case" for these purposes. *Mapara*, provides one example. That case involved a challenge to the co-conspirator's exception to the hearsay rule. The Supreme Court concluded that categorically, the exception was consistent with the principled approach. In the alternative, it was argued that, even though the statements in question satisfied the requirements of the exception, the specific facts of the case still left lingering reliability concerns. The appellant relied on the motives of one of the principal players to falsely implicate Mapara in the murder. There was also evidence that one of witnesses was mistaken about the timing of one of the conversations. McLachlin C.J. rejected these submissions on the basis that the concerns raised were inherent to any conspiracy, and were assuaged in the analysis to determine whether the exception itself complied with the principled approach. Any weaknesses in the evidence were issues of ultimate reliability rather than threshold reliability. She stated, at paras. 36-37:

> These concerns, with the exception of the discrepancy as to the date of the conversation, do not go beyond concerns already addressed in the analysis of whether the co-conspirators' exception complies with the principled approach to the hearsay rule. They are characteristic of any conspiracy. Any weaknesses go to the ultimate weight of the evidence, which is for the jury to decide. Nor does [the] error on when the conversation took place merit rejection of the evidence. This problem is one of ultimate reliability that the jury can decide. ...
>
> It follows that the appellant has not established that the evidence to which he objects constitutes one of those "rare cases" where evidence falling within a valid exception to the hearsay rule fails, in the peculiar circumstances of the case, to satisfy the indicia of necessity and reliability necessary for the admission of hearsay evidence.

91 This aspect of *Mapara* was applied in *R. v. Kler*, *2017 ONCA 64*, *345 C.C.C. (3d) 467*, which also involved a "rare case" argument related to evidence falling within the co-conspirators exception. Watt J.A. wrote that the onus is on the party wishing to invoke the "rare case" exception to demonstrate that the evidence does not meet the requirements of necessity and reliability: at para. 75, see *Starr*, at para. 214. He concluded this was not a "rare case": at paras. 93-94. He explained the interaction between the common law exceptions and the principled approach in the following passage, at para. 79:

> It is difficult to conclude that evidence falling under the *Carter* rule would lack the indicia of necessity and reliability required for the admission of hearsay under the principled approach. Apart from the most exceptional cases, the argument is exhausted where the traditional exception is found to be compliant with the principled approach: *Mapara*, at para. 34. [Emphasis added.]

92 *Mapara* and *Kler* suggest that the basis for asserting a "rare case" must extend beyond the reliability concerns inherently captured in the hearsay exception itself. It must be unique to the case at hand. Further, the reliability concerns must be issues that go to threshold reliability, rather than weaknesses in the evidence that go to weight and can properly be assessed by the trier of fact in determining ultimate reliability.

93 In this case, neither common law exception was challenged on a categorical basis. Nor am I aware of any cases that cast doubt on the compliance of either exception with the principled approach. Consequently, Nurse stands in the same position as the appellants in *Mapara* and *Kler* -- he seeks to engage the principled approach in the face of presumptive admissibility under valid common law hearsay exceptions. In fact, the incline is even steeper for Nurse because two valid exceptions are squarely engaged.

94 Realistically, the only thing that Nurse can point to as unique in this case is that the communication is conduct-based, not verbal. Although the two police officers gave slightly different versions of the sequence of events, this in itself is not exceptional. The real issue is not whether Mr. Kumar pointed at Nurse, but why. The only difference is that instead of actually saying "Nurse did this to me" or "Nurse was part of this", Mr. Kumar's gestures were capable of communicating the same information. Further, any concern as to whether the gestures were capable of conveying meaning, or conveying this meaning in particular, was addressed by the trial judge's response to the

issue of whether a gesture is capable of being a dying declaration: first ruling, at para. 36. Whether conduct or implied statements are capable of conveying meaning is addressed by the law governing assertions by conduct which recognizes that certain kinds of conduct may be assertive and thus capable of communicating a message. Ultimately, it was for the jury to decide what Mr. Kumar was attempting to convey, just as the jury in *Andrews* was required to grapple with whether Mr. Morrow said "Donald" (which would have been inculpatory) or "Donovan" (which may have been exculpatory). In both cases, the juries were well-equipped to do so.

