Date: 20011107
Docket: CAC 169024

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Fleet, 2001 NSCA 158]

Bateman, Flinn and Cromwell, JJ.A.

BETWEEN:

EDWARD JOSEPH FLEET

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel: Gregory S. Hildebrand for the appellant
Peter Rosinski for the respondent

Appeal Heard: September 13, 2001

Judgment Delivered: November 7th, 2001

THE COURT: Appeal dismissed per reasons for judgment of Bateman, J.A.; Flinn and Cromwell, JJ.A. concurring.

BATEMAN, J.A.:

[1] Edward Joseph Fleet appeals his convictions for negligent operation of a motor vehicle (**Criminal Code of Canada** , R.S.C. 1985, c. C-46, s.221) and refusing to comply with a demand for a blood sample (**Criminal Code**, s.254(5)).

Background:

[2] On August 22, 1998, Mr. Fleet and his fourteen-year-old son, Edward Fleet Jr., were injured in a single vehicle accident on the #7 Highway near their home in Watt Section, Halifax County just east of Sheet Harbour.

[3] They were found lying on the highway unconscious and appeared to be seriously injured. They were taken by paramedics to the emergency department at the Sheet Harbour hospital where they were initially assessed and treated then transported to Halifax area hospitals. The appellant required surgery to his jaw and leg. Edward Fleet, Jr. was in a coma for a week, but has since recovered. Mr. Fleet appeals the trial judge's refusal to stay the charges on account of unreasonable delay. Alternatively, he says that the convictions should be set aside because the Crown did not prove that he was the operator of the motor vehicle nor that he understood the blood demand. He did not testify at trial.

Issues:

[4] The appellant alleges a number of errors by the trial judge:

1. He failed to find that Mr. Fleet's s.11(b) right to be tried within a reasonable time had been infringed;
2. He erred in admitting into evidence the unsworn statement of Vincent Fleet, brother of the appellant;
3. He erred in concluding, in the absence of evidence, that Mr. Fleet was the operator of the motor vehicle;
4. He rendered an unreasonable verdict; and
5. He failed to apply the standard of proof beyond a reasonable doubt.

ANALYSIS:

Unreasonable Delay:

[5] Mr. Fleet was charged with the offences by Information dated September 20, 1998. His first appearance in Provincial Court was on December 8, 1998. He appeared for election on February 8, 1999, at that time entering pleas of not guilty. Trial was set for September 28, 1999.

[6] On September 28, Judge Robert Stroud presiding, the Crown requested an adjournment. A Crown witness, Linda Fleet, although subpoenaed, had not appeared. The Crown attorney was provided with a note from a Dr. Shina, which stated that Ms. Fleet was suffering from severe stress panic attacks and depression. The Crown attorney contacted Dr. Shina who was "unable to say whether [Ms. Fleet] could come to Court and testify or whether it would just be difficult for her to do so." It was the Crown's view that Ms. Fleet was a material witness who would have evidence about Mr. Fleet's consumption of alcohol on the day of the accident. The Crown attorney asked to have an opportunity to investigate the circumstances of Ms. Fleet's non-attendance in hopes that she would appear on an adjourned date. The Crown offered to present its ten available witnesses that day but suggested that an adjournment would be preferable to a break in the evidence.

[7] Counsel for Mr. Fleet objected to the adjournment and took the position that Ms. Fleet would be unlikely to appear in the future. He wanted to proceed on that day. He noted that Mr. Fleet was involved in child welfare proceedings and it was therefore important for him to have the matter of the charges resolved. The judge ruled that it would be premature to conclude that Ms. Fleet would not be available to testify at a later date. He adjourned the trial to July 11, 2000 which was the next open full court day.

[8] The decision of Judge Stroud finding that Ms. Fleet was a material witness and adjourning the matter is not under appeal. It is therefore not in dispute that Ms. Fleet was a material witness, although she did not ultimately testify at the trial.

[9] When the case came on for hearing on July 11, 2000, before Judge John Embree, Mr. Fleet moved for a stay of proceedings alleging infringement of his right to be tried within a reasonable time (s.11(b) **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11).

