# COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Hoffman, 2021 ONCA 781
DATE: 20211105
DOCKET: C67769

Hourigan, Paciocco and Zarnett JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Gary Hoffman

Appellant

Delmar Doucette and Cara Barbisan, for the appellant

Alexander Alvaro and Daniel Guttman, for the respondent

Heard: June 22, 2021, by video conference

On appeal from the conviction entered on June 19, 2019 by Justice Jennifer Woollcombe of the Superior Court of Justice, sitting with a jury.

**Paciocco J.A.:**

## OVERVIEW

[1] Following a trial by jury, Gary Hoffman, the appellant, was convicted of manslaughter in the beating death of Madad Kenyi.

[2] The appellant pursues three grounds of appeal before this court. First, he argues that the trial judge erred in failing to give a direction pursuant to the decision in *R. v. W.(D.)*, 1991 CanLII 93 (CSC), [1991] 1 S.C.R 742, relating to exculpatory evidence given by key witness Peter Ojha (the "*W.(D.)* direction"). Second, he

contends that the trial judge erred by misdirecting the jury on double hearsay that may have been contained in a "*K.G.B.* statement" made by Peter Ojha that was admitted into evidence. Finally, he submits that the trial judge erred in rejecting his constitutional *ultra vires* challenge to the validity of s. 4(b) of the Ontario *Juries Act*, R.S.O. 1990, c. J.3.

[3] At the conclusion of the appellant's oral submissions, we dismissed the latter ground of appeal, without calling on the Crown. We reserved judgment on the first two grounds of appeal.

[4] The following reasons explain why I would allow the appeal based on the trial judge's failure to give a *W.(D.)* direction relating to the testimony of Mr. Ojha, and on her failure to give a proper double hearsay direction. The reasons below also explain why we rejected the ground of appeal relating to the constitutionality of s. 4(b) of the *Juries Act*.

## MATERIAL FACTS

### (1) The Background

[5] On the evening of Thursday, September 24, 2015, several people, including Madad Kenyi, were in Elmcreek Park in Malton. Mr. Kenyi had been drinking heavily that night. He initiated a dispute with others in the park, which turned violent. Mr. Kenyi was knocked to the ground and swarmed by an undetermined number of people who punched, kicked, and stomped him. Many, if not all, of those people had also been drinking heavily. While Mr. Kenyi was on the ground, someone struck him with a tree branch (the "branch"). The beating was brutal; Mr. Kenyi sustained various injuries, including multiple blunt force injuries to his face and body.

[6] Tragically, Mr. Kenyi died in the ensuing days from the extensive injuries he suffered in the attack, which included a fractured skull that led to a fatal subdural hematoma.

[7] Five people were charged as a result of this horrid incident. After a joint preliminary inquiry, all five were committed to stand trial for manslaughter. Andrew Ramdass was subsequently discharged, after a successful *certiorari* application resulted in his committal being quashed. Nathan Bell (a.k.a. "Bugz") pleaded guilty to manslaughter and was sentenced. Brian Nelson and Emmanuel Blowes-Serrata were jointly tried and both acquitted. The appellant, who was tried alone, elected to be tried by a jury. As indicated, he was convicted of manslaughter.

### (2) Empanelling the Jury

[8] Prior to the jury being empanelled, the appellant brought a constitutional challenge to s. 4(b) of the Ontario *Juries Act*, which renders ineligible for jury service anyone who has been convicted of an offence that may be prosecuted by indictment and has not been pardoned. The appellant submitted before the trial judge that this provision is *ultra vires* because it is inconsistent with s. 638(1) of the

*Criminal Code*, R.S.C. 1985, c. C-46. At the time the jury was empanelled, s. 638(1), which has since been amended, permitted prospective jurors to be challenged for cause if they had been convicted of an offence for which they could be sentenced to a term of imprisonment exceeding twelve months. The appellant contended that it is necessarily implicit in s. 638(1) that, pursuant to the *Criminal Code*, prospective jurors with criminal records are eligible for jury service unless challenged for cause. He argued that, as federal legislation, s. 638(1) must be given paramountcy.

[9] The trial judge dismissed the challenge and the jury was empanelled with the juror disqualification in s. 4(b) in play.

### (3) Evidence Relating to the Appellant's Role in Mr. Kenyi's Death

[10] At the appellant's trial, it was common ground that Mr. Kenyi initiated the altercation and threatened the appellant with a knife. It was also agreed that the appellant threw a punch at Mr. Kenyi in self-defence.