95 I would dismiss the appeal on this basis. The gestures were assertions by conduct that fit squarely within the dying declaration and spontaneous utterances exceptions to the hearsay rule. Both rules sufficiently address the reliability concerns raised by the circumstances of this case. In other words, this is not a "rare case" within the meaning of *Starr*, *Mapara*, and *Kler* that requires the application of the principled approach as a precondition to admissibility.

(iv) Applying the Principled Approach

96 In the alternative, if it is necessary to evaluate this evidence under the principled approach, I would affirm the trial judge's conclusions on this issue.

97 The question of whether Mr. Kumar's gestures ought to have been admitted is a question of law. However, the factual findings that feed that determination are entitled to deference on appeal. Accordingly, absent an error in principle, the trial judge's conclusions about threshold reliability are entitled to deference: see *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at para. 81; *Blackman*, at para. 36; and *Youvarajah*, at para. 31.

98 In his analysis, the trial judge relied heavily upon *Khelawon*. Roughly 4 1/2 years later, we are asked to review his conclusions through the lens of *Bradshaw*, which prescribes what is arguably a more exacting analysis of reliability.

99 *Bradshaw* was concerned with the issue of when a trial judge may rely upon corroborative evidence to conclude that threshold reliability is established: at para. 3. *Bradshaw* was a murder case and the hearsay statement in issue was made by a former co-accused, Thielen, who refused to testify at Bradshaw's trial. Applying the principled approach, the trial judge admitted part of the prior statement. He subsequently gave a warning under *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811 concerning this evidence.

100 Importantly, none of the traditional hearsay exceptions was operative in *Bradshaw*. Admissibility had to be established from the ground up, based solely on the principled approach. This case is different because Mr. Kumar's gestures are admissible under two presumptively valid exceptions, both of which embody strict reliability safeguards.

101 In her discussion of threshold reliability, Karakatsanis J. in *Bradshaw* described the two ways in which threshold reliability may be approached, at para. 27:

> The hearsay dangers can be overcome and threshold reliability can be established by showing that (1) there are adequate substitutes for testing truth and accuracy (procedural reliability) or (2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability) (*Khelawon*, at paras. 61-63; *Youvarajah*, at para. 30).

See also *R. v. M.G.T.*, 2017 ONCA 736, 357 C.C.C. (3d) 109, at paras. 117-118.

102 In this case, because Mr. Kumar is dead, procedural reliability (i.e., an oath, cross-examination, video recording, etc.) is not an option for establishing threshold reliability. The focus must be on substantive reliability. This is gauged by the circumstances in which the statement was made, and any evidence that corroborates or conflicts with the statement: *Bradshaw*, para. 30; and *Blackman*, at para. 55. As Karakatsanis J. said at para. 40 of

Bradshaw: "substantive reliability is concerned with whether the circumstances, and any corroborative evidence, provide a rational basis to*reject*alternative explanations for the statement, other than the declarant's truthfulness or accuracy" (italics in original; underlining added).

103 *Bradshaw* also sharpened the focus of what may be relied upon as corroborative evidence: see paras. 33-43. As Karakatsanis J. explained, at para. 44:

> In my view, the rationale for the rule against hearsay and the jurisprudence of this Court make clear that not all evidence that corroborates the declarant's credibility, the accused's guilt, or one party's theory of the case, is of assistance in assessing threshold reliability. A trial judge can only rely on corroborative evidence to establish threshold reliability if it shows, when considered as a whole and in the circumstances of the case, 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. If the hearsay danger relates to the declarant's sincerity, truthfulness will be the issue. If the hearsay danger is memory, narration, or perception, accuracy will be the issue. [Emphasis added.]

See also *R. v. Mohamad*, *2018 ONCA 966*, 369 C.C.C. (3d) 211, at paras. 100-104. Hourigan J.A. noted in *R. v. Tsega*, *2019 ONCA 111*, at para. 26, that the standard set out in *Bradshaw* "will not be met where the corroborative evidence is equally consistent with another explanation. The corroborative evidence must show on a balance of probabilities that the only likely explanation for the statement is the truth or accuracy of the material aspects of the statement" (emphasis added).