[10] Mr. Fleet says that as a result of the lengthy delay leading up to trial he has suffered prejudice in relation to his involvement in child welfare proceedings. He is a single parent. Before he was formally charged with these offences but, according to Mr. Fleet, due at least in part to the criminal

charges arising from this accident, his three children were apprehended by the Children's Aid Society pursuant to the **Children and Family Services Act**, S.N.S. 1990 c.5. The children were placed in foster homes.

[11] The problem presented by the apprehension of the children was mentioned by defence counsel in opposing the adjournment of the September 28 trial. Defence counsel said in this regard:

> . . . The other problem that Mr. Fleet has, Your Honor, is that as a result of these charges last year, his children were taken into care by the Minister of Community Services. . . . I think it is fair to say that the outcome of the matter today is something that weighs heavily not only with Mr. Kennedy [the agent] but also with Mr. Fleet and the children. Consequently, knowing the Court docket to adjourn this matter to some time in the new year would be extremely prejudicial to Mr. Fleet and his civil proceedings, which are largely based on the allegations that are before the Court today. . .
> (Emphasis added)

[12] This issue was raised with Judge Embree on July 11th, 2000, as the centerpiece of Mr. Fleet's application for a stay of proceedings. The children had been returned to Mr. Fleet's care under a supervision order in January, 2000, after the adjournment but before trial. The statutory deadline for conclusion of the apprehension proceedings expired in August 2000. It was argued on Mr. Fleet's behalf that should the criminal charges be tried and result in a conviction Mr. Fleet would have insufficient time left to make alternative plans for the children before the end of the statutory period.

[13] It is accepted that a judicial stay of proceedings should only be granted in cases reflecting rare and exceptional circumstances. The standard of appellate review from the decision of a trial judge granting a stay of proceedings was addressed by the Supreme Court of Canada in **Canada (Minister of Citizenship and Immigration) v. Tobiass**, [1997] 3 S.C.R. 391; S.C.J. No. 82 (Q.L.) at p. 426:

> [87] A stay of proceedings is a discretionary remedy. Accordingly, an appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay. The situation here is just as our colleague Gonthier J. described it in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375:
>
> > [An] appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice.

(see also **R. v. Hiscock** (1999), 179 N.S.R. (2d) 350; N.S.J. No. 363 (Q.L.) (N.S.C.A.)).

[14] In determining whether the right to be tried within a reasonable time has been denied a court should be guided by the approach set out in **R. v. Morin**, [1992] 1 S.C.R. 771; S.C.J. No. 25 (Q.L.). At p. 787 (per Sopinka J.):

> The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in *Smith, supra*, "[i]t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p. 1131). While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:
>
> 1. the length of the delay;
>
> 2. waiver of time periods;
>
> 3. the reasons for the delay, including
>
> (a) inherent time requirements of the case,
>
> (b) actions of the accused,
>
> (c) actions of the Crown,
>
> (d) limits on institutional resources, and
>
> (e) other reasons for delay,
>
> 4. prejudice to the accused.

[15] The period under consideration here runs from the time of fixing the date on February 8, 1999 to July 11, 2000, the date set for trial. This eighteen month period, by its length alone, invites scrutiny. In assessing the reasonableness of the elapsed time it is important to look at the delay in context. The appellant properly concedes that had the matter proceeded on the originally scheduled trial date, there was no unreasonable delay. That said, the appellant should not be taken to have waived the time period from February 8, 1999 to September 28, 1999.

[16] Relevant to the assessment of reasonableness, as Judge Embree noted, is the reason for the failure to proceed on the original trial date. This was not a case where the trial was set down eighteen months from arraignment. The failure of a Crown witness to attend, despite subpoena, does not speak of a lack of due diligence by the Crown. Having been notified only on the day of trial, the Crown acted reasonably by taking what steps it could

to investigate the matter. The doctor's information was equivocal. The judge determined that it was premature to assume that the witness could not testify in future. Judge Stroud was satisfied that Ms. Fleet was a material witness.

[17] It is relevant, as well, to consider the appellant's response to the adjournment request. Mr. Fleet claimed that he wanted the trial to proceed before Judge Stroud on September 28. His position on that day, however, was that the trial be completed without the material witness. He did not suggest, although it was clearly open to him to do so, that the trial commence with the available witnesses, then be adjourned to enable the Crown to further investigate Ms. Fleet's non-attendance. The Crown had suggested that option. It is fair to infer that had that occurred, the trial could then have been completed within a much shorter time frame. Mr. Fleet was apparently content to have the matter adjourned in full, if the Crown was to be accommodated in its request to pursue the missing witness.