[11] The key issue was whether the Crown had proved beyond a reasonable doubt that the appellant participated in the subsequent assault in which unnecessary and excessive force claimed Mr. Kenyi's life. Witness testimony was inconsistent relating to whether the appellant had further involvement in the assault, and the nature of that involvement. As a result of the inconsistent testimony, the Crown pursued alternative paths to conviction. It argued that the appellant was a participant in the fatal assault on Mr. Kenyi, either by striking him with a branch or by participating in the swarming in which an unknown number of people punched, kicked, and stomped him.

[12] Rigoberto Membreno, who had been with Mr. Kenyi prior to the altercation, testified that the appellant did nothing to Mr. Kenyi after throwing the initial punch. He identified other participants in the assault, including Mr. Blowes-Serrata, who he said hit a prostrate and helpless Mr. Kenyi in the face with a branch after he had been knocked to the ground.

[13] Testimony that Mr. Membreno gave at a prior trial was also admitted into evidence. The appellant and the Crown disagree about the meaning of that testimony. The Crown contends that in his testimony at the prior trial, Mr. Membreno said that the appellant punched Mr. Kenyi during the swarming. The appellant argues that this is a misreading, and that when that prior testimony is interpreted in context, Mr. Membreno was not referring to the appellant when he described the punch.

[14] Aretha Taylor also testified that Mr. Blowes-Serrata struck Mr. Kenyi with a branch, but she said that Mr. Hoffman kicked Mr. Kenyi and joined in the assault with others when Mr. Kenyi was on the ground. In other words, her evidence incriminated the appellant in the swarming, but not the assault with a branch.

[15] Mr. Blowes-Serrata testified that he saw Mr. Hoffman strike Mr. Kenyi with a branch after retrieving a log from a nearby grove of trees. He also testified that the appellant kicked, stomped, and jumped on Mr. Kenyi's head.

[16] Andrew Ramdass described a circle of approximately ten people forming around Mr. Kenyi. He saw a melee in which Mr. Kenyi was being kicked, and saw someone strike Mr. Kenyi with a branch, but he could not identify who was involved. He said that prior to the attack he saw Mr. Hoffman with a stick, but not the branch that he saw used in the assault.

### (4) Peter Ojha's Evidence

[17] Mr. Ojha's evidence was presented both through his in-court testimony and an out-of-court police statement he had made which the trial judge admitted pursuant to the authority of *R. v. B. (K.G.)*, 1993 CanLII 116 (CSC), [1993] 1 S.C.R. 740 ("the *K.G.B.* statement"). As I will explain in more detail below, Mr. Ojha's in-court testimony was exculpatory, either in its entirety or on the material issue of whether the appellant struck Mr. Kenyi with a branch. However, Mr. Ojha's *K.G.B.* statement to police was inculpatory, describing the appellant as repeatedly striking Mr. Kenyi with a branch.

[18] Mr. Ojha was an important witness. When the jury asked to have his *K.G.B.* statement replayed during their deliberations, the trial judge wisely ruled that since the Crown's "case stands or falls, to a large degree, on Mr. Ojha", the jury should hear the pertinent parts of his in-court testimony as well.

[19] Since the rulings relating to Mr. Ojha's evidence are central to the outcome of this appeal, I will describe his evidence and how it was secured in some detail.

### (5) The Police Obtain Mr. Ojha's *K.G.B.* Statement

[20] On the early afternoon of Friday, September 25, 2015, the day after the attack, while the police were canvassing for witnesses, they found Mr. Ojha, along with his friend "Dave". Mr. Ojha, an alcoholic, was badly intoxicated. He smelled of alcohol and told the police he was under the influence of OxyContin. He admitted to having been present during the attack on Mr. Kenyi. When Officer Dawe asked Mr. Ojha about the appellant, Mr. Ojha said, "Listen, I am no rat. But what happened last night was wrong". He told the police that the appellant and "Bugz" – known to be Mr. Bell – were present at the time of the incident and were involved in the assault. He described the appellant, who he referred to as "G-Money", striking Mr. Kenyi, whom he called "the African guy", numerous times on the head with a branch.

[21] Mr. Ojha then accompanied officers to the police station where he gave a videotaped interview while clearly intoxicated. He was not sworn to tell the truth before doing so, nor was he cautioned about the consequences of not telling the truth.