104 In *Bradshaw*, at para. 57, Karakatsanis J. set out a four step framework to determine whether corroborative evidence is of assistance in the substantive reliability inquiry:

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.

105 Beginning with the first part of the framework, as discussed above the material part of the gestures tendered for its truth was that in pointing to Nurse, Mr. Kumar was implicating him in the murder. Turning to the second part of the analysis, in her submissions on behalf of Nurse, Ms. Verner said that in this case narration is the hearsay danger, making accuracy the issue. She argued that there was no way for the jury to evince what Mr. Kumar meant from his gestures, which were equally consistent with Mr. Kumar reaching out to a friend in a very stressful situation. This leads to the third part of the framework. The only alternative explanation of the gestures offered by the defence at trial, and on appeal, was that, by pointing at Nurse, Mr. Kumar was reaching out to a friend. In my view, in the circumstances of the case, the corroborative evidence rules out this alternative explanation such that the only likely explanation for the gestures is the material aspects for which they were tendered by the Crown.

106 This case does not involve an "incomplete utterance", as in *R. v. Ferris*, *1994 ABCA 20*, *149 A.R. 1*, aff'd *[1994] 3 S.C.R. 756*, in which Conrad J.A. found, at para. 17, "there exists no circumstances or context from which the true meaning of the words can be inferred." See also *Badgerow*, at paras. 143-150. Because the listener in *Ferris* did not hear what was said immediately before or after the utterance at issue, the lack of context rendered its meaning "speculative and its probative value ... tenuous": *Ferris*, SCC, at p. 756. Here, the full context in which Mr. Kumar made his gestures was available to assist in giving meaning to the gestures.

107 Two important events occurred just before Mr. Kumar made his gestures. First, and similar to *Andrews*, Mr. Kumar was asked by P.C. Mitchell "who did this?" Second, Nurse arrived on the scene and started talking. He said a number of things that were proven to be demonstrably false. For example, he initially said that Mr. Kumar had been dumped from a car by three men. He then said that he had actually witnessed Mr. Kumar being attacked by a black man with dreadlocks. Nurse told the officers that he was Mr. Kumar's friend, but then asked P.C. Bucsis if he could leave, when it was obvious to everyone present that his "friend" Mr. Kumar was mortally wounded.

108 The theory that Mr. Kumar pointed to Nurse because he was reaching out to a friend was shattered by the surrounding evidence. The corroborative evidence relied upon by the Crown indisputably proved that Nurse and Mr. Kumar were not friends. The BBM correspondence between the appellants overwhelmingly illustrated Nurse's hatred of Mr. Kumar. Similarly, there is no indication that Mr. Kumar regarded Nurse as a friend. Theirs was an unpleasant business relationship. Mr. Kumar had just threatened to evict Nurse from the house. His visit to the house that day was not a social call; he went there expecting to collect rent arrears, not knowing that Nurse had other plans. This corroborative evidence was not equally consistent with the alternative explanation that Mr. Kumar was reaching out to a friend. The corroborative evidence relied upon by the trial judge, summarized at para. 32 of the second ruling, meets the standard set out in *Bradshaw* and was capable of supporting the threshold reliability of the evidence.

109 I return to the important issue of context. As Watt J.A. observed in *M.G.T.*, at para. 57: "Without proper context it may be difficult, sometimes impossible, to tease out the meaning of words allegedly spoken." In this case, the fact that the police officers initially believed that Mr. Kumar was pointing to his "friend" demonstrates the importance of context. Their belief was premised on a false reality, constructed on Nurse's lies. When the trial judge was tasked with determining threshold reliability, his decision was fully informed by compelling corroborating evidence that realistically pointed to a single conclusion -- the gestures were meant to implicate Nurse in the terrible events that led to Mr. Kumar bleeding out on the side of the road.

110 To the extent that it was necessary for the trial judge to resort to the principled approach, I conclude that he reached the right conclusion, even though he did not have the benefit of the Supreme Court's decision in *Bradshaw*. I also note, with respect, that the trial judge's reasons on the principled approach fail to reflect that, in the "rare case" scenario, it is the party that resists the admission of hearsay evidence otherwise admissible under a traditional exception who bears the onus of showing that the evidence should nevertheless be excluded: see *Starr*, at para. 214; *Mapara*, at paras. 15, 37; and *Kler*, at para. 75. This only serves to fortify my conclusion that the trial judge was right to admit the evidence.