[18] As to the claim of prejudice, the trial judge did not accept that Mr. Fleet had established prejudice in relation to the custody of his children on account of the delay. Indeed, the judge commented that the fact that Mr. Fleet gained return of the children on a supervision order during the adjournment period may have ameliorated any claim of prejudice. I am not persuaded that the judge erred in so concluding. It is my view that the record before the trial judge was simply insufficient to establish that there was a nexus between the child welfare proceedings and the delay in the trial, which resulted in prejudice to Mr. Fleet.

[19] Mr. Fleet had asserted that as a result of the delay one of his witnesses became unlocatable. He provided no particulars. The trial judge did not err, in my view, in declining to conclude that Mr. Fleet had demonstrated prejudice on this account.

[20] In assessing the delay argument the trial judge considered the circumstances leading to the Crown's application for the adjournment as well as the judge's reasons for granting the Crown's request. He took into account the fact that the trial would require a full day and did not, therefore, lend itself to being set down on earlier part days which might be available. I would infer from his remarks that the judge found that the lengthy adjourned period here was not reflective of the usual time required for an adjournment in Provincial Court but attributable, at least in part, to the time requirements of the case.

[21] The release conditions pending trial were not onerous. There was no evidence from which the judge could conclude that there was prejudice to Mr. Fleet's liberty or security of the person interests.

[22] After a balancing of all of the factors the judge concluded that Mr. Fleet had not met the burden of establishing that proceeding with the trial would infringe his s.11(b) right. It is my view that this decision to refuse the stay does not reflect misdirection nor does it result in an injustice. Mr. Fleet did not demonstrate that he had suffered actual prejudice. The fact that a material witness was unavailable was a proper consideration resulting in the adjournment. That the trial required at least one full court day caused the adjournment to be longer than might otherwise be the case and is not of itself reflective of a lack of institutional resources.

[23] I would dismiss this ground of appeal.

Admission of Unsworn Statement:

[24] The appellant says that the trial judge erred in admitting into evidence the unsworn statement of Mr. Fleet's brother Vincent. According to his statement, given to police during the investigation, Vincent Fleet had spent the day of the accident with the appellant. When called as a Crown witness at trial, Vincent Fleet testified that he had no recollection of the events on the day in question. He could neither confirm nor contradict his statement. He explained that he had been in a bad car accident some years ago, as a result of which he could not remember things.

[25] Constable Richard Neil Parnell of the R.C.M. Police had interviewed Vincent Fleet at the police detachment on August 26, 1999, four days after the accident. The handwritten statement took the form of questions posed by Constable Parnell and the answers provided by Vincent Fleet. The interview was audio recorded and that recording later transcribed. When Mr. Fleet testified that he was unable to recall the events on the day of the accident, the Crown sought the court's permission to cross-examine Vincent Fleet on his statement pursuant to s. 9(2) of the **Canada Evidence Act** , R.S., 1985, c. C-5, s. 9; 1994, c. 44, s. 85:

> 9(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

[26] The judge ruled that there was no inconsistency between Vincent Fleet's statement and his trial testimony. He therefore denied the Crown's request to cross-examine Vincent Fleet on the statement.

[27] The Crown then applied to have the audiotape of the statement admitted as evidence of the truth of its contents. A *voir dire* was held. Ruling that the statement was substantively admissible, the judge received the audiotape into evidence. The appellant says that in so doing he erred.

[28] In response to the questions posed by Constable Parnell Vincent Fleet said that he had spent time with his brother on the day of the accident. They had attended an exhibition in Middle Musquodoboit with their families, returning to Vincent Fleet's house around 5 p.m. They then sat on Mr. Fleet's porch for a while, along with Edward Fleet's girlfriend and two of his children. Vincent Fleet left briefly to look at some windows which he was considering buying. As he was returning he saw Edward Fleet, Sr. and Jr. walking down the road toward the Esso service station where Edward Fleet's car was parked. Edward Fleet, Sr. drove back to his brother's house with Edward Fleet, Jr. in the car. Vincent Fleet offered to drive Edward Fleet, Sr. home and deliver his car to him the next day. Without responding to the offer, Edward Fleet, Sr. drove away, Edward Fleet, Jr. still in the passenger side. He was going in the direction of his home. About ten minutes later Vincent Fleet heard of the accident on his scanner.