[22] During the interview, Mr. Ojha said that he saw the appellant come out of the bush and beat Mr. Kenyi with a large branch. Mr. Ojha illustrated the length of the branch by stretching out his arms. He said Mr. Kenyi was on the ground when he was struck. Mr. Ojha said that "it wasn't pretty" and, even though Mr. Kenyi had not yet died when the interview took place, Mr. Ojha suggested from the nature of the beating Mr. Kenyi had received he was "probably dead". Mr. Ojha then picked the appellant out of a photo lineup.

**(6) Mr. Ojha's In-Court Testimony**

[23] In his in-court testimony, Mr. Ojha referred to the appellant as "G". Although his out-of-court statement incriminated the appellant as having struck Mr. Kenyi with a branch, the testimony Mr. Ojha gave at trial was inconsistent with the appellant having done so.

[24] Specifically, Mr. Ojha said that he was sitting in the park during the assault. He said that the appellant was "sitting a couple [of people] distance from me at the time … about two guys down". He said that the deceased yelled out "G, I have a knife, or something to that effect", which he could hear because the words were spoken to "G" who was nearby. Mr. Ojha was asked whether the appellant did anything in response. He said that "G was sitting right there, like I said, a couple of people from me". Mr. Ojha then testified, "I saw somebody pick up a log. I thought it was G, but when I looked over G was there … G was sitting down". Mr. Ojha said there were people in front of him, and he could not see exactly what was going on during the scuffle.

[25] The Crown does not dispute that this trial testimony by Mr. Ojha was exculpatory relating to the assault with the branch.

[26] The appellant takes the position that Mr. Ojha's testimony was not only exculpatory relating to the assault with a branch, but that it also exculpated the appellant from any involvement in the swarming, which was the Crown's alternative assault theory. In the appellant's view, Mr. Ojha was testifying that the appellant was beside him during the entire assault and therefore could not have participated in the swarming.

[27] There is support for this interpretation of Mr. Ojha's evidence in what he initially said. Mr. Ojha testified that he was sitting having a beer and stayed there until the ambulance came after the event. He described seeing a scuffle, with everyone running and fleeing in different directions. He was asked what "G" was doing. Mr. Ojha replied, "He was sitting a couple distance from me at the time". He was then asked whether "G" got up "at any point and leave that spot?" He said, "No".

[28] The Crown disputes that Mr. Ojha's evidence exculpated the appellant from participating in the swarming. The Crown submits that, when his evidence is read in its totality, Mr. Ojha did not testify to seeing what the appellant was doing throughout the entire incident. In support of this position, the Crown relies on an

answer that Mr. Ojha provided when asked, “And when people started getting up, do you remember where G-Money went?”. Mr. Ojha replied, “No, like I said, everybody running all over”.

[29] This answer by Mr. Ojha is open to interpretation. The series of questions that led up to this exchange was directed at a scuffle and then people leaving. The appellant argues with some effect that, interpreted fairly, Mr. Ojha’s evidence was that the appellant did not get up during the scuffle, but that he could not recall the appellant getting up after the scuffle when everyone fled.

### (7) Mr. Ojha’s *K.G.B.* Statement Gains Admission

[30] After Mr. Ojha failed to replicate in his trial testimony what he had said in his videotaped police statement, the Crown brought a successful application pursuant to s. 9(2) of the *Canada Evidence Ac*, R.S.C. 1985, c. C-5, to cross-examine Mr. Ojha on that police statement. However, Mr. Ojha did not adopt his police statement. He said that he had only a vague memory of being approached by the police. He testified he could not remember the specifics of what was said and that he had given “false witness” in his police statement.

[31] Mr. Ojha further testified that when he gave the statement, he “was high like a kite”, and that whatever he said about who did what during the statement was “all hearsay for me”. He denied seeing the appellant grab a branch and strike Mr. Kenyi. He testified that he told the police what he thought they wanted to hear because he was anxious to leave the police station. He said he based what he said on what he had heard from several others, including Dave, who had been present during the assault.

[32] Mr. Ojha’s disavowal of his prior inconsistent statement led to the Crown’s *K.G.B.* application and the ultimate admission of the *K.G.B.* statement into evidence. The necessity requirement of the principled exception was met because Mr. Ojha recanted the *K.G.B.* statement in his testimony. The trial judge held that the “procedural reliability” leg of the threshold reliability requirement to the principled exception was also satisfied. Specifically, she held that “there were adequate substitutes for testing the statement’s truth and accuracy”.