(v) The Application of the Curative Proviso

111 The Crown argued that, if the gestures of Mr. Kumar should not have been admitted, this court should apply the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*.

112 I agree with this submission and would be prepared to apply the proviso. The evidence against Nurse was overwhelming. As has been discussed above, Nurse's central involvement in the murder was established by the BBM chats, the forensic evidence which proved that he literally had Mr. Kumar's blood on his hands (and some articles of his clothing), his peculiar behaviour at the scene, and his parade of demonstrably false statements to the police. Without the gestures, the verdict would inevitably have been the same: *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para 46; *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, at para. 24; and *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 57.

(7) The Crown's Closing Address

113 Nurse submitted that, even if the evidence of Mr. Kumar's gesture was admissible, the Crown's closing address was improper and invited the jury to misuse the evidence in a manner that was prejudicial. Counsel for

Nurse pointed to passages from the Crown's closing in which he invited the jury to put themselves in the mind of Mr. Kumar as he was dying and suggested that they too would have wanted to point to their killer. Nurse also argued that the Crown's closing address invited to the jury to approach this evidence on the assumption that Nurse was guilty.

114 I would not give effect to either of these submissions. First, there was no objection to the Crown's jury address. These points were raised for the first time on appeal.

115 Second, the Crown did not invite the jury to consider the case based on prejudice or sympathy. The trial judge specifically warned the jury against deciding the case in this way, providing them with the standard instruction on the irrelevance of prejudice and sympathy: see David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 2015), at p. 242.

116 Third, and most importantly, evaluating the authenticity of a dying declaration naturally invites consideration of what a person in such dire circumstances would be thinking at the time. The defence attempted to cast doubt on the meaning of Mr. Kumar's purported utterances. The Crown was entitled to urge the jury to consider the situation from Mr. Kumar's perspective. In doing so, the Crown did not cross the line and invite the jury to consider the evidence improperly.

117 Similarly, the Crown did not encourage the jury to reason back from a conclusion of guilt. All the Crown did was ask the jury to consider Mr. Kumar's gestures in the context of all of the evidence at trial. There was nothing improper in this approach; indeed, it was mandatory that the jury do so.

118 I would dismiss this ground of appeal.

E. THE SEARCH OF THE BLACKBERRY DEVICES

(1) Introduction

119 On the day that the appellants were arrested, November 10, 2011, the police seized a BlackBerry Curve from Nurse and a BlackBerry Torch from Plummer. BBM chats between the two men were eventually extracted from these devices and formed a crucial part of the Crown's case. The appellants allege that this data was seized unlawfully and should have been excluded from evidence, pursuant to ss. 8 and 24(2) of the *Charter*. The trial judge disagreed.

120 At trial, the appellants challenged the validity of the warrant authorizing the seizure and search of the devices, and the conduct of the police in examining the devices. These arguments were rejected by the trial judge: *R. v. Nurse and Plummer*, *2014 ONSC 1779* ("original reasons").[3]

121 On appeal, the appellants pursue only one argument. When the police originally analyzed the data on the appellants' devices, the software that was used only revealed BBM chats showing some interaction between the appellants. However, about a year later, the software had been updated. The police analyzed the data again, this time successfully retrieving BBM chats that revealed a plan to kill Mr. Kumar. The appellants argue that this second inspection or analysis was a fresh search, not authorized by the first warrant. In other words, a new warrant was required.

122 The trial judge rejected these arguments, holding that the police conduct in 2012 was properly characterized as a "second analysis" of data that had already been reproduced, not a further search. He concluded that the police did not need another warrant to conduct the second analysis and s. 8 of the *Charter* was not violated: see original reasons, at paras. 65-66, 73; and *R. v. Nurse and Plummer*, *2014 ONSC 5989*, *322 C.R.R. (2d) 262*, at para. 7 ("further reasons"). For the reasons set out below, I agree with the trial judge's conclusion.