[29] When asked by Constable Parnell if Edward Fleet, Sr. was drinking that day, Vincent Fleet repeatedly responded that he could not really say or did not really know. He

allowed that Edward Fleet, Sr. seemed like he was "feeling pretty good". He acknowledged, as well, that Edward might have had a glass of beer while on his porch after the exhibition. Constable Parnell asked Vincent Fleet why he suggested to Edward Fleet, Sr. that he not drive that night. He responded that it was, in part, because Edward Fleet, Sr. did not have a driver's licence but added that Edward Fleet, Jr. did not look like he should be driving a car. When asked whether, had he had the opportunity to stop Edward Fleet, Sr. from driving, he would have done so, Vincent Fleet confirmed that he would.

[30] The appellant says that the statement should not have been admitted because it did not meet the prerequisites for substantive admission of a prior inconsistent statement laid down by the Supreme Court of Canada in **R. v. B. (K.G.)**, [1993] 1 S.C.R. 740; S.C.J. No. 22 (Q.L.) (called "**K.G.B.**").

[31] In **K.G.B.** the accused and three companions were involved in an altercation with the deceased. In the course of flight, one of the group stabbed him. Shortly after the event the three companions were interviewed separately by police. In their videotaped statements each told police that the accused had made statements to them in which he acknowledged that he thought he had caused the death of the victim. The accused young offender was charged with second degree murder. When called at trial the three companions admitted that they had made the statements to the police but said that they had lied and that the accused had not made the incriminating statements. The trial judge held that the only use that could be made of their prior inconsistent statements was with respect to their credibility, not for the truth of the contents. The first appeal was dismissed. On further appeal to the Supreme Court of Canada the Court held that the prior inconsistent statements were admissible for substantive use.

[32] The issue before the Supreme Court of Canada in **K.G.B.** is described in the opening remarks of Lamer, C.J.C.:

> The issue in this appeal is the substantive admissibility of prior inconsistent statements by a witness other than an accused. The Crown asks this Court to reconsider the common law rule which limits the use of such statements to impeaching the credibility of the witness. In my opinion, the time has come for the orthodox rule to be replaced by a new rule recognizing the changed means and methods of proof in modern society.

[33] The principles outlined in **K.G.B**. were developed in circumstances where a witness' testimony at trial conflicts with a former statement. This is not such a case. Here, the trial judge refused cross-examination on the statement because there was no "inconsistency" between Mr. Fleet's professed lack of recollection at trial and his prior statement. His trial evidence did not "contradict" his statement. While the opinion in **K.G.B.** establishes the hearsay principles for a particular line of cases, more appropriate guidance, for the facts here, is found in cases such as **R. v. Khan**, [1990] 2 S.C.R. 531; S.C.J. No. 81 (Q.L.) and **R. v. Smith**, [1992] 2 S.C.R. 915; S.C.J. No. 74 (Q.L.). Each concerns a situation where a witness is unavailable or unable to testify.

[34] The relaxation of the strict hearsay rule was signaled in **Ares v. Venner**, [1970] S.C.R. 608. It was significantly developed with the Supreme Court of Canada's decision in **R.**

v. Khan, supra and was further clarified in **R. v. Smith**, supra. (This evolution of the law is nicely summarized by Cromwell J.A. of this court in **R. v. Hart** (1999), 74 N.S.R. (2d) 165; N.S.J. No. 60 (Q.L.), at § 46 to 58).

[35] In **Smith**, Lamer, C.J.C., for the court, approved as a working definition of hearsay, the formulation found in **Subramaniam v. Public Prosecutor**, [1956] 1 W.L.R. 965 (P.C.), at p. 970:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

[36] In **Smith** and **Khan** the Court rejected the strict prohibition against the admission of hearsay. Provided it can be demonstrated that the proffered evidence is necessary and reliable, although "hearsay", the prior statement may be admitted. Here, the judge was satisfied, in view of Vincent Fleet's lack of memory, that it was "necessary" to receive the statement. That finding is not in dispute. The focus was the statement's reliability. At the admission stage of the inquiry, "reliable" refers to threshold reliability, not ultimate reliability.