[33] Relying on this court’s decision in *R. v. Trieu* (2005), 2005 CanLII 7994 (ONCA), 74 O.R. (3d) 481 (C.A.), she concluded that the fact that the statement was videotaped, and that Mr. Ojha was available for cross-examination, went a long way towards enabling the jury to test the reliability of what Mr. Ojha told the police. She reasoned that, despite his claim that he had little memory of the event or the interview, Mr. Ojha’s testimony during the s. 9(2) *voir dire* and during the trial showed that he had an adequate memory to enable effective cross-examination. Further, jurors could evaluate the impact of his intoxication on the reliability of what he was saying by viewing the videotape and considering his in-court testimony about his state of impairment. She also found that, although Mr. Ojha had not promised or sworn to tell the truth, there were clear indications based

on comments he made to the police that he knew the importance of telling the truth.

## ISSUES

[34] In his factum, the appellant raises the trial judge's decision to admit Mr. Ojha's *K.G.B.* statement as a ground of appeal. However, this ground of appeal was subsequently abandoned. Likewise, the appellant's sentence appeal was abandoned on November 2, 2020.

[35] The appellant thus pursues three issues on appeal from his conviction:

A. Did the trial judge err in failing to give a *W.(D.)* direction relating to Mr. Ojha's testimony?

B. Did the trial judge err in failing to give a proper double hearsay direction relating to Mr. Ojha's testimony?

C. Did the trial judge err in denying the constitutional challenge to s. 4(b) of the *Juries Act*?

## ANALYSIS

### A. THE *W.(D.)* DIRECTION ERROR

### (1) The Relevant Principles

[36] *W.(D.)* directions are provided to ensure that jurors properly apply the criminal standard of proof when making credibility and reliability determinations relating to exculpatory evidence on vital issues, most commonly the essential elements of charged offences or applicable defences: *R. v. B.D.*, 2011 ONCA 51, 266 C.C.C. (3d) 197, at paras. 96-97, 114; *R. v. Charlton*, 2019 ONCA 400, 146 O.R. (3d) 353, at para. 45.

[37] In *W.(D.)*, at pp. 757-58, Cory J. offered a standard jury charge for communicating the relevant principles:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[38] A trial judge need not use this standard charge when directing a jury on the relevant *W.(D.)* principles: *W.(D.)*, at p. 758; *R. v. J.H.S.*, 2008 SCC 30, [2008] 2

S.C.R. 152, at para. 13. However, the jury direction that is used must equip the jury to deal with each of the three reasoning scenarios described. Typically, this will require a dedicated *W.(D.)* charge. As Binnie J. cautioned in *J.H.S.*, at para. 8, "A general instruction on reasonable doubt without adverting to its relationship to the credibility (or lack of credibility) of the witnesses leaves open too great a possibility of confusion or misunderstanding."

[39] Before addressing the application of the *W.(D.)* principles in this case, two further preliminary points should be made.

[40] First, although *some* of the propositions articulated in *W.(D.)* refer only to the "testimony" *or* "evidence" of the accused, it is settled that the *W.(D.)* principles apply to the evaluation of the credibility of exculpatory evidence given by any witness, including Crown witnesses: *B.D.*, at paras. 105-114; *Charlton*, at para. 45. Therefore, the fact that Mr. Ojha was a Crown witness does not resolve whether the *W.(D.)* principles apply to his testimony.

[41] Second, as this court's decision in *Charlton* verifies, if a witness gives exculpatory evidence, a *W.(D.)* direction will be required even if that same witness also gives an inculpatory version of events. In *Charlton*, a Crown witness, Mr. Clark, gave in-court testimony that exculpated the accused. The trial judge also admitted into evidence prior statements that Mr. Clark had provided in his preliminary inquiry testimony that incriminated the accused. Even though Mr. Clark had given both an exculpatory and an inculpatory version of events, this court held, at paras. 44-49, that the trial judge erred in failing to provide a *W.(D.)* direction relating to the exculpatory testimony that Mr. Clark provided.

[42] Similarly, in this case, if Mr. Ojha gave exculpatory evidence, the fact that he also gave incriminating evidence would not remove the need for a *W.(D.)* direction.

### (2) The Pre-Charge Conference and the Charge

[43] During the pre-charge conference, both the appellant's trial counsel and the trial Crown agreed that a *W.(D.)* direction was required relating to the testimony of both Mr. Membreno and Mr. Ojha. The trial judge said, "You have to leave that with me and I'll do my best on the *W.D.*" She ultimately gave a *W.(D.)* direction with respect to Mr. Membreno's testimony, but not Mr. Ojha's. In my view, she erred in making that decision.

### (3) The Error Explained

[44] It is convenient to explain the *W.(D.)* error by addressing, in turn, the three arguments the Crown has made in response to this ground of appeal.