(2) The Relevant Facts and the Trial Judge's Ruling

123 The appellants acknowledge that their BlackBerry devices were properly seized incident to their respective arrests. The phones were secured in an Ontario Provincial Police ("OPP") vault and were not analyzed until the police obtained a warrant on November 16, 2011. The warrant authorized the police to re-seize the phones and to create "images" of the data on the phones for the purposes of forensic analysis. On its face, the warrant gave the police a 15 hour window to execute the warrant. Before the trial judge, the appellants argued that the analysis of the data on the devices had to be completed within this timeframe. The trial judge rejected this interpretation, holding that the timeframe on the warrant related to the seizure of the devices, not the time within which the police had to analyze the data on the phones, post seizure: original reasons, at paras. 45, 52.

124 After obtaining the warrant, the devices were taken to the E-Crimes section of the OPP. Because the devices were password protected, the E-Crimes section was unable to extract any data. On November 23, 2011, the OPP sent the devices to the RCMP Technological Crime Unit ("TCU") as it was the only police force that had the expertise to retrieve data from password locked Blackberry devices.

125 The TCU made forensic copies of the memories of the phones by a process known as physical extraction. This was done on Nurse's device on November 25, 2011, and Plummer's device on December 8, 2011. The memories of each phone were imaged and a "BIN file" was created for each device. These files contained the raw data. This data was then analyzed by software developed by a company called Cellebrite, which transformed the data into a readable form, revealing active and deleted content, including but not limited to BBM messages. The RCMP sent the raw data (i.e., the BIN files) and the results of the Cellebrite analysis back to the OPP. All of this data was stored on an OPP server. However, the results of the first Cellebrite analysis were quite limited.

126 Between 2011 and 2012, there were major improvements to the Cellebrite software. In November 2012, the OPP re-analyzed the contents extracted from the devices that were stored on its server. They were able to recover previously deleted BBM messages exchanged between the appellants that were highly incriminatory. The messages revealed a plan between Nurse and Plummer to kill Mr. Kumar.

127 The trial judge found that the second analysis of the extracted data did not violate the appellants' rights under s. 8 of the *Charter*.

128 During argument before the trial judge, defence counsel for Plummer (who did not appear as counsel on this appeal) attempted to draw an analogy between the actions of the police in this case and a situation where the police search a home with an ultraviolet light. She argued that, if the police came into possession of a more powerful light after the initial search, they would not be permitted to return to the home without further judicial authorization.

129 The trial judge rejected this argument, which is premised on the characterization of a phone as a "place". He found, at paras. 65-67 of his original reasons, that the process of using the 2012 Cellebrite software on the BIN files was properly characterized as a "second analysis" of data that had already been reproduced, not a further search into the contents of the phones:

> Ms. Bojanowska's submissions are attractive. However, after reviewing the record before me, I do not regard the conduct of the OPP in November of 2012 as a further search of a place. The phone had been lawfully seized and the police were given access to the contents of the phone and made a copy of the contents by creating a binary file which was a download of raw data. As Cromwell J. in *R. v. Vu* [,2013 SCC 60, *[2013] 3 S.C.R. 657*] points out (at para.48) that once a warrant to search a computer is obtained, the police have the benefit of s. 487(2.1) and (2.2) of the *Code*, which allows the police to search, *reproduce*, and print data that they find.

> In this case, once the data was reproduced or imaged, they analyzed the data. I think it is more appropriate to characterize what the police did in 2012 as a second analysis of data that had been reproduced and not a more extensive and deeper search into the contents of the phone...
>
> The agreed statement of facts points out that the program that was used to examine the binary file Cellebrite was updated in 2012. As a result of the update the program was capable of *interpreting* more data. [Italics in original; underlining added.]

130 The trial judge concluded that the police did not require a further warrant to re-analyze the data in 2012: at para. 73. The second analysis of the data did not infringe s. 8 of the *Charter*.

(3) Analysis

131 The appellants' argument on appeal is quite narrow. They do not challenge that: (1) their devices were lawfully seized upon searches incident to their arrests; (2) the police obtained a valid search warrant authorizing an analysis of the data on their devices; (3) the warrant permitted the police to create "images" of the data on the devices for the purpose of analysis; (4) the analysis of the data on the devices did not need to take place within any particular time frame, and certainly not within time range set out for the execution of the warrant; and (5) the images were lawfully analyzed by the initial use of the Cellebrite software. Their sole argument on appeal is that the second analysis was a "search" and therefore required a further warrant.