[37] The appellant says that in view of Vincent Fleet's inability to recall events on the day of the accident, there could be no meaningful cross-examination. The reliability of the statement could not, therefore, be established. That fact says the appellant was fatal to its admission. In evaluating this argument it is helpful to consider the reason for the hearsay prohibition and the role that cross-examination plays in ensuring reliability. This question was addressed in **R. v. Smith**, **supra** by Lamer, C.J.C.:

> It has long been recognized that the principles which underlie the hearsay rule are the same as those that underlie the exceptions to it. Indeed, *Wigmore on Evidence* (2nd ed. 1923), vol. III, described the rule and its exceptions at § 1420 in the following terms:
>
> > The purpose and reason of the Hearsay rule is the key to the exceptions to it. <u>The theory of the Hearsay rule ... is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination</u>. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation. Moreover,

> the test may be impossible of employment — for example, by reason of the death of the declarant —, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. These two considerations — a Circumstantial Guarantee of Trustworthiness, and a Necessity, for the evidence — may be examined more closely ... .

Of the criterion of necessity, Wigmore stated:

> Where the test of cross-examination is *impossible of application*, by reason of the declarant's death or some other cause rendering him now unavailable as a witness on the stand, we are faced with the alternatives of receiving his statements without that test, or of leaving his knowledge altogether unutilized. The question arises whether the interests of truth would suffer more by adopting the latter or the former alternative ... . [I]t is clear at least that, so far as in a given instance some substitute for cross-examination is found to have been present, there is ground for making an exception. [Emphasis in original.]

And of the companion principle of reliability — the circumstantial guarantee of trustworthiness — the following:

> There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a skeptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured.

Well before the decision of this Court in *Khan*, therefore, it was understood that the circumstances under which the declarant makes a statement may be such as to guarantee its reliability, irrespective of the availability of cross-examination. "Guarantee", as the word is used in the phrase "circumstantial guarantee of trustworthiness", does not require that reliability be established with absolute certainty. Rather it suggests that where the circumstances are not such as to give rise to the apprehensions traditionally associated with hearsay evidence, such evidence should be admissible even if cross-examination is impossible. . . (Emphasis added)

[38] In **R. v. Khan**, **supra**, the appellant medical doctor was charged with sexually assaulting a 3 ½ year-old girl. At trial, the judge ruled that the child was not competent to testify. The Crown was unsuccessful in its attempt to introduce statements made by the child to

her mother some 15 minutes after the alleged assault. On final appeal to the Supreme Court of Canada it was held, *inter alia*, that the mother's evidence of the child's statements should have been admitted. Although the statements were not admissible applying the traditional tests for spontaneous declarations, the strictures of the hearsay rule should be relaxed in the case of children's testimony. The Court concluded that hearsay evidence of a child's statement may be received where the two general requirements of necessity and reliability are met. Admission of the child's statements to the mother in this case was necessary, the child's *viva voce* evidence having been rejected. The Court was satisfied, as well, that the statements were reliable; the child had no motive to falsify her story, which emerged naturally and without prompting. Additionally, that fact that she could not be expected to have knowledge of such sexual acts clothed her statement with a stamp of reliability.

[39] In **R. v. Smith**, **supra** the Court clarified that **Khan** principles were not a special exception restricted to statements of children in sexual assault cases. At issue in **Smith** was the admissibility of certain telephone calls made by a deceased victim to her mother. The accused had been charged with murder. It was the Crown's theory that the accused was a drug smuggler from the United States who had traveled to Canada with the deceased to obtain cocaine. When the deceased refused to take the drugs back to the United States, the accused left her at a hotel, but later returned and strangled her. In the first telephone call the deceased told her mother that she had been abandoned at the hotel. She called her mother a second time saying that the accused had not returned. On the third call she said that the accused had come back for her and, on the fourth call, that she was on her way. On appeal to the Supreme Court of Canada, the Court found that the evidence of what the deceased had told her mother during the first two telephone calls satisfied the **Khan** criteria of necessity and reliability and was thus substantively admissible. As the events surrounding the making of the third call did not provide a circumstantial guarantee of trustworthiness, this evidence was not admissible. The admissibility of the last call was not before the court.