#### The requirement to provide an express *W.(D.)* direction

[45] First, the Crown submits that a *W.(D.)* direction is required only if the jury is faced with an "either/or choice" between competing narratives on vital issues – one inculpatory and the other exculpatory. The Crown argues that Mr. Ojha's testimony did not provide an exculpatory narrative since, at best, a jury could infer from his

testimony only that the appellant was not the person who struck the deceased with a branch. The Crown argues that, since Mr. Ojha's evidence does nothing to rule out the appellant's guilt as a participant in the swarming, his testimony is not exculpatory evidence, and therefore no *W.(D.)* direction was required.

[46] I will begin, for the sake of analysis, by assuming that the Crown's interpretation of Mr. Ojha's testimony is correct. Even on the premise that Mr. Ojha offered exculpatory evidence only relating to the assault with the branch, but not the swarming, a *W.(D.)* direction would have been needed. Put simply, a *W.(D.)* direction is required even where evidence is exculpatory on only one of the Crown's theories of culpability, but not others. A simple hypothetical example derived from this case illustrates why.

[47] Assume that because of credibility concerns relating to the Crown witnesses who claimed to see the appellant stomp and kick Mr. Kenyi, jurors were left with a reasonable doubt about whether the appellant joined in swarming him. Those jurors would then be left to consider the alternate Crown theory that the appellant is nonetheless guilty because he struck Mr. Kenyi with a branch. Without a functional understanding of the *W.(D.)* principles, those jurors would be unable to properly evaluate the impact of Mr. Ojha's exculpatory testimony on the remaining Crown allegation that the appellant struck Mr. Kenyi with a branch. Quite simply, if a version of events is vital enough to support a conviction if it is proved by incriminating evidence, it is vital enough to require a *W.(D.)* direction if challenged by exculpatory evidence.

[48] There is also a second and more basic flaw in the Crown's argument. It is for jurors to interpret Mr. Ojha's in-court testimony. That testimony was open to the reasonable interpretation that the appellant remained beside Mr. Ojha throughout the entire assault, and that he was therefore not complicit in any aspect of the fatal assault against Mr. Kenyi. Where testimony is realistically open to an exculpatory interpretation, a *W.(D.)* direction should be provided.

**The jury charge as a whole**

[49] Second, and in the alternative, the Crown argues that even without a *W.(D.)* direction relating to Mr. Ojha, the jury charge taken as a whole adequately communicated the *W.(D.)* principles that jurors had to consider in evaluating his testimony.

[50] There are indeed some cases where the failure to give an express *W.(D.)* direction will not be an error because, given the issues and the evidence, jurors can derive a functional and contextual understanding of the requisite principles from the balance of the jury charge: see e.g., *R. v. Ivall*, 2018 ONCA 1026, 370 C.C.C. (3d) 179, at paras. 126-130. Here, however, the jury was expressly told to apply the *W.(D.)* principles to the testimony of Mr. Membreno. Since that direction was given only with respect to Mr. Membreno's evidence, jurors may well have understood, incorrectly, that the *W.(D.)* direction applied to his evidence alone, and not to the testimony of Mr. Ojha.

[51] Moreover, I see nothing in the jury charge that could adequately communicate to the jury that they could be left in doubt by Mr. Ojha's exculpatory evidence without affirmatively believing it, or that they should not treat the conflict in Mr. Ojha's evidence as requiring them to choose which version to accept. I would not accept the Crown's position that the jury charge was adequate when read as a whole. In my view, it was not.

**The failure to object**

[52] Third, the Crown argues that the failure of trial counsel to object to the draft jury charge shows that counsel may have recognized that a *W.(D.)* direction relating to Mr. Ojha's evidence was unimportant, or that trial counsel made a tactical decision not to raise this issue at trial and should not be permitted to do so now on appeal.

[53] I would reject these arguments as well. I agree with the appellant that this is not a case of a failure to object. Trial counsel and the Crown both requested a *W.(D.)* charge relating to Mr. Ojha's exculpatory testimony. The trial judge told counsel to leave the issue with her. She evidently ruled to the contrary. In my view, trial counsel cannot fairly be expected to protest a ruling the trial judge has already made by objecting.

[54] In any event, Mr. Ojha was a key witness, and the principles of *W.(D.)* are of critical importance in the circumstances of this case. This was not the kind of error that should be disregarded because of a failure to object, even if such a failure had occurred.