132 I agree with the trial judge's analysis that the actions of the police in interpreting the data on a second occasion, using updated software, did not amount to a new search that required fresh authorization. Instead, it was another interpretation, inspection, or analysis of materials already lawfully seized. It involved no additional or further invasion of the appellants' privacy interests.

133 In analyzing this issue, it is important to consider the essential nature of computers and other digital devices. They challenge traditional definitions of a "building, receptacle or place" within the meaning of s. 487 of the *Criminal Code*. In *R. v. Marakah*, *2017 SCC 59*, [2017] 2 S.C.R. 698, McLachlin C.J. said, at para. 27: "The factor of 'place' was largely developed in the context of territorial privacy interests, and digital subject matter, such as an electronic conversation, does not fit easily within the strictures set out by the jurisprudence." See also *R. v. Jones*, *2011 ONCA 632*, *107 O.R. (3d) 241*, at paras. 45-52. Similarly, in *R. v. Vu*, *2013 SCC 60*, *[2013] 3 S.C.R. 657*, Cromwell J. said, at para. 39: "...computers are not like other receptacles that may be found in a place of search. The particular nature of computers calls for a specific assessment of whether the intrusion of a computer search is justified, which in turn requires prior authorization."

134 Because of these conceptual differences, arguments by analogy to traditional (i.e., non-digital) search scenarios will not always be helpful. For example, the trial judge was right to reject the ultraviolet light testing scenario advanced by trial counsel. It does not work in this context because the second ultraviolet light analysis would require re-entry into the premises resulting in a separate invasion of privacy.

135 The re-inspection or re-interpretation of the raw data harvested from the appellants' devices did not involve a further invasion of privacy. It is not necessary in this case to identify precisely when the appellants' privacy rights were defeated in favour of law enforcement. Nevertheless, their privacy rights were "implicated" when their devices were seized upon arrest. In *R. v. Reeves*, *2018 SCC 56*, *427 D.L.R. (4th) 579*, Karakatsanis J. held at para. 30: "When police seize a computer, they not only deprive individuals of *control* over intimate data in which they have a reasonable expectation of privacy, they also ensure that such data remains *preserved* and thus subject to potential future state inspection" (emphasis in original). The same would hold true for the seizure of a cellphone or BlackBerry device.

136 Beyond the privacy implications triggered by the seizure of the devices, the appellants' privacy interests in the data on their devices were subjugated to law enforcement interests upon the issuance and execution of the warrant to search the data on these phones: see *Vu*, at paras. 3, 49; and *Reeves*, at para. 30.

137 The appellants do not contend that it was improper for the police to image the data on their devices. Once this was done, there was no restriction, on the face of the warrant or at law, as to when or how often the police were permitted to examine or inspect this lawfully seized and copied data.

138 It might be said that what occurred in this case was akin to a fraud investigation in which the police seize documents and make copies. There is nothing wrong with the police looking at these documents over and over again, attempting to discern patterns, schemes, or whatever might be relevant to the investigation. Similarly, I see nothing objectionable in having properly seized documents analyzed by forensic accountants, or even obtaining a second (or third, etc.) opinion by different forensic accountants.

139 Similarly, with respect to blood-stained articles of clothing seized pursuant to a warrant, it would not be improper for the police to re-submit these items for further DNA testing to benefit from evolving scientific advances or improved forensic techniques.

140 Leaving analogies aside and returning to the facts of this case, there was nothing in the search warrant that restricted the police to conducting forensic analysis in any particular manner, or a finite number of times. These types of restrictions or directions, known as search protocols, were addressed by the Supreme Court in *Vu*. At para. 25, Cromwell J. said: "While such conditions may be appropriate in some cases, they are not, as a general rule, constitutionally required". Cromwell J. made the following observations about search protocols, at para. 54:

> ...I am not convinced that s. 8 of the *Charter* requires, in addition, that the manner of searching a computer must always be spelled out in advance. That would be a considerable extension of the prior authorization requirement and one that in my view will not, in every case, be necessary to properly strike the balance between privacy and effective law enforcement.