[40] On the broad applicability of **Khan** the Chief Justice wrote at p. 932 (S.C.R.):

> . . . *Khan* was a case of hearsay evidence of statements made by a child, alleged to have been sexually assaulted, who was found to be insufficiently mature to be a competent witness. In the present case, the declarant would have been a competent witness had she been available to give evidence, but she is dead. However, *Khan* should not be understood as turning on its particular facts, but, instead, must be seen as a particular expression of the fundamental principles that underlie the hearsay rule and the exceptions to it. What is important, in my view, is the departure signaled by *Khan* from a view of hearsay characterized by a general prohibition on the reception of such evidence, subject to a limited number of defined categorical exceptions, and a movement towards an approach governed by the principles which underlie the rule and its exceptions alike. The movement towards a flexible approach was motivated by the realization that, as a general rule, reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination. . . .

(Emphasis added)

[41] Reliability, said the Court in **Smith**, is a function of the circumstances under which the statement is made. The reliability of a statement need not be established to an absolute certainty as a condition to its admission.

[42] In determining that the first two telephone calls met the test Lamer C.J.C. commented that " . . . the traditional dangers associated with hearsay evidence — perception, memory and credibility — were not present to any significant degree." (at § 38). There was no reason to doubt the mother's evidence of what was said to her. He commented, as well, that "[w]here the criteria of necessity and reliability are satisfied, the lack of testing by cross-examination goes to weight, not admissibility", noting that ". . . a properly cautioned jury should be able to evaluate the evidence on that basis." (at § 39).

[43] This is not to suggest that the unavailability of cross-examination is irrelevant to the initial inquiry into reliability. Its importance, however, depends upon the nature and circumstances of the proffered evidence. In **Smith**, for example, the third statement was found not reliable, and thus not admissible, because of the Court's concern that the deceased could have been mistaken when she said that the accused had returned or she may have wished to deceive her mother. (see § 40 to 44):

> [44] . . . without the possibility of cross-examination. Indeed, at the highest, it can only be said that hearsay evidence of the third telephone call is equally consistent with the accuracy of Ms. King's statements, and also with a number of other hypotheses. I cannot say that this evidence could not reasonably have been expected to have changed significantly had Ms. King been available to give evidence in person and subjected to cross-examination.

[44] In **Khan**, **supra**, in assessing whether the mother's statement of what she was told was admissible in evidence the court considered that the child had no motive to falsify the story, that it emerged without prompting and that, at 3½ years of age, the child was unlikely to have the knowledge of the sex activity described.

[45] It is important to distinguish between cases where there are two conflicting versions of the information and those where the witness is simply unable or unavailable to testify. When a witness has given inconsistent accounts of an event doubt is cast upon the witness's credibility and the truth of either version of the story. In such circumstances, cross-examination is of heightened importance. This was noted by Lamer, C.J.C. in **R. v. F.J.U.**, [1995] 3 S.C.R. 764; S.C.J. No. 82 (Q.L.) citing the following commentary from *McCormick on Evidence* (4th ed. 1992), at p. 120.) (at § 38. F.J.U.):

> The witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore. The reasons for the change of face, whether forgetfulness, carelessness, pity, terror, or greed, may be explored by the two questioners in the presence of the trier of fact, under oath, casting light on which is the true story and which the false. It is hard to escape the view that evidence of a prior inconsistent statement, when declarant is on the stand to explain it if he can, has in high degree the safeguards of examined

testimony. In addition, allowing it as substantive evidence pays a further dividend in avoiding a limiting instruction quite unlikely to be heeded by a jury.