**(4) Conclusion Regarding *W.(D.)***

[55] I am persuaded that the trial judge erred in failing to direct jurors to apply the principles in *W.(D.)* when evaluating the testimony of Mr. Ojha. Without such direction, there can be no confidence that the jury understood the legal principles they were to apply. In my view, this non-direction amounted to a misdirection.

[56] Accordingly, I would give effect to this ground of appeal.

## B. THE DOUBLE HEARSAY ERROR

[57] Mr. Ojha's *K.G.B.* statement was received into evidence as admissible hearsay. On its face, Mr. Ojha's statement appears to be based on his personal observations. However, according to Mr. Ojha's testimony, his statement, which was being offered by the Crown as admissible hearsay evidence, was itself based on hearsay from others. If this claim was true, the *K.G.B.* statement was "double hearsay". As I will explain, reliance on "double hearsay" is impermissible unless both levels of hearsay are independently admissible. If Mr. Ojha's *K.G.B.* statement included hearsay information that Mr. Ojha learned from others, this second level hearsay would not be independently admissible hearsay because there is no available hearsay exception that would apply to what Mr. Ojha was told. Yet, the trial judge failed to direct the jury to disregard

the *K.G.B.* statement if it accepted Mr. Ojha's claim that his *K.G.B.* statement was based on what others had said. She simply instructed them that this would be an issue of reliability. I am persuaded that this jury direction was an error.

### (1) The Relevant Principles

[58] It is settled law that "a prior inconsistent statement [such as Mr. Ojha's *K.G.B.* statement] can only be admitted for the truth of its contents under the principled approach if the evidence contained in the statement would be admissible through the witness's testimony at trial": *R. v. Devine*, 2008 SCC 36, [2008] 2 S.C.R. 283, at para. 13, citing *K.G.B.*, at p. 784. Further, it is trite law that a witness cannot offer hearsay evidence in their testimony unless that hearsay evidence qualifies for admission pursuant to a hearsay exception. It follows that hearsay that is itself embedded in an otherwise admissible *K.G.B.* statement will not be admissible unless that embedded "double hearsay" qualifies for admission pursuant to its own hearsay exception: *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at para. 75; *R. v. Srun*, 2019 ONCA 453, 146 O.R. (3d) 307, at para. 135. Put simply, inadmissible double hearsay cannot ride into evidence on the coattails of admissible hearsay evidence.

[59] The reason why this is so, and its implications, are made apparent by returning to first principles. As Fish J. said in *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, at para. 31, "hearsay evidence is presumptively inadmissible because of the difficulties inherent in testing the reliability of the declarant's assertion". He went on, at paras. 31-32 to describe those difficulties. He explained that the demeanour with which the out-of-court declaration was made cannot ordinarily be evaluated. Moreover, the declarant's basis for making the out-of-court factual claim contained in the hearsay statement cannot ordinarily be assessed. Specifically, there is often no way to test the accuracy of the declarant's perception, or their memory, or the accuracy of their narration of what they observed, or their sincerity. It is arbitrary and therefore impermissible to rely upon evidence that cannot be assessed for its reliability or accuracy, hence the presumptive inadmissibility of hearsay evidence.

[60] Of course, there are exceptional circumstances where the presumptive inadmissibility of hearsay evidence is overcome, such as the principled hearsay exception that was used to admit Mr. Ojha's *K.G.B.* statement. Those exceptions tend to apply where it is not possible to secure the hearsay information through direct, in-court testimony of witnesses who have personal knowledge, and there are alternative bases for assessing the reliability of that hearsay statement. Where this is so, it is reasonable, not arbitrary, for a trier of fact to choose to rely upon the hearsay information. Hence the hearsay exceptions.

[61] The problem with double hearsay imbedded in an otherwise admissible hearsay statement is that the indicia of reliability that a trier of fact can use to assess the otherwise admissible hearsay statement tell us nothing about the reliability of the embedded hearsay. This case illustrates the point.

[62] As I have explained, the trial judge admitted Mr. Ojha's out-of-court *K.G.B.* statement on the theory that his statement had indicia of procedural "threshold reliability" that would equip jurors to evaluate the credibility and reliability of what Mr. Ojha told the police. Most importantly, jurors could observe Mr. Ojha's demeanour and judge his degree of impairment by viewing the interview on the video recording, and they could assess the accuracy of what he told the police by considering the answers he provided when he was cross-examined before them. These mechanisms for assessment would be useful if the *K.G.B.* statement contains only the personal knowledge of the person being interviewed.