141 In this case, the right balance was struck. Conducting a second interpretation of the data files did not further defeat the appellants' privacy interests. This was complete at the time the search warrant was issued and the police retrieved the phones from the police locker. It may not always be the case that a re-analysis or re-inspection of lawfully obtained evidence will not constitute a "new search". The inquiry must consider the specific circumstances in which the analysis is conducted. In this case, the second analysis was conducted in the course of an ongoing police investigation, the substance of which had not changed between the first analysis and the second analysis. The data was extracted from the devices at a fixed point in time, and remained frozen in time at this fixed point. That is, the second analysis was conducted on the very same BIN files that the police had already examined. Finally, there were no search protocols imposed by the warrant. In such circumstances, even if the appellants had a subjective expectation of privacy in relation to the BBM chats, it was objectively reasonable for the police to conduct the second analysis.

142 Similarly, the timing of the second inspection had no impact on the appellants' privacy interests. Indeed, I consider the timing issue to be a distraction. Had the police commenced running the data but were interrupted, they would not have needed to obtain a new warrant to commence the analysis again. If the updated version of Cellebrite became available a month after the first analysis, instead of a year later, there could be no complaint. During the oral hearing, counsel for Plummer acknowledged as much. I fail to see how *Charter* protection is engaged because of the extended length of time. It had no impact on privacy rights in the context of this case. Consequently, this variable is not constructive in analyzing the lawfulness of using the Cellebrite software on a second occasion.

143 The trial judge did not err in finding that the appellants' rights under s. 8 of the *Charter* were not infringed by the second analysis of the data extracted from their devices.

144 In the circumstances, it is not necessary to engage in a detailed analysis of s. 24(2) of the *Charter*. Appellants' counsel did not do so on this appeal. However, I would observe that, the application of all three factors under *R. v. Grant*, *2009 SCC 32*, *[2009] 2 S.C.R. 353* strongly favour admission of the evidence.

145 If the second analysis did amount to an infringement of s. 8, it was not a serious one. There was no hint of bad faith in the second analysis of the raw data. This is demonstrated by the fact that, at a time when the law had not yet been clarified by the Supreme Court in *Vu*, the police nevertheless obtained a warrant to search the appellants' devices, even though the devices had already been lawfully seized.

146 As already discussed, the impact on the appellants' privacy rights was negligible in the circumstances. The devices were seized under the common law power of search incident to arrest. They were re-seized and analyzed under the authority of a search warrant. Had a further warrant been required to conduct the second analysis, it would have been issued in a heartbeat. In these circumstances, the appellants would have been in the exact same position: *R. v. Tsekouras*, *2017 ONCA 290*, *353 C.C.C. (3d) 349*, at para. 112.

147 Lastly, the balancing required at the third stage of *Grant* tilts strongly in favour of admission. The BBM communications provided highly reliable evidence of the plan to kill Mr. Kumar. They formed the cornerstone of the Crown's case on first degree murder.

148 I would dismiss this ground of appeal.

F. CONCLUSION AND DISPOSITION

149 As explained above, the appeals were dismissed at the conclusion of the oral hearing.

G.T. TROTTER J.A.
D.H. DOHERTY J.A.:— I agree.
D.M. BROWN J.A.:— I agree.

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CORRECTION

Released: April 5, 2019

Please be advised that the last word in para. 138 (on page 55) now reads "accountants", instead of "accounts".

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1 In separate reasons, MacLaren J.A. adopted similar formulations at p. 8, as did Meredith J.A. in his own reasons, at p. 11.

2 The trial judge referred to this as the *res gestae* exception. With respect, I prefer the more modern expression -- "spontaneous utterance".

3 The appellants also argued that the reports of the data on the devices generated by the police were overbroad as the police failed to limit the reporting to "correspondence and communication". The trial judge accepted this argument and determined that the reporting should have been limited to BBM chats, texts, emails, notes, and call logs. He found that the overbroad reporting violated s. 8 of the *Charter* and the appropriate remedy under s. 24(2) was an exclusion of data outside of the scope of "correspondence and communication". See: *R. v. Nurse and Plummer*, *2014 ONSC 5989*, *322 C.R.R. (2d) 262*.