[46] The significance of cross-examination must be assessed in the context of the facts and the evidence offered. In **Khan** the court commented that concerns about the credibility of the witness would be addressed by submissions on the issue of ultimate reliability as would questions about the weight to be accorded to the evidence (at § 30). In **Smith**, Lamer C.J.C. wrote:

> In my view, it would be neither sensible nor just to deprive the jury of this highly relevant evidence on the basis of an arcane rule against hearsay, founded on a lack of faith in the capacity of the trier of fact properly to evaluate evidence of a statement, made under circumstances which do not give rise to apprehensions about its reliability, simply because the declarant is unavailable for cross-examination. Where the criteria of necessity and reliability are satisfied, the lack of testing by cross-examination goes to weight, not admissibility, and a properly cautioned jury should be able to evaluate the evidence on that basis.

(See also **R. v. F. (C.C.)**, [1997] 3 S.C.R. 1183; S.C.J. No. 89 (Q.L.)).

[47] The appellant has cited **R. v. Conway** (1997), 121 C.C.C. (3d) 397 (Ont.C.A.) as additional support for his position that the statement should not have been admitted. There the two accused were charged with second degree murder. The Crown's case depended primarily upon a statement given to the police by a witness Jardine which was admitted into evidence for the truth of its contents.

[48] At trial Jardine maintained that he did not remember writing or making the statement and that he did not know if the contents of the statement were true. The Crown sought to have the statement admitted for the truth of its contents on the basis of the rule in **K.G.B**.

[49] The statement consisted of fifteen pages. The first two pages were in Jardine's handwriting and the rest were in the form of questions and answers written by a police officer. A police officer testified that the day after Jardine had given his statement, he refused to swear an oath as to its truth or to repeat it on videotape. Jardine had given an earlier handwritten police statement in which he purported to know nothing about the killings. The trial judge ruled that the statement met the criteria set out in **K.G.B.**

[50] On appeal, in finding that the statement should not have been admitted into evidence, the court relied upon the following factors: there were no indicia of reliability, save for the police officer's testimony; Jardine had refused to repeat the statement under oath, which the court viewed as strong indicium of unreliability; little was done to impress upon Jardine the importance of telling the truth when giving the statement; given Jardine's professed lack of memory, cross-examination at trial would be useless as a tool to assess reliability. In my view, the circumstances in **Conway** are not comparable to those here. A pivotal distinction is the fact that, there, Jardine refused to confirm his statement under oath or on videotape. Additionally, he had provided an earlier, conflicting statement. This significantly undermined confidence in the reliability of the statement.

[51] The Supreme Court has emphasized that both necessity and reliability must be interpreted flexibly taking into account the circumstances of the case (**R. v. F.J.U., supra**). It is to

be noted, as well, that the judge need only be satisfied of threshold reliability on a balance of probabilities (**R. v. F.J.U.** at § 48).

[52] Applying these principles here, it is highly significant in my view, that Vincent Fleet's statement was audio taped. There was no risk of inaccuracy. Although not under oath, the fact that the interview was recorded as well as written and conducted at the R.C.M.P. detachment would impart some sense of importance and solemnity to the occasion. The statement was taken just four days after the accident when the events of that day would have been fresh in Vincent Fleet's memory. From the audiotape the judge could and did assess the manner of questioning by the police and the way in which Mr. Fleet responded. It was clear from listening to the tape that Vincent Fleet was relaxed and spontaneous in his responses.

[53] Additionally, Constable Parnell testified on the *voir dire* about the circumstances of taking the statement. It was his evidence that the meeting with Vincent Fleet had been arranged a couple of days in advance. On the day of the interview Constable Parnell had discussed with him the importance of telling the truth. Vincent Fleet appeared to understand the questions asked of him and did not, at that time, mention any memory problems. Constable Parnell reviewed the written statement with Vincent Fleet, who signed it. Mr. Fleet was aware that the interview was being audio recorded. He did not contact Constable Parnell at any time thereafter to indicate that the statement contained inaccuracies. The appellant had the opportunity to cross-examination Constable Parnell on this evidence.

[54] It is relevant, as well, that Vincent Fleet had nothing to gain in identifying his brother as the driver of the car. Additionally, he was not recounting something which he had been told but what he observed. The information which he provided was logical and not complex. The question of who was driving the car did not lend itself to confusion. It is the appellant's theory that Vincent Fleet may have been fabricating because he was angry with his brother about the accident and the danger posed to Edward Fleet, Jr. There was no suggestion in the statement that Vincent Fleet was adverse to his brother's interests. Indeed, he was evasive and hesitant when asked whether Edward Fleet, Sr. was drinking on that day. One would infer from his avoidance of a direct answer to that question that he was attempting to shield his brother. One cannot readily hypothesize circumstances in which this statement would be clarified or impeached on cross-examination.