[63] But if Mr. Ojha was communicating not what he knew but what he had been told, those procedural assessment mechanisms are useless in judging the accuracy of that information. Only information relating to the real witnesses – those who told Mr. Ojha what happened – could provide a reasoned basis for assessing the hearsay information that those witnesses shared with Ojha. Without hearing from them or having alternative indicia of reliability relating to what they said, any decision by the jury to rely on what Mr. Ojha heard these declarants say would be arbitrary.

### (2) The Error Explained

[64] I do not fault the trial judge for admitting Mr. Ojha's *K.G.B.* statement into evidence, notwithstanding Mr. Ojha's testimony that the incriminating content of that prior statement was based only on what he had heard. On its face, there was nothing in the *K.G.B.* statement to indicate that it was based on anything other than Mr. Ojha's personal knowledge. The trial judge was not obliged to treat that statement as containing double hearsay based solely on Mr. Ojha's after-the-fact testimony that it was based on hearsay. However, the jury could not ignore the claim that his police statement was based on what others had told him. It was for the jury to determine whether to accept Mr. Ojha's testimony to this effect. The trial judge was therefore entitled to determine the admissibility of the *K.G.B.* statement in its own right, and to leave it to the jury to assess whether to credit Mr. Ojha's claim that his hearsay statement was itself based on hearsay from others.

[65] The judge was nonetheless obliged to direct the jury accurately on how to proceed if they accepted Mr. Ojha's testimony in that regard. The jury should have been told that if they accepted Mr. Ojha's testimony that the *K.G.B.* statement was based on what he had been told, they should disregard his *K.G.B.* statement in its entirety, since they would have no available means to judge the reliability of what Mr. Ojha had been told. Reliance on the *K.G.B.* statement would therefore be arbitrary.

[66] But this is not what the jury was told. Instead, the trial judge said:

> First, you heard evidence of Mr. Ojha that what he told the police in this videotaped statement was simply things that he had heard on the street and things he heard in the park the morning after the incident before he went to

> the police statement. If you accept that Mr. Ojha was just repeating what others told him and did not tell the police what he actually saw, that would affect the reliability of his evidence. It is for you to determine whether he was or was not repeating what others told him in his videotaped statement. You will consider this evidence in making that determination, including what he said in his statement and how he said it. All of his evidence must be considered in deciding whether his statement was the product of collusion and if there was collusion, how it affects the reliability of his statement. (Emphasis added).

[67] In my view, this direction was not sufficient. By telling the jury only that a double hearsay finding on their part "would affect the reliability" of his statement, the trial judge was leaving it open to the jury to act on that double hearsay evidence. As I say, without any basis for evaluating the reliability of the double hearsay information, it would be arbitrary for the jury to act upon it. The trial judge should have told the jury if they accepted that the *K.G.B.* statement was based on double hearsay, they must disregard it.

[68] I note that the trial judge did give a general instruction to the jury that "[i]f a witness testified about something another person who was there in the park said", this evidence could only be used "to help you understand what the witness thought or believed as a result of that". In my view, this instruction cannot overcome the problem I have identified. First, the impugned instruction quoted above in para. 66 of this judgment is specific to the *K.G.B.* statement and instructs the jury to consider embedded hearsay as a reliability consideration in evaluating what was said in the statement. Second, elsewhere in the jury charge the trial judge instructed the jury specifically that in the case of Mr. Ojha they could use his previous statement "as evidence of what happened".

[69] I would therefore give effect to this ground of appeal.

[70] I will make one final point before moving to the next issue. During his submissions, the appellant also took issue with the trial judge characterizing the hearsay question as one of "collusion". He argued that there was no suggestion that Mr. Ojha engaged in collusion, such as that which occurred at a barbeque where other witnesses conspired about the story they would tell. Mr. Ojha's evidence was simply that he repeated what he had heard. I understand the appellant's concern, but the trial judge gave this direction almost immediately after defining "collusion" benignly as including shared stories that may result in altered versions. To be sure, given the connotation that "collusion" carries as an intentional conspiracy it would be better to avoid using this term to describe the inadvertent tainting that can occur when exposed to other versions of events, but I see no prejudice in these circumstances.

## C. THE *JURIES ACT* CHALLENGE

[71] At the close of the appellant's oral submissions, we dismissed his appeal of the trial judge's decision to reject the constitutional challenge he brought to s. 4(b) of the Ontario *Juries Act*. I will now briefly explain our reasons for doing so.

**(1) The Constitutional Argument**

[72] Section 4(b) provides as follows:

> A person is ineligible to serve as a juror if the person,
>
> …
>
> (b) has been convicted of an offence that may be prosecuted by indictment, unless the person has subsequently been granted a record suspension under the *Criminal Records Act* (Canada) or a pardon.

[73] The appellant argues that by enacting s. 638(1)(c) of the *Criminal Code*, Parliament intended for some jurors who would be caught by s. 4(b) of the *Juries Act* to be eligible for jury service, subject only to being challenged for cause. It is the appellant's position that s. 4(b) of the *Juries Act* is therefore *ultra vires* because it conflicts with s. 638(1)(c) of the *Criminal Code* and frustrates its purpose.

[74] At the time the jury that tried the appellant was selected, s. 638(1)(c) of the *Criminal Code* read as follows:

> A prosecutor or an accused is entitled to any number of challenges on the ground that
>
> …
>
> (c) a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months.

[75] Section 638(1)(c) was amended on June 21, 2019, after the appellant's trial, to restrict challenges for cause to jurors based on criminal history to those who have "been convicted of an offence for which they were sentenced to a term of imprisonment of two years or more and for which no pardon or record suspension is in effect".

[76] The appellant argues that the June 2019 amendment to s. 638(1)(c) fortifies his position, because it is evident that this amendment was undertaken to increase the opportunity for overpoliced visible minority populations to be represented on juries.

**(2) Analysis**

[77] I reject the appellant's submission that the trial judge erred in failing to find that s. 4(b) of the *Juries Act* is *ultra vires* because it conflicts with s. 638(1)(c) of the *Criminal Code* and frustrates its purpose.

[78] The appellant has not discharged his onus of showing that there is an operational conflict based on an impossibility of complying with both provisions, or that the provincial law frustrates the purpose of the federal law: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 72-75.

**Impossibility of compliance**

[79] The fact that the effective enforcement of s. 4(b) of the *Juries Act* would remove the need or opportunity to bring challenges for cause pursuant to s. 638(1)(c) does not constitute an operational conflict. As the trial judge pointed out, an operational conflict exists where the enactments at issue require inconsistent things, such that "compliance with one is defiance of the other", because one enactment says "yes" and another says "no": *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161, at p. 191; *Canadian Western Bank*, at para. 71.

[80] There is no such operational conflict here. Instead, there is a mere "duplication of norms" between the provisions at issue on this appeal, each of which operates to exclude or remove from juries, persons with criminal histories. The fact that two rules may duplicate the same outcome does not trigger paramountcy, as "the intent of Parliament would remain unaffected": *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, 442 D.L.R. (4th) 600, at para. 101. Nor does an operational conflict arise from the fact that the *Juries Act* has broader impact. Provincial legislation can add requirements that supplement federal legislation: *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] S.C.R. 241, at paras. 34-35; *Canadian Western Bank*, at para. 74.

**Frustration of purpose**

[81] Nor has the appellant satisfied us that s. 4(b) of the *Juries Act* frustrates the purpose of s. 638(1)(c) of the *Criminal Code*.

[82] As the trial judge points out, "the provincial and federal legislation govern different aspects of jury selection." Section 4(b) of the *Juries Act* addresses juror eligibility for those with criminal histories. Section 638(1) does not: it permits challenges for cause to be brought against eligible jurors who have criminal histories. The fact that Parliament has restricted the use of challenges for cause by elevating the sentence that will trigger a challenge does not mean that Parliament intended those who cannot be challenged for cause to be eligible as jurors. Indeed, it is presumed that Parliament intends its laws to co-exist with provincial laws: *Alberta (Attorney General) v. Moloney,* 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 27; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 66. We see no basis for concluding that in

enacting s. 638(1)(c) Parliament intended to occupy the field of juror eligibility for those with criminal histories. Indeed, s. 626(1) of the *Criminal Code* provides expressly that "a person who is qualified as a juror according to…the laws of a province" is "qualified to serve as a juror in criminal proceedings in that province".

[83] We therefore find that the trial judge was correct to deny the appellant's constitutional challenge to s. 4(b) of the *Juries Act*.

**CONCLUSION**

[84] For the reasons above, I would conclude that the trial judge erred in failing to give a *W.(D.)* direction relating to Mr. Ojha's testimony. In my view, the trial judge also erred by inviting jurors, if they found any double hearsay to exist in Mr. Ojha's *K.G.B.* statement, to act on that double hearsay after considering its reliability.

[85] Accordingly, I would set aside the appellant's manslaughter conviction and order a new trial.

Released: November 5, 2021 "C.W.H."

"David M. Paciocco J.A."
"I agree. C. W. Hourigan J.A."
"I agree. B. Zarnett J.A."