[55] It bears noting that this was not a case where the maker of the statement was completely unavailable for cross-examination. In determining the admissibility of the statement the judge was entitled to consider that Mr. Fleet was available to give evidence at trial, although impaired by professed memory problems. Vincent Fleet was cross-examined by the appellant's counsel. He acknowledged in testimony that he is sometimes able to recall events in the near past although he could not say whether his memory would extend back over several days. Nothing in his evidence suggested that his statement to the police four days after the accident was untrue or unreliable.

[56] It is my view that, in these circumstances, the threshold reliability of the statement was demonstrable. The limits on meaningful cross-examination about the statement at trial was not fatal to its admission.

Unreasonable Verdict:

(i) Negligent operation of the vehicle:

[57] The appellant says that the judge did not apply the proper standard of proof to the evidence consequently rendering an unreasonable verdict. In my view this ground is without merit.

[58] The judge rejected the evidence of the defence witnesses - two persons from the community known to the appellant testified that they had noticed the Fleet car passing by immediately before the accident and that, although they did not see who was driving, each noted that Edward Fleet, Sr. was asleep in the passenger seat. Additionally, Edward Fleet, Jr. testified that it was him driving the car at the time of the accident. When he was earlier questioned by police Edward Fleet, Jr. said he did not recall anything about the accident. At trial he was unable to recall other aspects of the events of that day. He explained at trial that he had not admitted to driving the vehicle because his father had assured him that "he could handle things". He came forward at trial he said, because he did not want his father going to jail for something that he didn't do.

[59] Judge Embree accepted the evidence of the Crown witnesses. The only Crown evidence which directly identified Edward Fleet, Jr. as the driver was the statement of Vincent Fleet. The judge referred to that statement and concluded, providing reasons therefore, that it was credible and reliable. The judge inferred, as he was entitled to do from the evidence before him, that Edward Fleet Sr. was driving the car at the time of the accident.

[60] **In R. v. Burns,** [1994] 1 S.C.R. 656; S.C.J. No. 30 (Q.L.), McLachlin, J. spoke of the duty of an appeal court when considering a submission that the verdict is unreasonable. She said at p. 663:

> In proceeding under **s. 686(1)(a)(i)**, the court of appeal is entitled to review the evidence, re-examining it and re-weighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it: **R. v. Yebes**, [1987] 2 S.C.R. 168; **R. v. W. (R.)**, [1992] 2 S.C.R. 122. Provided this threshold test is met, the court of appeal is not to substitute its view for that of the trial judge, nor permit doubts it may have to persuade it to order a new trial.

(See also **R. v. Biniaris**, [2000] 1 S.C.R 381; S.C.J. No. 16 (Q.L.))

[61] I am satisfied that the evidence is reasonably capable of supporting the trial judge's decision.

(ii) The refusal of the blood demand:

[62] The appellant says that the conviction on the refusal of the blood demand cannot stand because the Crown did not prove that the appellant had the capacity to comprehend the significance of the blood sample demand or waive his right to counsel. A blood sample

was demanded while the appellant was in the emergency room of the Eastern Shore Memorial Hospital awaiting transport to the Q.E. II Health Center in Halifax. Mr. Fleet did not testify at trial. There is no evidence from him suggesting that he did not understand the request. The only issue is whether the evidence presented at trial satisfied the burden of proof upon the Crown.

[63] In finding Mr. Fleet guilty of this count, the judge considered all of the circumstances surrounding the demand, including Mr. Fleet's physical condition. Dr. Atkinson, one of the treating physicians, testified that Mr. Fleet was responsive to questions but not conversational. There was evidence suggesting that Mr. Fleet was intoxicated by alcohol. The judge inferred that Mr. Fleet, having responded to the questions asked by the police officer, heard and understood them. This inference was open to the judge on the record before him. I would dismiss this ground of appeal.

DISPOSITION:

[64] The appeal is dismissed.

Bateman, J.A.

Concurred in:

Flinn, J.A.

Cromwell, J.A.